

DECISIONS OF THE
FEDERAL MARITIME BOARD, AND
MARITIME ADMINISTRATION
DEPARTMENT OF COMMERCE

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FEDERAL MARITIME BOARD

No. 763

ALUMINUM PRODUCTS OF PUERTO RICO, INC.

v.

TRANS-CARIBBEAN MOTOR TRANSPORT, INC.

Submitted March 21, 1956. Decided May 8, 1956

Certain rates, charges, and practices of respondent found to be in violation of section 18 of the Shipping Act, 1916, and of section 2 of the Intercoastal Shipping Act, 1933. Cease and desist order entered.

Sections 14 and 16 of the Shipping Act, 1916, not shown to have been violated. Complainant not shown to have been injured and entitled to reparation.

Garland M. Budd for complainant.

Eric Rath and *Alan F. Wohlstetter* for respondent.

Leroy F. Fuller as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

In his recommended decision of February 17, 1956, the examiner found certain rates, charges, and practices of respondent Trans-Caribbean Motor Transport, Inc., to be in violation of section 18 of the Shipping Act, 1916 (1916 Act), and of section 2 of the Intercoastal Shipping Act, 1933, and recommended requiring respondent to cease and desist from such violations. In addition, the examiner found that complainant has not been injured by such violations and is not entitled to reparation. We concur in and hereby adopt the recommended decision.

A limited "exception" to the recommended decision has been filed by respondent. The examiner found that complainant had paid respondent \$565.67 less than the amount due under applicable water tariffs alone, without consideration of the amount of additional charges which might be due respondent for services which were not a part of the water transportation and for which rates are not specified in the applicable tariff on file with us. In making the finding the examiner

stated that "The Shipping Act, 1916, does not give a carrier the right to file a complaint with the Board demanding reparation from a shipper, and the Board is without authority to order a shipper to make payments to a carrier."¹

Respondent has an action pending in the Circuit Court of the Eleventh Judicial Circuit of Florida, involving the same shipments here under consideration. It urges, for this reason, that we clearly show that the above-mentioned finding concerning additional moneys due and owing to it is in no sense a prejudgment of the amount which may be due and owing it for services other than water transportation.

While we consider the examiner's recommended decision to be clear in this regard, we have no objection to declaring, and hereby state, that nothing in this report or in the examiner's recommended decision shall be construed as a prejudgment of respondent's claim for moneys due and owing to it for services other than water transportation.

An appropriate order will be entered.

¹ We limit the scope of the quoted language by stating that we do not here decide whether a carrier may seek reparation against a shipper for violation of section 16 of the 1916 Act. While shippers are not included in section 1 of the 1916 Act within the definition of the term "other person subject to this Act," the express subjection of shippers to section 16 may effect an inclusion of shippers within the term "other person subject to this Act" as it appears in section 22.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 8th day of May A. D. 1956

No. 763

ALUMINUM PRODUCTS OF PUERTO RICO, INC.

v.

TRANS-CARIBBEAN MOTOR TRANSPORT, INC.

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 the date hereof, having made and entered of record a report thereon in which the Board adopted the findings and conclusions of the hearing examiner in his recommended decision served in this proceeding on February 17, 1956, which report and recommended decision are hereby referred to and made a part hereof:

It is ordered, That respondent Trans-Caribbean Motor Transport, Inc., be, and it is hereby, notified and required to cease and desist and hereafter to abstain from engaging in the violations of section 18 of the Shipping Act, 1916, as amended, and from the violations of section 2 of the Intercoastal Shipping Act, 1933, as amended, herein found to have been committed by respondent; and

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

By the Board.

(SEAL)

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

APPENDIX

FEDERAL MARITIME BOARD

No. 763

ALUMINUM PRODUCTS OF PUERTO RICO, INC.

v.

TRANS-CARIBBEAN MOTOR TRANSPORT, INC.

Certain rates, charges and practices of respondent found to be in violation of section 18 of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933. Cease and desist order should be entered.

Sections 14 and 16 of the Shipping Act, 1916, not shown to have been violated. Complainant not shown to have been injured and entitled to reparation.

Garland M. Budd for complainant.

Eric Rath for respondent.

Leroy F. Fuller as Public Counsel.

RECOMMENDED DECISION OF A. L. JORDAN, EXAMINER

This proceeding arises out of a complaint filed October 21, 1954, alleging that in March 1954 complainant entered into an agreement with respondent for the transportation of certain machinery, equipment and raw materials, by trailer ferry, from Miami, Fla., to Puerto Rico at \$450 per trailer load of 15,000 pounds; that respondent transported the cargo and billed complainant in the amount of \$8,572.53; that complainant did not agree with this billing; that respondent sent "corrected" invoices (billing) on July 15, 1955, in the amount of \$13,610.32; that complainant has paid \$6,271.78 for the account of the shipments involved; and that by reason of the foregoing, complainant has been and is subjected to the payment of rates for transportation which were, and still are, unjust, discriminatory or prejudicial in violation of sections 14, 16 and 18 of the Shipping Act, 1916, and in violation of section 2 of the Intercoastal Shipping Act, 1933. Complainant seeks a cease and desist order and reparation.

On January 3, 1955, respondent filed its answer to the complaint

denying that it agreed to transport the shipments at \$450 per trailer load or any other agreement to perform carriage at other than its published tariff rates, denying all allegations of unlawfulness, and requesting that the complaint be dismissed.

Public hearing was held in Miami, Fla., from June 1 through June 4, 1955.

THE ISSUES

The issues are (1) whether any unfair or unjustly discriminatory contract was entered into in violation of section 14 of the Shipping Act, 1916; (2) whether respondent's rates, charges, and practices in connection with the shipments were (a) unduly prejudicial in violation of section 16, (b) unjust and unreasonable in violation of section 18 of said Act; (3) whether respondent charged or demanded a different compensation for the transportation from that specified in its tariff in violation of section 2 of the Intercoastal Shipping Act, 1933; and (4) whether complainant is entitled to reparation.

FINDINGS OF FACT

1. Complainant is a Puerto Rico corporation, with its principal place of business in San Juan, and is engaged in the manufacture of aluminum windows, parts and components therefor.

2. Respondent is a common carrier by water, with its principal place of business in Miami, Fla., engaged in transportation of property between Florida and Puerto Rico, and is subject to the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

3. The cargo involved was complainant's aluminum plant at Miami which it desired dismantled and transported to Puerto Rico for re-assembly, consisting of the plant machinery, equipment, raw materials, and supplies.

4. Negotiations between complainant and respondent for the transportation of the cargo started several weeks before the first of the five shipments involved was made on March 29, 1954. The testimony as to the negotiations was vague and conflicting. Complainant understood that respondent agreed to transport the cargo at \$450 per trailer load of 15,000 pounds, and that there would be about 10 trailer loads, estimated by respondent. Respondent admits there was some discussion of such rate but states that it was to apply to aluminum products from Puerto Rico after the plant was established there, and that it would file such a rate with the Board, but it was not to apply to movement of the plant to Puerto Rico.

5. Both complainant shipper and respondent carrier were very careless in making arrangements for transporting the cargo involved. Complainant was unaware that respondent was a common carrier subject to charging tariff rates, and appeared not to have known or cared what the actual status of the carrier was. Respondent made little effort to inform complainant of what rates would be applicable, and made certain estimates of charges without proper consideration of the applicable tariff or the type of cargo to be carried.

6. At the time this cargo was transported respondent's operations were conducted under the name of two corporations, Trans-Caribbean Motor Transport, Inc. (Trans-Caribbean), and Trailer Marine Transportation, Inc. (Trailer Marine), and the designation "TMT" which appears on bills of lading and invoices is a trade name for both organizations. Trans-Caribbean operates as a motor carrier under ICC authority in Florida, and as a water carrier under a tariff filed with the Board. Trailer Marine was the Puerto Rican delivering agent for Trans-Caribbean at the time this cargo moved.

7. Respondent loaded the cargo onto trailers or sea vans and used the common carrier service of the *M. V. Ponce* for water transportation of four of the shipments from Port Everglades, Fla., to Ponce and San Juan, P. R., and the barge *Loveland 20* for one shipment direct from Miami to Puerto Rico, since the barge was in Miami for repairs.

8. At the time these shipments were made, in March, April, and May of 1954, respondent had only one tariff filed with the Board, FMB-F No. 1, which had been in effect since October 15, 1953. A tariff had been filed with the Board in the name of Trailer Marine Transportation, Inc., on April 19, 1954, to be effective May 19, 1954, which contained a rate of \$450 per trailer load for "Products of Aluminum." This tariff, however, was not accepted by the Board for filing, and it was withdrawn before it became effective.

9. Respondent has filed a new tariff with the Board, FMB-F No. 3, in the name of Trailer Marine Transportation (TMT), Inc., effective June 24, 1955, and all prior tariffs, including FMB-F No. 1 which was in effect at the time the cargo was carried, have been canceled in their entirety.

10. Respondent sent separate freight bills to complainant for each of the five shipments involved, in the total amount of \$8,572.53. The description of the cargo shown in the freight bills, and in the bills of lading, had been prepared by respondent who determined the description without instructions from complainant. Upon receipt of these freight bills complainant objected to the amount of the charges as

being more than it understood such charges would be, and refused to pay them. Discussions and negotiations followed and certain payments were made in the total amount of \$6,271.78.

11. On July 15, 1955, respondent sent "corrected" freight bills to complainant increasing the total charges from \$8,572.53 to \$13,610.32. At the hearing respondent was unable to explain how the charges in the original bills were determined under its tariff in effect at the time the cargo moved, except that they were made out in error by its billing clerk who had been discharged for making errors in these and other billings. Respondent stated that after the errors were discovered, upon audit, "corrected" bills were sent to complainant, made on the basis of respondent's tariff FMB-F No. 1, which was in effect during the period of the shipments involved.

12. This tariff, FMB-F No. 1, was incorporated in the record by reference. It provides for four different types of rates: (1) "Express Rates" (Item 150 (a), 3d Revised Page 16), to apply to all shipments weighing up to 3,300 pounds (Item 15, Original Page 9); (2) "Package Rates" on door-to-door basis, nowhere in the tariff clearly defined (Item 150 (b), 3d Revised Page 16); (3) "Household Goods and Personal Effects," not here involved (Item 150 (c), 3d Revised Page 16); and (4) "Commodity Rates" (Beginning on 3d Revised Page 17) applicable on all shipments of over 3,300 pounds (Item 15, Original Page 9). This is a port-to-port rate and does not include pickup, inland freight, and delivery charges (3d Revised Page 17). Pickup charges in Miami and delivery charges in Puerto Rico outside of Ponce and San Juan are to be charged (Items 25 and 30, Original Page 9). No rate for pickup in Miami is given in the tariff, but a delivery charge for inland delivery at Guaynabo, P. R., is given (Item 150 (e), Revised Page 24). Inland freight charges for inland motor transportation in the United States are nowhere set forth in the tariff.

13. Complainant made reference at the hearing to "shipping tickets" which would show proper weights, cube, and description of these shipments, and respondent referred to "weight slips" and "dock receipts." Both were requested to present these documents or any other evidence which would accurately show the weight, cube, and description of the goods carried. Neither was able to present the documents referred to, and the only identification of the goods made available were certain invoices, bills of lading, export declarations, and voyage manifests, which had been prepared by respondent. Complainant produced a series of invoices purporting to contain a list of all items sold to it and carried in these shipments. It is impossible to

determine from these invoices exactly what was carried in each shipment.

14. Since neither complainant nor respondent produced any weight slips, dock receipts, or shipping tickets which would indicate the weight or cube of the shipments, the only bases for determining the proper transportation charges are the invoices, export declarations, and voyage manifests referred to. Upon consideration of these under respondent's tariff, FMB-F No. 1, in effect when the cargo was transported, the rates and charges applied by respondent and those which it should have applied are shown in Table I herein.

15. As before stated, complainant has paid respondent \$6,271.78. Of this sum, \$964.53 was paid to Leonard Bros. for services other than transportation (footnote 3). Complainant, therefore, has paid respondent \$5,307.25 toward the transportation of the shipments, or \$565.67 less than the amount due under applicable rates in the tariff on file with the Board and in effect during the period involved. This, however, is without consideration of any other amounts which may be due respondent for pickup in Miami, motor transportation from Miami to Port Everglades, redelivery of certain material to complainant's plant by truck, or advances made by respondent for the account of complainant.

POSITION OF PARTIES

Neither the complainant nor the respondent filed a brief. Public Counsel filed a brief and his position is embraced herein.

DISCUSSION AND CONCLUSIONS

Under section 2 of the Intercoastal Shipping Act, 1933, the only rate which can be properly charged by respondent for these shipments is the rate on file with the Board and in effect on the dates the shipments were carried. *Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400, 455; *Pacific Lumber & Shipping Co. v. Pacific Atlantic S. S. Co.*, 1 U. S. M. C. 624, 626. As before stated, the only tariff of the respondent filed with the Board and in effect during the time of these shipments was its Freight Tariff No. 1, FMB-F No. 1. This tariff by its terms, for lack of clarity under the types of rates referred to, and as pointed out in table I and footnotes under finding of fact No. 14, is ambiguous and difficult of construction.

It is a settled rule of tariff construction that where a tariff is ambiguous or doubtful it is to be construed against the carrier who prepared it. *The Gelfand Mfg. Co. v. Bull S. S. Line, Inc.* 1

U. S. S. B. 169; *Rubber Development Corp. v. Booth S. S. Co., Ltd.*, 2 U. S. M. C. 746, 748. A fair and reasonable construction, however, must be given. *Thomas G. Crowe et al. v. Southern S. S. et al.*, 1 U. S. S. B. 145, 147, and "neither the intent of the framers nor the practice of the carriers controls, for the shipper cannot be charged with knowledge of such intent or with carrier's canons of construction." *National Cable and Metal Co. v. American-Hawaiian S. S. Co.*, 2 U. S. M. C. 470, 473.

The cargo transported is found to be that described in column 3 of table I herein. Interpreting respondent's tariff here under consideration in its most reasonable construction, the applicable charges are those shown in column 9 of said table I.

The complaint alleges violations by respondent of sections 14, 16, and 18 of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933.

Section 14, Shipping Act, 1916

While the evidence shows confusion and misunderstanding on the part of both the complainant and the respondent, such evidence is insufficient to show that there was any arrangement or agreement to carry the cargo involved at rates other than the applicable tariff charges, in violation of section 14, Fourth; nor does the record indicate that any actions of respondent were retaliatory within the meaning of section 14, Third. Accordingly, this section is not shown to have been violated.

Section 16, Shipping Act, 1916

In order for there to be unreasonable preference or advantage, or unreasonable prejudice or disadvantage, there must be unequal treatment of two or more persons or shippers. *Afghan-Amer. Trading Co., Inc. v. Isbrandtsen Co., Inc.*, 3 F. M. B. 622; *Huber Mfg. Co. v. N. V. Stroomvaart Maatschappij "Nederland,"* 4 F. M. B. 343.

The record fails to show that any actions of respondent subjected complainant to any undue or unreasonable prejudice or disadvantage in relation to any other shipper. Accordingly, this section is not shown to have been violated.

Section 18, Shipping Act, 1916

This section requires—

That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and traffs, and just and reasonable regulations and practices relating thereto * * *.

TABLE I

(1) Number of pieces	(2) Kind	(3) Description of goods	(4) Weight in pounds	(5) Cube in feet	(6) Rate applied	(7) Rate applicable	(8) Charges assessed	(9) Correct charges
3	TRL	<i>Mar. 29, 1964, shipment</i> Machinery 7 factory equipment uncrated— headed shippers' load and count, including one fork truck. Freight. Advance to Leonard. Documentation. Exchange fee. Delivery.	37,920		\$5 per 100 pounds ¹ .	\$2.73 per 100 pounds ² .	\$1,806.00 964.00 2.50 4.73	\$1,035.22
(1) 1	PC	<i>Apr. 9, 1964, shipment (in 3 parts)</i> Press brake machine—braced and crated in steel box 12' x 8' x 8'. Freight. Pickup. Delivery.	9,800	768	\$1.10 per cubic foot. 50 cents per 100 pounds. do. do.	\$1.10 per cubic foot. 50 cents per 100 pounds. do. do.	844.80 49.00 49.00 49.00	844.80
(2) 5	PCS	Heavy lift. Federal press machine and parts. Freight. Pickup. Advance. Delivery.	6,590	135	\$2.73 per 100 pounds. 50 cents per 100 pounds. 50 cents per 100 pounds. 50 cents per 100 pounds.	\$2.73 per 100 pounds. do. do. do.	179.91 32.95 45.00 32.95	179.91
(3) 8	PCS	Heavy lift. Express goods—consisting of various alumi- num parts. Freight. Pickup. Documentation. Delivery.	5,047		\$5 per 100 pounds. 50 cents per 100 pounds. 50 cents per 100 pounds.	\$2.73 per 100 pounds. do. do.	252.35 25.24 2.50 25.24	137.78
107	PCS	<i>Apr. 21, 1964, shipment</i> Express goods—consisting of aluminum jalousie parts. Freight. Pickup. Documentation. Delivery. Segregation and handling.	14,005		\$5 per 100 pounds. 50 cents per 100 pounds. 50 cents per 100 pounds.	\$2.73 per 100 pounds. do. do.	700.25 70.03 2.50 70.03 60.00	382.84

(1) 2	PCS	Apr. 20, 1954, shipment (in 2 parts) Press machine Plate or sheet metal machine.	11,900 claimed by respondent. ¹⁵		\$2.73 per 100 pounds ¹⁶ 50 cents per 100 pounds. do.	\$2.73 per 100 pounds ¹⁶ 50 cents per 100 pounds. do.	324.87 59.50 59.50	19,177.45 11,32.50 14,29.00
(2) 283	PCS	Heavy lift ⁹ Express goods—consisting aluminum extrusions, insulation, bars, screws, etc. Freight. Pickup ¹⁰	115,562 claimed by respondent. ¹⁷		\$5 per 100 pounds ¹⁸ 50 cents per 100 pounds.	\$2.73 per 100 pounds ¹⁸	5,778.10 377.81	11,1,872.78
82	Asst.	Documentation ¹¹ Delivery ¹² May 25, 1954, shipment Express goods—consisting aluminum extrusions, machines, machine parts, weather stripping. Freight. Pickup ¹⁰ Documentation ¹¹ Delivery ¹² Cost of redelivery of some of the goods to complainant. Total.	13,061		50 cents per 100 pounds.	50 cents per 100 pounds.	2.50 577.81	17,842.99
					\$5 per 100 pounds ¹⁸ 50 cents per 100 pounds.	\$2.73 per 100 pounds ¹⁸ 50 cents per 100 pounds.	653.05 66.31 2.30 66.31 52.58	856.57
								13,610.32

¹ "Commodity rate" called "Express Goods" of \$5 per 100 pounds, Tariff Revised Page 19, is not defined or explained in tariff, and it cannot be properly applied to the shipment.

² The shipment was made up of various machinery and parts, thus commodity rate would be "Machinery and Parts, n. o. s.," Tariff Revised Page 20, \$2.73 per 100 pounds. Rates apply weight of measurement whichever yields greater revenue. Original Page 6, item 5 (b). Cube of this and all shipments except parts of April 9 shipment is not shown.

³ Payment to Leonard Bros. Transfer & Storage Co., Inc., Miami, for preparing and loading machinery for shipment. Complainant acknowledges that this payment was made through the respondent.

⁴ A charge to the shipper for preparing and filing the Export Declaration, not shown or explained in the tariff.

⁵ 14 of 1 percent on collect shipments where money is transferred from Puerto Rico banks to the United States. It is passed on to the shipper as a charge made by the Puerto Rican banks. Second Revised Page 14, item 105.

⁶ The rate for delivery to Guaynabo, P. R., is \$0.50 per 100 pounds. Tariff Revised Page 24.

⁷ Applicable commodity rate is "Machinery and Parts, n. o. s.," Cubic foot rate at \$1.10 is applicable since it produces greater revenue than weight rate at \$2.73 per 100 pounds. Tariff Revised Page 20 and Original Page 6, item 5 (b).

⁸ This charge for pickup in Miami is now here explained in the tariff.

⁹ Heavy lift charge of 50 cents per 100 pounds is applicable since machine weighs in excess of 2,000 pounds. Tariff Original Page 7, item 5 (k).

¹⁰ Charges paid to Acme Fast Freight for delivery of this machine.

¹¹ It is not shown that any 1 of the 5 pieces weighed in excess of 2,000 pounds. Therefore, no heavy lift charge is assessable. Tariff Original Page 7, item 5 (k).

¹² Commodity rate, "Not Otherwise Specified," Tariff Revised Page 21.

¹³ Export Declaration shows shipment consisted of miscellaneous raw material and parts to be manufactured into jalousie windows, i. e., bundles of aluminum extrusions in 12- and 16-foot lengths, cartons of weather stripping, flat aluminum, boxes of screws, etc. Therefore, applicable rate was Commodity rate "Not Otherwise Specified," Tariff Revised Page 21.

¹⁴ A charge for segregating cargo at the dock or warehouse and returning some of the equipment to the plant of complainant at its request. The charge was the actual cost to complainant.

¹⁵ Export Declaration shows weight of the 2 pieces to be 6,500 pounds, 1 piece 5,900, other piece 600. These Export Declaration weights are found to be the correct weights. Therefore, heavy lift charges apply only to the piece weighing 5,900 pounds. Tariff Original Page 7, item 5 (k). Correct rate was applied.

¹⁶ Applicable commodity rate is "Machinery and Parts, n. o. s." Tariff Revised Page 20.

¹⁷ Export Declaration shows weight to be 68,598 pounds, which is found to be the correct weight.

¹⁸ Commodity rate "Not Otherwise Specified." 2d Revised Page 21.

Complainant's tariff FMB-F No. 1, here involved, contains in the Commodity Rates section an item "Express Goods" with a rate of \$0.99 per cubic foot and \$5 per 100 pounds (Revised Page 19 and 2d Revised Page 19). This item is not defined or explained anywhere in the tariff, and it is impossible to determine what particular commodities will be charged this rate. The tariff also contains two different rates for commodities which are not otherwise specified in the Commodity Rates section:

1. "Cargo, n. o. s." \$1.51 per cubic foot and \$3 per 100 pounds. (Revised Page 18 and 2d Revised Page 18).
2. "Not Otherwise Specified." \$1.10 per cubic foot and \$2.73 per 100 pounds. (Revised Page 21 and 2d Revised Page 21).

Such rates are ambiguous and conflicting, they could lead to discrimination between and unequal treatment of shippers, and they are unjust and unreasonable rates and practices within the meaning of this section of the Act. Since, however, respondent's new tariff, FMB-F No. 3, which has superseded all of its prior tariffs, contains no "Express Goods" item, and has only one "Cargo Not Otherwise Specified" item, it is unnecessary to direct respondent to amend its tariff.

Respondent failed to determine the cube on all but a part of one of the five shipments. Since the tariff involved provides that charges shall be determined on the basis of cube or weight, "whichever basis yields the greater revenue" (Item 5 (b), Original Page 6), failure to properly determine the cube was clearly an unjust and unreasonable practice within the meaning of section 18, and respondent should be ordered to cease and desist from such practice.

In connection with the March 29 shipment, respondent billed complainant an "exchange fee" for transfer of funds from Puerto Rico bank to the United States on a collect shipment (Item 105, 2d Revised Page 14). Since no payments were made to respondent in Puerto Rico this exchange fee was improperly assessed, and was an unjust and unreasonable practice within the meaning of section 18, and respondent should be ordered to cease and desist from such practice.

In connection with the April 9 shipment, respondent billed a "heavy lift" charge (item 5 (k), Original Page 7) on the full weight of the shipment although it failed to show that any one of the five pieces weighed in excess of 2,000 pounds. Application of this charge was improper, and was an unjust and unreasonable practice within the meaning of section 18, and respondent should be ordered to cease and desist from such practice.

Section 2, Intercoastal Shipping Act, 1933

This section provides that no common carrier by water in inter-coastal commerce shall—

charge or demand or collect or receive a greater or less or different compensation for the transportation of passengers or property or for any service in connection therewith than the rates, fares, and/or charges which are specified in its schedules filed with the Board and duly posted and in effect at the time.

Respondent charged and demanded a different compensation from that specified in its tariff on file with the Board during the period of the shipments involved. None of the original billing was based on the proper and applicable rates. The explanation of respondent that this billing was made through errors by its billing clerk does not change the fact that improper rates and charges were demanded of complainant. In some of the "corrected" bills, respondent charged and demanded a rate of \$5 per 100 pounds, the "Express Goods" commodity rate shown in column 6 of table I. It is impossible to determine from the tariff that this rate could be applied to any of the shipments involved. The proper commodity rate for the shipments is shown in column 9 of table I. The charging and demanding of the inapplicable rates were in violation of section 2 of the Intercoastal Shipping Act, 1933.

In order to be entitled to reparation under section 22 of the Shipping Act, 1916, the complainant must show some direct pecuniary injury resulting from the violations alleged. *Eden Mining Co. v. Blue-fields Fruit & S. S. Co.*, 1 U. S. S. B. 41, 47; *J. G. Boswell Co. v. American-Hawaiian S. S. Co.*, 2 U. S. M. C. 95, 105. While the tariff filed by respondent, and its actions in connection with the shipments involved, were violative of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, as found herein, complainant has not shown that it has paid in excess of applicable tariff charges or has otherwise suffered injury as a result of such violations. Accordingly, complainant is not entitled to reparation under section 22 of the Shipping Act, 1916.

As to the finding herein that complainant has paid respondent \$565.67 less than the amount due under the applicable tariff (finding of fact 15), the Shipping Act, 1916, does not give a carrier the right to file a complaint with the Board demanding reparation from a shipper, and the Board is without authority to order a shipper to make payments to a carrier. However, respondent is required by section 2 of the Intercoastal Shipping Act, 1933, to collect this under-charge of \$565.67. Consideration need not be given the applicability of additional charges which may be due respondent for services performed in connection with the shipments which were not a part of

the water transportation, and for which rates are not specified in the applicable tariff on file with the Board. As pointed out in finding of fact No. 6, respondent has Interstate Commerce Commission authority for motor carrier operations in the State of Florida.

ULTIMATE CONCLUSIONS

Upon consideration of all the foregoing facts, it is concluded and found that certain rates, charges, and practices of respondent as herein pointed out are shown to be in violation of section 18 of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933. Cease and desist order should be entered.

Sections 14 and 16 of the Shipping Act, 1916, are not shown to have been violated.

Complainant is not shown to have been injured and entitled to reparation.

5 F. M. B.

FEDERAL MARITIME BOARD

No. 776

LOPEZ TRUCKING, INC., ET AL.

v.

WIGGIN TERMINALS, INC.

No. 779

DANT AND RUSSELL SALES CO. ET AL.

v.

WIGGIN TERMINALS, INC.

Submitted April 11, 1956. Decided May 18, 1956

Respondent's proposed revision of its F. M. B. Tariff No. 5, Item 15-A, found to be an unreasonable regulation or practice in violation of section 17 of the Shipping Act, 1916.

Frank Daniels and *James E. Wilson* for complainants in Docket No. 776.

Joseph B. Wolbarsht for complainants in Docket No. 779.

John F. Groden, and *Charles C. Worth* for respondent.

Leander I. Shelley as *amicus curiae*.

Edward Aptaker as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

These proceedings arise out of similar complaints filed May 4 and May 13, 1955, and consolidated for hearing under Rule 5 (d) of the Board's Rules of Practice and Procedure. Both complaints allege that a proposed revision to F. M. B. Tariff No. 5 of Wiggin Terminals, Inc. ("Wiggin"), is unlawful in violation of sections 16 and 17 of the Shipping Act, 1916 ("the Act"). The proposed revision and addition is as follows, appearing as Item 15-A at 1st Revised Page 5:

All loading of lumber trucks shall be performed by labor and equipment supplied or designated by Wiggin, and shall be subject to its direction and control, except for the manner of placing on the vehicle and the quantity to be placed on the vehicle.

Public hearing was held in Boston, Massachusetts, from August 9, 1955, through August 12, 1955. The examiner found that proposed Item 15-A would result in violation of section 16, First, of the Act, and would be an unreasonable regulation or practice relating to the receiving, handling, storing, or delivering of property in violation of section 17 of the Act.

Exceptions to the recommended decision have been filed by Wiggin; replies thereto have been filed by complainants and by Public Counsel. Except as hereinafter particularly stated, we agree with the findings and conclusions of the examiner. Exceptions or recommended findings not discussed in this report nor reflected in our findings or conclusions have been considered and found unrelated to material issues or not supported by the weight of the evidence.

The facts are as follows:

1. Complainants in No. 776¹ are motor carriers ("truckers") operating under authority of the Commonwealth of Massachusetts and the Federal Government in the transportation of lumber and related materials to Boston from points in Massachusetts and nearby States. Complainants in No. 779² are corporations engaged in the wholesale lumber business who either receive lumber for their own account or purchase lumber from suppliers who receive it at Wiggin's facility.

2. Respondent is a person subject to the Act by virtue of its conduct of a lumber terminal operation at Castle Island, Boston, Massachusetts, an area of 101 acres owned by the Commonwealth of Massachusetts and leased to Luckenbach Steamship Company, Inc. ("Luckenbach"), under a 10-year lease. Wiggin's agreement with Luckenbach is also of a 10-year duration but subject to modification or termination on 90 days' notice by either party. Wiggin assumes full charge and responsibility for lumber terminal operation on Castle Island and agrees to save Luckenbach harmless from any losses, suits, damages, or judgments arising from any injury to or loss of property or death or injury to any person on or within the lumber terminal area, caused by any act or failure of Wiggin or any of its officers, agents, or employees, or by the condition of the premises. The agreement requires Wiggin to procure adequate insurance coverage for such purpose.

¹ Lopez Trucking, Inc., Cohenno, Inc., Thomas Cook & Sons, Inc., E. W. Larson & Sons, Inc., C. Malone Trucking, Inc., and William J. Coady, d. b. a. Coady Trucking Company.

² Dant and Russell Sales Co., L. Grossman Sons, Inc., Blanchard Lumber Company, Inc., Guernsey Westbrook Lumber Co., Gerrity Company, and Plunkett-Webster Lumber Co., Inc.

3. The lumber shipped to Castle Island moves under "tackle-to-tackle" rates. In contrast to general cargo, under lumber contracts of affreightment the carrying vessel is divested of custody of the cargo on delivery to the consignee, or to the terminal for the consignee, at the end of ship's tackle. Lumber is discharged from the end of ship's tackle onto a bolster, a platform similar to a pallet, picked up by a Wiggin straddle truck, and carried to a point of rest in the interior. While the record is not explicit in this respect, we infer from testimony of Wiggin representatives that discharged lumber is backpiled directly from ship's tackle and not from an intermediate point of rest. Essentially this is a backpiling operation, entailing maintenance of records of location, amount, and ownership of various lots of backpiled lumber. The records enable Wiggin to assess charges, fixed by its tariff, for parking³ (storing) of lumber after free time. The lumber dealers in their use of lumber terminal services and facilities have no contract or other arrangement with Luckenbach.

Wiggin's manager testified that very little of the lumber discharged at Castle Island is signed or receipted for. He did not reveal whether it is a Wiggin employee who signs for lumber on those occasions when receipts are issued.

Wiggin pays Luckenbach 90 percent of the sums collected as usage on lumber vessels,⁴ and 100 percent of the sums collected for wharf parking,⁵ both at the rates specified in Luckenbach's terminal tariff. Wiggin also pays 100 percent of the sums collected for shed parking, and 75 percent of the sums collected for open yard parking, both at the rates specified in the Wiggin tariff. All charges assessed against cargo are contained in the Wiggin tariff, including, in addition to the parking fee, those for backhanding to the place of rest, movement of lumber from place of rest to another area within the terminal, truckloading, and others.

4. Under its present tariff⁶ Wiggin loads lumber trucks by its

³ F. M. B. Tariff No. 5, Original p. 2 :

"The Term 'PARKING' refers to the monthly charge on any lots of lumber remaining in a place of rest."

⁴ F. M. B. Tariff No. 5, Original p. 2 :

"The Term 'USAGE CHARGE' refers to the charge on any lumber placed in a transit shed or on a wharf, or passing through, over, or under a wharf; or transferred between vessels or lighters; or loaded to or unloaded from a vessel at a wharf, regardless of whether or not wharf is used."

⁵ F. M. B. Tariff No. 5, Original p. 2 :

"The Term 'WHARF PARKING' refers to the daily charge on any lots of lumber remaining in shed or on a wharf in excess of free time allowed."

⁶ Item 15-A of the present tariff provides :

"Upon request from the driver or other authorized representative of the operator of the truck or other vehicle concerned, truckloading service will be furnished at the rates

own labor and equipment on request of the lumber dealers who own the lumber or the truckers employed by such dealers. In the past, however, Wiggin has performed but a small part of the truckloading. Under its proposed tariff revision it would have the right to perform all truckloading on Castle Island.

5. The proposed tariff revision was issued on March 15, 1955, and filed with the Board on March 17, 1955, to become effective May 15, 1955. On April 26, 1955, the effective date was extended to June 15, 1955, and on June 2, 1955, it was postponed until after decision of the Board on the issue in the present proceedings.

6. There are three categories of persons who will be or may be affected by the proposed tariff revision: complainant wholesale lumber dealers, complainant truckers, and certain wholesale lumber dealers⁷ ("resident tenants") who are competitors of complainants and who are permanently assigned particular areas on Castle Island for parking lumber.

7. The resident tenants have their own employees and equipment on Castle Island and perform their own truckloading. At times they also employ the truckers for loading and transporting. In 1954 the resident tenants received 54,384,000 net feet of lumber, or 41.4 percent of the total incoming lumber for that year.

8. The resident tenants have not protested the proposed tariff revision although they may be affected by it since Wiggin might take over their truck loading. Wiggin has not advised the resident tenants of such an intention, however, and has no determined policy or plan with respect to resident tenants' operations.⁸ It is possible that Wiggin would allow the present method of truck loading to continue.

9. The truckers have performed their own truck loading with their own labor and equipment since the Wiggin lumber operation commenced there in 1947, except as noted in Finding 12. Prior to World War II, Wiggin conducted a lumber terminal operation at Charles-

and subject to all applicable provisions of this tariff. The quantity of lumber loaded upon the vehicle and the manner of the placing thereof on the vehicle shall be as directed by the driver or other authorized representative of the operator of the truck or other vehicle. Such driver or other representative shall supervise and be responsible for the manner of loading. All loading service shall be furnished and loading performed at the sole risk and responsibility of the operator of the truck or other vehicle being loaded and a request for the furnishing of such service shall constitute an agreement by the operator of the truck or other vehicle involved to hold Wiggin harmless from all claims arising out of the load or the manner in which the load is placed and secured."

⁷ Weyerhaeuser Sales Company, Shepard and Morse Lumber Company, City Lumber Company, and Twin Harbors Lumber Company.

⁸ Although counsel for Wiggin, in oral argument before the Board, stated that under the proposed tariff revision Wiggin would control the truck loading of the "resident tenants," Mr. Sherman Whipple, Jr., president, and Mr. Paul Whipple, manager of Wiggin, testified that no decision concerning resident tenant loading had been reached.

town in the Port of Boston. While all mechanical truck loading at Charlestown was performed with gantry cranes owned by Wiggin, much of the truck loading was performed manually by the truckers. At that time the use of fork lift trucks for truck loading had not yet become common, and nearly 45 percent of the lumber which moved out of Charlestown was hand loaded.

From the commencement of the lumber operation at Castle Island, lumber trucks were loaded principally by truckers themselves, using fork lift trucks. While Wiggin initially was interested in controlling truck loading, it was unable to acquire a sufficient number of fork lift trucks to accomplish that objective.

10. The truckers, or some of them, have office space and maintain one or more fork lift trucks on Castle Island. Each fork lift truck is operated by a driver and two additional men. Together the truckers utilize eleven fork lift trucks, representing an original total cost of \$87,548.89 and a present market value of \$68,683.89. The truckers would need few of these fork lift trucks if the proposed tariff revision should become effective. Wiggin has offered to purchase these fork lift trucks at appraisal value, since effectuation of the proposed tariff amendment will require an additional 10 or 11 fork lift trucks. Purchase of new additional fork lift equipment would cost Wiggin nearly \$100,000.

11. The truckers load and haul lumber for both wholesalers and retailers. Most commonly, however, it is the lumber retailer who issues instructions to the trucker and pays the trucking freight. When instructed to pick up lumber the trucker dispatches a truck to Castle Island and ascertains the location of the lumber from Wiggin's clerk at the gate. The trucker then advises his fork lift operator of the location of the lumber, and both the transporting truck and the fork lift truck proceed to the pile or piles from which the required items are loaded. On departing from Castle Island the truckdriver gives the gate clerk a signed slip stating the quantity of lumber on the truck. The gate clerk, however, does not tally the lumber. His responsibility to Wiggin is to determine, to the best of his ability, that the ownership of the lumber is as stated by the trucker, and this is done for the purpose of computing parking charges. Truckers cannot depart from Castle Island, however, without signing for the lumber on their trucks.

12. The present system whereunder truckers are able to load their own lumber trucks is satisfactory to them and to the lumber retailers and wholesalers. Although Wiggin has, on rare occasions, loaded trucks for the truckers when the truckers were too busy to perform

their own loading, Wiggin's loading has been unsatisfactory to the truckers due to the greater cost occasioned by: (1) using up to twice as many men as the truckers do to load a truck, and loading less lumber in the same period of time; (2) loss in detention time of truckers' equipment waiting through long coffee breaks and lunch periods; (3) shortages of lumber; (4) inefficiency in preparing loads; (5) haphazard loading which often necessitates reloading in order to meet highway safety requirements.

13. The truckers as a group are loading considerably less at Castle Island since the proposed tariff revision than they loaded and transported for comparable periods in 1954. During the first seven months of 1954, Wiggin received 83,398,526 net feet^o of lumber. For the same period in 1955, 52,457,325 net feet were received, a decrease of 30,941,201 net feet or 37.2 percent as compared with the previous year. The decrease in the amount of lumber received by Wiggin and the decrease in the amount of lumber loaded and transported by the truckers have resulted from diversion of lumber from Boston to other New England ports and to rail, rather than water transportation, which has been caused by the apprehension of shippers and consignees that the proposed tariff provision might go into effect, by increases in water freight rates which have reduced the disparity between rail and water transportation costs, by a shortage of lumber-carrying vessels, and by strikes on the west coast.

The lumber dealers are apprehensive concerning the proposed tariff revision, principally because of the great increase in loading costs which they believe will result, and because of the delays in delivery which they believe will inevitably follow from the slower loading time, reduced actual working hours of Wiggin employees, frequent work stoppages, and the necessity for queuing-up for truck loading. In addition, truckers anticipate increases in truck rates because of detention time on their equipment.

As hereinabove stated, generally trucks which transport lumber for the wholesale lumber dealers are loaded by trucker employees. An exception, however, is L. Grossman Sons, Inc. ("Grossman"), a wholesale lumber dealer which maintains its own employees and truck-loading equipment on Castle Island. Grossman's loading costs, including labor and amortization of equipment, average about \$0.85 per one thousand net feet of lumber and are far less than the proposed Wiggin rate of \$1.65 per thousand gross feet, the equivalent of \$2.10 per thou-

^o The term "net feet" represents actual measurements of lumber after dressing; "gross feet," the measurement before dressing.

sand net feet.¹⁰ For this reason, Grossman would accelerate its present policy and practice of diverting its incoming lumber shipments to other New England ports should the proposed tariff revision go into effect. Other lumber dealers such as Dant and Russell, National Lumber Co. (a retailer), and Gerrity Company have indicated an intention to reduce or discontinue shipments to Castle Island if the tariff revision is made effective.

15. In its backpiling and occasional truck-loading operations, Wiggin employs members of Local 926, an affiliate of the International Longshoremen's Association (ILA). Although the men are classified as lumber handlers and are paid lower hourly wages than men employed as longshoremen, they are hired as casual labor in the same manner as longshoremen and are employed only when lumber ships are to be unloaded. For this reason, in negotiations in early 1955 looking to a new labor contract between Local 926 and the Employers Group,¹¹ the union demanded either the right to perform all truck loading at Castle Island in addition to the backpiling and occasional truck loading or the right to receive longshoremen's wages for the work performed. The negotiations terminated in an hourly increase of \$0.10 for the union members without a written commitment regarding exclusive loading. Shortly thereafter, Wiggin proposed the tariff revision here in dispute.

16. Local 926, since 1941, has sought exclusive control over the truck loading, an aim with which Wiggin, in the past, has been unsympathetic. In 1949, however, upon strong union urging, Wiggin sought controlled loading as now proposed. The proposal was then, as now, strongly opposed by the lumber dealers and by the truckers. This, plus the fact that Wiggin was in any case hesitant at that time to assume the necessary capital expense, and plus the failure of the union to appear in support of Wiggin at a meeting with Boston port authorities, at which time exclusive loading was to have been sought, caused Wiggin to drop the proposal.

Wiggin Local 926 employees consume up to twice as much time in truck loading as do the truckers' employees. In addition, Wiggin usually uses more men in truck loading than do the truckers' employees. The additional time consumed and the excess of men employed would materially add to the truckers' and to the lumber dealers' direct and indirect costs. Although the truck-loading employees of the resident

¹⁰ Wiggin's present tariff rate is \$1.85 per thousand gross feet

¹¹ A group composed of Wiggin, Weyerhaeuser Sales Co., Shepard & Morse Lumber Co., and The City Lumber Co. of Bridgeport, Inc., the last three of which are "resident tenants" who employ Local 926 members on a permanent basis.

tenants are members of Local 926, the same labor union as those of Wiggin, the resident tenants' employees work as efficiently and as expeditiously as do the truckers' employees, due probably to the permanent nature of their employment and to the supervision received from the resident tenants.

17. Luckenbach has urged Wiggin to take over truck loading as a good terminal practice, but has brought no pressure to bear on Wiggin. While Wiggin is reluctant to undertake exclusive truck loading, it considers that function essential to an efficient terminal operation.

18. Complainant truckers and lumber dealers state that Wiggin's terminal is inefficiently operated, which is admitted by Wiggin. Wiggin and the complainants, however, assign different reasons for the inefficiencies and dispute whether the proposed tariff revision will effect a cure.

Wiggin contends that free trucker access to parked lumber is responsible for most of the inefficiencies, while admitting poor housekeeping practices. The truckers deny that abuses result from free access, and state that Wiggin's poor housekeeping and careless backpiling are solely responsible for the conditions at Castle Island.

The lumber dealers consider both the truckers and Wiggin to be at fault, however, assigning the bulk of responsibility for the conditions to Wiggin's failure to exercise its right to supervise and control the truckers. Efficiency can be completely restored, it is urged, by effective supervision and policing of truckers' activities and by diligent housekeeping, without the necessity for Wiggin's performance of truck loading. Wiggin witnesses, as stated, urge that controlled truck loading is essential to an efficient lumber terminal operation, that it will correct most of the present terminal inefficiencies, and that it will give Wiggin complete control over the stored lumber. The following conditions contribute to the inefficiency of the terminal as a whole:

(a) The work of Wiggin Local 926 employees has frequently been interrupted by work stoppages (delays of less than one day) and by strikes (delays of greater than one day).

(b) The actual working hours of Wiggin employees are limited to about 5½ hours per day because of long coffee breaks and an unwillingness to begin truck loading as lunch or quitting time approaches.

(c) The few trucks handled by Wiggin employees are often unstable and improperly positioned, sometimes requiring reloading on the truck. Under both Wiggin's present tariff and the proposed revision thereto, however, Wiggin truck loading is performed under the supervision of the trucker's representative and at the risk of the trucker.

(d) Truckers frequently load and deliver wrong lots of lumber as well as incorrect quantities. This results from misdirection of lumber and placing lumber on the wrong piles in backloading by Wiggin, as well as from carelessness on the part of trucker employees in loading from piles owned by other lumber dealers.

(e) Piles of lumber are spilled or made unstable by the truckers' practice of bucking lumber on the blades of a fork lift truck against the pile in order to straighten out the load on the fork lift.

(f) Trucks are parked in streets and alleys, preventing access to or egress from the piles.

(g) Lumber has been strewn and allowed to remain on the wharf by Wiggin employees and in the roadways by both Wiggin and trucker employees.

(h) Lumber is transported by truckers on fork lift trucks, a hazardous practice conducive to spilled loads. A present tariff provision¹² requiring all lumber which is to be moved from one place of rest within the lumber area to be moved by Wiggin is ignored by the truckers. Wiggin states that the provision cannot be enforced as a practical matter or as a matter of right.

(i) Truckers occasionally load and carry more lumber than the amount to which the consignee is entitled, resulting in eventual shortages of lumber.

(j) Truckers occasionally remove partial lots and leave small piles lying around the terminal while at the same time signing out at the gate as having received a full lot. Wiggin annually or less frequently cleans up the yard by collecting such piles, and gives the lumber dealers an opportunity to identify and claim the lumber. Lumber so identified is released on payment of storage charges; the balance is sold for unpaid storage charges. In 1954 Wiggin realized \$3,000 from the sale of unclaimed lumber. The record does not reveal whether Wiggin retained the entire sum or whether 75 percent of the sum was paid to Luckenbach.

(k) Wiggin often fails to repile spilled lumber, strewn laths, and crossers, and to clear the roads of such materials.

(l) The roadways are in poor condition and are neither maintained nor cleared of snow by Wiggin, who denies responsibility for either function.

19. Many of the aforementioned inefficiencies result from Wiggin's denial of responsibility for or duty to parked lumber, and its denial of custody of the lumber and control over the lumber area. Wiggin admits that it has a duty to clear roadways of strewn lumber, crossers,

¹² F. M. B. Tariff No. 5, Item 14, Original p. 5.

and laths, but it nevertheless has not always done so. The abuses of the truckers, such as blocking of streets, transportation of lumber on fork lift trucks, bucking lumber piles, spilling lumber piles, over-delivery of lumber by truckers, leaving small piles of lumber scattered throughout the parking area, and loading from the wrong piles can be prevented by adequate policing and an exercise of general control over the lumber area. Further, both Luckenbach, under its lease from the Commonwealth of Massachusetts, and possibly Wiggin, under its agreement with Luckenbach,¹³ have the duty to maintain the roads in a state of repair equal to that shown by a survey made at the time of execution of the lease, and to clear the premises of snow.

20. Wiggin asserts that it is not the lessee of the premises, is a service organization only, and disclaims responsibility for shortage of or damage to lumber.¹⁴ It claims that it now has authority to regulate truck traffic and operations on Castle Island but denies authority to enforce such regulations. Wiggin has never considered assessing penalties against truckers who violate tariff rules and provisions, and its witnesses state that it has no right to bar from Castle Island any trucker who engages in such practices.

21. Wiggin's proposed tariff revision contains a provision requiring compliance with all Wiggin regulations relating to traffic control, speed, hours of operation, and the like.¹⁵ There is no comparable provision in the present tariff. Under the agreement between Luckenbach and Wiggin, however, Wiggin is granted full charge and responsibility for the conduct of a lumber terminal operation on designated parcels of land, agrees to maintain the lumber terminal section in good condition and repair, and agrees to "surrender" the lumber section in like good condition, ordinary wear and tear excepted.

22. Officials of six Atlantic coast lumber terminals¹⁶ testified in

¹³ Article 3 (f) of the agreement between Luckenbach and Wiggin provides:

"WIGGIN will maintain the lumber terminal section and all improvements, facilities and equipment in good and serviceable condition and repair, will comply with all existing and future laws, regulations, orders and decrees pertaining to the occupancy of the premises, and upon the expiration of the term of this agreement will surrender said section, improvements, facilities and equipment in the same condition in which they now are, or as they may later be improved by LUCKENBACH or the COMMISSION, ordinary wear and tear excepted."

¹⁴ Item 15C of Original Page 5, F. M. B. Tariff No. 5, provides:

"Wiggin, its officers, agents and employees shall not be responsible for any loss or damage to vessels, equipment, persons, lumber, merchandise or other property received, handled, or parked at the pier whether caused by theft, fire, water, action of the elements, or any other cause."

¹⁵ Item 16B of 1st Revised Page 5, F. M. B. Tariff No. 5, provides:

"All trucks and persons using the lumber area shall comply with such directions, rules, and regulations as may be issued by Wiggin relating to the traffic control, speed, hours of operation, and the like."

¹⁶ Bayway Terminal, Port Newark, Newark, N. J., Gowanus Lumber Terminal, Brooklyn, N. Y., Municipal Pier, Providence, R. I., Connecticut Terminal, New London, Conn.,

these proceedings. They backpile lumber and offer various lumber terminal services, including truck loading. They have public areas in which the terminal performs all of the truck loading and open areas where the truckers do the loading, and some have resident tenants who load their own trucks. These terminals have complete control of the lumber entrusted to their care. The truck loading is performed efficiently with a reasonably steady crew on the property. They have found that a permanent crew tends to increase the efficiency of those employed on a permanent basis as opposed to completely casual labor.

23. Approximately one-half of the Atlantic coast lumber terminals permit private loading of trucks; where it is permitted, the average is about 40 percent loading by the terminal and 60 percent by truckers and consignees. The terminal officials testified that the existence of a permanent truck-loading force on Castle Island would increase efficiency in loading. Since exclusive terminal-controlled loading would most probably entail maintenance of permanent crews, exclusive Wiggin-controlled loading would be more efficient than the present loading occasionally performed by Wiggin's casual personnel. Such exclusive loading by Wiggin, however, as elsewhere herein stated, would not be as efficient as loading by the truckers.

POSITIONS OF THE PARTIES

Principally, complainants maintain that the proposed tariff revision is unreasonable, within the meaning of section 17 of the Act, since exclusive Wiggin truck loading would result in increased truck-loading costs without corresponding increases in efficiency of terminal operation; that the revision would result in diversion of lumber shipments to New England ports other than Boston; and that the revision would result in financial loss to them without a corresponding gain by Wiggin.

Complainants allege that, since the proposed revision would be applicable to all lumber dealers except the resident tenants, it will unduly prefer the resident tenants, in violation of section 16 of the Act. They further allege that the diversion of lumber traffic to other ports or to rail, rather than water carriers, will result in undue preference to those ports and to that method of transportation and in undue prejudice to the Port of Boston. Finally, they allege that since truck loading of general cargo will not be controlled, the proposed revision will result in unjust discrimination against lumber commodities.

New Haven Terminal, New Haven, Conn., and Atlantic Terminals, Inc., Port Newark, Newark, N. J.

Public Counsel argues that the proposed revision will be an unjust and unreasonable regulation, in violation of section 17 of the Act, since the revision is not necessary to efficiency. Efficient operations can be restored, Public Counsel urges, by enforcement of existing and proposed tariff regulations relating to traffic control and by more responsible housekeeping.

Both complainants and Public Counsel assert that the real purpose of the proposed revision is to meet the demands of Local 926 rather than as an independent step toward greater operating efficiency.

Although the General Counsel to the North Atlantic Marine Terminals Conference filed a brief as *amicus curiae*, he made no attempt to evaluate the evidence but urged only that the Board in deciding the issues be guided by the following principles:

(a) That discrimination within the meaning of the Act can exist only where a terminal operator does not accord the same treatment to all of its customers alike; and that a failure to treat its customers in the same way as other operators treat theirs does not constitute discrimination.

(b) That the fact a regulation or practice is desired by a labor union or is adopted to resolve a labor problem is no evidence that it is unjust or unreasonable but on the contrary tends to prove that there was a reasonable basis for its adoption.

(c) That the Act does not require uniformity of regulations and practices among terminal operators, and that the existence of an alternate possible regulation or practice is no evidence that a regulation or practice is unjust or unreasonable.

The North Atlantic Marine Terminals Conference did not except to the examiner's recommended decision or orally argue its position before us.

DISCUSSION AND CONCLUSIONS

We cannot, as did the examiner, find that the proposed exclusive terminal loading tariff regulation itself will result in violation of section 16 of the Act. While, according to the testimony of Wiggin's president and its manager, it is unknown whether the exclusive loading regulation will be applied to the lumber of the resident tenants as well as to the other lumber dealers, counsel for Wiggin flatly asserted in oral argument that all lumber dealers would be treated alike. Since the tariff regulation on its face applies equally to all who utilize the lumber terminal, however, the regulation is not unduly preferential; the possibility that the equality contemplated by the tariff regulation will, in practice, be disregarded is relevant to the reasonableness of the regulation under section 17 of the Act.

The proposed exclusive loading regulation will not be unduly prejudicial to the Port of Boston, in violation of section 16 of the Act. No

evidence has been adduced showing or tending to show unequal treatment of localities by Wiggin. The evidence of diversion of traffic by lumber dealers which will or may be effected upon application of the regulation is immaterial to the allegation of violation of section 16 of the Act. Such evidence is, however, relevant to the issue of reasonableness of the regulation under section 17 of the Act.

The proposed regulation will not unduly prefer commodities other than lumber, in violation of section 16 of the Act. Neither injury to such cargoes nor an existing and effective competitive relationship between lumber and other commodities has been shown, as is required before such a violation may be established. *Phila. Ocean Traffic Bureau v. Export S. S. Corp.*, 1 U. S. S. B. B. 538 (1936).

We find, however, the proposed revision of F. M. B. Tariff No. 5, Item 15-A, as well as the contemplated effectuation thereof, to be an unreasonable regulation and an unreasonable practice, respectively, relating to the handling, storing, and delivering of property, by a person subject to the Act,¹⁷ in violation of section 17. As hereinbefore indicated, considerable uncertainty was expressed by Wiggin witnesses as to whether the proposed exclusive loading rule would be applied uniformly. Not only the potential discrimination in unequal application of a tariff regulation, but the mere possibility of a variance between regulation and practice, renders both regulation and practice unreasonable.

If the regulation should not be applied uniformly, the resident tenants, maintaining their own Local 926 personnel, would enjoy lower indirect loading costs by being able to supervise their loading operations, prepare lumber for loading prior to arrival of transporting trucks, avoid the loading delays attributable to the queuing-up of trucks for loading, and, at the present relative degree of efficiency of their own employees *vis-a-vis* Wiggin personnel, enjoy lower direct loading costs than other lumber dealers, all to their own advantage and to the competitive disadvantage of other lumber dealers. Obviously, the competitive disadvantage is not mitigated by the fact that the Wiggin loaders receive the same hourly wages as do the resident tenants' loaders, although an argument to that effect has been made by Wiggin counsel in exceptions.

The proposed regulation is equally unreasonable in other respects. The evidence establishes that exclusive Wiggin loading would result

¹⁷ "An 'other person' may be in connection with a water carrier without being affiliated with, controlled by, or in a continuing contractual relationship with such carrier. *United States v. American Union Transport, Inc., et al.*, No. 44, October Term, Supreme Court, 1945 [327 U. S. 437]." *Status of Carloaders and Unloaders*, 2 U. S. M. C. 761, 767 (1946). See also *California v. United States*, 320 U. S. 577 (1944).

in substantially increased direct and indirect costs of truck loading and would divert lumber to New England ports other than Boston. In justification for these serious results, Wiggin maintains that controlled truck loading is essential to give Wiggin complete control over the lumber terminal and thus to restore efficiency of operations. We do not find this to be a valid justification here. Item 16-B, 1st Revised Page 5 of the proposed tariff revision, not objected to by any of complainants, requires compliance "with such direction, rules, and regulations as may be issued by Wiggin relating to traffic control, speed, hours of operation and the like." Ample control over the lumber terminal operation can be gained by vigilant enforcement of this rule without the concomitant increases in cost and diversion of lumber which will result from effectuation of the proposed exclusive loading regulation. Further, while the evidence indicates that truck loading itself would be more efficient than it is at present should Wiggin employ permanent rather than floating lumber handlers, the evidence does not support a reasonable probability that the physical loading of trucks by Wiggin employees would eliminate or reduce many of the inefficiencies described herein.

Since the disadvantages and injurious effects of the proposed exclusive loading regulation outweigh the benefits to be derived therefrom, which benefits may be secured by other uncontested and innocuous means, we find the proposed exclusive loading regulation unreasonable.

We are puzzled by Wiggin's assertion that, as a service organization, it lacks control over the stored lumber although it collects fees for such storage. Since Wiggin is directly compensated for its backpiling and other lumber handling services, and since no services are rendered to the lumber after deposit at the place of rest, it is difficult to understand the basis for publication and collection of a parking charge by Wiggin, a service organization, if it has no custody, possession, or right to possession of the lumber. Wiggin asserts that Luckenbach, as lessee of the land on which the lumber terminal is located, has possession of and control over the lumber. If this were correct, reasonableness would require that Luckenbach publish the lumber terminal tariff in order that consignees of lumber might know to whom to look for care of and responsibility to their lumber while at the terminal. The argument is refuted, however, by the fact that lumber consignees deal with Wiggin, not with Luckenbach,¹⁸ and by the terms

¹⁸ The Luckenbach terminal tariff, F. M. B. I-1, provides:

"Item 3-A. WHARF PARKING: LUMBER—Refer to Wiggin Terminals' Federal Maritime Board Tariff No. 5."

"Item 7. CHARGES FOR HANDLING LUMBER: Luckenbach S. S. Co., Incorporated has contracted with Wiggin Terminals Inc. to handle and park lumber at Castle Island Terminal. Wiggin Terminals, Inc. publish their own tariff to cover these services."

of the agreement between Wiggin and Luckenbach. In that agreement, Wiggin undertakes to "assume full charge and responsibility for the lumber terminal operations," to save Luckenbach harmless in the event of "injury to or loss of property or death or injury to any person on or within the lumber terminal area *caused by any act or failure of WIGGIN or any of its officers, agents or employees, or by the condition of the premises,*" and to make certain remittances to Luckenbach in "*payment for the use of such portion of Castle Island Terminal by WIGGIN as a lumber terminal.*" [Emphasis supplied.] The sales by Wiggin of unidentified and unclaimed lumber for storage charges, and the fact that consignees may take possession of stored lumber during the specified terminal hours only, are further indicia of Wiggin's dominion over stored lumber and control of the lumber terminal. We find then that, contrary to its assertion, Wiggin has control of the lumber terminal and custody of lumber stored thereon, after free time and prior to demand and payment by the consignee dealer of accrued storage charges. Having so found, it is abundantly clear that the inefficiencies hereinbefore stated to be the result of Wiggin's failure to exercise its control over the lumber and over the premises should be rectified through enforcement of Item 16-B and/or such other regulation dealing with traffic control or control over stored lumber as may reasonably be necessary to insure trucker cooperation. While Wiggin asserts that policing of Castle Island would be impractical and overly expensive, it would appear that, in the absence of such control, Wiggin furnishes no consideration in return for the storage or parking fees received from lumber dealers.

We conclude that Item 15-A of F. M. B. Tariff No. 5 is an unreasonable regulation relating to the handling, storing, and delivering of property, and that the contemplated effectuation of Item 15-A is an unreasonable practice relating to the handling, storing, and delivering of property, both in violation of section 17 of the Act.

As stated by the examiner, the testimony of representatives of other North Atlantic lumber terminals has no significant bearing on the issues in these proceedings, and the findings and conclusions herein are not intended to have any application or effect upon such other terminals. Further, while much testimony was adduced tending to establish that the proposed revision resulted solely from labor union demands, it is the reasonableness of the regulation itself and the contemplated practice thereunder which must be considered and not the motivating reason for the revision.

An appropriate order will be entered.

Chairman Morse was absent from the country at the time of oral argument, and accordingly, does not participate in this report.

ORDER

At a Session of the FEDERAL MARITIME BOARD held at its office in Washington, D. C., on the 18th day of May A. D. 1956

No. 776

LOPEZ TRUCKING, INC., ET AL.

v.

WIGGIN TERMINALS, INC.

No. 779

DANT AND RUSSELL SALES CO. ET AL.

v.

WIGGIN TERMINALS, INC.

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

It is ordered, That respondent be, and it is hereby, notified and required to cancel and hereafter abstain from publishing and putting into effect Item 15-A of F. M. B. Tariff No. 5, found herein to be an unreasonable regulation in violation of section 17 of the Shipping Act, 1916.

By the Board.

[SEAL]

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

FEDERAL MARITIME BOARD

No. M-64 (Sub. No. 1)

PACIFIC FAR EAST LINE, INC.—APPLICATION TO EXTEND BAREBOAT
CHARTER OF VESSELS

Submitted May 25, 1956. Decided May 28, 1956

REPORT OF THE BOARD

BY THE BOARD:

In *Pacific Far East Line, Inc.—Charter of War-Built Vessels*, 4 F. M. B. 785, we recommended granting the charter of seven vessels to Pacific Far East Line, Inc. ("PFEL"), having found, as more fully set out in that report, that (1) the service under consideration is in the public interest, (2) such service is inadequately served, and (3) privately owned American-flag vessels are not available for charter from private operators for use in such service. We recommended to the Secretary of Commerce, *inter alia*, that the charters provide for June 20, 1956, redelivery at a United States west coast port to be named by the Maritime Administrator, and that PFEL be prohibited from commencing a voyage which might extend beyond that date.

Subsequent to execution of the charters as recommended and the commencement of the contemplated iron-ore lift, PFEL was obliged to redeliver four of the seven vessels, as described in the following Notice of Application and Tentative Findings served in this proceeding on May 18, 1956:

Pursuant to section 5 (e) of the Merchant Ship Sales Act, 1946, as amended (Public Law 591, 81st Cong.) (50 U. S. C. App. 1738), seven (7) Victory type vessels owned by the United States were chartered to Pacific Far East Line, Inc. (Applicant), for the carriage of iron ore from Stockton, Calif., to ore ports in Japan; the charter contemplated two (2) voyages per vessel, a total of fourteen (14) voyages; four (4) of the vessels were recalled after completion of one (1) voyage; the applicant is obligated to redeliver said vessels on or before June 20, 1956.

Applicant seeks to use the three (3) vessels currently under charter to complete a sufficient number of voyages so that the total voyages accomplished under the charter will be the total of fourteen (14) contemplated by the Report of the Board dated March 20, 1956.

The Board has tentatively affirmed its findings of March 20, 1956, and has tentatively determined that its recommendation 6 in its Report of March 20, 1956, should be relaxed to permit applicant to continue using the three (3) vessels for additional voyages sufficient to accomplish a total of fourteen (14) under the charter.

Any interested party may be heard concerning these tentative findings in Room 4519, New General Accounting Office Building, 5th and G Streets, N. W., Washington, D. C., at 2 p. m., e. d. t., May 24, 1956. Said findings will become final if no protestant appears.

On May 24 and 25, 1956, as provided in the foregoing notice, American Tramp Shipowners Association and States Marine Corporation of Delaware appeared in opposition to the proposed extension. No evidence was adduced by the interveners tending to show that our tentative findings should not be made, or that our tentative determination and recommendation to the Maritime Administrator that recommendation 6 of our March 20, 1956, report should not be relaxed to permit PFEL to continue using the three vessels for additional voyages sufficient to accomplish a total of fourteen voyages under the combined charters. Accordingly, on the records in this proceeding and the earlier proceeding, we reaffirm, adopt, and hereby finalize the aforesaid tentative findings, determinations, and recommendations.

5 F. M. B.

FEDERAL MARITIME BOARD

No. 725

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE ET AL.

No. 751

IN THE MATTER OF THE STATEMENT OF THE MEMBER LINES OF THE
NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE FILED UNDER
GENERAL ORDER 76

*Submitted June 28, 1955. Decided February 29, 1956**

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

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

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

Complaint of the Department of Agriculture dismissed since the proposed exclusive-patronage contract/noncontract system has not been found to be unlawful.

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

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

*As amended by order of March 30, 1956.

Edward Knuff, James E. Kilday, and Stanley N. Barnes for the Department of Justice.

Hymen I. Malatzky for himself.

M. W. Wells for Growers and Shippers League of Florida, Florida Citrus Commission, Florida Cannery Association, and Florida Citrus Mutual.

Roscoe H. Hupper, Burton H. White, and Elliott B. Nixon for members of North Atlantic Continental Freight Conference.

John Mason, Edward Aptaker, Richard J. Gage, and Richard W. Kurrus as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

Docket No. 725 arises out of a complaint filed on October 17, 1952, by the Secretary of Agriculture ("Agriculture"),¹ challenging the validity of the exclusive-patronage contract/noncontract rate system ("dual-rate system") proposed by North Atlantic Continental Freight Conference ("the conference") for use in the trade from United States North Atlantic ports to ports in Belgium, Holland, and Germany (exclusive of German Baltic ports). Agriculture alleges that the use of dual rates would violate sections 14, 16, and 17 of the Shipping Act, 1916 ("the Act"), and that the proposed dual-rate system may not be approved under section 15 of the Act.

Isbrandtsen Company, Inc. ("Isbrandtsen"), the Department of Justice ("Justice"), and Hymen I. Malatzky, doing business as Himala International (Malatzky), intervened in the proceedings. Although Malatzky filed a brief, he did not participate in the hearing before the examiner and filed no exceptions to the examiner's recommended decision.

Docket No. 751 is a proceeding arising out of a statement of the conference filed on February 25, 1954, pursuant to section 236.3 of our General Order 76,² and the comments thereto filed by Isbrandtsen, Agriculture, and Justice. The conference statement sets out the differential between contract and noncontract rates in the proposed dual-

¹ Filed pursuant to section 22 of the Shipping Act, 1916, and section 203 (j) of the Agricultural Marketing Act of 1946.

² 17 F. R. 10175, 46 C. F. R. 236.3 (Nov. 10, 1952): The section requires parties filing to initiate a dual-rate system to furnish a statement containing:

(a) The amount of the spread or differential in terms of percentages or dollars and cents;

(b) The effective date;

(c) The reasons for the use of contract/noncontract rates in the particular trade involved, and the basis for the spread or differential between such rates; and

(d) Copies of the form of all contracts pertaining thereto.

rate system complained of by Agriculture in Docket No. 725, the effective date of the proposed system, the reasons for the use of the system in the trade involved, the basis for the differential, and copies of the form contract proposed for use in the trade. Some of the matters encompassed in the statement, however, had been fully considered in our report in Docket No. 724, *Contract Rates—North Atlantic Con'l Frt. Conf.*, 4 F. M. B. 355 (1954), where a proposed 10-percent differential between contract and noncontract rates in this trade was found to be not arbitrary, unreasonable, unjustly discriminatory, nor in violation of the Act. The Board stated in that report, however, that "Nothing in this report shall be deemed to relieve the respondent conference from full compliance with the provisions of General Order 76 * * *."

The history of the controversy between the parties here was described in *Contract Rates, supra*, at p. 356, as follows:

On October 1, 1948, respondents advised shippers in the trade that the carriers proposed to reinstate the exclusive-patronage contract and dual-rate system which had been in use in the trade prior to World War II. Isbrandtsen brought suit in the United States District Court for the Southern District of New York seeking an injunction and an order to set aside certain rulings of our predecessor, the United States Maritime Commission, which purported to authorize the dual-rate system. The District Court granted a temporary injunction to preserve the status quo and directed Isbrandtsen to file a complaint before us to challenge the validity of the system. This complaint was filed, and, after due proceedings, we issued our report in Docket 684 upholding the system and finding at page 247:

"3. The use of the dual-rate system by the two conferences and their members is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and does not operate to the detriment of the commerce of the United States, and is not in violation of the Shipping Act, 1916, * * *."

Our order in Docket 684 was appealed to the District Court by Isbrandtsen, who urged that the dual-rate system was unlawful *per se* because in violation of section 14 (Third) of the Act. The court declined to find that the system could under no circumstances be valid, but granted a permanent injunction against the system on a point not argued before us, holding that the differential between the contract and noncontract rates offered to shippers had been arbitrarily determined and was therefore based on unreasoned conduct and so was unreasonable and unjustly discriminatory.⁹

In July 1952 we instituted a rule-making proceeding to provide machinery for securing information from conferences of ocean carriers as to the circumstances and justification for the use of dual rates and the basis for the amount of any differential between contract and noncontract rates to be charged. Before our rule-making proceeding had been completed and a rule promulgated,⁹ respondents announced their intention to institute a new exclusive-patronage dual-rate system effective October 1, 1952.

Our order of investigation, issued as above stated on September 19, 1952, initiated these proceedings, and by our report filed September 29, 1952 (*Contract*

Rates-North Atlantic Cont'l Frt. Conf., 4 F. M. B. 98), we in effect directed the respondent carriers to defer the institution of the dual-rate system until the conclusion of these proceedings. Our order of September 19, 1952, as amended on October 3, 1952, outlined the scope of the investigation to embrace only the issue of "whether the differential in the rates of the proposed system is arbitrary and unreasonable and therefore unjustly discriminatory."

² *Isbrandtsen v. United States*, 96 F. Supp. 883 (1951), affirmed by an equally divided Supreme Court *sub nom. A/S J. Ludwig Mowinckels Rederi et al. v. Isbrandtsen Co., Inc.*, et al., 342 U. S. 950 (1952).

³ Our General Order 76 was issued November 10, 1952.

In commenting on the statement presently before us, Isbrandtsen argued (1) that the dual-rate system proposed could not go into effect prior to full hearing and approval under section 15 of the Act, (2) that the matters considered in Docket No. 724 did not provide a sufficient basis for Board approval under section 15, (3) that the statement did not comply with the requirements of General Order 76, (4) that the proposed dual-rate system was violative of sections 14, 15, 16, and 17 of the Act, and (5) that the institution of the system would result in irreparable damage and injury to Isbrandtsen. The comments of Agriculture and objections of Justice are encompassed in Isbrandtsen's comments.

Oral argument on the statement and on the comments thereto was heard on March 29, 1954. In our order of March 30, 1954, we expressed doubt as to whether aspects of the proposed contract/noncontract rates, other than the amount of the proposed spread or differential between those rates, may be unjustly discriminatory or otherwise in violation of the Act, and we directed that the system be held in abeyance until further direction; we granted the requests of Isbrandtsen, Justice, and Agriculture for hearing on their comments on and objections to the statement, and we ordered that the hearing be consolidated with the hearing in Docket No. 725.

On April 15, 1954, at the request of the conference members and Public Counsel, we specified in the following manner the aspects of the proposed system as to which doubts had previously been entertained:

(1) Having determined that the differential between the proposed contract and noncontract rates is not arbitrary or unreasonable and not unjustly discriminatory, and that such differential is not in violation of the Shipping Act, 1916, as amended, there is nevertheless doubt as to whether the use of the proposed contract and noncontract rates in the trade described in Conference Agreement No. 4490, as amended, may be unjustly discriminatory or unfair as between carriers, shippers, exporters, or ports, or between exporters from the United States and their foreign competitors, or may operate to the detriment of the commerce of the United States, or may be in violation of the Shipping Act, 1916, as amended, and

(2) Having determined that the differential between the proposed contract and noncontract rates is not arbitrary or unreasonable and not unjustly discriminatory, and that such differential is not in violation of the Shipping Act, 1916, as amended, there is nevertheless doubt as to whether the use of the contracts pertaining to the proposed contract and noncontract rates as set forth in the Statement filed by the Member Lines herein, may be unjustly discriminatory or unfair as between carriers, shippers, exporters or ports or between exporters from the United States and their foreign competitors, or may operate to the detriment of the commerce of the United States, or may be in violation of the Shipping Act, 1916, as amended.

Hearings in the combined proceedings were held during the period April 27 to May 7, 1954. During the course of the hearing the examiner ruled that questions relating to the method by which the conference arrived at the differential between contract and noncontract rates and questions as to whether the differential was arbitrary could not be pursued. Counsel for Isbrandtsen and for Agriculture thereafter appealed the examiner's rulings under the provisions of Rule 10 (n) of our Rules of Practice and Procedure.³ By order dated May 3, 1954, we sustained the examiner's rulings.

In a recommended decision served on November 24, 1954, the examiner found that the proposed system would not be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, would not operate to the detriment of the commerce of the United States, and would not be in violation of the Act. He further recommended that a memorandum of the agreement to establish the proposed dual-rate system should be filed for approval under section 15 of the Act, and recommended that an order be entered dismissing the complaint in Docket No. 725 and discontinuing the proceeding in Docket No. 751. Motions by Isbrandtsen and Malatzky to remand the recommended decision, with instructions to make further findings and conclusions, were denied by our order of February 1, 1955.

Exceptions to the recommended decision were thereafter filed by Justice, Agriculture, Isbrandtsen, and by the conference, and oral argument on the exceptions was heard. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

³ Rule 10 (n) provides:

"Right of parties as to presentation of evidence.—Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. The presiding officer shall, however, have the right and duty to limit the introduction of evidence and the examination and cross-examination of witnesses when in his judgment such evidence or examination is cumulative or is productive of undue delay in the conduct of the hearing."

We find the following to be the facts in these proceedings:

The conference is a voluntary association of twelve common carriers by water ⁴ engaged in the transportation of cargo from United States North Atlantic ports to ports in Belgium, Holland, and Germany (exclusive of German Baltic ports). The conference operates under the authority of F. M. B. Agreement 4490, as amended ("the basic agreement"), approved in unamended form by our predecessor under section 15 of the Act on August 24, 1935.

Conference membership is open to any common carrier by water who has been engaged regularly in the trade or who furnishes evidence of ability and intention to maintain a regular service in the trade.

Article 3 of the basic agreement specifically provides for establishment of dual rates and authorizes the conference chairman or secretary to negotiate and execute such dual-rate contracts in the manner as may be authorized by the conference.

There are eight nonconference common carriers in this trade, Isbrandtsen, Meyer Line, Inc., States Marine Corporation ("States Marine"), Hamburg-Amerika Linie ("Hamburg-American Line"), Norddeutscher Lloyd ("North German Lloyd"), U. S. Navigation Company,⁵ Mitsui Steamship Co., Ltd. ("Mitsui"), and Osaka Shosen Kaisha ("O. S. K.").⁶ Of these, Hamburg-American,⁵ Meyer Line, Inc., and North German Lloyd are the predominant carriers. Several other lines have in the past operated independent berth or tramp service in the trade but do not presently serve the trade. Isbrandtsen, an American corporation employing United States-flag vessels in this trade, although not in all of the trades which it serves, is the only non-conference common carrier appearing in these proceedings. Of the conference membership, Black Diamond Steamship Corporation, United States Lines Company, Waterman Steamship Corporation, Belgian Line, and Holland-America Line were most active at the time of hearing in Docket No. 724.

The independent lines collectively provide complete port coverage and frequent and regular service, as do the conference lines. While

⁴ Conference membership at the time of the recommended decision included A/S J. Ludwig Mowinckels Rederi (Cosmopolitan Line), Black Diamond Steamship Corporation, Compagnie Generale Transatlantique, Compagnie Maritime Belge, S. A./Compagnie Maritime Congolaise S. C. R. L. (Joint Service), The Cunard Steam-Ship Company Limited (Cunard White Star), Ellerman's Wilson Line, Ltd. (Wilson Line), Home Lines, Inc. (Home Lines), N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn," Osaka Shosen Kaisha, Ltd., South Atlantic Steamship Line, Inc. (U. S. flag), United States Lines Company (U. S. flag), (Fjell Line)—Joint Service of Aktieselskapet Luksefjell, Aktieselskapet Dovrefjell, Aktieselskapet Falkefjell, Aktieselskapet Rudolf.

⁵ In 1955, subsequent to the close of hearings, North German Lloyd, Hamburg American Line, and United States Navigation Co. joined the conference. In the same year, Fjell Line and South Atlantic Steamship Line, Inc., resigned from conference membership.

⁶ Mitsui's entry predates O. S. K.'s entry of February 1954.

large individual shippers may require more frequent service than any single independent line provides, it is unlikely that the needs of any shipper could not be met by utilization of services provided by all of the independents in the trade. While a witness for Agriculture testified that shippers in this trade need more service and greater port coverage than collectively provided by the independent lines, the witness had no familiarity with this trade or with shipping problems.

Some of the conference vessels are equipped with refrigerated space. A witness for Isbrandtsen indicated that Mitsui might be the only nonconference line which provides refrigerated service, but he further stated that of the independent lines he was certain of the facilities of his own vessels only.

There are between 3,500 and 5,000 shippers in this trade, including about 1,500 consignees in Europe as well as consignors in the United States. In this number are included some of the largest shippers in the world. Several witnesses refused to estimate the maximum service which might be required by any single shipper. One witness stated that some shippers use two to four sailings per week but indicated that their requirements did not demand such frequent sailings and might well be met by one sailing per week. Nationalistic preferences are not shown other than by Dutch receivers for Holland-America Line. While shippers are interested in low rates, they are more interested in uniform and stable rates.

There is a considerable volume of cargoes moving in this trade which are attractive to tramp vessels and for which conference and nonconference liners as well as tramp vessels compete. For several months prior to the hearing, the carryings of one conference line were 90 percent bulk and 10 percent general. For calendar year 1953, the bulk cargo carryings of the conference member lines represented 60 percent of their total carryings. The percentage of general cargo⁷ carryings of conference member lines to total carryings of those lines has been substantially reduced since 1948. General cargo⁷ in 1953 represented 24 percent of the total conference carryings as against 56 percent in 1948. Generally, bulk cargoes are less attractive and less remunerative than general cargoes.

As found in our report in Docket No. 724, and officially noticed herein, the amount of commercial cargo in long tons carried by liner services in the trade and the number of eastbound sailings for the years 1948 to 1952 are as follows:

⁷ Exclusive of military cargo carried.

TABLE I

Year	1,000 tons	Conference	Nonconfer- ence	Total sail- ings	Conference sailings	Nonconfer- ence sailings
		<i>Percent</i>	<i>Percent</i>		<i>Percent</i>	<i>Percent</i>
1948.....	1,485	76	24	621	89	11
1949.....	.....	86	34	642	84	16
1950.....	1,812	57	43	613	80	20
1951.....	2,500	74	26	559	83	17
1952.....	1,900	66	34	688	79	21

¹ January-June 1952 only.

² Percentage figures based on 9 months' statistics for conference lines and 11 months for nonconference lines.

³ Estimated for full year, based on statistics mentioned in footnote 2.

Additional data introduced in this hearing indicates the following distribution of conference and nonconference sailings and commercial carryings in liner services for 1953 :

TABLE II

	Sailings	Commercial cargo	Percent cargo to total	Percent sailings to total
Conference.....	485	1,318,947	64.5	72
Nonconference.....	190	726,006	35.5	28
Total.....	675	2,044,953	100.0	100

The foregoing tables ⁸ point to an unmistakable increase in non-conference sailings and carryings in this trade. The combined sailings of nonconference lines have increased from 70 in 1948 to 190 in 1953, an increase of 170 percent. During the same period, nonconference commercial-liner cargo carryings have increased by 145 percent. On the other hand, conference-liner carryings have increased 4.6 percent during the period 1948 through 1953 while conference sailings for the same period decreased 12 percent.

Freight rates quoted by all of the nonconference lines are lower than the uniform rates of the conference members. There is no fixed amount by which the conference rates are underquoted. Rates of independents generally have been 10 percent or more below conference rates. The rates of Isbrandtsen in particular, while lower than conference rates, are aimed at realizing a profit. Other of the independents in the trade charge rates which are lower than those of Isbrandtsen.

The conference employed a dual-rate system prior to World War II, using a spread of 20 percent between contract and noncontract rates. The system, as then employed, covered between 100 and 200 of the

⁸ Tables I and II include bulk-type cargoes and exclude military and military-controlled cargoes.

2,700 or 2,800 items of the then-current tariff, those items presumably being the most highly competitive items moving in the trade. In the years during which the system was in effect, conference members had nonconference competition. As indicated in our report in Docket No. 724, prewar nonconference operators carried commodities covered by the conference dual-rate system.

When private operations of the conference ceased during World War II, existing dual-rate contracts became inoperative. Full private operation of the conference recommended in 1948, and in that year the conference endeavored to reinstitute a dual-rate system. The subsequent history of the conference's efforts in this regard is traced earlier in this report.

The proposed dual-rate contract differs from those in use by the conference prior to World War II, but doesn't differ in any material way from the contract approved by the conference in 1952 and submitted to the Board in Docket No. 724. Of the 1,500 or 1,600 commodities presently moving in the trade, the contract covers all except the following items, as specified in Article 6:

- (a) Bulk Cargoes (Not Package Goods)—Coal; Coke; Grain; Oils, Petroleum and Liquid Petroleum; Salt Cake
 - (b) Effects or Goods, Household or Personal, packed, including lift vans
 - (c) Explosives
 - (d) Hay
 - (e) Livestock; Animals, etc.
 - (f) Specie, Gold, Silver and Bullion.
- This contract does not apply to Human Ashes or Corpses.

Article 1 of the contract provides that the merchant shall ship all nonexcepted commodities by vessels of the conference carriers, "with equitable division of shipments among them." The conference does not view Article 1, however, as imposing any obligation on the shipper to divide his cargo proportionately among conference lines. The language hereinabove quoted was inserted in the hope that shippers would so divide their cargo. As a practical matter, the conference is unaware of any shipper who uses the services of one conference line exclusively. An additional provision in Article 1, whereby the carriers agree to maintain adequate shipping services, was viewed by the conference as enforceable by signatory shippers.

Article 3 provides as follows:

3. The Merchant agrees not to make any shipment hereunder for the benefit of any other Merchant or interest not a party to this contract or a contract substantially in this form with the undersigned Carriers; and agrees also not to ship any commodities covered by this contract by a carrier not a party to this contract, except as hereinafter provided.

Neither Article 3 nor any other article provides for liquidated damages in the event of carrier or shipper breach.

Objection to Article 3 was voiced by a shipper as legally invalid, if literally construed, as it would tend to bind an exporter or an importer to have goods carried by members of the conference even when the exporter or importer would have no legal right to select the carrier. The conference chairman indicated that a consignee, signatory to a contract, would be bound by his contract on any shipment when the consignee left the designation of the vessel to the consignor. He did not clearly indicate the effect of a consignee contract where a non-signing consignor, with knowledge of the consignee's contract, should insist on routing a c. i. f. or c. and f. shipment via nonconference carrier. The chairman did indicate the conference's willingness to extend a dual-rate contract to the merchant who controls the routing of shipments, whether f. o. b. or c. i. f. Most of the cargo in this trade moves on a c. i. f. basis.

Article 4 permits the merchant to ship via nonconference vessel if, after 3 days following application to the conference office for space, none of the conference carriers are able to provide space on a vessel scheduled to sail within 15 days of the desired time.

Article 7 provides that:

All shipments contemplated, tendered or made under this contract shall be governed by the provisions of the tariffs, permits, dock receipts, bills of lading and other shipping documents regularly in use by the Carriers. Receipt and carriage of dangerous, hazardous or obnoxious commodities shall be subject to the facilities and requirements of the individual Carriers, also to local laws and regulations.

Under Article 8, the contract would be in effect for an initial 9 months' period, and for successive 6 months' periods in the absence of a notice of termination given by either party 60 days prior to the termination of the initial or succeeding periods. Article 8 further provides that rates shall not be increased during the initial or any succeeding period of the contract. Rate increases may only be made on notice of 75 days prior to the end of any contract period, to become effective during the subsequent period.

Under the present single-rate system, shippers notifying the conference, or members thereof, of contemplated shipments are protected in the rate quoted by the conference during the current month and two next succeeding months. In addition, most of the lines in the trade, conference and nonconference, are accustomed to giving 60 days' advance notice of rate increases. Isbrandtsen gives 30-day assurance against rate increases. While no notice of rate decreases is now given by the conference or would be given under the contract, a shipper who

has received space at a higher rate receives the benefit of any rate reduction in existence at the time of actual shipment.

Rates of conference carriers in this trade have been stable, that is, free from appreciable fluctuation, since World War II. Rates of the independent carriers have been more or less stable during the same period except for an occasion in 1950 when Isbrandtsen's rates were increased on eight days' notice. During the postwar period the conference lines have provided frequent, regular, and dependable sailings.

The conference general rate level is lower today than it was in 1952. The average rate on general cargo is about \$25. In October 1952 the conference, having previously announced the initiation of a dual-rate system, and having deferred initiation of the system at our request, announced a 10-percent rate reduction or discount from tariff rates, available to all shippers of general cargo. The discount rate is still in effect. If the conference is permitted to initiate a dual-rate system the discount rate will be the contract rate and will be 10 percent lower than the noncontract rate.

There are three methods by which the conference may meet independent competition. First, it may attempt, by uniform rate reduction, to meet the independent's rate; this method is not likely to succeed in view of the independent's ability to reduce his rates further, and has, in fact, met with unsatisfactory results. The conference has not specifically attempted to meet Isbrandtsen's rate since Isbrandtsen is not its sole or major competitor. Second, the conference could declare rates to be open and thereby precipitate a rate war, although a rate war would injure all carriers in the trade. At times various lines have urged the conference to meet the rate-cutting practices of the independents but the conference has refrained from thus engaging in a rate war until permission to institute a dual-rate system has been granted or denied. Third, the conference may initiate a dual-rate system. In attempting to institute such a system here the prime purpose is to meet nonconference competition. Dual-rate systems are considered by the conference to be the cornerstone of the conference system. It was also stated by a conference witness that the dual-rate system will aid in stabilizing rates, assure regular, dependable, and frequent sailings, provide reasonable guaranteed rates, and enable member lines to plan for the future.

Witnesses for the American Farm Bureau Federation and for the National Grange, as well as Agriculture witnesses, expressed opposition to dual-rate systems generally and to the dual-rate system proposed for use in this particular trade. It was stated by those witnesses that differences in rates charged to contract signers and nonsigners

might make cargoes of the nonsigners noncompetitive with those moving at lower rates. There is no indication, however, that the lower rates charged by nonconference lines in the past have imposed prohibitive competitive burdens on similar cargoes moving at the higher conference rates. The witnesses further stated that a dual-rate system would tend to eliminate nonconference competition, enabling the conference lines to charge excessively high freight rates. The witnesses indicated that producers of agricultural products are primarily interested in low freight rates, and to this end favored free competition in shipping in foreign commerce. They recognized, however, that in free and open competition Isbrandtsen and other American carriers might be driven from the trade since costs of operating American vessels greatly exceed operational costs of foreign-flag vessels. Further, the desire expressed by the witnesses for frequent sailings in high-quality vessels is somewhat inconsistent with the desire for completely unregulated competition, since elimination of carriers through rate wars will reduce service and since vessel improvement and replacement is difficult of achievement under rate-war conditions.

Cargo carried by members of the conference is competitive with cargo carried in the Canadian North Atlantic Eastbound Freight Conference, the South Atlantic Steamship Conference, the Gulf/French Atlantic Hamburg Range Freight Conference, and with cargo moving to the same ultimate destinations through Mediterranean gateways.

Conference witnesses estimated, based on long experience, that the conference might, under the dual-rate system, expect to get 75 percent or less of the general cargo moving in the trade. A witness for Isbrandtsen estimated that the conference, under a dual-rate system, would tie up 90 percent of the general cargo. About 2,400 of the less than 5,000 shippers in the trade have signed dual-rate contracts in anticipation of the system going into effect. Both importers and exporters are numbered among the present signers. Many shippers will elect not to sign. There were, prior to World War II, big shippers who declined to sign a dual-rate contract.

The conference considers that the assurance of patronage of the contract signers and the additional cargoes which it will carry will permit the conference economically to allow a 10-percent discount. The conference presented no facts and figures, however, as to the amount of revenue which might be realized from the anticipated increased amount of general cargo. Isbrandtsen's witness declined to give his opinion on whether a saving would be effected by the conference lines even assuming carriage, by conference lines, of 90 percent of the general cargo in the trade. The question can be answered only

by weighing the increased volume of general cargo that probably would be obtained against the reduction in rates to contract signers. The record does not indicate the 1953 proportion between general cargo and bulk cargo carried by nonconference liners. The record does show, however, that Isbrandtsen presently carries a greater amount of general cargo than bulk and military-controlled cargo. Nonconference lines for the aggregate years 1948 through 1952 carried substantially more general than bulk cargo,⁹ and only in 1951 did the independent lines carry more bulk than general cargo. On the other hand, during the same aggregate period conference lines carried substantially more bulk cargo than general cargo.⁹ Only in 1948, the first year of record, did general cargo carryings of the conference lines exceed their bulk carryings. For the entire period independent lines carried approximately 32 percent of the total general cargo moving while maintaining less than 18 percent of the total sailings. General cargo carried by nonconference lines amounted to more than 49 percent of the total cargo, including military tonnage carried by them. In contrast, general cargo obtained by conference lines amounted to 36 percent of the total cargo, including military tonnage, carried by those lines. Bulk cargo carried by all lines in the trade slightly exceeded general cargo carryings by all liners.

There is no difference in cost of service as between signing and non-signing shippers of like cargo, identically destined, but insofar as the system increases conference average carryings, unit costs of carriage of all cargo, whether or not carried under contract, will be reduced.

While there is no dual-rate system in domestic transportation, entry into that field is regulated, as are transportation rates. In contrast, any carrier may enter the field of ocean transportation in foreign commerce and enjoy freedom from minimum or maximum rate regulation.

DISCUSSION AND ULTIMATE FINDINGS

Since, in Docket No. 724, we found that the 10-percent differential between contract and noncontract rates in the dual-rate system proposed by the conference is not arbitrary or unreasonable, unjustly discriminatory, or in violation of the Act, we consider that those questions are removed from these proceedings. The issues remaining for our consideration in Docket No. 751 are: (1) whether the initiation of a dual-rate system is necessary or required as a competitive measure to insure stability of rates and service to shippers; (2) if necessary, whether the use of contract and noncontract rates or the use of the dual-rate contract here proposed would be unjustly discriminatory or

⁹ Exclusive of military-controlled cargo.

unfair as between carriers, shippers, exporters, or ports, or between exporters from the United States and their foreign competitors, or would operate to the detriment of the commerce of the United States, or would be in violation of the Act. The issues raised in Docket No. 725, including the question of the legality *per se* of the dual-rate system in this trade and otherwise, parallel the issues remaining for our consideration in Docket No. 751.

In the recent case of *Contract Rates—Japan/Atlantic-Gulf Freight Conf.*, 4 F. M. B. 706, we determined that under section 15 of the Act we may approve the initiation of a dual-rate system in any trade if, under the facts adduced, the system as sought to be employed would not be unjustly discriminatory or unfair, detrimental to the commerce of the United States, or in violation of the Act. We consider our discussion in that report on the legality of dual-rate systems *per se* to be a full and sufficient answer to the arguments advanced here in support of the proposition that the Board may never, under section 15, approve such a system.

We consider the initiation of a dual-rate system to be necessary as a competitive measure to offset the effect of nonconference competition in this trade. The percentage of participation of nonconference lines in the total commercial liner movement has in each year exceeded the percentage of nonconference sailings to total sailings. Nonconference participation in the total commercial movement has increased from 24 percent in 1948 to 35.5 percent in 1953, the year of highest nonconference percentage participation except for 1950, when nonconference lines carried 43 percent of the cargo on 20 percent of the sailings. Conference carriage of general cargo has decreased from approximately 841,000 tons in 1948 to approximately 539,000 tons in 1952, while nonconference lines show an increase in volume of general cargo in 1952 as compared with 1948. While general cargo in 1948 represented 56 percent of the total conference carryings, such cargo represented only 24 percent of the conference total in 1953. Since general cargo is more remunerative than bulk-type cargo, it is clear that the competition of nonconference lines is felt even more keenly than the 11½-percent decrease in total carryings from 1948 to 1953 would appear to indicate. Without a dual-rate system, the conference may suffer the loss of still more general cargo to nonconference lines.

Although rates in this trade have been stable from 1948 to 1953, they have remained so only because the conference as a whole did not yield to the urging of some of its members to meet or better the rates of the nonconference lines. Such a measure, as indicated by past experience in this and other trades, would have been countered by

further rate reductions by nonconference lines, and inevitably would have culminated in a rate war whether the rates of conference lines were uniformly reduced or individually reduced under open rates. The competitive pressure on the conference lines has increased during the years of record despite the surface stability of rates. Where faced with formidable nonconference rate-cutting competition, and without a dual-rate system, as in this trade, it is impossible for conference lines to maintain stability of rates and at the same time a proportionate share of the desirable cargo. In such circumstances, a volume of cargo must be sacrificed for stability of rates or stability sacrificed for volume. Disastrous rate wars or initiation of a dual-rate system will reduce, for the period of the contract, the economic pressure on the conference lines to reduce rates on general cargo by creating a basic core of cargo on which the conference may rely. The guarantee of rates for a 6 months' period will facilitate forward trading by shippers and minimize the threat of rate wars, with their disastrous effects on carriers and on shippers.

The use of dual rates in this trade will not be unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Although the use of such rates is *prima facie* discriminatory, the discrimination will not be unjust since the shippers will retain complete freedom of choice between signing and not signing. No shippers will be preferred since all have equal opportunity to avail themselves of contract rates. There will be no coercion on shippers to sign since collectively the nonconference carriers provide complete port coverage and frequent and regular service. The difference between contract and noncontract rates will place no greater handicap or economic burden on cargoes moving at noncontract rates than the handicap on cargoes moving on conference vessels as compared with those moving on nonconference lines at rates lower by 10 percent or more than conference rates. Further, there is no indication that, collectively, nonconference vessels do not offer the same types of facilities as those offered to the public by vessels of the conference lines.

The use of the contract and noncontract rates here proposed will not be unfair as between carriers. Membership in the conference is and always has been open to independent common carriers regularly operating, or furnishing evidence of intention to operate regularly, in the trade. The principal reason for remaining outside of the conference appears to be the rate advantage which can be maintained by the independents over the conference lines. The independent carrier retains complete freedom to maintain its rate advantage or to enjoy,

as a conference member, the benefits of dual-rate contracts. But even if the independent carriers desire to remain outside of the conference there is no indication that initiation of a dual-rate system will eliminate any independent carriers from the trade. First, as found herein, there is in this trade a large volume of bulk-type commodities which will not be subject to the dual-rate system; second, the independent carriers, because of their comprehensive coverage and service in the trade, will remain able to compete for cargoes with conference carriers; and, third, it is probable that, under dual rates, conference vessels will carry no more than 75 percent of the total liner cargo. This probability is strengthened by our requirements with respect to the treatment of f. o. b. and f. a. s. shipments, as hereinafter discussed.

The use of contract and noncontract rates as proposed will not result in detriment to the commerce of the United States. The rates of the conference carriers will remain stable for at least successive 6 months' periods, and will enable nonconference carriers to stabilize rates at customary lower levels if such stability is considered by them to be desirable. Although, as hereinabove found, it is probable that the total nonconference carryings will be decreased, we do not share the views of those witnesses who fear that an increase in amounts of cargo carried on conference vessels will bring about a general increase in rates charged to shippers. We find such a result highly improbable in view of (1) the effectiveness of nonconference competition, (2) the effectiveness of the competition of other carriers and other conferences serving the ports of discharge in this trade from ports of loading not served by this conference, (3) the effectiveness of carrier competition at other gateways to areas served by this conference, and (4) the power of the Board over conference rates which are found by us to be detrimental to the commerce of the United States.

Since the form of the agreement between the conference carriers and particular shippers substantially affects the manner in which the proposed dual-rate system would be used, we have carefully examined the proposed contract and find the following provisions to be ambiguous or objectionable for other reasons, as hereinafter indicated.

Article 1 binds the merchant to move all of his shipments by vessels of the conference carriers. Article 3, in addition, prohibits shipments made for the benefit of a merchant not a party to the contract. Article 1, when construed with article 3, under a conceivable construction might require a signatory exporter to refuse to sell his products to an f. o. b. or f. a. s. buyer if the buyer should insist on routing shipments via nonconference carrier. The testimony of the chairman on this matter was not clear. Accordingly, the contract provision should

be clarified to avoid ambiguity. In place of those articles, we will require a provision which limits the restriction of the contract to ship exclusively via conference vessels to those circumstances wherein the contract signatory is in fact the shipper and which states, in the absence of fraud, that the person indicated as shipper in the ocean bill of lading shall be deemed the shipper. As we stated in the *Japan/Atlantic* decision, *supra*, p. 740:

In the situation where the contract signer appears as shipper in the bill of lading, it is no mere matter of form to say he is the shipper in fact. In c. and f. or c. i. f. sales the problem does not arise because there the contract signer is in fact the shipper, but in f. o. b. or f. a. s. sales we deem it undesirable to have the answer to this problem turn on the complicated questions of law as to risk of loss or when title passes in determining when a given shipment is or is not covered by the shipper's agreement. We deem it highly desirable that simple tests and standards be applicable.

The amended provision must not prevent shipments by an exporter as agent for the buyer, at the buyer's request and expense, where the exporter merely renders aid in obtaining the documents required for purposes of exportation.

In Article 7, all shipments under the contract are governed by the provisions of the tariffs, permits, dock receipts, bills of lading, or other shipping documents in use by the carriers. Such shipping-document provisions may not be controlling over provisions of the shipper contract in any case where they may (a) operate directly or indirectly to change the amount of spread between contract and non-contract rates, (b) impose on contract shippers additional requirements not imposed on all shippers, or (c) otherwise be inconsistent with the provisions of the shipper contract.

In *Swayne & Hoyt v. United States*, 300 U. S. 297 (1937), the Supreme Court upheld an order of the Secretary of Commerce cancelling proposed schedules of rates which were conditioned upon the execution of a dual-rate contract. In so doing, however, the Supreme Court stated at page 304:

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

Applying the test of the *Swayne & Hoyt* case, and balancing the foreseeable advantages against the foreseeable disadvantages, we find the latter outweighed by the former. While the increased carriage of cargo by conference lines might under other circumstances tend toward monopoly, we find no such likelihood here in view of the number of active independent competitors in the trade, the large volume of free cargo for which both independents and conference lines will compete, and the existing direct and indirect rate competition to the conference lines on cargoes originating in areas other than those served by conference vessels. These factors will act as a strong and effective deterrent against the imposition of exorbitant freight rates and against arbitrary conference action. On the other hand, the existence of the contracts with shippers guaranteeing levels of rates for the period of the contract or extension thereof will decrease the pressure on conference lines to wage a rate-reduction battle with non-conference lines. The genuine stability of rates which will ensue from the guarantee of rates and the assurance to conference lines of a basic core of cargo on which to rely will enable conference lines to put improved service on berth and more efficiently to plan sailings and service.

The conference has not considered its filing under General Order 76 to be a filing for approval under section 15 of the Act, arguing that the earlier approval of the basic agreement with its provision for dual rates makes any further approval unnecessary. The conference overlooks the facts, however, that it does not presently employ the dual-rate system and that its present filing is an application to institute or at least to reinstitute a dual-rate system. To this extent, we are unable to distinguish these circumstances from those before the court in *Isbrandtsen Co. v. United States*, 211 F. 2d 51 (D. C. Cir. 1954), where an agreement to institute dual rates was held to be an agreement or modification of an agreement between carriers which required approval under section 15. We will deem the conference's General Order 76 statement to have been filed for our approval under section 15, however, since the entire proceeding in Docket Nos. 725 and 751 has been conducted on this basis.

We incorporate herein the determinations made by us in Docket No. 724 wherein, as hereinbefore stated, the proposed differential was found to be not arbitrary, unreasonable, unjustly discriminatory, nor in violation of the Act.

The application of the conference to institute or reinstitute a dual-rate system in the trade from United States North Atlantic ports to ports in Belgium, Holland, and Germany is approved since we have

found the system will not be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, will not operate to the detriment of the commerce of the United States, and will not be in violation of the Act. Our approval is contingent, however, upon amendment of the proposed shipper's contract in conformity with our opinion herein.

Approval will be effective April 2, 1956.

Since the proposed dual-rate system has been found to be not unlawful, the complaint of Agriculture will be dismissed.

An appropriate order will be entered.

5 F. M. B.

ORDER

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

No. 725

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE ET AL.

No. 751

IN THE MATTER OF THE STATEMENT OF THE MEMBER LINES OF THE NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE FILED UNDER GENERAL ORDER 76

The case docketed as No. 725 being at issue upon complaints and answers on file, and the case docketed as No. 751 having been instituted by the Board on its own motion, and the cases having been consolidated for hearing 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; and the Board having therein incorporated its report in Docket No. 724, *Contract Rates—North Atlantic Cont'l Frt. Conf.*, 4 F. M. B. 355, which report is hereby referred to and made a part hereof insofar as it is not inconsistent with the report of the Board entered on the date hereof:

It is ordered, That the agreement evidenced by the aforesaid statement filed by the North Atlantic Continental Freight Conference be, and it is hereby, approved under the provisions of section 15 of the Shipping Act, 1916, as amended, excepting that (a) the exclusive-patronage contract/noncontract rate system contemplated therein shall not apply to shipments which are made on an f. o. b. or f. a. s. basis unless the person, whether seller or buyer, named in good faith

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as shipper in the ocean bill of lading, is a contract signatory; and (b) that the aforesaid agreement may not be altered by incorporation of provisions of tariffs, bills of lading, or other shipping documents which may operate directly or indirectly to change the amount of spread between contract and noncontract rates, or which may be otherwise inconsistent with the terms of the aforesaid agreement; and

It is further ordered, That the approval hereby granted shall be effective April 2, 1956, at 12:00 noon, eastern standard time; and

It is further ordered, That the complaint of the Department of Agriculture in the case docketed as No. 725 be, and it is hereby, dismissed; and

It is further ordered, That the case docketed as No. 751 be, and it is hereby, discontinued.

By the Board.

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

5 F. M. B.

FEDERAL MARITIME BOARD

No. 792

AGREEMENT AND PRACTICES PERTAINING TO LIMITATION ON MEMBERSHIP—PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT 5200)

Decided May 14, 1956

REPORT OF THE BOARD ON DEMAND FOR BILL OF PARTICULARS

BY THE BOARD:

By order of April 5, 1956, we directed the members of Pacific Coast European Conference¹ ("the conference") to show cause, at a hearing before an examiner, why we should not (1) find that the effectuation without our approval of an agreement to condition admission of Mitsui Steamship Company, Ltd. ("Mitsui"), on Mitsui's withdrawal from pending litigation, in which its position is opposed to that of the conference, is in violation of section 15 of the Shipping Act, 1916 ("the Act"), (2) find that the agreement should be disapproved as unjustly discriminatory and unfair as between carriers or detrimental to the commerce of the United States, and (3) order the condition to be cancelled by the conference.

The order recited the circumstances in the matter, insofar as they had been revealed to the Board, in the following manner:

1. On November 30, 1955,² Mitsui filed an application for membership in the conference.

2. On December 16, 1955, the conference notified Mitsui that the member lines had agreed to admit Mitsui to membership effective February 1, 1956, upon receipt of information satisfactory to the conference that Mitsui had withdrawn from pending litigation in which its position was opposed to that of the conference.

3. On December 21, 1955, Mitsui notified us of the condition to conference membership and stated that "it withdraws" from the pending litigation.

¹ Membership of the conference identified in the Appendix.

² By inadvertence our order of April 5, 1956, recited November 20 rather than November 30 as the date of Mitsui's application.

4. On December 28, 1955, our Regulation Office advised Mitsui and the conference that it considered the agreements to set a condition on Mitsui's membership and Mitsui's acceptance thereof to be new agreements or modifications of agreements between carriers requiring approval under section 15 of the Act prior to effectuation.

5. On January 7, 1956, the conference advised the Regulation Office that it was unable to concur in the view expressed by the Regulation Office.

6. On March 5, 1956, under our direction, the conference was advised by letter that the condition on admission to conference membership may not be a "just and reasonable cause" within the meaning of section 10 of the basic conference agreement,³ that it may be unjustly discriminatory or unfair as between carriers, and that it may operate to the detriment of the commerce of the United States. The conference was notified that a show cause order would be issued unless the condition should be withdrawn within twenty days of receipt of the letter.

7. On March 23, 1956, the conference advised us that its action, in its view, was proper in all respects.

On April 9, 1956, the conference advised us that it had suspended the condition imposed on the admission of Mitsui pending determination of whether the condition constitutes an unapproved section 15 agreement.

Our order to show cause was served on the conference by registered air mail on April 13, 1956. The conference responded, on April 27, 1956, by filing the document here under consideration, a demand for a bill of particulars "defining with certainty, in accordance with the law, the particular matters of law and fact alleged against * * *" the conference in that " * * respondents are unable to frame a responsive answer because of the vagueness, generality and uncertainty of the terms of the order * * *." The conference relied on the provisions of section 5 (a) (3) of the Administrative Procedure Act (APA). Section 5 (a) provides:

Notice.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties,

³ Section 10 of F. M. B. Agreement No. 5200, approved on May 26, 1937, provides:

Membership.—Any person, firm or corporation regularly operating, or giving substantial and reliable evidence of intention to operate regularly, as a common carrier by water in the trade covered by this agreement may become a member of the Conference upon the agreement of three-fourths of the members entitled to vote and by affixing his, their or its signature thereto, or to a counterpart thereof. No eligible applicant shall be denied membership except for just and reasonable cause and no membership shall become effective until notice thereof has been sent to the governmental agency charged with the administration of section 15 of the U. S. Shipping Act, 1916, as amended."

other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

Although the conference has not expressly so stated, we assume that reliance is also placed in Rule 5 (m) of our Rules of Practice and Procedure, which provides:

Bill of particulars.—Within ten (10) days after date of service of the complaint, respondent may file with the Board for service upon complainant a request for a bill of particulars. Within ten (10) days after date of service of such request, complainant shall file with the Board and serve upon respondent either (1) the bill of particulars requested or (2) a reply to such request, made in conformity with the requirements of rule 5 (p), setting forth the particular matters contained in the request which are objected to and the reasons for the objections. The time for filing answer to the complaint shall be extended to a date ten (10) days after the date of service of the bill of particulars or of notice of the Board's disallowance of the request therefor. The time limits prescribed above are subject to rule 7 (d). For good cause shown, request for a bill of particulars also may be filed after answer is made and within a reasonable time prior to hearing.

Section 5 (a) of the APA requires us to give sufficient notice of the issues with which a party is to be confronted as well as to grant sufficient time to consider the issues and to prepare a defense. The purpose of section 5 (a) has been ably described by Tom C. Clark, Attorney General of the United States at the time of passage of the APA, in a letter to the Chairman, Senate Judiciary Committee, in the following manner: ⁴

Section 5 (a) is intended to state minimum requirements for the giving of notice to persons who under existing law are entitled to notice of an agency hearing in a statutory adjudication. While in most types of proceedings all of the information required to be given in clauses (1), (2), and (3) may be included in the "notice of hearing" or other moving paper, in many instances *the agency or other moving party may not be in position to set forth all of such information in the moving paper, or perhaps not even in advance of the hearing, especially the "matters of fact and law asserted."* * * * [Emphasis supplied.]

The minimum requirements stated in section 5 (a) do not necessarily contemplate issuance of bills of particulars on demand of a respondent to an agency pleading. The APA is an attempt to bring into practice those principles of due process that have been enforced in the courts.⁵ The granting of bills of particulars, however, has been

⁴ Senate Report No. 752, 79th Cong., 1st Sess., Appendix B with appendix.

⁵ See statement of Congressman Gwynne of Iowa in the House of Representatives on May 24, 1946, 92 Cong. Rec. 5656.

held by the courts to be discretionary in both judicial⁶ and quasi-judicial proceedings.⁷

Pleadings instituting agency actions do not require the particularity of an indictment or an information. All that is requisite in a valid agency proceeding is that there be a statement of the things claimed to constitute the offense charged in order that respondent may put on his defense.⁸ That this requisite does not contemplate the specificity of a bill of particulars is clear from the analysis of the Attorney General, *supra*, when he states that the agency may not always be in position to particularly allege the matters of fact and law involved.⁹

Since the standards of section 5 (a) of the APA are minimum standards, and in the absence of a command in the APA, the method of protecting a respondent in an agency proceeding from surprise as a result of ambiguous agency pleading is in the sound discretion of the agency. While, in the exercise of our discretion, we have authorized the filing of requests for bills of particulars in proceedings commenced by *complaint*, we have not authorized such requests in Board-initiated proceedings.¹⁰

The absence of a rule for a bill of particulars does not, of course, permit this agency, by ambiguous pleading, to limit a respondent's opportunity to frame a reply or to prepare his case. In such a case, respondent may resolve his uncertainties as to matters alleged by informal request, in prehearing conference,¹¹ by motion to terminate the proceeding,¹² or by other motion. A right of this nature is clearly distinguishable from the right to a bill of particulars. The right extends only to clarification of ambiguity or vagueness as to material

⁶ *Muench v. United States*, 96 F. 2d 332 (8th Cir. 1938); *McKenna v. United States Lines*, 26 F. Supp. 558 (S. D. N. Y. 1939).

⁷ *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. 2d 862 (2d Cir. 1938).

⁸ *National Labor Relations Board v. Piqua Munising W. Prod. Co.*, 109 F. 2d 552 (6th Cir. 1940). See also Administrative Law, Davis, 1951, section 80, pp. 278, 279:

"The most important characteristic of pleadings in the administrative process is their unimportance. And experience shows that unimportance of pleadings is a virtue. In the judicial system the long-term movement has been from the common-law system of pleading to formulate issues, to the early code ideal of stating all material facts, to the view now prevailing in the federal courts that fair notice is the objective. 'The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved.'" (Footnotes omitted in quote.)

⁹ See footnote 4.

¹⁰ "Complaints" are distinguished from other methods of initiating proceedings in Rule 5 (a) of our Rules of Practice and Procedure.

¹¹ Rule 6 (d) of our Rules of Practice and Procedure provides for consideration of simplification of issues and the necessity or desirability of amendment to the pleadings, among other matters.

¹² Rule 5 (o), Rules of Practice and Procedure.

issues and does not, as does a bill of particulars,¹³ extend to amplification of ultimate facts in pleadings.

While Rule 12 (c) of the Federal Rules of Civil Procedure formerly contained a provision authorizing motions for bills of particulars, by amendment effective March 19, 1948, the provision was eliminated. The present Rule 12 (c) provides only for a motion for more definite statement. The distinction between the two provisions, under the rules, was this: a bill of particulars serves the function of enabling a party to prepare for trial as well as to prepare responsive pleadings; a motion for more definite statement serves only the latter function.¹⁴ It has been said that the presence of the former and eliminated provision "sometimes placed a premium upon strategic maneuvering of counsel rather than upon the merits of the issues involved."¹⁵

Strategic maneuvering is even more unseemly in agency proceedings, which involve investigative as well as judicial functions.¹⁶ The duty to investigate violations of regulatory statutes and other matters affected with a public interest makes it imperative that agency-instituted actions be not hampered by overly refined pleading techniques or mired in pleading contests. Section 5 (a) of the APA does not require notice provisions of this nature.

Even if we were to assume the conference's demand to be in nature as well as in name¹⁷ a demand for bill of particulars, and even assuming that our rules, issued under section 5 (a) of the APA, provided for such relief, we think it clear beyond question that this is not a proper case for the relief requested. The movant has a burden of showing that it is entitled to a bill of particulars and that the demand is made in good faith and not for the purpose of delay.¹⁸ The burden has not been met here in any of these respects. Our order to show cause is in all respects clear and unambiguous and requires no clarification of any kind.

¹³ *Jessup & Moore Paper Co. v. West Virginia Pulp & P. Co.*, 25 F. Supp. 598 (D. Del. 1938); *Massachusetts Bonding & Ins. Co. v. Harrisburg T. Co.*, 27 F. Supp. 987 (M. D. Pa. 1939).

¹⁴ *Citrin v. Greater New York Industries*, 79 F. Supp. 692, 696 (S. D. N. Y. 1948): "The definitiveness required of allegations [in motions for more definite statement] is only such as will be sufficient to enable defendant to prepare his answer."; *Moore's Federal Practice*, 12.17 [1] p. 2281; 16 Cal. State Bar Journal 156.

¹⁵ *Moore's Federal Practice*, 12.17 [1] p. 2280.

¹⁶ *Federal Comm'n v. Broadcasting Co.*, 309 U. S. 134 (1940); *Isbrandtsen Co. v. United States*, 96 F. Supp. 883 (S. D. N. Y. 1951).

¹⁷ Since the conference has pleaded inability "to frame a responsive answer," its request would, under the Federal Rules prior to amendment, have constituted a motion for more definite statement rather than a motion for bill of particulars.

¹⁸ *Brinley v. Lewis*, 27 F. Supp. 313 (M. D. Pa. 1939). The same standards apply to any request for clarification or similar remedy available before this agency.

Examination of the demand and the order in question leads us to the inescapable conclusion that most of the particulars demanded relate to matters wholly and peculiarly within the knowledge of the conference, its members, officials, or employees. The conference has indicated no uncertainty over the issue; it has merely indicated a desire that the agency confirm details of the subject matter which are well known to the conference. The information, if received, would serve no useful purpose to the conference; the conference is presently well able to frame a reply to our order and is well apprised of the issues which it must defend. Such matters as the specific terms of the agreement (paragraph 1 of the demand), the names of the carriers parties to the agreement (paragraph 2), the dates of effectuation of the agreement (paragraph 3), the status of Mitsui's attempt to withdraw from pending litigation¹⁹ (paragraph 4), and the name of the carrier injured (paragraph 16) by discrimination (paragraph 11) or unfair treatment (paragraph 13) are all matters fully within the knowledge of the conference and are, as well, matters clearly set forth, where material, in our order to show cause.

Matters referred to in paragraphs 6, 8, 10, 11, 12, 13, 14, and 15 are unmistakably put in issue by our order. Paragraph 5 requests substantially the same information requested in paragraph 6. The order plainly indicates that the condition to conference membership may be beyond the scope of the conference agreement, and as plainly indicates that the condition may be in violation of section 15 of the Act for that reason. It is equally clear that the portion of the commerce of the United States which may suffer detriment is that served by the conference, and that the unfairness and discrimination between carriers as well as the detriment to the United States results from the imposition of the condition to conference membership. While these matters are set out expressly or by necessary implication in our order, we do not consider that full amplification thereof is necessary to proper notice.

Paragraph 9 requests a statement as to whether the word "or" in the phrase "unjustly discriminatory and unfair as between carriers or detrimental to the commerce of the United States" is conjunctive or disjunctive. In view of correspondence between the parties previously set out in the order in which we stated, and the conference denied, both possibilities, the request serves no apparent purpose.

Paragraph 7 is incomprehensible. Most astonishing, however, is the conference's demand for specification of the particular portion or

¹⁹ We replied to Mitsui's letter stating that it withdrew from the aforementioned litigation by advising Mitsui that its attempt to withdraw was not in compliance with our Rules. Copy of our reply was furnished the conference.

portions of section 15 of the Act alleged to be violated. The conference is lawfully organized and existing solely by virtue of section 15 and Board approval, under that section, of the basic conference agreement. It is only reasonable to assume that the conference knew, since it is charged with such knowledge, that section 15 may only be violated by effectuation of an unapproved or disapproved agreement between carriers.²⁰ We cannot believe that the conference is truly in doubt in this respect.

We conclude that the demand for a bill of particulars is not authorized, is not justified even if authorized, and has done nothing more than delay compliance with the Board's order served on April 13, 1956.²¹ The delay is particularly unseemly here. While conference suspension of the condition has tolled the civil penalties of \$1,000 per day per carrier, which may be collected by the United States in a civil action should this agreement be found to be unapproved under section 15 of the Act, the uncertainty over the status of Mitsui as a conference member and over the legality of the condition needs quickly to be resolved in the interests of shippers in this trade and the trade itself.

The demand is denied. We will require the conference to file with us its reply to the show-cause order before 5:00 p. m. e. d. s. t., May 24, 1956.

²⁰ Section 15, Shipping Act, 1916; *City of Portland v. Pacific Westbound Conference*, 4 F. M. B. 664.

²¹ By motion dated April 25, 1956, counsel for the conference requested postponement of oral argument in Docket Nos. 764 and 773 until the termination of this proceeding. By this demand for a bill of particulars, the conference would delay this proceeding as well.

APPENDIX

REGULAR MEMBERS, PACIFIC COAST EUROPEAN CONFERENCE

- Anglo Canadian Shipping Co., Ltd.
Blue Star Line, Ltd.
Canadian Transport Co., Ltd.
Compagnie Generale Transatlantique (French Line).
The East Asiatic Company, Ltd. (A/S Det Østasiatiske Kompagni).
Fruit Express Line A/S.
Furness, Withy & Co., Ltd. (Furness Line).
Hamburg-Amerika Linie (Hamburg American Line).
"Italia" Societa Per Azioni di Navigazione (Italian Line).
Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth, Skibsaktieselskapet Ogeka (Knutsen Line—Joint Service).
Nippon Yusen Kaisha.
Norddeutscher Lloyd (North German Lloyd).
N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij (Holland-America Line).
Osaka Shosen Kaisha, Ltd.
Fred Olsen & Co. (Fred Olsen Line).
Rederiaktiebolaget Nordstjernen (Johnson Line).
Royal Mail Line, Ltd.
Seaboard Shipping Company, Ltd.
States Marine Corporation, States Marine Corporation of Delaware (States Marine Lines—Joint Service).
Westfal-Larsen & Company A/S (Interocean Line).
Western Canada Steamship Company, Limited.
Hanseatische Reederei Emil Offen & Co./Vaasan Laiva Oy (Hanseatic-Vaasa-Line).
Willy Bruns G. m. b. H. Reederei (German Fruit Line).
Mitsui Steamship Co., Ltd.

ASSOCIATE MEMBER, PACIFIC COAST EUROPEAN CONFERENCE

American President Lines, Ltd.

FEDERAL MARITIME BOARD

No. S-58

ARNOLD BERNSTEIN LINE, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 8, SERVICE NO. 1 (NEW YORK/ANTWERP-ROTTERDAM)

Submitted May 25, 1956. Decided June 8, 1956

Under section 605 (c) of the Merchant Marine Act, 1936, as amended:
1. Arnold Bernstein Line, Inc., is not an existing operator on Trade Route No. 8, Service No. 1, and its proposed service would be in addition to the existing service or services.

2. United States-flag service on Trade Route No. 8, Service No. 1, is inadequate, and in the accomplishment of the purposes and policy of the Act additional vessels are required to be operated thereon.

Section 605 (c) of the Act is not a bar to an award of an operating-differential subsidy to Arnold Bernstein Line, Inc., on Trade Route No. 8, Service No. 1.

Joseph A. Klausner and Roger S. Kuhn for applicant.

Robert E. Kline, Jr., and David P. Dawson for United States Lines Co., intervener.

Leroy F. Fuller as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

Exceptions have been filed by United States Lines Company ("U. S. Lines") to the recommended decision of the examiner and oral argument thereon has been heard. The following is the recommended decision of the examiner, with which we agree:

"This is a proceeding in which the Board is asked to make findings required under section 605 (c) of the Merchant Marine Act, 1936, as amended, in connection with the application of Arnold Bernstein Line, Inc., for financial aid in the operation of vessels in the foreign

trade of the United States. The applicant proposes to operate vessels in combined passenger and cargo service on Trade Route 8, Service No. 1, between New York and Antwerp/Rotterdam making 20 voyages per annum with the first vessel, a Mariner-type converted to passenger capacity of approximately 900 passengers, with the contemplation of adding sufficient ships to make weekly sailings.

“Pursuant to the Board’s notice of hearing, leave to intervene was granted to United States Lines Co. (U. S. Lines). Hearing was duly held in New York commencing December 15, 1955, and continuing for 2 days.

“Section 605 (c) inhibits the Board from granting a subsidy contract under Title VI ‘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.’ The second clause of section 605 (c) is inapplicable to the present proceeding since that clause ‘applies only where the applicant is an existing line furnishing services on the trade route with respect to which it asks Government aid.’ *Arnold Bernstein Line, Inc.—Subsidy, Route 8*. 3 U. S. M. C. 362, 363.

“This proceeding is one in which a new service is proposed by a line not yet in operation, and which would therefore be in addition to the existing service within the meaning of the first clause of section 605 (c).

“THE ISSUES

“The issues are (1) whether the service already provided by vessels of United States registry on Trade Route 8, Service No. 1, is inadequate, and (2) whether in the accomplishment of the purposes and policy of the Act additional vessels should be operated on such route.

“FINDINGS OF FACT

“*Existing Passenger Service*

“1. The Holland-America Line, a Netherlands corporation, provides the only regular passenger service on Trade Route 8. Its passenger carryings for the period 1951-54 were as follows:

"TABLE I

	Inbound	Outbound	Total
1951.....	16,085	11,956	28,041
1952.....	23,337	18,534	41,871
1953.....	25,735	19,107	44,842
1954.....	23,844	17,851	41,695

¹ Reduction is due, in substantial part, to the *Veendam* leaving the service, indicating that number of accommodations influences passenger traffic. This vessel carried approximately 5,000 passengers in the previous year on this trade route.

"2. American- and foreign-flag freight vessels for the years 1951, 1953, and 1954 (1952 figures not available) carried passengers as follows:

"TABLE II

	U. S.	Foreign	Total	Percent U. S.
Inbound:				
1951.....	289	667	956	30.2
1953.....	234	671	905	25.9
1954.....	172	673	845	20.4
Outbound:				
1951.....	89	420	509	17.5
1953.....	65	777	842	7.7
1954.....	104	811	915	11.4

"3. The passenger statistics of record on Trade Route 8 go back to 1925. The [Board] made section 605 (c) determinations concerning this Trade Route in 1949. *Arnold Bernstein Line, Inc.—Subsidy, Route 8, supra*. It is unnecessary to make an analysis here of such prior statistics.

"4. The trend in travel on Trade Route 8 during the past few years has been sharply upward, and it should continue to rise.

"Existing Cargo Service

"5. All cargo carried by combination passenger and freight vessels on Trade Route 8 for the period 1951-54 was carried by foreign-flag lines. United States-flag participation in cargo (tons of 2,240 pounds) carried on this Trade Route for the same period (including foreign for comparison) was as follows:

"TABLE III

	U. S.	Foreign	Total	Percent U. S.
Inbound:				
1951.....	176,453	912,332	1,088,785	16.2
1952.....	89,844	562,189	652,033	13.7
1953.....	139,356	763,827	903,183	15.4
1954.....	93,348	479,394	572,742	16.3
Outbound:				
1951.....	513,992	709,117	1,223,109	42.0
1952.....	327,056	702,180	1,029,236	31.8
1953.....	227,036	1,169,074	1,396,110	16.3
1954.....	233,302	1,278,229	1,511,531	15.4

“POSITION OF PARTIES

“The positions of counsel for applicant and of Public Counsel on the limited issues are embraced herein.

“Counsel for U. S. Lines, intervener, contend and propose as conclusions that under section 605 (c) no subsidy contract may be made with respect to the applicant’s proposed vessels because—

“1. Applicant’s proposed service is not an essential service.

“2. The existing service is adequate.

“3. Applicant has not established that in the accomplishment of the purposes and policy of the Act its proposed vessels should be operated on the proposed service.

“4. The effect of the proposed subsidy contract would be unduly prejudicial between citizens in the operation of vessels in competitive routes or services.

“DISCUSSION AND CONCLUSIONS

“As to U. S. Lines’ contention that applicant’s proposed service is not an essential service, U. S. Lines’ counsel sought to go into the question of whether Trade Route 8, Service No. 1, is essential under section 211 of the Act. This was not permitted because this proceeding is under section 605 (c) only, and the [Board] has previously determined the route and service to be essential. *Arnold Bernstein S. S. Corp.—Subsidy, Routes 7, 8, 11, 3 U. S. M. C. 351, 352; Arnold Bernstein Line, Inc.—Subsidy, Route 8, supra.*

“As to the contention of counsel for U. S. Lines that the existing service is adequate, they state that whether it is adequate must be measured in terms of essential trade route standards, and that since there cannot be any determination on the present record that the proposed or any other service on Trade Route 8, Service No. 1, is essential, it follows that there can be no determination that the existing service, measured in terms of the proposed service or any other service, is inadequate.

“The question of essentiality of the Trade Route is settled as shown above. As to adequacy of the existing service, it is not claimed by U. S. Lines that American-flag service on trade routes other than Trade Route 8 supplies adequate American-flag service on Trade Route 8. There is no American-flag ‘combination passenger and freight vessel’ service on Trade Route 8, and participation by United States-flag freighters in both passenger and cargo carryings is small (findings of fact 1, 2, and 5). Upon findings of fact 1 through 5 it is concluded and found that the service provided by vessels of

United States registry on Trade Route 8, Service No. 1, both as to passengers and cargo, is inadequate.

"As to the contention of U. S. Lines that applicant has not established that in the accomplishment of the purposes and policy of the Act its proposed vessels should be operated on the proposed service, counsel for U. S. Lines state that there can be no such determination unless the proceeding is reopened and U. S. Lines is given a full hearing on the basis of the data it requested concerning essentiality of the trade route and as to whether the proposed service would be a practical operation within the purposes and policy of the Act. The question of essentiality has already been discussed. Data under this and other questions sought by counsel for U. S. Lines, but not permitted or required to be furnished, falls under sections of the Act other than 605 (c) and is not required to be considered here. As already found and concluded, the existing service is inadequate with respect to both passenger and cargo services. 'This defect cannot be remedied unless suitable vessels are introduced into the trade.' *Arnold Bernstein Line, Inc.—Subsidy, Route 8, supra.* In *Bloomfield S. S. Co.—Subsidy, Routes 13 (1) and 21 (5)*, 4 F. M. B. 305, 324, the Board stated that—

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

"The Board applied this same principle in *American President Lines, Ltd.—Ports North of Cape Hatteras in the Round-the-World Service*, Docket No. S-51, decided November 21, 1955, not yet reported. Accordingly, it is concluded and found that in the accomplishment of the purposes and policy of the Act additional vessels should be operated on Trade Route 8, Service No. 1.

"It follows that section 605 (c) of the Act does not interpose a bar to grant of the application.

"As to the contention of counsel for U. S. Lines that the effect of the proposed subsidy would be unduly prejudicial between citizens in the operation of vessels in competitive routes or services, this question falls under the second clause of section 605 (c) earlier found herein to be inapplicable to the present proceeding.

"ULTIMATE CONCLUSIONS

"Upon consideration of all the foregoing facts it is concluded and found, and the Board should so conclude and find, under section 605 (c) of the Act:

"1. That Arnold Bernstein Line, Inc., is not an existing operator on Trade Route, Service No. 1, and its proposed service would be in addition to the existing service or services.

"2 That United States-flag service on Trade Route 8, Service No. 1, is inadequate, and in the accomplishment of the purposes and policy of the Act additional vessels are required to be operated thereon.

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

On analysis it is apparent that U. S. Lines places principal reliance in its exceptions on the contentions that Trade Route No. 8, Service No. 1, is not an essential service within the meaning of section 211 of the Act, that the examiner erred in refusing to reevaluate a prior determination of essentiality under section 211, that he refused to admit in evidence the data relied on in the section-211 determination, and that he ruled that he had no jurisdiction over the question of the essentiality of the proposed service.

In our report of this date in *States Marine Corp.—Subsidy, Tri-Continent Service*, 5 F. M. B. 60, we decided substantially similar issues in a manner counter to the arguments advanced here by U. S. Lines, determining (1) that jurisdiction to make or modify section 211 trade route findings has been vested exclusively in the Maritime Administrator, and (2) that section 211 trade route findings define, as a matter of transportation policy, the trade routes on which subsidy is to be granted, are binding upon the Board, and are not subject to review in a section 605 (c) proceeding before the Board. Having so determined, we held that neither a section-211 determination nor the data on which it is based is admissible in evidence in a section 605 (c) proceeding.

In January 1955 the Maritime Administrator published in the *Federal Register* tentative findings in reaffirmance of the essentiality of Trade Route No. 8, among other trade routes, and in the exercise of discretion extended to interested persons an opportunity to be heard. U. S. Lines did not avail itself of that opportunity, although it was to the Maritime Administrator rather than to the Board that the present arguments of U. S. Lines should have been addressed.

Other arguments of U. S. Lines are addressed to specific facts as found by the examiner. These exceptions provide no basis, however, for modifying the examiner's decision. Accordingly, we hereby adopt the examiner's findings of fact and make them our own. We likewise adopt the examiner's conclusions, as follows:

1. Arnold Bernstein Line, Inc., is not an existing operator on Trade Route No. 8, Service No. 1, and its proposed service would be in addition to the existing service or services.
2. United States-flag service on Trade Route No. 8, Service No. 1, is inadequate, and in the accomplishment of the purposes and policy of the Act additional vessels are required to be operated thereon.
3. Section 605 (c) of the Act is not a bar to granting the application.

5 F. M. B.

FEDERAL MARITIME BOARD

No. 744

TERMINAL RATE STRUCTURE—PACIFIC NORTHWEST PORTS

*Submitted April 30, 1956. Decided June 8, 1956**

Modification of Freas Formula for use at Pacific Northwest Ports is required, such modification to reflect a proper service charge consistent with this report and to establish a separate handling charge to be assessed against that party receiving the benefit thereof under the ocean contract of carriage. Approval of the Freas Formula will be given as not in violation of section 17 of the Shipping Act, 1916, upon resubmission of the formula suitably modified.

Robert W. Graham, Thomas J. White, and John Prince for Northwest Marine Terminal Association and members thereof, *James E. Lyons* and *Charles W. Burkett, Jr.*, for Southern Pacific Company, *Alan B. Aldwell* for Luckenbach Steamship Company, Inc., *Albert E. Stephan* for American Mail Line Ltd., and *H. B. Pennewell* for Matson Terminals, Inc., respondents.

Leonard G. James, Alexander D. Calhoun, Jr., Joseph J. Geary, Allan E. Charles, Edward Ransom, Alan B. Aldwell, Harry S. Brown, and *Thomas J. Callahan* for interveners.

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

REPORT OF THE BOARD

BY THE BOARD:

Oral argument has been heard on exceptions filed to each of the conclusions of the examiner in his recommended decision, appended hereto and hereby incorporated in and made a part of this report, except insofar as inconsistent herewith.

FIRST CONCLUSION

The Board should approve the Freas Formula as a proper method of segregating terminal costs and carrying charges, and apportioning such costs and charges to the various wharfinger services at Pacific Northwest ports

*Amended August 13, 1957.

Public Counsel, various offshore steamship conferences ("the conferences"), and Pacific American Steamship Association ("PASSA") have each excepted to the first conclusion although on somewhat dissimilar grounds.

Public Counsel asserts that the examiner erred in recommending, without apparent qualification, that we approve the Freas Formula as a proper method of segregating terminal costs and carrying charges, pointing out that the examiner himself has recognized that charges against the vessel for use of working areas in connection with the terminal's handling operation are properly assignable to the handling rather than to the dockage charge.

Witness Linnekin clearly indicated his views that some changes in the Freas Formula would be logical in the allocation of costs in this respect, and, in its reply to exceptions, the Northwest Marine Terminal Association ("the Association") agreed that such change was necessary. It is the view of the Association that, in view of the examiner's express discussion and ruling on this point, the recommended change is implicitly included in the examiner's first conclusion. We agree; we need only add that such a change is also necessary to insure assessment of all costs relating to handling against the person for whom handling has been performed.

It is PASSA's view that, even assuming that the handling adjustment should be made, the resultant decrease in the Northwest dockage charge will create a disparity between Northwest and California dockage charges which should preclude application of the Freas Formula in the Northwest. We do not share this view since, first, the level of terminal rates is not at issue in this proceeding, and second, it is obviously the total of terminal charges against a shipper or carrier rather than the level of a single charge which affects competition between the two areas.

The conferences have a more fundamental exception to the first conclusion. They argue that this Board has no jurisdiction to approve or disapprove a system of cost allocation such as the Freas Formula since such approval is necessarily a preliminary step in rate fixing, a function not vested in the Board.

Without deciding the extent of our authority over rates of terminal operators,¹ we cannot sustain the contention of the conferences. This proceeding, patently, has not been initiated for the purpose of fixing rates. Its purpose is to ensure that the regulations and practices of the terminal operators of the Association, as other persons subject to the Shipping Act, 1916 ("the Act"), conform to a standard of justice

¹ See *California v. United States*, 320 U. S. 577 (1944).

and reasonableness as required in section 17 thereof. We believe it captious to assert that a system of cost accounting which may result in assessment of charges against persons not directly benefited by services rendered may not be an unjust and unreasonable practice within the meaning of section 17, or may not be subject to our jurisdiction.

SECOND CONCLUSION

The Board should require those California and Pacific Northwest terminal operators which make a service charge to adopt a uniform definition and/or description of such charge consistent with that recommended by witness Linnekin herein

Exceptions to this conclusion have been filed by Public Counsel, the conferences, and PASSA.

Public Counsel, while not in apparent dispute as to the desirability of adopting a uniform definition as between California and Northwest ports, disputes the validity of the definition as actually recommended. He points to the examiner's finding, at page 17, that a practice of charging for unperformed checking is unreasonable, as standing in diametric opposition to the examiner's approval of a charge for unperformed checking if included with other items in a service charge. Since checking is the most expensive service included under the service charge, Public Counsel urges that a separate charge for checking be established in order that it be not assessed where checking is not performed.

PASSA objects to this conclusion on three grounds: (1) the conclusion purports to affect California terminals which are not parties to the proceedings; (2) it is unreasonable to permit a terminal, through a service charge, to realize revenues properly allocable to other operations; and (3) under the examiner's view a service charge could be assessed even if none of the services should be performed, an obvious injustice. The principal objection of the conferences is that the notice of proceeding in this matter did not alert interested persons to the possibility that such a finding might be made.

In view of the high proportion of nonchecked cargo which moves through Pacific Northwest public terminals, we agree with Public Counsel that the examiner has not recommended a proper service charge. Since checking may or may not be performed, reasonableness and justice requires that the checking charge be assessed only when earned and only against the party for whom the service was performed. We agree also with PASSA that no order entered in this proceeding may bind terminals which have not been made parties hereto. We

cannot find, however, that the conferences have had inadequate notice that recommendations would be made concerning the service charge; it is amply evident that such matters were contemplated in the notice of hearing and were recognized as being in issue in the conferences' petition to intervene herein. We also agree with PASSA that the terminals may not recover, through a service charge, deficiencies in revenue attributable to a totally different operation. Since some of the component elements of the service charge may fall on either party to the contract of affreightment, dependent on its terms, it is manifestly unjust to recover a deficiency in dockage, always a charge against the vessel, through a charge which may, under tackle-to-tackle rates, fall on the shipper.

As indicated in *Intercoastal S. S. Frt. Ass'n v. N. W. M. T. Ass'n*, 4 F. M. B. 387 (1953) ("Docket 720"), and in *Terminal Rate Increases—Puget Sound Ports*, 3 U. S. M. C. 21 (1948), "providing terminal facilities" is too broad a term and should be eliminated from the service charge definition. Similarly, "arranging berth for vessel" is an administrative expense connected with dockage and should be eliminated from the service charge.

Another exception of PASSA reaches a fundamental assumption in this proceeding and in our report in *Terminal Rate Structure—California Ports*, 3 U. S. M. C. 57 (1948), an assumption which may be misunderstood by some of the parties hereto. In that proceeding the Maritime Commission stated at page 61: "As a general principle expenditures were assigned to the activities in whose furtherance they have been incurred." In this regard, the Freas report itself provides, at page 9:

Division of responsibility as between shipper and carrier is of little consequence in a study of this nature. The concern is with the responsibility of each to the wharfinger. The study proceeds on the assumption that the vessel is responsible to the wharfinger for all usages and services from, but not including, the point of rest on outbound traffic and to, but not including, the point of rest on inbound traffic. All other wharfinger costs are assessed against the cargo. [Emphasis supplied.]

The foregoing language is, as asserted in brief by Public Counsel, an express recognition by its draftsman that the function of the Freas Formula is not to delineate or abridge the right of ship and cargo to enter lawful contracts relating to the carriage of goods. The division of responsibility is assumed only, and, where the assumption is rendered inapplicable by express contract between shipper and carrier, as in a tackle-to-tackle contract of affreightment, the terminal's charges must be adjusted to fall on that party for whom, under the contract of affreightment, they have been incurred. Recognition that

the point of rest does not necessarily delineate responsibility between carrier and shipper or consignee is not tantamount to a denial of compensation to the terminal for services performed as encompassed in the service charge. Where such services are performed, the terminal is entitled and obliged to recover compensation therefor, *from the person for whom the services have been performed.*

THIRD CONCLUSION

The Board should find that respondents operating publicly owned terminals are entitled to a fair return on investment

Exceptions to the third conclusion have been filed by the conferences. It is again their position that such a conclusion is necessarily dependent on rate-fixing authority. While we would agree that a conclusion that public terminals are entitled to a fair return on investment is, although requested, unnecessary here, our power to make such a finding is inherent in our authority, under section 17 of the Act, to find regulations and practices of terminal operators subject to our jurisdiction to be unjust and unreasonable. It appears to us to be indisputable that a terminal practice of cost allocation whereunder no allowance is made for terminal equipment maintenance, depreciation, and replacement, and which thereby threatens future steamship operations and port efficiency, is *prima facie* unreasonable and a matter for our attention.

FOURTH CONCLUSION

The Board should reverse the findings and conclusions in Docket 720

Exceptions to the fourth conclusion have been filed by Intercoastal Steamship Freight Association ("Intercoastal"), Public Counsel, PASSA, and the conferences. In this conclusion the examiner has resolved the single issue most important to the parties hereto. In arriving at this conclusion the examiner reasoned that the determination in Docket 720 was based upon a limited record, that the present proceeding has revealed a general deficiency in revenue, and that accordingly there is no basis upon which reparation could be paid.

Intercoastal points out (1) the Board in Docket 720 specifically denied an Association petition for reconsideration of its report and order and for a stay of action, and (2) that no notice has been given in this proceeding that a reversal of Docket 720 was possible as an outcome of the proceeding. Public Counsel succinctly states that the examiner's reasoning appears to require a conclusion that only a venture which was profitable could be illegal, reasoning with which he

totally disagrees. PASSA supports the views of Intercoastal, as do the conferences, in principle.

We reject the examiner's fourth conclusion as unwarranted. First, we see no reason for doing collaterally that which we have declined to do when in issue. Second, the premises upon which the conclusion was based are faulty; we see no necessary relationship between profit and illegality. Third, and most important, assuming that we could in this proceeding properly set aside the report and order in Docket 720, we have been presented with no valid reason for doing so. The principal portion of the report in Docket 720 was premised on the theory that a terminal may not assess charges for checking not performed for the carrier. Implicit also in the report, in relation to other component elements of the service charge, is a similar but more fundamental principle, namely, that under tackle-to-tackle rates a carrier's duty to receive cargo does not arise until delivery to a point within reach of ship's tackle, whether the actual delivery to that point is performed, in whole or in part, by the terminal or by the shipper himself.² No evidence was adduced or argument advanced which would require us to depart from that principle. We did not determine in Docket 720, however, that terminals may not recover from the person for whom performed the cost of performance of those services which were rejected as charges against carriers.

FIFTH CONCLUSION

The Board should complete the record and dispose of the issues remaining to be decided in the California case

We agree with PASSA that the fifth conclusion of the examiner is erroneous; we cannot in this proceeding "dispose of the issues remaining to be decided in the California case" since, as stated, the California terminals are not party to this proceeding.

² In our memorandum in opposition to a petition for an interlocutory injunction against and judicial review of our order in Docket 720, filed with the United States Court of Appeals for the 9th Circuit in *Northwest Terminals Ass'n. et al. v. Federal Maritime Board and United States of America* (decided January 17, 1955), we interpreted Docket 720 in the following manner:

"* * * the Board held that in the carriage of lumber under tackle-to-tackle rates the carrier did not assume the duty to provide these services (related to the checking, receiving and handling of cargo), and that such services were instead performed for the convenience of the shipper."

While the court did not pass on the merits of our report and order in Docket 720, finding that the Association's petition had not been filed timely, the foregoing view is consistent with the prior pronouncement of the Maritime Commission in *Transportation of Lumber Through Panama Canal*, 2 U. S. M. C. 143, 148 (1939).

SIXTH CONCLUSION

The Board should give consideration to instituting a nation-wide rule-making proceeding under section 4 of the Administrative Procedure Act and the Shipping Act, 1916, to make as uniform as possible the allocation of terminal charges between ship and cargo, and as uniform as possible the definition of tariff services offered by all persons carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water throughout the United States, its Territories and possessions

We reserve decision on the sixth conclusion until completion of an informal investigation of terminal practices currently being conducted.

Luckenbach Steamship Company, which operates terminals only in connection with its own steamship operations, will be dismissed from this proceeding; since Matson Terminals, Inc., previously has been dismissed from the proceeding, no order may be entered against that company at this time.

From the foregoing we conclude :

1. The Freas Formula, if modified to reflect the views expressed herein in regard to separation of the handling charge from the dockage charge, and if modified by definition of a service charge, the incidence of which will fall on those persons for whom services have been performed, will be approved as not unreasonable or unjust within the meaning of section 17 of the Act.

2. Under tackle-to-tackle rates, terminals may not assess charges against carriers for services performed or facility usage incurred prior to delivery within reach of ship's tackle or subsequent to delivery at the end of ship's tackle.

3. A uniform service charge to be applied to California terminals not party to this proceeding may not be prescribed here.

4. We may not on this case reverse the findings and conclusions in Docket 720 or dispose of issues remaining to be decided in the California case.

5. We will not at this time act on the examiner's recommendation that a nation-wide rate-making proceeding be instituted.

The proceeding is dismissed without prejudice to subsequent reopening for approval of a modification of the Freas Formula consistent with this report, if submitted by the terminals.

An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 8th day of June A. D. 1956

No. 744

TERMINAL RATE STRUCTURE—PACIFIC NORTHWEST PORTS

This case 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 June 8, 1956, having made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That this proceeding be dismissed without prejudice to a subsequent reopening of the proceeding for approval of a modification of the Freas Formula consistent with this report, if submitted by the terminals.

By the Board.

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

APPENDIX
FEDERAL MARITIME BOARD

No. 744

TERMINAL RATE STRUCTURE—PACIFIC NORTHWEST PORTS

Freas Formula approved as a proper method of segregating terminal costs and carrying charges, and apportioning such costs and charges to the various wharfinger services at Pacific northwest ports.

Uniform definition of service charge recommended.

Publicly owned terminals found entitled to a fair return on investment.

Reversal of Board decision in *Intercoastal S. S. Frt. Ass'n v. N. W. M. T. Ass'n*, 4 F. M. B. 387, recommended.

Completion of record and disposition of undecided issues in *Terminal Rate Structure—California Ports*, 3 U. S. M. C. 57, recommended.

Nation-wide rule making proceeding to determine uniformity of allocation of terminal charges between ship and cargo and tariff definitions recommended.

Robert W. Graham, Thomas J. White and John Prince for Northwest Marine Terminal Association and members thereof; *James E. Lyons and Charles W. Burkett, Jr.*, for Southern Pacific Company; *Alan B. Aldwell* for Luckenbach Steamship Company, Inc.; *Albert E. Stephan* for American Mail Line Ltd., and *H. B. Penewell* for Matson Terminals, Inc., respondents.

Leonard G. James, Alexander D. Calhoun, Jr., Joseph J. Geary, Allan E. Charles, Edward Ransom, Alan B. Aldwell, Harry S. Brown and *Thomas J. Callahan* for interveners.

John Mason and Allen C. Dawson as Public Counsel.

RECOMMENDED DECISION OF ROBERT FURNESS, EXAMINER

The Northwest Marine Terminal Association, hereinafter called the Association, is a voluntary association of persons carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with common carriers by water in the States of Washington and Oregon, and are subject to the provisions of the Shipping Act, 1916, as amended, hereinafter called the Act.

The members of the Association¹ are parties to Agreement No. 6785, approved by the Maritime Commission, hereinafter called the Commission, pursuant to section 15 of the Act. The Association was formed for the following purposes: (1) to promote fair and honorable business practices among those engaged in the marine terminal industry; (2) to more adequately serve the interests of the public at Northwest ports, i. e., ports in the States of Washington and Oregon; (3) to establish and maintain just and reasonable, and, so far as practicable, uniform terminal rates, charges, classifications, rules, regulations and practices at Northwest ports in connection with waterborne traffic; and (4) to cooperate with the marine terminal operators of other districts, either individually or through their associations, to the end that the purposes set forth above may be achieved by such other terminal operators. Members of the Association, as well as other terminals in the Northwest are in competition with California terminal operators for business originating in or destined to the interior, and the Northwest operators compete with each other.

By petition filed November 23, 1953, the Association and its members asked the Board to enter upon a proceeding of inquiry similar to that conducted by the Commission in *Terminal Rate Structure—California Ports*, 3 U. S. M. C. 57 (1948), hereinafter called the *California* case, wherein the Commission employed Mr. Howard G. Freas, then Rate Expert of California Public Utilities Commission and presently a member of the Interstate Commerce Commission, to study wharfing functions (receiving, holding, and delivery of cargo), and to make a tentative cost formula, hereinafter called the Freas formula, segregating terminal costs and carrying charges and apportioning such costs and charges to the various wharfing services. Allocation of terminal charges between ship and cargo under the Freas formula was described in general by the Commission on page 59 as follows:

All expenditures were apportioned to vessel and cargo in proportion to the use made of the facilities provided and of the service rendered. The vessel was held responsible to the wharfing for all usages and services from, but not including, the point of rest on outbound traffic and to, but not including, the point of rest on inbound traffic. All other wharfing costs were assessed

¹ Alaska Terminal & Stevedoring Co., Seattle, Wash.; Albina Dock Co., Inc., Portland, Oreg.; Ames Terminal Co., Seattle; Arlington Dock, Inc., Seattle; Baker Dock Co., Tacoma, Wash.; Columbia Basin Terminals Co., Portland Commission of Public Docks of Portland, Oreg.; G & S Handling Co., Seattle; Ocean Terminals, Portland; Olympic Steamship Co., Inc., Seattle; Port of Astoria, Astoria, Oreg.; Port of Bellingham, Bellingham, Wash.; Port of Everett, Everett, Wash.; Port of Longview, Longview, Wash.; Port of Olympia, Olympia, Wash.; Port of Port Angeles, Port Angeles, Wash.; Port of Seattle; Port of Tacoma; Port of Vancouver, Vancouver, Wash.; Salmon Terminals, Inc., Seattle; Shaffer Terminals, Inc., Tacoma; Tait Tidewater Terminals, Seattle; Virginia Dock & Trading Co., Seattle; Williams, Dimond & Co., Portland.

against the cargo. The point of rest is the location at which the inbound cargo is deposited and outbound cargo is picked up by the steamship company.

The Commission approved the formula and found that respondents operating publicly owned terminals are entitled to a fair return on investment.

The petition herein was filed primarily because of the Board's decision in *Intercoastal S. S. Frt. Ass'n v. N. W. M. T. Ass'n*, 4 F. M. B. 387, hereinafter called the Intercoastal case, which found that the collection of a terminal "service charge" from the ship by Association members in connection with lumber moving in eastbound intercoastal commerce was an unjust and unreasonable regulation or practice in violation of section 17 of the Act. This decision "places petitioners in substantial doubt" as to the applicability of their service charge against the ship in connection with various other bulk commodities moving over their facilities and with respect to lumber shipped in other trades. In addition the petition brings into issue the practical use of the Freas formula in the Northwest and the competitive relationship between Northwest and California terminals. Petitioners state that they have built their rate structure upon the approved Freas formula and that the Board failed to apply it in the *Intercoastal* case. They seek Board approval of the same allocation of terminal charges between vessel and cargo as that approved in the *California* case.

In response to the petition the Board, on May 14, 1954, ordered :

That a proceeding of inquiry be instituted upon the Board's own motion, in the exercise of its powers and duties under section 15 and 17 of the Shipping Act, 1916, concerning the operations of the Association and its members hereinabove named, for the purpose of obtaining information as to the proper bases (1) for the segregation of the services, and the costs thereof, rendered for the account of the vessel from those rendered for the account of the cargo, (2) for allocating costs assignable to the vessel as between dockage, service charge, and other services rendered to the vessel, (3) for allocating costs assignable to the cargo as between wharfage, wharf demurrage and storage, and other services rendered to the cargo, (4) for determining carrying charges on waterways, land, structures, and other terminal property devoted to furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water, and of apportioning such charges to the various wharfinger services, and (5) any other services and costs necessary to a determination of the above-mentioned bases.

In addition to the Association and its members, Eureka Terminals, Inc., formerly doing business at Tacoma; Waterside Milling Co., located at Tacoma; General Hardwood Co., located at Tacoma; Matson Terminals, Inc., doing business at Seattle, Tacoma and Portland; "Luckenbach Terminals", doing business at Portland as Lukenbach

Steamship Company; Irving Dock, located at Portland; Southern Pacific Company, formerly operating an export lumber dock at Portland; American Mail Line, Ltd., operating a pier at Seattle; and Puget Sound Terminal Co., a subsidiary of Puget Sound Freight Lines, operating at Seattle, Bellingham, Olympia and possibly other Puget Sound ports, were named respondents.

By order of September 16, 1954, the Board granted a motion to dismiss the proceedings as to Southern Pacific Company on the ground that it does not now operate any marine terminal facilities in connection with a common carrier by water at Northwest ports, and upon consideration that Southern Pacific file promptly a supplement to its Terminal Tariff No. 230-K to reflect such fact. Said supplement was filed.

Respondent Eureka Terminals, Inc., is not now in operation. It should be ordered to file a supplement to Tacoma Terminal Tariff No. 1 showing that fact, after which this proceeding as to it should be dismissed.

Respondents Tait Tidewater Terminals, Williams, Dimond & Co. and Ames Terminal Co. are no longer in the wharfing business in the Northwest, are not parties to any terminal tariff on file with the Board, and this proceeding, as to them, should be dismissed.

The Commission of Public Docks of Portland now operates Ocean Terminals.

Respondent American Mail Line Ltd. filed a motion to be dismissed as a party on the ground that the Board's power to require the filing of any particular type of terminal rates in foreign commerce is derived from its power under agreements filed pursuant to section 15 of the Act; that said respondent is not a party to any such agreement; and that therefore the Board has no power to require it to become a party to or adhere to any particular type of terminal tariff. Public Counsel replied to the motion, pointing to the fact that the words "tariff" and "terminal tariff" do not appear in the order instituting this proceeding. They cite *Contract Rates—Port of Redwood City*, 2 U. S. M. C. 727; *Free Time and Demurrage Charges—New York*, 3 U. S. M. C. 89; and *Interchange of Freight at Boston Terminals*, 2 U. S. M. C. 671, as typical cases where jurisdiction over individual terminals not parties to section 15 agreements has been exercised under the provisions of section 17 of the Act. By order of November 17, 1954, the motion was dismissed.

Respondent Matson Terminals, Inc., moved that it be dismissed as a party on the main grounds that it exists solely for the purpose of serving the vessels of its parent company, Matson Navigation Com-

pany and another subsidiary of that company, The Oceanic Steamship Company, and that it does not operate a public terminal in the real sense of the word as do members of the Association. No party opposed the motion, and it was granted. Therefore Matson Terminals, Inc., should be required to cancel its participation in Seattle Terminals Tariff No. 2-C, The Commission of Public Docks of the City of Portland, Oregon, Terminal Tariff No. 3-A and any other general public wharfing tariff it may participate or concur in. Its terminals Tariff No. 6 is on file with the Board.

Numerous steamship freight conferences² and Pacific American Steamship Association were permitted to intervene on behalf of their members.

A motion to dismiss the proceeding was filed on behalf of the first 13 intervening conferences shown in footnote No. 2. The motion was filed upon the jurisdictional ground that the Board's power of investigation under the Act is provided in section 22 where such power is limited to investigating "any violation of this Act." It was urged in support of the motion that this proceeding of inquiry is not an investigation of any violation, or alleged violation, of the Act and that therefore the Board has no power to conduct it. The Association and Public Counsel replied to the motion citing various authorities, including *California v. United States*, 320 U. S. 577, recognizing jurisdiction of the Board to conduct proceedings of inquiry under the powers conferred by sections 15 and 17 of the Act. The motion was dismissed by order of the Board.

With respect to the substance of this proceeding, interveners have no objection to uniform application of the Freas Formula, but object to using it as a means of reviewing the *Intercoastal* case or as an attempt to increase terminal charges against the ship.

There is no controversy between the parties and no problem presented concerning application of the Freas formula to wharfing services accorded general cargo which is checked or tallied by respondents for the ship, described in the *Intercoastal* case as the "principal item going into the service charge". It is only necessary, therefore, to consider "nonchecked" cargo which generally consists of bulk commodities, including lumber, received, held, and delivered by respondents at their general wharfing facilities. As here used "nonchecked"

² Pacific Indonesia Conference; Camexco Freight Conference; Canal, Central America Northbound Conference; Capca Freight Conference; Colpac Freight Conference; Pacific Coast/Caribbean Sea Ports Conference; Pacific Coast/Mexico Freight Conference; Pacific Coast/Panama Canal Freight Conference; Pacific/West Coast of South America Conference; West Coast South America/North Pacific Coast Conference; Pacific Straits Conference; Pacific Coast European Conference; Pacific Coast River Plate Brazil Conference; Pacific Westbound Conference; and Intercoastal Steamship Freight Association.

means that no check or tally of cargo is made by respondents for the vessel.

Illustrative of such nonchecked cargo passing over Northwest terminals, inbound and outbound, are lumber, fabricated steel products; heavy equipment such as cranes, railroad cars or motor vehicles; sand, rolled steel products, plate and window glass, ores, aluminum pig, concentrates, sulphur, phosphate rock, coal, scrap, logs and machinery. They are loaded or discharged by ship's tackle from or to open-top railroad cars or barges alongside, although the bulk of outbound lumber arrives at the terminal by motor vehicle. While the terminals do not check or tally this cargo for the ship unless requested, they do issue receipts therefor. During the calendar year 1952 respondents Port of Seattle, Ames Terminal, Olympic Steamship Company and Alaska Terminal & Stevedoring Company handled in excess of 203,000 tons of nonchecked cargo, exclusive of lumber. The percentage of nonchecked cargo to total cargo ranged from 35 to 50 percent. During the same period the Port of Seattle alone handled and collected service charges on 173,780 tons of cargo, other than lumber, of which 87,131 tons was nonchecked. About 60 percent of total cargo handled by the Port of Tacoma is nonchecked. At Portland about 25 percent of the total cargo handled by the Commission of Public Docks is nonchecked, exclusive of lumber and bulk cargo separately handled at its specialized bulk facility.

The record shows that there is no clear line of demarcation between terminal functions with respect to nonchecked cargo on the one hand and general cargo on the other, insofar as the ship's use of facilities and the services rendered to it are concerned. The duties performed by the terminal for the ship are precisely the same irrespective of the nature of cargo in the following particulars:

1. The vessel must be directed to and furnished an available berth.
2. Agreement between the terminal and the ship is made with respect to whether it will tie up on the port or starboard side.
3. The number of hatches to be worked must be known and arrangements made accordingly.
4. Procurement of labor and cargo-handling equipment such as cranes or lift trucks is done by the terminal in advance of arrival of the ship.
5. Cargo is assembled on the terminal advantageous to the ship's berth.
6. Ordering, checking, spotting and moving railroad cars on the terminal is similar with respect to either open top or box cars, and

understanding with the railroad companies are necessary for expeditious loading and discharging of the vessel.

7. Dock receipts are prepared from the line-up furnished by the water carrier, and cargo is delivered to the ship against receipt by the ship's supercargo.

8. As to cargo loaded from barge, raft, lighter or other water carrier, the terminal furnishes adequate berthing and other facilities necessary to the expeditious turn-around of the ship.

9. Interchange of freight between the ship, consignees, consignors and land carriers involves a great amount of clerical work performed by the terminal which does not vary with the nature of the cargo.

The record also shows that with respect to both checked and non-checked cargo the services performed and wharfinger facilities furnished by Northwest terminals for ship and cargo are in general similar to those performed by California terminals except that in the Northwest the term "stevedoring" is limited to mean stevedoring performed on the ship, whereas in California the term is used to include the dock gang which handles cargo between place of rest and ship's tackle.

The Association asserts that the definitions of the terminal charges contained in their tariffs³ are "substantially identical" with those contained in Marine Terminal Association of Central California Terminal Tariff No. 1-A, F. M. B. No. 1, "which definitions have been approved by the Commission" in the *California* case. It should be observed here that the Commission did not approve any tariff definitions in that case. However, the importance of uniformity of definitions was recognized by the Commission in *Terminal Rate Increases—Puget Sound Ports*, 3 U. S. M. C. 21, 23 (hereinafter called the *Puget Sound* case) in the following language:

We are of the opinion that there should be uniform and clear definitions of various terminal services, and a clear and inclusive list of the specific activities contained in each definition in order to enable terminal operators, the shipping public, carriers, and us to determine whether each service is bearing its fair share of the cost load. Such uniformity should be a goal sought by all owners and operators of terminals in all ports of the United States and its Territories and possessions. This does not mean, however, that there necessarily should be a uniformity of charges. Uniformity of definitions will result in a much healthier condition of the industry and much fewer competitive situations resulting in noncompensatory charges for certain services. While it may be difficult to cover all ports in an attempt to secure immediate and universal uniformity,

³ Seattle Terminals Tariff No. 2-C; The Commission of Public Docks of the City of Portland, Oreg.—Terminal Tariff No. 3-A; Tacoma Terminals Tariff No. 1; Port of Astoria Tariff No. 6; Port of Longview Terminal Tariff No. 2; Port of Vancouver, Wash., U. S. A., Tariff No. 1; Port of Everett Tariff No. 1; Port of Olympia Terminals Tariff No. 5; Port of Bellingham Tariff No. 3; and Baker Dock Company Terminal Tariff No. 1.

we should take every opportunity to require terminal operators to publish their charges under headings which are clear, concise, and which in no way overlap.

It is axiomatic that uniformity of definitions is a prerequisite to uniform application of the Freas formula to terminal operations along the entire Pacific coast range. It is therefore necessary to critically examine certain basic definitions and descriptions of service appearing in Association tariffs.

The Association cites the Seattle tariff as representative of definitions used by them and as a convenient means of comparison with those provided by California tariffs.

WHARFAGE

The term "wharfage" is defined in the Seattle tariff as follows:

Wharfage is the charge that is assessed on all freight passing or conveyed over, onto, or under wharves or between vessels or overside vessels when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is the charge for use of wharf and does not include charges for any other service.

The same definition of wharfage is found in the other Association tariffs and there is no conflict with that published in the Central California tariff. Mr. Freas says "Tolls (wharfage) covers the charge against the cargo for passing freight over the wharves." In the *Puget Sound* case at page 24 the Commission said with respect to the same definition:

The imposition of a wharfage charge against the cargo can be justified only on the principle that the carrier, or the terminal operator on the carrier's behalf, does not actually take possession or deliver up possession of the cargo other than at place of rest on the pier as distinguished from the end of ship's tackle. Between that place and the entrance to or exit from the pier the cargo is using the pier to get into position to utilize the carrier's facilities or has finished the use thereof. The establishment of the charge against the cargo for this use has been widespread throughout the country under various names, viz: "wharfage," "top wharfage," "tollage," "wharf tollage." We cannot ignore that fact. The definition appears to be adequate.

CARLOADING AND CAR UNLOADING

The terminal service is described in the Seattle tariff as follows:

Carloading and car unloading charges are the respective charges for services performed in loading freight from wharf premises on or into railroad cars or unloading freight from railroad cars onto wharf premises. The services include ordinary breaking down, sorting and stacking on wharf. Carloading and car unloading charges are assessed against cargo when not absorbed by carriers.

While the same definition is found in other Association tariffs, Bellingham includes, in addition, the loading and unloading of trucks or

any type of carrier; Longview and Vancouver specifically include motor trucks and barges; while Baker Dock provides charges for loading and unloading motor trucks when requested. The Central California tariff provides for loading and unloading cars or trucks which are not inconsistent with Northwest descriptions of service. As a general rule the motor carriers do their own loading and unloading so that the terminal charges therefor do not apply. In California much of the railroad carloading and unloading on the terminals is performed by independent carloading companies. See *Status of Carloaders*, 2 U. S. M. C. 761; 2 U. S. M. C. 791; 3 U. S. M. C. 116; and 3 F. M. B. 268; and *Carloading at Southern California Ports*, 2 U. S. M. C. 788; and 3 F. M. B. 261.

California terminals charge the cargo for direct transfer by ship's tackle from or to open top cars spotted alongside vessel, whereas Association members make no such charge except for rental or use of mechanical equipment and labor, and that is against the *ship*.

Mr. Freas describes loading and unloading as follows:

Car and truck loading operations should be charged with the expenses of the areas, facilities and services employed by them and make use of between point of rest and rail car or truck. In the case of rail shipments handled through a transit shed, this embraces a proportionate share of shed aisle space, such portions of docks, if any, as are utilized by carloaders and unloaders, and general overhead. If the services are performed by the terminal it includes also labor and supervision. The resulting costs are assignable to carloading and unloading. The fact that certain terminals do not load or unload cars is of no consequence. The service is nevertheless performed on their facilities and under the use principle here followed is chargeable with a proportionate share of the cost of making the facilities available. Other activities should not be burdened with costs incurred in carloading and unloading. The cost of providing facilities on which others may load and unload cars may be passed on to those conducting business on the wharfinger's property in the form of a rental or license.

Under the Freas Formula all forms of loading and unloading are charged to cargo.

WHARF DEMURRAGE AND ACCESSORIAL SERVICES

It is unnecessary to review in detail the definitions and descriptions of services regarding wharf demurrage and such accessorial services as weighing, repacking, reconditioning and stencilling because, while there are variations in tariff provisions, they mean the same thing and the services are alike in the Northwest as well as in California. For example, wharf demurrage is charged cargo for holding it beyond the free designated by the tariff although it is called "wharf demurrage," "wharf storage" or "monthly storage." Irrespective of the terminology used, wharf demurrage is a penalty charge whether collected

in California or the Northwest. The accessorial services are charged to cargo in both areas.

HANDLING CHARGE

The term "handling charge" is defined in the Seattle tariff as follows:

Handling charge is the charge made against vessels, their owners, agents or operators (see exception) for moving freight from end of ship's tackle on the wharf to first place of rest on the wharf, or from first place of rest on the wharf to within reach of ship's tackle on the wharf. It includes ordinary sorting, breaking down and stacking on wharf.

Exception: Handling charges applying on fish and seafood, canned, except foreign imports, moving under rates named in item 136 series, when not absorbed by ocean carriers, are assessed against the cargo and are due from the owner, shipper or consignee of the cargo.

The terminal companies, when equipped to perform the service of handling freight and to care for the same on their terminals, reserve the right in all instances to perform such services.

The other Northwest tariffs publish the same definition and some (Portland and Tacoma) add notes and exceptions of no particular consequence to the issues.

Handling charges are not provided for in the Central California tariff. As pointed out above, the handling of cargo between ship's tackle and place of rest in California is done by the ship's contracting stevedores and not by the terminals.

The offshore carriers serving California, Oregon and Washington ports have been required by the Commission to publish their own handling charges. See, for example, Pacific Westbound Conference Local Tariff No. 1-W, Rule No. 19, original page No. 59, where the following appears:

The carrier, its agent, or stevedore, shall perform at the expense of the consignor or consignee, the handling service at all Pacific coast ports, at rates hereinafter provided:

1. on terminal direct from place where unloaded from railroad car or other vehicles to ship's tackle,
2. from place of rest on terminal, barge or lighter to ship's tackle, including ordinary breaking down and trucking.

As to handling the Board said in the Puget Sound case at pages 23 and 24:

The carrier must furnish a convenient and safe place at which to receive cargo from the shipper and to deliver cargo to the consignee. If this can be done at end of ship's tackle, then it can be so stated and the contracts of carriage may be limited to such service. On the other hand, if such receipt and delivery is impracticable or impossible, the carrier must assume as part of its carrier obligation the cost of moving the cargo to where it can be delivered to the consignee

or from where it can be received from the shipper—referred to generally as the place of rest. The carrier cannot divest itself of this obligation by offering a service which it is not prepared to perform. It can, however, separate its rates into two factors, one covering the actual transportation and the other covering the handling between tackle and place where cargo is received or delivered. *J. G. Boswell Co. v. American-Hawaiian S. S. Co.*, 2 U. S. M. C. 95; *Los Angeles By-Products Co. v. Barber S. S. Lines, Inc.*, 2 U. S. M. C. 106.

The Freas Formula does not take into account the handling of cargo between ship's tackle and place of rest as a terminal *service* but it is included as a use apportioned to the vessel.

The fact that Northwest terminals perform the handling service for the ship while the California terminals do not is no bar to use of the Freas Formula in both areas. Nor are shippers and consignors concerned as to whom such charges are paid. As stated by Mr. Freas on page 9 of his study, "Eventually, the cost of the terminal service as well as that of the water transportation is borne by the consumer."

DOCKAGE CHARGE

The Seattle tariff definition is :

Dockage is the charge assessed against ocean vessels for docking at a wharf, pier or seawall structure, or for mooring to a vessel so docked, or for coming within a slip.

The term is similarly defined in all other Association tariffs as well as in the Central California tariff.

On page 140 of the Freas Study the following appears :

Under dockage are accumulated the costs of furnishing berthing space, facilities for tying up the vessel, and working areas for gear and stevedores.

SERVICE CHARGE

The Seattle tariff defines the service charge as follows :

Except as otherwise provided in individual items, service charge is the charge assessed against ocean vessels, their owners, agents, or operators which load or discharge cargo at the terminals for performing one or more of the following services (subject to Notes 1, 2, 3, and 4) :

1. Providing terminal facilities.
2. Arranging berth for vessel.
3. Arranging terminal space for cargo.
4. Check cargo.
5. Receive cargo from shippers or connecting lines and give receipts therefor.
6. Deliver cargo to consignees or connecting lines and take receipts therefor.
7. Prepare dock manifests, loading lists, or tags covering cargo loaded aboard vessels.
8. Prepare over, short, and damage reports.
9. Order cars, barges, or lighters as requested or required by vessels.

10. Give information to shippers and consignees regarding cargo, sailing and arrival dates of vessels, etc.

11. Lighting the terminal.

NOTE 1.—Service charge will not apply on cargo moving under rates named in section 4 of this tariff.

NOTE 2.—Service charge does not include any freight handling, loading, nor unloading operations, nor any labor other than that which is essential to performing the service.

NOTE 3.—When it is required and permitted that the services of checking, receiving and/or delivering cargo as defined in paragraph (A), be performed by the U. S. Government, with its own personnel or with personnel in its employ and under its direction, service charge rates as named in item 49-3 will apply.

NOTE 4.—When owners, agents, or operators of vessels are permitted to perform the services of checking, receiving, and/or delivering of cargo, as defined in paragraph (A), with their own personnel or with personnel directly in their employ and under their direction, service charge rates named in item 49-3 series will apply.

Section 4 of the tariff referred to by Note 1 provides rules, regulations, rates and charges applicable to bulk liquids only.

The Portland, Astoria, Everett, Longview, and Olympia tariffs provide the same definition of service charge as the Seattle Tariff. The Baker Dock Company and Tacoma Terminals tariffs carry the same definition, but provide that as to softwood lumber moving in east-bound intercoastal service the *service charge applies the shipper or owner of the cargo and not against the vessel*. The Vancouver definition differs sharply from those provided in the other Northwest tariffs. It reads:

Service charge is the charge assessed, on the basis of cargo tons handled against vessels, their owners, agents or operators which load or discharge cargo at the terminals, for use of terminal facilities, *for berthage while loading or discharging cargo, for administrative expense in serving the carrier*, and for performing one or more of the following services [emphasis supplied]:

(The list of services is the same as shown above from the Seattle tariff.)

Rules and Regulations Applicable to Lumber and Lumber Products Moving in Intercoastal Trade

Service charge is the charge assessed for performing any one or more of the following services:

1. Arranging terminal space for lumber.
2. Keeping record of lots and parcels of lumber received and handled on dock.
3. Receiving lumber from shippers or connecting lines and giving receipts therefor.
4. Delivering lumber from consignees or connecting lines.
5. Preparing loading lists, manifests, or tags, covering lumber to be loaded aboard vessel.
6. Ordering cars, barges, or lighters, as requested or required.
7. Give information to shippers and consignees regarding lumber shipments, sorting and arrival dates of vessels.

8. Furnish lights for receiving, sorting, and handling of lumber on terminal.

NOTE.—Service charge does not include handling, loading, or unloading operations, or any other than that which is essential to performing the services.

The Port of Bellingham does not publish a service charge for the probable reason that it is in competition with Bellingham Warehouse Company, a wholly-owned subsidiary of Pacific American Fisheries, Inc., which, in connection with its industrial dock at South Bellingham, operates a public wharfing business, and which does not maintain a service charge against vessels docking there. Bellingham Warehouse Company, while not a respondent, has filed its tariffs with the Board since the date of hearing.

The Port of Bellingham handles less cargo than any other member of the Association, its total volume for the calendar year 1952 amounting to only 2,762 revenue tons, which was about one-tenth of one percent of the total handled by Association members. Sixty percent of the Bellingham tonnage consists of lumber, the rest being general cargo. Ninety percent of its traffic is Alaskan and ten percent Hawaiian. Members of Pacific Westbound Conference will not call at Bellingham for less than 300 revenue tons of cargo or 300,000 board feet of lumber or lumber products. Bellingham is not shown as a terminal port in the Pacific Coast European tariff, but arrangements for calling may be made between shipper and ship.

It is evident that the failure of Bellingham to apply a service charge is no threat to uniformity on the Pacific coast, and the parties do not appear concerned with the operations of Bellingham Warehouse Company.

The Central California tariff definition of the service charge is similar to that provided in the Seattle tariff.

In the Puget Sound case the Board made the following observations as to definitions of service charges, especially pertinent to the one found in the Vancouver tariff:

To include "berthage" with other services "incidental to receiving and delivering of freight" will add still more to the general confusion in the use of terminal definitions. Berthage should be established as a separate item since it is purely a use charge for space occupied by the vessel and has no direct relation to a "service" as such.

The phrase "for use of terminal facilities" is broad enough to comprehend the use of terminal facilities for which compensation is included in other charges, such as wharfage, and should be eliminated. For a like reason, "administrative expense in serving the carrier" should be deleted. Each service presumably bears its proper share of the administrative expense in the charge established for the service, and, to exact payment for such expense in the service charge would be a duplication of charges.

Another expression of the Board on the same subject is found in the *Intercoastal* case at page 394:

In the interest of uniform and clear definitions, we think services included in respondents' service charge should be limited to those concerned with or incidental to the receiving and checking of cargo (the principal item going into the service charge). If respondents desire to make a charge against the vessel for ordering railroad cars alongside, it should be set up as a special charge and not included in the service charge.

In the *California* case the definition of "Service and Other Charges" against the ship used in the Freas Formula is set forth on page 60, n. 6 as follows:

The charge assessed for arranging berth for vessel, arranging terminal space for cargo, checking cargo to or from vessel, receiving outbound cargo from shippers, and giving receipts therefor, delivery of cargo to consignees and taking receipts therefor, preparing manifests, loading lists or tags covering cargo loaded aboard vessel, preparing over, short and damage reports, ordering cars, supplying shippers with vessel information, and lighting terminal. Some definitions also include "use of terminal facilities."

This understandable general confusion as to what the generic term "service charge" means, insofar as application of the Freas Formula is concerned, is readily resolved by referring to the Freas study and the formula itself. How it fits into the whole pattern of terminal operations is described on page 22 of the study as follows:

Regardless of the terminal company's chosen method of doing business, wharfing revenue is obtained from several or all of the following operations:

(1) Use of space and facilities for docking vessels (charge for which is commonly known as dockage).

(2) Passing cargo over wharf (charge for which is commonly known as wharfage (toll)).

(3) Holding cargo (the charge for holding cargo within a specified "free time" is included in the toll; that made for holding beyond the free time is commonly known as wharf demurrage or storage).

(4) Rental of facilities (this may entail the use of an entire pier or piers for the conduct of a terminal service or of portions of piers for office purposes, storage of gear, etc.).

(5) Miscellaneous vessel services (usually covered by a "service" charge). They do not include any cargo handling operations or labor.

(6) Accessorial services (charged for in various ways). Accessorial services include car or truck loading and unloading, fumigating, sampling, stencilling, labeling, strapping, repacking, etc.

In addition to the services rendered and use of facilities furnished by the wharfing to the ship as generally described in the *California* case under the caption "Service and other charges," the Freas study and formula specifically list and explain on pages 36, 88, 119, 120 and 140:

- (1) Assembling cargo for the account of the vessel.
- (2) Handling lines.
- (3) Any other labor expense incurred for the benefit of the vessel.
- (4) Costs incurred in rendering clerical services for the vessel and areas used therefor.

So far as service charges are concerned it is obvious that it will be necessary to reconcile the tariff definitions with the Board's decisions and the Freas Formula before the "substantial doubt" can be removed and the goal of uniformity can be attained. However, there can be no doubt that the service charge, properly defined, is a legitimate charge against the vessel as to lumber or bulk commodities as well as to general cargo. It would, of course, be an unreasonable practice to make a specific charge for checking when that service is not performed. A cease and desist order should be entered prohibiting any of the respondents from collecting service charges from shippers or receivers of freight, including lumber moving in the eastbound intercoastal trade.

THE FREAS FORMULA

The Association employed Philip E. Linnekin, a certified public accountant, to analyze the operations of the members and determine the applicability of the Freas Formula to their wharfinger functions. His experience in Pacific coast terminal cost accounting dates from 1946 when he was assistant to Mr. Freas in the *California* case. Since that time Mr. Linnekin has been continually engaged in making current applications of the formula to both California and Northwest terminal operations, has trained port staff personnel in its use, and has established systems improvements to facilitate accumulation of accounting data for application of the formula. He testified on behalf of the Association, and his qualifications as an expert witness were readily accepted by all parties.

Witness Linnekin's testimony is that both from an organizational and operational point of view the principles of cost accumulation and segregation in the Freas Formula apply to the Northwest marine terminal industry to the same extent as in California. He states that the applied formula recognizes in both areas the division of responsibility between the vessel and the cargo and the underlying principle of allocating costs according to use.

Eight members of the Association,⁴ which account for about 80 percent of the entire volume of the total business done by all members, were selected as representative for the purpose of analysis.

⁴Port of Seattle; Port of Tacoma; Commission of Public Docks, Portland; Port of Longview; Alaska Terminal & Stevedoring Co.; Ames Terminal; Olympic Steamship Co.; and Port of Vancouver, Wash.

Witness Linnekin's approach to the studies in the Northwest was that used by Mr. Freas in the *California* case. Physical inspections were made of the facilities; volume and character of cargo handled were ascertained; the condition of the records and accounting systems were examined; and most of the detail work was done by terminal personnel under his direct supervision.

As explained in the *California* case, cost allocations are grouped under three main headings (1) Carrying Charges, (2) Dock Operating Costs, and (3) General and Administrative expenses. The formula itself consists of six schedules. Schedule I provides respectively for the development and separation of carrying charges; Schedule II for the further separation of the carrying charges developed in Schedule I and for the development and separation of the dock operating and general and administrative expenses; and Schedules III, IV, and V for the further breakdown respectively of the costs assignable to service charges, tolls, and wharf demurrage. Schedule VI summarizes the results of the other five.

The application of the Freas Formula to California ports is shown in the appendix to the Commission's decision in the *California* case, Howard Terminal having been selected for illustrative purposes. Application of the formula to the Northwest terminals is shown in Schedules I and II of the appendix hereto, East Waterway and Lander Terminals of the Port of Seattle being used as an example. The basic cost allocations are contained in these two schedules. All of the cost items appear in the Northwest studies as they did in the *California* case except for maintenance which represents a 5-year average in the Northwest whereas the same item represented only 1 year in the California study.

Schedule I covers the accumulation and allocation of plant carrying charges (facility costs) between waterways, aprons, cargo areas, rail and truck areas, and other wharfing and nonwharfing areas. The cost items include provision for return on land and structures, taxes on land and structures, insurance on structures, depreciation and maintenance of structures.

Schedule II provides for the accumulation of all costs and their allocation between services performed for the vessel and services performed for the cargo. The first part of the schedule deals with the allocation of the carrying charges developed in Schedule I. The carrying charges are allocated to the various services on the same bases as in the *California* case.

In general, witness Linnekin proposes no change in the incidence of costs against vessel or cargo, although, as in the *California* case,

his study reveals need for increased terminal revenue, deficiencies existing in both carrier and cargo revenue. No party of record challenges the structure of the formula or use of it in the Northwest.

But, as indicated above, a refinement in the formula is necessary to reflect handling of cargo between place of rest and ship's tackle by the Northwest terminals, a labor activity which is regarded as stevedoring in California and consequently a nonwharfinger service under the Freas Formula. The existence of this service in the Northwest is recognized and provided for by witness Linnekin by adding column (f) to Schedule II. The direct costs of handling are segregated on the records of the terminal operators, and the indirect operating and administrative costs are allocated to this service in the same manner as they are allocated to other services in accordance with the principle embodied in the Freas Formula of allocating costs to use. In the interest of uniformity all carrying charges against the vessel for the working areas in the handling service are allocated to dockage by witness Linnekin, although he agrees with Mr. Guy M. Carlon, consultant to the Board who participated in this proceeding, that under the Freas theory of use the carrying charges for aprons and shed and open cargo areas which are allocated in his studies to dockage, should be allocated to the handling charge. The Board should find that under the Freas Formula in the Northwest these charges are properly assignable to handling instead of dockage.

No problem is presented in applying the Freas Formula to the terminal facility activity, the costs of which are designed to be recovered in both California and the Northwest through the service charge against the vessel. The cost factors used by witness Linnekin are the same as those appearing in the Freas Formula (Schedule II) with the exception of two items, i. e. (1) assembling cargo for the account of vessel and (2) handling lines. So far as the Association is concerned, assembling cargo for account of vessel appears to be included in the handling charge, while handling lines is regarded as part of the stevedoring, a nonwharfinger function, and consequently unrelated to the service charge. The following table shows the composition of costs that are included by witness in the service charge, based upon the application of the Freas Formula to the eight Association terminals studied:

Cost element (a)	Amount (b)	Percent, total (c)
Direct cost of checking.....	\$441,764	39.40
Indirect costs of service charges:		
Superintendence.....	10,399	.93
Clerical other than checking.....	75,895	6.77
Cleaning sheds and docks.....	11,008	.98
Watchmen.....	17,584	1.57
Utilities.....	6,341	.56
Industrial insurance.....	7,728	.69
Claims.....	2,824	.25
Miscellaneous dock expense.....	12,094	1.08
Miscellaneous dock equipment.....	4,365	.39
Carrying charges—miscellaneous.....	20,337	1.81
Administrative expense.....	52,284	4.66
Total indirect costs.....	220,859	19.69
Dockage deficiency.....	458,757	40.91
Total costs recoverable by service charges.....	1,121,380	100.00

Includes \$386,787 for carrying charges on aprons and cargo areas (sheds and open) allocated by witness Linnekin to dockage, but recommended herein as properly allocable on the basis of use to the handling charge. If so allocated, the total costs recoverable by the service charge would be reduced to \$734,593.

Recognizing that the general confusion resulting from the service charge is caused by its tariff definition or description, witness Linnekin suggests that the California and Association tariffs be clarified to indicate clearly that the service charge includes provision for the recovery of the cost of terminal structures and/or facilities provided for the benefit of the vessel to the extent that such costs are not recovered through dockage or handling charges. He recommends that the descriptive heading of the tariff item which now reads "Service Charge" be amended to read "Service and Facilities Charge" and that the clause in the item reading "Providing Terminal Facilities" be eliminated and in lieu thereof the following description be inserted:

Providing for the vessel terminal structures and/or facilities necessary to the performance of the services enumerated below and to enable the vessel to accomplish the transfer of cargo

- (a) from vessel to consignees, their agents or connecting carriers, or
- (b) from shippers, their agents or connecting carriers to vessel.

AMERICAN MAIL LINE, LTD.

Respondent American Mail Line, Ltd., leases Pier 88 in Seattle from the Great Northern Railroad and operates it as part of its steamship operations. It also furnishes terminal facilities there for Moore-McCormack Lines, Inc., and Blue Star Line.

American Mail Line's terminal rates, charges, rules and regulations are published in three individual tariffs which are on file with the Board: Terminal Tariff No. 1-B, F. M. B.—T—No. 1, applicable to transpacific cargo; Terminal Tariff No. 3-B, F. M. B.—T—No. 5, applicable to cargo in the South American and Caribbean Sea trades; and Terminal Tariff No. 2, F. M. B.—T—No. 2, applicable to vessels using the facility. This means that American Mail Line departs from the practices of California and Association terminal operators by naming in one tariff all charges against cargo and in another, all charges against the vessel. There is also a marked difference in the construction of its tariffs with a view towards simplicity. In Terminal Tariff No. 1-B, applicable to transpacific cargo, a single rate is named to apply on cargo "delivered to and received from trucks" and another single rate for cargo "loaded to or unloaded from railroad cars." This avoids naming separate rates for wharfage, handling, loading and unloading. In Terminal Tariff No. 3-B, applicable to cargo in the South American and Caribbean Sea trades, specific charges are made for wharfage and loading or unloading and reference is made to steamship conference tariffs for the handling charges. Terminal Tariff No. 2, naming charges against the vessel, carries only two items of general application, (1) dockage and (2) terminal rates. As to the scope of dockage there is no difference between American Mail, Association and California tariffs. The terminal rates are on a specific commodity basis, divided between railroad and motor carrier traffic. While American Mail Line does not publish a service charge against the vessel, its dockage charge is higher than that made by Association terminals.

No party challenges either the lawfulness of American Mail Line's terminal practices or the system of cost accounting used. Obviously the Freas Formula could not be easily adjusted to its operations because of the difference in breakdown of the factors of wharfage, dockage, handling, carloading and unloading, and the complete absence of the service charge. There is no suggestion of record that American Mail Line adopt the formula.

THE INTERCOASTAL CASE

The *Intercoastal* case was a complaint and answer proceeding and the conclusions reached were based upon a limited record. No consideration was given to the necessity of the imposition of the service charge to obtain a fair return on investment in the terminal facilities used by the vessel or to the division of responsibility to the terminal between the vessel and the cargo. In addition to condemning the

service charge as an unlawful practice the Commission referred the case to the examiner for further proceedings on complainants' claim for reparation. In view of the fact that the figures of record herein prove a general deficiency in revenue, including that sought to be recovered through the service charge, it seems clear that there is no basis upon which reparation could be paid. Appendix II hereof shows the revenue, expenses, and gain or deficiency of the eight operators included in the study.

For these reasons, and based upon the more complete record in this case, the Board should reverse the decision in the *Intercoastal* case, set aside the cease and desist order entered therein, and close the record without further proceedings on the question of reparation.

ULTIMATE CONCLUSIONS

The Board should :

(1) Approve the Freas Formula as a proper method of segregating terminal costs and carrying charges, and apportioning such costs and charges to the various wharfinger services at Pacific northwest ports;

(2) Require those California and Pacific northwest terminal operators which make a service charge to adopt a uniform definition and/or description of such charge consistent with that recommended by witness Linnekin herein;

(3) Find that respondents operating publicly owned terminals are entitled to a fair return on investment;

(4) Reverse the findings and conclusions in the *Intercoastal* case;

(5) Complete the record and dispose of the issues remaining to be decided in the *California* case;

(6) And give consideration to instituting a nationwide rulemaking proceeding under section 4 of the Administrative Procedure Act and the Shipping Act, 1916, to make as uniform as possible the allocation of terminal charges between ship and cargo, and as uniform as possible the definitions of tariff services offered by all persons carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with common carriers by water throughout the United States, its Territories and possessions.

An appropriate order should be entered.

APPENDIX I

Port of Seattle, Freas Formula Applied to East Waterway & Lander Terminals, Schedule I—Plant carrying charges, calendar year 1952

Line No.	Item (a)	Total cost (b)	Bases (c)	Waterway (d)	Cargo areas		Open (g)	Rail and truck areas (h)	Wharfinger (i)	Non-wharfinger (j)
					Aprons (e)	Sheds (f)				
1	Return—land.....	\$42,824	1	\$6,519	\$1,271	\$8,120	\$15,785	\$4,749	\$698	\$5,682
2	Return—structures and facilities.....	60,268	1	-----	10,129	23,518	719	13,691	9,656	2,548
3	Insurance—structures only.....	4,520	2	-----	1,343	1,709	17	849	279	43
4	Depreciation—substructure.....	2,981	2	-----	1,607	1,310	113	1,071	393	61
5	Depreciation—superstructure.....	1,894	2	-----	-----	2,380	-----	-----	185	396
6	Depreciation—rail and truck facilities.....	1,944	3	-----	-----	-----	-----	1,094	-----	-----
7	Depreciation—service system.....	28,945	3	-----	9,559	9,136	456	6,373	8,826	605
8	Maintenance—substructure.....	10,776	2	-----	-----	16,020	-----	-----	2,242	1,514
9	Maintenance—superstructure.....	8,276	3	-----	-----	-----	-----	8,276	-----	-----
10	Maintenance—rail and truck.....	7,084	3	-----	-----	-----	-----	-----	7,084	-----
11	Maintenance—service system.....	-----	-----	-----	-----	-----	-----	-----	-----	-----
12	Total carrying charges.....	179,655	-----	6,519	22,939	61,169	17,087	35,803	25,289	10,849

Key to bases numbers (col. c)
 1. Apportion according to value.
 2. Direct allocation, or value if separate data not available.
 3. Direct allocation.

Port of Seattle, Fees Formula applied to East Waterway & Lander Terminals, Schedule II—Allocation of costs to services, calendar year 1952

APPENDIX

XXIII

Line No.	Item (a)	Total costs (b)	Bases (c)	Dockage (d)	Service charges (e)	Handling charges (f)	Cargo					
							Wharf- age (g)	Wharf- demur- rage (h)	Car- loading, unload- ing (i)	Acces- sorial services (j)	Non- wharf- inger (k)	
<i>Carrying charges (schedule I)</i>												
1	Waterway.....	\$6,519		\$6,519								
2	Aprons.....	22,939	1	22,939								
3	Cargo areas—sheds.....	61,169	2	5,811			\$3,038		\$5,811			
4	Cargo areas—open.....	17,087	2	1,623			854		1,623			
5	Rail and truck areas.....	35,803	1									
6	Other wharfinger.....	25,289	3	1,661	\$3,781	\$7,908	215		1,515		\$4,997	
7	Nonwharfinger.....	10,849	1									\$10,849
8	Total carrying charges.....	179,655		38,553	3,781	7,908	4,127		8,949		4,997	10,849
<i>Dock operating charges</i>												
9	Superintendence.....	9,815	3	645	1,467	3,069			83		588	1,940
10	Checking.....	69,110	1		69,110							
11	Car loading and unloading.....	20,250	1							20,250		
12	Handling.....	144,592	1			144,592						
13	Accessorial services.....	91,335	1									91,335
14	Clerical other than checking.....	30,967	2	1,358	13,409	6,456			175		1,237	4,779
15	Cleaning sheds and docks.....	34,228	3	2,249	5,117	10,703			291		2,050	2,704
16	Watchmen.....	14,988	3	985	2,241	4,687			127		898	2,601
17	Utilities.....	6,266	3	412	837	1,959			53		373	2,239
18	Industrial insurance and medical.....	11,952	4	118	2,393	5,007			15		732	3,163
19	Claims.....	1,238	1		309	620					309	
20	Cartage.....	3,438	1		3,438							
21	Miscellaneous dock expense.....	26,249	3	1,692	3,949	6,052			219		1,542	5,088
22	Cargo handling equipment.....	74,860	3			63,758					9,222	
23	Other equipment.....	4,863	3	319	727	1,321			41		291	962
24	Total dock operating charges.....	543,621		7,776	99,559	255,862			1,004		37,494	117,531
25	General administrative expense.....	188,146	6	8,979	20,945	31,142			995		9,007	23,761
26	Total costs.....	861,422		55,308	123,385	314,912			6,126		55,450	146,289

Key to bases numbers (col. c).

1. Direct allocation.

2. Allocation according to use.

3. Direct allocation according to nature where determinable, remainder to all services based on the sum of carrying charges exclusive of waterway and nonwharfinger and direct labor items.

4. Direct labor

5. Cargo handling labor

6. The sum of carrying charges and dock operations charges (exclusive of nonwharfinger if that portion was excluded from total cost, but including nonwharfinger if that portion was not excluded from total cost).

APPENDIX II

Northwest Marine Terminals Association, summary of revenue and expenses, all 8 operators included in study

Line No.		Revenue	Expense	Gain or deficiency
		(1)	(2)	(3)
(A) GENERAL CARGO				
<i>Charges to vessel</i>				
1	Dockage.....	\$110, 639	\$489, 301	² (\$378, 662)
2	Service charge.....	512, 417	633, 878	(121, 461)
3	Handling charge.....	1, 508, 681	1, 701, 602	² (192, 921)
4	Total charges to vessel.....	2, 131, 737	2, 824, 781	(693, 044)
<i>Charges to cargo</i>				
5	Wharfage.....	730, 056	1, 609, 886	(879, 830)
6	Wharf demurrage.....	103, 161	141, 224	(38, 063)
7	Car loading and unloading.....	319, 529	515, 678	(196, 149)
8	Truck loading and unloading.....	1, 002	6, 725	(5, 723)
9	Accessorial services.....	517, 515	493, 095	(23, 820)
10	Total charges to cargo.....	1, 671, 263	2, 767, 208	(1, 095, 945)
11	All charges.....	3, 803, 000	5, 591, 989	(1, 788, 989)
(B) LUMBER				
<i>Charges to vessel</i>				
12	Dockage.....	13, 802	93, 897	² (80, 095)
13	Service charge.....	57, 746	28, 745	29, 001
14	Handling charge.....	144, 500	144, 735	² (235)
15	Total charges to vessel.....	216, 048	267, 377	(51, 329)
<i>Charges to cargo</i>				
16	Wharfage.....	90, 978	363, 162	(272, 184)
17	Wharf demurrage.....	5, 897	10, 800	(4, 903)
18	Carloading and unloading.....	71, 348	¹ 124, 569	(53, 221)
19	Truck loading and unloading.....	29, 547	18, 427	(11, 120)
20	Accessorial services.....	75, 018	77, 581	(2, 563)
21	Total charges to cargo.....	272, 788	594, 539	(321, 751)
22	All charges.....	488, 836	861, 916	(373, 080)

¹ Includes \$33,214 truckloading and unloading.

² If the carrying charges on aprons and cargo areas (shed and open), amounting to \$324,533 on general cargo terminals and \$62,254 on lumber terminals, which have been allocated to dockage by witness Linnekin in these results, be allocated to the handling charge on the basis of use as recommended herein, the expense and deficiency here shown for dockage would be reduced by those amounts and the expense and deficiency for the handling charge would be correspondingly increased.

FEDERAL MARITIME BOARD

No. S-57

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

No. S-60

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

Submitted May 24, 1956. Decided June 8, 1956

REPORT OF THE BOARD ON INTERLOCUTORY APPEAL

BY THE BOARD:

This matter has been presented on interlocutory appeal, under Rule 10 (m) of our Rules of Practice and Procedure, from rulings of the hearing examiners in these proceedings. In each proceeding the examiner has determined, inter alia, (1) that trade route essentiality determinations of the Maritime Administrator ("Administrator") under section 211 of the Merchant Marine Act, 1936 ("the 1936 Act"), constitute relevant and material evidence for production in proceedings before the Board under section 605 (c) of the 1936 Act, and are entitled to some weight in such proceedings; (2) that the Administrator should produce the official documents containing formal determinations made under section 211 of the 1936 Act, together with the reasons for the determination if contained in the documents; and (3) that the Administrator may produce his reasons for the 211 determination, if not contained in the official documents, in a manner convenient to him, whether by submission of minutes, staff memoranda, or other study, or by summary statement.

While the examiners ruled on other issues, also appealed to the Board, this report will be confined to the rulings on the section-211 issues.

Oral argument was heard, and Public Counsel (for the Administrator), States Marine Corporation and States Marine Corporation of Delaware ("States Marine"), American President Lines, Ltd. ("APL"), American Mail Line Ltd. ("AML"), and Isbrandtsen Company, Inc., appeared in partial or full opposition to the examiners' rulings; United States Lines Company ("U. S. Lines"), Moore-McCormack Lines Inc. ("Moore-Mac"), Lykes Bros. Steamship Co., Inc. ("Lykes"), Pacific Far East Line, Inc. ("PFEL"), and Weyerhaeuser Steamship Company ("Weyerhaeuser") appeared in support of the rulings.

The issue here presented, simply stated, is whether, under the 1936 Act and Reorganization Plan No. 21 of 1950 ("Plan 21"), section-211 determinations are relevant as *prima facie* correct, or otherwise relevant in sections 605 (c) proceedings, or whether the determinations made by the Board under section 605 (c) are made independently of the Administrator's action under section 211.¹

Insofar as is here pertinent, section 211 of the 1936 Act, Plan 21, and section 605 (c) of the 1936 Act provide:

SEC. 211. The Commission is authorized and directed to investigate, determine, and keep current records of—

(a) the ocean services, routes, and lines from ports in the United States, or in a Territory, district, or possession thereof, to foreign markets, which are, or may be, determined by the Commission to be essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States, and in reaching its determination the Commission shall consider and give due weight to the cost of maintaining each of such steamship lines, the probability that any such line cannot be maintained except at a heavy loss disproportionate to the benefit accruing to foreign trade, the number of sailings and types of vessels that should be employed in such lines, and any other facts and conditions that a prudent business man would consider when dealing with his own business, with the added consideration, however, of the intangible benefit the maintenance of any such line may afford to the foreign commerce of the United States and to the national defense;

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

* * * * *

SEC. 105 OF PLAN 21. *Transfer of subsidy award and other functions to the Board.*—The following functions of the United States Maritime Commission are hereby transferred to the Board:

¹ Other statutory provisions relevant to this report are set out in the Appendix.

(1) The functions with respect to making, amending, and terminating subsidy contracts, and with respect to conducting hearings and making determinations antecedent to making, amending, and terminating subsidy contracts, under the provisions of Titles V, VI, and VIII * * *: *Provided further*, That, except as otherwise hereinbefore provided * * * the functions transferred by the provisions of this section 105 (1) shall exclude the making of all determinations and the taking of all actions (other than amending or terminating any subsidy contract), subsequent to entering into any subsidy contract, which are involved in administering such contract: *Provided further*, That actions of the Board in respect of the functions transferred by the provisions of this section 105 (1) shall be final.

* * * * *

Sec. 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, and ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper.

DISCUSSION

By Plan 21, the functions under sections 211 (a) and 211 (b) were assigned exclusively to the Secretary of Commerce rather than to the Board. Message from the President of the United States, H. Doc. 526, 81st Cong., 2d sess.; hearings before Committee on Expenditures in the Executive Departments on S. Res. 265, 81st Cong., 2d sess. ("the congressional hearings"), pp. 35-36, 53, 65, 151. Those functions were vested in the Secretary of Commerce² in keeping with his position as adviser to the President on matters of national transportation policy,³ to be exercised in consonance with the general maritime policy laid down by Congress in section 101 of the 1936 Act. Appeal from the Administrator's section-211 findings lies only to the Secretary and not to the Board.

² Delegated to the Administrator by Commerce Department Order 117.

³ Congressional hearings, pp. 40, 41.

While the Board has been allocated the functions of making, amending, and terminating subsidy contracts, wherein the Board alone determines the recipients and amounts of awards, it is clear from examination of the congressional hearings that the Board determinations are limited and circumscribed, in effect, by the route patterns and requirements as established by the Administrator.⁴ The Secretary has no power to alter, limit, modify, or review Board determinations made under sections 605 (c) or 601 (a).

The distinction is this: while the Board, after advisory hearings under section 605 (c), determines whether or not that section is a bar to award of subsidy to the applicant, other determinations to be made by the Board under 601 (a) *may* operate as a bar to the award whether or not section 605 (c) is a bar, and the Administrator's findings under section 211 may similarly bar or limit award of subsidy on a particular route. Neither the Board's findings under section 601 (a) nor the Administrator's section-211 determinations affect the Board's section 605 (c) findings; all three findings are necessary independent steps to be taken prior to final award of subsidy by the Board.

Put otherwise, while "the Board alone will determine to whom subsidies shall be granted and will make and amend the subsidy contract,"⁵ such determinations are ineffective unless the Administrator has determined or until the Administrator subsequently determines, under section 211,⁶ that the trade route with which the Board has been concerned in its 605 (c) findings and 601 (a) determinations is essential. While recommendations concerning essential routes may be made to the Administrator by the Board, and section 605 (c) hearings may be held by the Board prior to a section-211 finding, the determination of essentiality must, nevertheless, be made by the Administrator before subsidy may be awarded. *U. S. Lines Co.—Subsidy, Route 8*, 3 F. M. B. 713, 715 (1952); *Grace Line Inc.—Subsidy, Route 4*, 3 F. M. B. 731, 732 (1952).

Conversely, if the Board is unable to make the requisite findings under either sections 601 (a) or 605 (c), it is obliged, by the 1936 Act, to deny an application for subsidy regardless of the Administrator's section-211 findings. Further, in discharging its duties under section 605 (c), where the precise route, the sailing frequencies thereon, or types of vessels to be operated thereon, is in issue in relation to the purposes and policies of the 1936 Act, the Board is obliged to deter-

⁴ Congressional hearings, p. 40.

⁵ Message from the President, *supra*.

⁶ The function under sec. 211 was described by Senator Brewster, at p. 36 of the congressional hearings, as " * * a veto power on the route awards * * *."

mine the issues without regard to the Administrator's section-211 determinations, and the Board's findings are final.⁷ Where the determinations are in conflict, however, no effect may be given to the Board's determinations to the extent they are in excess of the Administrator's section-211 findings unless and until the Administrator, acting on the advice of the Board or on the record compiled in the section-605 (c) proceedings, alters his prior section-211 determination.

While the Maritime Commission, in whom both the policy making and subsidy awarding functions were vested, has affirmed⁸ and revised⁹ prior section-211 determinations in reports issued after section-605 (c) hearings, the Commission on those occasions merely used the record adduced in the 605 (c) proceeding as the basis for reexamining earlier determinations of essentiality, in the same manner as it might have relied on staff memoranda. The same result can presently occur where the Administrator desires to utilize a similar record as the basis for a 211 determination or modification.

The determinations to be made by the Administrator and by the Board under sections 211 and 605 (c), respectively, are essentially different from each other, although the determinations may, as stated, be based on the same information. The section-605 (c) determinations are quasi-judicial in nature and subject to the Administrative Procedure Act. The section-211 determination is purely an *ex parte*¹⁰ exercise of delegated legislative power whereby the Administrator defines, as a matter of national policy, the limits within which the Board may, under the standards of titles I and VI of the 1936 Act, award subsidy to a particular applicant. The section-211 determinations, like the 1936 Act itself, or like congressional limitations in appropriation acts on subsidized sailings, are not relevant in a section-605 (c) proceeding; they are, rather, a legislative limitation on the Board's power to award subsidy. Within that limitation, however, Board determinations relative to making, amending, or terminating subsidy contracts are independently arrived at and are final.

In consonance with the foregoing, we determine that neither the Administrator's determination nor the data upon which it is based will be received in evidence in a section-605 (c) proceeding.

An appropriate order will be entered after resolution of the other issues before us on appeal from the examiners' rulings in these proceedings.

⁷ *American President Lines v. Federal Maritime Board*, 112 F. Supp. 346 (D. C. D. 1953).

⁸ *Am. Sou. African Line, Inc.—Subsidy, S. and E. Africa*, 3 U. S. M. C. 277, 287 (1938).

⁹ *Am. Sou. African Line, Inc.—Subsidy, Route 14*, 3 U. S. M. C. 314, 320 (1947).

¹⁰ See description of Senator Magnuson at 96 Congressional Record 7316.

APPENDIX

SECTION 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

SECTION 601 (a). The Commission is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States * * *

5 F. M. B.

FEDERAL MARITIME BOARD

No. 767

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

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

Submitted January 13, 1956. Decided June 8, 1956

REPORT OF THE BOARD ON PETITION FOR RECONSIDERATION IN PART
BY THE BOARD:

Petitioners, members of the Pacific Coast European Conference ("the conference"), seek reconsideration of our report herein on motions for interim order and related petitions, 4 F. M. B. 696, wherein we found an amendment to a conference tariff rule relating to brokerage to have been effectuated prior to our approval, in violation of section 15 of the Shipping Act, 1916 ("the Act"). Subsequent to issuance of the report we issued an order declaring effectuation of the amendment to the brokerage rule (Amended Rule 21), while unapproved, to be a violation of section 15. The report and order are considered by petitioners to be erroneous since, it is urged, (1) the Board has no statutory right to issue a declaration of unlawfulness, and (2) the decision is based on critical errors of fact and law.

In its first argument the conference states that under section 15 of the Act we are given the right to disapprove agreements on findings specified in section 15, and to approve all other agreements. We have, it is stated, no other powers. The power to issue a declaration of unlawfulness, the conference states, is not included in the statutory language of section 15, and therefore, "since the Board has sought to issue an order and decision in excess of its statutory powers, *both the order and decision are nullities.*" [Emphasis supplied.]

Replies have been filed by Public Counsel, Customs Brokers and Forwarders Association of America, Inc., Pacific Coast Customs and Freight Brokers Association and Los Angeles Customs and Freight Brokers Association, American Union Transport, Inc., and New York Freight Forwarders and Brokers Association, Inc. ("New York Brokers"), the latter party also having filed a cross-petition for reconsideration. All of the replies point to section 5 (d) of the Administrative Procedure Act¹ ("APA") as a complete answer to the first conference contention. The replies further consider that we have properly construed the law in this case. When section 5 (d) was in this manner brought to its attention, the conference, in disregard of our Rules of Practice and Procedure,² filed a reply to the briefs in opposition to its petition. In that reply the conference asserted, in contrast to the position taken in its petition, that it "does not challenge the Board's power to hold, *in a proper proceeding*, that an agreement among common carriers is such as to require approval under Section 15 of the Shipping Act before it may lawfully be carried out." [Emphasis in text.] After conceding that such a decision may be made under our Rule 5 (g) or 5 (i), which deal with show cause and declaratory orders, respectively, the conference states:

We challenge the power of the Board to declare, in a decision in response to an application for an interim order, that any action of respondents is *unlawful* under the Shipping Act. Such a finding may be made only after full hearing in accordance with the requirements of the Administrative Procedure Act and the rules of the Federal Maritime Board. A recommended decision of the trial examiner following a full hearing is essential and that has not been had in this proceeding on the request for an interim order. [Emphasis in original.]

While we do not countenance disregard for our Rules, the gravity of either of the conference's contentions in this instance merits a waiver of the Rules and full consideration of the Board's authority.

The arguments, taken singly or together, constitute an attempt to strip this Board of regulatory authority.

THE PETITION

The petition considers that we exceeded our powers in stating, at page 703 of our report on motions, *supra*, that—

* * * where we become aware of an agreement * * * which may be * * * unapproved * * * within the meaning of section 15, assuming no issues of fact

¹ Section 5 (d) of the APA provides that—

"The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

² Rule 5 (p) provides in part: "A reply to a reply is not permitted." While the New York Brokers filed a cross-petition with its reply, the conference reply did not deal with the matters contained in the cross-petition.

or administrative discretion, we are authorized under section 22* to order the carriers to show cause * * * why the agreement should not be declared to be unlawful as an unapproved agreement within the meaning of the Act. The sanctions which we may then impose are, first, a declaration of unlawfulness of the agreement under section 15 * * *.

In support of its argument, the conference selects the Maritime Commission's decision in *Reliance Motor Car Co. v. Great Lakes Transit Corp.*, 1 U. S. M. C. 794 (1938).³ In that proceeding the Commission rejected complaints verified more than 2 years after the date of alleged injury although filed, in unverified form, in less than 2 years after the proper date, holding that the explicit requirements, in section 22 of the Act, that complaints be both sworn and filed within two years after accrual of the cause of action, are jurisdictional.

The citation of this decision in the petition in support of an argument that we have power, in section-15 matters, only to approve or disapprove agreements between carriers,⁴ is at odds with the conference admission, in its reply, that we may, in a proper case, declare agreements to be unlawful as unapproved under section 15. It is necessarily an assertion, moreover, that the authority granted in section 22, which authorizes us, in proceedings commenced by complaint or upon our own motion, to make such order as we deem proper, is limited by the express authority granted elsewhere in the Act.

If we should accept the above conclusion we would likewise be required to say, in the absence of express terms in the Act, that we have no power to order carriers and other persons subject to the Act to cease and desist from violating sections other than 17,⁵ or to seek an injunction to restrain a practice of a single carrier pending our decision on the merits of the practice.⁶ If our powers are so restricted

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

³ Cited by petitioner as a Shipping Board report.

⁴ The conference overlooks another power included in the statutory language of section 15, i. e., the power to modify agreements. An order to modify an agreement necessarily includes a disapproval of that agreement in part, a declaration that effectuation of the part disapproved will be thenceforth unlawful, and a requirement that the parties to the agreement thereafter cease and desist from effectuation of that which has been disapproved. Our authority to require modification of agreements has been upheld by the courts in *Atlantic & Gulf/West Coast, Etc. v. United States*, 94 F. Supp. 138 (S. D. N. Y. 1950); *Pacific Westbound Conference v. United States*, 94 F. Supp. 649 (N. D. Calif. 1950).

⁵ Section 17 specifically authorizes issuance of "an order that the carrier shall discontinue demanding * * * any * * * unjustly discriminatory or prejudicial rate, fare, or charge."

⁶ In *West India Fruit & Steamship Co. v. Seatrain Lines*, 170 F. 2d 775 (2d Cir. 1948), petition for certiorari dismissed, 336 U. S. 908, the Court of Appeals upheld the power of a District Court to issue an injunction in a matter wherein the Maritime Commission intervened as a party plaintiff. The Act does not expressly authorize this agency

there is no logical basis for asserting that we have exclusive primary jurisdiction over violations of the Act.⁷

The argument is unsound, however. The powers granted to us by the Act are broad.⁸ It is inconceivable that Congress would have granted antitrust law immunity to agreements between carriers which might, in the absence of such immunity, offend those laws, and yet have denied the agency charged with supervision over those agreements the power to protect the public by declaring a given agreement to be unlawful, as unapproved, and/or by requiring the carriers to cease and desist from effectuating the agreement prior to approval or after disapproval.⁹ None of these powers is specified in the Act, yet each has been vested implicitly in us as necessary to the "effective government supervision"¹⁰ contemplated by the Act. Section 22 of the Act, in permitting us to make such order as we deem proper, gives us that authority. In our report on motions, *supra*, at page 704, we stated:

The question of our authority to suspend amended Rule 21 during the pendency of proceedings in Docket 767 requires little discussion. Briefly, we considered this Board to be without authority, express or implied, to suspend or stay approved or unapproved agreements between carriers. * * * In the present case we are not authorized to order the conference to cease and desist from applying amended Rule 21 either prior or subsequent to a determination of the status of the rule under section 15 of the Act. [Emphasis supplied.]

Since that report, a realization of the full import of *U. S. Nav. Co. v. Cunard S. S. Co.*, *supra*, compels us to reverse the foregoing lan-

to petition for an injunction or intervene as plaintiff in a carrier's petition for an injunction prior to issuance of an order capable of being enforced by the courts. It is noted that in our brief opposing a petition for writ of certiorari in that proceeding, we urged the Supreme Court that the necessity and propriety of such an agency action "was foreshadowed in *State of California et al. v. United States et al.*, 320 U. S. 577, in which case this Court said:

"Finding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, [] within the general framework of the Shipping Act, fashion the tools for so doing."

"Not only 'may' but 'must.' As stated elsewhere in the opinion the Commission is 'charged by law with the duty to do so.'"

⁷ See *United States Nav. Co. v. Cunard S. S. Co.*, 50 F. 2d 83, 91 (2d Cir. 1931): "[The Shipping Board] has exclusive jurisdiction here, because of the nature of the questions involved and the broad powers given to it under the act." [Emphasis supplied.]

⁸ See footnote 7.

⁹ Cf. *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, 487:

"* * * it reasonably cannot be thought that Congress intended to strip the board of its primary original jurisdiction to consider such an agreement and 'disapprove, cancel, or modify' it, because of a failure of the contracting parties to file it as § 15 requires. A contention to that effect is clearly out of harmony with the fundamental purposes of the act and specifically with the provision of § 22 authorizing the board to investigate any violation of the act upon complaint or upon its own motion and make such order as it deems proper."

¹⁰ 4 Alexander Report (H. Doc. 805, 63d Cong., 2d sess., 1914).

guage of our report insofar as it disclaims the power to issue cease and desist orders, or the equivalent, the power to stay an unapproved agreement.¹¹ In that case a petition for an injunction was filed under the Clayton Act to restrain the respondents from engaging in concerted acts both within the scope of condemnation of the Sherman and Clayton Acts and also within the apparent prohibition of the Act. The acts complained of resulted from an agreement between common carriers unfiled with and unapproved by the Shipping Board. The bill was dismissed by the District Court as stating matters within the exclusive primary jurisdiction of the Shipping Board. On review, the Court of Appeals considered the most important question presented to be whether the antitrust law immunity granted to agreements between carriers in section 15 of the Act is limited to those agreements which have been approved under that section. The court then stated, at page 89:

It is said that the foregoing clause leaves a private suitor free to seek *an injunctive remedy* under the Clayton Act so long as the agreement has not been filed and approved. * * * *The Shipping Act complete provides remedies for all the alleged wrongs* * * *. [Emphasis supplied.]

At page 90 the court stated:

The Shipping Board may determine whether any agreement such as is described in the bill has actually been made, and, if it has, may order it filed and require the parties to cease from acting under it unless and until it is approved.

In holding that actions concerning unapproved as well as approved agreements are within the exclusive primary jurisdiction of the Shipping Board, the court appeared to have been influenced greatly by the injunctive power over unapproved agreements it considered to be vested in the Shipping Board. In the court's view, the Act provides remedies as complete¹² as those available to private suitors under the antitrust laws. On review the Supreme Court stated:¹³

* * * If there be a failure to file an agreement as required by § 15, *the board, as in the case of other violations of the act, is fully authorized* by § 22, *supra*, to afford relief upon complaint or upon its own motion. [Emphasis supplied.]

The Supreme Court's equation of section 15 with other sections of the Act, in relation to the Board's powers under section 22, is particularly significant since the courts have uniformly upheld our power, under other sections, to issue cease and desist orders. *State of Cali-*

¹¹ In view of the explicit prerequisites to disapproval under section 15 of the Act, and since a stay of an approved agreement is tantamount to a disapproval for the duration of the stay, it is clear, as stated in our report on motions, *supra*, that we have no power to suspend or stay an approved agreement.

¹² Described in *River Plate & Brazil Conf. v. Pressed Steel Car Co.*, 227 F. 2d 60 (2d Cir. 1955), as "virtually coextensive with those under the anti-trust laws" (p. 63).

¹³ P. 486.

fornia v. United States, 46 F. Supp. 474 (N. D. Calif. 1942), *affd.* 320 U. S. 577 (1944); *Booth S. S. Co. v. United States*, 29 F. Supp. 221 (S. D. N. Y. 1939); *Isthmian S. S. Co. v. United States*, 53 F. 2d 251 (S. D. N. Y. 1931).

It is clear, then, that we have (1) power to issue cease and desist orders in the event of violation of section 15 of the Act, and (2) power to issue declarations of unlawfulness of agreements under section 15.¹⁴ The latter power is necessarily implicit in the authority to issue a cease and desist order under section 15, and is explicitly contained in section 5 (d) of the APA. We accordingly will modify our report on motions, *supra*, by elimination of the words "or unapproved" in the above-quoted language and the words "or an unapproved" appearing in the ultimate paragraph of the report. We will further eliminate that language of the foregoing quotation commencing at "In the present case" and continuing to the end of the foregoing quotation from page 704 of the report.

As a second ground for reconsideration, the petition asserts that our report on motions, *supra*, is based on critical errors of law and fact, arising principally from our interpretation of *Isbrandtsen Co. v. United States*, 211 F. 2d 51 (D. C. Cir. 1954), cert. denied sub nom. *Japan-Atlantic & Gulf Conference et al. v. United States et al.*, 347 U. S. 990 (1954). Our view, that the *Isbrandtsen* case provided a standard for distinguishing between routine and nonroutine agreements between carriers, is not only incorrect, it is urged, but an "unwarranted abandonment by the Board of its primary jurisdiction to interpret section 15 of the Shipping Act." It is the conference view that the Court of Appeals held that we cannot approve an agreement among common carriers without a hearing, such approval being based on the specific findings enumerated in section 15. It was not the Court of Appeals but the Board itself, it is stated, which determined that an agreement to use dual rates requires specific section-15 approval.

We recommend to the conference a rereading and analysis of the cited decision. Briefly, the court, under the Hobbs Act,¹⁵ reviewed a Board order which found, *inter alia*, that a proposed dual-rate system was not in violation of the Act. The court reversed the primary agency decision on its legal merits, finding the dual-rate system to be unapproved under section 15. The court rejected, *for that case*, the scope of authority argument, finding that a prior Board approval of a basic conference agreement to set joint rates did not operate as approval of a later agreement to institute dual rates. The court held,

¹⁴ See Attorney General's Manual on the APA, at p. 59, where the relationship between the power to issue declaratory orders and cease and desist authority is discussed.

¹⁵ 5 U. S. C. A. 1032.

in spite of a contrary finding in the Board order under appeal, that the latter agreement violated section 15 since it introduced an entirely new scheme of rate combination and discrimination not embodied in the basic conference agreement, and requiring separate approval.

In our report on motions *supra*, we accurately applied the *Isbrandtsen* yardstick in holding that an agreement to boycott a broker who solicits for a competitor is not encompassed within the approval of an agreement to make uniform rules and regulations concerning brokerage. The lack of Board approval of the new agreement being admitted, and the secondary effect of the new agreement on competitors as well as brokers being apparent on the face of the agreement, we decided the matter, as did the court in *Isbrandtsen*, as a matter of law or its equivalent, a matter free from genuine issues of material fact. Our decision, it is stated, is inconsistent with our proposal to set a rule-making proceeding for the guidance of conferences. We see no inconsistency. The rule-making proceeding has been proposed as a guide, as complete as may be possible, to the type of agreements which requires specific approval, in order to eliminate any confusion, genuine or spurious, as to filing requirements and in order to avoid recurrence of proceedings of this kind. The proceeding is designed to assist carriers to meet the burden of filing copies or memoranda of agreements,¹⁸ which has been imposed on them by section 15 of the Act.

A third point raised in the petition is specious. It is contended that a discrepancy between the report and the order issued thereunder makes compliance an impossibility. The discrepancy, it is stated, is the reference in the report to "amended Rule 21" and the reference in the order to the "amendment to Rule 21." It is clear from the report, however, that that which is called, in the report, "amended Rule 21," by way of short definition, is the amendment to the Rule. Further, while the petition indicates that compliance is impossible prior to clarification of the discrepancy, we note that the conference has been careful to suspend the amendment to the Rule.

THE REPLY

In its "reply," the conference asserts that we have violated our Rules and the APA (and, we assume, section 23 of the Act as well) by denying it a hearing on the question of whether the amendment to Rule 21 is unlawful as an unapproved agreement within the meaning of section 15. Such a hearing has been held. The conference was given notice that that issue would be decided after oral argument thereon; oral argument was held, at which counsel for the confer-

¹⁸ *Section 15 Inquiry*, 1 U. S. S. B. 121, 125 (1927).

ence appeared. As stated at page 703 in our report on motions, *supra*, "oral argument on such questions affords a full opportunity to be heard, within the meaning of section 23 of the Act."

CROSS-PETITION

The New York Brokers (1) seek reconsideration of a statement in the report on motions, *supra*, which, it is argued, construes the amendment to Rule 21 as a routine agreement; and (2) requests action aimed at collection of the penalties provided in section 15. Both requests are denied; (1) it is obvious that we have considered the amendment to Rule 21 to be an unapproved section-15 agreement as a matter of law, and (2) an action aimed at collection of section-15 civil penalties is one between the Government and the offending carriers. The remedy of persons other than the Government, in the event of injury resulting from violation of section 15, is an action for reparation commenced under sections 15 and 22.

CONCLUSION

The conference petition and the cross petition of the New York Brokers for reconsideration of our report on motions, *supra*, are denied. Of our own motion, however, under the authority of section 25 of the Act, we modify our report on motions, *supra*, by the elimination of the words "or unapproved" appearing on page 704, the words "or an unapproved" appearing in the ultimate paragraph, and the sentence "In the present case we are not authorized to order the conference to cease and desist from applying amended Rule 21 either prior or subsequent to a determination of the status of the rule under section 15 of the Act," appearing at page 704 of the report.

Since the conference in its petition is of the view that our report on motions, *supra*, and the order issued thereunder are nullities, we will, in addition to the modification hereinabove set out, require the conference to cease and desist from carrying out the amendment to Rule 21, from which the conference has a statutory right to judicial review. In the event of violation of our order, we will (1) apply to a court of competent jurisdiction to enforce obedience thereto, (2) commence a civil action to collect the penalties provided in section 15 of the Act, and (3) commence action to cancel the basic conference agreement.

An appropriate order will be entered.

Chairman MORSE concurring in result:

I agree with the majority that this petition for reconsideration should be dismissed. I disagree, however, with the reasoning ex-

pressed by the majority in arriving at that result. In considering the arguments of the conference that a declaration of unlawfulness under section 15 is beyond the express authority of the Board, the majority equated such a power with cease and desist authority under section 22, considering both powers to be necessarily implicit in the authority under section 22 to "make such order as [the Board] deems proper."

The analogy is inept. We do not have cease and desist authority under section 15. Our power to issue a declaration of unlawfulness as a matter of law is expressed in the Act as tantamount to and implicit in our power to disapprove agreements which are in violation of the Act. Whether we call a given order a "declaratory order" or whether we say it constitutes an order disapproving an agreement is a play on words. Here there was an actual and existing controversy. We were not functioning within a vacuum. The effect of our decision was to order, as a matter of law, that the agreement was disapproved. In my opinion, we clearly have that jurisdiction under section 15, and our authority was properly exercised.

The power to issue a cease and desist order is clearly distinguishable and one which requires specific congressional delegation. Such delegation is contained in section 17 of the Act. It is not contained in sections 14, 15, or 16 of the Act. In view of the specific inclusion of such power in one section, I necessarily conclude that comparable power has been denied the Board under sections wherein the power is not similarly expressly granted. See my concurring opinion in *Mitsui S. S. Co. Ltd. v. Anglo Canadian Shipping Co., Ltd.*, 5 F. M. B. 74.

5 F. M. B.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 8th day of June A. D. 1956

No. 767

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

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

These matters being at issue on petitions for reconsideration in part of an order of the Board issued herein on the 20th day of December 1955, and full consideration of the matters and things involved having been given, and the Board on the date hereof having made and entered of record a report stating its conclusions and decision on said petitions, which report is hereby referred to and made a part hereof;

It is ordered, That the petitions for reconsideration be, and they are hereby, denied; and

It is further ordered, That the report of the Board issued on the 30th day of November 1955 and made a part of the aforesaid order of the 20th day of December 1955 be, and it is hereby, modified in accordance with the report of the Board on the date hereof; and

It is further ordered, That petitioner Pacific Coast European Conference and its members as named in the Appendix cease and desist from effectuating any or all of the provisions of the October 5, 1954, amendment to Rule 21 of the Pacific Coast European Conference Tariff No. 12.

By the Board.

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

APPENDIX

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

FEDERAL MARITIME BOARD

No. 764

MITSUI STEAMSHIP COMPANY, LTD.

v.

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

No. 773

AMERICAN POTASH & CHEMICAL CORPORATION ET AL.

v.

AMERICAN PRESIDENT LINES, LTD., ET AL.

Submitted May 15, 1956. Decided June 8, 1956

Interpretation of Pacific Coast European Conference Shippers' Rate Agreement as including all goods of contract signatories sold for shipment in the conference trade, whether sold f. o. b., f. a. s., c. i. f., or c. and f. basis, found to be a new agreement between carriers, effectuated in violation of section 15 of the Shipping Act, 1916. Conference and its members ordered to cease and desist from the violation.

The foregoing interpretation not found to have resulted in violation of sections 14, 16, 17, or 18 of the Act.

Alan F. Wohlstetter and *Ernest H. Land* for complainant Mitsui Steamship Co., Ltd.

Martin A. Meyer, Jr., for complainants American Potash & Chemical Corp. and Three Elephant Borax Corp.

Leonard G. James and *Robert D. Mackenzie* for respondents.

Leroy F. Fuller and *Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

This is a consolidated proceeding involving complaints filed by Mitsui Steamship Co., Ltd., ("Mitsui"), and by American Potash & Chemical Corp. and its subsidiary Three Elephant Borax Corp. (col-

lectively "American Potash") against the member lines of Pacific Coast European Conference (the "conference"), alleging violations of the Shipping Act, 1916 ("the Act").

In its complaint, as amended, Mitsui alleges that it is a citizen of Japan and a common carrier by water between Pacific coast ports of the United States and ports of the United Kingdom and Continental Europe; that each of the respondents is engaged as a common carrier by water in the same trade; that the conference, pursuant to Agreement F. M. B. No. 5200, has established an exclusive-patronage contract/noncontract dual-rate system; that foreign buyers and consignees of goods purchased in the United States on an f. o. b. or f. a. s. basis desired to exercise their customary rights to designate the carrier in such purchases, and desired to ship via Mitsui; that the conference, by the use of unfair, coercive, discriminatory, and illegal practices, deprived those foreign consignees of their rights to ship via Mitsui, and in coercing the consignees, who were not signatories to exclusive-patronage contracts, to ship exclusively on conference lines, violated their natural and legal rights to designate the carrier when they are obligated to pay the freight; and that these actions of the conference are in violation of sections 14, Third, 15, 16, and 17 of the Act. Reparation is requested to the extent damages are proven.

The American Potash complaint, as amended, alleges that complainants are engaged in the manufacture and sale of various chemicals, including boron products, which are exported from Pacific coast ports to the United Kingdom and continental Europe; that each of the conference member lines is a common carrier by water from Pacific coast ports to the United Kingdom and continental Europe; that the conference, pursuant to Agreement F. M. B. No. 5200, has established an exclusive-patronage contract/noncontract dual-rate system; that complainants are each signatories to Shippers' Rate Agreements and are entitled to be charged the lower contract rate for their shipments; that the conference unlawfully terminated complainants' right to contract rates effective October 15, 1954, and on April 1, 1955, gave notice of termination of complainants' Shippers' Rate Agreements, to be effective as of the close of business on May 31, 1955; that since October 15, 1954, the conference members have wrongfully and unlawfully charged complainants the higher noncontract rate while charging their competitors the lower contract rate; and that these actions of the conference have violated sections 15, 16, 17, and 18 of the Act. Reparation is requested to the extent that damages may be proven.

After hearings held between May 9 and May 14, 1955, a recommended decision was issued in which the examiner found, in Docket No. 764, that Mitsui had failed to show that the conference lines have coerced buyers and consignees to ship goods exclusively on conference vessels in violation of sections 14, Third, 15, 16, and 17 of the Act. The examiner further recommended that an oral motion to dismiss made jointly by complainant and respondents in Docket No. 773, based on satisfaction of the complaint, be granted. Exceptions to the recommended decision have been filed and oral argument has been heard.

ISSUES

The focal point of this proceeding is the conference interpretation of its form of exclusive-patronage contract, or shippers' agreement, as requiring signatories thereto to ship via conference vessels all goods supplied by them for shipment in this trade whether the goods are sold on an f. o. b., f. a. s., c. i. f., or c. and f. basis,¹ whether or not the receiver of the goods is a signatory to the Shippers' Rate Agreement. The issues which result are as follows:

(a) Is the conference interpretation such a new agreement or modification of an agreement between carriers within the meaning of section 15 of the Act as to require Board approval under that section?

(b) Is the interpretation, as a matter of law, correct? Put otherwise, is an American exporter in any or every instance the "shipper" of goods which have been sold on an f. o. b. or f. a. s. basis?

(c) Has the conference interpretation resulted in violation of sections 14, Third, 15, 16, or 17 of the Act?

The facts are the following:

The conference is a voluntary association of 24 common carrier steamship lines operating under the authority of Agreement F. M. B. No. 5200 (basic agreement), initially approved, under section 15 of the Act, on May 26, 1937. Conference vessels operate in the trade from United States and Canadian Pacific coast ports to Great Britain, Northern Ireland, Ireland, continental Europe, Baltic Scandinavian, and Mediterranean Sea ports.

The conference has established and employs an exclusive-patronage contract/noncontract freight-rate system (dual-rate system). Under that system, two levels of freight rates are established, the lower to be applicable to cargoes of those shippers who agree to patronize con-

¹ F. O. B.—free on board; f. a. s.—free alongside; c. i. f.—cost, insurance, freight; c. and f.—cost and freight.

ference lines exclusively, the higher to be applicable to the cargoes of all other shippers. The form of agreement between the conference carriers and the signatory shippers is called a Shippers' Rate Agreement. Insofar as is pertinent to the present disputes, the conference's current Shippers' Rate Agreement provides:

1. In consideration of the mutual covenants herein contained and the contract rates as shown in the applicable tariff of the

PACIFIC COAST EUROPEAN CONFERENCE

hereinafter called the Conference, the Shipper agrees to offer or cause to be offered for transportation on vessels of the Carrier from Pacific Coast ports of the United States and Canada to ports of call in Great Britain, Northern Ireland, Ireland, Continental Europe, Scandinavia, and French Morocco and on the Mediterranean Sea and other seas bordering thereon (except the Black Sea) *all of its shipments* by water on which said contract rates are applicable. The contract rates, and the rules, regulations and conditions applicable thereto, as shown in the applicable Conference tariff, shall govern to the ports of destination as set forth in said tariff.

This agreement covers *all export shipments of the Shipper* (excluding shipments via Intercoastal vessels) to aforesaid countries moving via any Pacific Coast port of the United States or Canada. All such shipments shall be tendered to the Carriers for their vessels which may load at any Pacific Coast port of the United States or Canada and are scheduled to sail to any ports of call in the aforesaid countries. Failure to so tender any such shipments to the Carriers or shipment of them by vessels other than those of the Carriers shall constitute a violation of this agreement. In agreeing to so confine the carriage of *its (their) shipments* to the vessels of the Carriers the Shipper hereby promises and declares it is the intent and purpose to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or subsidiaries.

2. If, at any time, the Shipper shall make any shipment or shipments in violation of any provision of this Agreement, the Shipper shall pay liquidated damages to the Conference in lieu of actual damages which would be difficult or impracticable to determine. Such liquidated damages shall be paid in the amount of freight *which the Shipper would have paid* had such shipment or shipments moved via a Conference Carrier computed at the contract rate or rates currently in effect. Failure of the Shipper to pay liquidated damages within thirty (30) days after the receipt of notice from the Conference that such liquidated damages are due and payable shall be cause for the Conference to terminate the Shipper's right to the contract rates until the Shipper pays to the Conference the amount due. In the event the Shipper violates this contract more than once in any period of twelve (12) months, the Conference may cancel this contract by serving written notice of such cancellation upon the Shipper and notifying the Federal Maritime Board of such action. If the contract is cancelled for violation thereof as provided herein, the Conference may refuse to enter into a new contract with the Shipper until any unpaid liquidated damages due to the Conference have been paid in full.

In order that the Conference may determine the existence or non-existence of a violation hereof, the Shipper shall, upon request, furnish to the Conference

full and complete information with respect to any shipment or shipments made by such Shipper in the trade covered by this Agreement. [Emphasis supplied.]

Mitsui is a common carrier by water engaged in the transportation of merchandise between Pacific coast ports of the United States and ports of the United Kingdom and continental Europe. While Mitsui is a member of many American and foreign steamship conferences, it was not, at the close of hearings in these proceedings,² a member of this conference. Its vessels do not call regularly at all of the loading and discharging ports served collectively by the conference, do not provide refrigerated service, and are longer in transit, because of calls at New York, than the bulk of the conference lines. Two sailings per month are provided by it in this trade.

Mitsui's European agents regularly solicit consignees in the Pacific coast-European trade, none of whom are signatory to the conference Shippers' Rate Agreement.

Prior to Mitsui's entry into this trade in September 1953, the conference had no independent liner competition. During this period European consignees did not customarily control the routing of cargo movements. Since Mitsui's entry, however, European receivers have asserted the right to select the ocean carrier of goods bought on f. o. b. or f. a. s. basis.

Prior to World War II, most of the goods shipped in this trade had been sold under c. i. f. terms. In the postwar period, however, f. o. b. sales increased because of the buyer's ability, under such a sale, to pay freight in his own currency rather than in American dollars. Presently, the majority of transactions are on an f. o. b. or f. a. s. basis.

During 1954 the conference notified 10 signatories to its Shippers' Rate Agreement³ that the conference had information indicating shipment of cargoes via Mitsui in violation of the agreement. In the letters or telegrams of notification the conference requested information concerning the shipments involved, and warned the signatories that liquidated damages would be demanded in the event of failure to furnish the requested information. The conference chairman could not recall the specific information, the type of information, or the source of the information on which he acted in sending the notices to shippers. Further, he used no standards or guides in determining

² On February 1, 1956, Mitsui was admitted to this conference, conditioned upon its withdrawal from this and other proceedings against the conference. Determination of the legality of the condition is presently pending in Docket No. 792.

³ American Potash & Chemical Corp.; Associated Metals & Minerals Corp.; Brandeis Goldschmidt & Co., Inc.; California By-Products Corp.; H. Muehlstein & Co., Inc.; Kaufman Trading Corp.; Miles Metals Corp.; Pacific Coast Borax Co.; Sinason-Teicher Inter American Grain Corp.; South American Minerals & Merchandise Corp.

whether action should be taken against a signatory, nor has the conference prescribed the type of evidence which is required in such circumstances.

All of the notified exporters in reply to the conference either denied shipping via Mitsui or advised the conference that the shipments had moved via Mitsui at the request and under the control of the European buyer. No further action was taken against five of the notified exporters, although some action may or may not be taken in the future. Five other shippers, however, admitted supplying cargoes which moved via Mitsui but denied having control of the movement. Those exporters received closer attention from the conference. A fuller discussion of these exporters and their relationships with the conference follows:

(a) *American Potash*, a manufacturer of borate and other chemical products, was advised by the conference that a shipment f. o. b. Los Angeles via Mitsui to an A. G. Schering had constituted an evasion or subterfuge in violation of the Shippers' Rate Agreement in view of the fact that Schering was, in the view of the conference, an "intermediary or subsidiary" of American Potash within the meaning of Article 2 of the agreement. The accusation was vigorously denied by American Potash, which maintained that its only alternative would have been to refuse to make the sale. Thereafter, as a result of this shipment, rights to contract rates were denied to American Potash as of October 15, 1954, and to Three Elephant Borax Corp., its subsidiary, as of October 28, 1954. The companies were assessed non-contract rates from the specified dates until approximately March 1, 1955.

The market for borate is highly competitive. The competition for European sales is principally among producers in this country, with only 5-10 percent of borate sold in Europe originating in countries other than the United States. During the period when American Potash was assessed noncontract rates on its shipments in this trade, it absorbed the difference between contract and noncontract rates in order to meet the competition of other producers. Because of these absorptions no sales were lost.

(b) *Pacific Coast Borax Co.* ("Pacific"), another manufacturer of borate products, in reply to the conference, produced evidence that its shipment questioned by the conference was in fact delivered to and shipped by the buyer's agent in this country, the sale having been made on "f. a. s. Los Angeles Harbor" terms. Pacific stated that, in shipping under such terms, it had been guided by a letter of advice addressed to it by the conference on May 13, 1949, wherein it was stated:

Counsel for the Conference has advised us that you wish to have for the records of Pacific Coast Borax Company, a written confirmation of the oral opinion given to you by Conference counsel with respect to the validity of the shipments by non-Conference lines when the cargoes in question are purchased on f. a. s. terms.

It is the opinion of our attorneys that the shippers rate agreement employed by this Conference is not violated by a shipper who has sold goods to a foreign importer on f. a. s. terms whereby title to the goods is taken by the importer at ship's side or prior thereto and the goods are shipped by a non-Conference line in the name of the importer with the contract shipper's name not appearing on any shipping documents in connection with the shipments. It is the opinion of the Conference attorneys that *under such circumstances the contract shipper is not in fact the shipper of the cargo, but that the shipper is the foreign importer* who, if not bound by a shippers rate agreement with this Conference, is not required to ship via Conference lines. The fact that the shipper would, as agent for the foreign importer, obtain the export license for the foreign importer, would not, in the opinion of the Conference attorneys, affect the status of the shipment as being made by the foreign importer and not by the contract shipper. [Emphasis supplied.]

The conference replied by demanding liquidated damages for violation of the Shippers' Rate Agreement.

The 1949 letter was explained by the conference as applying only to shipments to the Joint Export Import Agency, a Government agency, and not to commercial shipments. By letter of March 16, 1955, however, the conference offered to waive the liquidated damages assessed if Pacific would concur in the conference interpretation of the Shippers' Rate Agreement as requiring exporters to ship via conference vessels all goods sold for export, regardless of the terms of sale. The conference affirmed by wire of March 18, 1955, that this interpretation would apply to sales made f. o. b. seller's inland plant. Although the conference had threatened to terminate Pacific's right to contract rates unless liquidated damages were paid on or before January 31, 1955, no such action was taken against Pacific.

(c) *Kaufman Trading Corp.* ("Kaufman") advised the conference that a shipment which had moved via Mitsui had been under the control of the foreign buyer. When threatened with assessment of liquidated damages, however, Kaufman agreed to apply to future shipments the conference interpretation of the Shipper's Rate Agreement. Damages have not been assessed against Kaufman, and contract rates have not been denied it.

(d) *Sinason-Teicher Inter American Grain Corp.* ("Sinason") advised the conference in October 1953 that it was obligated by European buyers to ship via nonconference vessels. Nearly a year later, the conference demanded of Sinason payment of liquidated damages

for a shipment which moved via a nonconference vessel. Sinason's right to contract rates was thereafter cancelled.

The conference chairman stated that rights to contract rates have not been terminated nor have liquidated damages been assessed against any shipper because of *f. o. b. shipments via nonconference carrier*. He stated that he had no knowledge of whether Sinason's shipment in question moved *f. o. b.*, *f. a. s.*, *c. and f.*, or *c. i. f.* In view of Sinason's representation that the buyer obligated it to book a shipment via Mitsui, however, the chairman admitted that the shipment probably was not *c. and f.* or *c. i. f.*

(e) *South American Minerals & Merchandise Corp.* ("Samin-corp") advised the conference that it had sent shipments forward via Mitsui in accordance with specific instructions of the buyers. The conference assessed liquidated damages on the shipments, however, and terminated Samincorp's right to contract rates on November 29, 1954. While the record does not conclusively establish the fact, it is most probable that the Samincorp goods which moved via Mitsui had been sold on *f. a. s.* or *f. o. b.* terms in view of Samincorp's vigorous arguments, in correspondence with the conference, that an exporter cannot select the carrying vessel on an *f. a. s.* sale.

In early March 1955, the conference, by letter, advised 15 borate shippers of its interpretation of the Shippers' Rate Agreement as applying to all export shipments of contract signatories, regardless of terms of sale. The shippers were requested to indicate concurrence in the conference interpretation by signing and returning the letter before April 1, 1955, or to expect cancellation of the Shippers' Rate Agreement. Stauffer Chemical Co. ("Stauffer") and seven others concurred in the interpretation.

As a result of conference action taken at a meeting on April 1, 1955 (Ex. No. 11), the conference sent notice of termination of the Shippers' Rate Agreement to Pacific and to American Potash, effective in 60 days; established a moratorium on claims for liquidated damages from those shippers, effective until June 1, 1955; restored the right of American Potash to contract rates retroactive to February 1, 1955; established a moratorium regarding conditions in the March 16 letters addressed to other borate shippers who had not yet concurred; and offered Stauffer an opportunity to withdraw their acceptance of the conference's March 16 letter. Stauffer subsequently withdrew its concurrence with the conference letter of March 16, and no notice of termination of the Shippers' Rate Agreement has been sent to any of the other 13 borate shippers.

During the course of the hearings, American Potash and the conference submitted a Dismissal with Prejudice with an attached letter

dated May 10, 1955, confirming an agreement whereunder the conference restored the right of American Potash and its subsidiary, Three Elephant Borax, to contract rates retroactive to October 15 and October 28, 1954. The conference further agreed to a moratorium on claims for liquidated damages for a 90-day period after May 31, 1955, and agreed to restore to American Potash the difference between contract rates and noncontract rates which had been charged subsequent to October 1954. For its part, American Potash agreed to attempt to persuade foreign buyers to surrender the power to make bookings.

By letter of May 11, 1955, a similar moratorium was established on claims against Pacific. Likewise, a similar moratorium was extended to Stauffer and to other borate shippers for the same period. No moratorium was extended to shippers of products other than borate.

Despite American Potash's agreement with the conference, that company has not changed its interpretation of the Shippers' Rate Agreement and does not know what it would do to attempt to persuade foreign buyers to ship via conference vessels. The company would not refuse to sell to a foreign buyer who insisted on routing shipments via a nonconference vessel. In any event, an American Potash witness anticipated that at the termination of the period of the moratorium the conference would again be "at loggerheads" over the proper legal construction of the Shippers' Rate Agreement.

American Potash's interpretation of the Shippers' Rate Agreement, more fully stated, is as follows: American Potash considers that title to goods sold on an f. o. b. or f. a. s. basis passes to the buyer on delivery to the vessel or alongside the vessel, that the buyer has the right to designate the method by which he wants to have the goods shipped, and that, accordingly, such shipments are not included in the coverage of the Shippers' Rate Agreement. On such shipments American Potash appears on the ocean bill of lading as agent for the buyer, who is the shipper on such transactions, and the existence or nonexistence of a letter of credit as the method of payment for the goods does not affect the buyer's status as shipper. American Potash asserts, however, that the terms f. o. b. and f. a. s. do not determine who *will* select the carrier but merely who *has the right to select*. For this reason, American Potash considers that the buyer's failure to select the carrier gives the exporter the right to select. Under such circumstances, American Potash maintains, the exporter is entitled to receive contract rates on f. o. b. and f. a. s. shipments, as indeed American Potash has in the past, prior to Mitsui's entry into this trade. On f. o. b. or f. a. s. shipments in which the buyer did not exercise a right to select the carrier, and to which contract rates were applied, American Potash

appeared as shipper on the ocean bill of lading, but the buyer paid the ocean freight to the carrier.

Stauffer interprets the Shippers' Rate Agreement in much the same manner. Briefly, Stauffer believes that an f. o. b. or f. a. s. buyer has the right to make the booking on a vessel of his solicitation. If the buyer does not exercise his right—or put otherwise—in the absence of a specific agreement as to the routing of cargo, the seller may designate the carrier. Most of Stauffer's sales are made on an f. o. b. vessel or f. a. s. basis. While payment is usually made after arrival of the goods in Europe, Stauffer does not believe that it has a lien on the goods in the event of nonpayment since it considers that title to the goods has passed to the buyer on delivery to the dock or to the vessel. While goods sold on an f. o. b. basis have moved via Mitsui vessels on the instructions of buyers, Stauffer has never been denied the contract rate on its shipments via conference vessels. In February 1955, Stauffer was given a notice of cancellation of its Shippers' Rate Agreement, but the notice was subsequently withdrawn.

The testimony of other shipper witnesses presented by Mitsui was in general agreement with the American Potash and Stauffer position. Five shipper witnesses presented by the conference testified generally that they considered f. o. b. and f. a. s. shipments to be included within the terms of the Shippers' Rate Agreement. Of these, one stated that he had made no f. o. b. or f. a. s. shipments in the Pacific coast European trade. Three others have not been requested to ship via Mitsui and, in fact, could not since Mitsui does not provide reefer service in this trade, does not regularly serve all of the ports of shipment, and does not serve all of the ports of discharge. Libby-McNeill & Libby, a shipper of canned goods, does make some shipments on an f. o. b. basis and has been requested by buyers to ship via nonconference lines. Buyers have always acquiesced, however, in the insistence of Libby-McNeill & Libby that the goods move via conference vessels.

The conference takes the position that its Shippers' Rate Agreement applies to all shipments, regardless of the terms of sale, and that if a signatory shipper enters into any arrangement with the foreign buyer which permits the foreign buyer to direct cargo to move on a non-conference vessel, the signatory shipper violates the agreement. The conference chairman stated that if a foreign buyer insisted that he had the right, under the terms of an f. o. b. or f. a. s. sale, to direct the routing via nonconference vessel, the signatory shipper, in order to comply with the terms of the Shippers' Rate Agreement, could not deliver to the nonconference vessel, and that if the buyer insisted on his right, compliance with the agreement would require the seller to

refuse to make the sale. It is the conference's position that a sale f. o. b. inland plant in the United States, where the foreign buyer or his forwarder handles the inland transportation and ships via non-conference line, would amount to a violation of the agreement by a signatory seller, if the seller knew that the goods would be shipped abroad. The mere fact that an f. o. b. or f. a. s. shipment moved via a nonconference line would amount to an evasion or a subterfuge within the meaning of the agreement. The record is silent on the question whether, prior to the entry of Mitsui in this trade in 1953, the conference had ever advised shippers of this interpretation.

In f. o. b. and f. a. s. transactions in this trade, the freight is normally paid collect by the foreign consignee, and the payment for the goods is made in varying ways—by letter of credit, sight draft and invoice, open account, or prepayment. Payment for the goods may actually be received by the seller before, during, or after carriage of the cargo.

In the Revised American Foreign Trade Definitions, it is considered the duty of the buyer in f. o. b., f. a. s. transactions, and of the seller in c. i. f. transactions, to provide and pay for ocean transportation. In comments on all f. o. b. terms the definitions provide:

6. Under f. o. b. terms, excepting "f. o. b. (named inland point in country of importation)," the obligation to obtain ocean freight space, and marine and war risk insurance, rests with the buyer. Despite this obligation on the part of the buyer, in many trades the seller obtains the ocean freight space, and marine and war risk insurance, and provides for shipment on behalf of the buyer. Hence, seller and buyer must have an understanding as to whether the buyer will obtain the ocean freight space, and marine and war risk insurance, as is his obligation, or whether the seller agrees to do this for the buyer.

While a similar comment is made on f. a. s. terms, no variation of duty on c. i. f. terms is suggested in the definitions. No witness to these proceedings disagreed with the matter set out in the definitions and comments thereto. All of the witnesses agreed on the desirability of uniform rates in the trade, and no witness opposed a dual-rate system in the trade. A number of witnesses testified that in this trade, on f. o. b. shipments, the seller is requested to obtain and does obtain shipping space on behalf of the buyer.

DISCUSSION

In *Contract Rates—Japan/Atlantic-Gulf Freight. Conf.*, 4 F. M. B. 706, the Board was required to determine the lawfulness of a provision in an agreement between carriers which would require signatories of exclusive-patronage contracts to ship via vessels of conference lines all of the shipments made directly or indirectly by the

signatory, whether made on c. i. f., c. and f., f. o. b., ex-godown or other terms. On the evidence there presented, we disapproved of the provision, stating at page 740:

* * * as drafted, the receiver under the f. o. b., f. a. s. shipments may obtain contract rates as long as he patronizes exclusively conference vessels, but once he ships nonconference he may not thereafter receive contract rates. This provision is objectionable because such a receiver obtains the benefits of contract rates without signing a shipper contract whereas all other nonsigners are charged the full noncontract tariff rates; unlike treatment therefore is being accorded nonsigners. Such f. o. b. receiver should receive contract rates only if he is a contract signatory.

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

Consistent with that language, we ordered (January 10, 1956) "that said contract system shall not apply to shipments which are made on an f. o. b., f. a. s., or ex-godown basis unless the person, whether seller or buyer, named as shipper in the ocean bill of lading, is a contract signatory * * *"

Following the foregoing determination we ordered, in another dual-rate proceeding, *Secretary of Agriculture v. N. Atlantic Cont'l Frt. Conf.*, 5 F. B. M. 20, that the particular dual-rate system therein considered "shall not apply to shipments which are made on an f. o. b. or f. a. s. basis unless the person, whether seller or buyer, named in good faith as shipper in the ocean bill of lading, is a contract signatory * * *"

In these proceedings, among other issues, we are called upon to determine whether the conference Shippers' Rate Agreement contemplates exclusive shipment via conference vessels of goods sold by contract signatories on an f. o. b. or f. a. s.⁴ basis as well as exclusive

⁴ Throughout the hearing the terms f. o. b. and f. a. s. were not distinguished other than by the fact that in the former type of sale the price includes delivery on board a vessel, while in the latter the price includes only delivery alongside. It was the testimony of the

shipment of goods sold on a c. i. f. or c. and f. basis. To this end we consider a discussion of the incidents of the terms to be in order.

At the outset, it should be noted that, in the absence of evidence of an intention to the contrary, the beneficial interest in goods and the risk of loss thereof passes to the buyer on delivery of the goods to the carrier in c. i. f.⁵ shipments as well as in f. o. b. port-of-loading shipments.⁶ From the viewpoint of beneficial interest and risk of loss, then, it is not accurate to state that c. i. f. shipments are shipments of the seller and f. o. b. shipments are shipments of the buyer. Recognition of the contrasting nature of these types of sale in other respects, however, enables us ultimately to distinguish between them on that basis.

In a true c. i. f. contract, the full property in goods does not pass to the buyer nor is there the complete delivery contemplated by the contract until tender of the requisite documents.⁷ For this reason, c. i. f. sales have been considered sales of documents relating to goods rather than sales of goods.⁸ The c. i. f. contract is fulfilled by delivery of the documents, and in the event of failure to deliver an essential document, the seller will be in default.⁹ A tender of proper

conference chairman that an f. a. s. sale was not otherwise "essentially different from the f. o. b." The terms, unless otherwise appearing from the context, will hereinafter be treated as synonymous for the purpose of this report.

⁵ *Thames & Mersey Ins. Co. v. United States*, 237 U. S. 19, 26 (1915); *Warner Bros. & Co. v. Israel*, 101 F. 2d 59 (2d Cir. 1939); *Mec et al. v. McNider*, 109 N. Y. 500 (1888); *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F. 2d 399, 402 (2d Cir. 1945).

⁶ *Nelson Bros. Coal Co. v. Pcrryman-Burns Coal Co.*, 48 F. 2d 99 (2d Cir. 1931); *Higgins v. California Prune & Apricot Growers*, 16 F. 2d 190 (2d Cir. 1926); *Ingles v. Stock*, 5 Asp. 422, 424 (1885).

⁷ *Warner Bros. & Co. v. Israel*, *supra*; *Rand v. Morse*, 289 F. 339, 342 (8th Cir. 1923); *Harper v. Hochstein*, 278 F. 102 (2d Cir. 1921); *Smyth v. Bailey*, 45 Com. Cas. 292 (1940); *Karberg v. Blythe*, (1915) 2 K. B. 379; *Ireland v. Livingston*, 5 H. L. (A. C.) 395 (1871); *Horst v. Biddell*, (1912) A. C. 18, 22: "The answer is that delivery of the bill of lading when the goods are at sea may be treated as delivery of the goods themselves;" *Macondray & Co. v. W. R. Grace & Co.*, 30 F. 2d 647 (9th Cir. 1929); *Groom v. Barber*, (1915) 1 K. B. 316: "It * * * becomes immaterial whether before the date of the tender of the documents the property in the goods was the seller's or buyer's or some third person's. The seller must be in a position to pass the property in the goods by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender, nor need he have obtained any right to deal with the bill of lading until the moment of tender." See also *Cohen v. Wood & Selick*, 212 N. Y. S. 31, 35 (1925); *Dwane v. Weil*, 192 N. Y. S. 393 (1922).

But see the following cases to the effect that title in a c. i. f. sale passes on delivery to the carrier for shipment: *American Sugar Refining Co. v. Page & Shaw*, 16 F. 2d 662 (1st Cir. 1927); *Commissioner of Internal Revenue v. East Coast Oil Co.*, 85 F. 2d 322, 323 (5th Cir. 1936); *Cerro De Pasco Copper Corp. v. Knut Knutsen O. A. S.*, 94 F. Supp. 60 (S. D. N. Y. 1950); *Ruttonjee v. Frame*, 199 N. Y. S. 523 (1923). See also 30 Yale L. J. 91; *Orient Co., Ltd. v. Brekke and Howlid*, 18 Com. Cas. 101 (1913).

⁸ *Karberg v. Blythe*, *supra*; *Finlay v. N. V. Kwik*, etc., 32 Ll. L. Rep. 245, 248 (1928).

⁹ *Hansson v. Homel*, (1922) 2 A. C. 36; *Manbre Saccharin Co. v. Corn Products Co.*, (1919) 1 K. B. 198. Also *Schmoll Fils & Co. v. Scriven*, 19 Ll. L. Rep. 118, 119 (1924); *Shipton, Anderson & Co. v. John Weston & Co.*, 10 Ll. L. Rep. 762, 763 (1922).

documents must be accepted even though the parties are aware that the goods have been lost or destroyed.¹⁰ On the other hand, in the usual f. o. b. port-of-loading sale, and in the absence of a contrary intention, the delivery contemplated by the contract is a delivery of goods at ship's rail at the named point of shipment.¹¹ Title to the goods as well as risk loss and right to possession will, in these circumstances, be presumed to pass to the buyer on delivery of the goods to the carrier¹² rather than on delivery of the bill of lading.

The presumptions arising from the use of the terms under consideration are subordinate, of course, to an expression of a contrary intent by the parties. Whether a reservation of title in the seller is an expression of a contrary intent has frequently been litigated. Under English law the presumption that beneficial ownership passes to the buyer on f. o. b. delivery remains unaffected by retention of a security title in the seller.¹³ While some doubt exists as to whether the same rule obtains in this country,¹⁴ we consider the better view to be that expressed by the English cases and those American cases which are in accord. In c. i. f. sales, however, the beneficial interest and risk of loss clearly pass to the buyer on shipment, regardless of retention of a security title in the seller,¹⁵ unless an intent to the contrary is unmistakably shown.¹⁶

In c. i. f. sales, as hereinabove indicated, the use of the term necessarily indicates that the seller must, *inter alia*, and as a contractual commitment, arrange the contract of affreightment to destination and ship the goods.¹⁷ In f. o. b. sales, it has been said, on the one hand,

¹⁰ *Law and Bonar (Limited) v. British American Tobacco Co.*, 21 Com. Cas. 350 (1916); *Dwane v. Well*, *supra*.

¹¹ *J. & J. Cunningham Limited v. Robert A. Munro & Co., Limited*, 28 Com. Cas. 42, 45 (1922).

¹² *United States v. Andrews*, 207 U. S. 229 (1907); *Higgins v. California Prune & Apricot Growers*, *supra*; *Nelson Bros. Coal Co. v. Ferryman-Burns Coal Co.*, *supra*.

¹³ *Inglis v. Stock*, *supra*.

¹⁴ The property and risk of loss remain in the seller. *L. Lazarus Liquor Co. v. Julius Kessler & Co.*, 269 F. 520 (6th Cir. 1920). Regardless of the form of the bill of lading, the property passes to the buyer on delivery to the carrier. *Rosenberg Bros. & Co. v. F. S. Buffum Co.*, 234 N. Y. 338 (1922); *Pennsylvania R. Co. v. Bank of the U. S.*, 212 N. Y. S. 437 (1925); *Standard Casing Co. v. California Casing Co.*, 233 N. Y. 413 (1922).

This represents the better view: 2 *Williston Sales* (1948), section 280b, pp. 100, 101.

¹⁵ *Harper v. Hocheteln*, *supra*; *Ruttonjee v. Frame*, *supra*.

¹⁶ *Northern Grain Warehouse Co. v. Northwest Trading Co.*, 201 P. 903, 904 (Wash. 1921); *Donbigh, Cowan & Co. v. Atcherly & Co.*, 125 L. T. 388 (1921).

"In some trades there is in use a form which is in terms expressed to be a c. i. f. contract, but also provides (I) for payment on loaded weights; (II) for payment as to any goods arriving damaged with an allowance; and (III) for the contract to be void as to any portion shipped but not arriving. Except in name this is not a c. i. f. contract." *Scrutton on Charterparties*, 16th Ed., footnote (n) at p. 201. See also *Cundill v. A. W. Milhouser Corporation*, 257 N. Y. 416 (1931).

¹⁷ *A. Klipstein & Co. v. Dilizian*, 273 F. 473 (2d Cir. 1921); *Warner v. Israel*, *supra*; *Seaver v. Lindsay Light Co.*, 182 N. Y. S. 30, 33 (1920); *American Sugar Refining Co. v. Page & Shaw*, *supra*; *Karberg v. Blythe*, *supra*; *Carver's Carriage of Goods by Sea*, Ninth Ed., p. 746 and cases cited.

that the *prima facie* effect of the phrase f. o. b. is that the buyer must select the carrier;¹⁸ on the other hand, it has been held that each case must rely upon its own facts in determining which party to a sale has the duty to secure transportation.¹⁹ Still other decisions find the buyer to be under a duty to furnish or designate a carrier in f. o. b. sales.²⁰ The apparent conflict is readily reconciled. On this point, Williston states (Williston, *supra*, p. 96) :

Where goods are to be transported by private conveyance, as on a chartered ship, it is an obvious duty of the buyer to provide the ship, if by the terms of the contract the seller is merely to deliver goods on board a vessel at the point of shipment (footnote omitted). When, however, the goods are to be shipped by a common carrier, the assumption seems unwarranted that either party undertakes that the carrier shall be either able or willing to perform its normal functions. The contract is made on the mutual assumption that the carrier will perform these functions. It is indulging in fiction to say, as some cases do, that the carrier is the agent of the buyer. There is no such agency until the carrier accepts the shipment. *It is assumed by both parties that the carrier will be willing to become the agent or bailee for the buyer* (footnote omitted). [Emphasis supplied.]

Obviously, where common rather than private carriage is contemplated, the parties to a sale may agree, consistent with the presumption of delivery arising from the use of the term f. o. b., that either buyer or seller may select the carrying vessel. But since the goods are presumptively delivered to the buyer at ship's rail, it presumptively is the buyer who has the right to designate the bailee. Accordingly, although the right to select may be delegated to the seller, if the seller does not maintain a security title to the goods the selection of a carrier in an f. o. b. shipment²¹ is made on behalf of the buyer and the shipment is therefore the shipment of the buyer. Consistently, the buyer should appear as shipper on the ocean bill of lading.

From the foregoing analysis, as well as from the testimony of all witnesses in these proceedings, and from the generally accepted definition of the term as set forth in the Revised American Foreign Trade Definitions, we find that c. i. f. shipments are the shipments of the seller since (1) final delivery under the contract does not occur until

¹⁸ *Davis v. Alpha Portland Cement Co.*, 134 Fed. 274 (E. D. Pa. 1905) and cases cited. See also *United States Smelting Co. v. American Galvanizing Co.*, 236 F. 596, 598 (E. D. Pa. 1916); *Evanston Elevator & Coal Co. v. Castner*, 133 Fed. 409, 410, 411 (Cir. III.); *Baltimore & L. Ry. Co. v. Steel Rail Supply Co.*, 123 Fed. 655, 658 (3d Cir. 1903).

¹⁹ *Hecht v. Alfaro*, 4 F. 2d 255 (N. D. Calif. 1925); *Mathieu v. George A. Moore & Co.*, 4 F. 2d 251 (N. D. Calif. 1925). See also *H. Hackfeld & Co. v. Castle*, 198 P. 1041 (Calif. 1921).

²⁰ *Carvel v. John Kellys*, 53 N. Y. S. 2d 640 (1945); *Brandt v. Morris*, (1947) 2 K. B. 784; *Douglas Fir Exploitation & Export Co. v. Comyn*, 279 F. 203 (9th Cir. 1923).

²¹ Assuming that the delivery of goods contemplated by the sales contract is delivery to the carrier.

tender of the requisite documents made *after* the goods are received for shipment by the ocean carrier; (2) the seller must arrange and procure the contract of affreightment as a condition to the contract of sales; and (3) the parties contract with reference to general commercial custom, which, as stated, contemplates a duty in the seller to ship in c. i. f. contracts of sale. This is true, of course, whether or not the seller ships to his own order or to the order of a third party.

Unlike c. i. f. sales, where the arrangement of the contract of affreightment by the seller is an integral part of the agreement, without which the contractual delivery is incomplete, in f. o. b. sales the selection of the carrier is, as hereinabove indicated, a matter of variable intention between buyer and seller. The difference between the types of sale has been acknowledged by the witnesses in these proceedings and is recognized in the Revised American Foreign Trade Definitions.

From our examination of the law, we consider that the right to designate a carrier on f. o. b. shipments is vested in that person having the right to possession of the goods at the time of shipment, since it is he who has the power to designate a bailee of the goods. Where a contrary intention is not specified, the right to possession of goods passes to the buyer on delivery to the carrier.²² Reservation of a security title in the seller, however, is an expression of a contrary intention which entitles the seller to appear as shipper in the ocean bill of lading. In circumstances where the seller ships to his own order or to the order of a third party as security against payment by the buyer, it is the seller who has the right to possession and, consequently, the right to designate a carrier. While there is, as hereinabove stated, some doubt as to the effect of a security title on risk of loss and right to the goods, there is nevertheless no doubt that a reservation of security title in a seller retains the seller's right to possession of the goods prior to tender of payment.

We consider that the commercial custom of considering f. o. b. and c. i. f. shipments to be those of the buyer and seller, respectively, recognized in the Revised American Foreign Trade Definitions, is derived from an analysis of the rights of the parties similar to our own. It is significant to renote that in the "Comments on All F. O. B. Terms," where the seller obtains the ocean space and marine insurance, he is considered to have acted "for the buyer" and "on behalf of the buyer." Whether the actual selection is made by the buyer or by the

²² 2 Williston, *supra*, p. 98: "As it is a necessary implication in f. o. b. contracts that the buyer is to be at all expense in regard to the goods after the time when they are delivered free on board, the presumption follows that the property passes to the buyer at that time * * *."

seller in such case, it is nevertheless made for the *buyer*, who is the shipper in such sales, except as herein noted where security title is reserved, and should appear on the ocean bill of lading as such.

Our view of f. o. b. and c. i. f. transactions disposes of the issue as to whether f. o. b. shipments are included in the phrases "all of its shipments" and "all export shipments of the shipper," appearing in Article 1 of the Shippers' Rate Agreement. We find, in consonance with the foregoing, that goods sold by a signatory exporter on an f. o. b. basis are not included within the meaning of the phrase unless the exporter retains a security title to the goods sold.

If further indication were needed, we need only point to the 1949 letter in which the conference stated: "* * * the shippers rate agreement employed by this conference is not violated by a shipper who has sold goods to a foreign importer on f. a. s. terms whereby title to the goods is taken by the importer at ship's side or prior thereto and the goods are shipped by a nonconference line in the name of the importer with the contract shipper's name not appearing on any shipping documents in connection with the shipments. It is the opinion of the conference attorneys that under such circumstances, the contract shipper is not in fact the shipper of the cargo but that the shipper is the foreign importer who, *if not bound by a shippers rate agreement* with this conference, is not required to ship via conference lines." [Emphasis supplied.]

The conference expansion of the letter is not convincing. It is urged that the statement stands as a specific exception to the coverage of the Shippers' Rate Agreement granted only because the "foreign importer" in point was a Government agency. We note, however, that (1) no such qualification appears in the letter, (2) no reason is given for preferential treatment of Government importers vis-a-vis private importers, and (3) no explanation was given for limitation of the preference to those Government agencies not signatory to a Shippers' Rate Agreement. While the letter referred only to f. a. s. shipments, it is, in our opinion, of equal applicability to f. o. b. shipments for reasons previously herein set forth, equating in principle the two types of shipments.

It must be noted that prior to the entry of Mitsui as an independent in this trade, the conference members assessed contract rates on shipments made pursuant to f. o. b. or f. a. s. port-of-shipment sales of contract signatories when control of the routing was left to the seller. This course of conduct is consistent with the conference view that its Shippers' Rate Agreement requires signatories thereto to ship exclusively via conference lines all goods sold for export in the conference

trade. It is also consistent, however, with a conference view that f. o. b., f. a. s. sales of a contract signatory are within the scope of the Shippers' Rate Agreement *only where the buyer delegates to the seller his duty of selecting the carrier*, or only where the seller retains a security title to the goods sold. As found by the examiner, the conference recognizes "possible limited exceptions" to its view "such as (1) Government-controlled shipments, (2) forwarder acting for buyer in certain circumstances, (3) if title passes at ship's side or prior thereto and goods are shipped in name of buyer who is shipper, and (4) where there is complete delivery and transfer of title and the seller didn't know the goods were for export." These "exceptions" implicitly recognize, among other considerations, that the right to select the carrier is dependent upon the right to possession of the goods. Whether or not the buyer delegates his right to select the carrier, the shipment is not entitled to contract rates unless the buyer is a contract signatory. Where a seller retains a security interest in goods sold, of course, the seller has the right to select the carrier and to appear as shipper on the ocean bill of lading. But even if we were to assume *arguendo* that f. o. b. shipments are not those of the buyer, as indicated in our findings, shippers disagree on whether f. o. b., f. a. s. sales are included within the scope of the Shippers' Rate Agreement, and the agreement itself makes no reference to such sales. There has been, therefore, no clear intent expressed by the parties to each Shippers' Rate Agreement as to the coverage of the agreement, and the agreement itself is of no help in the problem. Since it is an elementary principle of construction that a contract must be construed strictly against the drafting party,²³ the Shippers' Rate Agreement here must for this reason also be construed against the conference's contention.

Since the Shippers' Rate Agreement does not specify that f. o. b. and f. a. s. shipments of a signatory must move via conference vessels, since shippers disagree as to whether agreement imposes that obligation, since the custom of the industry, as evidenced by the Revised American Foreign Trade Definitions, contemplates that ordinary f. o. b. and f. a. s. shipments are those of the buyer, since the conference, in a 1949 letter expressed, from all that appears in the letter, a broad opinion to the effect that f. a. s. shipments are not included within the coverage of the Shippers' Rate Agreement, and since the new agreement has a secondary effect on nonsignatory buyers, not the natural and logical result of the agreement as written, we find that the new conference interpretation is an agreement or a modification of an approved agreement between carriers which requires specific

²³ *Grace v. American Central Ins. Co.*, 109 U. S. 278 (1883); *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, 190 F. 2d 817 (3d Cir. 1951).

approval under section 15 of the Act, and which has been effectuated prior to such approval in violation of section 15.²⁴

It is unnecessary for us here to consider whether the new conference interpretation is detrimental to the commerce of the United States. Detriment to the commerce of the United States is a ground for disapproval of a section-15 agreement; we are not called upon to approve or disapprove this agreement in the present proceedings, nor is such action necessary in view of our finding that the conference interpretation is a new agreement or a modification of an agreement between carriers and has been effectuated in violation of section 15 of the Act. Under the authority of sections 15 and 22 of the Act, we will require the conference and its members to cease and desist from effectuation of the new interpretation until such time as the agreement has been approved under section 15.

We do not here state that we may never approve of a Shippers' Rate Agreement which requires its signatories to ship exclusively via conference vessels all goods sold by such signatories for export in the trade served by the conference, whether sold on f. o. b., f. a. s., c. i. f., or c. and f. terms. Such an agreement, like the dual-rate system itself, would depend, for approval, on the competitive need shown to exist, in keeping, however, with the command of the court in *Isbrandtsen Co. v. United States*, 211 F. 2d 51, 57 (D. C. Cir. 1954) that a concerted conduct approved by us and thus exempted from the antitrust laws must not offend the spirit of those laws any more than is necessary to serve the purposes of the Act.²⁵ Our view that approval of such an agreement depends upon the evidence adduced has recently received support from the District Court for the Northern District of California in *United States v. Borax Consolidated, Ltd., et al.*, 141 F. Supp. 397 (D. Cal. 1955). There a petition, brought to restrain borax producers and the conference from causing customers of the borax producers to ship borax products exclusively on conference vessels, was dismissed on the ground that the subject matter is within the exclusive primary jurisdiction of this Board.

Like the examiner, we cannot find on the evidence before us that the new conference interpretation has resulted in violation of sections

²⁴ While the Act places the burden of filing for our approval those agreements or modifications of agreements between carriers which fall within the standards of section 15, we have in Docket No. 767 proposed a rule-making proceeding to assist the carriers in meeting that burden by defining, *inter alia*, insofar as they may be capable of enumeration, those nonroutine agreements which require separate section 15 approval.

²⁵ While the court in *Isbrandtsen* continued to state that, until approval, the agreement is subject to the operation of the antitrust laws, that view is opposed to the weight of authority. See *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474 (1932); *Far East Conf. v. United States*, 342 U. S. 570 (1952); *American Union Transport v. River Plate & Brazil Conf.*, 126 F. Supp. 91 (S. D. N. Y. 1954), affirmed 222 F. 2d 369 (2d Cir. 1955).

14, 16, or 17 of the Act. No injury to any exporter has been shown to have resulted from conference termination of the exporter's right to contract rates in circumstances where a shipment of the exporter has moved via nonconference vessel under f. o. b. or f. a. s. terms. American Potash was, for a period, denied contract rates, but the right to such rates has been restored and a refund of excess charges over contract rates has been agreed to. While the Samincorp and Sinason Teicher Shippers' Rate Agreement have been terminated, complainants have not established that the movements which resulted in termination of those Shippers' Rate Agreement had been made on f. o. b. or f. a. s. terms in circumstances where those companies did not have the right to control the movements.

There is no evidence before us of any actual loss by specific discrimination against Mitsui, nor is there evidence that any foreign consignee has been coerced or prejudiced or has in fact suffered any loss or injury as a result of conference action. Finally, in view of the conference agreement to restore to American Potash the excess of charges over contract rates, we cannot find that unjustly discriminatory rates have been charged by the conference. In view of this satisfaction of the American Potash complaint, we will permit American Potash to withdraw. We will dismiss as unproven all of the charges in Mitsui's complaint except the allegation that the conference interpretation of its Shippers' Rate Agreement has been an effectuation of a new agreement between carriers without our approval, in violation of section 15 of the Act. Although complainants' burden of proof has not been sustained as to whether the conference actions in the Samincorp and Sinason Teicher matters have been in violation of the Act, we will consider the possibility of investigating those matters on our own motion.

An appropriate order will be entered.

Chairman MORSE concurring in result:

Although I arrive at the same result reached by the majority, I disagree with the majority's decision that this Board has power under sections 15 and 22 of the Act to issue cease and desist orders. This agency is one of limited jurisdiction created by statute. We have the authority and jurisdiction granted to us by the Congress. We have no authority or jurisdiction not specifically granted to us or necessarily implied from the general or specific authority. Within the framework of that statutory authority we should exercise our jurisdiction to its fullest extent to carry out the purposes and intent of the various statutes, but we cannot arrogate unto ourselves jurisdiction in excess of that granted to us by statute. The fact that the agency has purported to exercise cease and desist authority in the past does not, in

my mind, justify a continuance where clearly in excess of our statutory jurisdiction.

Other agencies that exercise cease and desist authority do so in reliance on clear and explicit statutory authority.²⁶

Section 17 of the Act specifically grants the authority to require carriers to cease and desist from charging unjustly discriminatory rates. No similar authority is contained in sections 14, 15, or 16. Accordingly, I construe the specific inclusion of the power in section 17 to be a necessary exclusion of similar power under the aforementioned sections 14, 15, and 16.

If the Congress had wanted us to have cease and desist authority generally it would either have omitted any reference to cease and desist authority in section 17, or it would have included cease and desist authority in section 22. The authority in section 22 to "make such order as [the Board] deems proper" does not enable us to exercise unlimited and unrestrained jurisdiction and authority. In my opinion, adequate remedies lie in section 15 and in our right to obtain injunctive relief from the courts.²⁷

²⁶ N. L. R. B., 29 U. S. C., sec. 160 (c); F. C. C., 47 U. S. C., sec. 312 (c); I. C. C., 49 U. S. C., sec. 15 (1); F. T. C., 15 U. S. C., sec. 45 (b); and C. A. B., 49 U. S. C., sec. 642 (c).

²⁷ *West India Fruit & Steamship Co. v. Seatrain Lines*, 170 F. 2d 775 (2d Cir. 1948).
Commission on Organization of Executive Branch of the Government, report to Congress on Legal Services and Procedures, March 1955, Recommendation No. 50 (p. 85).

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 8th day of June A. D. 1956

No. 764

MITSUI STEAMSHIP COMPANY, LTD.

v.

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

No. 773

AMERICAN POTASH & CHEMICAL CORPORATION ET AL.

v.

AMERICAN PRESIDENT LINES, LTD., ET AL.

These matters 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 8th day of June 1956, having made and entered of record a report stating its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof:

It is ordered, That Pacific Coast European Conference and its members, as named in the Appendix, cease and desist from effectuating any interpretation of said conference's Shippers Rate Agreement inconsistent with the interpretation set forth in the report herein; and

It is further ordered, That the complaint in Docket No. 764 be, and it is hereby, dismissed, except as to the charge that the conference's interpretation of its Shippers Rate Agreement constitutes an unapproved agreement in violation of section 15, Shipping Act, 1916; and

It is further ordered, That the complainant in Docket No. 773 be, and it is hereby, permitted to withdraw its complaint.

By the Board.

(Sgd.) A. J. WILLIAMS,

Secretary.

APPENDIX

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

FEDERAL MARITIME BOARD

No. M-67

ISBRANDTSEN COMPANY, INC.—APPLICATION TO CHARTER FIFTEEN
LIBERTY-TYPE, WAR-BUILT, DRY-CARGO VESSELS

REPORT OF THE BOARD

BY THE BOARD:

This proceeding was instituted pursuant to Public Law 591, 81st Congress, upon the application of Isbrandtsen Company, Inc. ("Isbrandtsen"), for the bareboat charter for 1 year of 15 Liberty-type, war-built, dry-cargo vessels for employment in the coal trade from United States ports north of Cape Hatteras to Antwerp, Rotterdam, Terneuzan, or North France (Bordeaux/Dunkirk range).

Hearing was held before an examiner, at which American Tramp Shipowners Association, Inc. ("ATSA"), intervened in opposition to the application. Marine Transport Lines and Marine Navigation Co. intervened as their interests might appear. In his initial decision, the examiner recommended that the Board find and certify to the Secretary of Commerce that the service under consideration is required in the public interest, that such service is not adequately served, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service. Exceptions to the examiner's recommendations were filed by ATSA and by Marine Transport and Marine Navigation.¹ Public Counsel urges the adoption of the examiner's recommendations. Oral argument was not heard. The petition of ATSA to instruct the examiner to reopen the proceeding to receive additional

¹ Counsel for Marine Transport and Marine Navigation advised the examiner at the commencement of the hearing that those companies had filed a teletype application to charter 10 vessels for the same trade, and he requested that the present application and the application of his clients be heard together. The request was denied. The exceptions of these interveners complain that the examiner, in his decision, failed to decide whether the two applications were mutually exclusive. The procedural position of the examiner was correct, hence he was not called upon to reach a formal conclusion in his decision on the issue of mutual exclusivity.

evidence is hereby denied. Our conclusions agree with those of the examiner.

Isbrandtsen executed a charter with Association Technique de l'Importation Charbonnier ("ATIC") on April 27, 1956, to transport coal in the trade mentioned above at the rates of \$11.60 a ton to Belgian and Dutch ports and \$12.10 to French ports, subject to Isbrandtsen's ability to obtain the 15 vessels here sought. ATIC, which is an association of coal importers, supervises for the Government the importation of all coal into France. Isbrandtsen agrees, as to the 15 vessels, to bear the cost of breaking out, reconditioning, and making them ready for sea, with the privilege of refusing any vessel which, in its opinion, would require the expenditure of more than \$150,000. Isbrandtsen also stipulates that the charter hire shall be based upon the floor price, or \$6,806.32, for each vessel per month. Charter for 1 year is requested because of the high amortization entailed by the expenses of breakout, etc.

Public interest.—France is the largest importer of coal in the world, and because of the severe winter of 1955–56, the drop in rainfall, and the lack of snow, a greater quantity of coal is needed during the next year for its economy. The normal importations from Great Britain and Germany have fallen off because of conditions in those countries, and France finds herself dependent to a greater degree upon coal from the United States. For example, whereas France imported slightly over 1 million tons of coal from the United States in 1955, approximately 6 million tons will be needed in 1956.

Being a member of North Atlantic Treaty Organization and Organization for European Economic Cooperation, the welfare of France is extremely vital to that of the United States. The economic stability of France is contingent in great measure upon its ability to obtain coal from the United States. Incidental but nonetheless important is the fact that the mining of coal and its shipment from the United States is advantageous to those industries in various ways.

The vessels under consideration clearly are to be used in a service which is in the public interest.

Adequacy of service.—At the time of hearing the charter market for American-flag vessels was tight. Furthermore, the president of ATSA admitted that owners of such vessels have never been interested in carrying coal, which is a low-paying commodity. Without being too specific, the witness from International Cooperation Administration claimed that there was such a shortage of American-flag vessels that some of his programs had not been announced. The record shows that two of ATIC's regular brokers in New York canvassed the charter

market after the agreement had been made between ATIC and Isbrandtsen, but only four American-flag vessels had been fixed at the time of the hearing. Although owner witnesses alluded to as many as 20 American-flag vessels which were available for charter by ATIC, only 2 of these vessels were definitely offered to ATIC. ATSA's president stated that the owners of the others preferred to have them available to handle cargoes for the United States Government. The two vessels referred to, when originally offered, were subject to the withdrawal of the present application. This condition was removed subsequently. The volume of coal to be transported for ATIC would require more vessels than the 15 here sought and the 20 already mentioned.

The record substantiates the fact that at the time of the hearing the service under consideration was not adequately served by American-flag vessels.

Reasonable conditions and rates.—ATSA's president conceded that a rate of \$11.60 for coal is a very good one, being the equivalent of approximately \$65,000 per month for time charter. Isbrandtsen's cost of operation of chartered Libertys is about \$40,000 per month, exclusive of overhead, leaving a margin of between \$5,000 and \$6,000. Isbrandtsen's witness stated that the operation of a Liberty vessel at a rate less than \$11.60 would be unprofitable for the company.

Upon this record, the privately owned American-flag vessels available to Isbrandtsen for the carriage of ATIC's coal, other than those few which were fixed prior to the hearing or were offered during the hearing at the rate of \$11.60, were not available on reasonable conditions and at reasonable rates.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

1. That the service under consideration is in the public interest;
2. That such service is not adequately served; and
3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

Any charters which may be granted herein should be for the requested period of 12 months, subject to the right of cancellation by the charterer on 15 days' notice, and the right of cancellation by the Government on 15 days' notice after 6 months; basic charter hire should be at a rate not less than 15 percent of the statutory sales price of the vessels chartered; and all breakout, readying, and layup costs

should be for account of applicant. Before any affirmative action is taken on such charters, however, the Maritime Administrator should satisfy himself that conditions which form the basis for these findings continue to exist and warrant the chartering of the vessels here sought.

JUNE 28, 1956.

5 F. M. B.

FEDERAL MARITIME BOARD

No. M-65

POPE & TALBOT, INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY CARGO VESSELS FOR OPERATION IN THE INTERCOASTAL TRADE

No. S-62

PACIFIC ARGENTINE BRAZIL LINE, INC.—APPLICATION UNDER SECTION 805 (A), MERCHANT MARINE ACT, 1936, AS AMENDED, FOR PERMISSION FOR ITS PARENT CORPORATION, POPE & TALBOT, INC., TO OPERATE SUCH CHARTERED VESSELS IN THE INTERCOASTAL TRADE

REPORT OF THE BOARD

BY THE BOARD:

Docket No. M-65 is a proceeding under Public Law 591, 81st Congress, upon the application of Pope & Talbot, Inc., for the bareboat charter of three Government-owned, war-built, dry cargo, Victory-type vessels for operation in the domestic trade between ports on the Pacific and Atlantic coasts of the United States via the Panama Canal, for a period of 12 months. Docket No. S-62 is a proceeding upon the application of Pacific Argentine Brazil Line, Inc., under section 805 (a) of the Merchant Marine Act, 1936, as amended, for permission for its parent corporation, Pope & Talbot, Inc., to operate such chartered vessels in the intercoastal trade.

The Virginia State Ports Authority, The Port of San Diego, the Norfolk Port Authority, Pan Atlantic Steamship Corporation, American Tramp Shipowners Association, Inc., and Luckenbach Steamship Company, Inc., intervened, the two last named in opposition to the application to charter.

Hearing on these applications was held before an examiner on a consolidated record on May 7, 8, 9, and 10, 1956, pursuant to notice in the Federal Register of April 27, 1956. The examiner's decision was

served on May 29, 1956, in which he recommended that the Board should make the statutory findings necessary for the charter and grant the section-805 (a) permission. Exceptions were filed by Pope & Talbot, Inc., Public Counsel, Luckenbach Steamship Company, Inc., and American Tramp Shipowners Association, Inc., and we heard the parties in oral argument on June 20, 1956.

The evidence establishes that for shipments of steel products, printing paper, pneumatic rubber tires and tubes, alcoholic liquor, lumber, canned fruits and vegetables, and dried fruits there is a continuing and growing shortage of cargo space in the intercoastal trade. The factors contributing to this condition are the increasing volume of shipments, reduction of service by Pan Atlantic Steamship Company and by Quaker Line, and discontinuance of all service by American Hawaiian Steamship Company and by Isthmian Steamship Company. The intercoastal service is an integral part of the domestic commerce of the United States and is in the public interest. Its importance has been recognized by the Congress, the Interstate Commerce Commission, the Maritime Administration, and the Board.

Pope & Talbot, Inc., which has been engaged in the intercoastal trade for many years, owns four Victory-type and two C-3-type vessels. One of the C-3 vessels, under charter to States Marine Lines since December 21, 1955, was due for redelivery on the Pacific coast about May 20, 1956, at which time it was to reenter the intercoastal trade. During 1955 several of applicant's ships were chartered on termination of the eastbound intercoastal voyage for operation in foreign trade and redelivered to it at a Pacific coast point. Operating in this manner, applicant completed 30 eastbound sailings and 20 westbound sailings in 1955; in the first quarter of 1956, seven eastbound and four westbound sailings. Steel and steel products are the principal westbound cargoes, loaded at Philadelphia, Baltimore, and Norfolk for discharge at Los Angeles Harbor, San Francisco Bay area, Portland, and Seattle. Service is on a fortnightly frequency and turnaround of 70 days. Space on the westbound sailings is allocated by applicant's New York office to prevent overbooking. The ships are fully loaded and complete discharge alternately at Portland and Seattle, at which points they are placed on the eastbound loading berth. Lumber, constituting about 75 percent of the eastbound carryings in 1955, is loaded at the lumber berths in the Columbia River and Puget Sound areas for discharge at Baltimore, Philadelphia, New York Harbor, Albany, and occasionally north of New York. General cargo, consisting principally of canned goods and dried fruit, is loaded at San Francisco; pig lead at Selby, Calif., for discharge at Deep-

water, N. J., and occasionally bulk magnesite for discharge in the Philadelphia area.

Applicant is constantly receiving requests from the shippers of general cargo for additional eastbound service; all lumber space has been booked through June 1956, and 57 million feet of lumber offered for shipment in May, June, and July have been turned down because of lack of space. The three vessels sought to be chartered are to augment the present service to 45 round voyages annually. Service, on a 9-day frequency, will be from Seattle, and alternately, Portland, and San Francisco Bay area to Baltimore, Albany, and, if sufficient traffic offers, to Norfolk, in the general cargo berth, and to Baltimore, Philadelphia, Brooklyn, Newark, Irvington, and Albany in the lumber route. There will be one so-called combination vessel each month which will lift lumber and general cargo; the remaining 33 voyages will be with full loads of lumber.

Applicant has sought through its New York chartering agent to charter privately owned Victory-type vessels but has been advised that none is available. Two Liberty-type ships were offered for time charter at rates of \$65,000 and \$67,000 per month but were rejected, as operation of these slower ships in applicant's berth service would result in an out-of-pocket loss before any allocation of overhead. One Liberty ship was offered on the Pacific coast at a rate of \$70,000 per month but applicant was not agreeable to negotiating on the basis of that rate. Although members of the American Tramp Shipowners Association, Inc., had been informed by Association circular dated April 26, 1956, that applicant was seeking to charter Victory vessels, applicant had not received through May 8 any offers of any tonnage from any broker or operator.

Of the eight other carriers operating in the intercoastal service only Luckenbach Steamship Company, Inc., opposes granting of the application to charter. Its position is that the trade is now being served by privately owned vessels, and that the interjection of Government-owned vessels on a fundamental basis lower than the cost to the privately owned vessels is unfair competition. Luckenbach does not carry lumber eastbound and does not serve the ports of Norfolk, Baltimore, or Albany. As Philadelphia is the only port served by both applicant and Luckenbach, there is no basis for a finding of unfair competition.

At the hearing applicant stated that if its application to charter be granted it would be agreeable to having the charters contain a requirement that for the duration of the charters those vessels and the four owned vessels be operated solely in the intercoastal trade. American

Tramp Shipowners Association, Inc., insists upon such a condition and numerous others being attached to the charters should the application be granted. These would require a commitment by applicant to purchase vessels to replace the chartered vessels; that it serve all the places to which shipper witnesses desire service; that San Francisco be served on all voyages; that it pay the break-out and lay-up express involved; that the charter rate be the standard 15 percent, with the standard recapture provision; that the charters be subject to cancellation on 15 days' notice by the Government; that the charters should be cancelled when privately owned Liberty ships are offered to applicant at \$59,000 per month, which amount it admits it can afford to pay; and that the Board take such further action as may be necessary to insure that lumber will not be given preference.

Luckenbach asks that if the application be granted that the charters be conditioned upon applicant eliminating Philadelphia from its east-bound and westbound services; that the same privilege of chartering vessels be opened to all carriers in the trade, including Luckenbach; that the charter hire be the full 15 percent of the statutory sales price of the vessels without advantage in respect of break-out items or otherwise; and that the charters be subject to cancellation on 15 days' notice, with opportunity to any interested party at any time to reopen and present new facts deemed important.

Public Counsel's position is that none of applicant's vessels should be permitted to operate in trades other than the intercoastal; that the vessels of Pacific Argentine Brazil Line, Inc., a subsidiary of applicant, should be required to fulfill their commitment on Trade Route 24 or to operate in the intercoastal trade before they are sent offshore in other trades; and that the rate of charter hire should be not less than 15 percent of the unadjusted statutory sales price, or the floor price of the vessels, whichever is higher.

Under date of June 22, 1956, American Tramp Shipowners Association, Inc., informed the Board that applicant had chartered on June 21st one of its vessels, the *Pathfinder*, to the Military Sea Transportation Service for the carriage of coal to Korea, loading expected to begin August 12, 1956. It was urged that this action disqualifies Pope & Talbot as an applicant in this proceeding. Applicant immediately denied this charge for the reason that undisputed testimony of record established that the *Pathfinder* is owned by applicant's subsidiary, Pacific Argentine Brazil Line, Inc., and that for some time that vessel has been chartered in the offshore trade (as in the present MSTs charter), subject to Maritime Administration approval, the profits of which charters are includable in the earnings of Pacific Argentine

Brazil Line, Inc., for purposes of subsidy recapture. Rule 13 (g) of the Rules of Practice and Procedure permits our taking official notice of material facts outside the record, under certain circumstances, and the decision herein will be influenced in part by this new development.

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

1. The intercoastal service under consideration is in the public interest;

2. Such service is not adequately served; and

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

RECOMMENDATIONS

The circumstance of Pope & Talbot, Inc., acquiescing in the action of its subsidiary Pacific Argentine Brazil Line, Inc., in chartering one of its vessels for presumably more lucrative operation in foreign trade impels us to recommend that any charters which may be granted pursuant to the findings herein be limited to not more than two Victory-type dry-cargo vessels, except as hereinafter provided; that the vessel *Pathfinder* be required to be placed in the intercoastal service upon termination of the current charter to Military Sea Transportation Service and to remain in the intercoastal service until the charters of both vessels authorized hereunder are completed, unless prior thereto the *Pathfinder* is again required in the subsidized service of Pacific Argentine Brazil Line, Inc., on Trade Route No. 24, in which event the third vessel applied for may be chartered on the terms and conditions stated herein for the other two vessels, except that the term of the charter period shall be coterminous with the term of the charter for the other two vessels; that the charters of the two Victory-type vessels be for the requested period of 12 months; that the charter hire for such vessels be at a basic rate of 15 percent of the unadjusted statutory sales price of the vessels, or of the floor price, whichever is higher, of which 8½ percent is payable unconditionally and the remaining 6½ percent payable if earned on a cumulative basis; that all break-out, readying, and lay-up expenses incurred be borne by the charterer; that the charters be subject to cancellation by the charterer at any time upon 15 days' notice, and, after a period of six months, upon 15 days' notice by the Maritime Administrator, except that in the event of a national emergency the charters may be cancelled by either party on less than such 15 days' notice. We further recommend that such charters be conditioned upon the chartered vessels and the four

vessels owned by Pope & Talbot, Inc., remaining in the intercoastal trade for the duration of the charter period.

With respect to the application of Pacific Argentine Brazil Line, Inc., for permission for its parent corporation to operate the chartered vessels in the intercoastal trade, we find that such operation will not result in any unfair competition to any person, firm, or corporation operating exclusively in the intercoastal service, or that it would be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended. The Board recommends to the Administrator that written permission to so operate, pursuant to section 805 (a) of the 1936 Act, be granted, and that the Administrator also give written permission, pursuant to section 805 (a) of the Act, to Pacific Argentine Brazil Line, Inc., so that its vessel *Pathfinder* may be operated in the intercoastal service, as recommended herein.

June 28, 1956

5 F. M. B.

FEDERAL MARITIME BOARD

No. M-66

LYKES BROS. STEAMSHIP CO., INC.—APPLICATION TO BAREBOAT
CHARTER FIVE VICTORY VESSELS FOR OPERATION ON TRADE ROUTE
No. 21, SERVICE 2, AND TRADE ROUTE No. 13

REPORT OF THE BOARD

BY THE BOARD:

This proceeding was instituted pursuant to Public Law No. 591, 81st Congress, upon the application of Lykes Bros. Steamship Co., Inc., for the bareboat charter of five Government-owned, Victory-type, dry-cargo vessels for operation for a minimum period of six months on Trade Route No. 21, Service 2, and on Trade Route No. 13, at standard bareboat-charter terms. Pursuant to notice in the Federal Register of May 9, 1956, a hearing was held and oral argument heard, in lieu of briefs, before an examiner on May 28, 1956.

In his initial decision, the examiner recommended that the Board find and certify to the Secretary of Commerce that the service under consideration is required in the public interest, that such service is not adequately served, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

Exceptions were filed by intervener American Tramp Shipowners Association, Inc. ("ATSA"). Waterman Steamship Corporation and Bloomfield Steamship Company intervened but took no position. The Director for Transportation for International Cooperation Administration appeared in favor of the granting of the application to ensure adequacy of service to accommodate and accelerate that agency's foreign-aid program.

The application indicates that the company proposes to charter these vessels to augment the regular service provided by owned vessels on the two trade routes referred to above. It is pointed out in the application, and substantiated at the hearing, that applicant, during the month of March 1956, has been unable to move and declined a substantial volume

of cargo on these two trade routes, and that its 16 vessels on Trade Route No. 21, Service 2, and 12 vessels on Trade Route No. 13 have been sailing outbound substantially full for a period of 6 months prior to the filing of the application.

Public interest. Trade Route No. 21, Service 2, and Trade Route No. 13 have been determined to be essential, and we adopt as our own the findings of the examiner in this respect.¹

Predicated upon these findings, the vessels herein sought to be chartered clearly are to be used in a service which is in the public interest.

Adequacy of service. While testimony offered by applicant's witness indicates that the number of United States-flag sailings from the Gulf to the Mediterranean (Trade Route No. 13) from November 1955 through May 1956 was thirteen fewer than the same period in 1954-1955, and that there was a reduction in applicant's sailings as well as in foreign-flag sailings, this decrease was explained as being caused by adverse weather conditions and several mishaps. This same explanation was offered also with respect to sailings to continental ports on Trade Route No. 21, Service 2. Since May 18, 1956, however, applicant has been forced to decline very substantial amounts of cargo to the Continent and to the Mediterranean, as well as inbound cargo on both trade routes. It was also shown that the new farm bill recently enacted will result in a substantial increase in the movement of cotton, which will probably materialize during August and September 1956. On this point a witness for the American Cotton Shippers Association testified in corroboration of these statements, pointing out that shippers had difficulty in obtaining May and June space and that some shippers are making August and September sales subject to availability of space. In addition to cotton, applicant also anticipates a heavy movement of grain, dairy products, and feeds under the surplus agriculture disposal program.

Applicant has indicated that the vessels here sought will operate at capacity on berth; that limited amounts of weight cargo, such as grain, phosphate, and sulfur will be used as nucleus or filler, and loading will be completed with general cargo. The record amply substantiates that at the time of the hearing the service under consideration was not adequately served by American-flag vessels.

Availability of ships—reasonable rates. According to applicant's witness, efforts were made to obtain fast liner-type vessels for three to

¹ Findings of the examiner: "The routes involved have been determined to be essential, and, with the services thereon, form important arteries for the movement of cotton, sulfur, petroleum, carbon black, phosphate rock, grain and other agricultural products from United States Gulf ports."

five months. This effort was made in February 1956, but the only vessel then available and offered was a Liberty vessel at \$66,000 time charter per month. Applicant considered this to be high. Testimony of a chartering broker was to the effect that during the week of May 20, 1956, the charter rates had risen to \$80,000-plus for C-2's, \$73,000 to \$75,000 for Victories for one and two years, respectively, and \$70,000 for Libertys for 10-12 months, and that a premium would be charged for delivery to the Gulf.

While witness Cocke indicated that applicant might lose a small amount of money on the operation of these vessels at a 15 percent basic charter hire rate, the company was willing to suffer a loss since it felt that it owed a duty to its shippers to furnish adequate service to meet the needs of the trade.

There was no evidence offered by ATSA to rebut the foregoing, and, upon this record, we sustain the view expressed by the examiner that privately owned vessels are not available at reasonable rates for use in the service under consideration at the time of the hearing.

Counsel for ATSA has argued that the requested charters are for the purpose of carrying tramp cargo; that applicant could have chartered privately owned vessels in February at break-even rates; that the charter of Government-owned vessels will have a detrimental effect upon the charter market; and that applicant has not proven the existence of an emergency such as is contemplated by Public Law 591.

We feel that such arguments are without merit. The requested vessels are to be operated in berth services carrying a substantial amount of general cargo, with weight cargo to be used as a nucleus or filler. The evidence shows that the private charter rates offered in February 1956 would result in a loss even if overhead were excluded from voyage expenses. Nor can we agree that the breaking out of Government vessels will have a detrimental effect upon the charter market.

As to the contention that an emergency within the meaning of Public Law 591 does not exist, in our opinion Public Law 591 does not require us to make a finding of emergency as a prerequisite to granting a charter.

On the basis of the facts adduced in the record, we find and certify to the Secretary of Commerce:

1. That the service under consideration is in the public interest;
2. That such service is not adequately served; and
3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

We recommend: (1) that bareboat charters of the five vessels be executed at a basic charter hire of 15 percent of the unadjusted statutory sales price of the vessels, or the floor price, whichever is the higher; (2) that applicant bear all break-out, readying, and lay-up costs incurred on the five chartered vessels; (3) that any charter which may be granted pursuant to the findings in this case be for a minimum period of six months, subject to the right of cancellation by applicant on 15 days' notice at any time, and the right of the Government to cancel on 15 days' notice at any time after the end of such six months' period, except that in the event of a national emergency the charters may be cancelled by either party on less than such 15 days' notice.

JUNE 28, 1956.

5 F. M. B.

FEDERAL MARITIME BOARD

No. M-68

GULF & SOUTH AMERICAN STEAMSHIP CO., INC.—APPLICATION TO
BAREBOAT CHARTER ONE VICTORY VESSEL FOR OPERATION ON TRADE
ROUTE No. 31

REPORT OF THE BOARD

BY THE BOARD:

This proceeding was instituted pursuant to Public Law 591, 81st Congress, upon the application of Gulf & South American Steamship Co., Inc., for the bareboat charter of one Government-owned, Victory-type, dry-cargo vessel for operation for a minimum period of 6 months on Trade Route No. 31. Hearing was held before an examiner on June 7, 1956, pursuant to notice in the Federal Register of May 29, 1956, and was followed by oral argument in lieu of briefs. There was no opposition to the application.

The examiner recommends that the Board find and certify to the Secretary of Commerce that the service under consideration is required in the public interest; that such service is not adequately served; and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service. No exceptions were filed to the recommended decision.

The application sets forth that the applicant is a United States-flag operator serving Trade Route No. 31, and that the vessel, if chartered to applicant, will be used in its regular berth service on the route between United States Gulf ports and the West coast of South America; that the vessel is to augment applicant's fleet of four owned C-2 type vessels operated under an operating-differential subsidy agreement (Contract No. FMB-28) and a Liberty vessel now being time chartered for one round voyage of about 70 days; that no subsidy aid will be requested for the vessel sought to be chartered; that it was unable to charter a suitable privately owned United States-flag vessel at reasonable rates and on reasonable conditions for use in such service; and that an additional vessel is necessary to permit applicant

to maintain its position in Trade Route No. 31 and to carry 50 percent of Public Law 480 and Export Import Bank cargoes which are expected to be offered in the last half of 1956.

Public interest. Trade Route No. 31 has been determined to be an essential foreign trade route, and we adopt as our own the findings of the examiner in this respect. Predicated upon these findings, the vessel herein sought to be chartered clearly is to be used in a service which is in the public interest.

Adequacy of service. The vessel sought to be chartered will augment applicant's operation so as to provide a sailing approximately every 11 days. Although no other United States-flag vessels, either berth or tramp service, serve any portion of Trade Route No. 31, there is foreign-flag competition on the route. At the present time applicant's vessels provide a sailing approximately every 14 days on a 56-day turnaround, serving 6 Gulf ports and 14 ports of call in South America. With the vessel sought to be chartered, the service will be stepped up to approximately one sailing every 11th day.

Applicant has indicated that the use of an additional vessel is necessary to maintain an adequate service on this route due to increased industrial and commercial development on the West coast of South America. There is ample evidence to support this contention. Also, it is expected that within the next 60 days an unusual amount of cargo, consisting principally of heavy lifts, cranes, etc., will take place out of New Orleans, and additional cargoes are expected to result from the opening of a new mine in Chile by the Anaconda Copper interests and the development of nitrate and other commercial plants by interests in Chile. Increased shipments from the United States of certain agricultural products under the provisions of Public Law 480 are anticipated for Bolivia, Peru, and Chile.

Availability of ships—reasonable rates. Late in February 1956 applicant sought, through its charter broker, to secure a Victory or C-2 type vessel but, as none was available, a Liberty ship was chartered, making its first sailing from New Orleans on April 9, 1956. As late as June 4, 1956, the same broker informed applicant that no liner-type vessels would be available for charter for delivery in June, July, or August.

While figures were given by applicant as to the amount it would consider to be reasonable to pay for the charter of a vessel, there is no indication that vessels would be available at such figures. Under the circumstances, we have no difficulty in finding that privately owned American-flag vessels were not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

Applicant has stated that the figures presented in this record are estimated break-even figures for a vessel being delivered in class and ready to go on berth, and it objects to paying for break-out, readying, and lay-up expenses of the vessel in any manner. Public Counsel is of the opinion that the statutory requirements for bareboat charter have been met by applicant but that, in the public interest, the Board should recommend to the Secretary of Commerce that such conditions be incorporated in the charter as will ensure reimbursement to the Government of all costs of breaking out the ship and putting it in class. We agree with Public Counsel as to applicant meeting the statutory requirements for bareboat charter and for a recommendation that applicant should reimburse the Government for the cost of breaking out, readying, and laying up the vessel.

On the basis of the facts adduced in the record, we find and certify to the Secretary of Commerce:

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

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

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

We recommend:

(1) That the bareboat charter of the one Victory vessel be executed at a basic charter hire rate of 15 percent of the unadjusted statutory sales price of the vessel, or of the floor price, whichever is the higher;

(2) That applicant bear all break-out, readying, and lay-up costs incurred on the chartered vessel; and

(3) That any charter which may be granted pursuant to the findings in this case be for a minimum period of 6 months, subject to the right of cancellation by applicant on 15 days' notice at any time, and the right of the Government to cancel on 15 days' notice at any time after the 6 months' period, except that in the event of a national emergency the charter may be cancelled by either party on less than such 15 days' notice.

JUNE 28, 1956.

5 F. M. B.

FEDERAL MARITIME BOARD

No. M-69

MARINE TRANSPORT LINES, INC., ET AL.—APPLICATIONS TO BAREBOAT
CHARTER GOVERNMENT-OWNED VESSELS

REPORT OF THE BOARD

BY THE BOARD:

This is a proceeding under Public Law 591 of the 81st Congress upon the application of Marine Transport Lines, Inc., and Marine Navigation Company, Inc., for the bareboat charter of 10 Government-owned, war-built, Liberty or Victory-type dry-cargo vessels for approximately one year for use in world-wide trading for the carriage of International Cooperation Administration ("ICA") and other Government-sponsored cargoes and such other cargoes as may be approved by the Maritime Administration. In view of the pending request of ICA for the break-out of 30 ships, preferably of the Victory type, for general agency operation, the notice of hearing was extended to permit any other interested operator to file an application to bareboat charter Government-owned, war-built, dry-cargo ships for the transportation of the type of cargoes mentioned, because it was felt that the ICA request for ships should be fulfilled through the medium of chartering. Notice of hearing was published in the Federal Register of June 7, 1956, subsequent to which 13 other companies filed applications for the charter of 77 vessels¹ for similar use.

Because of an emergency situation appearing to exist, the Board rather than a hearing examiner heard the evidence on June 14, 15, and 19, and heard oral argument in lieu of briefs. Exceptions will not be filed to this report.

The increasing volume of coal exports to Europe is regarded by ICA as the main factor in bringing about a scarcity of tonnage since last

¹ A. H. Bull Steamship Co., 10 Liberty or Victory ships; Grainfleet Steamship Company, Inc., 2 Libertys or Victories; Olympic Steamship Co., Inc., 4 Victories; Shepard Steamship Co., 5 Libertys or Victories; West Coast Steamship Company, 5 Libertys; American Export Lines, Inc., 10 Libertys or Victories; Luckenbach Steamship Company, Inc., 5 Libertys or Victories; Coastwise Line, 5 Libertys or Victories; Pacific Far East Line, Inc., 5 Victories; Seas Shipping Company, Inc.; 5 Victories; American President Lines, Ltd., 5 Libertys or Victories; Pacific Atlantic Steamship Company, 5 Victories; and American Defense Line, Inc., 1 Liberty.

fall. The Coal Committee of the Organization of European Economic Cooperation estimates that for the current calendar year the coal exports to Europe will amount to 40 million tons, compared with approximately 26 million tons for the previous year. Temporary factors creating this situation arose out of the severe winter of 1955-1956 and consequent high coal consumption for heating, requiring a rebuilding of resources. The long range factors are the consequence of the high rate of industrial activity developing in Europe with the consequent increase in power consumption and increased transportation requirements. Present estimates are that due to this increased industrial activity, European coal requirements for the immediate future will continue to increase. Accordingly, this trade has absorbed a considerable portion of the available tramp vessels of the world fleets because of attractive freight rates and quick turnarounds.

Due to accelerated activity in the sale of surplus agricultural commodities because of the severe cold and floods of the past winter in several areas throughout the world, current and potential programs for the movement of ICA and Public Law 480 cargoes, and cargoes financed by cooperating countries, exceed the capacity of available privately owned vessels, foreign or American flag, on reasonable conditions and at reasonable rates, for use in the services where they are required. Early in May 1956 the shortage of tonnage became so acute as to seriously retard the movement of commodities, particularly grain, in United States-sponsored programs, with the result that ICA requested the Maritime Administration to reactivate 30 Victory ships, in increments of 10, to meet Government requirements for space.

ICA does not buy or transport cargoes but finances the commercial procurement and ocean transportation of cargoes which are considered essential by ICA countries within the various programs which have been approved by the ICA. Other cargoes move under Public Law 480, and some are financed by the countries themselves. Most transactions are consummated through private channels of trade and are therefore not directly controlled by ICA.

Apart from the Department of Defense, ICA, General Services Administration ("GSA"), and the Department of Agriculture are the principal shipping agencies of the Government. Premised on their experience during fiscal year 1956, these agencies project the following as the complete summary of their estimated requirements for fiscal year 1957:

ICA estimates that vessel space will be required for a total of 3.6 million tons of export cargoes consisting of grain (including a backlog of 300,000 tons of 1956 grain), coal, fertilizer, sugar, lumber, and scrap, of which 1.2 million tons are expected to move on berth ships and 2.4

million tons on tramp ships to destinations in four general areas, Europe, the Near East, the Far East, and Latin America. Approximately one-half of the backlog of 300,000 tons of grain has been booked for shipment. Of the total, 1,035,000 tons are expected to move during the first quarter, 930,000 tons in the second, 935,000 tons in the third, and 700,000 tons in the fourth.

The Department of Agriculture estimates that during fiscal year 1957 its various programs such as Public Law 480, the International Wheat Agreement, and barter programs will require tramp ship space totaling 11,480,000 long tons and 8,028,000 tons in berth vessels. These export commodities include grain, rice, cotton, tobacco, dairy products, fats and oils, dry beans, processed dairy products, and other processed commodities. Exports under the International Wheat Agreement and the barter programs are not subject to the 50/50 cargo preference law.

Anticipated imports of strategic materials under the barter programs of the Department of Agriculture during fiscal 1957 are estimated at 1,430,000 tons, all of which are covered by outstanding contracts; the programs of GSA aggregate 1,292,000 tons of such materials. Some of these materials are in relatively minor quantities and will move in berth ships, but for the larger programs, such as one calling for 208,000 tons of bauxite, tramp tonnage will be used. Definite coverage for the bauxite program from the Caribbean area has been concluded, contractual obligations having been made with an operator of foreign-flag tramp vessels. The foregoing calculations are subject to revision, dependent upon congressional appropriations, delays in releasing monies by the Bureau of the Budget, or delays in country program determinations. They are not true portrayals of the future programs because enabling legislation has not yet been enacted, but they represent the anticipated movement of cargoes to the indicated areas.

Approximately 6 million tons of the Department of Agriculture exports on tramp vessels and 3.6 million tons of those estimated for berth services are subject to the statutory provisions that require at least 50 percent of the movement to be on American-flag vessels. To attain that objective in respect of these Government-sponsored cargoes, privately owned American-flag vessels of necessity would transport 4.8 million tons thereof.

The combined exports of coal and grain from the United States will approximate 4 million tons per month, of which ICA finances less than 10 percent, or about 3.5 to 4 million tons per year. That agency has estimated that the total exports of coal and grain in May of 1956 would amount to 4.3 million tons; in June, 4.7 million tons; in July, 4.7 million tons; in August, 4.7 million tons; in September, 4.5 million

tons; in October, 4.4 million tons; in November, 4.4 million tons; and in December, 4.5 million tons. None of these estimates have been made available to tramp owners as they are not public information. ICA estimates that a total of 20 vessels per month, American flag and foreign, will be used throughout 1956, and that the American-flag carriers will get about 10 to 15 cargoes per month.

The ICA representative stated that bids would be opened on June 25 for the transportation of 110,000 tons of grain for Pakistan in June and July, and that vessels could be offered to the Pakistan Embassy or to the grain houses for fixtures. Two other spot cargoes in the Gulf were mentioned as being available for the second half of June. The vessels sought to be broken out of lay-up were to be used for the movement of grain to Turkey and India as well as to Pakistan. ICA had programmed the Pakistan grain last year but the actual authorization was not issued until about ten days before this hearing. There was no notification to the shipping industry of such a contemplated movement as ICA could make no commitment until an agreement had been signed by the United States Government, ICA, and the Pakistan Government. The grain is in the possession of the grain companies and is not available for shipment by them until ICA has financed the transaction. Programs of the Department of Agriculture and GSA are handled in substantially the same way, with the result that there is always a sudden demand for vessel space. Neither the representatives of the shippers nor of the ocean carriers are represented at the meetings of the Interior Agency Committee, which is composed of representatives of the Defense Department, Department of Agriculture, ICA, GSA, Bureau of Public Roads, and Maritime Administration. Another factor affecting the situation is that until the agreement is actually signed information concerning the sale of the commodity is classified information so as not to jeopardize the negotiations. Accordingly, vessel owners, being uninformed of possible movements, do not always have ships at hand for immediate loading.

The Department of Agriculture experienced no difficulty in getting American-flag vessels to carry more than half of the financed cargoes that moved during fiscal year 1956, but for approximately 40 to 50 days prior to this hearing there had been some of minor consequence. All of the anticipated tramp movement in fiscal 1957 of 3,686,000 tons of grain under Public Law 480 will be to countries served by American-flag liner services, and to the knowledge of the Department's representatives there is not now offering any of the cargoes covered by the Department's programs which cannot obtain ocean transportation at reasonable rates. There was at the time of the hearing no cargo known to be available in July for any of the numerous vessels

named to the Inter-Agency Committee, but it is expected that there will be about 700,000 tons of bulk grain to move from the Pacific coast to Japan in the fiscal year 1957.

With respect to the availability of American-flag vessels, most of the 60 to 70 American-flag tramps are presently on short term charters, and in the opinion of the president of American Tramp Shipowners Association, Inc. ("ATSA"), practically all of those vessels would be available to any future projection for carriage of ICA-sponsored cargoes. Assuming that an average voyage would be of about 60 days duration, probably 30 tramp vessels would be available each month during the coming year.

In April and May 1956, ICA approved 40 American-flag vessels, 40 ICA-country-flag vessels, and 31 third-nation-flag vessels. Some American-flag vessels offered at rates in excess of those established by National Shipping Authority ("NSA") have been rejected. Those rates are fixed by NSA as reasonable in relation to vessel operating costs and are regarded by the Inter-Agency Committee as maxima, but as the ship operators have never been informed of the existence of such level they have been unable appropriately to limit their proffers. Not all offerings at higher rates are disapproved, however, 13 such having been accepted in April and 12 in May 1956. Early in June two American-flag vessels were approved and the Agency was informed by ATSA under date of June 12 that 26 other named vessels were seeking cargoes. These were indicated to be available at various times from spot position through August at Atlantic, Gulf, and Pacific coast points. Also, the Inter-Agency Committee had been informed by telegrams of June 7, 8, and 11 from Polarus Steamship Company of 19 additional American-flag vessels that were and would be available to the end of August. Replies from 22 American-flag berth operators to the Board's requests of June 15 for detailed information show that these operators expect to have an aggregate of approximately 2 million tons of additional cargo space available during fiscal year 1957 for Government-sponsored cargoes.

DISCUSSION AND CONCLUSIONS

This record establishes that actual and immediate need by Government agencies for cargo space on American-flag vessels in excess of the capacity of available privately owned vessels has not yet materialized; that all requirements are in terms of estimates and projections; that approximately half of ICA's backlog of 1956 grain has been booked for shipment; that there is not now offering any cargo under programs of the Department of Agriculture that cannot obtain

ocean transportation at reasonable rates; and that the Department of Agriculture knows of no cargo that will be available for movement in July beyond the capacity of available tonnage. The vessel operators have demonstrated that there is no dearth of tramp ships for early employment, and that berth operators will be able to accommodate substantially increased volumes of Government-sponsored cargoes in the ensuing fiscal year. Accordingly, we are unable to make the affirmative finding that privately owned American-flag vessels to the extent required are not available for charter by private operators on reasonable conditions and at reasonable rates for use in the world-wide services under consideration. Under the circumstances, it is unnecessary to comment on the other two statutory issues.

There appears to be a lack of coordination between the Government agencies which control or finance the shipment of cargo and the ship operators, in that the latter are not informed of tonnage to be moved until the cargoes are ready for loading. ICA and the other Government shipping agencies should be in position to give carriers several weeks' notice that ships are desired to be available for certain loading periods. The ship owners have also indicated a reluctance to reveal promptly their availability of ships, which is no doubt in the interest of offering them for the more desirable cargoes and trades. It is obvious that a more cooperative procedure should be established which would benefit all interested parties. We recommend that the agencies and carrier representatives inaugurate such a plan in order that the parties may reach accord respecting both availability of ships and proper rates.

If any Government agency, having given advance notice of definite requirements, advises the Board that it is unable to meet such requirements from privately owned American-flag vessels at reasonable rates and on reasonable conditions, the Board will then immediately reopen this hearing for the purpose of taking additional evidence with respect to such definite requirements and will, if the statutory requirements are shown to have been met, recommend bareboat charters of such Government-owned ships as are necessary to meet requirements to qualified applicants. To the end that this may be accomplished, the present record will be held open.

JULY 9, 1956.

5 F. M. B.

FEDERAL MARITIME BOARD

No. 723

CITY OF PORTLAND, OREGON, ACTING THROUGH ITS THE COMMISSION
OF PUBLIC DOCKS, AND THE PORT OF SEATTLE

v.

PACIFIC WESTBOUND CONFERENCE, AMERICAN-HAWAIIAN STEAMSHIP
COMPANY ET AL.

Submitted May 16, 1956. Decided July 12, 1956

1. Equalization on explosives from du Pont, Washington, to the Philippines found justified on basis of inadequacy of scheduled direct service at time of prior hearing and since.
2. A monthly direct service would be adequate to serve normal needs of shippers of explosives from Puget Sound to the Philippines.
3. Equalization on explosives permitted to meet special needs of shippers when direct sailings unavailable.
4. Pacific Far East Line's past equalization on explosives may have resulted in overpayments; a separate proceeding to be initiated to determine if violations of the Shipping Act, 1916, have occurred.
5. Board's prior report and order modified to accord with above findings.

Additional appearances:

Odell Kominers for respondent Pacific Far East Line, Inc.

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

REPORT OF THE BOARD ON FURTHER HEARING

BY THE BOARD:

In its original decision herein, 4 F. M. B. 664, the Board, after finding that respondent Pacific Far East Line, Inc. ("PFEL"), admitted there was adequate service from Pacific Northwest ports for the shipment of explosives to the Far East, found unlawful PFEL's practice of equalizing rates on such traffic originating in the Northwest and shipped through San Francisco. PFEL, after petition for

reconsideration and stay of the Board's order was denied, filed suit for judicial review in the Court of Appeals for the District of Columbia Circuit. The Court, on January 9, 1956, denied PFEL's motion for interlocutory injunction and for temporary stay or suspension, but granted its motion to adduce additional evidence, and directed the Board—

to take additional evidence in connection with the conclusion of the Board that Pacific Far East Line, Inc., admitted the adequacy of explosive service from the ports of Seattle and Portland * * *.

By order of January 24, 1956, the Board reopened and remanded the proceeding to the examiner to take such additional evidence, and to that end to take—

additional evidence as to the adequacy of service to meet the requirements of shippers of explosives to the Far East from the ports of Seattle and/or Portland, including evidence as to whether the practice of equalization on explosives from areas naturally and geographically tributary to (such) ports is justified.¹

Further hearing was held on February 29 and March 1, 1956. Briefs were filed on March 23 and 27, 1956.

The following is a statement of evidentiary facts, basic facts, and the ultimate findings and conclusions of the chief examiner on further hearing:

Evidentiary facts.—The record on further hearing establishes the following facts:

"1. The principal shipper of explosives from the Northwest to the Philippines is the du Pont Company. Its witness herein, called by PFEL, was U. J. Cook, manager of its San Francisco export office. du Pont manufactures and ships explosives from its plant located on tidewater at du Pont, Washington, near Tacoma. Ninety percent of the shipments are dynamites and accessories such as caps, fuses and detonating devices. The balance are nonexplosives such as wire and blasting agents, including 'nitramon' which is manufactured elsewhere. Normally, explosives and nonexplosives are shipped together. They are used chiefly in the operation of mines, which are vital to Philippine economy.

"2. du Pont ships to approximately 25 receivers at nine island destinations. The Philippine Constabulary limits the amount receivers can store, which is estimated to vary from 15 to 300 tons. The Constabulary requires mining companies to file monthly storage reports and is said to be unwilling to permit discharge of explosives until after

¹ The order also states that the Board may modify its findings of fact, or make new findings, by reason of the additional evidence taken, and may modify or set aside its order.

such reports are filed, approximately the 10th of each month.³ Also, the cost of inventory maintenance limits storage. Therefore, receivers desire to receive small shipments on a relatively frequent basis.

"3. du Pont also ships explosives occasionally to other countries in the Far East, to Hawaii, Alaska, and Central and South America, where it encounters domestic and foreign competition. In the Philippines, which is its principal market, it faces potential competition from Japan and active competition from plants in the San Francisco Bay region, which have a minimum of two PFEL sailings per month available from San Francisco to the Philippines. Witness Cook stressed the importance of satisfactory transportation service in meeting competition, with at least two regular sailings monthly. He testified that his customers specify approximately a 2-week period for delivery 'in early April, or mid-April, or late April,' for instance; that if only monthly service were available out of Puget Sound, consequent delays would force consumers either to buy from du Pont's competitors who have fortnightly service, or to suspend operations; that without equalization through San Francisco, du Pont would be forced to market its products at a substantial cost disadvantage; and that the du Pont works in Washington has been a marginal operation dependent on a substantial volume of export business, without which it might have to close down.

"4. Vessels carrying explosives are not permitted to call at general cargo docks here or at destinations. They load explosives at designated anchorages; and if general cargo also is to be loaded or discharged, it is necessary before entering port to off-load the explosives, proceed to the general cargo dock for loading or unloading, then return to the explosive anchorage for reloading explosives. This is a costly, impractical and unsatisfactory operation both from the carrier's and receiver's standpoint. The nonexplosive items shipped are not subject to these restrictions and may be shipped on any liner vessel.

"5. The present movement of explosives under equalization is from du Pont, Washington, via truck or rail to an explosives dock on San Francisco Bay (Giant, California). There it is placed in portable magazines or vans provided by PFEL and barged to PFEL vessels for shipment direct to the Philippines. PFEL absorbs the cost of barge service and of transfer from rail or truck to barge. Use of vans results in greater safety, improved handling and better condition of

³ "This information was conveyed to Cook in letters from Macondray & Co. Inc., du Pont's Philippine agent, and a dealer in explosives. Cook was unable to state what the storage limits were and did not know the financial ability of any receivers to maintain an investment in stock. Macondray also stated that receivers require three to four sailings a month.

shipments upon arrival. Normally, shipments go direct to Manila and within one to 5 days are transshipped to outports. du Pont has no interest in whether PFEL delivers directly or by transshipment, so long as the receiver is satisfied. Absent equalization, the movement would be either direct from du Pont, Washington, by vessel to the Philippines, or from du Pont by barge or vessel to Blake Island anchorage (outside of Seattle), thence by vessel direct to the Philippines. du Pont is satisfied with PFEL's service, and wishes to continue using it under equalization.

"6. PFEL effects equalization by refunding to du Pont the costs incident to delivery of explosives from du Pont, Washington, to along-side vessel at San Francisco, less a flat amount of \$10.96, regardless of the volume of the shipment. This is stated to be the cost to du Pont of diesel oil which would be used by du Pont's towing equipment in moving the cargo about 40 miles from plant to Blake Island. Witness Cook knew nothing about the kind of boat that would be used by du Pont to move the cargo to Blake Island, what crew would be used, the distance involved, or what the cost of such carriage would be. PFEL's Traffic Manager was similarly uninformed, but he testified he was satisfied that the \$10.96 figure was proper after checking the expense with du Pont's main office.⁴ Equalization payments based thereon have been made since 1953, and have been approved by the Pacific Westbound Conference, of which PFEL is a member. Actual shipments of explosives have moved from du Pont, Washington, to Blake Island by Puget Sound Freight Lines, a common carrier, for shipment to Alaska. Its tariff rate for such service, effective August 17, 1955, was \$.94 per 100 pounds or \$18.80 per ton. There are other barge lines or contract carriers which might be able to arrange for such carriage at differing rates.

"7. The following table shows du Pont's cargo, in revenue tons, carried by PFEL in 1955 to the Philippines:

⁴ "He stated that du Pont owned the equipment, and paid the employees, which would be utilized, and that \$10.96 would be the extra cost of delivery, irrespective of the number of tons moved or time of year shipped.

TABLE

Sailed San Francisco	Arrived	Manila	Philippine outports								Total (tons)
			(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	
Jan. 14.....	Jan. 31.....		X								95
Jan. 22.....	Feb. 6.....	X	X					X			165
Feb. 1.....	Feb. 15.....	¹ X	X					X			92
Feb. 11.....	Feb. 28.....			X					X		410
Mar. 21.....	Apr. 6.....	¹ X	X				X			X	292
Apr. 29.....	May 15.....	X	X	X				X	X		295
June 11.....	June 26.....	X	X	X							320
June 30.....	July 18.....		(¹)	X							48
July 22.....	Aug. 7.....		X								¹ 1
Sept. 2.....	Sept. 22.....	X	X	X			X	X	X		270
Sept. 18.....	Oct. 2.....	X	X								¹ 1
Sept. 30.....	Oct. 15.....	X	¹ X	X						X	237
Oct. 16.....	Oct. 30.....			X							² 46
Nov. 3.....	Nov. 19.....			X							104
Nov. 14.....	Dec. 2.....		X								379
Nov. 26.....	Dec. 12.....	X									² (7')
Dec. 28.....	Jan. 12.....	X	X	X	X	X		X	X		314
Total.....											3,069

¹ First port of call at San Fernando (Col. 1). Shipments to other outports transshipped from Manila, which was first port of call.

² Not equalized because shipments were either nitramon or did not qualify under Rule 2.

"8. This table reveals the following significant facts: The volume of shipments is slightly over 3,000 tons,⁵ averaging approximately 180 tons per shipment. Shipments ranged from 1 to 50 tons up to 300 to 400 tons. With the exception of four direct shipments to San Fernando (Col. 1), all other shipments to outports were transshipped from Manila, which had 13 direct calls. Equalization was not accorded on four shipments. Of the 13 remaining shipments which were accorded equalization—three amounted to less than 100 revenue tons,⁶ six went to Manila, nine to San Fernando, six to Jose Panganibon (Col. 2), and not over four went to any other outport. Witness Cook conceded that no one receiver would require two sailings a month, but he maintained that because of the number and scattered location of receivers, it was impossible to coordinate their requirements for shipment, and that the receivers, as a group, sometimes require more than one sailing a month. The Board, in its Report on page 18, found that a greater frequency than one was required. Of the 13 shipments equalized three arrived on or before the 6th of the month, and three arrived on the 26th, 28th and 31st. If one to five days are allowed for transshipment, the indication is that most of these six shipments would have arrived at final destination prior to the 10th of the month.

⁵ "The volume for 1955 is about 20 percent greater than in 1953 and 1954, and is substantially the volume forecast for 1956. Included in the 3,069 tons is 352 tons of nitramon which normally does not move from du Pont.

⁶ "There were also 13 shipments made in 1953, three of which amounted to less than 100 revenue tons.

"9. du Pont has billed PFEL for equalization on the shipments of November 3 and 14, and December 28, 1955, in amounts averaging slightly over \$30 per revenue ton. These moved after the Board's Report and Order herein of October 12, 1955, which condemned the practice of equalizing on explosives.⁷ PFEL has continued to offer equalization on explosives despite a ruling from counsel for the Conference that it was prohibited by the Board's order. PFEL has not reported to or secured approval of the Conference for such equalization despite the tariff rule so requiring.⁸

"10. No shipments of explosives have been made by du Pont to the Philippines between the last voyage shown in the Table, December 28, 1955, and date of further hearing, February 29, 1956. The next shipment was scheduled to be made via PFEL on March 16, 1956, approximating 250 tons. The only other shipment on order was for 27½ tons.

"11. The Board's finding that there was an admission by PFEL of adequate nonconference service for explosives from the Pacific Northwest to the Philippines was based upon the prior testimony of witness L. G. Dunn. Upon further hearing he testified that there was no nonconference service, including tramp service, at the time he originally testified, now, or since World War II; ⁹ that he did not intend in his prior testimony to admit or state that there was, and that now there is not adequate scheduled service by conference vessels from the Pacific Northwest. His testimony as to inadequacy of the service is not only un rebutted but is confirmed by other witnesses.

"12. During 1953-1955 all vessels, whatever their routing, which called at the Pacific Northwest and thereafter called at the Philippines averaged 2.2 to 2.6 sailings per week, the U. S.-flag sailings averaging approximately one a week.¹⁰ However, none of these sailings was direct to the Philippines except those of Java Pacific, Hoegh Line ("Java Pacific"), a foreign-flag line which provides a direct monthly sailing from the Northwest to the Philippines. However, its

⁷ "The Board's Report found the practice and so much of Article 4 of the basic agreement and Rule 2 which authorized the practice, to be unjustly discriminatory and unfair as between ports within the meaning of Section 15 of the Shipping Act, 1916. Its order disapproved the Article and Rule insofar as they authorized the practices found unjustly discriminatory and unfair.

⁸ "PFEL's Traffic Manager testified that there was conflicting opinion as to the status of equalization, that the Board's order required the Conference to amend the tariff rules, that no such amendment had been approved by the Board and the rules as to equalization remained unchanged. He had doubt as to the effective date of the Board's disapproval of Rule 2 and Article 4 insofar as they authorized the condemned equalization.

⁹ "He stated there was an attempt to establish a nonconference service 5 or 6 years ago which failed after one or two sailings.

¹⁰ "The Board, on page 12 of its Report, took official notice that "Outbound sailings calling at Pacific Northwest ports enroute Philippines average about four per week, and these are divided about equally between United States flag and foreign flag ships."

last port of loading, after leaving Puget Sound, is Vancouver, British Columbia.¹¹

"13. Java Pacific's service was instituted in 1950, and was scheduled to sail last from Seattle in anticipation of handling du Pont's dynamite shipments direct. This schedule was changed in 1953 to serve Vancouver last, because of failure to secure du Pont's dynamite and because of the heavier movement of flour from British Columbia. Java Pacific is experienced in, and its vessels are capable of, handling dynamite. It would use built-in powder rooms which, its witness E. L. Bargones conceded, would not be the most economical or safest way of handling dynamite. However, this method would comply with Coast Guard rules. Java Pacific has solicited this cargo and desires to handle it now. Bargones, who appeared under subpoena, testified that if the dynamite traffic could be secured, Java Pacific, after loading at Vancouver, would proceed to Blake Island for loading, a matter of 65 miles deviation, and proceed direct to the Philippines without calling at Seattle.

"14. Following the Board's order of October 12, 1955, representatives of du Pont, including Cook, and of Java Pacific, including Bargones, met in November, 1955, at du Pont's request to consider the dynamite traffic. Bargones testified that after du Pont stated the conditions of shipment, Java Pacific offered to handle the business, and based on its monthly service, undertook to give service identical to that being furnished by PFEL; that it would carry small as well as large shipments; and would deliver either directly or by transshipment to the outports. Bargones testified that Cook told him that Java Pacific's monthly service was more than adequate, that sailings every two or three months might be all right, but that du Pont desired to have nothing less than quarterly sailings. Bargones further testified that there was no reference to the fact that receivers might require delivery after the 10th of the month. Cook testified that he did not recall discussing the time of month the Java Pacific vessels were scheduled to arrive.¹²

"15. Witness Cook testified the meeting was only exploratory, that he might have expressed the opinion that monthly service would be satisfactory, but that after discussing the matter with du Pont's people in the Philippines and going over the records, it was concluded that du Pont required at least two sailings a month to be competitive. He conceded that if Java Pacific's service should prove inadequate, it

¹¹ "Over two-thirds of its arrivals at Manila during 1953-1955, have been prior to the 10th of the month.

¹² "PFEL's Traffic Manager did not recall any specific instructions from du Pont requiring that arrivals of its cargoes be after the 10th of the month.

could be supplemented by use of PFEL's service. However, he was opposed to splitting up shipments among two or more carriers, stating that with the fluctuating volume of shipments a carrier must be given both the "bitter and sweet" to sustain an economical operation, and to insure to the shipper a continuous service.

"16. The only U. S.-flag lines sailing from the Northwest to the Philippines are American Mail Line ("AML"), every 10 days, and States Steamship Company ("States"), monthly. To the Philippines, AML goes via Japan; States via California ports. Their representatives, who appeared under subpoena, testified they would not be interested in this traffic unless assured of substantial minimum shipments, AML 450 tons and States 400-500 tons. To participate, they would either have to reschedule their sailings or off-load and reload the dynamite at each intervening port.

"Basic facts derived from the foregoing recital are as follows:

"17. Whether witness Dunn, for PFEL, admitted adequacy of service is beside the point in view of this record which establishes the fact that the witness did not intend to make such admission; also the fact that there was not, at the time of the prior hearing, nor has there been since, any nonconference or tramp service, or any scheduled conference service adequate for the shipment of explosives from Seattle, Blake Island or Portland to the Philippines. This finding is based upon the undisputed testimony on further hearing that direct service is required, but that it was and is nonexistent.

"18. No requirement is shown for the necessity of more than one monthly sailing for the explosive traffic involved. The case for two or more sailings rests mainly upon the alleged limitations on storage imposed by Philippine authorities, the natural desire of receivers to limit their investment to minimum inventories, the fear that San Francisco competitors with more sailings available may capture the Philippine market, and the self-serving statements of du Pont's agent in the Philippines, Macondray, whose demand for three to four sailings seems exaggerated compared to the more modest claims of witness Cook. Giving all possible weight to these considerations, the fact remains that the testimony as to storage limitations is vague, unsubstantiated, and unconvincing. Moreover, the desire of receivers to keep down their capital outlay, and the fact that San Francisco competitors have a more advantageous location, are not controlling factors in determining adequacy of service from Northwest ports. The actual experience for 1955 shows 13 equalized shipments of widely fluctuating volume, a maximum of four, six and nine going to individual ports. Note also the time lapse of 2½ months between shipments during the

first quarter of 1956. While there is an indication by Cook in a statement to Bargones that a monthly service, or perhaps a quarterly service, would suffice, Cook later changed his mind after talking to his people in the Philippines and going over the records. But presumably the record he consulted was of past performance (see Table), which he projected for 1956 as to volume; and presumably he expressed the views of his people, including Macondray, in his testimony, all of which has been analyzed and considered above.

"19. The service of Java Pacific, with a monthly sailing from Blake Island direct to the Philippines, would be adequate for du Pont's explosives traffic without the need for any equalization. The record is convincing that Java Pacific is ready, able and willing to commit its vessels to this service. PFEL points out that Java Pacific's vessels arrive in the Philippines before the 10th of the month, and therefore prior to the time when monthly storage reports are made by mine operators to the Constabulary. This, it contends, would render the service inadequate because of consequent difficulties in securing discharge permits from the authorities due to the lack of such reports. This argument appears to come as an afterthought, supplied by Macondray's letter, in view of the fact that time of vessel arrival was not mentioned as a condition of shipment in the negotiations between Cook and Bargones, during which it was indicated by Cook that Java Pacific's service would be adequate. PFEL's Traffic Manager had no knowledge of such condition. Also, Cook testified that receivers specify a two-week period for delivery which could be made in the early, middle or late part of the month. Even PFEL's service, which is admittedly satisfactory, does not follow a consistent pattern of arrivals after the 10th of the month. Therefore, it must be concluded that if the receivers of explosives in the Philippines have any preference for delivery at a particular time in the month, it is only partially a factor to be taken into consideration in determining adequacy of service. Finally, PFEL argues that Java Pacific's service would not be adequate because it lacks the portable vans or magazines used by PFEL. However, this does not appear to be a significant factor in determining adequacy since Java Pacific's method of handling explosives complies with Coast Guard rules.

"20. Equalization on explosives, as practiced in the past by PFEL, has obviously resulted in overpayments to du Pont, the extent of which cannot be determined here. Manifestly, a flat charge of \$10.96 (a factor used in the equalization) for barging quantities ranging from 40 to 400 tons a distance of 40 miles is absurdly low. This follows from the fact that such charge does not reflect any direct cost of labor and

equipment; also the fact that the regular common carrier charge for such service is \$18.80 per ton. The testimony in support of this flat charge was extremely vague and was unsupported by any first hand knowledge of the operation which it was supposed to cover.

"21. PFEL has continued to offer equalization on shipments of explosives since October 12, 1955, the effective date of the Board's Order, and has failed to file any report thereof to the Conference as required by Rule 2 of the conference tariff. The evidence is not clear that the amounts billed by du Pont have been paid, but such payment would violate the plain terms of the Order. In extenuation of PFEL's course, it must be said that the Board's order condemning equalization on explosives was based upon a mistake of fact, namely, its erroneous finding that there was adequate service from Northwest ports. (See Finding 17).

"22. Public Counsel contend, on brief, that the Board's prohibition of equalization may be circumvented by unlimited transshipment, and suggest that the Board clarify its Report, page 21, on emergency transshipment. This is dealt with hereafter.

"Ultimate findings and conclusions.

"23. The practice of equalization on explosives from du Pont, Washington, has been justified on the basis of services as scheduled during and since the prior hearing, except to the extent of over-equalization indicated in Findings 6 and 20. However, such practice would not be justified should Java Pacific institute the service for explosives traffic which it proposed at the further hearing. (See Findings 13 and 19).

"24. The Report and Order of the Board herein, issued October 12, 1955, should be modified to reflect the findings of fact and conclusions made herein."

The foregoing is the initial decision of the examiner in this matter. Exceptions thereto have been filed by complainants, Public Counsel, and PFEL. Replies have been filed by complainants and PFEL. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

Exceptions of complainant and Public Counsel.—Complainants except principally (1) to the admission of certain letters in evidence and to the amount of credence, although slight, given by the examiner to the contents of those letters, (2) to the examiner's finding that witness Bargones conceded that Java Pacific's method of handling explosives "would not be the most economical or safest way of handling dynamite", and (3) to the finding that there is not now adequate direct service for shipment of explosives from du Pont, Washington.

We reject the first principal exception. As we have recently indicated in *Practices of Fabre Line and Gulf/Mediterranean Conf.*, 4 F. M. B. 611 (1955), the Administrative Procedure Act permits the introduction of hearsay evidence in agency proceedings subject to the requirement that rules or orders issued by the agency be supported by reliable, probative, and substantial, as distinguished from hearsay, evidence. Since the examiner found contrary to the proposition for which the letters were offered, namely, that more than one sailing per month is necessary to meet the needs of the dynamite shipper, we consider complainant's argument to be moot.

The same disposition may be made of the second principal exception. The examiner ultimately found the difference in handling methods to be insignificant to a determination of adequacy, in view of the fact that Java Pacific's handling methods comply with Coast Guard safety regulations. The exception is moot.

In its third principal exception, however, in which Public Counsel joins, complainant argues that while it is literally true that Java Pacific has not actually provided direct sailings from Puget Sound to the Philippines since 1953, it has at all times since 1950, when it first instituted the direct service, been available to handle the dynamite shipments in question. In this regard Public Counsel argues that "the record clearly shows * * * that Java Pacific is not only *now* ready, able and willing to commit its vessels to this service 'but *has continuously* been ready, able and willing' to do so for a number of years in the past" (emphasis in text). Public Counsel further argues that Java Pacific's present failure to serve Blake Island last has been caused by PFEL's continued equalization and Java Pacific's resultant inability to obtain the cargo. Inadequacy so caused, it is argued, is not, in fact, inadequacy at all.

We agree that the present lack of direct service by Java Pacific has been caused in part by the practice of equalization. We must find, however, a present inadequacy of direct service for carriage of dynamite from Blake Island to the Philippines. Had it not been for PFEL's disregard of the Board's order by continuing to ship du Pont explosives through San Francisco, Java Pacific would in all probability presently provide a direct service as its solicitation of these cargoes subsequent to our order clearly indicates. The fact remains that Java Pacific discontinued its direct service to the Philippines in 1953 and its present last outbound port of call is Vancouver, B. C., rather than Seattle or Blake Island. We must therefore sustain the examiner's conclusion, although the present inadequacy has been caused, in part, by PFEL's equalization on dynamite shipments. We will leave the

record open for a period of 30 days, however, within which we will expect Java Pacific to give assurances of its intention to initiate immediate and regular direct service. As evidence of an intention to adjust its sailing schedule to provide Seattle, Blake Island, or du Pont as its last outbound call, we will accept a revised tariff or schedule reflecting the adjustment. If its sailings are to be so adjusted, we will by order prohibit PFEL from equalizing on explosive shipments originating in the Northwest, except when special conditions exist.

Exceptions of PFEL.—Although PFEL concurs in the examiner's conclusion that direct service from Puget Sound to the Philippines is inadequate, it has filed seven exceptions to the initial decision. Those exceptions and our position thereon are as follows:

1. PFEL excepts to the examiner's conclusion that the practice of equalizing on explosives from du Pont "would not be justified should Java Pacific institute the service for explosives traffic which it proposed at the further hearing". Such a finding, it is urged, is beyond the scope of the January 9, 1956, order of the United States Court of Appeals, *supra*, of our order of January 25, 1956, and of the complaint herein, which involves past equalization practices. In any event, PFEL further maintains that the examiner erred in finding a monthly sailing adequate to meet shipper needs.

PFEL's view appears to require a conclusion that we are rigidly limited in our findings and conclusions by the precise language of a complaint or order of remand, regardless of the facts which may be developed *and argued* by the parties to the proceeding.

We do not share this view of our duties under the Shipping Act, 1916 ("the Act"). In our view, we would be remiss in our duties if, assuming actual direct service by Java Pacific, we did not, acting on this record, prevent continued unlimited equalization on dynamite by PFEL. As stated in *Chesapeake & O. Ry. Co. v. United States*, 11 F. Supp. 588, 592 (1935), in discussing an Interstate Commerce Act provision similar to our section 22:

* * * after a complaint is filed before the commission, it becomes the duty of the commission to investigate the complaint and take proper action upon its own motion * * * its power is not restricted by the issues raised on the complaint, provided * * * that the (respondent) * * * had full opportunity to make (its) defense.

It is the duty of the commission to look to the substance of the complaint rather than its form and it is not limited in its action by the strict rules of pleading and practice which govern courts of law.

This Board, like other administrative agencies, has an affirmative duty to investigate as well as to decide, in consonance with its position as trustee of the public interest in matters within its jurisdiction.

See *Federal Comm'n v. Broadcasting Co.*, 309 U. S. 134 (1940); *United States v. Morton Salt Co.*, 338 U. S. 632 (1950). We cannot discharge that duty by ignoring an unjust discrimination which will, according to the facts in this record, exist if Java Pacific should resume its direct service from Puget Sound to the Philippines. We must, rather, inform ourselves as to whether Java Pacific will reinstitute its direct service. It is clear that this complaint, in substance, has sought our aid to correct a loss of traffic to the Pacific Northwest and, in addition, to prevent future traffic losses. Continued unlimited equalization of dynamite, if adequate service becomes immediately available, would result in such a loss of traffic to Blake Island, a Puget Sound port.

PFEL further urges that there can be no unjust discrimination between ports "when in fact the explosives traffic involved has not moved and will not move through the complainant ports (sic) of Seattle, irrespective of the outcome of this case, and there is no evidence of any port interest adversely affected by equalization on explosives." The argument is without merit; as we found in our earlier report, the traffic would move, but for equalization, through Blake Island, which is the explosives loading area for vessels calling at Seattle. Blake Island, whether or not within the port area of the Port of Seattle, has suffered and will continue to suffer a loss of traffic. Our jurisdiction under section 22 of the Act does not depend on whether complainant, rather than another, is injured. *Isthmian S. S. Co. v. United States*, 53 F. 2d 251 (S. D. N. Y. 1931).

2. PFEL excepts to the examiner's finding that no requirement is shown for the necessity of more than one monthly sailing, urging that we found in our earlier report that a greater frequency was needed. This further hearing has been held on that precise question, among others, and a full record developed. PFEL presents no arguments of fact which have not been considered by the examiner, and none which would justify reversing his finding in this respect. We find that the examiner correctly evaluated the evidence on this issue, and will accordingly modify the contrary discussion in our earlier report, but with the qualification that in the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing of a conference member from a terminal through which such explosives would normally move at a date which will meet the needs of such shipper or his consignee, equalization will be permitted on such shipment provided the shipper certifies to the conference the need for space at such date and gives 48 hours after the receipt of such certification for the conference to name a conference carrier which will provide space on a direct sailing which will meet the shipper's need.

3. PFEL excepts to the finding that Java Pacific's monthly service would be adequate for du Pont's explosives traffic, urging that Java Pacific has made no firm commitment to reestablish its direct Puget Sound-Philippines service, and that the examiner erred in rejecting evidence tending to show that Java Pacific's service would be inadequate. A proper finding, it is stated, would reflect the desire of receivers to have delivery after the 8th or 10th day of the month, the fact that PFEL loading methods are superior, and the desire of receivers to keep down capital outlay.

We ourselves will ascertain whether or not Java Pacific will reinstitute its direct service, in spite of the fact that the evidence overwhelmingly indicates its intention to do so. The findings considered proper by PFEL appear to us, as to the examiner, to be entitled to little weight. First, the evidence indicates that buyers presently receive delivery, after transshipment, prior to the 8th or 10th of the month in a large number of instances; next, the handling methods of both PFEL and Java Pacific are acceptable to Coast Guard requirements—we have no concern here with the comparative merits of each within that acceptability; and finally, we can see little difference, even if relevant to the issues, between the capital outlay necessary to take advantage of 13 sailings and the outlay involved in 12 shipments. However, in paragraph 2 next above, we have set forth conditions which will permit equalization in the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing of a conference member from a terminal through which such explosives would normally move at a date which will meet the needs of such shipper or his consignee.

4. PFEL's fourth exception, that no injury to Seattle has been shown, has been answered elsewhere in this report as well as in our original report.

5. PFEL next urges, in substance, that we should not invoke our jurisdiction solely in aid of Java Pacific, a foreign-flag carrier. We take this to be an argument that discrimination between ports through equalization is justified if the carrier serving the port is foreign flag. We cannot accept such an argument. First, this proceeding was initiated by complaint of the Northwest ports and not of Java Pacific. More important, however, American-flag carriers and the commerce of the United States are not promoted by quasi-judicial discrimination against vessels of other nations, nor does the Act contemplate such discrimination. Our decision here, under the Act, may in no way differ from the decision which would issue were Java Pacific the equalizing carrier and PFEL the carrier unable to procure cargo because of equalization.

6. PFEL agrees with the examiner that his findings on overequalization are beyond the scope of the remand, and excepts to and demands deletion of the findings made in this regard. It is further urged that the examiner's finding that PFEL has equalized on dynamite shipments in violation of our October 1955 order should be disregarded in view of his ultimate finding that adequate service is not available. Little discussion accompanies these exceptions.

We disagree that the matter of overequalization is entirely beyond the scope of the remand, although we agree that the question of whether PFEL and/or du Pont have violated section 16 of the Act since 1953 by giving or receiving, respectively, transportation at less than the regular freight rates which would otherwise be applicable, is beyond the scope of *this* proceeding. Accepting the assertion that du Pont and San Francisco shippers are keenly competitive, the fact of overequalization, if established, would go a long way toward explaining du Pont's desire for continued "equalization" and the competitive advantage thereby acquired, its assertion that it needs more than a monthly service, and its reluctance to utilize Java Pacific's services, although it has indicated to Java Pacific that it considers that line's services to be satisfactory. Moreover, while such a finding would have no bearing on the affirmative conclusions of our earlier report and accordingly cannot alter the determinations of our report and order presently under judicial review, it would necessitate modification of that portion of our report which considers the relief afforded complainants under section 15 of the Act to have rendered moot the alleged violations of sections 16 and 17. We accordingly will modify the earlier report by stating the question of violation by PFEL of sections 16 and 17 will be made the subject of a separate Board investigation. In view of the indication in this proceeding that other lines also equalize on explosives originating in du Pont but shipped out of San Francisco, we will join as respondents in the contemplated proceeding any other line which may have equalized under similar circumstances.

7. Finally, PFEL excepts generally to the failure to find facts as requested in its brief to the examiner, directing attention specifically (a) that the record does not support a finding that dynamite shipments were a factor in the institution or suspension of Java Pacific's direct service, (b) that the examiner erred in failing to find that it is impracticable for du Pont to divide its shipments among two or more carriers, a necessity which will arise if equalization is not permitted on all shipments, and (c) that the examiner failed specifically to find that the Board erred in officially noticing that "outbound sailings

calling at Pacific Northwest ports en route Philippines average about four per week * * *"

Proposed findings and conclusions of PFEL, as well as those of other parties hereto, which are not specifically or implicitly included in the initial decision, or in this report, have been considered and found unrelated to material issues or not supported by the evidence.

On the specific matters raised in this exception we have the following comments:

(a) The testimony of witness Bargones does support the chief examiner's finding concerning the influence of the dynamite shipments on Java Pacific's service. In the light of the examiner's and our ultimate finding that equalization on dynamite shipments prior to our October order has been justified by an inadequacy of direct service from Puget Sound to the Philippines, whatever the cause of the inadequacy, we fail to understand the relevance of the PFEL exception.

(b) No valid reason has been shown for finding that it would be impractical to divide shipments between Java Pacific and PFEL, if in the future du Pont should require more than one sailing per month. We do not consider the shipper's desire "to hold a hammer over (the carrier's) head"² to be a valid reason.

(c) The examiner did correct the Board's error in taking official notice of service to the Philippines, by finding the correct number of sailings, foreign and American flag. In addition to adopting the examiner's finding in this regard, we will modify our earlier report by substituting for the word "Philippines", appearing at line 18, 4 F. M. B. 672, the words "far eastern ports".

Another matter in relation to our earlier report has been brought to our attention by Public Counsel. While the conference chairman in the earlier proceeding indicated that transshipment³ between ports is effected by conference carriers only in rare circumstances, it appears that since our earlier report the conference is of the view that any carrier serving both areas may absorb, without limit, the transportation costs of cargo originating in the northwest area and ship such cargo to and from San Francisco. Public Counsel urges that while the earlier report, at page 678, obviously intended to limit transshipment to emergency situations, the Board's condemnation of

² Transcript p. 739.

³ "The movement from the carriers' dock or terminal at the first place of delivery of the cargo to the carriers' dock or terminal, at which the vessel loads the cargo. It is exercised when carriers may be, for operating reasons or other reasons, don't call at ports that they had originally scheduled to call, and cargo they may have received can then be brought to a subsequent port." (TR 971) (Page 27 Public Counsel brief dated March 27, 1956).

unjustified equalization is presently being thwarted by transshipment. For this reason it is urged the earlier report should be clarified.

While the record does not entirely bear out Public Counsel's statement that the Board's condemnation of unjustified equalization is presently being thwarted by transshipment, we feel that, since this situation may arise, it is advisable to point out that the diversion of cargo from a port through which it would normally move would be unjustly discriminatory and unfair between ports within the meaning of section 15 of the Act and detrimental to the commerce of the United States as contrary to the principles of section 8 of the Merchant Marine Act, 1920, if accomplished by transshipment to the same extent as if accomplished by equalization.

In consonance with the foregoing, we hereby adopt the examiner's initial decision, as supplemented hereby and except as inconsistent herewith. We conclude:

1. The practice of proper equalization under the tariff rules on explosives from du Pont, Washington, has been justified on the basis of an inadequacy of scheduled direct steamship service from Puget Sound to the Philippines; and will continue to be justified until such time as direct approximately monthly sailings are provided.

2. A regular direct service from Puget Sound to the Philippines with a frequency of approximately one sailing per month would be adequate to meet the normal needs of shippers of explosives from that area.

3. In the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing of a conference member from a terminal through which such explosives would normally move at a date which will meet the needs of such shipper or his consignee, equalization will be permitted on such shipment provided the shipper certifies to the conference the need for space at such date and gives 48 hours after the receipt of such certification for the conference to name a conference carrier which will provide space on a direct sailing which will meet the shipper's need.

4. PFEL's equalization on explosives may have resulted in overpayments to du Pont. A separate proceeding will be commenced to determine whether the PFEL overpayments, if made, are in violation of the Act.

5. Our prior report is modified by elimination of the following language at page 676:

* * * although a greater frequency is required to meet shippers needs. PFEL admits, however, that nonconference vessels are able to provide the necessary service from the Northwest * * * Further since it is admitted that there is no inadequacy of service to accommodate this cargo but merely an insufficient

number of conference sailings, we conclude that the conference has not justified the prima facie discrimination against the Seattle area which is inherent in the practice of equalizing inland transportation costs of moving this cargo to San Francisco.

The earlier report is further modified by clarification of the passage relating to transshipment and by substitution of "far eastern" for "Philippines", as hereinbefore set out.

The record will be held open for 30 days, within which time we will expect Java Pacific to advise us whether it has adjusted its sailings to provide Blake Island in Puget Sound as its last call on direct sailings to the Philippines. An appropriate order will be entered at that time.

Board Member Stakem did not take part in this decision.

5 F. M. B.

ORDER

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

No. 723

CITY OF PORTLAND, OREGON, ET AL.,

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

The Board having served its Report on Further Hearing herein on July 20, 1956 (which report is hereby referred to and made a part hereof), in which the record was held open for 30 days within which time Java Pacific & Hoegh Lines was to advise the Board whether it has adjusted its sailings to provide Blake Island in Puget Sound as its last call on direct sailings to the Philippines; and

It appearing, That the practice of proper equalization under the tariff rules on explosives from du Pont, Washington, has been justified on the basis of an inadequacy of scheduled direct steamship service from Puget Sound to the Philippines, and that such practice will continue to be justified until such time as approximately monthly direct sailings are available; and

It further appearing, That a regular direct service from Puget Sound to the Philippines with a frequency of approximately one sailing per month would be adequate to meet the normal needs of shippers of explosives from that area; and

It further appearing, That on August 7, 1956, the Board was formally advised that Java Pacific & Hoegh Lines will make calls approximately monthly at Blake Island when explosive cargo, in any quantity, is offered, and in such cases Blake Island will be the last loading port prior to proceeding directly to Philippine Island ports of discharge;

It is ordered, That equalization on explosives from du Pont, Washington, to Philippine ports is no longer justified;

It is further ordered, That in the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing from a terminal through which explosives would normally move at a date which reasonably will meet the needs of such shipper or his consignee, equalization shall be permitted on such shipment, *Provided,* That the shipper certifies to the conference the need for space on such date and allows 48 hours after receipt of such certification for the conference to name a conference carrier which will provide space on a direct sailing which reasonably will meet the shipper's need.

By the Board.

(SEAL)

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

5 F. M. B.

(11)

FEDERAL MARITIME BOARD

No. M-69 (Sub. No. 1)

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

REPORT OF THE BOARD

BY THE BOARD:

This is a proceeding under Public Law 591 of the 81st Congress upon the application of Pacific Far East Line, Inc. ("PFEL"), to bareboat charter two Government-owned Victory-type vessels for one voyage each to carry wheat from the Pacific Northwest to Pakistan, beginning in July 1956. The vessels sought, SS *Swarthmore Victory* and SS *Arcadia Victory*, are now under bareboat charter to PFEL pursuant to the Board's findings in Docket No. M-64 and Docket No. M-64 (Sub. No. 1), and the charters will terminate at the end of July.

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

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

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

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

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

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

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

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

In this proceeding, ATSA offered no vessels whatever.

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

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

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

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

1. That the service under consideration is in the public interest;
2. That such service is not adequately served; and
3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

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

JULY 23, 1956.

5 F. M. B.

FEDERAL MARITIME BOARD

No. S-60

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

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

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

Submitted June 20, 1956. Decided August 31, 1956

REPORT OF THE BOARD ON APPEALS FROM RULINGS OF EXAMINER

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

BY THE BOARD:

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

ORDER

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

No. S-60

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

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

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

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

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

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

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

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

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

BY THE BOARD.

(SEAL)

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

5 F. M. B.

(II)

FEDERAL MARITIME BOARD

No. M-71

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

REPORT OF THE BOARD

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

BY THE BOARD:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

1. That the service under consideration is in the public interest;
2. That such service is not adequately served; and
3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

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

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

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

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

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

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

SEPTEMBER 6, 1956.

5 F. M. B.

FEDERAL MARITIME BOARD

No. S-57

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

REPORT OF THE BOARD ON APPEALS FROM RULINGS OF THE EXAMINER
CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS.
E. STAKEM, JR., *Member*

BY THE BOARD:

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

No. S-57

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

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

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

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

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

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

By the Board.

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

FEDERAL MARITIME BOARD

No. M-70

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

Submitted August 9, 1956. Decided October 3, 1956

The transportation of American coal in foreign commerce on American-flag vessels operated by American Coal Shipping, Inc., found to be a service which is required in the public interest and is not adequately served, and for which privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

John C. Gall and Jerome Powell for applicant.

Welly K. Hopkins for United Mine Workers of America.

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

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

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

REPORT OF THE BOARD

BY THE BOARD:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

² Section 5 of the Act as modified by section 204 of Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and Public Law 591, 81st Congress, 64 Stat. 304, divides the responsibility for passing upon charter applications between the Secretary of Commerce and the Federal Maritime Board. The Secretary has delegated his authority in such matters to the Maritime Administration (section 6.01, subsection 2, paragraphs (1) and (2) of Department Order No. 117 (amended), published as section 5 (a) (2) (1) and (11) in the Federal Register, September 15, 1953, 18 F. R. 5518, 5519).

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

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

1. "is required in the public interest,"
2. "is not adequately served," and
3. "for which privately owned American flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service."

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

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

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

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

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

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

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

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

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

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

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

Interveners argue that applicant is an illegal combination which will

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

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

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

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

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

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

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

The chairman of the board of directors testified that ACS will carry coal for all shippers "first come, first serve," without discrimination, and that it was not formed to transport the coal of its stockholders alone. Its President testified that "the policy has been established that these ships are going to be operated as an independent shipping line, offered on the market to any charterer, and not confined to the owners of the company." It was also testified that the mine owners will not give preference to ACS when shipping. The enforcement⁵ of the antitrust laws, except where superseded by the Shipping Act, 1916 (which is not here relevant), is primarily the responsibility of the Department of Justice, and we are satisfied that, if the Department deems it necessary it will review the operation of ACS from an anti-trust point of view as it does in other cases. The Board has a continuing jurisdiction over all operations under the 1916 Act. *Far East Conf. v. United States*, 342 U. S. 570 (1952). Moreover, the charters provide for annual review and termination by the Administrator for any reason upon 15 days' notice, which will amply protect the public interest against the continuance of any improper practices of the charterer should they develop.

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

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

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

We do not agree with the argument that it would be contrary to the public interest to grant the application because of the provision of section 211 (h) of the Merchant Marine Act, 1936. Under this section the Administrator⁶ is authorized to investigate and determine the advisability of enacting legislation authorizing the Board:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

1. That the service under consideration is required in the public interest;
2. That such service is not adequately served; and
3. That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

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

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

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

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

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

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

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

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

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

5 F. M. B.

FEDERAL MARITIME BOARD

No. 772

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

v.

AMERICAN UNION TRANSPORT, INC., ET AL.

No. 784

AMERICAN UNION TRANSPORT, INC.

v.

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

Submitted September 14, 1956. Decided October 29, 1956

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

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

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

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

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

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

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

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

REPORT OF THE BOARD

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

BY THE BOARD:

These two cases arise out of complaints filed by United States Atlantic and Gulf-Puerto Rico Conference and its member lines¹ (the conference) on February 25, 1955, and by American Union Transport, Inc. (AUT), on September 30, 1955, and were consolidated for hearing. Hearings were held before an examiner, who served his recommended decision on May 25, 1956. Exceptions were taken in each of the cases by AUT, but no exceptions were filed by the conference.² The matters were argued orally before the Board.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION AND CONCLUSIONS

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

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

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

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

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

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

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

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

ORDER

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

No. 772

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

v.

AMERICAN UNION TRANSPORT, INC., ET AL.

No. 784

AMERICAN UNION TRANSPORT, INC.

v.

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

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered of record its report, which report is hereby referred to and made a part hereof:

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

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

BY THE BOARD.

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

FEDERAL MARITIME BOARD

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

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

Submitted October 8, 1956. Decided October 31, 1956

REPORT OF THE BOARD

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

BY THE BOARD:

This is a proceeding under Public Law 591 of the 81st Congress upon the application of Pacific Far East Line, Inc. (PFEL), and others to bareboat charter war-built, dry-cargo vessels from the Government for the carriage of Government-sponsored bulk cargoes and other approved bulk cargoes. Notice of hearing was published in the Federal Register of September 22, 1956, and prior to the hearing, applications for more than 80 vessels were filed by a total of 18 steamship companies.¹ Since the Board received evidence and heard arguments in the original and subsequent proceedings (*Marine Transport Lines, Inc., Et Al.—Charters of War-Built Vessels*, 5 F. M. B. 112, and *Pacific Far East Line, Inc.—Charter of War-Built Vessels*, 5 F. M. B. 136), and since an emergency situation appears to exist, the Board in this proceeding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

1. That the services under consideration are required in the public interest;
2. That such services are not adequately served; and
3. That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such services.

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

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

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

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

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

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

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

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

The Board further recommends to the Secretary of Commerce:

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

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

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

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

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

5 F. M. B.

FEDERAL MARITIME BOARD

No. M-73

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

Submitted December 12, 1956. Decided December 12, 1956.¹

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

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

INITIAL DECISION OF A. L. JORDAN, EXAMINER

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

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

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

¹In the absence of exceptions thereto by the parties and notice by the Board that it would review the examiner's initial decision, the decision became the decision of the Board on the date shown (section 8 (a) of the Administrative Procedure Act and Rules 13 (d) and 13 (h) of the Board's Rules of Practice and Procedure).

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

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

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board should find and certify to the Secretary of Commerce :

- (1) That the service under consideration is in the public interest;
- (2) That such service is not adequately served; and
- (3) That privately owned American flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

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

FEDERAL MARITIME BOARD

No. M-69 (Sub. No. 3)

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

Submitted December 6, 1956. Decided December 18, 1956

REPORT OF THE BOARD

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

BY THE BOARD:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION AND CONCLUSIONS

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

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

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

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

1. That the services under consideration are required in the public interest;
2. That such services are not adequately served; and

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

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

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

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

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

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

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

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

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

The Board further recommends to the Secretary of Commerce:

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

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

5 F. M. B.

APPENDIX

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

¹ Joint application.

5 F. M. B.

FEDERAL MARITIME BOARD

No. M-72

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

Submitted December 28, 1956. Decided January 9, 1957

REPORT OF THE BOARD

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

BY THE BOARD:

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION AND CONCLUSIONS

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

American Export excepts to the initial decision in that it:

- (1) stated that applicants who had secured "conditional commitments" should receive preference over other applicants;
- (2) failed to recommend that in allocating Government-owned vessels preference be given those shipping companies, both tramp and liner, who normally serve the trade area to which the particular cargoes are consigned and who are experienced and qualified to operate the vessel in the services outlined;
- (3) failed to recommend that preference be given to applicants who, together with their closely affiliated companies, use predominantly

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

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

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

Bull excepts to the initial decision in that it:

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

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

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

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

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

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

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

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

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

We will therefore certify to the Secretary of Commerce⁶ that a maximum of 50 Government-owned dry-cargo vessels may be bareboat chartered for use in the services herein considered. Recognizing that this number of vessels is less than the number desired by applicants and witnesses, we leave to the discretion of the Secretary of Commerce the allocation of vessels to particular applicants for use in such services as will best serve the public interest.

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

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

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

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

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

- (1) That the services under consideration are required in the public interest;
- (2) That such services are not adequately served; and
- (3) That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such services.

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

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

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

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

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

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

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

The Board further recommends to the Secretary of Commerce:

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

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

APPENDIX

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

¹ Joint application.

FEDERAL MARITIME BOARD

No. M-74

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

Submitted January 7, 1957. Decided January 9, 1957

Board finds and certifies to the Secretary of Commerce that the services considered are required in the public interest and are not adequately served; that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such services; and that not to exceed 35 Government-owned vessels may be chartered for such services, subject to recommended conditions and restrictions.

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

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

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

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

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

Carl S. Rowe for American Export Lines, Inc.

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

Vern Countryman for American President Lines, Ltd.

Richard Kurrus for American Tramp Shipowners Association, Inc.

Richard J. Gage as Public Counsel.

REPORT OF THE BOARD

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

BY THE BOARD:

This is a proceeding under section 5 (e) of the Merchant Ship Sales Act of 1946, as amended, 50 App. U. S. C. sec. 1738 (e), upon the applications of Lykes Bros. Steamship Co., Inc., and others¹ to bareboat charter war-built dry cargo vessels from the Government for operation in berth services. Notice of hearing was published in the Federal Register of December 14, 1956, and hearing was held before an examiner on December 19, 1956. American President Lines, Ltd. (APL), intervened in opposition to the applications and to urge certain restrictions and conditions on use of the vessels if chartered. Pacific Far East Lines, Inc. (PFEL), Pope & Talbot, Inc., Pacific Transport Lines, Inc., States Steamship Company, and American Tramp Shipowners Association, Inc., intervened as their interests might appear, and opposed some applications in part. An initial decision was issued by the examiner, and exceptions thereto have been filed by APL and PFEL. APL has requested oral argument, which is herewith denied.

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

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

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

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

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

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

- (1) That the services herein considered are required in the public interest;
- (2) That such services are not adequately served; and
- (3) That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such services.

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

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

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

APPENDIX
FEDERAL MARITIME BOARD

No. M-74

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

The Board should find and so certify to the Secretary of Commerce that the services considered are required in the public interest, that such services are not adequately served, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such services.

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

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

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

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

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

Carl S. Rowe for American Export Lines, Inc.

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

Vern Countryman for American President Lines, Ltd.

Richard W. Kurrus for American Tramp Shipowners Association.

Richard J. Gage as Public Counsel.

INITIAL DECISION OF A. L. JORDAN, EXAMINER¹

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

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

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

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

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

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

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

LYKES BROS. STEAMSHIP CO., INC.

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

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

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

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

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

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

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

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

STATES MARINE CORPORATION OF DELAWARE

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

- A. U. S. Gulf-U. K./Europe Service—between U. S. Gulf ports (Brownsville/Tampa range)—and ports in the Bordeaux/Hamburg Range and Liverpool, Trade Route 21.
- B. U. S. Gulf-Mediterranean Service—between a U. S. Gulf port or ports and a port or ports in Spain and/or Portugal and/or the Mediterranean and/or the Black Sea, with the privilege of calling at Casablanca, Spanish

Morocco, the Azores, and/or ports in the United States South Atlantic, south of Norfolk, and at ports in the West Indies and Mexico, Trade Route 13.

- C. Tri-Continent Service—Gulf Far East (returning via Pacific-Europe Service, Pacific/Havana/Gulf Service or Pacific-Atlantic Intercoastal with lumber (as described in Docket S-57), Trade Route not numbered (F. R. January 13, 1955, page 317).
- D. Gulf-Pacific Coast Intercoastal (Westbound). I. C. C. certificate of convenience and necessity No. W-1033 (Sub.-No. 2).

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

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

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

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

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

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

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

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

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

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

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

T. J. STEVENSON & Co., INC.

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

Stevenson is advised by chartering brokers that no privately owned

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

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

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

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

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

PRUDENTIAL STEAMSHIP CORPORATION

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

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

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

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

AMERICAN EXPORT LINES, INC.

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS, CERTIFICATION AND RECOMMENDATIONS

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

1. That the services under consideration are required in the public interest;
2. That such services are not adequately served; and
3. That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such services.

The Board should recommend:

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

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

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

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

FEDERAL MARITIME BOARD

No. M-75

COASTWISE LINE—APPLICATION TO CHARTER ONE GOVERNMENT-OWNED VESSEL

Submitted January 21, 1957. Decided January 28, 1957

Board finds and certifies to the Secretary of Commerce that the California, Pacific Northwest, British Columbia service is required in the public interest, that it is not adequately served, that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service, and that the *Ira Nelson Morris* may be chartered for such service subject to recommended conditions and restrictions.

Motion to dismiss application for want of timely notice denied.

Robert S. Hope for Coastwise Line.

Alan F. Wohlstetter for Alaska Freight Lines, Inc.

Richard J. Gage as Public Counsel.

REPORT OF THE BOARD

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

BY THE BOARD:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

- (1) That the California, Pacific Northwest, British Columbia service is required in the public interest;
- (2) That such service is not adequately served;
- (3) That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

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

- (1) That any charter which may be granted herein be for a 1-year period, subject to the right of cancellation by either party on 15 day's notice.
- (2) That the charter hire be a fixed sum in an amount determined to be consistent with the policies of the Merchant Ship Sales Act of 1946, as amended, and not less than the prevailing world market

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

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

5 F. M. B.

FEDERAL MARITIME BOARD

No. M-76

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

Submitted February 12, 1957. Decided February 21, 1957

Board finds and certifies to the Secretary of Commerce that the service under consideration, transportation of sulphur from the Gulf to the Pacific Northwest and lumber from the Pacific Northwest to the North Atlantic, is required in the public interest, that such service is not adequately served, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service, subject to recommended conditions and restrictions.

James K. Knudson for applicant.

Allen C. Dawson as Public Counsel

REPORT OF THE BOARD

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

BY THE BOARD:

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

1. That the service under consideration, transportation of sulphur from the Gulf to the Pacific Northwest and lumber from the Pacific Northwest to the North Atlantic, is required in the public interest;
2. That such service is not adequately served; and
3. That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

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

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

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.

APPENDIX
FEDERAL MARITIME BOARD

No. M-76

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

The Board should find and so certify to the Secretary of Commerce that the service under consideration, transportation of sulphur from the Gulf to the Pacific Northwest and lumber from the Pacific Northwest to the North Atlantic, is required in the public interest, that such service is not adequately served, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

James K. Knudson for applicant.

Allen C. Dawson as Public Counsel.

INITIAL DECISION OF A. L. JORDAN, EXAMINER¹

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

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

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

¹ This decision will become the decision of the Board in the absence of exceptions thereto, or Board review (Rules 13 (d) and 13 (h), Rules of Practice and Procedure—18 F. R. 8718).

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

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

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

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

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

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

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

FINDINGS, CERTIFICATION AND RECOMMENDATIONS

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

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

2. That such service is not adequately served; and

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

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

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

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

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

FEDERAL MARITIME BOARD

No. 758

AMERICAN UNION TRANSPORT, INC.

v.

RIVER PLATE & BRAZIL CONFERENCES ET AL.

Submitted January 30, 1957. Decided March 25, 1957

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

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

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

REPORT OF THE BOARD

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

BY THE BOARD:

This case arises out of a complaint filed under section 22 of the Shipping Act, 1916, as amended (the Act), by American Union Transport, Inc. (AUT), against River Plate & Brazil Conferences and the member lines thereof¹ (the conference), alleging that the conference

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

adopted an agreement on June 12, 1952, neither filed with nor approved by the Board, in violation of section 15² of the Act, pursuant to which brokerage otherwise earned by AUT was withheld by the conference. Reparation in the amount of brokerage withheld is demanded. The conference contends that it did not violate section 15, that the payment of brokerage here would have resulted in a violation of section 16 of the Act, that brokerage was not in fact earned, and that AUT had directly competed with respondents for the very business upon which it now demands brokerage, thereby negating any claim which AUT may have had for the brokerage.

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

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

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

No. 4. No freight brokerage shall be paid in excess of one and one quarter percent (1¼%) on the amount of freight paid in accordance with the tariff.

* * * * *

7. The members of each Conference, * * * shall, at any meeting of the Conference, consider and pass upon the ordinary routine business of the Conference, and upon any matter involving discriminations, tariffs, freights, commissions, brokerages * * * governing south bound transportation * * *.

Rule 10 of respondents' Tariff No. 11 provides:

Brokerage.—Freight brokerage * * * may be allowed only to bona fide brokers whose actual business shall be brokerage and freight between ocean carriers and the general shipping public, * * * freight brokerage shall be paid only on the following understanding which shall be written or stamped on all brokerage bills:

"In compliance with Section 16 of the Shipping Act, 1916, payment by the carrier and acceptance of freight brokerage by the broker are on the strict under-

² See appendix.

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

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

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

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

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

* No mention is made therein as to the spare parts.

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

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

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

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

⁴ On June 11, 1952, the conference chairman advised all members.

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

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

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

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

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

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

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

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

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

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

FINDINGS AND RECOMMENDATIONS OF THE EXAMINER

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

Exceptions

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

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

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

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

DISCUSSION AND CONCLUSIONS

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

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

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

⁷ “Nor is anything herein to be construed as a prohibition against carriers, acting under a conference agreement, from establishing all reasonable rules or regulations which will prevent the payment of brokerage under circumstances which would violate the Act, or as a prohibition against such carriers from placing limitations upon the amounts which they may pay” (page 177).

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

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

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

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

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

⁸ See appendix.

⁹ Section 16 of the Act.

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

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

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

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

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

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

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

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

An appropriate order will be entered.

APPENDIX

SECTION 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

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

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

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

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sec-

tions seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

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

SECTION 16. That it shall be unlawful for any shipper consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

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

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

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

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

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

ORDER

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

No. 758

AMERICAN UNION TRANSPORT, INC.

v.

RIVER PLATE & BRAZIL CONFERENCES ET AL.

These matters being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board having made and entered of record its report, which report is hereby referred to and made a part thereof:

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

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

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

By the Board.

(Sgd.) JAMES L. PIMPER;
Secretary.

FEDERAL MARITIME BOARD

No. 767

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

Submitted October 30, 1956. Decided March 29, 1957

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

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

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

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

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

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

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

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

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

John Mason and Edward Schmeltzer as Public Counsel.

REPORT OF THE BOARD

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

BY THE BOARD

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

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

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

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

(b) that Rule 21 of conference Tariff No. 12² was amended effective September 29, 1954, by addition of the following provision:

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

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

¹ Appedix A lists the respondents.

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

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

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

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

(a) grain, grain products and flour— $\frac{3}{4}$ percent

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

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

(d) net rate cargo—no brokerage payable

(4) that on all other cargo brokerage may be paid at 1 $\frac{1}{4}$ percent.

Appendix B quotes entire Rule 21, as amended.

³ Section 15: "That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

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

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

The Board's order then directed respondents to show cause why Rule 21, including the amendment thereto, should not be modified or cancelled, or failing such modification or cancellation, why the Board should not disapprove or cancel its approval of Agreement No. 5200.⁴

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

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

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

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

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

Section 16, as herein applicable:

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

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 17, as herein applicable:

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

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

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

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

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

TESTIMONY AND EVIDENCE

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

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

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

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

The conference chairman testified that brokerage has been paid in the Pacific coast European trade since the inception of the conference in 1919 or 1920. The present prohibitions and limitations on brokerage have been in effect in substantially the same form since that time. In Docket No. 657 the Maritime Commission declared that concerted prohibitions against payment of brokerage and limitations on payment of brokerage to less than $1\frac{1}{4}$ percent were detrimental to the commerce of the United States within the meaning of section 15 of the Act, and directed the carriers and conferences in that proceeding (all outbound conferences and their member lines in the United States foreign trade which had prohibitions on payment of brokerage, except the Pacific Coast European Conference) to remove such prohibitions and limitations. It is the testimony of the conference chairman in the present proceeding that, since the conference was not named as a respondent in Docket No. 657, the prohibitions and limitations below $1\frac{1}{4}$ percent contained in Rule 21 were unaffected by the prior decision and have remained in effect. No other conference covering an outbound trade from the United States now has such prohibitions and limitations on payment of brokerage.

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

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

No commodity on the Net Rate list (commodities on which no brokerage is payable) has been removed from that list since 1928, and none of the items on which less than $1\frac{1}{4}$ percent brokerage is payable have been changed, although in 1948 the conference considered adding to the commodities on which less than $1\frac{1}{4}$ percent brokerage would be payable. The conference chairman testified that all provisions of Rule 21 prohibiting payment of brokerage or limiting payment of brokerage to less than $1\frac{1}{4}$ percent, were determined

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

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

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

The record shows that when services are provided by forwarder-brokers (either the service of securing cargo for a particular carrier or vessel or any of the services rendered as forwarder for the shipper) in connection with commodities on which brokerage is prohibited or limited to less than $1\frac{1}{4}$ percent, such services are substantially similar to the services provided in connection with other commodities on which $1\frac{1}{4}$ percent is payable.

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

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

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

It is the position of the forwarder-brokers that the Board should follow the decision in Docket No. 657 and should declare that the portions of Rule 21 which prohibit payments of brokerage or limit brokerage to less than $1\frac{1}{4}$ percent are unlawful.

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

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

The nonconference brokerage rule was filed as an amendment to Rule 21, to be effective September 29, 1954. The conference chairman testified that the purpose of the nonconference rule was to control and eliminate nonconference competition in the trade. It was aimed primarily at Mitsui, which entered this trade to Europe as a nonconference line in September 1953. Mitsui has been attempting to attract business away from the conference lines by charging freight rates consistently lower than the rates charged by the conference lines, and by paying brokerage in excess of the $1\frac{1}{4}$ percent maximum rate

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

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

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

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

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

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

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

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

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

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

DISCUSSION AND CONCLUSION

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

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

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

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

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

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

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

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

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

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

It seems clear to us that there is substantial evidence in the record before the Commission to sustain its findings that forwarding activities have developed American commerce, that the forwarding industry is an integral part of the commerce of the United States, that forwarders, when earning and collecting brokerage are doing so in return for services to the carrier and that agreements not to pay brokerage result in detriment to the commerce of the United States. Plaintiffs urge, however, that whatever the state of the evidence with regard to other carriers and conferences, there was, as to them and the trades in which they are engaged, no evidence sufficient to support the commission's findings and order.

It is true that there is relatively little evidence in the record bearing directly upon plaintiffs' trades. Thus at the outset we have to consider whether evidence relating to the foreign forwarding and carrying industries as a whole may validly be used to support findings and an order affecting these plaintiffs. We believe that it may. It was not necessary to have evidence as to plaintiffs' specific conferences. It was proper for the Commission to make rational inferences from experiences in other segments of the industry and to apply them to the segment here involved. This the Commission did.

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

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

of securing cargo for the ship is provided in connection with commodities on which brokerage is prohibited or limited to less than $1\frac{1}{4}$ percent, such brokerage service is substantially similar to the brokerage services provided in connection with other commodities on which $1\frac{1}{4}$ percent is payable. It is further clear from the record that the prohibitions and limitations on brokerage to less than $1\frac{1}{4}$ percent, contained in Rule 21, are similar to the concerted prohibitions and limitations condemned by the Commission in Docket Nos. 657 and 718, 719.

It follows that if we are to find that the prohibitions and limitations on brokerage to less than $1\frac{1}{4}$ percent, contained in Rule 21, are proper and are not detrimental to the commerce of the United States within the meaning of the cases cited, we must overrule or modify some of the basic findings and conclusions therein.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

An appropriate order will be entered.

5 F. M. B.

FEDERAL MARITIME BOARD

No. M-77 (Sub. No. 1)

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

Submitted April 9, 1957. Decided April 22, 1957

Board finds and certifies to the Secretary of Commerce that the services under consideration are required in the public interest; that such services are not adequately served; and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such services.

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

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

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

Garrett Fuller for West Coast Steamship Company.

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

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

Donald McCleay for Mississippi Shipping Company, Inc.

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

Joseph A. Klausner for Boston Shipping Corporation.

William J. Lippman for Paroh Steamship Corporation.

Ronald A. Capone for United States Lines.

Frank B. Stone for American Export Lines, Inc.

John Regan for General Services Administration.

Allen C. Dawson as Public Counsel.

5 F. M. B.

REPORT OF THE BOARD

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

BY THE BOARD:

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

The initial decision found and concluded:

- (1) That the services under consideration are required in the public interest;
- (2) That such services are not adequately served; and
- (3) That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such services.

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

- (1) That the services considered are required in the public interest;
- (2) That such services are not adequately served; and
- (3) That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such services.

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

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

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

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

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

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

5 F. M. B.

FEDERAL MARITIME BOARD

No. 792

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

Submitted March 14, 1957. Decided April 25, 1957

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

Leonard G. James for respondents.

Alun F. Wohlstetter for Mitsui Steamship Co., Ltd.

Edward Aptaker as Public Counsel.

REPORT OF THE BOARD

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

BY THE BOARD:

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

¹ See appendix.

² Section 15 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Counsel has filed exceptions to the recommended decision. Contentions of the parties or requested findings not discussed in this report nor reflected in our findings have been considered and found not related to material issues or not supported by the evidence.

FINDINGS OF FACT

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

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

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

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

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

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

5. Mitsui's application was first considered on December 14, 1955, by the conference Advisory Committee, which handles matters of "more than mere routine value to the conference." On this date, following the Advisory Committee meeting, the conference chairman advised Mitsui by night letter that the:

Committee unanimously views Mitsui's continuation as a party to litigation before Federal Maritime Board constitutes an illogical and untenable situation. Therefore committee urgently request that you reconsider your position and that conference be given an undertaking that Mitsui will withdraw from such litigation in order not endanger favorable action on its application at Special Conference Meeting convening Friday December 16th.

Mitsui replied by telegram requesting the conference to consider at the December 16th meeting its application as then filed, stating that its application complied in all particulars with the application form furnished by the conference, and accordingly that Mitsui expected prompt and favorable action on its application.

6. The full conference considered the application on December 16, 1955, and on that date advised Mitsui and the Board that the conference had adopted the following resolution:

Resolved that Mitsui Steamship Co., Ltd., be admitted to membership pursuant to its application of November 30, 1955 to become effective February 1, 1956 and upon receipt by the Conference office of satisfactory information that Mitsui has withdrawn from pending litigation in which its position is opposed to that of the Conference.

On December 21, 1956, Mitsui sent the following letter to the Board:

The Mitsui Steamship Co., Ltd. on November 30, 1955, filed an application for membership in the Pacific Coast European Conference.

By telegram dated December 16, 1955, confirmed by letter of the same date, the Mitsui Line was advised that at a special Conference meeting held on December 16, 1955, the following resolution had been adopted:

"RESOLVED THAT MITSUI STEAMSHIP COMPANY LTD. BE ADMITTED TO MEMBERSHIP PURSUANT TO ITS APPLICATION OF NOVEMBER 30, 1955, TO BECOME EFFECTIVE FEBRUARY 1, 1956, AND UPON RECEIPT BY THE CONFERENCE OFFICE OF SATISFACTORY INFORMATION THAT MITSUI HAS WITHDRAWN FROM PENDING LITIGATION IN WHICH ITS POSITION IS OPPOSED TO THAT OF THE CONFERENCE."

Accordingly the Mitsui Line withdraws from various litigation pending before the Federal Maritime Board in which its position may be opposed to that of the Pacific Coast European Conference.

Two days later the conference chairman, by letter, with a copy to the Board, advised Mitsui that its action of December 21 was considered satisfactory information that Mitsui Line has withdrawn from litigation in which its position is opposed to that of the Conference, and that

In order to make Mitsui Line's admission effective as of February 1, 1956, [date requested by Mitsui] it will be necessary for a representative of Mitsui to sign a counterpart of the Conference Agreement and to deposit with this office an admission fee in the amount of \$1,000.00 as required by Articles 10 and 11 of the Conference Agreement.

7. On December 28, 1955, the Board's Regulation Office informed the conference and Mitsui that it considered the agreement among the member lines adopting the condition on Mitsui's admission to the conference and Mitsui's acceptance of such condition to be a new agreement or amendment to an agreement within the purview of section 15 of the Act, and that such agreement should be approved by the Board before being made effective.

8. On January 7, 1956, the conference informed the Regulation Office and Mitsui that it was unable to concur in the view of the Regulation Office that the agreement is within the purview of section 15, and that:

Since Mitsui Line has now met the qualification and placed itself on equal terms with the present members, it is fully qualified for membership under the Conference agreement and has been admitted effective as of February 1, 1956.

9. By letter of March 5, 1956, the Board wrote to the conference stating

At this time, and without a hearing, the Board is of the view that the condition may not be a "just and reasonable cause" within the meaning of Section 10 of your basic Conference Agreement for denial of membership, and that it further may be unjustly discriminatory or unfair as between carriers, and operate to the detriment of the commerce of the United States.

You are, therefore, notified that unless you withdraw the above mentioned condition on Mitsui's membership in your Conference within twenty days of receipt of this letter, the Board will institute a proceeding on its own motion to determine, after opportunity for hearing, whether such condition to membership is within your basic agreement and is unjustly discriminatory or unfair as between carriers or operates to the detriment of the commerce of the United States, or will take such other action as may be available to it.

10. On the same date, the Board informed Mitsui and the conference that Mitsui's letter of December 21, 1955, withdrawing from

certain litigation, did not comply with the withdrawal procedure set forth in the Board's Rules of Practice and Procedure, particularly Rule 6 (c) thereof.

11. On March 23, 1956, the conference replied to the Board's letter of March 5, 1956, stating that it felt that the admission of Mitsui was proper in all respects and that it disagreed with the position stated in the Board's letter of March 5, 1956. Mitsui, by letter to the conference dated March 22, 1956, stated that it considered the conference's letter of March 23, 1956, to the Board as being inaccurate in several respects and not responsive to the Board's letter of March 5, and stated that Mitsui's withdrawal from the litigation referred to could not be characterized as "voluntary."

12. Further concerning the Board's letter of March 5, 1956, to the conference, the conference on April 2, 1956, telegraphed the Board that it believed the matter might be worked out amicably among the parties, and that withdrawal of the condition referred to would be further considered by the conference as soon as possible. Before such consideration was given, and between April 2 and April 5, 1956, the Chief of the Regulation Office telephoned the conference chairman, by direction of the Board, and informed the conference (1) that its communications on the subject were not considered satisfactory, (2) that an order had been adopted directing the conference to show cause why the carrying out of the "condition" was not violative of section 15, and why the Board should not disapprove it as being an agreement imposing conditions unjustly discriminatory or unfair as between carriers, or operating to the detriment of the commerce of the United States, and (3) that the order would not be served if the condition was cancelled prior to close of business in Washington by April 10, 1956.

13. On April 9, 1956, at a special meeting of the conference, the conference again considered the matter. A vote was taken on the following motion:

That the Conference suspend the condition imposed on the admission of Mitsui Line pending a determination by the Federal Maritime Board of whether such condition constitutes a Section 15 Agreement or is within the scope of Article 10 of the Conference Agreement covering admission of new members.

This motion failed to carry and the conference then voted upon the following motion:

That the following message be dispatched by Chairman McArt to the Federal Maritime Board, Washington:

"The Pacific Coast European Conference, although not conceding that the condition under which the Mitsui Line was admitted to membership constitutes an Agreement under Section 15, or is violative thereof, is willing to rescind

said action, and hereby cancels the condition under which Mitsui was or is to withdraw from litigation pending before the Federal Maritime Board and involving this Conference.”

This second motion was defeated, and on another vote, by secret ballot, the first motion was passed and forwarded to the Board.

14. The conference action of April 9, 1956, suspending the condition was not considered by the Board as being in compliance with its request of March 5, 1956, to withdraw the condition to Mitsui's membership in the conference, and on April 13, 1956, the Board served its show-cause order of April 5, 1956, initiating this proceeding.

15. On May 16, 1956, oral argument was held before the Board in Docket Nos. 764, 773, which was one of the proceedings from which Mitsui had been required to withdraw by the conference as a condition to membership. Counsel for Mitsui participated in this argument to a very limited degree only. As a result of the activities of counsel for Mitsui in appearing at the oral argument, as well as Mitsui's actions in connection with the instant proceeding, the conference, at meetings on June 5, 6, and 7, 1956, adopted the following motion:

That Conference Chairman and Conference Counsel be directed to prepare and send to Mitsui Line's representative in New York a letter requesting them to refile their notice of withdrawal from pending cases in which they have opposed the Conference's position, such notice to be submitted to the Board in accordance with the contents of the Board's letter of March 5, 1956, to Mitsui Line, and a copy thereof to be furnished the Conference office.

Be it further Resolved, That a copy of this resolution be furnished the Federal Maritime Board at its offices in Washington, D. C. and to Mitsui Line. No copy of this resolution was at that time forwarded to the Board.⁴

16. On June 8, 1956, the conference wrote to Mitsui notifying it of the foregoing motion, and further stating:

Pursuant to the motion, this letter is a request to you to submit to the Federal Maritime Board, as promptly as possible, your withdrawal in proper procedural form from the cases now pending before the Board in which your position has been opposed to that of the other Conference members. I also request that your (sic) furnish a copy of your withdrawal to this office.

It is considered that withdrawal of Mitsui from these cases will serve the best interest of all Conference members in the outcome of these proceedings. Hence, in behalf of the Conference members, I urge that you take every step to discontinue immediately your participation in these cases against the Conference of which you are now a member. Prompt action on your part to accomplish such withdrawal will help to terminate the uncertainty with regard to your membership which has been the subject of allegations of Federal Maritime Board officials. It will also terminate conflicting statements between your agents and your counsel in which the former have indicated your withdrawal

⁴ Copy of this resolution was received as part of the conference minutes by the Regulation Office of the Board three months later—August 8, 1956—one day after the hearing in this proceeding had concluded.

from opposition to the Conference in contrast to continuing opposition expressed by your counsel. The welfare of all concerned would seem to depend upon your clarifying your position in these cases at the earliest possible moment. (emphasis added).

No copy of this letter to Mitsui was forwarded to the Board.

17. On June 21, 1956, Mitsui replied to the conference's letter of June 8, 1956, stating that it shared the objective of the conference to terminate the litigation referred to, desired specific guidance as to procedure, and suggested that the conference's counsel be requested to submit for Mitsui's action a draft of a withdrawal from such proceedings.

No copy of this letter was forwarded to the Board.

18. The record does not show whether the requested guidance was furnished, but on June 29, 1956, Mitsui filed motions in Docket Nos. 767, 764, and 773 for termination of the proceedings with respect to it. In Docket No. 767 the motion was granted by the Board's order of July 30, 1956. In Docket Nos. 764 and 773 (consolidated), the motion to terminate was received by the Board on the same day its final report in these cases was served—June 29, 1956—the Board having made its decision in the consolidated proceeding on June 8, 1956. The motion to terminate was therefore considered moot.

19. On July 12, 1956, the conference issued a call for a special meeting for July 17, 1956, in which item No. 1 was to be a vote on a resolution regarding Mitsui's membership. At the meeting the following resolution was put to a vote:

Whereas, Mitsui Line having been admitted to membership in the Pacific Coast European Conference effective as of February 1, 1956, conditioned upon the taking of such action, satisfactory to the Conference, as might be necessary to effect its withdrawal from proceedings before the Federal Maritime Board in which its position was opposed to that of the Conference, and

Whereas, Mitsui has filed motions with the Board in accordance with the contents of the Board's letter to Mitsui dated March 5, 1956, said motions, copies attached, requesting the Board to terminate the proceedings in Dockets 764 and 773 and Docket 767 with respect to Mitsui,

Now, therefore, be it Resolved, That the Conference hereby records that the condition imposed upon Mitsui's membership has been fulfilled, and said condition is no longer of any force or effect, and

Be it further Resolved, That a copy of this resolution be furnished the Federal Maritime Board at its offices in Washington, D. C. and to Mitsui Line.

This resolution failed to pass and the conference then passed the following motion:

It is resolved that the condition imposed upon Mitsui's membership is hereby cancelled, and that it is further resolved that a copy of this resolution be furnished the Federal Maritime Board at its offices in Washington, D. C. and to Mitsui Line.

By letter of July 25, 1956, the motion was communicated to the Board.

20. The only provision in the basic conference agreement which refers to requirements of admission to conference membership are Articles 10 and 11, which state:

Article 10. MEMBERSHIP. Any person, firm or corporation regularly operating, or giving substantial and reliable evidence of intention to operate regularly, as a common carrier by water in the trade covered by this Agreement may become a member of the Conference upon the agreement of the parties as provided in Article 8 and by affixing his, their or its signature hereto, or to a counterpart hereof. No eligible applicant shall be denied membership except for just and reasonable cause and no membership shall become effective until notice thereof has been sent to the governmental agency charged with the administration of Section 15 of the U. S. Shipping Act, 1916, as amended.

Article 11. Each person, firm or corporation, exclusive of present membership or associate membership, shall, at the time of admission, deposit with the Conference, the sum of One Thousand Dollars (\$1,000.00) as an admission fee.

21. Article 14 of the basic agreement provides that

If in the opinion of the Conference members failure to observe the Conference Agreement or Conference rules, regulations or tariffs, in a particular case, or cumulatively, jeopardizes the accomplishment of the basic purposes of this Agreement, the offending party may be expelled from the Conference.

and that

No expulsion shall become effective until and unless notice thereof with a detailed statement of the reason or reasons therefor and the record vote of the member lines thereon, shall have been mailed to the governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

22. There is nothing in the approved basic agreement which states that a carrier, otherwise qualified, must discontinue any litigation opposed to a position of the conference, and there is nothing in the standard application for membership which indicates such a condition on membership.

23. At the hearing the conference chairman appeared as a witness and presented the position of the conference as follows:

(a) Admission of new members must always be on "exactly equal terms" with all other members. If Mitsui had been admitted while continuing its position in opposition to the conference position in respect to the F. O. B. and F. A. S. shipments in Docket Nos. 764/773, and the payment of brokerage in Docket No. 767, Mitsui's position would be quite different from that of the other members.

(b) No member line may sue the conference in connection with any matter which has been agreed to by the conference, and no member line may file a

complaint against the conference with a regulatory agency such as the Federal Maritime Board. If any member line filed a complaint before the Board it would have to withdraw from membership in the conference. The basis for this is that member lines must conform to the practices and activities which are agreed to by the conference, as provided in Articles 1 and 2 of the basic agreement which read as follows:

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

"2. No party hereto shall engage, directly or indirectly, in the aforementioned transportation under terms, conditions and/or rates different from those agreed upon by and between the members hereto * * *"

(c) The purpose of imposing the condition on Mitsui's admission to the conference was to put Mitsui on the same basis as all other members, bound by the decisions and thereby bound by the position of all other members. The only other course would have been to refuse membership to Mitsui.

(d) It was the desire of the conference to dispose of the litigation referred to, since the effect on the conference of having one member suing the rest of the members, in matters of such high importance to the conference as those involved in such litigation, would create an intolerable situation.

(e) If Mitsui had become a member of the conference without withdrawing from such litigation it would have continued to litigate its position therein against the conference; a privilege no member has, since on becoming a conference member a line gives up any right to take independent action with respect to rates, tariff rules, or whatever it may be, under the conference agreement, as all members agree to be bound by the decisions of the conference.

24. The record shows that Mitsui fully complied with and gave satisfactory answers to all questions asked in the standard application form, including the answer that "We have made no cargo commitments for carriage beyond February 1st, 1956, which are at variance with Conference rates, terms or conditions." Mitsui signed the basic conference agreement whereby it agreed not to "engage, directly or indirectly, in the aforementioned transportation under terms, conditions and/or rates different from those agreed upon by and between the members hereto." There is nothing in the record to show that Mitsui would have failed to live up to such agreement even with respect to matters wherein Mitsui had taken a position before the Board contrary to the position of the conference. The conference chairman testified that he had nothing to indicate that Mitsui would have done other than honor the conference interpretation of the shippers' rate agreement with respect to f. o. b. and f. a. s. shipments.

ISSUES

The issues raised by the show-cause order are as follows:

1. Was the agreement of the conference lines to admit Mitsui to conference membership on condition that it withdraw from certain proceedings before the Board in which its position was opposed to that of the conference, an agreement or modification of an agreement requiring Board approval prior to its effectuation, and if so, was the agreement effectuated without Board approval, in violation of section 15 of the Act?

2. Was said condition on Mitsui's admission to membership unjustly discriminatory or unfair as between carriers or detrimental to the commerce of the United States within the meaning of section 15 of the Act?

3. Should the Board order the "condition" cancelled by the conference?

Contentions of the parties. Respondents' counsel contends that the agreement imposing this condition on Mitsui's admission to the conference is not one requiring separate approval by the Board under section 15 of the Act; that the action affected Mitsui solely as a conference member and concerned only intraconference relationships; that the sole purpose was to place Mitsui on equal terms with the other members; that the action was a decision within the scope of the approved basic conference agreement; and that the condition was not unjustly discriminatory or unfair as between carriers or detrimental to the commerce of the United States.

Respondents' counsel further states that the legislative history of the Act shows that section 15 was never intended to authorize or require administrative approval by the Board of conference rules, regulations, activities, practices, decisions, or any concerted action other than conference agreements under which the carriers propose to be governed in the activities expressly enumerated in section 15, and that the activities of conferences themselves are not intended by that section to be subject to prior administrative approval.

Respondents' counsel contends that since the basic conference agreement provides that all members shall abide by the rules and regulations of the conference, including such matters as the conference considers "necessary or desirable to further the ends of the conference as set forth herein," the conference could not lawfully admit Mitsui without such a condition; that the Board and its predecessors have permitted conferences to impose as a condition on membership that applicants withdraw from any contractual commitments they may have upon rates, terms, and conditions different from those agreed

upon by the conference lines (citing *Application of G. B. Thorden for Conference Membership*, 2 U. S. M. C. 77 (1939)); and that this condition on Mitsui's admission to the conference is such a condition.

Counsel for respondents further contends that continued opposition by Mitsui on the vital matters involved in Docket Nos. 767 and 764, 773, would have been "just and reasonable cause", under Article 10 of the conference agreement, for denial of membership, and that to permit Mitsui to receive the benefit of open conference discussions with respect to the conference's defense of cases in which Mitsui was opposed to the conference, would have been an "intolerable situation."

Counsel for respondents finally states that the Board had characterized conferences as "voluntary associations"; that it has been judicially settled that a voluntary association may place conditions on membership necessary to preserve the association and its objectives; and that membership has been considered by the courts as a privilege which the voluntary association may accord or withhold at its pleasure, and the courts have decided not to interfere to compel the admission of a person not regularly elected.

Mitsui took no position on the issues.

Public Counsel contends that the condition on Mitsui's membership is a sufficiently important and unorthodox matter as to constitute a section-15 agreement which requires specific filing with and approval by the Board, and since there has been no Board approval, effectuation by the conference has been violative of section 15.

Public Counsel states that there is nothing in the approved basic agreement which authorizes the imposition of the condition; that nothing in the historical practice of the conference contemplated the imposition of the condition; that it has been the consistent policy of the Board that common carriers must be free to join conferences; and that if conference agreements are unreasonably exclusory they must be disapproved.

It is the contention of Public counsel that the condition imposed on Mitsui's admission to the conference introduces an entirely new scheme of membership standards not embodied in the basic agreement, and that the Board has authority to determine as a matter of law whether an agreement between carriers has been authorized by an approved basic agreement.

Public Counsel states that the agreement has been effectuated without Board approval, in violation of section 15; that such violation has been consciously flagrant and deliberate; and that respondents should be penalized as provided by section 15.

DISCUSSION AND CONCLUSIONS

We consider, first, the question of whether the agreement between the member lines of this conference to impose upon Mitsui, as a prerequisite to its admission to conference membership, the condition that it withdraw from litigation pending before this Board wherein Mitsui's position was opposed to that of the conference, is an agreement, or modification to an agreement, which requires filing with and approval by the Board under section 15 of the Act.

If the imposition of the condition is an agreement or modification to an agreement

- (1) fixing or regulating transportation rates or fares, or
 - (2) giving or receiving special rates, accommodations, or other special privileges or advantages, or
 - (3) controlling, regulating, preventing, or destroying competition,
- or
- (4) pooling or apportioning earnings, losses, or traffic, or
 - (5) allotting ports or restricting or otherwise regulating the number and character of sailings between ports, or
 - (6) limiting or regulating in any way the volume or character of freight or passenger traffic to be carried, or
 - (7) in any manner providing for an exclusive, preferential, or cooperative working arrangement

then it must, under section 15 of the Act, be filed with and approved by the Board prior to effectuation.

The questions of whether the Board may, under section 15, approve such agreement, is irrelevant to this question, and will be discussed separately hereafter.

We feel that the agreement to impose this condition on Mitsui's admission to conference membership is clearly an agreement or modification to an agreement, controlling, regulating, preventing, or destroying competition, and a preferential or cooperative working arrangement, within the meaning of section 15.

Under conference agreements, competing carriers in a particular trade fix and establish uniform rates and charges for transportation and uniform rates and charges for brokerage payments, abide by uniform tariff rules and regulations, and establish uniform rules and regulations for carrying out the provisions of the conference agreement. Such conference agreements have been recognized by Congress as necessary and desirable in order to maintain stability of rates and adequacy of service in our foreign commerce. Congress has provided, therefore, that the Board may, under the authority of and in accordance with the provisions of section 15 of the Act, approve agree-

ments between carriers and thereby exempt such agreements from the operations of the antitrust laws.

Where concerted action under conference agreements is approved by the Board, it is apparent that the degree to which common carriers operating in the trade are free to enter the conference and operate under the conference system, vitally affects the extent to which conference agreements control and regulate competition. The Board has consistently recognized that admission or nonadmission of an applicant to conference membership directly affects the competitive conditions in a particular trade.

The Board's predecessor has stated that:

the failure to admit complainant to conference membership, including participation in shippers' contracts entered into pursuant to said agreement, resulted in the agreement and contracts being unjustly discriminatory and unfair as between complainant and defendants, thus subjecting the agreement to disapproval or modification under section 15 of the Shipping Act, 1916, as amended. (*Sprague S. S. Agency, Inc. v. A. S. Ivarans Rederi*, 2 U. S. M. C. 72, 76 (1939)).

To the same effect see also *Phelps Bros. & Co., Inc. v. Cosulich-Societa, Etc.*, 1 U. S. M. C. 634 (1937); *Waterman S. S. Corp. v. Arnold Bernstein Line*, 2 U. S. M. C. 238 (1939); *Cosmopolitan Line v. Black Diamond Lines, Inc.*, 2 U. S. M. C. 321 (1940); *Black Diamond S. S. Corp. v. Cie M'tme Belge (Lloyd R.) S. A.*, 2 U. S. M. C. 755 (1946).

The Board and its predecessors have consistently treated conditions effecting admission to conference membership as agreements or modifications to agreements, which require approval or disapproval under the provisions of section 15 of the Act. (Cases cited in previous paragraph, and *Pacific Coast European Conference*, 3 U. S. M. C. 11 (1948)).

Pacific Coast European Conference, supra, is particularly applicable to this problem because it clearly indicates (a) that the Maritime Commission and this conference itself have recognized that imposition of conditions on admission to membership are agreements or modifications to an agreement which are required to be filed with and approved by the Board under section 15; (b) that in fact agreements by this conference imposing conditions on admission to membership have been filed for approval under section 15; and (c) that under the authority of section 15 the Commission required this conference to modify its agreement pertaining to conditions on admission of new members. The decision in that case states at page 12:

This is an investigation instituted upon our own motion to determine (1) whether a *proposed modification* (Agreement No. 5200-2) to Article 11 of Pacific

Coast European Conference Agreement (Agreement No. 5200) increasing the admission fee of members from \$250 to \$5,000 should be approved; (2) whether Agreement No. 5200 should be cancelled or modified because of the restrictions contained in Article 10 thereof, *which limited admission to the conference to those persons, firms, or corporations regularly engaged as common carriers by water in the trade covered by the agreement * * **. (emphasis added).

The Commission found the increase in admission fee, item (1) above, was so high as to be unjustly discriminatory and detrimental to the commerce of the United States, and disapproved Agreement 5200-2; as to item (2) above, the Commission stated at page 12:

Since the hearings, respondents filed, and the Commission approved, Agreement No. 5200-4, which modified Article 10 by eliminating the restriction mentioned above so that common carriers regularly engaged *or giving substantial and reliable evidence of intention of operating regularly* in the trade may qualify for membership in the conference. That issue will not be considered further.⁵

The record further shows that a modification to Article 11 which would increase the admission fee to this conference from \$250 to \$1,000 was filed with the Board by this conference for approval as Agreement No. 5200-10, and was approved by the Board on May 17, 1949.

We think that the addition of a new condition on admission to membership in the conference is as much a "modification" of the conference agreement as the changing of a condition already written into such agreement. In both situations the agreement is "modified" to the extent that conditions for admission to membership are changed.

The condition imposed on Mitsui's admission to the conference forced Mitsui to either (a) continue as a party in litigation before the Board, wherein its position was opposed to that of the conference, and thereby be denied admission to conference membership, or (b) withdraw from such litigation and thereby qualify for conference

⁵ In recognition of the fact that restrictions on conference membership will have a real effect on competition in a trade, the Board and its predecessors have repeatedly refused to approve conditions and restrictions on membership other than such a requirement of operating, or giving intention to operate, regularly in the trade. See cases cited, *supra*. In the *Black Diamond* case, at page 759, the Commission stated:

"A proper clause for the admission of new members, in line with the clause insisted upon by us in new agreements submitted for our approval, would be somewhat as follows:

"Any common carrier by water as defined in section 1 of the Shipping Act, 1916, as amended, who has been regularly engaged as such common carrier in the trade covered by this agreement, or who furnishes evidence of ability and intention in good faith to institute and maintain a regular service between ports within the scope of the agreement, may hereafter become a party to this agreement * * *."

For other indications of this consistent policy that conference membership must be open to any qualified line without restriction, see *Isbrandtsen Co. v. N. Atlantic Continental Frt. Conf. et al.*, 3 F. M. B. 235 (1950); *Contract Rates—Japan/Atlantic—Gulf Freight Conf.*, 4 F. M. B. 706 (1955); the dissent of the Chairman in *Contract Rates—Trans-Pacific Freight Conf. of Japan*, 4 F. M. B. 744 (1955).

membership. This was the clear and obvious intent and purpose of the conference in imposing such a condition.

To the extent Mitsui might be precluded by the condition from joining the conference, the condition clearly controlled and regulated competition in the trade. To the extent it forced Mitsui to withdraw from pending proceedings before the Board and deprived Mitsui of its right to continue as a party in proceedings before the Board⁶ in which Mitsui argued that certain competitive practices of this conference were unlawful under the Act, it is equally apparent that the condition was calculated to have an effect upon competitive practices in the trade.

It is furthermore apparent that respondents themselves recognize that the condition imposed on Mitsui's admission to the conference was calculated to have an effect on competitive conditions in this trade, and that the condition was part of this conference's "efforts to meet nonconference competition." The first sentence in respondents' brief states at page 1:

This [Board investigation in Docket No. 792] is one of several cases brought against the Pacific Coast European Conference *to restrict its [the conference's] efforts to meet non-conference competition.* (emphasis added.)

From the foregoing analysis we find and conclude that the agreement to impose this condition on the admission of Mitsui to membership in this conference was an agreement between carriers, or modification of an agreement between carriers, controlling, regulating, preventing, or destroying competition, and a preferential or cooperative working arrangement within the meaning of section 15 of the Act, which requires approval by the Board prior to effectuation.

We next consider whether the agreement to impose the condition has been filed with and approved by the Board as required by section 15.

It is apparent from the record that this agreement itself has never been presented to the Board for approval or disapproval and has never been separately approved by the Board. The argument advanced to support the contention that the agreement is one which has properly been approved by the Board, is that the condition was merely a routine action of the conference to place Mitsui on equal terms with all other conference members; that as a conference member Mitsui must be bound by all rules and regulations agreed to by the confer-

⁶ Section 22 of the Act provides that "any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water * * *." We think such statutory right necessarily includes the right to carry such a complaint through full legal process to a final conclusion.

ence; and that the action was a decision within the cover of authority of the existing approved basic conference agreement.

The basic conference agreement contains no provision that an applicant for membership in the conference must withdraw from pending litigation in which its position is opposed to that of the conference. The standard application form which has been used by this conference for many years, and which was fully completed by Mitsui, does not indicate the existence of any such condition on membership. The record fails to show any instance where such a condition was imposed upon an applicant as a requirement for admission to this conference.⁷ The only reference to conditions on admission to conference membership are contained in Articles 10 and 11 of the basic conference agreement.

It is true that in order to become a member of the conference an applicant carrier, when signing the conference agreement, agrees to be bound by the terms thereof, together with the conference uniform tariff rates, rules, and regulations. It is apparent that if a member line, in connection with its transportation activities, refuses or is unable to abide by any provisions of the agreement, tariff rates, or rules and regulations, it may be expelled from the conference, and in like manner an applicant who refuses or is unable to abide by the agreement and the uniform tariff rates, rules, and regulations may be properly denied admission to the conference. The Board and its predecessors have specifically held such actions by conferences to be proper and within the scope of their approved basic agreements.

In *Practices of Fabre Line and Gulf/Mediterranean Con.*, 4 F. M. B. 611 (1955), Fabre Line had been expelled from the conference because it violated specific provisions of the conference agreement. In approving such expulsion the Board stated at page 642:

Since, as hereinabove found, Fabre has acted in violation of the letter of the agreement by (1) paying brokerage in an amount greater than 1¼ percent of ocean freight earned,⁴⁸ (2) absorbing discharging costs on shipments of woodpulp from Florida to Marseilles,⁴⁹ and (3) shipping cotton freight collect in lire,⁵⁰ the action of the Conference was clearly within the scope of its ap-

⁴⁸ Prohibited under revised Article 5 of Agreement No. 134.

⁴⁹ Prohibited under Article 4 of Agreement No. 134 as supplemented by tariff regulations.

⁵⁰ Prohibited under Article 3 of Agreement No. 134.

⁷ The argument that *Willy Bruns v. C, G. T.*, Docket No. 746, is a situation where this conference imposed such a condition on admission to membership, is completely untenable. In that proceeding, Willy Bruns filed a complaint with the Board seeking an order for the conference to admit it to membership. Prior to hearing, the conference admitted complainant to the conference and the complaint, thereby being satisfied, was dismissed.

proved agreement between carriers and was not in violation of section 15 of the 1916 Act.

In *Application of G. B. Thorden for Conference Membership, supra*, Thorden Lines had existing contracts under which it was committed to the carriage of cargoes at rates different from the agreed uniform conference tariff rates. The Maritime Commission stated at page 81:

By the terms of the conference agreement it is provided that the members of the conference will charge and collect all freight and other charges for the transportation of merchandise carried by any vessels owned, chartered, or operated by them * * * "strictly in accordance with the rates, regulations, and charges which may be adopted by the conference." By their assumption of the Philipsons' contract and the making of the additional contracts referred to herein, Thorden Lines have placed themselves in the position of being unable to conform fully and unreservedly to the agreement of the conference to which they seek admission.

And at page 82:

We find, in view of the contract situation in which Thorden Lines are involved, that they are not shown to be eligible for equal membership in the conference and that the record does not justify disapproval of the conference agreement.

If it were shown that Mitsui, in carrying out its transportation activities, would not or could not abide by some provision of the conference agreement, or a rate in the tariff, or any of the conference rules and regulations, then it is apparent from the foregoing that the conference could have refused admission to membership and such action would have been recognized by the Board as within the scope of the approved basic agreement. The record fails to show that Mitsui, in carrying on its shipping activities in this trade, intended to do other than abide by all the provisions of the conference agreement, tariff rates, and conference rules and regulations. Mitsui made such a representation to the conference in its application for membership, and it later signed the conference agreement without reservation. The conference chairman testified that he had no indication from Mitsui that it would do other than abide by its commitments to the conference.

The record shows only that if the condition had not been imposed by the conference Mitsui might have continued to argue before the Board the positions it had previously taken in Docket Nos. 764, 773 regarding f. o. b., f. a. s. shipments, and in Docket No. 767 regarding the conference rules in connection with payment of brokerage. Although Mitsui's position in those proceedings was opposed to that of the conference, there is no indication that Mitsui, in carrying on its

shipping activities, would not adhere to the existing conference interpretation, rules, and regulations as to f. o. b., f. a. s. shipments and as to payment of brokerage.⁸

The condition of Mitsui's admission to the conference was not required, therefore, in order to assure that Mitsui, in connection with its transportation activities, would abide by the conference agreement, tariffs, or rules and regulations.

The condition placed on Mitsui's admission to the conference forced Mitsui to either withdraw from pending litigation before the Board and thereby qualify for membership in the conference, or in the alternative, continue as a party in litigation before the Board and thereby be refused admission to the conference. We see only a difference in degree between such a condition for membership and a condition that no conference member may file a complaint with the Board or take part in proceedings before the Board where its position is opposed to that of the conference.

The conference chairman also could see little if any difference between these two situations. He clearly testified that no member line may file a complaint against the conference before the Board, or take a position before the Board in opposition to an agreed position of the conference. If a member line filed such a complaint it would be expelled from the conference. Therefore, he contended, to admit Mitsui to membership while arguing positions before the Board in opposition to the conference would place Mitsui in a position substantially different from the other member lines. The recommended decision follows this rationale.

This reasoning appears to be based on the premise that there is now understanding or arrangement between the member lines that no member line may file such a complaint with the Board. The record does not support the statement that such an agreement, understanding, rule, or regulation exists, or that the member lines of this conference have ever entered into such an understanding or agreement, or adopted any such rule or regulation. No such agreement has ever been presented for approval under section 15, and none has been granted approval under that section. Section 22 of the Act, as observed in footnote 6, provides:

that any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water * * *.

The Board, in carrying out its regulatory functions, relies to a large extent on the filing of complaints by private parties under

⁸ Respondents argue that this condition on Mitsui's admission to the conference is a situation analogous to that presented in the *Thorden* case, *supra*. We think our analysis herein clearly distinguishes the two situations.

section 22. We would not approve an agreement between carriers which would interfere with the statutory right of "any person" to complain to the Board of activities which may be violative of the Act, and which might interfere with the Board's carrying out of its regulatory functions.

We do not agree, therefore, that imposition of this condition on Mitsui was required under the provisions of the conference agreement in order to place Mitsui on equal terms with other conference members, by reason of the fact that other members could not file a complaint before the Board.

Respondents contend that (a) the approved basic agreement contains a provision that all members of the conference shall be bound by all decisions of the conference which, "in the opinion of the members of the conference, are necessary or desirable to further the ends of the conference as set forth herein" (Agreement No. 5200, Article 6); (b) their positions in Docket Nos. 764, 773, and 767 were "necessary or desirable to further the ends of the conference as set forth" in the basic agreement; and (c) imposition of the condition was within the scope of the conference agreement and no further approval was required under section 15.

The recommended decision of the examiner found and concluded that, since the approved basic agreement contained a provision that "no eligible applicant shall be denied membership except for just and reasonable cause", and since this condition was "just and reasonable," it was within the cover of authority of the approved basic agreement and no separate approval under section 15 was therefore required. From this reasoning it would necessarily follow that if this condition were found to be *not* "just and reasonable", the agreement to impose the condition would *not* be within the cover of authority of the approved basic agreement and the imposition of the condition would have been a violation of section 15.

Under such a "cover of authority" doctrine, until the Board makes a final determination, after a full evidentiary hearing, as to whether an agreement to impose a particular condition may be "just and reasonable," neither the Board, the conference members, nor anyone else would know whether such an agreement should have been filed with and approved separately by the Board under section 15. The instant proceeding is an example of the problems which such a theory would create. Here the condition already has been imposed against Mitsui and the agreement between carriers has been effectuated and completed. After a full evidentiary hearing, and over a year after the agreement has been carried out, the Board, if it should

follow this cover-of-authority doctrine, would now determine retroactively whether the condition was "just and reasonable", and therefore lawful when effectuated, or was "unjust or unreasonable", and therefore unlawful when effectuated prior to filing with and approval by the Board, in violation of section 15. Under different circumstances an agreement might be in effect for substantially longer than one year before the Board could determine, after an evidentiary hearing, that it was not within the scope of authority of general language contained in the basic agreement and therefore retroactively unlawful. We think such a theory is inconsistent with the regulatory powers vested in the Board; is not contemplated by section 15; and has been rejected by the courts and the Board in recent decisions.

Prior to the decision of the Court of Appeals in *Isbrandtsen Co. v. United States*, 211 F. 2d 51 (D. C. Cir. 1954), activities of the general character of this condition were often considered to be routine actions within the cover of authority of the approved basic agreement and not requiring separate approval under section 15. See *Pacific Coast European Conf.—Payment of Brokerage, supra*, page 703.

In the *Isbrandtsen* case, *supra*, the court laid down a judicial standard for determining agreements which require specific approval under section 15 as distinct from routine conference activities flowing from approved basic conference agreements. The Board in that proceeding argued to the court that approval of a basic conference agreement which authorized the fixing of rates conferred a scope of authority within which conference carriers might, without separate Board approval, institute a dual-rate system, and that such a system was therefore a lawful and routine action without separate Board approval. The court rejected this argument, stating at page 56:

"Agreements" referred to in the Shipping Act are defined to include "understandings, conferences, and other arrangements." Clearly, a scheme of dual rates like that involved here is an "agreement" in this sense. It can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement. But even if it were not a new agreement, it would certainly be classed as a "modification" of the existing basic agreement. In either case, § 15 requires that such agreements or modifications "shall be lawful only *when* and as long as *approved*" by the Board. Until such approval is obtained, the Shipping Act makes it illegal to institute the dual rate system.⁹

⁹ Although the approved conference agreement considered in the *Isbrandtsen* case contained no language which provided for the institution of the dual-rate system, the Board has recently indicated that the *Isbrandtsen* case would have reached the same result even if the approved basic agreement contained specific language authorizing the institution of a dual-rate system.

Since the *Isbrandtsen* case the Board has on at least three occasions considered whether certain practices and agreements of conferences were routine activities within the scope of the approved basic agreement, or were new agreements, or modifications to an agreement, which required separate approval under section 15. Two of these proceedings involved respondent conference. In *Pacific Coast European Conf.—Payment of Brokerage, supra*, the Board stated at page 703:

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

Again, in *Mitsui Steamship Co. v. Anglo Canadian Shipping Co., supra*, the Board stated at page 92:

* * * and since the new agreement has a secondary effect on nonsignatory buyers, not the natural and logical result of the agreement as written, we find that the new conference interpretation is an agreement or a modification of an approved agreement between carriers which requires specific approval under section 15 of the Act, and which has been effectuated prior to such approval in violation of section 15. (emphasis added)

In *American Union Transport v. River Plate & Brazil Confs.*, 5 F. M. B. 216 (1957), the conference argued that concerted action it had taken with respect to brokerage was within the scope of authority of the approved basic agreement which authorized the member lines to "consider and pass upon * * * any matter involving * * * brokerages." The Board rejected this cover-of-authority argument, citing the *Isbrandtsen* case, *supra*, and stating at page 222:

Approval of that language did not constitute a "cover of authority" under which any future agreements by respondents concerning brokerage were given prior approval.

In *Secretary of Agriculture v. N. Atlantic Cont'l Frt. Conf.*, 5 F. M. B. 20 (1956), the Board stated at page 25:

Article 3 of the basic agreement specifically provides for establishment of dual rates and authorizes the conference chairman or secretary to negotiate and execute such dual-rate contracts in the manner as may be authorized by the conference. and at page 37:

The conference has not considered its filing under General Order 76 to be a filing for approval under section 15 of the Act, arguing that the earlier approval of the basic agreement with its provision for dual rates makes any further approval unnecessary. The conference overlooks the facts, however, that it does not presently employ the dual-rate system and that its present filing is an application to institute or at least to reinstitute a dual-rate system. To this extent, we are unable to distinguish these circumstances from those before the court in *Isbrandtsen Co. v. United States et al*, 211 F. 2d 51 (D. C. Cir. 1954), where an agreement to institute dual rates was held to be an agreement or modification of an agreement between carriers which required approval under section 15.

We do not consider past approval of Article 10, including its reference to "just and reasonable cause" for denial of conference membership, to be a continuing pre-approval of any new or modified condition on membership which may hereafter be found to be "just and reasonable." Nor do we consider past approval of Article 6, including its provision that all members shall be bound by conference rules and regulations which, "in the opinion of the conference, are necessary or desirable to further the ends of the conference," to be a continuing pre-approval of any condition on admission to membership later found to be "necessary or desirable to further the ends of the conference."

Under the standards laid down in the foregoing cases, we think it apparent that the agreement among the member lines of this conference to impose this condition on Mitsui's admission to the conference cannot be considered a routine action within the cover of authority of the approved basic agreement.¹⁰ It cannot be considered an "interstitial sort of adjustment;" it clearly creates an entirely new scheme of membership requirements not embodied in the basic agreement.¹¹ It modifies the standards of admission to conference membership in a manner which "is not the natural and logical result of the agreement as written."¹² To the extent it creates restrictions on admission to conference membership, or interferes with the statutory right of a "person" to complain to the Board of competitive practices violative of the Act, it clearly affects more than purely intraconference competition.¹³

We find and conclude, therefore, that this agreement among the member lines of this conference to impose this condition on Mitsui's admission to the conference, is an agreement or modification to an agreement, within the purview of section 15, which has not been approved by the Board, and which may not lawfully be effectuated without our prior approval.

In reaching this conclusion it has not been necessary to consider whether the agreement is "just and reasonable,"¹⁴ "unjustly discrim-

¹⁰ The record shows that the agreement to impose this condition was not considered "routine" by the conference. Testimony shows that the condition was first considered and acted upon by the conference Advisory Committee, which handles matters of "more than mere routine value to the conference."

¹¹ *Isbrandtsen Co. v. United States*, *supra*.

¹² *Mitsui Steamship Co. v. Anglo Canadian Shipping Co.*, *supra*.

¹³ *Pacific Coast European Conf.—Payment of Brokerage*, *supra*.

¹⁴ We feel that "just and reasonable" is virtually coextensive with "unjustly discriminatory or unfair" or "detrimental to the commerce of the United States", as used in section 15. If found "just and reasonable", an agreement will probably be approvable under section 15; if "unjust and unreasonable", it will probably not be approvable. Counsel for respondents appears to agree with this analogy, as indicated on page 14 of his brief, which states:

inatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors," or operates "to the detriment of the commerce of the United States," or is "in violation of this Act." These are factors to be considered in determining whether the Board shall, under section 15, approve or disapprove the agreement—they are not factors to be considered in determining whether the agreement is one which must be filed with and approved by the Board.

This distinction has been clearly recognized by the Board in cases previously cited. In Docket No. 767, *supra*, the Board, after determining as a matter of law that the brokerage rule therein considered was an unapproved section-15 agreement, stated at page 703:

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

In *Mitsui Steamship Co. v. Anglo Canadian Steamship Co.*, *supra*, the Board found the conference's new interpretation of its shippers' rate agreement to be an agreement, or modification to an agreement, within the purview of section 15, and stated at page 92:

It is unnecessary for us here to consider whether the new conference interpretation is detrimental to the commerce of the United States. Detriment to the commerce of the United States is a ground for disapproval of a section-15 agreement.

In Docket No. 767, *supra*, the Board reached a further conclusion which we think is sound and consistent with our conclusions herein. That proceeding held that the Board could determine "as a matter of law," and without the necessity for an evidentiary hearing, whether a particular agreement is one which comes within the purview of section 15 of the Act, requiring filing with and approval by the Board prior to effectuation. The Board stated at page 703:

We consider, then, that where we become aware of an agreement among conference carriers which is considered by those carriers to be authorized but which may be an unapproved agreement within the meaning of section 15, assuming no issues of fact or administrative discretion, we are authorized under

* * * It is evident that just and reasonable cause is a question of fact and as an issue is not distinguishable from that set forth in the Board order as the second issue in this proceeding [is the agreement unjustly discriminatory or unfair or detrimental to commerce].

The examiner's recommended decision also adopts this analogy in finding, first, that the agreement is "just and reasonable" and therefore within the scope of the basic agreement, and then finding that, since it is "just and reasonable," the condition is not unjustly discriminatory or unfair or detrimental to the commerce of the United States.

section 22 to order the carriers to show cause, within a specified time, why the agreement should not be declared to be unlawful as an unapproved agreement within the meaning of the Act. The sanctions which we may then impose are, first, a declaration of unlawfulness of the agreement under section 15; second, the institution of a civil action for the collection of the statutory penalties.

In its report on reconsideration in the same proceeding (5 F. M. B. 65), the Board further held that it has authority to stay or suspend the effectuation of such an unapproved section-15 agreement.

If the Board's declaration of a violation of section 15 must await the results of a determination as to whether a particular agreement may be "just and reasonable," or is within the scope of some other general or vague standard contained in the basic agreement, then the Board will lose much of the regulatory power which it properly exercised in Docket No. 767.

We next consider whether this agreement has been effectuated by respondents without prior approval of the Board, in violation of section 15.

In accordance with the condition attached to its admission to the conference, Mitsui notified the Board on December 21, 1955, that it "withdraws from various litigation pending before the Federal Maritime Board in which its position may be opposed to that of the Pacific Coast European Conference." The conference on December 23, 1955, notified Mitsui that this was "satisfactory information that Mitsui has withdrawn from pending litigation," and that upon execution of the conference agreement and payment of the admission fee, Mitsui would be admitted to membership effective February 1, 1956. On January 7, 1956, the conference notified the Board that:

Since Mitsui Line has now met the qualifications and placed itself on equal terms with the present members, it is fully qualified for membership under the conference agreement and has been admitted effective as of February 1, 1956.

Although subsequent to such admission the conference notified the Board on April 9, 1956, that the conference "suspended" the condition, it is apparent from the record that the conference considered that, as a practical matter, Mitsui would take no further part in the proceedings and that the condition was already an accomplished fact. When counsel for Mitsui later appeared in oral argument before the Board in Docket Nos. 764, 773 for a limited purpose only and not to participate actively in the case, the conference, as a result of such appearance, again insisted that Mitsui refile its notice of withdrawal and discontinue its participation in proceedings before the Board wherein its position was opposed to that of the conference. This Mitsui did, and its motion to terminate the proceeding as to it

was granted in Docket No. 767, and in Docket Nos. 764, 773 was treated as moot since the Board report therein had been issued.

We conclude that this agreement between carriers was effectuated by respondents prior to approval by the Board, in violation of section 15.

Having concluded that the agreement to impose the condition has not been approved and was effectuated in violation of section 15, Board Member Stakem feels it is unnecessary for the Board to determine whether the agreement should be disapproved as unjustly discriminatory or unfair or detrimental to the commerce of the United States, within the meaning of section 15. Vice Chairman Guill feels the Board should make a specific finding on this issue, and his views are set forth in a separate concurring opinion.

We recognize that past requirements as to what agreements should be filed for separate approval under section 15 have not been precisely defined, and we have proposed that a rule-making proceeding be instituted to more specifically define the types of agreements which require our approval under section 15 before effectuation. See Docket No. 767, *supra*, page 704.

We recognize further that the Board, in the proceedings from which Mitsui was required to withdraw, did not terminate those cases but carried them through to a final conclusion. No rights have therefore been substantially affected by the particular violation of section 15 herein found.

In view of the foregoing, and in the exercise of the administrative discretion vested in us, we will not in this particular proceeding take any action aimed at collection of penalties provided in section 15.

An appropriate order will be entered.

Vice Chairman Guill, concurring:

I concur in the foregoing opinion subject to the following additional comments.

Having concluded that the imposition of the condition prior to Board approval was unlawful and in violation of section 15, I recognize that it is not essential to the disposition of this proceeding to determine whether the condition is unjustly discriminatory or unfair, or detrimental to the commerce of the United States i. e., should this agreement be approved or disapproved by the Board under the standards of section 15. I think it appropriate, however, for the guidance of this and other conferences to state my views on this issue.

In my opinion this agreement is clearly unjustly discriminatory and unfair and detrimental to the commerce of the United States within the meaning of section 15. It should be expressly disapproved.

Respondents argue that since the conference is a "voluntary association" it may set its own rules and regulations on admission to membership without interference from the Board; that such membership is a privilege which the voluntary association may accord or withhold at its pleasure; that the courts have decided not to compel the admission of a person not regularly admitted; and that this condition on Mitsui's admission therefore was just and reasonable and not unjustly discriminatory or unfair as between carriers or detrimental to the commerce of the United States (citing numerous cases for these propositions of law).

I do not disagree with these general statements of law as applied to voluntary associations such as the "Building Trades Council of Sacramento", "Ancient Egyptian Arabic Order of the Mystic Shrine", "American Society of Composers, Authors & Publishers", "American Association of University Women", and "North Central Association of Colleges and Secondary Schools," which were considered in the cases cited by respondents. See brief of respondents in this proceeding, page 18.

I do think, however, that these arguments are patently wrong and inapplicable to regulatory proceedings involving shipping conferences organized and functioning under the jurisdiction of the Board pursuant to the Act, and particularly section 15 thereof.

Competing carriers under a conference system are permitted, with proper approval and regulation by the Board, as set forth in section 15, to fix rates, to set uniform competitive practices, and to control and limit competition in other ways. Such concerted actions would manifestly violate the antitrust laws except for the fact that proper Board approval under section 15 exempts them from operation of those laws. Conference control and regulation of competition is permitted by virtue of Board approval—without such Board approval it would be unlawful. Being thus exempt from the operation of the antitrust laws, and subject to the continuing jurisdiction of the Board, a conference obviously is not free to set whatever conditions for membership it may deem appropriate.

The Board and its predecessors continually have recognized that conference membership should be open to any common carriers engaged in, or giving substantial evidence of intention in good faith to engage regularly in the trade, and repeatedly have refused to permit other restrictive conditions on admission to conference membership. See cases cited at pages 260 and 261, *supra*.

I think, furthermore, that certain aspects of this condition on Mitsui's admission to membership are particularly objectionable. As

previously pointed out, section 22 of the Act provides that "any person may file with the Board a sworn complaint setting forth any violation of this Act by a common carrier by water." This statutory right necessarily includes the right to carry such a complaint through full legal process to a final conclusion.

In carrying out its regulatory functions under the Act, the Board has relied to a large extent on the filing of complaints by private parties under section 22, and such complaint proceedings are an integral part of the regulatory scheme embodied in the Act. An agreement among carriers which deprives any "person" of a statutory right to complain to the Board, and which would interfere with the exercise of the Board's regulatory powers, is clearly unjust and unreasonable, and detrimental to the commerce of the United States. Such an agreement should not, therefore, be approved by the Board.

The condition imposed on Mitsui's admission to the conference was complied with by Mitsui, and the proceedings from which Mitsui was required to withdraw have been decided by the Board. Cancellation of the condition after its purpose has been accomplished was a moot and useless action by the conference.

To the extent respondents may understand that the condition on Mitsui's admission to membership is a continuing condition to be applied to any new or existing member, I feel we should expressly disapprove such an understanding.

Chairman Morse, dissenting:

I dissent. The decision of the majority begs the main issue.

Article 10 of the basic agreement establishes the conditions applying generally to applications for membership and then declares that no eligible applicant shall be denied membership "except for just and reasonable cause." This latter is the phrase which requires interpretation. In my view, the majority opinion does not interpret this phrase; it disregards the phrase. In substance, the majority opinion declares that if a given conference action amounts in fact to a modification or amendment of its basic agreement, such action must be submitted to the Board for prior section-15 approval even though the action was clearly and admittedly taken within the scope and authority of a previously approved basic agreement. In my view, under the facts presented in this case, we do not have a modification or amendment of the basic agreement unless we find the condition on membership to be unjust or unreasonable.

A denial of membership could be made by the conference in the first instance or by the Board, but from the context it is obvious that the phrase has reference to denial by conference action rather

than Board action. I reach this conclusion because it seems clear that the action of our predecessors in approving the basic agreement, including the phrase in question, gave the conference the right to exclude applicants for just and reasonable cause.

We are not here dealing with the principle of "cover of authority." Here, the authority in the first instance to establish "just and reasonable" cause was clearly and specifically granted to the conference.

Nor are we here dealing with a proposed modification or amendment of an existing agreement as in *Pacific Coast European Conference, supra*, and as such, one which requires a section-15 approval. Here, the conference was acting under the specific authority granted to it by the basic agreement. Whether it acted properly is for our ultimate determination, but it is clear that the conference did not purport to modify or amend the basic agreement.

I am not concerned here with the question whether it was *wise* to give the conference the authority to establish, in the first instance, just and reasonable cause for exclusion. I am not concerned because that question was answered affirmatively by our predecessors, and accordingly we have only its interpretation for consideration, not whether this Board would have approved or disapproved such general authority had the agreement been submitted to us for approval under section 15. I say "in the first instance" hereinabove because the conditions to membership established by the conference within its "just and reasonable" authority would be subject to our review in all events, as are other actions taken by conferences, and must meet the standards of the Act.

Accordingly, I assert that if a given condition imposed by the conference is found by the Board to be "just and reasonable cause," then there is no new agreement or amendment or modification of an existing agreement within the meaning of section 15, but on the contrary, it is an action taken by the conference within the framework of its approved agreement. On the other hand, if we find a condition attached by the conference to a membership application not to be "just and reasonable cause," it would then follow that such condition would constitute a new agreement or a modification of an existing agreement within the intent of section 15, and must be submitted for Board approval within the framework of section 15. The critical question is whether the condition here under consideration constitutes in fact "just and reasonable cause." The conference may propose the condition but the final determination whether it is just and reasonable is vested in the Board, and if not just and reasonable, whether it is approvable under section 15.

Today's action means that any conference which elects to take action *ex parte* in reliance upon such broad language in its basic agreement as "just and reasonable cause," or the like, now does so at its peril on two scores: first, on the hazard, which has always existed, that the Board may disagree and conclude the action was not in fact "just and reasonable cause;" and second, on the hazard that the Board may conclude the action taken was not "just and reasonable cause," not because the action was unjust or unreasonable in fact, but because of (1) a feeling or belief in the present Board that it was unwise on the part of the predecessors to the present Board to have granted such authority to the conference, or (2) a desire by the present Board to have more direct control of conference activities.

I do not necessarily disagree with the ends sought, but I disagree with the means used to achieve those ends. I can understand, even though I may disagree with, the view that the particular condition to membership imposed here was not in fact "just and reasonable cause." The decision of the majority makes it unnecessary to decide that matter. Under such a view, section-15 approval would be required because the condition was not one falling within the framework of the basic agreement. I cannot condone the view that, irrespective of whether the condition was in fact "just and reasonable cause," for policy reasons we should, in effect, repudiate our previous section-15 approval of the basic agreement which permits the conference to establish "just and reasonable" conditions without seeking prior section-15 approval, and instead now require section-15 prior approval to truly "just and reasonable" membership conditions.

I am concerned with the breadth of actions taken by conferences acting within such broad and general provisions contained in many approved agreements. I think it a healthy thing that conferences be required to work more closely with the Board. There is a public responsibility owed by the conferences. In my opinion, conferences are not only affected with a public interest but, being exempt, under certain conditions, from the antitrust laws, they should be scrupulous to observe all rules in order to safeguard their favored status. But the public interest requires not only that conferences abide by governing laws but equally that conferences and other persons may rely upon the integrity of Board actions.

I would initiate a proceeding to modify this and similar agreements, by deleting the phrase "just and reasonable cause" and either spell out specifically what causes constitute grounds for exclusion, or alternatively require that all proposed exclusions be submitted to the Board prior to final action being taken by the conference. In the

meantime, I would not repudiate an approved agreement which, like many others having similar broad language covering all types of conference activities, has been in effect for many years.

As the matter now stands, I would not know and I think no one else would know how to counsel a conference other than to advise it to file with the Board for section-15 approval *every* action taken, regardless of the provisions of the approved basic agreement.

5 F. M. B.

APPENDIX

Regular members, Pacific Coast European Conference:

Anglo Canadian Shipping Co., Ltd.
Blue Star Line, Ltd.
Canadian Transport Co., Ltd.
Compagnie Generale Transatlantique (French Line)
The East Asiatic Company, Ltd. (A/S Det Østasiatiske Kompagni)
Fruit Express Line A/S
Furness, Withy & Co., Ltd. (Furness Line)
Hamburg-Amerika Linie (Hamburg American Line)
"Italia" Societa Per Azioni di Navigazione (Italian Line)
Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific,
Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate,
Dampskibsaktieselskapet Lisbeth, Skibsaktieselskapet Ogeka (Knutsen
Line—Joint Service)
Nippon Yusen Kaisha
Norddeutscher Lloyd (North German Lloyd)
N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij (Holland-
America Line)
Osaka Shosen Kaisha, Ltd.
Fred Olsen & Co. (Fred Olsen Line)
Rederiaktiebolaget Nordstjernen (Johnson Line)
Royal Mail Line, Ltd.
Seaboard Shipping Company, Ltd.
States Marine Corporation, States Marine Corporation of Delaware (States
Marine Lines—Joint Service)
Westfal-Larsen & Company A/S (Interocean Line)
Western Canada Steamship Company, Limited
Hanseatische Reederei Emil Offen & Co./Vaasan Laiva Oy (Hanseatic-
Vaasa-Line)
Willy Bruns G. m. b. H. Reederei (German Fruit Line)
Mitsui Steamship Co., Ltd.

Associate member, Pacific Coast European Conference:

American President Lines, Ltd.

5 F. M. B.

(1)

FEDERAL MARITIME BOARD

No. 771

BANANA DISTRIBUTORS, INC.

v.

GRACE LINE INC.

No. 775

ARTHUR SCHWARTZ

v.

GRACE LINE INC.

Submitted November 19, 1956. Decided April 29, 1957

Respondent found to be a common carrier of bananas from Ecuador to United States Atlantic ports.

Respondent's contracting all of its refrigerated space to three shippers to the exclusion of complainants and their supporting interveners, found to be unjustly discriminatory in violation of sections 14 and 16 of the Shipping Act, 1916.

The institution by respondent of forward-booking arrangements of two year periods, under which respondent's refrigerated space would be equitably prorated among existing shippers and complainants and their supporting interveners, would be consistent with common carriage and not unjustly discriminatory in violation of sections 14 and 16 of the Shipping Act, 1916.

Marvin J. Coles, Francis B. Goertner, and Richard W. Kurrus for Banana Distributors, Inc., and *John J. O'Connor, Jr., and John J. Foley* for Arthur Schwartz, complainants.

John H. Hanrahan, Jr., John J. McElhinny, and Francis A. Wade for Stanley Grayson, *Robert F. Martin* for Robert Martin Associates, *Maurice Finkelstein, Thomas J. Beddow, and Douglass Hunt* for Irving B. Joselow and Compania Frutera Sud Americana (Ecuador) S. A., and *George F. Galland and William J. Lippman* for Philip R. Consolo, interveners.

Lawrence J. McKay, Arthur Mermin, and James E. Greeley for respondent.

Robert Blackwell as Public Counsel.

REPORT OF THE BOARD

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

By the Board:

These two cases arise out of complaints filed by Banana Distributors, Inc. ("Banana Distributors"), and Arthur Schwartz ("Schwartz"), alleging that Grace Line Inc. ("Grace"), a common carrier by water between Ecuador and Atlantic coast ports, refused to carry complainants' bananas in its refrigerated ("reefer") space, in violation of sections 14, 15, and 16 of the Shipping Act, 1916 ("the Act"), and of sections 1 and 2 of the Sherman Antitrust Act ("the Sherman Act").¹

Schwartz and Stanley Grayson ("Grayson") intervened in No. 771; Banana Distributors intervened in 775; Irving B. Joselow ("Joselow"), Compania Frutera Sud Americana (Ecuador) S. A. ("Frutera"), Philip R. Consolo ("Consolo"), Robert Martin Associates ("Martin"), and Public Counsel intervened in both proceedings. Grayson and Martin substantially supported the contentions of complainants whereas Joselow and Frutera supported the position of Grace. Consolo intervened only as his interests appeared.

The cases were consolidated for hearing, and the examiner served his recommended decision on June 1, 1956. Exceptions to this decision were filed by Grace, Joselow, Frutera, and Consolo. Replies to the exceptions were filed by complainants and Public Counsel, and the matters were argued orally before the Board.

The Board is in general agreement with the examiner. Exceptions taken and recommended findings not discussed in this report have been given consideration and have been found either not related to material issues or not supported by the evidence.

Complainants ask the Board to (1) declare the contract between Grace and the existing banana shippers in this trade contrary to law and void, (2) direct Grace to desist from further carrying out the illegal contracts, (3) require Grace to allot reefer space to complainants in an amount deemed fair and reasonable by the Board, and (4) award other relief which the Board deems proper.²

¹ Complainant in No. 771 abandoned the Sherman Act allegations in its brief.

² Although reparation was demanded, all parties agreed to defer this question.

Grace opposes these demands, contending that (1) it is a contract carrier of bananas in this trade, and therefore its banana operations are not subject to the Act, and (2) the Board is without jurisdiction to determine the validity of its banana contracts in the light of the Sherman Act.

THE FACTS

Respondent is the only U. S.-flag operator offering a common carrier berth service on Trade Route No. 2, and is a party to an operating-differential subsidy agreement with the Board covering this service. In this service, Grace operates three freighters with approximately fortnightly sailings and six combination passenger-cargo vessels with weekly sailings, all of which vessels have reefer facilities. United Fruit Company and Standard Fruit Company have vessels plying this trade route, but they carry bananas as exclusively proprietary cargo. Grancolombiana Line and Chilean Line, both foreign-flag operators, operate berth line vessels with reefer space in this trade, but Grancolombiana calls at Philadelphia before New York City, and due to infrequent or irregular service Chilean Line is not a satisfactory banana carrier.

All of the bananas carried by Grace from Ecuador to New York since the inception of its reefer service on Trade Route No. 2 in 1934 have been by contract, and bananas are the only product carried on a contract-carrier basis; every other commodity is carried as common carriage.

At present, three shippers³ utilize all of Grace's reefer space under two-year contracts, and the contracts are renewable, at the option, however, of the carrier.

Each shipper has exclusive use and control of individual compartments. The shipper loads the vessel at Guayaquil, Ecuador, at his own risk and expense, and unloading is performed by Grace at the risk of and for the account of the shipper. Grace follows the shipper's temperature control instructions en route. Except in rare instances, all shippers have requested that their bananas be transported at the same temperature.

Loading of bananas at Guayaquil is difficult. Port limitations necessitate loading offshore from barges. The vessel is available for loading at Guayaquil for about 12 hours only. Each shipper moves his bananas shipside by barge, where gangways are erected into side ports and loading is accomplished manually. When one shipper completes his loading and stowing another shipper draws his barges alongside and the entire operation is repeated.

³ Joselow, Frutera, and Consolo.

Growing, shipping, and marketing of bananas, due to the nature of the commodity itself, requires a carefully synchronized operation. Bananas grow quickly, and once cut from the plants are subject to rapid ripening. A shipper requires an assured amount of space in order to integrate his entire operation properly. There are no shore-side refrigerated warehouses in Guayaquil, and refrigeration does not prevent the normal ripening process. Shippers rigidly inspect bananas prior to their loading and stowing in order to prevent the shipment of overripe or sigatoka-diseased bananas since they could adversely affect otherwise "healthy" bananas. Each shipper strives to have his fruit reach destination as green as possible.

On this trade route Grace carries Chilean fruit northbound in its reefer space during the Chilean fruit season, thereby reducing the space otherwise available for bananas. There is no commingling of Chilean fruit with bananas due, in part, to the difference in temperature requirements between the Chilean fruit and bananas. The Chilean fruit, although carried under terms of common carriage, is carried subject to "special arrangements" with the shippers.

Banana Distributors is an experienced importer and distributor of bananas. At present, this complainant imports a substantial quantity of bananas from Panama and, as the New York agent for Consolo, distributes Ecuadorian bananas. This complainant has requested reefer space of Grace since 1953, but each request has been positively denied. Schwartz has been connected with the banana business since 1928 and his business reputation is good. He has requested space since 1946 but his requests have been denied. Grace offered Schwartz reefer space on the cargo vessels but because these vessels could offer a fortnightly service only, he refused it. Although Schwartz has had financial difficulties there is no evidence that respondent denied him space for this reason.

Grayson has been in this business since 1942 and has had considerable experience importing bananas. At present not an importer, he is associated with others in a wholesale banana business in New York. Although he himself cannot finance a banana operation from Ecuador, he can obtain the necessary backing if he can secure space. He has requested reefer space from respondent since 1945, to no avail.

Martin has had limited experience in the banana trade, but is presently associated with others in a proposed banana importing project. One of his associates has had experience importing bananas from Ecuador. Grace has refused Martin reefer space since 1954. This intervener apparently has sufficient financial backing to engage in this trade and has agreed to post a performance bond with Grace.

FINDINGS AND RECOMMENDATIONS OF THE EXAMINER

The examiner concluded upon the record that (1) Grace is a common carrier of bananas in this trade, and (2) the denial of reefer space to complainants and supporting interveners resulted in unjust discrimination, in violation of sections 14 and 16 of the Act. He recommended that (1) the Board order Grace to cancel its existing contracts with the three banana shippers in this trade, (2) the Board order Grace to prorate its reefer space on a fair and reasonable basis among existing shippers, complainants, and interveners under two-year forward-booking arrangements, and (3) the Board hold the record open for a certain period in which Grace might accomplish these directives.

The examiner also recommended that, in view of his finding that Grace's operations in the premises resulted in violations of sections 14 and 16 of the Act, it was unnecessary to make any findings respecting possible violations of the Sherman Act. No findings as to any violations of section 15 of the Act were made inasmuch as agreements between carriers and shippers—the contracts or agreements here—do not fall within the purview of this section.⁴

EXCEPTIONS

Respondent excepted to the findings and conclusions of the examiner, contending that (1) it is a contract carrier of bananas in this trade, (2) its exclusion of complainants and others from participation in its reefer space was not in violation of sections 14 and 16 of the Act, and (3) the recommendation that a 2-year forward-booking arrangement be adopted in the banana trade is not common carriage but is a form of contract carriage and at any rate would be unworkable. The exceptions of Joselow, Frutera, and Consolo present no issues not raised by Grace.

Complainants, their supporting interveners, and Public Counsel urge the adoption by the Board of the recommended decision.

DISCUSSION AND CONCLUSIONS

It is acknowledged that banana shippers have made substantial investments in their trade, that the entire operation, from grower in

⁴ Complainant in Docket No. 771 alleged that Grace, as a member of the steamship conference covering this trade, under an agreement approved by the Board (F. M. B. Agreement No. 3302), operated contrary to the terms of the conference agreement and hence in violation of section 15. However, complainants did not pursue this argument in its brief, and since neither the conference nor the members thereof were parties to these proceedings, no determination of the issue is here made.

Ecuador to retailer in the United States, requires careful coordination, that bananas ripen rapidly, that care in shipment is essential, that the fruit is highly perishable, and that loading is difficult and must be accomplished within a relatively short time. On the other hand, the record clearly indicates that bananas are readily available to newcomers to the trade, that bananas from different plantations have been successfully mixed in a single compartment, that all exporters carefully inspect the fruit before loading, and that carrying temperatures seldom vary. No doubt loading and stowing difficulties will increase as the number of shippers increase, but this factor is present in every trade and is no excuse for the carrier discriminating against some shippers in favor of a few.

On the whole, this record supports the conclusion that bananas are susceptible to common carriage, and it follows that respondent, a common carrier of general cargo, has carried under contract a commodity which is capable of being and should have been carried under terms of common carriage.

The so-called specialty cases relied upon by Grace as authority to except bananas from common carriage are not sufficient to bring this commodity into that class. Indeed, the cases most prominently urged upon the Board, the *Express Cases*, 117 U. S. 1,601 (1886), and the *Voigt*⁵ case, are completely inapplicable: they deal with the question whether a common carrier obligation is owed by one common carrier to another common carrier who is a shipper; in each case the Court indicated that a different result might have been reached had a normal shipper-carrier relationship been presented. For example, in the *Express Cases*, at page 28, the Court said:

If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented.

Further, none of the specialty cases cited indicates that a common carrier could, in carrying the specialty under contract, unjustly discriminate against other shippers similarly situated. In *U. S. v. Contract Steel Carriers*, 350 U. S. 409 (1956), the Supreme Court upheld the contention of a duly licensed contract carrier that he was not operating as a common carrier where he confined his services to the specialty set forth in his license although his operation contained many of the attributes of common carriage. Here, however, we are concerned with the duties and obligations owed by a common carrier to the shipping public rather than those owed by a contract carrier.

⁵*Baltimore & Ohio Railway v. Voigt*, 176 U. S. 498 (1900).

The Board agrees with the examiner that the specialty cases are inapplicable.

Other than those involving common carrier-common carrier relationships, the specialty cases cited by respondent involve commodities which, by their very nature, are not capable of being carried under the terms of common carriage,⁶ and since they dealt with the question of liability they do not stand for the proposition that other shippers similarly situated could legally be denied space. It is therefore unnecessary for us to examine the authorities which say that a common carrier may at the same time and with the same facility be both a common carrier and contract carrier.

We next inquire into whether respondent excluded complaints and their supporting interveners from participation in respondent's reefer space in violation of sections 14 and 16 of the Act. As set forth above, the record discloses no convincing reason why any of these parties were denied space. We must assume, in view of the voluminous record, that had there existed valid reasons for Grace, as a common carrier, to deny these applicants space, they would have been presented; in the absence of such reasons we must conclude, as did the examiner, that complainants and interveners were qualified banana shippers. Having demanded and been refused such space by respondent, it is not necessary that complainants and interveners prove that they actually tendered bananas for shipment. Such tendering, under the circumstances, would have been futile, idle, and legally unnecessary. *Philip R. Consolo v. Grace Line Inc.*, 4 F. M. B. 293 (1953), citing *Atlantic Coast Line R. Co. v. Geraty*, 166 Fed. 10 (4th Cir. 1908). Therefore, on the basis of this record, we find that respondent's refusal to carry bananas for complainants and interveners constituted a violation of sections 14 and 16 of the Act.

It is obvious that respondent cannot satisfy all the reefer space desires of its present shippers and those of complainants and their supporting interveners, and thus arises the problem of providing a plan, consistent with common carriage, of allocating space to qualified banana shippers.

First, where the demand for space exceeds the supply, the law is clear: a common carrier must equitably prorate its available space among shippers. *Penna R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121 (1915); *Patrick Lumber Co. v. Calmar S. S. Corp.*, 2 U. S. M. C.

⁶ *Dickenson v. Great Northern Ry Co.*, 18 Q. B. D. 176 (1886) (dogs); *Honeyman v. Oregon & C. R. R. Co.*, 13 Or. 352, 10 P. 628 (1886) (dogs); *Farmers and Mechanics Bank v. Champlain Transportation Co.*, 16 Vt. 52 (1844) (bank bills); *Cleveland, C., C. & St. L. Ry Co. v. Henry*, 170 Ind. 94, 83 N. E. 710 (1908) (circus cars); *Roberts v. Chicago & K. I. & P. R. Co.*, 99 F. Supp. 895 (D. Minn. 1951) (Pullman cars); *United States v. Louisville & Nashville Railroad Co.*, 221 F. 2d 698 (6th Cir. 1955) (silver).

494 (1941). Equitable proration of space alone, however, in view of the economic factors inherent in this trade, is not a panacea. And it was with these economic factors in mind that the examiner recommended the adoption of a forward-booking arrangement.

Grace argues that the recommendation of a forward-booking system is an admission that bananas do constitute a specialty. We need go no further than respondent's own operation on this very trade route to dispose of the argument that forward booking justifies the finding of a specialty: during the Chilean fruit season Grace, as a common carrier, transports this fruit under forward-booking arrangements, and when the fruit offered exceeds the available space, the space is prorated among the shippers.

Grace further contends that there is no justification in law for a forward-booking system of the character and duration recommended. Forward booking is not new to common carriage. *Ocean S. S. Co. v. Savannah Locomotive Works & Supply Co.*, 131 Ga. 831, 63 S. E. 577 (1909). It is, then, the duration of the system with which we must be concerned. We are mindful that once the system is initiated, qualified applicants for space would be foreclosed from any proration in the space until the end of any given period. Although this is not a desirable result, in view of the economic problems presented here we believe that the 2-year duration can be characterized as "reasonable" and is a system, compatible with common carriage, which affords existing importers the protection they require while providing a reasonable opportunity for prospective shippers to engage in the trade.

Grace contends that the commingling of bananas of different shippers in the same compartment might result in increased damage claims based upon the arrival of spoiled fruit. Although we recognize that the intermingling of ripe and sigatoka-diseased bananas might adversely affect otherwise healthy bananas, in view of the facts of record—(1) good quality bananas are plentiful in Ecuador, (2) only Gros Michel bananas are exported from Ecuador, (3) all such bananas move at the same carrying temperature, (4) all shippers rigidly inspect their fruit prior to loading, and (5) shippers desire to get their bananas to their destination in as green a condition as possible—coupled with the absence of any evidence tending to indicate that complainants and their supporting interveners would operate differently from Grace's present shippers, we believe that the possibility of damage is seemingly remote. We also recognize that other perishable fruits and vegetables are commingled in cooled or refrigerated spaces. We conclude that applicants and their support-

ing interveners should not be excluded from participation in Grace's reefer space in this trade. We will leave to the parties the making of any necessary and practical arrangements designed to minimize or eliminate the commingling of bananas of several shippers.

In view of the foregoing, the Board adopts the examiner's recommendation that Grace prorate its reefer space, upon a fair and reasonable basis, among existing shippers and complainants and their supporting interveners, under forward-booking arrangements of 2 years. To this end, Grace shall cancel its existing contracts with three banana shippers and offer reefer space, upon reasonable notice, fairly and equitably, under two-year forward-booking arrangements, to all qualified shippers.

Grace may require prospective shippers in this trade to post a bond covering the space assigned, and may otherwise establish reasonable rules covering dead freight, inspection, and loading and stowing, which prospective shippers must meet in order to qualify as users of space.

At the end of any forward-booking period, in the event that additional qualified importers desire reefer space, it will be incumbent upon respondent to reallocate space to existing importers and the new applicants upon a fair and reasonable basis.

No order will be entered at this time. Within 30 days after the service of this report and after seven days' advance service upon respondent, complainants shall submit an appropriate order, on matters other than reparation, for our approval. Hearing on the question of reparation, if required, will be set by the examiner.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 19th day of August A. D. 1957

No. 771

BANANA DISTRIBUTORS, INC.

v.

GRACE LINE INC.

No. 775

ARTHUR SCHWARTZ

v.

GRACE LINE INC.

These cases being at issue upon complaints and answers on file, and having been duly heard on a joint record with respect to issues other than reparation, and the Board on April 29, 1957, having made of record a report stating its conclusions, decision, and findings therein, which report is hereby referred to and made a part hereof:

It is ordered, That respondent Grace Line Inc. be, and it is hereby, notified and required to cease and desist and to abstain from entering into, or continuing, or performing any of the contracts, agreements, or understandings for the carriage of bananas found herein to be in violation of sections 14 and 16 of the Shipping Act, 1916, as amended, not later than October 1, 1957;

It is further ordered, That respondent, within 10 days after the date of service of this order, shall offer to its present shippers and to all qualified shippers, including complainants and their supporting interveners, upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas on respondent's vessels from Ecuador to United States Atlantic ports, for a period not to exceed 2 years, said period to begin not later than October 1, 1957, and shall thereafter offer, for periods not to exceed 2 years, refrigerated space available for such carriage;

It is further ordered, That respondent shall employ uniform, fair, and reasonable standards in determining the qualifications of applicant shippers, and in exercising its judgment in this regard, respond-

ent shall take into consideration (1) applicant's financial capacity to engage in the banana business on a scale proportionate to the refrigerated space requested; (2) applicant's ability to arrange for the purchase, loading, and stowage of the bananas to be shipped, and (3) applicant's ability to arrange for the discharge of bananas; and to this end, respondent may require applicant shippers to provide verified information sufficient to enable respondent to make the necessary determinations;

It is further ordered, That respondent be, and it is hereby, notified and required to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, stowing, transporting, carrying, and discharging of bananas on its vessels, which regulations and practices may include the following requirements: (a) each shipper shall furnish and maintain as security for the performance of all of its obligations under the 2-year forward booking a deposit in cash, negotiable securities, or a bond satisfactory to respondent equal to 12½ percent of the total minimum freight charges due under said forward booking; (b) no shipper shall be permitted, without the approval of respondent, to assign the forward booking or otherwise transfer any rights secured by him under said forward booking; (c) the payment by the shipper of dead freight of up to 90 percent of complete utilization of space assigned; (d) loading, stowing, and unloading shall be at the expense and risk of the shipper, respondent to have the right to designate the stevedore or itself to perform the necessary stevedoring at the port of discharge; (e) during the Chilean fruit season respondent may proportionately reduce the refrigerated space assigned to banana shippers, without discrimination, upon reasonable notice, to permit the carriage of Chilean fruit; (f) the treatment as a single shipper those individuals, partnerships, or corporations who are affiliated with each other to the extent of 10 percent or more common ownership;

It is further ordered, That respondent shall file with the Board (a) copies of the 2-year forward bookings entered into hereunder, (b) the regulations and practices adopted by respondent relating to the receiving, handling, stowing, transporting, carrying, and discharging of bananas, and (c) the criteria used by respondent in determining what applicant shippers are qualified;

It is further ordered, That these cases be held open for further proceedings on the claims of complainants for reparation, if any.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

MARITIME ADMINISTRATION

No. S-52

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR PERMISSION UNDER SECTIONS 805 (a) AND 605 (c) OF THE MERCHANT MARINE ACT, 1936, TO CALL ITS TRANSPACIFIC VESSELS AT HAWAII

No. S-55

PACIFIC FAR EAST LINE, INC.—APPLICATION FOR PERMISSION UNDER SECTION 805 (a) OF THE MERCHANT MARINE ACT, 1936, TO CALL ITS TRANSPACIFIC VESSELS AT HAWAII

Submitted April 8, 1957. Decided May 10, 1957

To permit Pacific Far East Line, Inc., to carry cargoes between ports in Hawaii and ports in California, Oregon, and Washington on unsubsidized transpacific voyages with cargo vessels would result in unfair competition to an operator engaged exclusively in the coastwise or intercoastal service, and would be prejudicial to the objects and policy of the Merchant Marine Act, 1936. Application for such permission under section 805 (a) of the Merchant Marine Act, 1936, denied.

Odell Kominers and J. Alton Boyer for Pacific Far East Line, Inc. Peter N. Teige and George Wick, Jr., for American President Lines, Ltd.

Alvin J. Rockwell, Willis R. Deming, Alan B. Aldwell, Ernest K. Kai, and Robert G. Dodge for Matson Navigation Company.

James L. Adams, Gilbert C. Wheat, Gordon L. Poole, and Tom Killefer for Pacific Transport Lines, Inc., and States Steamship Company.

Allen C. Dawson as Public Counsel.

REPORT OF THE BOARD AND MARITIME ADMINISTRATOR

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

BY THE BOARD AND MARITIME ADMINISTRATOR:

This proceeding arises out of applications filed by American President Lines, Ltd. ("APL"), and Pacific Far East Line, Inc. ("PFEL"), for written permission under section 805 (a) of the Merchant Marine Act, 1936, as amended ("the Act"),¹ to provide service between the west coast of the United States and Hawaii.

APL filed two applications dated July 30, 1954, seeking permission to call certain of its vessels at Hawaii. One related to domestic trade and the other principally to foreign trade. The Board referred for hearing (Docket No. S-52) only so much of these applications as sought (a) written permission under section 805 (a) of the Act to carry domestic cargoes between California and Hawaii in APL's subsidized cargo vessels operating on Trade Route No. 29 ("Route 29"),² Freight Service F, and (b) authorization under section 605 (c) of the Act to lift and discharge at Hawaii with these vessels cargoes to and from foreign ports within the trading area of Route 29.

¹ Section 805 (a) of the Act is as follows:

"It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

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

² California ports/Far East.

PFEL filed an application dated December 15, 1954, for permission for its unsubsidized vessels to transport cargo in the domestic trade between Hawaii and the California coast as part of a transpacific voyage, and to transport cargo between Hawaii and ports on Route 29 as part of a transpacific voyage. Under the date of March 1, 1955, PFEL amended its application so as to request permission for its unsubsidized vessels to transport cargo in the domestic trade between Hawaii, on the one hand, and ports in California, Oregon, and Washington, on the other hand, as part of a transpacific voyage, and to transport cargo between Hawaii and ports in Guam as part of a transpacific voyage. The Board referred for hearing (Docket No. S-55) only so much of the application as sought written permission under section 805 (a) of the Act to carry cargoes between ports in Hawaii and ports in California, Oregon, and Washington on unsubsidized transpacific voyages with cargo vessels.³

The two proceedings were consolidated. Pursuant to notice published in the Federal Register, hearing was held before an examiner from October 17 through November 14, 1955, at San Francisco; from November 14 through December 8, 1955, at Honolulu; and from January 24 through February 1, 1956, at Washington, D. C. The record consists of 7,561 pages of testimony and 176 exhibits.

Matson Navigation Company ("Matson"), Pacific Transport Lines, Inc. ("PTL"), States Steamship Company ("States"), and Isthmian Steamship Company ("Isthmian") intervened. PFEL intervened in No. S-52 and APL intervened in No. S-55. Isthmian was not represented at the hearing and filed no brief. No briefs were filed by PTL or States. PTL says that it "is familiar with the arguments of Matson in opposition to Section 805 (a) permission contained in the opening brief of Matson, and both adopts as its own and endorses such arguments of Matson." States, now an applicant for subsidy, advises that, "if the Federal Maritime Board were to grant PFEL permission under Section 805 (a) to serve Hawaii, States will itself apply for similar permission to call its transpacific vessels at Hawaii in the domestic trade between Hawaii and ports on the Pacific coast."

Subsequent to the hearing, on June 18, 1956, APL withdrew its applications and has taken no further part in the proceeding.

Briefs were filed, the examiner issued a recommended decision, exceptions were filed, and we heard oral argument.

³ Where the term "application" is hereinafter used in referring to PFEL's application, it will be understood to mean only that part of the application that was referred for hearing.

The examiner found and concluded that the granting of PEEL's application will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, or be prejudicial to the objects and policy of the Act, and recommended that PFEL's application be granted. We do not agree with the ultimate conclusions and recommendations of the examiner. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been found not related to material issues or not supported by evidence.

PFEL operates a subsidized service on Route 29 under an operating-differential subsidy agreement with the Board. In addition, it operates without subsidy and on a regular schedule a Pacific/Guam service, and also, a transpacific refrigerated-vessel service.

PFEL's unsubsidized Pacific coast/Guam service has been operated for about nine years. The service is maintained on a twice-monthly frequency. One of the sailings is made with a vessel that loads outbound in the Pacific Northwest and then proceeds to Los Angeles and San Francisco to load; on the other sailing, the vessel loads only at California ports. The vessels carry general cargo to Guam and bulk cargo to Japan, normally returning to the Pacific coast in ballast. On one of the two sailings calls are made at Honolulu to load cargo for Wake and Guam. The service does not presently carry cargo between the Pacific coast and Hawaii. Transpacific bulk cargo carried by the Guam vessels is not competitive with the bulk cargoes carried by PFEL's subsidized vessels because it is over and above the requirements of the latter for bulk. Moreover, the quantity of bulk cargoes carried by United States-flag berth operators on Route 29 is insignificant in comparison with past and present available bulk cargo. If the application is granted, PFEL will turn the vessels at Guam and will not employ them to carry bulk cargo beyond Guam. It will charter vessels, to the extent approved by the Maritime Administration, to lift bulk cargoes for destinations beyond Guam.

PFEL'S transpacific refrigerated-vessel service is operated with fully refrigerated ships bareboat chartered from the Government. These vessels are employed for the carriage of military reefer cargo under military contract and military direction. PFEL has carried on these vessels refrigerated military cargo from United States Pacific coast ports to Hawaii at the specific instruction and direction of the military. The average lift has been from 900 tons to 1,000 tons per month, moving as a single lot.

If the application is granted, PFEL will maintain a service between the Pacific coast, Hawaii, and Guam on a ten-day frequency, em-

plying six liner vessels. It is presently planned that these vessels will be three AP-3's now owned by PFEL and three C-3's bareboat chartered by PFEL. The itinerary initially contemplated is service outbound from the Pacific Northwest (alternating between Puget Sound and the Columbia River, i. e., Seattle, Tacoma, Portland, Longview, and Astoria), Los Angeles, and the San Francisco Bay area (including Stockton, an east-bay terminal, and a San Francisco terminal) to Honolulu, thence Wake, thence Guam, turning at Guam, and loading homebound at Guam and Hawaii for the Pacific coast. Service will be afforded for dry and reefer cargo and for bulk liquids. PFEL expects to make space available for about 2,500 tons of cargo on each sailing from the Pacific coast to Hawaii and for about 4,000 to 5,000 tons per sailing from Hawaii to the Pacific coast. It will offer direct service to Honolulu and will serve the other Hawaii ports by transshipment, or by direct call if sufficient cargo offers. Service will be provided at Matson's then current rates. To the extent special equipment or fittings may be necessary to carry refrigerated cargo, sugar, bulk liquids, or any other cargo, PFEL is prepared and intends to furnish such special equipment and fittings.

APL carries cargo between Los Angeles and San Francisco and Honolulu on its combination passenger-cargo vessels *President Cleveland* and *President Wilson*. It does not solicit cargo for this trade. Its Hawaiian carryings in recent years have averaged at best a few hundred tons per voyage and have been limited to so-called express and refrigerated cargo.

PTL operates a subsidized fortnightly service on Route 29 under an operating-differential subsidy agreement with the Board. It has authority under section 805 (a) to call at Hawaii on not more than 13 sailings annually in each direction. PTL serves Hawaii on its subsidized voyages, with statutory abatement of subsidy. Outbound carryings are principally from San Francisco proper. Service was discontinued from Stockton and from east-bay terminals in San Francisco Bay, and little cargo is being obtained from the Los Angeles area. Direct service for commercial cargo is provided to Honolulu only, with transshipment to other Hawaiian ports. Eastbound service from Hawaii has not been furnished for the past years. No reefer service is offered to or from Hawaii. PTL characterizes Hawaii as playing "a minor role" in its total carryings. Under the permission granted to PTL to call at Hawaii, it must at all times give priority to its transpacific cargo requirements, and, since 1953, except for an occasional bad month, it has had very little outbound free space in its transpacific vessels.

Matson operates four services between mainland ports of the United States and Hawaii, as follow: Pacific Northwest/Hawaii freight service, California/Hawaii freight service, a passenger service, and Atlantic-Gulf/Hawaii joint freight service. Each of these services is confined to domestic ports, except that since 1932 the Pacific Northwest/Hawaii freight service has included calls at British Columbia ports to load and discharge cargo.

Matson's service between the Pacific Northwest and Hawaii is maintained with two C-3's and two Liberty-type vessels. The C-3's sail at frequencies of 14 and 21 days from Portland, Seattle, Tacoma, and British Columbia, carrying dry, liquid, and refrigerated cargo. While they are operated as general-cargo vessels, they lift quantities of lumber and military cargo. They return, carrying dry and liquid cargo, at intervals of 14 and 21 days to Seattle and Tacoma, with a time provision in the schedule to permit calling at San Francisco Bay if required. They also provide eastbound service to British Columbia. The Liberty-type vessels are used in a lumber service. One of these vessels, or lumber carriers as they are called, is available once in every 30 days, alternately serving Puget Sound and Columbia River-Coos Bay. The lumber carriers may lift items of general cargo or military cargo in addition to lumber. They return with cargo from Hawaii to Portland. Schedule time provides sufficient flexibility to call at San Francisco Bay if required, and also at Vancouver, Washington.

Service between San Francisco Bay ports and Los Angeles and Hawaii is provided by Matson with eight C-3's, which operate on a 28-day turnaround. From San Francisco-Alameda, Matson makes a sailing every Wednesday, and from Los Angeles, every Friday. From Hawaii to San Francisco-Oakland-Alameda, a sailing is made every Thursday, and to Los Angeles, every Monday. The Los Angeles vessel also brings cargo to San Francisco Bay. Dry, liquid, and refrigerated cargo is lifted westbound and eastbound. The schedule is so arranged that eastbound ships into San Francisco, upon completion of discharge, give weekly service to the military and are available to lift outbound general cargo from San Francisco before proceeding to Los Angeles.

From Stockton, Matson schedules a sailing for Hawaii once every 21 days; inward sailings are on about the same schedule.

Matson has engaged in coastwise trade with Hawaii for 73 years. It has invested over \$30,000,000 of its own funds in freight vessels, which have been fitted to serve the Hawaiian trade, and over \$5,000,000 in shore facilities and equipment to handle the cargo in

the Hawaiian trade. It has also assumed substantial financial obligations with respect to shore facilities and equipment required to care for and handle Hawaiian cargo. In addition, Matson has a continuous research program investigating new and improved methods and facilities for handling, caring for, and transporting cargo in the Hawaiian trade.

No carrier other than those mentioned above provides service between the United States Pacific coast and Hawaii or in any leg or segment of that trade.

There have been occasions when cargo offered to Matson has not been accommodated on a particular vessel and has had to await the next sailing. Utilization outbound has ranged from about 80% in 1950 to about 90% in the first six months of 1955. In each year there has been substantial unused underdeck, deck, and reefer space, and there have been times when the cargo vessels were withdrawn due to insufficient cargo. While certain shippers have requested more frequent service and more cargo space at particular times, the record shows that most shippers are satisfied with the Matson service.

Longview, Washington, has not been served by Matson for general cargo, though service is provided to lumber docks. One shipper indicated a movement of 150 to 250 tons of paper a year to Hawaii, and 10 to 15 tons would be available for a particular call.

No service had been given by Matson to Astoria, Washington, until the time of the hearing. The record indicates a movement of 500 tons of flour per month from Astoria to Hawaii, and during the hearing trial service to Astoria was instituted. The port of Stockton had asked for fortnightly frequency, and Matson has instituted service on a 21 day frequency. Certain Stockton shippers feel this service does not fully meet their needs.

In 1954 Matson carried 1,048,505 short tons of cargo outbound from the Pacific coast to Hawaii, PTL carried 17,297 long tons, and APL carried 1,862 long tons. In the same year, Matson carried 1,184,086 short tons of cargo inbound from Hawaii to the Pacific coast, PTL carried 2,770 long tons, and APL carried 343 long tons.

Of the cargo moving from Hawaii to the Pacific coast, approximately 95 percent consists of sugar, molasses, and pineapple. All of this is carried by Matson.

Through interlocking corporate relationships Matson is associated with the major producers and shippers of sugar, molasses, and pineapple in the Hawaiian Islands, and these same business interests handle much of Matson's terminal and stevedoring work and agency work in both Hawaii and the United States. Certain of these affili-

ated interests are large importers of lumber and fertilizer from the Pacific coast.

Matson owns and acts as agent for the Oceanic Steamship Company ("Oceanic"), which operates substantial service on Trade Route No. 27⁴ under an operating-differential subsidy agreement with the Board. Matson and Oceanic have identical officers, directors, management, and freight traffic staffs in the United States (except for a freight traffic manager, his assistant, and a stenographer employed solely by Oceanic in its San Francisco office), and have common offices, agents, and terminals. Matson's overhead not specifically allocable to Oceanic is prorated between Oceanic and Matson in keeping with Maritime Administration's formula.

Matson contends that PFEL's application, as amended in the course of the hearing, is outside the scope of the hearing authorized by the Board and that no permission can be granted thereon. Actually, the application was not amended at the hearing. PFEL asks permission to carry cargo between ports in Hawaii and ports in California, Oregon, and Washington on unsubsidized voyages with cargo vessels, just as it did before the hearing. The point made by Matson is that PFEL now seeks permission to carry cargo between the Pacific coast and Hawaii on vessels which would not proceed beyond Guam, whereas, before the hearing, it requested permission to perform the transportation between the Pacific coast and Hawaii as part of a service that would include calls in the Far East. This difference is insufficient to warrant a finding that the operation now proposed is outside the scope of the authorized hearing.

PFEL contends that Matson has no standing to oppose its application. It claims that, since Matson is the parent corporation and managing agent of Oceanic, a subsidized operator, these two carriers are required to have written permission under section 805 (a) for operation between the mainland of the United States and Hawaii; that it does not appear that any such permission has been granted except under the grandfather clause of section 805 (a); that grandfather rights cannot predicate a grant of authority greater in any material particular than the prior operations upon which they are based; that Matson's present service is substantially different from its 1935 service, both over-all and in its component parts, and that, therefore, Matson does not have grandfather authority for its present operation.

Referring to Matson's Pacific Northwest/Hawaii freight service, which includes calls at British Columbia ports, PFEL asserts that,

⁴ U. S. Pacific/Australasia.

quite apart from the question of whether this service is so much a part of the entire service between the Pacific coast and Hawaii as to make the whole operation one not exclusively in domestic trade, there can be no argument but that the Pacific Northwest service (i. e., the two C-3's plus the two lumber vessels) is not entitled to the protection of section 805 (a). Matson states that, although very important to the Hawaiian economy, the volume of cargo carried between British Columbia ports and Hawaii comprises only a small percentage of the domestic cargo carried on Matson vessels, and urges that this foreign-trade cargo carried at the insistence of receivers and shippers of cargo in Hawaii, in a service that is primarily a domestic service, should not deter the Board from affording to Matson and its Pacific Northwest freight service the protection afforded by section 805 (a).

Matson contends that the proposed competition of PFEL would be unfair. It claims that PFEL's domestic Hawaiian cargo service would deprive it of cargo to which it is fundamentally entitled, which it has the capacity to carry, and which it needs. In claiming to be fundamentally entitled to carry Hawaii's cargo, Matson says: "We use the expression 'fundamentally entitled', of course, in the context of this proceeding. The question of who is fundamentally entitled to cargo naturally does not arise where there is free competition with none of the contestants supported by the Government. On the other hand, the question of fundamental entitlement arises sharply where, as here, there is a domestic operator which is entitled to the protection of section 805 (a) from a subsidized operator." Matson maintains that it is fundamentally entitled to carry Hawaii's cargo by reason of its 73 years in the Hawaiian trade and its investment in shore facilities and in its fleet. It urges that PFEL would over-tonnage the trade, blanket Matson sailings, provide irregular or unrestricted service, concentrate on the most favorable cargoes, use chartered vessels, and compete unfairly with Matson through the use of its subsidized vessels. It also maintains that the benefits that PFEL receives in foreign trade in the form of construction-differential subsidy, operating-differential subsidy, benefits from deposits in statutory reserve funds, and cargo-preference aid, and would receive from the expected carriage of domestic cargo on an added-cost basis, would have an unfair impact on Matson.

Asserting that, if PFEL's application is granted, Matson will still be the primary carrier in the trade and the carrier on which the trade must rely for basic service year after year, Matson also contends that competition which deprives such a domestic carrier of cargo which it needs, which it has the capacity to carry, and to which it is funda-

mentally entitled is not only unfair competition but is also prejudicial to the objects and policy of the Act. It claims that that which results in unfair competition to Matson is prejudicial to the objects and policy of the Act even if Matson itself were not in a position to invoke the statutory defense of unfair competition. Therefore, it urges the same grounds in support of its contention that PFEL's competition would be prejudicial to the objects and policy of the Act as it advances in connection with its contention that such competition would be unfair. In addition, it maintains that PFEL would neglect its primary trades, that PFEL's chartered vessels would not provide certainty of future service commensurate with the damage to Matson, that PFEL's application must be considered in relation to PFEL's present and potential operations, and that Matson's vessels are essential to national defense.

PFEL contends that the grant of its application will be neither unfairly competitive to Matson nor prejudicial to the objects and policy of the Act, and that, in any event, the Hawaiian Islands need and will benefit from the competition to be furnished by PFEL.

Public Counsel maintains that the proposed service of PFEL will be consistent with the objects and policy of the Act and will not result in unfair competition to Matson.

Matson bases its contention that PFEL would deprive it of Hawaiian cargo that it needs on the adverse effect that PFEL's participation in the Pacific coast-Hawaii traffic would have on Matson's vessel-replacement program. It urges that it made a profit of only 38 cents per revenue ton after taxes and before declaration of dividends on the movement of 13,474,497 revenue tons from 1950 through 1954; that PFEL expects to carry 2,500 tons per voyage on 36 voyages per year from the Pacific coast to Hawaii and 4,000 tons from Hawaii to the Pacific coast; that, converted to revenue tons, PFEL would deprive Matson of 10 percent of the cargo that would otherwise be carried by Matson, and that, from 1950 to 1954, the diversion from Matson of 10 percent of the domestic cargo moving on an average round voyage of a freight vessel between the Pacific coast and Hawaii would have deprived Matson of 31 percent of voyage gross profit and 60 percent of voyage net profit for such round voyage.

DISCUSSION AND CONCLUSIONS

Matson has requested that the withdrawal of APL's application in No. S-52 be held to operate with prejudice. We agree with the examiner that this request should be denied. If the APL application

is renewed, the question of whether it should be entertained can be raised at the time of its renewal.

Matson is the only intervener operating “exclusively in the coastwise or intercoastal service” within the meaning of section 805 (a). In its service between California and Hawaii it clearly operates “exclusively” in the domestic service. With respect to its Pacific Northwest/Hawaii service, Matson includes calls at British Columbia. We agree with the examiner that the British Columbia calls preclude a finding that Matson is operating “exclusively” in the coastwise or intercoastal service on its Northwest/Hawaii service. An operator engaged exclusively in the coastwise or intercoastal trade is one furnishing a service that does not include foreign ports. *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 488, 501 (1954).

PFEL contends that Matson and its subsidiary carrier Oceanic do not have proper grandfather rights and permission under section 805 (a) for Matson’s domestic Hawaiian service, and, therefore, Matson has no standing to claim the protection of section 805 (a) in opposing the PFEL application. The status of Oceanic’s permission with respect to Matson’s domestic services is irrelevant to the question of whether Matson is operating “exclusively” in the domestic coastwise or intercoastal trade. Here the facts of record show Matson to be such an operator with respect to its California/Hawaii service. To that extent Matson is clearly entitled to the protection of section 805 (a) and has standing to oppose the PFEL application.

The burden of proving the statutory requirements of section 805 (a) are upon the applicant, and the domestic operator has only the burden of rebutting the *prima facie* proof required by section 805 (a). *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 555, 556 (1955). The Board and its predecessors have indicated a special concern for the protection of coastwise and intercoastal operators (*Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 F. M. B.—M. A. 457, 470 (1951); *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 488, 504 (1954); *American President Lines, Ltd.—Sec. 805 (a) Application*, 4 F. M. B.—M. A. 436, 440 (1954), and have further indicated that doubts should be resolved in favor of the intercoastal operator (*Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17, supra*, at page 470; *American President Lines, Ltd.—Sec. 805 (a) Application, supra*, at page 440).

Matson has been engaged exclusively in the Pacific coast/Hawaii service for over 73 years, has invested substantial sums in shoreside facilities and equipment, and has built up and maintained a fleet

of vessels especially equipped to handle cargoes moving in the Hawaiian trade. This service has been developed and maintained by private investment without benefit of operating or construction subsidy. Although Matson's subsidiary Oceanic is a subsidized carrier, the record shows that Matson is primarily a domestic unsubsidized operator. There is nothing in the record which indicates that Matson's domestic Hawaiian service has been supported by Oceanic subsidy. In contrast, PFEL is primarily a subsidized operator in the foreign commerce of the United States, and even if granted permission to provide its requested service to Hawaii, its operations would continue to be primarily in offshore services.

Matson's Hawaiian operations have been operated at only a modest profit, an average of only 38 cents per revenue ton after taxes and before dividends, for the period 1950 through 1954. PFEL expects to carry approximately 2,500 tons per voyage from the Pacific coast to Hawaii, and 4,000 to 5,000 tons per voyage from Hawaii to the Pacific coast, on 36 voyages per year. It is apparent from the record that PFEL would be in a position to concentrate primarily on high value commodities, and would, in effect, "skim the cream" in this trade. PFEL would, in addition, provide direct service to Honolulu only, and service to Hawaii outports would be provided by transshipment, or by direct call only if sufficient cargoes offer. In contrast, Matson, the primary and historic carrier in this trade, must continue to provide the necessary and more costly direct service to the Hawaii outports, regardless of the volume of cargoes carried. We therefore feel that although the PFEL competition may divert less than 10 percent of the tonnage in this trade, the diversion of Matson revenues may be substantially greater. Such diversion of cargoes which otherwise have been moving by Matson would sharply reduce the voyage net profits of Matson's sailings in this trade. Matson's vessel-replacement program for Pacific coast freighters will require an investment of at least 100 million dollars. Even at present voyage profit levels the replacement of vessels for Matson is a serious problem. It would be aggravated by approval of the PFEL application.

The examiner found that the years 1952 and 1954 should be excluded from a calculation of average voyage net profit because of strike and labor situations which unduly reduced voyage profits. Even excluding those low-profit years we feel that a diversion of nearly 10 percent of the cargo moving between the Pacific coast and Hawaii would jeopardize Matson's vessel-replacement program.

The record shows that while certain shippers have indicated that particular cargoes have sometimes been refused for a particular sail-

ing, and that certain shippers desire more service to Stockton and broader port coverage, the record as a whole supports a finding that the great majority of shippers have been adequately served by Matson. Though particular sailings have been full and cargoes have on limited occasions been held for a later sailing, there has been available excess free space on most Matson sailings, and vessels have at times been withdrawn from this service for lack of cargoes. The record supports a finding that Matson has had sufficient capacity to serve the trade adequately, and will continue to provide sufficient capacity to meet the needs of this trade in the foreseeable future. The record fails to show the need for service in excess of that presently provided by Matson and other existing operators.

Prior decisions of the Board and Administrator have stated the principle that a subsidized operator should not be permitted to deprive regular domestic carriers of cargoes which they need, have the capacity to carry, and to which they are fundamentally entitled. *Amer. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17, supra*; *American President Lines, Ltd.—Sec. 805 (a) Permission, supra*; *American President Lines, Ltd.—Subsidy, Route 17, supra*.

In *Unsubsidized Operation, supra*, at page 470, the Board and Administrator stated:

The great importance to our merchant marine of its domestic fleet, and the serious difficulties that have attended the reestablishment of domestic shipping in the period since World War II, should prompt us to resolve all doubts against activities of subsidized companies whose operations might tend to impede the development of domestic transportation by sea.

In *Subsidy, Route 17, supra*, at page 504, the Board and Administrator further indicated that,

* * * in our judgement those operators who provide exclusively intercoastal services are entitled, as against primarily offshore operators such as APL, to whatever intercoastal cargoes they can carry.

In view of the foregoing analysis, and in conformity with the principles previously announced by the Board and Administrator, we feel that Matson, an exclusively domestic operator in the California/Hawaii trade, needs the available cargo in this trade, has the capacity to carry such cargoes and, as opposed to PFEL, primarily a subsidized offshore operator, is fundamentally entitled to such cargoes. Furthermore, the diversion of the volume of cargo which PFEL would carry would seriously jeopardize Matson's vessel-replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service. We should be particularly careful to protect the existing operator in an offshore

territorial trade such as the Pacific coast/Hawaii trade considered herein. The Hawaiian economy is vitally dependent on ocean transportation to and from the Pacific coast. We conclude that to permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson in its California/Hawaii service, an exclusively domestic service, and would be prejudicial to the objects and policy of the Act.

The PFEL application is for an integrated service which would serve both the Northwest and the California ports and Hawaii on the same vessels. The primary service would appear to be between California and Hawaii. In view of our findings that such service would result in unfair competition to an operator engaged "exclusively in the coastwise or intercoastal service," and would be prejudicial to the objects and policy of the Act, we are unable to grant the permission requested by PFEL. We have not been presented herein with an application for service solely between the Northwest and Hawaii, in which service Matson is not an exclusive domestic operator entitled to the protection of section 805 (a), and our conclusions are not directed to such an application.

Matson is the predominant carrier in the Pacific coast/Hawaii trade, and we recognize that such a carrier should not be protected from free competition. Denial of PFEL's application does not protect Matson from such competition. Any *unsubsidized* United States-flag carrier may at any time, and without restriction or permission from this Board, enter into competition with Matson in this trade.

On the full record herein, we find and conclude that the granting of permission to PFEL to provide the requested service between Pacific coast ports and Hawaii would result in unfair competition to a carrier operating exclusively in the coastwise or intercoastal service, and would be prejudicial to the objects and policy of the Act. We therefore deny such application.

Vice Chairman Guill, dissenting:

I do not concur in the result reached by the majority. In my view, the record and arguments support the findings and conclusions of the examiner.

The primary issues presented in this proceeding, such as (a) does Matson in fact have sufficient capacity to meet the needs of the trade, (b) is there a need for additional service, (c) would additional competition from PFEL be unfair to Matson, and (d) would the amount of cargoes diverted from Matson by PFEL be a real burden on Matson's domestic operations or prejudice Matson's vessel-replacement

program, are primarily issues of fact which must be determined from an analysis of conflicting testimony and evidence.

Extensive hearings were held before an experienced examiner of the Board, covering 45 days of testimony in San Francisco, Honolulu, and Washington. The record consists of over 7,500 pages of transcript, 176 exhibits totalling 1900 pages, and includes the testimony of over 70 witnesses. The examiner, who actually observed the witnesses and heard the conflicting testimony of numerous shipper, consignee, and company witnesses, made findings and reached conclusions (a) that Matson's services do not fully meet the needs of shippers in the trade, (b) that certain ports have been given insufficient service, (c) that through its business affiliations in Hawaii Matson would have an advantage over PFEL in obtaining cargoes, (d) that for all practical purposes Matson's service in the first six months of 1955 operated at maximum utilization, (e) that in view of the deficiencies in Matson's service "it can hardly be said that PFEL's service would be superfluous", (f) that in view of indicated future growth in the Pacific coast/Hawaii trade, the competition of PFEL would not appear to be a burden on Matson's domestic operations and would not prejudice Matson's vessel-replacement program, and (g) that PFEL's competition would not be unfair to Matson or prejudicial to the objects and policy of the Act.

The examiner who hears the testimony and observes the demeanor of witnesses is especially qualified to reach the proper factual conclusions. *Ohio Associated Tel. Co. v. National Labor Relations Bd.*, 192 F. 2d 664 (6th Cir. 1951); *United States Steel Co. v. National Labor Relations Bd.*, 196 F. 2d 459 (7th Cir. 1952); *Great Western Food Distributors v. Brannan*, 201 F. 2d 476 (7th Cir. 1953). This is particularly true in the instant proceeding, which involves one of the most lengthy and exhaustive records ever developed in a Board proceeding. We should overrule the examiner's findings only for real and substantial cause. I find no arguments advanced in exceptions or oral argument which, in my opinion, warrant our reversal of the examiner's findings.

If Matson were solely a domestic unsubsidized operator without any affiliations or connections with a subsidized line, I would be more inclined to resolve any doubts in favor of Matson, and certain aspects of PFEL's competition might be termed "unfair" within the meaning of section 805 (a). Here, however, Matson, through its wholly owned subsidiary Oceanic, has available to it substantially the same subsidy benefits which would be available to PFEL in connection with its proposed unsubsidized Hawaiian operations. Fur-

thermore, Matson Orient Line, another Matson subsidiary, presently has pending an application for subsidized operations. Because of these facts, it is my view that Matson has a greater burden in rebutting PFEL's *prima facie* case than would a carrier who had no such affiliations with a subsidized line. See *Pac. Transp. Lines, Inc.—Subsidy, Route 29*, 4 F. M. B. 7, 17 (1952). I feel that Matson has not sustained its burden.

In my view, the record fails to show that the granting of PFEL's application would jeopardize Matson's vessel-replacement program. Matson's own traffic witness estimated a 10 percent increase for traffic in 1955 over 1954, and we can take official notice of the fact that there is a steady and continuing increase in cargoes moving in this trade. It appears that diversion of cargoes to PFEL as a result of permission herein sought would be more than made up through over-all increases in the trade. In any event, cost of replacing vessels is a fundamental factor in determining a compensatory freight rate. Over a reasonable period of time freight revenues should support a vessel-replacement program, regardless of whether PFEL is permitted to compete to the limited extent herein requested. Furthermore, Matson's witness would not testify that the granting of PFEL's application would in fact prevent consummation of Matson's vessel-replacement program.

By virtue of its long experience in the trade and close affiliations with business interests in Hawaii, Matson has developed a virtual monopoly in carriage of cargoes moving between the Pacific coast and Hawaii. In 1954 it carried approximately 98 percent of westbound cargoes and 99 percent of eastbound cargoes. I fail to see how, under these conditions, PFEL's proposed competition can be termed "unfair." I have serious doubts that Congress, in enacting section 805 (a), intended to protect a domestic operator who had, in fact, a near monopoly in any trade. Rather, I feel it intended to protect normally competitive domestic operators from unfair competition by predominantly offshore subsidized lines.

In summary, I would like to reemphasize that if Matson were in fact unrelated to any subsidized operations I would be more inclined to resolve all doubts in favor of the exclusively domestic operator. Here, however, Matson and PFEL stand on substantively equal terms insofar as subsidy is concerned, and, in my view, PFEL's competition would not appear to be unfair to Matson or prejudicial to the objects and policy of the Act.

I feel we should adopt the findings and conclusions of the examiner, and grant the permission requested by PFEL.

I am convinced on the record developed herein, as was the examiner, that PFEL's proposed competition would not be unfair to Matson's present operations and would not appear to be prejudicial to the objects and policy of the Act. As to possible future effects of PFEL competition, the Board could, as it has in the past, grant section 805 (a) permission for a limited period of time, and provide for Board review and possible modification or termination of the permission, if found to result in unfair competition or prejudice to the objects and policy of the Act. *Unsubsidized Operation, supra; Pacific Transp. Lines, Inc.—Sec. 805 (a) Application*, 4 F. M. B. 146 (1953).

5 F. M. B.—M. A.

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. Gal-land 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 Isthmian² 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 1954³ 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 period⁴ 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.

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 applicant'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 since 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 ⁶ 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 CARRIINGS 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 uncontroversial 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. GULL, *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 non-terminal 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.

⁴This 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.

5 F. M. B.

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

5 F. M. B.

Skibsaktieselskapet Mandeville
Skibsaktieselskapet Goodwill
KNUTSEN LINE—
Dampskibsaktieselskapet Jeanette
Skinner

Skibsaktieselskapet Pacific
Skibsaktieselskapet Marie Bakke
Dampskibsaktieselskapet Golden
Gate

Dampskibsaktieselskapet Lisbeth
Skibsaktieselskapet Ogéka

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 COR-
PORATION

II

ASSOCIATE MEMBERS

- DAMPSKIBSSELSKABET AF 1912,
AKTIESELSKAB AKTIESELS-
KABET DAMPSKIBSSELSKA-
BET SVENDBORG
(A. P. Moller, Maersk Line)
BANK LINE, LTD.
COMPAGNIE DE TRANSPORTS
OCEANIQUES
ELLERMAN & BUCKNALL ASSOCI-
ATED LINES
(American & Manchurian Line)
FERNVILLE FAR EAST LINES—
Fearnley & Eger and A. F. Klave-
ness & Co., A/S
Skibsaktieselskapet Varild
Skibsaktieselskapet Marina
Aktieselskabet Glittre
Dampskibsinteressentskabet Ga-
ronne
Skibsaktieselskapet Sangstad
Skibsaktieselskapet Solstad
Skibsaktieselskapet Siljestad
Dampskibsaktieselskabet Interna-
tional
- 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 DAMPSKIBSAK-
TIESELSKAB
A/S Den Norske Afrika—Og Aus-
tralielinie
A/S Tonsberg
A/S Tankfart I A/S Tankfart IV
A/S Tankfart V A/S Tankfart VI
YAMASHITA KISEN KAISHA

III

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 SHIP-
MENTS 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 MCB-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 SHIP-
MENTS 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.

5 M. A.

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. GULL, *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.

5 F. M. B.

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.

5 F. M. B.

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. GULL, *Vice Chairman*,
THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This case arises from a complaint filed under section 22¹ 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; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement" (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.

(1)

5 F. M. B.

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 Navigation 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 group¹ 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 rebate² 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. 8085⁷ 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 inferable 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 Matson 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 licensee 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

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

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

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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.

5 F. M. B.

FEDERAL MARITIME BOARD

No. M-82

AMERICAN PRESIDENT LINES, LTD., ET AL.—ANNUAL REVIEW OF BARE-BOAT 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:

<i>Vessel</i>	<i>Charterer</i>
<i>Council Bluffs Victory</i> -----	American President Lines, Ltd.
<i>Hope Victory</i> -----	American President Lines, Ltd.
<i>Baylor Victory</i> -----	Central Gulf SS. Corp.
<i>Lahaina Victory</i> -----	American Mail Line Ltd.
<i>Pine Bluff Victory</i> -----	Pacific Atlantic SS. Co.
<i>Casimir Pulaski</i> -----	American Coal Shipping, Inc.
<i>Joseph C. Cannon</i> -----	Blidberg Rothschild Co., Inc.
<i>Greece Victory</i> -----	Isbrandtsen Co., Inc.
<i>Navajo Victory</i> -----	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 Commerce¹ 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. GULL, *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 18¹ of the Shipping Act, 1916, as amended (the 1916 Act), and section 3² 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/Hawaii service include:

	<i>Percent</i>
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 fleet⁸ 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 $\frac{1}{10}$ 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

¹³The 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 \$62,909,000¹⁴ 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-

¹⁴The 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 substantial 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.

5 F. M. B.

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 original 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:

	<i>Tons</i>
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:

	<i>Tons</i>
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:

<i>Year</i>	<i>Average tons</i>
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:

<i>Out-bound (Per cent)</i>	<i>In-bound (Per cent)</i>
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 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.

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 be 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 paragraph of section 605 (c) of the Act, i. e., "that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon." The finding of inadequacy of United States-flag service is the primary reason for making this second finding required under the section.

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	24	(**)	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	335,282	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.

5 F. M. B.—M. A.

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 examiner 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. GULL, *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 appraisal 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	(*)
1953.....	1,672,000	12	(*)
1954.....	1,626,000	11	35
1955.....	1,722,000	16	35
1956.....	1,982,000	22	36
Total.....	(b) 7,963,600	16	(*)

* 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	(*)
1953.....	1,547,000	20	(*)
1954.....	1,598,000	14	27
1955.....	1,740,000	16	29
1956.....	1,035,000	20	32
Total.....	8,115,000	19	(*)

* 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)

* 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)	Irrigators
Bowls	Kettles
Canisters	Pails
Casseroles	Pans
Chambers, Sanitary	Pots, Coffee
Commodos, Sanitary	Shovels, Stoves
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	

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:

<i>Stoves, viz.:</i>		<i>Class</i>
Alcohol.....	-----	3
Coal, Gas, Gasoline, Oil or Wood Burning.....	-----	6
Electric.....	-----	3
<i>Ovens, viz.:</i>		
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:

<i>Refrigerators, viz.:</i>		<i>Class</i>
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 Ciudad 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:

<i>Stoves, viz.:</i>	<i>Class</i>
Alcohol -----	3
Coal, Gas, Gasoline, Oil or Wood Burning -----	6
Electric -----	3

<i>Ovens, viz.:</i>	<i>Class</i>
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
Commodos, 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.

5 F. M. B.

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. GULL, *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 abbreviation "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 business 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-

³The 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 1953 through August 1953, 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.

⁴This 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.

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 privilege 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-71⁴ 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 applications⁵ there has been no section-605 (c) hearing and that in two⁶ 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 discharged 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 Victories or Libertys
- Mississippi Shipping Company, Inc., for 3 Victories 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 Liberties. 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 transportation 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.

5 F.M.B.

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 involvement 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.

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

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 (*Californiu 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,
5 F.M.B.

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

<i>United Export</i>	<i>Bimor Textile</i>	<i>Lynne Forwarding</i>
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

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.' 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, Cyclopedic 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:

<i>United</i>	<i>Lynne</i>
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.*, 803 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.

5 F.M.B.

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 inter-coastal service from California to Norfolk and Baltimore, and (2) its east-bound 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, Jeddah, 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, Piræus, 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.

⁵ If subsidized Isbrandtsen 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 Isbrandtsen 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 Isbrandtsen 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 service¹⁰ on Trade Route 10, an Alexandria express service¹¹ on Trade Route 10, an India service¹² on Trade Route 18, and a passenger service¹³ 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 inter-coastal 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 Caribbean 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.)

5 F.M.B.

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.

5 F. M. B.

(11)

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 Kaifu 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 $\frac{1}{8}$ -inch corestock veneer; 6,000 square feet of $\frac{1}{8}$ -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 subpoena, 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 reduction² 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, 200 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 Philippine 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.....	29,314	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 manufacturers, 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 imported 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.

5 F.M.B.

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 WILHELMSSEN LINE—
 Wilhelmsens Dampskibsaktiesels-
 kab
 A/S Den Norske Afrika-Og Aus-
 tralienlinie
 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
 Dampskibsinteressentskabet
 Garonne
 Skibsaktieselskapet Sangstad
 Skibsaktieselskapet Solstad
 Skibsaktieselskapet Siljestad
 Dampskibsaktieselskabet Interna-
 tional
 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 Naviga-
 tion Company, Ltd.
 Nederlandsche Stoomvaart Maat-
 schappij "Ocean" N.V.
 EAST ASIATIC CO., LTD.
 ELLERMAN & BUCKNALL ASSO-
 CIATED 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 SERV-
 ICE—
 Aktieselskapet Ivarans Rederi
 Skibsaktieselskapet Igadi
 A/S Lise
 ISTHMIAN LINES, INC.
 JAVA PACIFIC LINES—
 Koninklijke Rotterdamsche Lloyd,
 N.V.
 Stoomvaart Maatschappij "Neder-
 land" 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 Interna-
 tional
 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 Aktie-
 selskab

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 COR-
PORATION
WILHELMSSEN LINES—
Wilhelmsens
Dampskipsaktieselskab
A/S Den Norske Afrika-Og Aus-
tralielinie
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 Atlantic 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.

5 F.M.B.

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 September 22, 1958. Decided October 9, 1958

The continuation by Isbrandtsen Company, Inc., of (1) its eastbound inter-coastal service from California to New Haven, and (2) its service from Puerto Rico to Norfolk, when and if subsidy is awarded, found not to constitute unfair competition to any person, firm, or corporation engaged exclusively in the coastwise or intercoastal service, or to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

SUPPLEMENTAL REPORT OF THE BOARD

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

BY THE BOARD:

On September 12, 1958, Isbrandtsen Company, Inc. (Isbrandtsen), filed a petition for partial reconsideration of the Board's report herein of August 12, 1958 (5 F.M.B. 448). Specifically, Isbrandtsen seeks a modification of the report with respect to (1) its bulk coastwise and cross-Gulf service, (2) its intercoastal service to New Haven, and (3) its service from Puerto Rico to Norfolk.

Replies to the petition were filed by interveners A. H. Bull Steamship Co., Bull-Insular Line, Inc., Luckenbach Steamship Co., Inc., and Marine Transport Lines, Inc. (intervenors), and by Public Coun-

sel. Public Counsel supported applicant on items (2) and (3), above, and interveners voiced no objection to item (3).

Bulk coastwise and cross-Gulf. Isbrandtsen's arguments that the Board reverse its conclusion so as to allow the continuation of this service, as sought in its application and as noticed for public hearing, are unconvincing and were fully considered prior to the issuance of the first report. As to Isbrandtsen's proposal to augment its bulk coastwise and cross-Gulf service with a service from South Atlantic ports to Puerto Rico, we note that written permission is sought for a service substantially different from that in the original application, upon which public hearings were held, and therefore it must be denied. This denial is without prejudice, however, to the filing of an application under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), for such service.

Intercoastal service to New Haven. Applicant contends that the written permission granted Isbrandtsen to continue its intercoastal service to Puerto Rico, Norfolk, and Baltimore in conjunction with its eastbound round-the-world service, should be extended to include New Haven, particularly since the record shows that no intervener serves the port of New Haven intercoastally. Isbrandtsen contends that the rationale followed by the Board in authorizing service to Norfolk and Baltimore, when applied to the facts of record with reference to New Haven, requires a conclusion that the permission be granted. There is one difference however: Isbrandtsen is *now* operating to Baltimore and Norfolk intercoastally; it has not served New Haven for more than three years. We do not propose to extend section-805(a) permission authorizing a subsidized operator to serve a particular port at some future time when it deems the service feasible. On this record, however, we find that the service to New Haven, at this time, would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, and that it would not be prejudicial to the objects and policy of the Act. In the event Isbrandtsen does not re-establish its intercoastal service to New Haven within a reasonable time, the findings herein made will be subject to modification or vacation.¹

The argument of intervener Luckenbach that in serving both New York and Boston it adequately serves the needs of New Haven intercoastally, is not controlling here. To accept such argument would

¹ In *Matson Orient Line, Inc.—Subsidy, Route 12*, 5 F.M.B. 410, after finding that the provisions of section 805(c) of the Act did not interpose a bar to the award of subsidy, and assuming the applicant would qualify for subsidy under other sections of the Act, it was stated that "• • • unless a subsidy contract, if offered, is executed and operations have commenced within a reasonable time, we shall review our determination in light of conditions as they then exist."

prejudice New Haven consignees of intercoastal cargo. Further, we feel that the granting of the permission here sought is consonant with the congressional policy favoring port development, as manifested in section 8 of the Merchant Marine Act, 1920, 46 U.S.C. 867. *Pacific Far East Line v. United States*, 246 F. 2d 711 (1957).

• *Puerto Rico to Norfolk*. Upon re-examination of the record, we find that Isbrandtsen is the only carrier offering a service in this trade. In view of all the circumstances, we cannot find that the continuation of the service would result in unfair competition to any person, firm, or corporation operating exclusively in the domestic trades, and we believe that by authorizing this service the objects and policy of the Act would be promoted. Further, the consignees at Norfolk as well as those at New Haven are entitled to a direct service.

In conclusion, in the event Isbrandtsen is awarded a subsidy contract, and 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 intercoastal service from California to New Haven, and (2) its domestic service from Puerto Rico to Norfolk, both in conjunction with its eastbound round-the-world service. Permissions herein granted are in addition to those set forth in the prior report.

5 F.M.B.

FEDERAL MARITIME BOARD

No. 828

GENERAL INCREASES IN ALASKAN RATES AND CHARGES

Submitted June 9, 1958. Decided October 9, 1958

Respondents' proposed increased rates and charges, and regulations and practices, found just and reasonable.

Stanley B. Long, Richard S. Sprague, and Edward G. Dobrin for Alaska Steamship Company and Garrison Fast Freight, Division of Consolidated Freightways, Inc., Alan F. Wohlstetter for Alaska Freight Lines, Inc., and Vaughn E. Evans and Martin P. Detels, Jr., for Coastwise Line, respondents.

Harry C. Burnett for Upper Columbia River Towing Company, J. Gerald Williams and David J. Pree for Territory of Alaska, John Regan, C. M. Graff, Edward C. Sweeney, F. W. Denniston, Malcolm D. Miller, and Clarence J. Koontz for Administrator of General Services, Wilbur L. Morse, W. Harwood Huffcut, Harry R. Tansill, and Milton J. Stickles, Jr., for Department of Defense, Fred H. Tolan for Northwest Fish Traffic Committee and Associated Grocers, Incorporated, Omar O. Victor for United States Smelting, Refining and Mining Co., J. D. Paul for Seattle Traffic Association, and H. E. Franklin, Jr., for Tacoma Chamber of Commerce, interveners.

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:

In October 1957, respondents Alaska Steamship Company (Alaska Steam) and Coastwise Line (Coastwise) filed tariff schedules with the Board to become effective December 2, 1957, providing a general 15-percent increase in rates and charges applicable to the carriage of cargo between United States Pacific coast ports and ports in Alaska,

and setting forth new rules, regulations, and practices affecting such rates and charges. In November 1957, respondents Garrison Fast Freight Division of Consolidated Freightways, Inc. (Garrison), and Alaska Freight Lines, Inc. (Alaska Freight), filed changes in their tariffs effecting similar rate increases in the ocean portion of their services, to be effective December 18, 1957.¹

Pursuant to section 18 of the Shipping Act, 1916, as amended (the 1916 Act),² and section 3 of the Intercoastal Shipping Act, 1933, as amended (the 1933 Act),³ the Board, by order served on December 2, 1957, instituted this investigation into and concerning the lawfulness of the foregoing rates, charges, rules, and regulations, and suspended the effective date of the proposed changes until April 2, 1958.

Pursuant to petitions filed by respondents, the Board permitted interim rate increases of 7½ percent,⁴ to become effective January 30, 1958.

Upper Columbia River Towing Company intervened in support of respondents but took no active part in the proceeding, indicating that it proposed to enter the Alaskan trade in the near future. Northwest Fish Traffic Committee, Associated Grocers, Inc., Territory of Alaska, General Services Administration on behalf of the executive agencies of the Federal Government except the Department of Defense, and United States Smelting, Refining & Mining Co., intervened in opposition to the proposed increases. The Department of Defense, Seattle Traffic Association, and Tacoma Chamber of Commerce intervened as their interests might appear.

Hearing was held, briefs were filed, and the examiner issued his initial decision on May 5, 1958. The examiner found and concluded that the proposed rates, charges, regulations, and practices were just and reasonable and not unlawful.

Alaska Steam provides the only common-carrier service covering all areas of Alaska. It operates a fleet of 13 vessels, five of which are Liberty type and eight are vessels of the C1-M-AV1 class. Four of the C1-M-AV1 vessels are bareboat chartered from Maritime Administration and the other nine vessels are owned by Alaska Steam. All these vessels are normally used during the peak season (approximately May through September) but several are laid up during the

¹ Alaska Freight and Garrison published through one-factor rates including pick-up and delivery charges as well as charges for the water haul, without segregation as between rates for the water transportation and for the land transportation. Their over-all rates were generally increased 7.5 percent, reflecting, they allege, an increase of approximately 15 percent in the portion of the rates applicable to the water haul.

² Set forth in pertinent part in the appendix.

³ Set forth in the appendix.

⁴ The actual increases of Alaska Freight and Garrison on their through one-factor rates was again about half the increase of the other respondents, or 3.75 percent.

remainder of the year. The Government-owned vessels continue under charter for the full year but are in an off-hire status when laid up. In the past years certain of the idle vessels have been chartered out for use in other trades; but Alaska Steam asserts there appears to be no prospect of such charter during 1958.

Alaska Steam furnishes weekly C1-M-AV1 service, year-round, from Seattle to Ketchikan, Petersburg, and Juneau, in Southeastern Alaska, with biweekly stops at Seward, Wrangell, and Sitka, and monthly stops at Haines and Skagway. Weekly Liberty-ship service is furnished from Seattle to Seward and Valdez, with calls every third voyage at Cordova, and with calls at Whittier as traffic demands. During the summer months an additional C1-M-AV1 operates biweekly to Seward from Seattle with a stop at Cordova. Every third Wednesday, year-round, a C1-M-AV1 sails for Kodiak and Womens Bay with occasional calls at Seldovia and Homer. Service to cannery and cold storage locations along the Alaska Peninsula and Bristol Bay ports is scheduled as traffic warrants during the fishing season. About three or four trips are scheduled each summer to the Norton Sound area, with one proceeding to the northernmost port of Kotzebue.

Southbound service from the salmon canneries requires the stationing of more vessels in those areas than northbound traffic would justify, since these canneries, which furnish the greater part of the southbound traffic via Alaska Steam, have only limited storage facilities. The canneries generally are located at out-of-the-way ports where no stevedore personnel are available, and cannery personnel must be used to assist in the loading.

Coastwise owns one C-4 type vessel, and operates seven chartered vessels consisting of four C-2's and three Libertys. In early 1957 Alaska service was provided with three Liberty vessels sailing from California ports to Portland and Puget Sound, and thence to Seward, Whittier, and Valdez in the rail belt area of Alaska, with occasional calls at Kodiak, Ketchikan, and Anchorage. Later in the year the three Liberty vessels were gradually replaced by C-2 vessels operating only to Seward, Whittier, and Valdez; the Liberty vessels thereafter were operated in foreign trades.

At the beginning of 1958, Coastwise discontinued its direct C-2 service and substituted an interchange arrangement with Alaska Steam at Seattle on traffic between California and Alaska. In this service Coastwise uses its owned C-4 vessel. Costs of loading and discharging are borne by each carrier, and the costs of pier handling at Seattle and revenues are divided 45 percent to Coastwise and 55

percent to Alaska Steam. This interchange arrangement can be discontinued by either line, but Coastwise could not predict whether it would be continued or whether the direct C-2 service would be reinstated.

Alaska Freight operates nine owned tugs, one chartered tug, one tug held under a lease-purchase agreement, 16 owned barges, one owned power barge, and one LSM held under lease-purchase agreement. It provides regular scheduled integrated sea-land service between points in and around Seattle, Tacoma, Longview, and Vancouver, Washington, and Portland, Oregon, and points in Alaska in and around Anchorage, Fairbanks, Palmer, Big Delta, Seward, and Valdez. Substantial fleets of trucks and trailers are maintained at Seattle and in Alaska, and most of the cargo carried is packed in trailer vans and transported on the decks of barges, although some is loose-stowed in the holds of the barges. On February 10, 1958, a service consisting of one sailing every two weeks was instituted from Portland to Alaska, and it is expected that a monthly sailing from California ports will be instituted later this year. Rates for the latter service are not involved in this proceeding.

Garrison operates no vessels but files a tariff naming through rates for the through movement of cargo in motor cargo vans from points in the United States to points in Alaska. The vans are carried on vessels of Alaska Steam under a division-of-rates arrangement.

Prior investigations by the Board in Alaskan rate proceedings⁵ have emphasized the particular difficulties and hazards inherent in providing water transportation to Alaska. There are an exceptionally large number of small ports to be served. In 1957, for example, Alaska Steam called at 65 different ports. Hazards to navigation are extreme because of ice, wind, fog, shoals, strong tides at narrow passages, and poor berthing accommodations. The trade is highly seasonal, with the majority of the cargoes moving in the period from April through September. The movement is severely unbalanced, as indicated by the fact that in 1957 northbound traffic of Alaska Steam was about 3.5 times that of southbound traffic; for Alaska Freight and Coastwise, northbound traffic was about 90.2 percent and 95.8 percent, respectively, of their total revenue tons. Our previous observations as to the general characteristics of this trade are confirmed by the present record.

Since May 1947 there have been two general rate increases in this trade, one of 15 percent in 1952 and one of 7½ percent in 1954. In-

⁵ *Alaskan Rate Investigation*, 1 U.S.S.B. 1 (1919); *Alaskan Rates*, 2 U.S.M.C. 558 (1941); *Alaskan Rate Investigation No. 3*, 3 U.S.M.C. 43 (1948).

cluding the interim rate increase of 7½ percent made effective on January 30, 1958, the cumulative rate increases since May 1947 amount to 32.9 percent. This compares with corresponding cumulative rate increases of 101.5 percent in the Pacific coast-Puerto Rican trade and 85.2 percent in the Pacific coast-Hawaiian trade.

Alaska Steam is by far the dominant carrier in the trade, carrying 514,301, or 71.2 percent, of the total 722,375 revenue tons handled by the four respondents in 1955; 532,214, or 71.0 percent, of the total 749,304 revenue tons carried in 1956; and 481,411, or 71.7 percent, of the total 671,051 revenue tons carried in 1957. Alaska Steam thus being clearly the dominant carrier in the trade and generally the rate-making line, we believe an examination of that carrier's operations will correctly determine the issues here presented. Our analysis will therefore be directed to the operations of Alaska Steam. *General Increase in Hawaiian Rates*, 5 F.M.B. 347 (1957).

The increases under consideration apply only to commercial cargo, but the traffic projections presented by Alaska Steam assume that similar increases will be sought and granted from the various Government agencies shipping so-called military cargoes. In 1957, 18.3 percent of the revenues and 18.9 percent of the traffic of Alaska Steam consisted of military cargo.

Alaska Steam carried the following revenue tons in recent years:

TABLE I

1949.....	690, 626	1954.....	518, 967
1950.....	635, 210	1955.....	514, 301
1951.....	715, 049	1956.....	532, 214
1952.....	555, 502	1957.....	481, 441
1953.....	586, 216		

Traffic officials of Alaska Steam estimated a decline in cargo movement of 15 percent in 1958 as compared with 1957, but the total movement projected for 1958 in Alaska Steam exhibits was 429,307 tons, or a decrease of 10.8 percent from 1957. This decrease was based upon the experienced decrease from the carryings in the last half of 1957 as compared with the last half of 1956. This projected decrease was supported by predictions of Alaska Steam that the southbound movement of canned salmon would continue to decline; that there would be a decline in the movement of military cargo; that construction activity in 1958 will be less than in 1957; and that the sparse population of Alaska will decline in 1958.

Public Counsel and certain of the interveners contend that Alaska Steam's traffic projections are unduly pessimistic. They point out that Alaska Steam did not allow for additional traffic which will arise from the Coastwise interchange, and that the data relied upon by Alaska Steam was insufficient for a reliable prediction of such a sharp decrease. Public Counsel estimates a decrease in tonnage of about 4½ percent in 1958, the same rate of annual decrease experienced by Alaska Steam from 1953 to 1957.

Based upon its projected decrease for 1958, the assumption that the proposed 15-percent rate increase had been in effect for the full year, the adjustments in expenses to reflect for a full year the increased wages incurred during 1957, and adjusting expenses to reflect five fewer sailings in 1958, Alaska Steam presented the following operating results for 1957 and as projected for 1958:

TABLE II

	1957	1958 (projected)
Revenues.....	\$13, 521, 327	\$14, 160, 951
Expenses.....	13, 539, 369	13, 079, 651
Profit before income tax.....	(18, 042)	1, 081, 300
Profit after income tax.....		519, 024

Alaska Steam contends that the proper and lawful value of the property owned and used by it in the Alaskan trade, i.e., the "rate base" to be used in determining whether the increased rates will result in a fair and reasonable rate of return, is \$23,591,769.00, made up of the following asset valuations:

TABLE III

Owned vessels.....	\$10, 790, 700
Chartered vessels.....	5, 377, 900
Property other than vessels:	
Owned.....	684, 400
Used.....	1, 329, 518
Working capital.....	3, 591, 000
Going concern value.....	1, 818, 251
Total.....	23, 591, 769

The record shows the following to be the net book value,⁶ reproduction cost depreciated,⁷ and domestic market value⁸ of Alaska Steam's owned and chartered vessels.

TABLE IV

	Net book value	Reproduction cost depreciated	Domestic market value
Owned vessels	\$3, 006, 000	\$14, 127, 000	\$4, 500, 000
Chartered vessels.....	1, 518, 600	7, 032, 000	2, 540, 000
Totals	4, 524, 600	21, 159, 000	7, 040, 000

In reaching its rate base valuation of \$10,790,700.00 for owned vessels and \$5,377,900.00 for chartered vessels, Alaska Steam used a formula weighting original cost depreciated at 30 percent and reproduction cost depreciated at 70 percent, in order, it states, to give effect to the long-continued and consistently upward trend in the reproduction cost of the type vessels utilized by it.

Public Counsel and certain interveners contend that nonowned chartered vessels should not be included in the rate base if the charter hire therefor is included in operating expenses; that the value of owned vessels should be either book value or present market value; and that reproduction costs should not be given controlling weight in the determination of a fair vessel valuation for rate base purposes.

Owned property other than vessels include automobiles, office and repair shop supplies, equipment and machinery, furniture and fixtures, life boat radios, and real estate, with a net book value of \$94,820.00, appraised by Alaska Steam at \$133,726.00, and the unitized cargo equipment owned by Alaska Steam with a net book value of \$88,625.00, appraised by Alaska Steam at \$550,692.00. The unitized cargo equipment consists of lift trucks, pallet jacks, cargo gards,

⁶ In accordance with the initial decision of the examiner, net book value of the four chartered C1-M-AV1 vessels has been included in this table at the same net book value as the four C1-M-AV1 vessels.

⁷ Reproduction cost was estimated in exhibits prepared and presented by Alaska Steam, and depreciation was calculated on a 20-year life basis.

⁸ Domestic market value of the vessels was estimated by an expert witness for Alaska Steam and by a Maritime Administration appraiser. Recognizing that experts will honestly differ in appraisals of value, we have accepted, as did the examiner, an approximate average of the two appraisals for the owned and chartered vessels at the time of hearing.

and cargo cribs. The gards were depreciated over a 3-year period and are fully depreciated. The collapsible crib parts are of wooden construction, and the sides, ends, and tops are written off in one year while the pallet board bottoms are written off in two years.

The value of nonowned property, other than vessels, urged by Alaska Steam has been computed on the basis of 90 percent of the net book value of the cargo vans, semitrailers, highway cargo vans, and temperature control devices utilized principally in the through transportation arrangements between Alaska Steam and Garrison, some of which are leased individually by Alaska Steam on a per diem rental arrangement. The equipment is owned by Arctic Terminals, a corporation of which the stock is held 49 percent by Alaska Terminal & Stevedoring Co., an affiliate of Alaska Steam, and 51 percent by Consolidated Freightways, Inc. The figure of 90 percent was used on the theory that at least that much of the equipment was utilized in the service of Alaska Steam. The record does not disclose the actual or approximate time that the equipment is in the possession of and used by Alaska Steam, as compared with the time the equipment is used by Garrison, so no fair allocation for valuation can be made. The 90-percent figure does not represent actual use by Alaska Steam. The per diem rental charges for this equipment are included as an item of expense by Alaska Steam, and in the case of through traffic handled by Garrison and Alaska Steam, the rental charges are deducted from the gross revenues before division of the latter between the two carriers.

Public Counsel and interveners contend that the valuation of owned property other than vessels should be based on book value, and that nonowned property other than vessels should be excluded from the rate base, particularly where, as here, the rental charges for the use of such property are included in operating expenses and cannot be clearly segregated.

Alaska Steam computed working capital by adding together two items: (1) net investment in working capital, determined by subtracting unpaid current accounts, taxes payable, untermiated voyage revenue, and deferred liabilities from uncollected accounts receivable, working funds, cash in transit, prepayments, untermiated voyage expenses, and materials and supplies; and (2) a buffer fund of cash equal to the maximum month's operating expenses in 1957. These computations, showing average, maximum, and minimum working capital in 1957 are as follows:

TABLE V

	Monthly average	Minimum month	Maximum month
Net investment in working capital, exclusive of buffer fund of cash.....	\$1, 195, 223	\$1, 042, 426	\$1, 602, 274
Operating expenses, including taxes other than income taxes, exclusive of depreciation.....	1, 102, 375	670, 663	1, 989, 070
Total.....	2, 297, 598	1, 713, 089	3, 591, 344

Public Counsel and certain interveners contend that working capital was overstated by Alaska Steam and should be limited to \$2,000,000.00 or less. Public Counsel urges that working capital is a fund needed to support the lag between payment by the company of expenses for conducting operations, and receipt by the company of revenues for the service for which the expense was incurred. Under this definition they argue that working capital in the Alaska trade should be not more than \$2,000,000.00, or approximately the highest-month's operating expenses.

The item of going-concern-value represents an arbitrary ten percent of the value of all the physical assets otherwise included in the rate base. Public Counsel and interveners urge that no specific item should be included in the rate base for "going concern value," and the examiner rejected this item.

In concluding that the proposed increases were just and reasonable, the examiner did not fix one precise rate base for determining a fair return. He determined that for Alaska Steam, on a rate base of \$9,540,000.00, consisting of the market value of owned and chartered vessels, \$2,200,000.00 working capital, and \$300,000.00 for all other properties, the revenue of \$14,160,951.00 projected for 1958 would produce a net profit of \$519,024.00, or a 5.44 percent return, and on a rate base of \$15,341,800.00 weighting the net book value and reproduction cost depreciated of owned and chartered vessels equally, and allowing the amounts stated immediately above for working capital and other property, the same net profit would result in a return of 3.38 percent. He concluded that these rates of return on the rate bases considered could not be said to be unreasonably high, and that the increases were therefore just and reasonable.⁹ The examiner gave no controlling

⁹ The examiner also made separate findings with respect to Alaska Freight, but since we are treating Alaska Steam as the rate-making line in the Alaska trade, we have not separately considered the operations of Alaska Freight.

weight to the operating ratio theory¹⁰ advanced by Alaska Steam and Alaska Freight, merely commenting that the projected operating ratio of 96.33, after income taxes, cannot reasonably be characterized as unduly low.

Exceptions were filed by Public Counsel, Administrator of General Services, Northwest Fish Traffic Committee, Associated Grocers, Inc., Alaska Steam, Garrison, and the Territory of Alaska. Replies to exceptions were filed by Alaska Freight, Public Counsel, Alaska Steam, and Garrison. Exceptions taken and recommended findings not discussed in this report and not reflected in our findings and conclusions have been found not relevant or not supported by the evidence.

DISCUSSION AND CONCLUSIONS

Under the 1933 Act the burden of proving that the proposed increases are just and reasonable rests upon respondents (section 3), and if the tariffs are found to be unjust or unreasonable the Board may "determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation or practice" (section 4).

What Alaska Steam and the other respondents are entitled to is 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), cited in *General Increase in Hawaiian Rates, supra*.

We agree with the examiner that the operating-ratio theory has never been followed by the Board or its predecessors and should have no controlling weight in this proceeding. Operating ratio has been used in motor carrier rate cases by the Interstate Commerce Commission, where the ratio of operating revenues (and expenses) to investment in capital equipment is relatively large, i.e., four or five to one or better. In contrast, Alaska Steam's ratio of revenue (or expenses) to capital investment is only slightly in excess of two to one. We see no reason to depart from the fair-return-on-fair-value standard which the Board and its predecessors have used.

We first direct our inquiry to the cargo carryings which can reasonably be expected by Alaska Steam in 1958, and to the operating profit which may be expected from carrying such traffic under the 15-percent increase and the increased costs estimated for 1958.

¹⁰ Operating ratio is the ratio of operating expenses to gross revenues.

It is clear from the record that Alaska Steam can expect some decline in cargo offerings in 1958 as compared with 1957. The record does not support a decline, however, as great as the 10.82 percent projected by the company.

The total movement of traffic between the United States and Alaska has shown a consistent decline in recent years. In the years 1949-1957, as shown in table I, *supra*, Alaska Steam's revenue tons fluctuated widely but generally declined, as follows:

1949-----	690, 626	1954-----	518, 967
1950-----	635, 210	1955-----	514, 301
1951-----	715, 049	1956-----	532, 214
1952-----	555, 502	1957-----	481, 441
1953-----	586, 216		

From 1949 to 1957 the traffic of Alaska Steam decreased a total of 209,215 revenue tons, or an average annual decrease of 3.8 percent; from 1954, the date of the last rate increase, to 1957, traffic decreased 37,556 revenue tons, or an average annual decrease of 2.4 percent; and from the peak Korean War year of 1951 to 1957, the decrease was 233,638 revenue tons, or an average annual decrease of only 5.5 percent.

The factors relied upon by Alaska Steam in supporting its projected decline in traffic do not support the calculation of a precise and reliable mathematical projection. In view of the traffic experience of Alaska Steam, and upon consideration of the record as a whole, we find that a decrease of 5 percent can be reasonably projected for 1958 as compared with 1957. On this basis, it can be predicted that Alaska Steam will carry 457,340 revenue tons in 1958.

Based upon its projection of 429,307 revenue tons to be carried in 1958 at the increased 15-percent rates for the full year, Alaska Steam has estimated total revenues of \$14,160,951.00. Applying a return of \$32.26 per revenue ton¹¹ to the 457,340 revenue tons we consider reasonable for 1958, Alaska Steam's gross revenues for the year would be \$14,753,788.00.

Based upon 429,307 revenue tons projected for 1958, Alaska Steam has estimated its annual total expenses at \$13,079,651.00. Adding to this the cost of handling the additional 28,033 revenue tons¹² which we estimate will be carried, or \$303,878.00, the projected total expenses for carrying 457,340 revenue tons in 1958 would be \$13,383,529.00.

¹¹ \$32.26 is the average return per revenue ton for commercial and military cargoes as projected by Alaska Steam for 1958 at the 15-percent increased rate.

¹² The average cost of handling commercial cargo in 1957 was \$10.84 per ton.

Revenues of \$14,753,788.00 and expenses of \$13,383,529.000 result in a net profit of \$1,370,259.00 before taxes and \$647,724.00 after taxes.¹³

We next direct our inquiry to the rate base, i.e., the fair value of the property devoted to the common-carrier operations of Alaska Steam. In ascertaining such a fair value we are not bound by any artificial rules or formulae. *General Increase in Hawaiian Rates, supra.*

The rate-base valuations advanced by Alaska Steam consisted of vessels, owned and chartered; property other than vessels, owned and leased; working capital; and going-concern value.

Vessels. The record shows the net book value, reproduction cost depreciated, and domestic market value of Alaska Steam's owned and chartered vessels to be as follows:

TABLE VI

	Net book value	Reproduction cost depreciated	Domestic market value
Owned vessels.....	\$3, 006, 000	\$14, 127, 000	\$4, 500, 000
Chartered vessels.....	1, 518, 600	7, 032, 000	2, 540, 000
Total.....	4, 524, 600	21, 159, 000	7, 040, 000

Various valuations of vessels for rate-base purposes were presented—\$16,168,600.00 (net book value weighted 30 percent, and reproduction cost depreciated weighted 70 percent), proposed by Alaska Steam; \$12,841,800.00 (50-50 average of net book value and reproduction cost depreciated); \$7,040,000.00 (domestic market value of owned and chartered vessels); and \$4,500,000.00 (domestic market value of owned vessels only—chartered vessels excluded), urged by Public Counsel.

We consider the value of \$16,168,600.00, weighting net book value 30 percent and reproduction cost depreciated 70 percent, to be excessively high as it gives unreasonable emphasis to hypothetical reproduction costs where the record shows that these vessels will probably not be reproduced and that Alaska Steam has historically never operated with newly constructed tonnage. We further consider book value alone as unrealistic. In *General Increase in Hawaiian Rates, supra*, we considered as two possible valuations for rate-base purposes the average of net book value and depreciated reproduction cost and fair market value adjusted to eliminate short term peaks or valleys in

¹³ Taxes are calculated at 52 percent, the tax rate used by Alaska Steam in its exhibit calculations.

vessel values. For Alaska Steam's own and chartered vessels the average of the net book value and depreciated reproduction cost is \$12,841,-800.00. Considering the upward trend in vessel values in recent years, and allowing for the decline in such values which has occurred since the excessively high values during the Korean War and the Suez crisis, we consider the domestic market value at the time of hearing of \$4,500,000.00 for owned vessels and \$2,540,000.00 for chartered vessels to be a fair and reasonable market valuation for rate-base purposes.

We do not agree with the contention of Public Counsel and interveners that the proper method of handling these Government-owned chartered vessels is to exclude their value from the rate base, but instead allow charter hire to remain as an item of operating expense. We consider inclusion of a fair value for these vessels in the rate base to be more realistic and less subject to market fluctuations than to exclude such vessels from the rate base and allow charter hire as an item of expense. We will therefore include the rate-base values, as set forth in the preceding paragraph, for both owned and chartered vessels.¹⁴ It would be improper, however, to allow a return on the value of nonowned property and at the same time allow the cost of using such property, i.e., charter hire, to remain as an operating expense.¹⁵ We will therefore reduce projected operating expenses for the year 1958 by \$155,190.00, the amount of such annual charter hire.

Property other than vessels. Alaska Steam valued owned property other than vessels at an appraised value of \$684,418.00, although the net book value of such property is only \$183,445.00. It is evident that the value of much of this property has been charged off as depreciation in operating expenses, and the record shows that certain of this equipment is depreciated in only one or two years and is treated more as an expense item than as capital equipment. We consider the proper valuation of this owned property to be book value, or \$183,445.00. This is consistent with our decision in *General Increase in Hawaiian Rates, supra*, wherein we allowed net book value in the rate base for property other than vessels.

¹⁴ We consider these chartered vessels used and useful in Alaska Steam's service during the entire year, even though they may be withdrawn from service during a portion of the year. In *Alaska Rates, supra*, the Board disallowed a pro rata portion of vessel valuation for the period they were engaged in other services. Here the record indicates these chartered vessels will not be used in any other service while withdrawn from the Alaska trade.

¹⁵ On this record it is impossible to determine with accuracy the owner's expenses for these chartered vessels, the owner being the United States Government, and we have not included in expenses any item of "owner's costs." We find it unnecessary to determine whether we would allow such expense costs in a proceeding where they could be precisely determined.

Property other than vessels, used but not owned by Alaska Steam, consists of cargo vans, semitrailers, highway cargo van carriers, and other equipment utilized in the through transportation arrangement with Garrison, and owned by a company jointly owned by an affiliate company of Alaska Steam and Consolidated Freightways. The valuation of \$1,329,518.00 placed on this property by Alaska Steam is stated to be 90 percent of its net book value, on the theory that this much of the equipment is utilized in the services of Alaska Steam. The record is silent as to how much of the time the property is used by Alaska Steam, on the one hand, and by Garrison, on the other hand. It is impossible on this record to allocate a value of the equipment to Alaska Steam based upon percentage of use in its services. The rental cost is included in Alaska Steam's operating expenses, though not separately identified on the record. As previously stated in regard to chartered vessels, we think it improper to allow the value of nonowned property to be included in the rate base, while at the same time the charges for the use of that capital equipment is included as an operating expense. Since the proper valuation of this non-owned property in Alaska Steam's operations is difficult if not impossible to determine accurately, and since the expenses for its use is included in operating expenses, we will not include any value for the equipment in the rate base.

Working capital. Alaska Steam has included in its rate base a value for working capital of \$3,591,344.00, which consists of the maximum-month's net investment in working capital in 1957 of \$1,602,274.00, plus a buffer fund of the maximum-month's operating expenses of \$1,989,070.00. This is stated to be the method used by the Board's predecessor in *Alaskan Rates*, 2 U.S.M.C. 639, 644-6 (1942).

Working capital consists of funds necessary to pay operating expenses prior to the time revenues are received for the service rendered. As stated in *Alabama-Tennessee Nat. Gas Co. v. Federal Power Com'n*, 203 F. 2d 494 (3d Cir. 1953), working capital for rate base purposes is—

“* * * [the] allowance for the sum which the Company *needs to supply from its own funds* for the purpose of enabling it to meet its current obligations as they arise and to operate economically and efficiently.” Barnes, *The Economics of Public Utility Regulation* (1942) 495. Since it is normally contemplated that all operating expenses will eventually be paid for out of revenues received by the Company, the need for working capital arises largely from the time lag between payment by the Company of its expenses and receipt by the Company of payments for service in respect of which the expenses were incurred.

Public Counsel contend that working capital should be limited to not more than the net balance of current assets over current liabilities, or approximately one month's operating expenses, but that under no circumstances are both these items justified. On this basis Public Counsel urge that working capital should be valued at no more than \$2,000,000.00. The examiner valued working capital at approximately the average (rather than maximum) monthly net investment in working capital plus the average monthly expenses, or \$2,200,000.00. Calculation of working capital in accordance with General Order No. 71¹⁶ (superseded by General Order 31) would give a working capital valuation in recent years of slightly under \$1,000,000.00.

The record shows that the Alaska trade is to some extent prepaid, and it is further apparent that certain operating expenses of Alaska Steam are of the type normally paid after the expense is incurred. It is not clear to what extent these factors may counteract each other, and it is impossible to ascertain with any accuracy the extent of lag between payment of expenses and receipt of revenues. We consider a calculation in accordance with General Order No. 71 to be a fair and reasonable valuation of working capital for rate-base purposes. Such a value was allowed in *General Increase in Hawaiian Rates, supra*, and no sound reason justifying a higher value for working capital has been presented in this proceeding. We conclude, therefore, that the fair and reasonable value for Alaska Steam's working capital should be limited to approximately the value calculated under General Order No. 71, or \$1,000,000.00.

Going concern value. Neither the Board nor any of its predecessors has ever included a separate "going concern value" in a rate base; on the contrary, such a separate value in rate proceedings has been specifically rejected. *Alaskan Rates*, 2 U.S.M.C. 558, 568. No separate item of "going concern value" should be included in the rate base for Alaska Steam.

Based upon revenues of \$14,753,788.00 and expenses of \$13,228,339.00,¹⁷ Alaska Steam's profit for 1958 would be \$1,525,449.00 before taxes and \$732,215.00 after taxes. On a rate base of \$8,223,445.00, consisting of market value for owned and chartered vessels, or \$7,040,000.00, \$183,445.00 for property other than vessels, and \$1,000,000.00 for working capital, the rate of return would be 8.90 percent. On a rate base of \$14,025,245.00, consisting of an average of net book value and reproduction cost depreciated for owned and chartered vessels, or

¹⁶ General Order No. 71 (46 C.F.R. Part 291) sets forth the basis for determination of working capital for subsidized water carriers. Working capital as therein calculated basically consists of the average voyage expenses for each vessel in the carrier's fleet.

¹⁷ Expenses have been reduced by \$155,190.00, the annual charter hire for vessels.

\$12,841,800.00, \$183,445.00 for property other than vessels, and \$1,000,000.00 for working capital, the rate of return would be 5.22 percent.

In view of all the evidence of record, we find that the foregoing rates of returns on the "fair value" rate bases above considered are within the zone of reasonableness, and we find it unnecessary to determine one precise rate base for measuring the reasonableness of the rates. We conclude, therefore, that the proposed increased rates and charges and the regulations and practices of Alaska Steam and the other respondents are just and reasonable and not unlawful.

Alaska Steam has excepted to a ruling of the examiner which denied incorporation in the record of a verified statement of Alaska Steam's vice president filed after the close of hearing and the filing of briefs, pursuant to Rule 10(w) of the Board's Rules of Practice and Procedure (46 C.F.R. 201.163). In view of the reservations and objections to such statement filed by certain respondents, the examiner was correct in his ruling.

An order discontinuing this proceeding will be entered.

5 F.M.B.

APPENDIX

Section 18, Shipping Act, 1916:

SEC. 18. 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.

Section 3, Intercoastal Shipping Act, 1933:

SEC. 3. 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.

5 F.M.B.

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 9th day of October A.D. 1958

No. 828

GENERAL INCREASES IN ALASKAN RATES AND CHARGES

This proceeding having been instituted by the Board on its own motion, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rates, charges, regulations, and practices herein under investigation are just and reasonable:

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

(Sgd.) JAMES L. PIMPER,
Secretary.

5 F.M.B.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-79

THE OCEANIC STEAMSHIP COMPANY—APPLICATION UNDER SECTION
805(a)

Submitted November 17, 1958. Decided November 17, 1958

One voyage by SS *Lurline* commencing on or about January 6, 1959, between San Francisco and Seattle, Seattle and Hawaii, and Seattle and California ports via Hawaii, found not to result in 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.

Willis R. Deming and *Alvin J. Rockwell* for The Oceanic Steamship Company.

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

REPORT OF THE MARITIME ADMINISTRATOR

BY THE ADMINISTRATOR:

The Oceanic Steamship Company (Oceanic) has applied for written permission of the Maritime Administrator, under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, to permit its parent organization, Matson Navigation Company (Matson), to operate the SS *Lurline* on one voyage commencing at San Francisco on or about January 6, 1959, carrying passengers and their automobiles between (a) San Francisco and Seattle, (b) Seattle and Hawaii, and (c) Seattle and ports in California via Hawaii. The hearing, notice of which was published in the Federal Register of November 6, 1958, was held before the Administrator on November 17, 1958. No one appeared in opposition to the application.

The SS *Lurline*, together with the SS *Matsonia*, is regularly engaged in the California-Hawaii passenger trade. Matson experiences a lull in this trade during January and feels that there is a demand

for passenger service for a voyage at that time between the ports set forth in the application. By granting the application Matson would avoid the possibility of laying up the vessel with its attendant consequences.

Pope and Talbot, Inc., a domestic carrier between San Francisco and Seattle, has indicated that it has no objection to the application, and Hawaiian Textron, Inc., a domestic operator between California ports and Hawaii, likewise does not oppose the granting of the permission.

Upon this record, it is found and concluded that the granting of the written permission under section 805 (a) of the Act for one voyage by the SS *Lurline*, carrying passengers and their automobiles, between (a) San Francisco and Seattle, (b) Seattle and Hawaii, and (c) Seattle and California ports via Hawaii, commencing on or about January 6, 1959, would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, nor be prejudicial to the objects and policy of the Act.

This report will serve as written permission for the voyage.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 24th day of November A.D. 1958

No. S-57

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

RULING ON MOTION FOR COMPARATIVE CONSIDERATION *

On October 28, 1958, American President Lines, Ltd., and American Mail Line Ltd. (APL/AML) filed a motion requesting that decision on States Marine Lines' (SML) request to operate along the full Pacific coast range on Trade Routes Nos. 29 and 30 be deferred until similar requests by APL/AML can be presented and given comparative consideration with that of SML. Replies to the motion have been filed by SML and Public Counsel.

APL/AML urge comparative consideration on the grounds (1) that a section-211 determination may be made by the Maritime Administrator fixing the number of subsidized voyages which will be permitted full-coast loading privileges on Trade Routes Nos. 29 and 30, (2) that such number, if and when set, may be insufficient to allow subsidy on all the full-coast loading voyages requested by SML and APL/AML, and (3) that therefore the section-605(c) determinations with respect to SML and APL/AML are mutually exclusive and should be given comparative consideration by the Board, citing *Ashbacker Radio Co. v. F.C.C.*, 326 U.S. 327 (1945).

*Report of the Board under sections 605(c) and 805(a) of the Merchant Marine Act, 1936, is found at 5 F.M.B. 537 (1959).

It appearing, That at this time the effect of a possible future section-211 determination by the Maritime Administrator upon the pending applications of SML and APL/AML are unknown; and

It further appearing, That findings under section 605(c) do not guarantee a subsidy contract or award subsidy to any particular applicant, and are not, therefore, "mutually exclusive" within the meaning of the *Ashbacher* doctrine;

Now, therefore, for the foregoing reasons, among others, and upon consideration of the motion and memorandum in support thereof and the replies thereto:

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

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. 824

MARKT & HAMMACHER COMPANY—MISCLASSIFICATION OF GLASSWARE

Submitted October 31, 1958. Decided November 24, 1958

Respondent Markt & Hammacher Company, a shipper, found to have knowingly and willfully, by means of false classification, obtained transportation by water for property at less than rates or charges which would otherwise be applicable, in violation of section 16 of the Shipping Act, 1916, as amended.

Louis H. Powell for Markt & Hammacher Company, respondent.
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:

This investigation, instituted on the Board's own order, concerns alleged violations of section 16 of the Shipping Act, 1916, as amended (the Act), 46 USC 815.¹

As recited in the order of investigation, it appeared that during 1956 Markt & Hammacher Company (respondent or Markt & Hammacher), an exporter, made certain shipments of glassware²—cake

¹ Section 16 provides in pertinent part:

"That it shall be unlawful for any shipper, 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."

² The items under question are set forth in the appendix.

pans, loaf pans, mixing bowls, and the like—via ocean carriers from the United States to Venezuela at less than the applicable freight rates, through the device of falsely classifying the shipments, in violation of section 16 of the Act.

Hearings were held and a stipulation of facts with attached exhibits was agreed to by the parties. A recommended decision was served, in which the examiner concluded that respondent's misclassification was not knowingly and willfully made, and therefore section 16 of the Act was not violated. Exceptions to this decision were filed by Public Counsel and a reply was filed by respondent. No oral argument was requested or held.

FACTS

Markt & Hammacher, long engaged in the foreign trade, purchased the glassware items in question³ from Anchor Hocking Glass Corporation, at a discount, and resold the items to Venezuelan customers at Anchor Hocking's catalogue price. Title to the goods passed in the United States and freight and related costs were paid by the foreign buyers. In arranging the ocean carriage in each instance respondent was acting on behalf of the foreign buyer. Independent freight forwarders were not employed and respondent prepared all the shipping documents in its own traffic department.

The items in question moved under United States Atlantic & Gulf/Venezuela and Netherlands Antilles Conference Freight Tariff No. VEN-7. This tariff contains Item 1000, "Glassware NOS",⁴ and Item 115, "Bottles or Jars, Empty, Glass;" the former takes a higher rate than the latter. Respondent's traffic manager caused the shipments to be designated "Bottles or Jars" and hence caused them to move at the lower rate. During the same period, through its traffic manager, respondent shipped similar items as "Glassware NOS," and has not shipped any of the items under the lower-rated classification since the Board instituted its preliminary investigation.

In selecting the lower classification respondent's traffic manager stated in his affidavit:

An examination of Freight Tariff No. VEN-7 tariff schedule showed that "Bottles or Jars, Empty, Glass" were to be classified under Item 115. I consulted a dictionary in an effort to determine what would be defined as "Jars." The definition contained in the dictionary described "Jars" as "deep wide mouthed vessels." I therefore classified as jars those items of glassware which I feel fulfilled that description.

³ See appendix.

⁴ Not otherwise specified.

DISCUSSION

There can be no question that the shipment of these items as "Bottles or Jars" constituted a factual misclassification and that the misclassification resulted in the payment of a lower freight rate than would be otherwise applicable. Respondent has admitted the misclassification. Whether section 16 has been violated depends upon whether the misclassification was knowingly and willfully made.

The examiner concluded that the misclassification was not knowingly and willfully made. His conclusion was grounded on two findings: (1) that since title passed to the foreign buyer in the United States, prior to shipment, no benefit inured to respondent or its traffic manager, and (2) the traffic manager's misclassification was neither condoned nor known by the management and was made contrary to its policy and instructions.

We feel that neither of these findings negates a record which otherwise indicates knowing and willful conduct. Through its traffic manager, respondent obviously was aware of the proper tariff classification, and the resort of the traffic manager to a dictionary definition of a jar, which does such violence to the clear meaning of the tariff, at best, manifests such an indifference and lack of care in construing the tariff as to constitute a deliberate violation of section 16. *Rates from United States to Philippine Islands*, 2 U.S.M.C. 535 (1941). Where a shipper has doubt as to the proper tariff designation of his commodity, he has a duty to make diligent and good faith inquiry, that is, inquiry of the carrier or conference publishing the tariff. *Hazel-Atlas Glass Co.—Misclassification of Glass Tumblers*, 5 F.M.B. 515, decided this date.

A benefit to the shipper is not a *sine qua non* to a finding of a knowing and willful misclassification by a shipper. Although no direct benefit was proved here, the most that can be inferred from it is that no *motive* or reason is apparent for the violation. But a *motive* or reason is not necessary for the finding of a violation. *State v. Santino*, 186 S.W. 976 (1916).

The misclassification here involved was made by an employee acting within the scope of his employment, and it is beyond dispute at this late date that a corporation is liable for the acts of its agents when done within the scope of their authority. *New York Central R.R. v. United States*, 212 U.S. 481 (1909); *United States v. George F. Fish, Inc.*, 154 F. 2d 798 (1946); *United States v. General Motors Corporation*, 226 F. 2d 745 (1955).

An appropriate order will be entered.

APPENDIX

<i>Catalogue or ware No.</i>	<i>Invoice description</i>
H 452	Sq. Cake Pan
H 410	Baking Pan
H 411	Baking Pan
H 408	Cass. K/Cover
H 407	Cass. K/Cover
H 406	Cass. K/Cover
H 405	Cass. K/Cover
H 426	Pie Dish
H 409	Loaf Pan
H 440	Sq. Baking Pan
H 442	Ind. Baker
W300/148	Mix. Bowl
H 424	Dessert
W300/149	Mix. Bowl
L4374	Dessert
G355	Mixing Bowl
G356	Mixing Bowl
G357	Mixing Bowl
L4157	Mixing Bowl
L4159	Mixing Bowl
G655	Batter Bowl
G291	Soup
W291	Soup
G300/129	Bowl Set
G300/130	Bowl Set
W355	Bowl
W356	Bowl
W357	Bowl
H 425	Pie Dish
G4159	Mixing Bowl
G4158	Mixing Bowl
G4157	Mixing Bowl
L4378	Veg. Bowl
1426	Bowl
3355/127	Ftd. Ivy Ball
3306/128	Crimp Top Vase
3306/127	Crimp Top Vase
598	Butter and Cov.
595	Milk Pitcher
E86	Ice Lip Pitcher
L4354	Creamer
G3854	Creamer
G3874	Dessert
G3878	Veg. Bowl
G221	Butter and Cover
L235	French Cass/Cov.
M4177	Veg. Bowl
M4178	Veg. Bowl

<i>Catalogue or ware No.</i>	<i>Invoice description</i>
W221.....	Butter and Cover
W300/182.....	Mix. Bowl Set
W1400/50.....	Punch Set
687.....	Ice Lip Pitcher
B4067.....	Soup Pl.
B4078.....	Veg. Bowl
L291.....	Soup
M498.....	Meas. Pitcher
E333.....	Sherbet
H 496.....	Meas. Cup
H 498.....	Meas. Pitcher
B4054.....	Creamer
H 402.....	Cass. and Cover

5 F.M.B.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 24th day of November A.D. 1958

No. 824

MARKT & HAMMACHER COMPANY—MISCLASSIFICATION OF GLASSWARE

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

It is ordered, That:

1. Respondent Markt & Hammacher Company be, and it is hereby, notified and required to hereafter abstain from the practices herein found to be in violation of section 16 of the Shipping Act, 1916, as amended;

2. Respondent Markt & Company be, and it is hereby, required to notify the Board, within ten (10) days from the date of service hereof, whether it has complied with this 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; and

3. The proceeding be, and it is hereby, discontinued.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. 823

HAZEL-ATLAS GLASS COMPANY, INGE & COMPANY—MISCLASSIFICATION OF GLASS TUMBLERS

Submitted March 28, 1958. Decided November 24, 1958

Respondent Hazel-Atlas Glass Company, a shipper, found to have knowingly and willfully, by means of false classification, obtained transportation by water for property at less than rates or charges which would otherwise be applicable, in violation of section 16 of the Shipping Act, 1916, as amended.

H. Bartow Farr, Vincent R. Fitzpatrick, and S. Roy French, Jr.,
for Hazel-Atlas Glass Company, respondent.

Francis J. Haley for Inge and Company.

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

REPORT OF THE BOARD

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

BY THE BOARD:

This proceeding was instituted by order of the Board dated July 25, 1957, and is an investigation into and concerning alleged violations of the Shipping Act, 1916, as amended (the Act). As recited in the Board's order, it appeared that during 1954 and thereafter, certain shipments of glass tumblers had been made by Hazel-Atlas Glass Company (Hazel-Atlas), a manufacturer-shipper, by ocean carriers from the United States to Venezuela at less than applicable freight rates, as a result of misbilling, and that Inge and Company (Inge), a forwarder, had performed foreign freight forwarding services on such shipments, all in violation of section 16 of the Act.¹

¹ 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."

A hearing was held in New York on November 22, 1957, and a stipulation of facts with attached exhibits was submitted and agreed to by respondents and Public Counsel, which stipulation was received in evidence and constituted the entire record in the case.

The issue presented is whether either or both respondents, knowingly or willfully, shipped packer's tumblers as "Bottles or Jars, Empty, Glass" rather than as "Glassware, N.O.S." or as "Tumblers," each of such classifications being contained in the applicable ocean tariffs.

A recommended decision was served on March 13, 1958, in which the examiner concluded that Hazel-Atlas had not misclassified its shipments of glassware and hence had not violated section 16 of the Act; that Inge, who performed freight forwarding services in connection with the shipments in question, had not misclassified the shipments; and that the proceeding should be discontinued as to each respondent.

No exceptions were filed to this decision, but on June 5, 1958, U.S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference (the conference) filed a petition for permission to intervene, seeking to reopen the proceeding for the purpose of presenting additional evidence.

FACTS

Hazel-Atlas, long engaged in the glass business, sold its assets to Continental Can Company, Inc. (Continental), on September 13, 1956, since which time the business has been carried on as Hazel-Atlas Division of Continental.

Between March 27, 1954, and September 16, 1957, Hazel-Atlas shipped certain quantities of packer's tumblers to Venezuela via ocean carriers. The freight forwarding services on these shipments were performed by Inge, a duly registered freight forwarder, which, in preparing the bills of lading and other shipping documents in connection therewith, followed the written instructions of Hazel-Atlas.

The shipments were made via conference vessels and pursuant to conference tariffs VEN-6 and VEN-7, which list various commodities and rates to be charged by conference members on shipments from Atlantic ports to Venezuela during the period in which the shipments under investigation were made. The tariffs² provide:

Item 115

Bottles or Jars, Empty, Glass (not Cut Glass or Vacuum), with or without their equipment of Caps, Covers, Stoppers, or Tops (not Nipples) * * *.

Item 1000

Glassware, N.O.S. * * *.

² None of the parties contends that "Glassware, N.O.S." is the correct classification for packer's tumblers, and it is readily apparent that packer's tumblers do not fall within the terms "Glassware, N.O.S."

Item 1000

Tumblers, viz :

Glass * * *

There is no classification for "Packer's Tumblers." The first of the three classifications, "Bottles or Jars", takes the lowest rate and was used by Hazel-Atlas in the designation of its shipments of packer's tumblers.

By definition, a packer's-tumbler is a glass jar used for the packing of certain products and suitable for reuse as a drinking glass, and a drinking glass is a tumbler. All of the shipments in question were made to purchasers who package food products.

The 1955 edition of the *Glossary of Packaging Terms*, published by the Packaging Institute, Inc., and incorporated in part in the stipulation of facts, contains the following excerpts:

P. 274—"tumbler"—A container made like a drinking glass, with straight sides or sides flaring slightly outward toward the opening. Also *packer's tumbler*. Usually made of glass but also made from transparent molded plastic.

P.274—"tumbler, packer's"—A glass jar, pressed, without neck, used for packing of certain products and suitable for re-use for drinking purposes.

A price list of packer's tumblers is maintained by Hazel-Atlas. This list is separate and distinct from its price list for tumblers and glassware and its list for decorated glassware. There is no price list for bottles or jars in the record, and these items are not included in the packer's tumblers price list.

The affidavit of the vice chairman of the conference indicates that he would have advised Hazel-Atlas that the items shipped should be classified as "Tumblers" had the shipper made inquiry of him as to their proper classification, but the affidavit of the traffic manager of the Venezuelan Line indicates that had the shipper inquired of him as to their correct tariff classification he would have advised that "Bottles or Jars" was correct.

DISCUSSION AND CONCLUSIONS

To constitute a violation of section 16 of the Act resulting from an alleged false classification of goods, there must be affirmative findings supported by the record (1) that there has been a factual misclassification and (2) that the misclassification was knowingly and willfully made in order to obtain transportation by water of property at rates less than those otherwise applicable.

In shipping the packer's tumblers as "Bottles or Jars," Hazel-Atlas caused them to be shipped at a rate lower than the rates for "Tumblers."

We are not here concerned with the question whether the tariff could have included packer's tumblers within Item 115. We are concerned only with the question whether, by a fair and reasonable interpretation of the tariff, it can be said that the particular items shipped should properly have been shipped under Item 115, "Bottles or Jars", or under Item 1000, "Tumblers."

We do not agree with the examiner that "packers' tumblers fall within the classification 'Bottles or Jars, Empty, Glass'", contained in the tariffs. It is true that packer's tumblers embody the attributes of both jars and drinking glasses, but although they are designed, manufactured, and sold as food containers, they are nevertheless designed, manufactured, and sold to be used as drinking glasses.

The packer's tumblers depicted in Exhibit 5, and covered by the packer's tumblers price list not containing prices for bottles or jars, reflects, we believe, the intention of Hazel-Atlas, in designing and manufacturing packer's tumblers, to offer for sale something more and different than a jar—a glass container and a drinking glass. This is confirmation of the fact that the food packer has bought more than a container, and that in marketing its product it is also marketing a tumbler.

Although we agree that the purpose for which a thing is manufactured—the controlling use—determines its classification tariffwise, we do not agree that its controlling use is necessarily its first use in point of time. A jelly jar, which in some households might be used ultimately as a drinking glass, does not thereby become a tumbler for tariff purposes, but, by the same token, a packer's tumbler, which is designed for use as both a container and a tumbler, is not excluded from the tariff classification "tumbler" by reason of its use as a container. These very items contain the generic term "tumbler." It is a term which the industry itself has adopted, and but for the use of the article as a drinking glass, we think the term would not have been employed. Further, in the Packaging Institute's Glossary, to which Hazel-Atlas subscribes, this commodity is cataloged "tumbler, packer's."

We find from all the evidence that Hazel-Atlas has considered packer's tumblers as separate and distinct from bottles or jars, and conclude, therefore, that Hazel-Atlas is guilty of a misclassification.

Since the misclassification has in fact resulted in the movement of the commodities at a lower rate than would otherwise be applicable under the appropriate tariffs, the critical question in determining whether the statute has been violated turns upon whether the misclassification was knowingly and willfully made.

An unwitting failure to comply with the statute, of course, is not sufficient to constitute a violation. *Boone v. United States* 109 F. 2d 560 (1940). In order to show a knowing and willful violation, however, it is not necessary to establish an intentional violation of law or an evil purpose (*United States v. Erie R. Co.*, 222 F. 444 (1915)), particularly, as here, where the statute does not involve turpitude. *U. S. v. Illinois Cent. R. Co.*, 303 U.S. 239 (1938). A conscious purpose to avoid enlightenment, where there is a duty to know, supports a charge of a violation. *United States v. General Motors Corporation*, 226 F. 2d 745 (1955). Knowledge may be presumed where one, upon whom a duty to know has been cast, intentionally or willfully keeps himself in ignorance. Indifference to diligent inquiry on the part of a shipper or a forwarder constitutes knowing and willful conduct tantamount to an outright and active violation. *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483 (1954).

Hazel-Atlas, as a shipper, had a duty to correctly classify its shipments, and where it entertained doubt or was in possession of facts sufficient to raise a doubt, it had a duty to inform itself as to the proper tariff classification of the goods it was exporting. There is no evidence in this record that it ever took any steps to inform itself. It is argued that in designating the goods as jars it did what was reasonable, right, and proper,³ and having no doubt that jars constituted the correct classification, it had no duty to inquire further.

From what we have said above, it is obvious that respondent's classification was not correct. We find it difficult, indeed, to believe that this shipper could—without doubt of error—classify these commodities as "Bottles or Jars." Hazel-Atlas maintains an experienced export department which was familiar with the classification "Tumblers," and the commodities, as we have noted, were advertised to prospective customers as having a use as a drinking glass—a tumbler.

Having not found the specific tariff classification, we believe that Hazel-Atlas had two alternatives: (1) to designate the articles as tumblers, or (2) to inquire of the carrier or the conference as to the correct classification.⁴ The failure to designate the shipments properly, together with the failure to inquire—a manifest lack of due diligence in view of all the surrounding circumstances—evinces a

³ Whether packer's tumblers move via rail at the same rate as jars, is of no consequence for we note that the specimen of the inland bill of lading of record specifically provides for "Jelly Glasses (Packing Glasses)."

⁴ We give no weight to the affidavit of an official of the Venezuelan Line—the carrier of many of these shipments—rendered after the fact, that he would have construed the tariffs so as to authorize the classification "Bottles or Jars."

knowing and willful attempt on the part of the shipper to avoid the proper tariff rate.

On the record as a whole, we find that the course of conduct on the part of Hazel-Atlas supports the conclusion that it has knowingly and willfully violated section 16 of the Act.

With respect to Inge, the record discloses only that it is a registered freight forwarder, preformed freight forwarding services for Hazel-Atlas on all the shipments here involved, and did so in accordance with "written instructions from a duly authorized official of Hazel-Atlas specifying the tariff classification to be used on the shipping documents." A freight forwarder, in following written instructions from its principal, is not thereby insulated from a finding of a violation of section 16 of the Act as to the forwarder. A registered freight forwarder holds itself out to the shipping public as an expert in the handling of ocean freight, and its expertise includes a knowledge of applicable tariffs. Indeed, if Inge prepared the necessary bills of lading, procured cargo insurance, consular invoices, and customs declarations, as forwarders generally do, the nature of the cargo necessarily should be within Inge's knowledge. The forwarder has a duty to take reasonable steps to inform itself as to the nature of the cargo it is handling and to act lawfully with respect thereto.

Since the record fails to evidence any conduct whatsoever on the part of respondent Inge as to the shipments involved, other than the fact that written instructions were followed, the proceeding will be remanded to the examiner for further hearing. Further hearing, however, shall be limited in scope to whether Inge acted in violation of section 16 of the Act as to the instant shipments of packer's tumblers.

In view of our disposition of the issues as to Hazel-Atlas, the conference's petition to intervene is denied, without prejudice to the filing of another petition with respect to the further hearing.

Contentions of the parties not specifically answered herein have been considered and have been found not relevant to, or unnecessary for, the disposition of the issues here presented or not supported by the evidence.

An appropriate order will be entered.

Vice Chairman GULL, dissenting:

I cannot agree with the majority in this case.

First, this record, in my opinion, does not establish a factual misclassification of the particular items shipped. A packer's tumbler is first and foremost a glass container—a jar—manufactured for the

primary purpose of packaging food stuffs. Its ultimate use as a drinking glass is both secondary and incidental to its primary use. As glass containers or jars, therefore, these packer's tumblers were properly classified by respondents under the applicable tariffs.

Second, I believe that the applicable tariffs are ambiguous, and even if packer's tumblers are not to be equated with jars, under the prevailing rules of tariff interpretation, the selection of the classification "Bottles or Jars" was correct. If it can be said that a packer's tumbler is something different from a jar, it is likewise something different from a drinking glass. In the absence of a specific tariff classification, a shipper is entitled to select the lower-rated tariff designation where, in so doing, a strained tariff interpretation would not result. I think that is the case here.

Third, the conference, after the case had been submitted, petitioned to intervene, averring that it "had no idea that its tariff was under attack or that the decision would be based on such attack." This statement is incredible in view of the affidavit of the conference's vice chairman, which is an exhibit of record, relating to the tariff and its interpretation. The conference apparently desires two bites at the apple.

Fourth, in view of the above, I see no reason for remanding the proceeding for further hearing as to the freight forwarder.

I would dismiss the proceeding as to both respondents.

5 F.M.B.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 24th day of November A.D. 1958.

No. 823

HAZEL-ATLAS GLASS COMPANY, INGE & COMPANY—MISCLASSIFICATION
OF GLASS TUMBLERS

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

It is ordered, That:

1. Respondent Hazel-Atlas Glass Company be, and it is hereby, notified and required to hereafter abstain from the practices herein found to be in violation of section 16 of the Shipping Act, 1916, as amended;

2. Respondent Hazel-Atlas Glass Company be, and it is hereby, required to notify the Board, within ten (10) days from the date of service hereof, whether it has complied with this 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;

3. The proceeding as to respondent Hazel-Atlas Glass Company be, and it is hereby, discontinued;

4. The petition of United States Atlantic & Gulf-Venezuela and Netherlands Antilles Conference to intervene be, and it is hereby, denied; and

5. The proceeding be, and it is hereby, remanded to the examiner for the purpose of receiving further evidence, at a public hearing to be held at a time and place to be hereafter determined by the Chief Examiner, on the issue of whether respondent Inge and Company knowingly and willfully participated in the misclassification herein found; and

6. The further hearing be conducted in accordance with the Board's Rules of Practice and Procedure, and that a recommended decision be issued by the examiner.

By the Board.

(Signed) JAMES L. PIMPER,
Secretary.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-80

MOORE-McCORMACK LINES, INC.—APPLICATION UNDER SECTION 805 (a)

Submitted November 25, 1958. Decided November 25, 1958

One voyage by the SS *Robin Mowbray*, commencing on or about December 4, 1958, carrying a full cargo of lumber from United States North Pacific ports to United States North Atlantic ports, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in the coastwise or intercoastal service, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Ira L. Ewers and *William B. Ewers* for Moore-McCormack Lines, Inc.

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

REPORT OF THE ADMINISTRATOR

BY THE ADMINISTRATOR :

Moore-McCormack Lines, Inc. (Mormac), has applied for written permission of the Maritime Administrator under section 805 (a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, for its owned vessel the SS *Robin Mowbray*, which is under time charter to States Marine Corporation of Delaware (States Marine), to engage in one intercoastal voyage commencing at United States North Pacific ports on or about December 4, 1958, carrying a full cargo of lumber to United States North Atlantic ports. Notice of hearing was published in the Federal Register of November 11, 1958, and hearing has been held before the Administrator. There were no petitions to intervene, and no one appeared in opposition to the application.

States Marine, the charterer of the SS *Robin Mowbray*, conducts as a part of its regular steamship operations a regular eastbound intercoastal lumber service. For the early December sailing under con-

sideration it has endeavored to obtain a C-2 or C-3 type vessel which is required for this service, but has been unable to do so. No exclusively domestic operators in this trade have objected to the use of the SS *Robin Mowbray* for this sailing.

Upon this record, it is found and concluded that the granting of written permission under section 805 (a) of the Act, for the Mormac-owned vessel SS *Robin Mowbray*, which is under time charter to States Marine, to engage in one intercoastal voyage commencing at United States North Pacific ports on or about December 4, 1958, carrying a full cargo of lumber to United States North Atlantic ports, 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.

This report shall serve as written permission for the voyage.

5 M.A.

FEDERAL MARITIME BOARD

No. S-64

ISBRANDTSEN COMPANY, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 32

Submitted November 18, 1958. Decided January 2, 1959

Service by vessels of United States registry between North Atlantic ports of the United States and the United Kingdom, Germany, Holland, Belgium, Atlantic France, and Northern Spain 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 the operation of cargo vessels in the service described in the paragraph above.

John J. O'Connor and Richard W. Kurrus for applicant.

Robert E. Kline, Jr., Ronald A. Capone, and Russell T. Weil for United States Lines Company, intervener.

Odell Kominers and Mark P. Schleffer for domestic interveners.

Robert E. Mitchell, Edward Aptaker, Edward Schmeltzer, and Robert B. Hood, Jr., as Public Counsel.

REPORT OF THE BOARD

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

BY THE BOARD:

Isbrandtsen Company, Inc. (Isbrandtsen), has filed an application for an operating-differential subsidy contract which contemplates (1) two services on Trade Route No. 32 (Great Lakes/Europe) during the open navigation season,¹ and (2) two services from North Atlantic ports to Europe on Trade Routes Nos. 5, 7, 8, and 9 during

¹ Those months during which the Great Lakes are navigable. The "closed season" refers to those months during which the Lakes are not navigable.

the closed season. It is the application for subsidy during the closed season which is now before us.² Together with this application is a request under section 805(a) of the Act for written permission by Isbrandtsen to continue certain of its domestic operations. The 805(a) issues were before the Board in Docket Nos. S-60 and S-60 (Sub. No. 1), which resulted in the granting of written permission for the continuation of a portion of Isbrandtsen's domestic operations (5 F.M.B. 448, 483).³ A motion to dismiss this part of the present proceeding is now pending.

Under section 605(c), since Isbrandtsen does not claim to be operating an "existing service" within the meaning of the Act, we must determine (1) whether U.S.-flag service on the routes involved is adequate, and if it is not adequate, (2) whether, in the accomplishment of the purposes and policy of the Act, additional U.S.-flag vessels should be operated on the routes.

In Service "A", Isbrandtsen proposes to operate three sailings per month between U.S. North Atlantic ports and London and Hamburg, with the privilege of calling at Liverpool and Bremen. In Service "B", applicant plans three sailings per month between the same U.S. North Atlantic ports and Antwerp and Rotterdam, with the privilege of calling at Le Havre, Dunkirk, Bordeaux, and Amsterdam. Essential trade routes involved are Nos. 5, 7, 8, and 9.

United States Lines (U.S. Lines), the predominant carrier in the trades, presented the only opposition to the application.⁴

In his recommended decision served August 20, 1958, the examiner found that U.S.-flag service over the routes proposed by Isbrandtsen is inadequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated on the routes, and concluded that section 605(c) did not interpose a bar to the granting of a subsidy contract to Isbrandtsen in accordance with its application. U.S. Lines excepted to these findings and replies thereto were filed by Isbrandtsen and Public Counsel. Oral argument on the exceptions has been held.

Applicant's Service "A" involves ports on Trade Routes Nos. 5 and 7. Between 1952 and 1956, the greatest U.S.-flag participation in the liner commercial movement on these two routes occurred in

² By order of the Board dated May 6, 1958, the 605(c) hearings with respect to applicant's open-season service were discontinued, the Board having determined that the provisions of 605(c) would not interpose a bar to the proposed subsidy award.

³ The domestic interveners here, Bull-Insular Line, Inc., A. H. Bull Steamship Co., Luckenbach Steamship Company, Inc., Marine Transport Lines, Inc., Weyerhaeuser Steamship Company, and Pope & Talbot, Inc., were heard in Docket Nos. S-60 and S-60 (Sub. No. 1). No arguments in opposition to the granting of the permission not considered in that proceeding were raised here.

⁴ While both Waterman Steamship Corporation and States Marine Lines operate in these trades, they have carried little or no general commercial cargo, and did not intervene.

1955, when it reached 2,273,000 long tons, or 44 percent.⁵ On Trade Route No. 5, U.S.-flag participation was 44 percent in 1956, the most recent year reflected in the statistics of record, when 1,492,000 long tons were lifted. On Trade Route No. 7, U.S.-flag vessels accounted for only 33 percent of the 1956 movement of 571,000 long tons.

Trade Routes Nos. 8 and 9 are covered in applicant's Service "B". On Trade Route No. 8, during the 5 years of record the highest U.S.-flag participation was 28 percent in 1952, when 1,164,000 long tons of liner commercial cargo was moved. Although liner commercial on this route had increased by 1956 to 1,768,000 long tons, U.S.-flag participation slipped to 17 percent. Thus, U.S.-flag vessels carried less cargo in 1956 than they did in 1952, when the total movement was smaller. On Trade Route No. 9, in 1956, 482,000 long tons of liner commercial cargo were handled, and U.S.-flag vessels accounted for 38 percent of the movement. In that year, both total liner offerings and U.S.-flag-vessel participation therein were the highest of the years of record. On Trade Routes Nos. 8 and 9 combined the total liner commercial movement in 1956 reached a high of 2,250,000 long tons, but U.S.-flag participation therein skidded to 21 percent from the 1952 participation of 28 percent in the much smaller total movement of 1,473,000 long tons.

The first contention raised by U.S. Lines in its exceptions is that, since Isbrandtsen proposes to serve only selected ports on the trade routes involved, the statistics relating to entire routes cannot support a finding of inadequacy as to individual ports. In short, it claims that adequacy should have been determined strictly by measuring U.S.-flag service to the ports applicant proposes to service. Had such statistics been used, U.S. Lines argues, a different result would have been reached. It is true that Isbrandtsen proposes to serve only London and Liverpool in the United Kingdom, but we note that over 50 percent of U.S. Lines Trade Route No. 5 cargo is discharged at these two ports. Similarly, most of intervener's Trade Route No. 7 cargo is discharged at Hamburg and Bremen, the only major ports on the route, *all* of its Trade Route No. 8 cargo moves to Antwerp, Rotterdam, and Amsterdam, and most of its Trade Route No. 9 movement is discharged at Le Harve, Dunkirk, and Bordeaux, all ports Isbrandtsen proposes to serve.

Section 605(c) prohibits the award of subsidy in a case such as this unless the Board determines "that the service already provided * * * in such service, route, or line is inadequate, and that

⁵ The liner commercial movement on Trade Routes 5, 7, 8 and 9 combined, 8, 9, and 8 and 9 combined, with U.S.-flag participation therein, from 1952 through 1956, is set out in the appendix.

in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon.”

While the facts in a particular case might indicate that analysis on an over-all basis is uninformative, the Board, in the instant case, should properly resolve the issues under section 605(c) on the basis of statistics for the entire trade route.

In view of the comparatively small geographical areas defined by these particular trade routes and the preponderance of the movement on these routes passing through the ports Isbrandtsen proposes to serve, we feel that the over-all trade route statistics are appropriate for a determination of adequacy here. Further, after section 605(c) issues are resolved, the Board under other sections of title VI of the Act may well insist on a contract at variance with the service proposed by the applicant. It is obvious that an applicant cannot limit the scope of the ports of call which the Board might require under a contract by applying only for those which he might wish to serve. If such were the case, the functions of the Maritime Administrator under section 211 of the Act and those of the Board under title VI of the Act would become meaningless.

Intervener's second exception urges that the examiner erred in finding that the trades in issue are now inadequately served by U.S.-flag vessels. U.S. Lines claims that the examiner, in determining adequacy, (1) relied upon a rigid 50-percent formula which was intended to be but a general guide, and in view of the factors in these trades is unrealistic here, and (2) considered bulk cargoes not heretofore carried by liners in these trades. A rigid 50-percent guide was not used here. It is obvious that U.S.-flag participation in the liner commercial movement has been well below 50 percent (see the appendix). Based on the liner movement alone, together with the relatively low free-space factor of U.S. Lines,⁶ we feel that U.S.-flag service on these routes is inadequate. Additionally, the combined liner/nonliner commercial offerings in each of these trades have shown a marked growth since 1952, with an attendant over-all decline in U.S.-flag participation. In view of Isbrandtsen's experience as a transatlantic bulk hauler, the examiner correctly concluded that Isbrandtsen should have success in converting some of these nonliner offerings.

Finally, U.S. Lines contends that the granting of the application would not be consonant with the purposes and policy of the act. It is true, as U.S. Lines points out, that there has been no appreciable increase in North Atlantic cargo offerings during the winter months, and that Isbrandtsen's service from North Atlantic ports would be

⁶ In 1955 and the first half of 1956, U.S. Lines' cargo vessels achieved 95 percent utilization. During the last six months of 1956 intervener's cargo vessels sailed 89 percent full on these routes. For fiscal 1957, intervener averaged 12 to 17 percent free space.

on a part-time basis only. But U.S.-flag service on these routes is inadequate and we feel that the service proposed by applicant would increase our participation in the commercial movement. Inadequacy of present service, plus the ability of applicant to lessen the inadequacy, necessarily leads to the conclusion that the granting of the application would be in furtherance of the purposes and policy of the Act. Moreover, we are here presented with a special problem stemming from the physical limitations presented on the Great Lakes. During the open season, applicant intends to operate its vessels on Trade Route No. 32 from Great Lakes and St. Lawrence River ports in the United States to the same European ports as from North Atlantic ports during the closed season. Depending upon the severity of any given winter, applicant's vessels cannot operate from the Lakes during 4 or 5 months each year. Unless suitable employment for these vessels can be found for the winter months, they would have to be tied up, with resulting unemployment for American seamen and the jeopardizing of the open season service. We believe applicant's winter service on routes inadequately served would be in the accomplishment of the purposes and policy of the Act.

We find that U.S.-flag service on Trade Routes Nos. 5, 7, 8, and 9 is inadequate within the meaning of section 605(c) of the Act, and that, in the accomplishment of the purpose and policy of the Act, additional U.S.-flag vessels should be operated thereon. It is our conclusion, therefore, that section 605(c) of the Act does not interpose a bar to the award of an operating-differential subsidy contract to Isbrandtsen for the operation of cargo vessels on Trade Routes Nos. 5, 7, 8, and 9 during the closed navigation season, to the extent of 23 to 30 sailings per year.

Since no evidence relating to the continuance of the domestic services has been raised here, and since the matter was fully considered in Docket Nos. S-60 and S-60 (Sub. No. 1), the written permissions authorized therein will not be disturbed here. The section-805(a) portion of this proceeding therefore is dismissed.

Contentions and arguments of the parties, not specifically referred to here, have been considered and have been found not relevant to or not necessary for the disposition of the issues here presented, or not supported by the evidence.

APPENDIX

I. Trade Route No. 5 Outbound Liner Commercial

<i>Year</i>	<i>Long tons</i>	<i>U.S. Percent</i>
1952.....	1, 178, 000	37
1953.....	844, 000	33
1954.....	1, 135, 000	40
1955.....	1, 727, 000	48
1956.....	1, 492, 000	44

II. Trade Route No. 7 Outbound Liner Commercial

1952.....	601, 000	52
1953.....	542, 000	32
1954.....	546, 000	29
1955.....	546, 000	33
1956.....	571, 000	33

III. Trade Routes Nos. 5 and 7 Combined Outbound Liner Commercial

1952.....	1, 779, 000	42
1953.....	1, 386, 000	33
1954.....	1, 681, 000	36
1955.....	2, 273, 000	44
1956.....	2, 063, 000	41

IV. Trade Route No. 8 Outboard Liner Commercial

1952.....	1, 164, 000	28
1953.....	1, 486, 000	15
1954.....	1, 583, 000	15
1955.....	1, 742, 000	16
1956.....	1, 768, 000	17

V. Trade Route No. 9 Outbound Liner Commercial

1952.....	309, 000	26
1953.....	243, 000	29
1954.....	248, 000	25
1955.....	309, 000	38
1956.....	482, 000	38

VI. Trade Routes Nos. 8 and 9 Combined Outbound Liner Commercial

1952.....	1, 473, 000	28
1953.....	1, 729, 000	17
1954.....	1, 831, 000	16
1955.....	2, 051, 000	19
1956.....	2, 250, 000	21

FEDERAL MARITIME BOARD

No. S-67

T. J. MCCARTHY STEAMSHIP COMPANY—APPLICATION FOR SECTION 805(a) PERMISSION

Submitted December 12, 1958. Decided January 2, 1959

Proceeding remanded to examiner for further hearing under section 805(a) of Merchant Marine Act, 1936, as amended.

Paul D. Page Jr., and *Arthur E. Tarantino* for applicant.

John H. Eisenhart, Jr., for Great Lakes Ship Owners Association, and *Donald A. Brinkworth* for Eastern Territory Railroads, 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 March 9, 1956, T. J. McCarthy Steamship Company (McCarthy) filed an application for operating-differential subsidy aid for its proposed operations on Trade Route No. 32. The application also contained a request for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1223 (the Act), to continue certain domestic operations in the event a subsidy contract is awarded: (1) an automobile-carrier service from Detroit to Cleveland and to Buffalo, and (2) a bulk service between United States ports on the Great Lakes, both with owned, unsubsidized vessels.

Since the Board, on March 6, 1958, concluded that section 605(c) of the Act did not interpose a bar to the award of a subsidy contract, only the request for written permission to engage in domestic operations remains for decision.

The Great Lakes Ship Owners Association¹ (the Association) and Eastern Territory Railroads intervened in opposition to the request for the permission.

A hearing, at which applicant's president was the sole witness, was held before an examiner, who, in his recommended decision, found that the continuation of the domestic operations, in the event subsidy aid is awarded, 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. He concluded that section-805 (a) permission should be granted.

Exceptions to this decision were filed by the Association, applicant and Public Counsel replied thereto, and the matter was orally argued before the Board.

Briefly, McCarthy has been engaged in the Great Lakes carriage of automobiles from Detroit to Cleveland and from Detroit to Buffalo since 1935, with the exception of the years during World War II, and since 1947 has continuously carried bulk commodities between United States Great Lakes ports.

Applicant now owns three vessels which have been specially converted for the automobile trade, and each can accommodate from 420 to 450 cars. Shoreside facilities to accommodate automobiles are owned and maintained by McCarthy at Detroit, Cleveland, and Buffalo. The turnaround time to Cleveland and Buffalo—24 hours and 48 hours, respectively—allows the vessels to ballast back to Detroit. The movement by water on the Lakes of new automobiles reached its peak in 1953, and since the Chrysler Corporation, the principal shipper of automobiles by water from Detroit, has established an assembly plant in Delaware, it is anticipated that the 1953 automobile offerings will not be equaled in the foreseeable future. One of applicant's automobile carriers is now tied up for lack of business.

McCarthy has carried full loads of iron ore, grain, coal, and the like, and during 1957 operated at a profit, carrying almost 300 full cargoes. This amounted, however, to less than one percent of the total movement of bulk cargo on the Great Lakes, restricted to American-flag vessels. The amount of Great Lakes domestic cargo which is the subject of proprietary carriage is not shown, but apparently it is substantial, and McCarthy's carryings would certainly exceed one percent if such movement were excluded from the figures. The record indicates that many bulk carriers on the Lakes were laid up by September 1957 for want of cargoes.

¹ Bison Steamship Company, Oglebay Norton Company, Copper Steamship Company, Gartland Steamship Company, Nicholson Transit Company, and Roen Steamship Company.

Several of the Association's members are certificated to transport automobiles. Nicholson has three specially converted automobile carriers tied up because it cannot get automobiles. These vessels formerly operated in the Detroit to Cleveland and Detroit to Buffalo service, but in 1957, after McCarthy filed its subsidy application, Chrysler allocated all of its eastbound automobile business to McCarthy and its Duluth business to Nicholson. Since it is not economically feasible to employ specially converted automobile carriers in the Duluth trade—the turnaround time is six days and return cargoes are necessary—Nicholson hauls cars in bulk carriers accommodating 99 to 119 cars.

Under section 805(a) of the Act written permission to continue applicant's domestic services, in the event subsidy is awarded, may not be granted if such operation (1) would result in unfair competition to any person, firm, or corporation operating exclusively in the domestic coastwise or intercoastal service, or (2) would be prejudicial to the objects and policy of the Act.

The Association contends, chiefly, that the provisions of section 605(a) of the Act² establish its member lines as exclusively domestic operators entitled to the protection of section 805(a), and applicant should be denied the requested written permission because it failed to sustain its burden of proof in establishing that its operations would not result in unfair competition to exclusively domestic carriers and would not be prejudicial to the objects and policy of the Act.

Section 605(a) is misconstrued by the Association. That section refers to the payment of subsidy, and, as respects trade between the United States and Canada on the Great Lakes, it prohibits the Board from subsidizing such voyages. Section 605(a) clearly relates solely to the Board's authority to pay subsidy. Further, in our opinion section 605(a) was not intended to change by law an existing factual situation nor to increase or enlarge the number or class of persons specified in section 805(a) "exclusively operating in the coastwise or intercoastal service." An operator on the Great Lakes engaged in foreign commerce between the United States and Canadian ports is not con-

² Section 605(a) provides:

"No operating-differential subsidy shall be paid for the operation of any vessel on a voyage on which it engages in coastwise or intercoastal trade: *Provided, however,* That such subsidy may be paid on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States or a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, and if the subsidized vessel earns any gross revenue on the carriage of mail, passengers, or cargo by reason of such coastal or intercoastal trade the subsidy payment for the entire voyage shall be reduced by an amount which bears the same ratio to the subsidy otherwise payable as such gross revenue bears to the gross revenue derived from the entire voyage. No vessel operating on the Great Lakes or on the inland waterways of the United States shall be considered for the purposes of this Act to be operating in foreign trade."

verted by that section into a person "exclusively operating" in the domestic trade, for the purposes of section 805 (a) of the Act.

Prior decisions of this Board have held that the burden of proof in a section-805 (a) proceeding rests upon applicant, and a protestant has only the burden of rebutting applicant's *prima facie* case. *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B. 555 (1955); *Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii*, 5 F.M.B.—M.A. 287 (1957). We have also manifested a special concern for the plight of the coastwise and intercoastal operators (*American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B.—M.A. 488 (1954)),³ even where the domestic operator has not operated exclusively in the coastwise or intercoastal service (*Isbrandtsen Co., Inc.—Subsidy, E/B Round The World*, 5 F.M.B. 448 (1958)), and have indicated that doubts should be resolved in favor of the exclusively domestic operator. *American President Lines, Ltd.—Sec. 805(a) Application*, 4 F.M.B.—M.A. 436 (1954). We are more concerned with the merits of the controversy than with the niceties or technicalities of procedure.

This record establishes that Nicholson has in the past provided automobile transportation by water between Detroit and Cleveland and Buffalo and that the vessels formerly used in this service are now laid up. Too, the record does not contain sufficient data as to bulk trading on the Great Lakes.

Since we feel that the present record does not afford us the facts necessary to determine the far-reaching issues attendant in a section-805 (a) case, the proceeding will be remanded to the examiner for further hearing.

We realize, as was pointed out to us at oral argument, that a remand would afford a protesting intervenor a second opportunity to establish his case. But in a proceeding of this nature the Board is charged with an affirmative duty, and since we feel that a more complete record is essential for the discharge of our obligation to determine the controversy on the merits, the case will be remanded.

In view of the relatively short time remaining between now and the opening of the 1959 navigational season on the Great Lakes, further hearing will be expedited in a manner deemed proper by the examiner.

³ " * * * 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." (p. 504).

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-82

AMERICAN PRESIDENT LINES, LTD.—APPLICATION UNDER
SECTION 805(a)

Submitted January 27, 1959. Decided January 27, 1959

The carriage of passengers booked by Military Sea Transportation Service from California to Hawaii aboard voyage 17 of the SS *President Hoover*, sailing from San Francisco on or about February 5, 1959, found not to result in 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.

Warner W. Gardner for American President Lines, Ltd.

Willis R. Deming and *Alvin J. Rockwell* for Matson Navigation Company.

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

REPORT OF THE MARITIME ADMINISTRATOR

BY THE ADMINISTRATOR:

American President Lines, Ltd. (APL), has applied for written permission of the Administrator under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, to carry ten passengers booked by Military Sea Transportation Service (MSTS) from California to Hawaii on voyage No. 17 of the SS *President Hoover* sailing from San Francisco on or about February 5, 1959. A hearing, notice of which was published in the Federal Register of January 23, 1959, was held before the Administrator on January 27, 1959. Matson Navigation Company (Matson) intervened as its interests might appear.

Due to the withdrawal of the SS *Leilani* from the California-Hawaii service on January 8, 1959, MST requested APL to indicate the number of MSTS passengers it could accommodate between California

and Hawaii. Probable available passenger space to Hawaii on its transpacific vessels during 1959 was furnished MSTS by APL, and the earliest space offered was 10 berths on voyage No. 17 of the SS *President Hoover*. MSTS advised that it desired to book this space. It is not known whether MSTS will desire further passenger bookings on subsequent transpacific sailings of this vessel, but this application contemplates written permission for voyage No. 17 only.

At present, APL carries passengers between California and Hawaii on two of its vessels, the SS *President Cleveland* and the SS *President Wilson*, and the application of APL for written permission to add a third vessel is now being considered by the Federal Maritime Board in Docket No. S-78. Matson has no objection to the proposed permission for the single voyage here under consideration, provided the granting of the permission is without prejudice to the position of any party in Docket No. S-78.

Upon this record, it is found and concluded that the granting of the written permission under section 805(a) of the Act for the carriage of ten passengers booked by MSTS from California to Hawaii on voyage No. 17 of the SS *President Hoover* commencing on or about February 5, 1959, would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, nor be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage. The action herein is without prejudice to the position of any party in Docket No. S-78.

FEDERAL MARITIME BOARD

No. S-57

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

No. S-57 (Sub. No. 1)

No. S-57 (Sub. No. 2)

STATES MARINE CORPORATION AND STATES MARINE CORPORATION OF
DELAWARE—APPLICATION FOR WRITTEN PERMISSION UNDER SECTION
805(a), MERCHANT MARINE ACT, 1936

Submitted September 30, 1958. Decided February 16, 1959

Section 605(c) of the Merchant Marine Act, 1936, as amended, found not to interpose a bar to the granting of an operating-differential subsidy contract to States Marine Corporation and States Marine Corporation of Delaware for the operation of vessels (1) in their tricontinent service (a) to the extent of 12 to 24 direct annual sailings on Trade Route No. 12 and an additional 12 annual sailings on the route topping off in California, (b) to the extent of 12 to 24 direct annual sailings on Trade Route No. 22 and an additional 24 annual sailings topping off in California, (c) to the extent of 14 to 17 annual sailings on Trade Route No. 23, and (d) to the extent of 24 to 36 annual sailings on Trade Routes Nos. 26 A & B, all topping off on Trade Routes Nos. 5, 6, 7, 8, 9, and 11, with the privilege of lifting cargo at Hawaii for discharge in Europe; (2) in their Gulf/Mediterranean service to the extent of 12 to 24 annual sailings on Trade Route No. 13; and (3) in their transpacific service (a) to the extent of 18 to 24 direct annual sailings on Trade Route No. 29, (b) to the extent of 6 to 12 annual sailings on Trade Route No. 30, and (c) to the extent of 12 to 24 annual sailings serving both Trade Routes Nos. 29 and 30, half to sail last from a Trade Route No. 29 port and the other half to sail last from a Trade Route No. 30 port.

Section 605(c) of the Merchant Marine Act, 1936, as amended, found to interpose a bar to the award of an operating-differential subsidy contract to
5 F.M.B.

States Marine Corporation and States Marine Corporation of Delaware for (1) inbound service on Trade Route No. 30 from the Far East to the Pacific Northwest with vessels other than those which sailed outbound on Trade Route No. 30; (2) inbound service to Hawaii from the Far East; (3) inbound service to the Gulf from Europe on Trade Route No. 21 in the tri-continent service; and (4) service between the Gulf and the Azores on Trade Route No. 13 sailings.

The continuation of (1) a Pacific/Atlantic lumber service to the extent of 24 to 36 annual sailings, and (2) a Pacific/Gulf intercoastal service to the extent of 14 to 17 eastbound sailings and 24 westbound sailings, by States Marine Corporation and States Marine Corporation of Delaware, when and if subsidy is awarded, found not to result in unfair competition to any person, firm, or corporation operating exclusively in the domestic coastwise or intercoastal service, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended. Written permission for the continuation of these services will be granted in the event subsidy is awarded.

Isthmian Lines, Inc., and its predecessor in interest found to have been engaged continuously in the Atlantic/Hawaii leg of its Atlantic-Gulf/Hawaii service since 1935, and the continuation of the Gulf/Hawaii leg of the service found not to result in unfair competition to any person, firm, or corporation operating exclusively in the domestic coastwise or intercoastal service, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended. Written permission for the continuation of the Atlantic-Gulf/Hawaii service by Isthmian Lines, Inc., will be granted in the event a subsidy contract is awarded States Marine Corporation and States Marine Corporation of Delaware.

Herman Goldman, Elkan Turk, Irving Zion, George F. Galland, and Robert N. Kharasch for applicant.

Warner W. Gardner, Lawrence W. Hartman, and Vern Countryman for American President Lines, Ltd., and American Mail Line Ltd., *Odell Kominers and J. Alton Boyer* for Pacific Far East Line, Inc., *Lykes Bros. Steamship Co., Inc., and Weyerhaeuser Steamship Company, David P. Dawson, Robert E. Kline, Jr., and Russell T. Weil* for United States Lines Company and Moore-McCormack Lines, Inc., *Albert F. Chrystal* for Moore-McCormack Lines, Inc., *James L. Adams, Tom Killefer, Harold E. Mesirov, and Gordon L. Poole* for States Steamship Company, Pacific Transport Lines, Inc., and Pacific-Atlantic Steamship Co., *Carl S. Rowe, Frank B. Stone, and William Caverly* for American Export Lines, Inc., *Alvin J. Rockwell and Willis R. Deming* for Matson Orient Line, Inc., *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation and Pan-Atlantic Steamship Corporation, *Wade W. Hollowell* for Mississippi Valley Association, *Cyrus Guidry* for Board of Commissioners of the Port of New Orleans, *Richard B. Swenson* for Gulf Ports Association, Inc., and *Thomas J. White* for The Commission of Public Docks of the City of Portland, Oregon, interveners.

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 a proceeding under section 605(c) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1175(c), to determine whether the provisions of that section interpose a bar to the award of an operating-differential subsidy contract to States Marine Corporation and States Marine Corporation of Delaware (SML), joint applicants, and under section 805(a) of the Act, 46 U.S.C. 1223(a), to determine whether written permission should be granted applicant and its wholly owned subsidiary, Isthmian Lines, Inc. (Isthmian), to continue certain domestic operations.

The application seeks subsidy for an aggregate of 108 minimum and 168 maximum annual sailings over many trade routes embraced in three distinct services: (1) a tricontinent service, (2) a transpacific service, and (3) a Gulf/Mediterranean service.¹ The tricontinent service covers, westbound, outbound sailings on Trade Routes Nos. 12 and 22, with top-offs on Trade Route No. 29, and eastbound, inbound sailings on Trade Route No. 30 and outbound sailings on Trade Routes Nos. 23 and 26 A and B, with top-offs at North Atlantic ports on Trade Routes Nos. 5, 6, 7, 8, 9, and 11, whence the vessels return to Atlantic and Gulf ports.

The tricontinent service. Applicant seeks a minimum of 60 and a maximum of 84 annual subsidized sailings in this service. Westbound, it proposes (1) 12 to 24 direct outbound sailings on Trade Route No. 12—Atlantic coast ports to ports in the Far East—plus an additional 12 outbound sailings on the route which will top off at California ports (Trade Route No. 29), and (2) 12 to 24 outbound sailings on Trade Route No. 22—Gulf ports to ports in the Far East—plus an additional 24 outbound sailings which will top off at California ports.² On these sailings (from both the Atlantic and the Gulf) applicant desires the privilege of calling at ports in the Canal Zone, the west coast of Mexico, and Okinawa.

Eastbound, after returning its vessels to the Pacific Northwest, on Trade Route No. 30, some in ballast and some with cargo, SML proposes 24 to 36 outbound sailings per year on Trade Routes Nos. 26 A and B—Pacific coast ports to the United Kingdom and Eire, and to

¹ Applicant does not seek subsidy for its Pacific/Mediterranean service, which it proposes to continue in the event the instant application is granted.

² These sailings, it is proposed, also will provide a westbound Gulf/Pacific intercoastal service, *infra*.

ports in the Havre/Hamburg range—all topping off at North Atlantic ports carrying outbound cargo on Trade Routes Nos. 5, 6, 7, 8, 9, and 11.³ A service on Trade Route No. 23—Pacific coast ports to Havana—with a minimum of 14 and a maximum of 17 outbound annual sailings per year, also is proposed.⁴ Applicant proposes that its tricontinent vessels, after discharging cargoes in Europe, return to North Atlantic and Gulf ports with cargoes for those areas and the Pacific coast. Inbound to the Gulf, the vessels would traverse Trade Route No. 21.⁵

The pattern of applicant's operations is further evidenced by the fact that its eastbound intercoastal services—Pacific/Atlantic lumber trade and Pacific/Gulf trade, the eastbound service of the latter in conjunction with the proposed outbound (eastbound) Pacific coast to Havana service on Trade Route 23—are vehicles for the positioning of the vessels on the Atlantic and Gulf coasts for the commencement of westbound (outbound) tricontinent sailings (Trade Routes Nos. 12 and 22).

Transpacific service. A minimum of 36 and a maximum of 60 subsidized sailings per year are proposed for this service. Applicant intends a minimum of 18 and a maximum of 24 direct sailings on Trade Route No. 29—California to the Far East—a minimum of 6 and a maximum of 12 direct sailings on Trade Route No. 30—Pacific Northwest ports to the Far East—and a minimum of 12 and a maximum of 24 additional sailings serving both routes, half to sail last from a California port and the other half to sail last from a northwest port. In conjunction with these services, the privilege is sought to make calls at ports on the west coast of Mexico, Okinawa, and British Columbia. Some inbound service is proposed, to be in addition to that proposed to the Pacific Northwest with tricontinent vessels. Inbound service is proposed from the Philippines on these routes, but only limited outbound service to the southern Far East.

Gulf/Mediterranean service. Subsidy is sought for a minimum of 12 and a maximum of 24 annual sailings on Trade Route No. 13, with the privilege of making calls at east coast of Mexico ports, the West Indies, and the Azores.

Domestic operations. Section 805(a) permission is sought for (1) the continuation of applicant's Gulf/Pacific intercoastal service—14 to 17 sailings eastbound with tricontinent vessels in the Pacific/Ha-

³ SML requests the privilege on these sailings of lifting Hawaiian cargo destined for Europe, and calling at the west coast of Mexico, the Canal Zone, and Iceland.

⁴ These sailings also will provide an eastbound Gulf/Pacific intercoastal service, *infra*.

⁵ No outbound service is offered on Trade Route No. 21, but it is proposed to traverse this route from Europe to the Gulf in order to position certain of the vessels for the outbound (westbound) Trade Route No. 22 sailings in the tricontinent service, and to carry some inbound European cargo to the Gulf.

vana trade, and 24 sailings westbound, to be accomplished with Gulf/Far East tricontinent vessels topping off in California; (2) the continuation of applicant's intercoastal lumber service—about 2 to 3 sailings per month—which provides Atlantic coast positioning of some of the tricontinent vessels for outbound Trade Route No. 12 sailings; and (3) continuation of Isthmian's Atlantic-Gulf/Hawaii service, a self-contained entity.

Applicant also proposes the free interchange of its vessels among the several services.

Applicant has operated to a considerable extent with chartered vessels; if subsidized, it proposes to replace them with suitable owned vessels.

American President Lines, Ltd. (APL), American Mail Line Ltd. (AML), Lykes Bros. Steamship Co., Inc. (Lykes), Moore-McCormack Lines, Inc. (Mormac), Pacific Far East Line, Inc. (PFEL), Pacific Transport Lines, Inc. (PTL), States Steamship Co. (States),⁶ United States Lines Company (U.S. Lines), Mississippi Valley Association, Board of Commissioners of the Port of New Orleans, Gulf Ports Association, Inc.,⁷ Matson Orient Line, Inc.,⁸ Waterman Steamship Corporation,⁸ American Export Lines, Inc. (Export),⁹ and the Commission of Public Docks of the City of Portland (Portland Docks) intervened in the 605(c) portion of the proceeding.

APL, AML, and States operate in the transpacific trades and oppose so much of the application as pertains to transpacific operations, including the California top-offs in the tricontinent service. Lykes operates on Trade Routes Nos. 21, 22, and 13 (as they are involved here), and opposes the application for subsidy on those routes. Lykes also contests the proposed California top-offs as well as the essentiality of the tricontinent service, and alleges that an unlawful agreement between SML and Bloomfield Steamship Company (Bloomfield) disqualifies SML from receiving subsidy. U.S. Lines and Mormac oppose the proposed Atlantic top-offs with tricontinent vessels operating in the Pacific-Atlantic/UK-Europe trade, and Portland Docks seeks direct transpacific service from that port.

In the 805(a) portion of the proceeding, interveners include Weyerhaeuser Steamship Company (Weyerhaeuser), Pacific-Atlantic Steamship Co.,¹⁰ PTL,¹⁰ and PFEL.¹⁰

⁶ PTL and States have merged since this proceeding was instituted; both will be referred to as States.

⁷ Its motion to withdraw was granted.

⁸ Matson Orient offered no evidence; Waterman submitted traffic figures only.

⁹ Export contends that the continuation of SML's unsubsidized west coast/Mediterranean service with Atlantic top-offs would somehow prejudice Export. This contention is not cognizable in a 605(c) proceeding and no further reference will be made to it.

¹⁰ Presented no evidence.

The examiner issued a recommended decision in which he concluded that the provisions of section 605 (c) of the Act do not interpose a bar to the award of subsidy to SML for the services proposed, save the proposed California top-offs on westbound tricontinent sailings, *provided* (1) applicant is not permitted to enjoy sailing spreads materially larger than those of its competitors, (2) applicant is required to serve the Philippines to the same extent as its subsidized competitors on the routes, and (3) inbound services be provided to the same degree that other subsidized competitors provide it, except that with reference to vessels returning to the Pacific Northwest, only sailings originating in that area should be permitted to move inbound cargoes to the Northwest. He also concluded that written permission for the continuation of domestic services should be granted.

Exceptions to the recommended decision were filed by applicant, APL, AML, PFEL, States, Weyerhaeuser, U.S. Lines, Mormac, Export, and Lykes, and replies thereto were filed. Oral argument was held before the Board on September 30, 1958. Contentions and arguments of the parties not specifically discussed herein have been considered and have been found not to be related to material issues or supported by the evidence.

DISCUSSION

The only issues are whether the provisions of section 605 (c) of the Act interpose a bar to the award of subsidy to SML with respect to its application, and whether, under the provisions of section 805 (a) of the Act, written permission should be granted authorizing the continuance of certain domestic operations in the event subsidy is awarded.

Under the first clause of section 605 (c) we may conclude that the provisions thereof do not interpose a bar to the award of subsidy if the record dictates that the service already provided by U.S.-flag vessels, other than those of applicant, on the route or routes involved, is inadequate to carry a substantial portion of our foreign commerce, and that in the accomplishment of the purposes and policy of the Act, additional vessels of U.S. registry should be operated on the route or routes. The second clause of the section is concerned with whether applicant is conducting an existing service. If the service is existing, within the meaning of the section, and the award of subsidy for such service would not unduly advantage applicant or unduly prejudice its U.S.-flag competitors, the section would not interpose a bar to the award of the subsidy. And even if undue advantage or undue prejudice would result from the award of subsidy, we may conclude nevertheless that the provisions of the section do not interpose a bar to the award of subsidy if the record supports a finding that the trade or trades are

inadequately served by other U.S.-flag operators and that, in the accomplishment of the purposes and policy of the Act, additional U.S.-flag vessels should be operated on the route or routes.

Under section 805 (a), we must determine whether the continuation of the domestic services for which permission is sought (1) would result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, or (2) would be prejudicial to the objects and policy of the Act, unless applicant qualifies under the "grandfather" clause of that section, in which case the permission to continue the service must be granted.

The application and the record here made, then, will be measured in the light of the standards set out in sections 605 (c) and 805 (a). Contentions and arguments which do not fall within their purview will not be considered. It is well settled that a favorable 605 (c) determination does not of itself result in a subsidy contract (*Matson Orient Line, Inc.—Subsidy, Route 12*, 5 F.M.B. 410 (1958)), and precedent to any award the Board must make other determinations with respect to the application under other sections of the Act. We are not here concerned with issues properly within the scope of other sections of the Act, which have been injected into the proceeding, e.g., the alleged unlawful agreement between SML and Bloomfield, vessel interchange, sailing spreads, and "round voyages."

Tricontinent service. Since this service encompasses several trade routes, it is necessary that the 605 (c) standards be met as to each route. The first to be considered is the proposed service on Trade Route No. 12—Atlantic to Far East. SML proposes from 12 to 24 direct sailings on this route, plus an additional 12 sailings which will top off in California. Between 1952 and 1955, the liner commercial outbound movement on this route increased from 961,000 long tons to 1,722,000 long tons. U.S.-flag participation in the movement has not kept pace with the offerings, actually declining from 19 percent in 1952 to 16 percent in 1955. There is no evidence to indicate that liner commercial offerings on the route, in the foreseeable future, will not remain at least at their 1955 level. This application was pending at the time of the Board's decision in *Matson Orient, supra*, where it was noted that "* * * the granting of all pending applications pertaining to this service would amount to about 52 percent U.S.-flag vessel participation, assuming that there is no increase in the liner cargo offerings in the future." In view of the ability of U.S.-flag vessels to capture offerings in this trade, as evidenced by the high space utilization of such vessels, and the inability of other U.S.-flag carriers to carry an appreciable amount of applicant's commercial carryings—in 1955, SML carried 12,326 long tons of liner commercial and 49,261 long tons of bulk

commercial—we conclude that U.S.-flag participation on Trade Route No. 12 is inadequate, and that in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon. We have no need, therefore, to discuss applicant's contention that its service on the route is "existing."

In connection with applicant's proposed Trade Route No. 12 leg, we note that chiefly outbound service is contemplated and that 12 sailings are to include California top-offs. There is a substantial inbound movement on Trade Route No. 12—1,740,000 long tons inbound as compared to 1,722,000 long tons outbound in 1955—and if subsidy is awarded, the Board, under other sections of the Act, may well insist upon substantial inbound service being rendered by vessels on the route. The California top-offs proposed to be made in conjunction with Trade Route No. 12 vessels are considered *infra*.

U.S.-flag participation in the offerings on Trade Route No. 22, although substantial, would be inadequate without the contribution of SML. Both liner and bulk commercial offerings materially increased between 1952 and 1955: liner from 509,000 long tons to 1,451,000 long tons and bulk from 514,000 long tons to 1,666,000 long tons. Liners have carried large amounts of bulk cargoes in this trade—phosphate rock, soya beans, wheat, rice, and corn. Disregarding the bulk movement, and without the contribution made by SML—118,000 long tons in 1955, accounting for over 30 percent of the U.S.-flag liner commercial movement—the trade would be inadequately served by U.S.-flag vessels. In 1952 American-flag vessels handled 57 percent of the liner movement. After slight declines in 1953 and 1954, they again carried 57 percent of the much larger movement in 1955. The low level of U.S.-flag vessel free space (Lykes, the principal carrier in the trade, had less than 2 percent free space during the 1952-1955 period) indicates that, without SML's contribution, U.S.-flag participation would be considerably less than 50 percent.

SML proposes that 24 of its Trade Route No. 22 sailings top off in California. These top-offs are to be made on sailings which provide the westbound leg of the Gulf/Pacific intercoastal service, and since they constitute sailings on Trade Route No. 29 they will be considered hereinafter with the proposed transpacific services. At this juncture it is sufficient to say that section 605(c) of the Act does not interpose a bar to the award of subsidy to applicant for 24 to 36 annual sailings on Trade Route No. 12 and for 36 to 48 annual sailings on Trade Route No. 22 in the tricontinent service.

Applicant proposes to return its tricontinent vessels from the Far East to the Pacific Northwest, some in ballast and some with cargo, with the privilege of calling at Hawaii and British Columbia. This leg constitutes an inbound sailing on Trade Route No. 30, with respect

to which SML does not conduct an existing service. Further, there is no evidence to support a finding of inadequacy on this inbound route to the extent of 60 to 84 sailings (over and above those proposed in SML's transpacific service). We therefore conclude that section 605(c) interposes a bar to the award of a contract to SML which would include provisions for inbound sailings to the Pacific Northwest over and above those proposed for its transpacific services. This conclusion should not be construed as a bar to the inbound carriage of cargoes on such vessels for discharge at Gulf or Atlantic ports. It is a bar, however, to the carriage of cargoes inbound to the Pacific Northwest by vessels operating in the tricontinent service. Further, as the record fails to show inadequacy of U.S.-flag service from the Far East to Hawaii, and as applicant does not operate an existing service there, section 605(c) interposes a bar, *Matson Orient*, *supra*. For like reasons, the same result is required as to the privilege of serving British Columbia inbound with vessels operating in the tricontinent service.

SML proposes that its tricontinent vessels, upon return to the Pacific Northwest, have three options while remaining in the tricontinent service: (1) Pacific coast ports to Europe on Trade Routes Nos. 26 A and B, all topping off at North Atlantic ports with cargo destined for ports on Trade Routes Nos. 5, 6, 7, 8, 9, and 11; (2) Pacific coast ports to North Atlantic ports with full loads of lumber; and (3) Pacific/Gulf eastbound intercoastal service as part of applicant's Pacific/Havana Trade Route No. 23 eastbound sailings.¹¹

On Trade Routes Nos. 26 A and B, a minimum of 24 and a maximum of 36 annual sailings are proposed, all topping off at North Atlantic ports. SML is the only American-flag operator offering a Pacific to Europe service in this growing trade. Liner commercial offerings almost doubled between 1952, when 457,000 long tons were carried, and 1955, when 886,000 long tons moved. A similar increase was experienced in bulk offerings: 306,000 long tons in 1952 to 508,000 long tons in 1955. Since (1) U.S.-flag participation is extremely low in this trade (about 8 percent in 1955, practically all of which was moved by SML), (2) applicant provides the only U.S.-flag liner service, and (3) there is no evidence that the commercial offerings will not remain at least at the 1955 level during the foreseeable future, we conclude that U.S.-flag service on Trade Routes Nos. 26 A and B is inadequate and that, in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon. Section 605(c) of the Act does not interpose a bar to an

¹¹ The Pacific/Atlantic lumber service and the Pacific/Gulf intercoastal service are considered *infra*.

award of subsidy to SML for the operation of 24 to 36 sailings per year on the routes.¹²

As to the proposed North Atlantic top-offs on Trade Routes Nos. 26 A and B, we find that the routes involved in the topping-off operation (Nos. 5, 6, 7, 8, 9, and 11—eastbound sailings from the North Atlantic) are inadequately served, and that in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon. The proposed minimum of 24 and maximum of 36 top-offs would allow SML to lift about 70,000 tons of cargo annually outbound in these trades. Since U.S.-flag participation has been well below 50 percent,¹³ since U.S.-flag vessels have a comparatively high utilization ratio, and since these routes enjoy the largest movement of U.S. outbound liner commercial traffic, we find that in the accomplishment of the purposes and policy of the Act, additional vessels to the extent proposed in the application should be operated thereon. As the routes in their entirety are inadequately served, section 605(c) is not a bar to either the inbound or the outbound movement.

The outbound-inbound ratio on Trade Routes Nos. 26 A and B is about 2 to 1 outbound, and while SML does not propose substantial inbound service on the routes, the Board, under other sections of the Act, may well insist upon certain inbound service to the Pacific coast from Europe. But that problem is not presented here. The routes in their entirety are inadequately served, and section 605(c) does not bar the award of subsidy for the operation of U.S.-flag vessels thereon. The Board is aware that foreign-flag vessels in the Pacific coast/Europe trade do not top off at North Atlantic ports, and whether a definitive contract, if one be awarded, will permit such top-offs or will restrict the number of sailings on which top-offs will be permitted, is an issue to be considered by the Board under other sections of the Act.

Once they are in Europe and after discharging their cargo, SML proposes to dispatch some of its vessels to the Gulf, traversing Trade Route No. 21, so as to position them for outbound sailings on Trade Route No. 22 to the Far East. It is desired to carry inbound cargo on these Gulf vessels. Since there has been no showing that there is an existing service on Trade Route No. 21 or that the route is inade-

¹² Applicant seeks the privilege of calling at Hawaii for outbound cargoes destined for Europe. 26,000 tons were moved by applicant in this trade in 1956, and since it is the only U.S.-flag operator providing a liner service there, section 605(c) does not interpose a bar to the granting of the privilege. The fact that section 605(c) is no bar, however, is not a commitment that the Board will include it in a contract under section 601 of the Act.

¹³ In 1955 U.S.-flag participation in the outbound liner movement on these routes was 48 percent on Trade Route No. 5; 31 percent on Trade Route No. 6; 33 percent on Trade Route No. 7; 16 percent on Trade Route No. 8; 38 percent on Trade Route No. 9; and 31 percent on Trade Route No. 11.

quately served, section 605(c) interposes a bar to such proposal. There is no prohibition, however, against the carriage of inbound cargoes on Trade Routes Nos. 26 A and B from Europe to the Pacific coast on vessels sailing from Europe to the Gulf. Indeed, such service may be required by the Board under other sections of the Act.

On Trade Route No. 23—Pacific coast to Havana—SML proposes a minimum of 14 and a maximum of 17 annual sailings eastbound. Applicant offers the only U.S.-flag liner service on the route, having maintained it since late in 1953. It averages 15 sailings yearly with an average of about 2,300 long tons per sailing. The vessels also provide the eastbound leg of applicant's Gulf/Pacific intercoastal service, *infra*. The record supports a finding that Trade Route No. 23 is inadequately served by U.S.-flag vessels and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon. We conclude that the provisions of section 605(c) do not interpose a bar to the award of subsidy for 14 to 17 yearly sailings in this service. Again, however, the Board may require applicant, if subsidy be awarded, to provide a westbound (inbound) service from Havana to the Pacific coast, but that is not an issue here. We will not consider in this proceeding, which arises under sections 605(c) and 805(a) of the Act, questions concerning "round voyages" under section 605(a) of the Act, raised by interveners.

Gulf/Mediterranean service. Applicant proposes a minimum of 12 and a maximum of 24 sailings on Trade Route No. 13, with the privilege of calling at ports on the east coast of Mexico eastbound and the Azores. Although U.S.-flag participation in the liner commercial movement on the route has been high—a high of 59 percent in 1952 and a low of 50 percent in 1955—both the liner and bulk commercial movement have experienced some growth. U.S.-flag service would be inadequate without the carryings of SML. In the 1952–1955 period SML averaged about 97,000 long tons of commercial cargo per year, and Lykes, the major U.S.-flag operator on the route, had sufficient free space to accommodate only about 4,000 additional long tons per year. Without applicant's carryings, and because of the physical limitations of the remaining U.S.-flag lines to accommodate more than a small fraction of applicant's carryings, U.S.-flag participation would amount to about 42 percent. We find that the trade is inadequately served and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon. We are not impressed with the argument that, since the trade is adequately served inbound, section 605(c) is a bar to the award of subsidy. Outbound carryings amount to 10 times inbound carryings. On this record we find that section 605(c) does not interpose a bar of 12 to 24 annual sailings in this service.

As to the privilege of calling at the Azores, we cannot find that SML is conducting an existing service with respect thereto or that the trade is inadequately served. The provisions of section 605(c) therefore interpose a bar to the award of subsidy for this service. *Matson Orient, supra; Isbrandtsen Co., Inc.—Subsidy, E/B Round the World*, 5 F.M.B. 448 (1958).

Transpacific services. As noted, applicant proposes a minimum of 36 and a maximum of 60 sailings in its three transpacific services: 18 to 24 on Trade Route No. 29, 6 to 12 on Trade Route No. 30, and 12 to 24 on both routes, half of which will sail last from California and half will sail last from the Northwest. Too, 36 top-offs at California are proposed with tricontinent sailings on Trade Routes Nos. 12 and 22. As we said in *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F.M.B. 304 (1957) :

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.

Apart from the California top-off sailings, SML has averaged 61.75 sailings per year in its transpacific services, which should be credited toward its claim of existing service. On Trade Route No. 29, where 24 to 36 sailings are proposed, SML averaged 24.5 direct liner commercial sailings per year between 1952 and 1955.¹⁴ On Trade Route No. 30, where 12 to 24 sailings are sought, there was an annual average of four such sailings.¹⁵ During the same period, SML averaged 33.25 annual sailings which served both routes, and the dual range or integrated sailings proposed, 12 to 24 in number, half to sail last from California and half to sail last from the Northwest, are included above in the totals proposed on each route. Although the integrated sailings demonstrate that 23.5 loaded last in California and 9.75 loaded last in the Northwest, since they served both areas they may be credited 50 percent to Trade Route No. 29 sailings and 50 percent to Trade Route No. 30 sailings. Thus, SML has established an average of 41 yearly sailings serving Trade Route No. 29 and 20.5 yearly sailings serving Trade Route No. 30, sufficient to establish it as conducting an existing service, within the meaning of section 605(c), for its proposed direct and integrated transpacific trades.

It is clear from the record that SML has topped off, annually, an average of 39 sailings from California with its Trade Routes Nos. 12 and 22 vessels, carrying, generally, slightly less than 400 tons of general cargo per voyage. We find that this average is sufficient to estab-

¹⁴ Sailings on which four or more tons of general cargo were booked.

¹⁵ Two direct sailings on Trade Route No. 30 in 1955 are discounted since they were made under charter, while four sailings which carried only MSTs and bulk cargoes in 1954 are counted in recognition of the nature of the trade.

lish applicant as an existing operator, within the meaning of section 605(c), as to the 36 proposed California top-offs.

Whether section 605(c) will interpose a bar to the proposed transpacific services, including the top-offs, depends upon whether the granting of subsidy aid to SML for such services would unduly advantage SML or unduly prejudice its American-flag competitors on the route or routes.

As we understand the application in the light of this record, SML proposes to carry inbound cargoes as it chooses and to exercise selectivity regarding outbound port and area coverage. A section-605(c) proceeding affords no such election; service descriptions in subsidy contracts are not measured solely by the application.

AML's claim that it would be unduly prejudiced by the inbound carriage of cargoes on Trade Route No. 30 has been removed by the conclusion that the operation inbound of tricontinent vessels on the route is barred by the provisions of section 605(c). Any prejudice which AML might suffer by reason of SML's carriage of inbound cargoes *by vessels sailing outbound from the Pacific Northwest* springs not from the fact of subsidization but from the fact of SML's presence in the field.

APL's claim that it would be unduly prejudiced by SML's ballasting many voyages home, and proposing only limited service to the Philippines as well as to other areas in the southern Far East, does not constitute undue prejudice. We do not feel that APL can complain, in the context of section 605(c), that SML would be in a better position than APL if subsidy be awarded, merely because SML petitions for and might receive something different from that which APL petitioned for and received. To hold that these facts constitute undue prejudice would result in our requiring that all operators on any given trade route must receive identical contracts and provide identical service thereunder. If APL and other operators in the transpacific trades now feel that the service descriptions in their contracts do not provide for efficient service, their relief, if any, is to petition for modifications of their contracts.

Lykes' claim that undue prejudice would result from California top-offs with Trade Route No. 22 tricontinent vessels is not supported by the record. The allegation of an unlawful agreement between SML and Bloomfield is beyond the scope of a section-605(c) proceeding and will not be considered here.

We conclude that section 605(c) does not interpose a bar to the award of subsidy to SML for its proposed number of transpacific sailings, including the top-offs with tricontinent vessels. Under section 601(a), however, we may well insist upon a service description

quite different from that contemplated in the application, and we may require all of applicant's Trade Route No. 12 and Trade Route No. 22 sailings to be direct, thereby foreclosing California top-offs which are not barred by section 605 (c).

Domestic operations. In the event a subsidy contract is awarded to SML, section-805 (a) permission to continue certain domestic operations depends upon whether they would result in unfair competition to any exclusively domestic operator within the meaning of that section or whether they would be prejudicial to the objects and policy of the Act. The contention that such operations are barred by the provisions of section 605 (a) is irrelevant here. As we recently said in *T. J. McCarthy Steamship Co.—Sec. 805 (a) Application*, 5 F.M.B. 531 (1959), "Section 605 (a) clearly relates solely to the Board's authority to pay subsidy." Whether section 605 (a) does prohibit the payment of subsidy on a particular voyage which includes a domestic leg is, like other issues, to be considered by the Board precedent to the tender of a subsidy contract. It cannot be the subject of a collateral attack in an 805 (a) proceeding. The requested permission must be measured here in the light of the standards set out in section 805 (a).

Isthmian and its predecessor in interest have continuously engaged in the Atlantic/Hawaii trade since 1935, except for interruptions beyond their control during World War II, and Isthmian unquestionably qualifies under the "grandfather" clause of section 805 (a) for written permission for its continued operation in such trade in the event subsidy is awarded. There is some question as to whether "grandfather" rights attach to Isthmian's Gulf/Hawaii service because the record discloses that very little westbound service was offered between 1935 and 1939. It is not necessary for us to resolve this issue here, however, since no exclusively domestic operator contends that the continuation of the service would result in unfair competition, and it is apparent from this record that continuation would be in the furtherance of the objects and policy of the Act. We conclude that in the event subsidy is awarded, section 805 (a) permission will be granted for the continuation of Isthmian's Atlantic-Gulf/Hawaii service.

As to the continuation of SML's Pacific/Atlantic lumber service, we find that it would not result in unfair competition to any exclusively domestic operator nor be prejudicial to the objects and policy of the act. SML has conducted this service since 1953 as an integral part of its tricontinent service, and under subsidy it proposes about 24 to 36 sailings yearly. The record establishes that lumber offerings have exceeded available vessel space since 1952, that SML carried 186,000 long tons of lumber in 1955, accounting for 12 percent of the movement, and that the growing offerings of lumber have resulted in

the intercoastal trade becoming unbalanced—1,900,000 long tons westbound compared to 2,700,000 long tons eastbound in 1955. Intervener Weyerhaeuser, in addition to its contention that section 605 (a) prohibits the continuation of this service if subsidy be awarded, claims that there is no showing that the service is needed or that it would be profitable for SML. Weyerhaeuser also suggests that the number of lumber sailings proposed is not determined, hence the degree of competition to which it may be subjected is unknown. The foregoing facts of record answer most of these arguments. Section 605(a) issues will be considered by the Board prior to the tender of any subsidy contract, and the number of such sailings will not exceed from 24 to 36 annually.

SML proposes 24 westbound sailings in its Gulf/Pacific intercoastal service in conjunction with its proposed Trade Route No. 22 leg of the tricontinent service, topping off at California, and 14 to 17 eastbound sailings in conjunction with its proposed Pacific coast/Havana service. Section 805(a) permission will be granted for the continuation of this Gulf/Pacific intercoastal service in the event a subsidy contract is awarded. The record clearly establishes that SML and its predecessor have continuously operated in this service since 1935, except during World War II. The "grandfather" clause of section 805(a) therefore requires that the permission be granted. Although it is not necessary to consider whether the continuation of the service after subsidy would result in unfair competition to any exclusively domestic operator or would be prejudicial to the objects and policy of the Act, the record demands negative answers in both respects. There is no evidence of unfair competition since SML offers the only general cargo service in the trade, a large number of shippers are served, and SML's carryings have been substantial. Similarly, the record supports the finding that the continuation of the service would be in furtherance of the objects and policy of the Act. As noted hereinbefore, section 605(a) questions relating to "round voyages" are beyond the scope of this proceeding.

On this record, we conclude that the provisions of section 605(c) do not interpose a bar to (1) the award of subsidy to SML for its proposed tricontinent service:

a. to the extent of 12 to 24 direct annual sailings on Trade Route No. 12 and an additional 12 annual sailings on the route topping off in California;

b. to the extent of 12 to 24 direct annual sailings on Trade Route No. 22 and an additional 24 annual sailings topping off in California;

c. to the extent of 24 to 36 annual sailings on Trade Routes Nos. 26 A and B, all topping off on Trade Routes Nos. 5, 6, 7, 8,

9, and 11, with the privilege of lifting cargo at Hawaii for discharge in Europe; and

d. to the extent of 14 to 17 annual sailings on Trade Route No. 23;

(2) the award of subsidy to SML for its proposed 12 to 24 annual sailings on Trade Route No. 13; and (3) the award of subsidy to SML for its proposed transpacific services:

a. to the extent of 18 to 24 direct annual sailings on Trade Route No. 29;

b. to the extent of 6 to 12 direct annual sailings on Trade Route No. 30; and

c. to the extent of 12 to 24 annual sailings serving both Trade Routes Nos. 29 and 30, half to sail last from ports on each route.

We also conclude that the provisions of section 605(c) do interpose a bar to the award of subsidy to SML for (1) its proposed carriage of inbound cargo to the Pacific Northwest with vessels other than those which sail outbound on Trade Route No. 30; (2) its proposed inbound service to Hawaii; (3) its proposed inbound service to the Gulf of Mexico from Europe on Trade Route No. 21; and (4) its proposed outbound service to the Azores in conjunction with its proposed Trade Route No. 13 service.

We do not in this proceeding concern ourselves with allegations of an unlawful arrangement between SML and Bloomfield, matters relating to SML's proposed flexibility of operations, including vessel interchange and minima-maxima sailing spreads, and the construction of the term "round voyage" as used in section 605(a); those matters, along with others, are reserved for proper determination under other sections of the Act.

We further conclude that under section 805(a), in the event a subsidy contract is entered into with SML, written permission will be granted for:

1. the continuation of a Pacific/Atlantic lumber service to the extent of 24 to 36 sailings per year;

2. the continuation of a Pacific/Gulf intercoastal service to the extent of 14 to 17 sailings eastbound and 24 sailings westbound; and

3. the continuation, by Isthmian, of its present Atlantic-Gulf/Hawaii service.

In the event a contract is entered into, this report will serve as the written permission contemplated under section 805(a) of the Act. Whether SML may perform the Pacific/Atlantic and Gulf/Pacific intercoastal services with subsidized vessels is a matter which will be determined under sections 601 and 605(a) of the Act.

FEDERAL MARITIME BOARD

No. M-78

GRACE LINE INC. ET AL.—APPLICATIONS TO BAREBOAT CHARTER
GOVERNMENT-OWNED DRY-CARGO VESSELS

Submitted May 31, 1957. Decided May 31, 1957

The Board should find and so certify to the Secretary of Commerce that the services considered are required in the public interest, that such services are not adequately served, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such services.

George F. Galland and Robert N. Kharasch for Grace Line Inc.
Walter J. Murray, Arthur E. Tarantino, and Paul D. Page, Jr., for
T. J. McCarthy Steamship Company.
John J. O'Connor for Isbrandtsen Company, Inc.
Einar H. Crown pro se.
Edward Aptaker as Public Counsel.

INITIAL DECISION OF EDWARD C. JOHNSON, EXAMINER¹

This proceeding under Public Law 591, 81st Congress, was instituted by the Board's notice of March 14, 1957, upon the applications of Grace Line Inc. and others to bareboat charter on an interim basis certain designated war-built ships of the N3-S-A2 type for employment in general cargo carriage between ports of the Great Lakes and the Caribbean area and the United Kingdom and Continent of Europe. The specific ships requested are located in the Government's reserve fleet at Wilmington, N.C.²

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).

² The reserve fleet includes only 11 vessels of this type, now owned by the Government and available for charter. The remaining 7 are at various reserve fleet anchorages on the Pacific Coast. The number of N3 vessels in existence is less than the aggregate number sought by the applicants.

Notice of the hearing was published in the Federal Register of March 16, 1957, and pursuant to such notice certain applicants complied with the terms and conditions set forth therein. Grace Line Inc. ("Grace") seeks to charter 4 N3's for the Great Lakes to the Caribbean area. Isbrandtsen Co., Inc. ("Isbrandtsen") and T. J. McCarthy Steamship Company ("McCarthy") respectively ask for 8 and 4 of these type vessels and propose to operate them between the Great Lakes and the United Kingdom and Continent of Europe. In addition, Einar H. Crown ("Crown") seeks to charter 2 N3's for similar Great Lakes-European service.³ Prior to the hearing United States Lines Co. ("United States") showed some interest in chartering 8 N3's for use in the Great Lakes-European service. No formal application however was filed as is required by General Order 60 nor were they represented at the hearings held in Chicago beginning on March 28, 1957. In consequence, no consideration will be given to this Company's mere prior expressed interest in these vessels.

All applications for charter are conditioned on grants of operating subsidy.

The notice of hearing confined the testimony to the statutory issues set forth in Public Law 591. In pertinent part it provided:

* * * to receive evidence with respect to whether the services for which such vessels are proposed to be chartered are required in the public interest and are not adequately 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. Evidence will be received with respect to any restrictions or conditions that may be necessary or appropriate to protect the public interest in respect of such charters as may be granted and to protect privately owned vessels against competition from vessels chartered as a result of this proceeding.

At the conclusion of the hearings Grace's counsel requested the Presiding Examiner to make, from the Bench, the necessary statutory findings under the Merchant Ship Sales Act as amended by PL 591 and cited as reasons therefor that the N3 vessels sought by the various applicants would be serviceable only during two navigation seasons—1957 and 1958—since the deep channel Seaway is due to open in 1959 and that larger ships would come into use, and the N3 vessels would then have no further utility. Further, that the navigation season on the St. Lawrence is short, that the season is now about to open and the reconditioning of the N3's would take time and money, that it was essential that the ships be operated for two years in order to permit the spreading of the breakout costs over a two-year period, and that the Board must act promptly if Grace, or anyone else, is to use the ships at all.

³ While Crown submitted a skeletal supplement to the form of application required under General Order 60, Crown has not filed a basic application as required by General Order 60.

In recognition of these circumstances decision was then rendered, summarizing the evidence in support thereof, finding:

1. That the services under consideration were in the public interest;
2. That such services were not adequately served; and
3. That privately owned United States-flag vessels were not available for charter from private operators on reasonable conditions and at reasonable rates for use in such services; and stating that the aforementioned findings and conclusions would be supported, in due course, by a formal written memorandum.

The above ultimate findings with the record transcript were transmitted to the Board in memorandum form on April 15, 1957, for such action as the Board might desire to take. My formal basic findings and conclusions, in more detailed fashion follow:

GRACE LINE INC.

(Trade Route 33)

Grace, through its Executive Vice President, T. B. Westfall testified that the Company is an established carrier and has for many years operated vessels between the Caribbean area and the United States Atlantic ports. It seeks to charter four (4) N3's named in its application and located at Wilmington, N.C., for use on the Great Lakes-Caribbean route.⁴ The service proposed will connect Chicago, Milwaukee, Detroit and Cleveland (plus Toronto and Montreal) with ports on the North coast of Colombia and Venezuela and ports in the Netherland Antilles. No United States-flag service is presently provided between the Great Lakes and the Caribbean, and the only service of any kind is furnished by two foreign flag carriers⁵ which cannot accommodate all shipments, with the result that cargo must be shipped to seaboard ports for transfer to ocean carriers.

There was abundant evidence, from numerous witnesses representing shippers, ports, public bodies, as well as private associations and institutions indicating that the service proposed by Grace would relieve a shipping bottleneck for firms exporting from the Great Lakes to the Caribbean areas where the present service is inadequate as to frequency of sailings, regularity, dependability and vessel capacity. The ports of Venezuela and Colombia offer a natural outlet for a wide variety of mid-western products originating in the Great Lakes region. An impressive list of industrial goods and other high-rated items are presently being, and will be shipped to Latin America—agricultural

⁴ On April 8, 1957, shortly after the hearings in Chicago were concluded this route was tentatively designated as essential under Sec. 211 of the Merchant Marine Act, 1936, 20 F.R. 2646.

⁵ Ahlmann Transcaribbean Line (German-flag) and Saguenay Terminals Ltd. (Norwegian-flag).

machinery, animal by-products, auto parts, automobiles, canned meats, chemicals, drugs, electrical equipment, paint, paper and glass products, refrigerators, power shovels and cranes, rubber crude and finished products, seeds, steel, tractors—the list is a long one. Many exporters who are using Great Lakes shipping services now find that rates are lower than rail-ocean rates and that there are savings in handling costs. Others report that they do not use Great Lakes overseas shipping because of poor and irregular service, inadequate port facilities, and because no American ships are available. In addition, substantial cost savings for shippers can be had by reducing inland transportation charges now incurred in shipping exports from midwestern origins to seaboard for loading aboard ocean vessels. Then too, the service proposed will expedite collection procedures by permitting exporters to obtain more promptly their on-board bills of lading against which letters of credit are payable, reduce total freight charges for certain shippers and enable others to effect savings by doing away with export packaging.

Since the N3's are not usable as is, Grace has inspected the ships and made a survey of necessary repairs and modifications. They estimate it will cost about \$600,000 to get them in shape for use and take six weeks to do the job. Grace proposes to operate the ships on a 54-56 day turnaround, affording fortnightly service in a range of 14-17 sailings during a full season.

ISBRANDTSEN COMPANY, INC.

(Trade Route 32⁶)

Isbrandtsen's Executive Vice President, Matthew S. Crinkley, a man with wide knowledge and extensive experience in steamship line operations of a world wide nature testified that his company wanted eight (8) N3⁷ ships for two services, one involving four ships to the United Kingdom and Continental ports, and in another service four ships for use between Great Lakes and the Continent, twice a month in each instance. He further stated that no one was in a better position " * * * to get hold of these vessels and get them into operation sooner or more economically * * * than the Isbrandtsen Company". Trade Route 32 over which the company proposes to use the vessels for operation during the interim period until the Seaway is fully open, has been declared essential. Many witnesses for Grace also spoke in favor

⁶ The Great Lakes/European service has been determined by the Maritime Administrator to be an essential foreign trade route F.R. Vol. 21, No. 31, pg. 1060, February 15, 1955.

⁷ The four specific N3 type vessels applied for by all applicants (except Crown who requests any 2 N3 type ships) located on the East Coast at Wilmington, N.C. are SS. Kolno, SS. Kowel, SS. James Miller and SS. George Crocker. Isbrandtsen asks for four (4) additional vessels from the reserve fleets on the West Coast of the United States.

of the other applications for ships to be used on Trade Route 32. Isbrandtsen relies in part on a February 9, 1956 release of the Maritime Administrator with an accompanying Press Release, to support its position. (Exhibit 16)

The Maritime Administration estimated that during the period of shallow draft, approximately 8 or 9 small shallow draft N3-S-A2 or similar type freighters would provide the minimum sailing requirements of the newly designated Trade Route and that in 1959, and in subsequent years after deep draft passage is provided, approximately 18 to 26 fast, "at least 18-knot or equivalent" freighters would be required to provide 11 to 16 sailings per month on the route. These, it was indicated, would possibly be divided into 8 to 12 sailings per month to the United Kingdom/Atlantic Europe area and approximately 3 to 4 sailings per month to the Baltic/Scandinavian area.

In "Background Information for the Press", accompanying the release, the Administrator also stated :

Great Lakes/Overseas traffic for many years has been moving between various ports in the Great Lakes/St. Lawrence River basin and several foreign areas. Some cargo moves between Great Lakes ports and ports in the Mediterranean, and smaller amounts move between the Great Lakes and the Caribbean and the West Coast of Africa. However, as the Great Britain-Ireland-Atlantic Europe area is the most important, attention has been centered on this area which for convenience is termed Western Europe.

* * * * *

Traffic on the Great Lakes/Western Europe route comprises not only cargoes moving through United States Great Lakes ports, but also cargo moving through Canadian ports on the Great Lakes and on the St. Lawrence River west of Montreal. During the last decade the traffic trend in Great Lakes overseas shipping has been decidedly upward with the result that total carryings in dry cargo ships which exceeded one-half million tons in 1953 and 1954 was four to five times larger than in 1948. The great majority of the cargo moved between the Great Lakes and Western Europe.

The Great Lakes/Western Europe route is primarily a general cargo route and indications are that with the opening of the Seaway general cargo will be carried in increasing amounts, supplemented by part cargoes of grain moving as bottom cargo to fill out the deep-draft freighters.

The evidence clearly indicates that large portions of the cargo which originates in the Great Lakes area will move directly by water out of the Lakes, rather than by rail to the North Atlantic for transshipment by water to foreign areas.

There are no American flag vessels in service on Trade Route 32 and the only ships available for this interim service are the N3 ships in the Government lay-up fleet. The testimony adequately discloses that the service by the foreign-flag ships engaged is not adequate.

T. J. McCARTHY STEAMSHIP COMPANY

(Trade Route 32)

While McCarthy has never engaged in foreign trade, this Company has nevertheless had extensive experience in transporting freight and has for a great many years successfully operated steamships on the Great Lakes. The President of the Company, Daniel J. McCarthy stated that he hoped to get four (4) of the ships and place them in service on Trade Route 32 from the Great Lakes to the North Atlantic European ports of Antwerp, Rotterdam and Hamburg, with the privilege of calling at Bremen and LeHavre. The Company further relies on the February 9, 1956 release by the Maritime Administrator in which it is shown that the Great Britain-Ireland-Atlantic Europe area is most important as a cargo area, and in which the Maritime Administrator stated:

* * * * *

In taking this action we have given careful consideration to economic and national defense factors. We are expressing here our faith in the traffic possibilities of the future, not only for the post-Seaway period which will begin in 1959 after completion of this great project, but also for the interim period from 1956 to the opening of the Seaway in 1959.

* * * * *

The Federal Maritime Board and the Maritime Administration of the U.S. Department of Commerce will do everything within the law to encourage establishment at an early date of liner service for this essential route by ships of United States Registry.

At present no American-flag vessels operate between the Great Lakes and Western Europe. Foreign-flag vessels provide all of the service now available. The government-owned N3's sought by the applicants for charter are the only American-flag vessels available for use in the above described services since the draft of these ships is adequate to permit navigating the canal between the Great Lakes and the Saint Lawrence River. There are no privately-owned American-flag ships available for charter on reasonable rates and conditions by any of the applicants.

EINAR H. CROWN

(Trade Route 32)

Crown's application states that he wants to bareboat charter two (2) of the N3's for a 5-year period for use on Trade Route 32 between the Great Lakes ports and those of Northwest Europe, " * * and with a port on the lower Mississippi during the closed season on the Great Lakes; 15 November to 15 April, for the transfer to and from barges

to maintain continuous service to and from Chicago and other Great Lakes ports”.

Applicant who has been in the importing business for the past 25 or 30 years, does not operate any ships at the present time nor does the record indicate that he has in the past operated any vessels. This application, like the others, is conditioned upon receiving subsidy, yet the only subsidy application by the Crown interests to date, was drawn up on behalf of a company to be named Corydon and Ohlrich, not yet in existence, and the application itself had not been formally submitted at the time of closing the Chicago hearings.

Each applicant through its learned counsel contends that it has met the three requirements of P.L. 591. Public Counsel agrees, and suggest that there are no particular considerations involved in the proposed operations that require the imposition of restrictions or conditions.

FINDINGS, CERTIFICATION AND RECOMMENDATION

Upon consideration of the facts adduced in the record, and the evidence summaries hereinbefore set forth, it is concluded and found, and the Board should find and certify to the Secretary of Commerce:

1. That the services in which N3's are proposed to be used on Trade Routes 32 and 33 are in the public interest;
2. That the services in which the vessels are to be operated are not adequately served; and
3. That privately owned American-flag vessels are not available for charter on reasonable conditions and at reasonable rates.

TERMS AND CONDITIONS

The notice of hearing contemplates the receipt of evidence bearing on any restrictions or conditions that may be necessary to protect the public interest in respect to such charters as may be granted, and to protect privately owned vessels against competition from vessels chartered as a result of this hearing. The record is without evidence suggesting the need for the imposition of any conditions or restrictions to protect private vessel owners. In fact, no competitive American-flag interests are involved, nor do there appear to be any other special considerations which would justify any conditional recommendations to the Administrator by the Board, and none are made herein.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-77

OCEANIC STEAMSHIP COMPANY—APPLICATION FOR WRITTEN PERMISSION UNDER SECTION 805(a), MERCHANT MARINE ACT, 1936

Submitted April 2, 1958. Decided April 2, 1958

Charter by Matson Navigation Company to States Marine Corporation of Delaware of the SS *Hawaiian Fisherman*, or similar substitute, for a single one-way intercoastal voyage from Seattle, Washington, to United States Gulf and North Atlantic ports with a full load of lumber, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in the coastwise or intercoastal service or to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Willis R. Deming and *Alvin J. Rockwell* for applicant.

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

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

REPORT OF THE MARITIME ADMINISTRATOR

BY THE ADMINISTRATOR:

This proceeding arises out of an application filed on March 19, 1958, by Oceanic Steamship Company (Oceanic), which seeks written permission under section 805(a) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1223 (the Act),¹ to permit its parent organization, Matson Navigation Company (Matson), to charter the latter's owned C-3 vessel, SS *Hawaiian Fisherman*, or a similar substitute owned vessel, to States Marine Corporation of Delaware (States Marine) for a single one-way intercoastal voyage from Seattle, Washington, to United States Gulf and North Atlantic ports with a full load of lumber, to commence on or about April 2, 1958.

American Tramp Shipowners Association, Inc. (ATSA), filed a telegram protesting grant of the application and requesting hearing

¹ Section 805(a) is set forth in the appendix.

and leave to intervene. There was no other opposition to the application.

After hearing and oral argument on April 2, 1958, written permission under section 805(a) of the Act was granted to Oceanic for its parent corporation, Matson, to make the charter requested, it having been found that such permission would not result in unfair competition to any person operating exclusively in the coastwise or intercoastal trade or be prejudicial to the objects and policy of the Act. The permission was based upon the following findings and determinations:

Oceanic holds an operating-differential subsidy agreement with the Federal Maritime Board for operation on Trade Route No. 27. It is wholly owned by Matson, an unsubsidized carrier operating in the United States-Hawaii trade. States Marine operates various unsubsidized services in the foreign commerce of the United States, including a service between the Gulf, California, and the Far East.

Sometime prior to March 19, 1958, States Marine sought to charter a C-3 type vessel for a single intercoastal voyage from Seattle to United States Gulf and North Atlantic ports with a full load of lumber, the vessel to continue on charter in States Marine's berth service from Atlantic, Gulf, and California ports to the Far East for discharge at Japan, Korea, and Formosa. An employee of States Marine, presented as a witness by Matson, testified that States Marine has a certificate of public convenience and necessity from the Interstate Commerce Commission for intercoastal carriage of cargoes from Pacific coast ports to United States Gulf and Atlantic ports. Loading of the lumber was to be in early April.

Victory Carriers, Inc., a tramp operator (Victory), offered to States Marine the *Northwestern Victory* for this charter. The offer was turned down because the capacity of a Victory ship would be inadequate for charterer's requirements for both the intercoastal lumber movement and the Atlantic-Gulf-California Far East voyage.

On March 19, 1958, States Marine entered into a charter with Matson for the latter's own C-3 type vessel *Hawaiian Fisherman*. The charter is a time form for 100 days at \$225,000.00 lump-sum hire, early April loading, redelivery to be at a Pacific coast port or Hawaii at owner's option. The charter was conditioned on approval by the Federal Maritime Board and/or Maritime Administration.

Victory had offered the *Northwestern Victory* to States Marine, and such vessel had been in position on the west coast for delivery in early April; it had been tendered at a rate slightly higher than \$50,000 per month. As previously noted, States Marine refused this offer because of the inadequacy of the Victory-type vessel.

On March 31, 1958, two days before the hearing, the *Northwestern Victory* had been chartered for a voyage from the Gulf, and at the time of hearing was being moved under ballast from California to be in position for the charter. The record fails to show whether the charter was more favorable or less favorable than the charter to States Marine might have been.

At approximately the same time States Marine was arranging the charter of the *Hawaiian Fisherman* from Matson, one of its owned vessels, the *Golden State*, a C-2 type vessel, was fixed for a coal charter from the west coast to Korea. The record fails to show that the *Northwestern Victory* or any other tramp vessel was offered for the Korean coal charter, or that any tramp vessel was in fact deprived of such cargo because of the *Golden State* charter. The Executive Secretary of ATSA, who also appeared for Victory, a member of ATSA, knew of no tramp ships in layup on the west coast.

DISCUSSION AND CONCLUSIONS

ATSA concedes that under section 805(a) of the Act it is not entitled to protection from unfair competition as a "person, firm, or corporation operating exclusively in the coastwise or intercoastal service." It contends, however, that the charter to States Marine would be "prejudicial to the objects and policy of the Act", and that it thus is entitled to the protection of the section. Its position is that the privately owned United States-flag tramp fleet is a large and vital part of the American merchant marine, and that to permit the present charter would deprive an unsubsidized United States-flag privately owned tramp vessel of needed cargoes, which would be "prejudicial to the objects and policy of the Act."

Upon this record there is no showing that Victory or any other tramp operator could be prejudiced by the grant of permission for charter here sought. Victory's *Northwestern Victory* was refused because of the inadequacy of capacity for charterer's requirements; it had in fact been chartered from the Gulf under conditions which may or may not be more advantageous than the States Marine charter might have been; at the time of hearing it was unavailable for the charter here under consideration; and no other United States-flag tramp vessel appears to have been available. As to the charter of the *Golden State* for the movement from the Pacific coast to Korea, the record fails to show whether any tramp operator offered for that charter or was in fact even interested.

At the time of hearing the parties were informed that decision would be reserved as to whether ATSA or Victory was "a person, firm, or corporation having any interest in such application", with the right to intervene.

Having determined from the record, however, that no prejudice could result to the protesting parties from the grant of permission for this charter, it is unnecessary to decide the "interest" question.

5 M.A.

APPENDIX

Section 805(a) of the Merchant Marine Act, 1936, as amended:

"It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

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

FEDERAL MARITIME BOARD

No. 800

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC., AND
NEW JERSEY MOTOR TRUCK ASSOCIATION, INC.

v.

AMERICAN EXPORT LINES, INC., ET AL.

No. 801

TRUCK LOADING AND UNLOADING OF WATERBORNE CARGO AT NEW
YORK—INVESTIGATION OF RATES AND PRACTICES OF PARTIES TO
AGREEMENT No. 8005

No. 821

IN THE MATTER OF AGREEMENT No. 8005-1 BETWEEN AMERICAN EX-
PORT LINES, INC., AMERICAN PRESIDENT LINES, LTD., BULL-INSULAR
LINE, INC., AMERICAN STEVEDORES, INC., INTERNATIONAL TERMINAL
OPERATING CO., INC., ET AL.

Submitted July 8, 1958. Decided February 24, 1959

respondents' Tariffs Nos. 3 and 4 found not to be new agreements or modifica-
tions of an agreement, within the meaning of section 15 of the Shipping
Act, 1916.

General level of rates in Tariff No. 3 not shown to be unjustly discriminatory or
unfair, detrimental to commerce, or in violation of the Shipping Act, 1916.
Failure of respondents properly to comply with the express provisions of Agree-
ment No. 8005 and the tariffs issued thereunder found to be in violation of
section 17 of the Shipping Act, 1916.

General level of rates in Tariff No. 4 not shown to be unjustly discriminatory
or unfair, detrimental to commerce, or in violation of the Shipping Act, 1916.
Rates in Tariff No. 4 on iron and steel and tinplate found to be unreasonably
high in relation to other rates and therefore unjustly discriminatory and
unfair and detrimental to commerce.

Provision that extra charge for loading or unloading cargo weighing more than 6,000 pounds will be determined by negotiation, found to be an unjust and unreasonable practice in violation of section 17 of the Shipping Act, 1916.

Agreement No. 8005-1, insofar as it would eliminate "no service" with respect to truck unloading, found detrimental to commerce and not approved.

Agreement No. 8005-1, modified so as to eliminate "no service" with respect only to truck loading, found not to be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Shipping Act, 1916, and approved as so modified.

Complainants not shown to have been injured and are not entitled to reparation.

Herbert Burstein, Nathan E. Zelby, and Arthur Liberstein for complainants and certain interveners.

Herman Goldman, Benjamin Wiener, and Seymour Kligler for respondents.

Nicholas Maarschalk for American Can Company, *Seymour Grubbard* and *Peter Nicholas Schiller* for American Institute for Imported Steel, Inc., *Bradshaw Mintener* for Association of Cocoa and Chocolate Manufacturers of the United States, *Charles A. Pascarella* for Association of Food Distributors, Incorporated, *D. J. Speert* and *A. C. Welsh* for Brooklyn Chamber of Commerce, *Albert Hoffman* for Cocoa Merchants' Association of America, Incorporated, *Stephen Tinghitella* and *J. S. Sinclair* for Commerce and Industry Association of New York, Inc., *Richard E. Costello* and *Frederick G. Hoffman* for General Managers' Association of New York Harbor Railroads, *W. E. Aebischer* for Great Atlantic and Pacific Tea Company, *Hugo Rothschild* for Kurt Orban Company, Incorporated, *Donald E. Cross* for the Middle Atlantic Conference, *Robert de Kroyft* for New Jersey Industrial Traffic League, *Edward I. Kaplan* and *David Weisband* for New York Fruit Auction Corporation, *John J. Duffy* for Noritaki Company, Incorporated, *George A. Olsen* for Peat Moss Association, Inc., *Charles Lurie* for Providence Import Company, Incorporated, *John A. Jancek*, *Abe McGregory Goff*, and *Julian T. Cromelin* for United States Post Office Department, *Michael C. Bernstein* for Anthony A. Bianco, Anthony Scott Company, Charles Schnell, Emil Tassini, Fruit Export Corporation Gargiulo & Amendola, Inc., Levatino Company, Marichal-Agostc Inc., Robert T. Cochran & Company, Inc., The El Morro Corporation, and William Turino Company, Inc., *Sidney Elliott Cohn* and *Jerome B. Lurie* for Truck Drivers Local Union No. 807, I.B. of T, *William P. Sirignano*, *David Simon*, and *Irving Malchman* for Waterfront Commission of New York Harbor, *Sidney Goldstein*, *Daniel P. Goldberg*, *Patrick J. Falvey*, *Joseph Lesser*, and *Francis A. Mulhern* for the Port of New York Authority, *Louis Waldman* and *Seymour M. Waldman* for International Longshoremen's Association

Maurice W. Fillius for National Association of Alcoholic Beverage Importers, Inc., and *Alfred Giardino* and *C. P. Lambos* for the New York Shipping Association, Inc., interveners.

Robert E. Mitchell, *Edward Aptaker*, *Richard J. Gage*, and *Allen C. Dawson* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

These consolidated proceedings involve a complaint and orders of investigation on the Board's own motion.

No. 800

The complaint in No. 800 was filed August 22, 1956. It alleges, in substance, that respondents' ¹ Tariff No. 3, which assesses charges and establishes rules and regulations for the loading and unloading of waterborne cargo onto and from trucks in the port of New York, violates the provisions of sections 14, 15, 17, and 18 of the Shipping Act, 1916, as amended (the Act).² Complainants ³ seek a cease and desist order, cancellation of the tariff, and reparation. On October 10, 1956, respondents filed their answer, denying all allegations of unlawfulness and requesting that the complaint be dismissed.

No. 801

The Board's orders of September 14, 1956, and August 1, 1957, in No. 801 instituted investigations to determine (1) whether the rates, charges, rules, and regulations set forth in respondents' Tariffs Nos. 3 and 4, issued pursuant to F.M.B. Agreement No. 8005, are detrimental to the commerce of the United States, and (2) whether the practices resulting from the adoption of the tariffs are unjust and unreasonable practices for or in connection with the receiving, handling, or delivering of property.

On August 1, 1957, the Board requested respondents to postpone the effective date of Tariff No. 4 until completion of its investigation. Effective August 19, 1957, respondents suspended until fur-

¹ Respondents, except W. L. Swain, are marine terminal operators in the port of New York. They receive, handle, and deliver freight moving in foreign or interstate commerce by common carriers by water. As a part of their terminal operations, they provide the service of and issue tariffs covering charges for truck loading and unloading involved in this proceeding, pursuant to F.M.B. Agreement No. 8005, approved by the Board on March 23, 1955. Respondent W. L. Swain is the terminal operators' agent designated pursuant to the provisions of the agreement.

² 46 U.S.C. 812, 813, 816, 817.

³ Complainants are associations whose members are motor carriers engaged in the transportation of property in either interstate or intrastate commerce, or solely within the New York City commercial zone. In the course of their operations, the motor carriers deliver to, or pick up at, the piers in the port of New York waterborne freight which has a subsequent or prior movement in foreign or interstate commerce by common carriers by water.

5 F.M.B.

ther notice the rules, regulations, and rates contained in the tariff. Tariff No. 3 remained in effect until April 14, 1958, when respondents withdrew their voluntary suspension of Tariff No. 4. Tariff No. 4 became effective and has remained in effect since that date.

No. 821

The Board's order of June 13, 1957, instituted an investigation to determine whether operations under F.M.B. Agreement No. 8005-1,⁴ filed by respondents for approval pursuant to section 15 of the Act, would be unjustly discriminatory or unfair, detrimental to commerce, or result in violation of sections 16 First or 17 of the Act.

The proceedings were consolidated for hearing, which was held before an examiner in New York, N.Y., from August 19 through October 18, 1957. All parties who participated did so as their interests appeared on a common record, and the issues will be determined in this single report.

Prior to the examiner's recommended decision the following parties intervened in opposition to the provisions of the tariffs and agreements involved, or as their interests might appear: American Can Company, American Institute for Imported Steel, Inc., Association of Cocoa and Chocolate Manufacturers of the United States, Association of Food Distributors, Incorporated, Brooklyn Chamber of Commerce, Cocoa Merchant's Association of America, Incorporated, Commerce and Industry Association of New York, Inc., General Managers' Association of New York Harbor Railroads, Great Atlantic and Pacific Tea Company, Kurt Orban Company, Incorporated, Middle Atlantic Conference, New Jersey Industrial Traffic League, New York Fruit Auction Corporation, Noritaki Company, Incorporated, Peat Moss Association, Inc., Providence Import Company, Incorporated, United States Post Office Department, Anthony A. Bianco, Anthony Scotto Company, Charles Schnell, Emil Tassini, Fruit Export Corporation, Gargiulo & Amendola, Inc., Levatino Company, Marichal-Agosto, Inc., Robert T. Cochran & Company, Inc., The El Morro Corporation, and William Turino Company, Inc.

The examiner concluded and found that:

1. Tariffs Nos. 3 and 4 (a) are within the authority of respondents' basic Agreement No. 8005, and (b) are not new agreements or modifications of an agreement, within the purview of section 15 of the Act, requiring approval by the Board before being made effective.

2. Departures from Tariff No. 3 with respect to (a) refusal to load trucks present at 3 p.m., and (b) denial of partial service, are unjust

⁴ Agreement No. 8005-1, more fully set forth hereinafter, would, in effect, allow respondent terminals to prohibit anyone other than themselves from loading and/or unloading trucks at their facilities.

and unreasonable practices relating to the receiving, handling, or delivering of property, in violation of section 17 of the Act.

3. Tariff No. 3 rate structure is noncompensatory and thus detrimental to commerce within the meaning of section 15 of the Act.

4. Tariff No. 4 application of rates to fruits and vegetables, iron and steel, and tinplate is too high in relation to rates applied to certain other commodities, and thus detrimental to commerce within the meaning of section 15 of the Act.

5. Tariff No. 4, except as found in paragraph number 4 above, not shown to be in violation of the Act.

6. Tariff No. 3 should be canceled, and Tariff No. 4 should be put into effect upon respondents' publishing and filing new rates applicable to fruits and vegetables, iron and steel, and tinplate, reflecting the findings made.

7. Agreement No. 8005-1 not shown to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or otherwise to be in violation of the Act.

8. Complainants not shown to have been injured and entitled to reparation. Complaint in No. 800 should be dismissed, and Nos. 801 and 821 should be discontinued.

Subsequent to the issuance of the recommended decision the following parties intervened: Port of New York Authority, Waterfront Commission of New York Harbor, International Longshoremen's Association, New York Shipping Association, Inc., Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, and National Association of Alcoholic Beverage Importers, Inc.

Exceptions to the recommended decision and replies thereto were filed, and oral argument has been heard. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in these proceedings.

1. Respondents operate about 125 piers in the port of New York, varying in size, physical facilities, and age. Most of the piers are of the finger type and were constructed at a time when the largest percentage of cargo on the piers moved by lighters and the balance by horse-drawn vehicles. The piers were not designed to accommodate the large number of trucks which now call at the terminals to load or unload cargo. Some of the Staten Island piers have facilities for rail cars, but there are little or no such facilities in Manhattan or Brooklyn. The great preponderance of cargo must therefore be moved to and from the piers by trucks and lighters. This fact under-

lies practically all of the terminal and trucking problems about which this proceeding revolves.

2. Practically all of the common-carrier-by-water import and export general cargo handled in the port of New York moves over the piers operated by respondents. It is hardly necessary to note that the volume of such cargo is great. Ten major or principal general cargo import items⁵ moving through New York in 1956 amounted to approximately 3,552,017 long tons. The total import tonnage through New York in 1956 was approximately 6,494,649 long tons, valued at approximately \$4,026,900,000.

3. While the volume and value of import cargo through New York have increased over the past few years, the character of such cargo has not changed appreciably.

4. Prior to December 31, 1953, truck loading and unloading at New York was performed by public loaders. Abuses developed under this system, and public loaders were outlawed by the provisions of the New York-New Jersey Waterfront Commission Compact, Public Law 252 of the 83rd Congress (approved August 12, 1953). In pertinent part the declaration of policy stated in the compact is:

* * * that the function of loading and unloading trucks and other land vehicles at the piers and other waterfront terminals can and should be performed, as in every other major American port, without the evils and abuses of the public loader system, and by the carriers of freight by water, stevedores and operators of such piers and other waterfront terminals or the operators of such trucks or other land vehicles.

5. After the public loaders were outlawed, committees representing the terminal operators and the truckers met and arrived at the informal decision that the terminal operators should take over the responsibility of furnishing the truck loading and unloading service. After a period of flux, during which the responsibility for the service and the charges therefor were unsettled, the present system evolved pursuant to Agreement No. 8005⁶ and tariffs thereunder. The necessity of a uniform tariff throughout the port of New York is generally conceded both by the truckers and the terminal operators.

6. Agreement No. 8005 in pertinent part provides that respondents

* * * are permitted to load or unload waterborne freight onto or from vehicles at piers or at other waterfront terminals in the Port of Greater New York and vicinity, for a fee or other compensation, under the provisions and subject to the requirements of Public Law 252—83rd Congress, approved August 12, 1953, granting the consent of Congress to a compact between the State of New Jersey and the State of New York known as the Waterfront Commission Compact.

⁵ Sugar, coffee, bananas, crude rubber, newsprint, iron and steel products, lumber and shingles, cocoa, inedible vegetable oils, liquors and wines.

⁶ Agreement No. 8005 was approved by the Board on March 23, 1955.

* * * with respect to the fixing of charges to be made by them [respondents] to truckers for the service of loading or unloading, or assisting in loading or unloading, freight * * * onto or from trucks * * * [respondents] agree * * *:

1. That they shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to such services * * *.

2. That they shall assess and collect rates and charges for and in connection with such services strictly in accordance with rates, charges, classifications, rules, regulations and practices set forth in said tariffs and, further, shall not in any respect whatsoever deviate from or violate any of the terms or conditions or provisions of said tariffs * * *.

7. Agreement No. 8005-1, if it should be approved by the Board, would authorize respondents to insert the following pertinent provision in their tariff:

1(a) The tariff may contain rules, regulations and practices prohibiting the loading and/or unloading of trucks at the piers or other waterfront terminals in said Port by anyone other than the operators of said piers or waterfront terminals.

8. The essential dispute in these proceedings is between the trucking firms (truckers) and the terminal operators (terminals or respondents), involving, primarily, the reasonableness and lawfulness of the rates, charges, rules, regulations, and practices in and under Tariffs Nos. 3 and 4 and Agreement No. 8005-1, with respect to loading and unloading trucks at the New York piers.

The tariffs.

9. Following Board approval of Agreement No. 8005, respondents issued Tariff No. 1 on April 25, 1955. This tariff became the subject of dispute and litigation and never went into effect. During the period from May to August 1955, representatives of respondents and representatives of truckers conducted negotiations which resulted in the issuance of Tariff No. 2, effective August 15, 1955. The rates in this tariff represented a compromise between the truckers and the terminals, and the tariff remained in effect until it was canceled and superseded by Tariff No. 3, effective September 15, 1956. Rates were increased generally in Tariff No. 3 over Tariff No. 2. These increases, and other provisions of Tariff No. 3, were not satisfactory to the truckers and resulted in commencement of these proceedings. Tariff No. 4, also, is unsatisfactory to the truckers.

10. The format of Tariff No. 2, i.e., its breakdown as between class and commodity rates, was agreed upon by committees representing truckers and terminal operators. Truckers at the hearing indicated approval of the concept of class and commodity rates. The same format was followed in Tariffs Nos. 3 and 4. Generally, the class rates are higher than commodity rates. Under Tariff No. 2, about

90 percent of the cargo was covered by class rates; under Tariff No. 3, about 50 percent; and under Tariff No. 4, still more items would be removed from the class rates to the commodity-rate category. The class rates in Tariffs Nos. 3 and 4 are divided into three categories, based upon density of the cargo: (1) cargo measuring 100 cubic feet or less per ton (2240 lbs.), about 90 percent of which falls within this density, (2) cargo measuring 101 to 200 cubic feet per ton, and (3) cargo measuring 201 cubic feet per ton and over. Under both the class rates and the commodity rates, one rate is applied to truck loads of 25,000 pounds or more and another to less than truckloads. The 25,000-pound dividing line was adopted partly as a result of the negotiations between the truckers and the terminal operators. The terminals made no specific study of their own to determine this figure.

11. The great preponderance of service performed by the terminals under the tariffs is truck loading rather than unloading. The truckers, in most cases, do their own unloading, as described later.

12. Tariff No. 3 (as did No. 2) provides for "partial service," defined as follows:

Partial service shall mean the moving of cargo from a place of rest on the dock which is readily accessible to the truck and elevating the same to a place of rest on the truck without the necessity of placing men on the truck.

13. Tariff No. 3 also provides for "full service", which, in addition to partial service, includes stowing the cargo in or on the truck by one or more of the terminal's employees getting onto the truck to complete the loading. In addition, the tariff provides for "no service," under which the trucker may perform the complete loading or unloading himself and no charge is made therefor. Tariff No. 3 provides lower rates for partial service than for full service.

14. Some commodities can be loaded directly onto open trucks by a fork-lift truck, or "hilo" machine, without the aid of men on the truck. This has created a source of conflict since some of the terminals contend that any placement beyond the tailgate is full service, whether performed directly with the hilo machine or with men placed on the truck.

15. Partial service is considered by some of the terminals to be uneconomical because the men who assist the hilo machine driver are kept idle when partial service is rendered. In addition, partial service has not been in great demand by the truckers. Another area of conflict over partial service arises in connection with the relative speed or tardiness with which the truck driver stows cargo on the truck. If the truck driver is unnecessarily slow in stowing the cargo,

the hilo machine and its driver are idle and the truck itself blocks off pier space which may be needed for other trucks. Sometimes the terminals charge the full-service rate in such a case.

16. Tariff No. 4 does not provide for partial service, leaving to truckers the choice between full service and no service. It sets separate rates for closed and open trucks, the latter rates being lower and reflecting increased efficiency resulting from the ability to stow cargo directly by hilo machine without the need for placing men on the truck. The lower rate for open-top trucks is to some extent a substitute for partial service, and reflects cost savings resulting from use of such trucks.

17. Other reasons given by the terminals for elimination of partial service, under Tariff No. 4, are (1) that it will expedite the loading of trucks, particularly those that call without helpers and require tailgate service, which prolongs the loading and delays other trucks, (2) that it will enable the terminals to better estimate the number of loaders required, and thus effect a saving in their labor cost, particularly at the piers where the loaders work in teams and the men not engaged in the partial loading service remain idle, and (3) that it will eliminate disputes that arise, including those of a jurisdictional nature.

18. A tariff expert and consultant engaged by complainants to analyze Tariffs Nos. 3 and 4 stated that these tariffs contain more ambiguities than most tariffs. For example, he points out, Tariff No. 3 provides that:

Trucks not supplying a helper to assist the driver, shall employ the services of the Terminal Operator to load or unload the truck, unless the nature of the cargo is such that the driver can load or unload his truck within 40 minutes time.

19. The "40 minutes time" starts to run when the truck is in position, ready to load. The terminal operator does not guarantee, however, to keep cargo flowing to or from the truck, and moreover, the terminal determines whether the cargo can be loaded or unloaded in 40 minutes.

20. Another difficulty arises in relation to heavy lifts. Tariff No. 4 provides that cargo weighing over 6,000 pounds per piece is subject to a negotiated rate. This provision was adopted by the terminals because most of them have equipment capable of handling a maximum of 6,000 pounds. When heavier pieces must be loaded, outside firms must be employed to bring in heavy-lift equipment. No standards have been set as to how the individual terminal is to interpret these and other discretionary provisions of the tariffs.

Procedure followed in setting rates.

21. In arriving at the rates to be charged for the truck loading and unloading service, respondents considered cost of the service and the type, value, and volume of the commodities. Respondents state that because of the variety of commodities and of the radical variations between the physical facilities of the various terminal operators, it is difficult, if not impossible, to fix rates in exact relation to costs, and that the rates were established on the basis of "educated guesses":

We try to arrive at a rate which will produce the overall revenue that is required for the entire port. In other words, if Pier A can take a certain commodity and handle it more efficiently than Pier B, we would take the average between Piers A and B. We are not trying to subsidize the inefficient.

In setting the rates for Tariff No. 2, the terminals were admittedly "shooting in the dark" and "needed experience."

22. Tariff No. 3 was prepared under more organized conditions; respondents had gained more experience. Also, they had before them certain income and expense statements, segregated as to truck loading and unloading, for the period January 1 to June 30, 1956, which had been prepared by individual terminals on request of the Board, discussed later. These statements indicated that the terminals were operating at losses from 25 to 28 percent of gross revenue under Tariff No. 2. The level of rates in Tariff No. 3 was set so as partially to recoup such losses. No comprehensive study was made in the preparation of this tariff, however. The differential between partial and full service was set on the basis of discussions between representatives of truckers and terminals, and on experience of some of the terminals. Commodity rates (lower than class rates) were established in Tariffs Nos. 3 and 4 for aluminum, lead, and zinc, but not for steel, although steel moves in large volume, the primary reason for commodity rates.

23. In the preparation of Tariff No. 4, the terminals had more information available to them and they had gained more experience. Even so, this tariff represents a "guess," to some extent, as to the rates on specific commodities. New York Port Authority statistics were relied upon, although not exclusively, to determine volume of commodities handled. Volume of movement was the primary consideration in determining which commodities would be given a commodity rate. Studies were available on asbestos pipe, mail, flower bulbs, appraiser's stores, and bagged coffee. Also available was the report of the certified public accounting firm retained by respondents to conduct a cost study of terminal operations during the spring of 1957, discussed later.

24. Some adjustments in commodity rates were made in Tariff No. 4, based on the experience of some of the terminals. Various rates

and plans were proposed by individual terminals prior to adoption of the tariff. Some, such as surcharges per truck, were rejected as being impractical. All proposals were discussed fully, including review and revision of Tariff No. 3 in the light of the losses shown to have been sustained thereunder. The terminals unanimously approved Tariff No. 4 on July 17, 1957.

Cost studies.

25. Respondents retained a certified public accounting firm to conduct a cost study of their terminal operations during the spring of 1957, as previously mentioned. The study embraced six terminals comprising 11 piers, selected as being representative of all the terminals, and covered truck loading only.

26. The cost study covers three elements: labor, machines, and overhead. As to overhead, each of the six terminals performs functions other than loading trucks, making difficult, the accountants stated, a precise allocation of overhead expenses assignable to truck-loading operations. They accepted, therefore, the data supplied by the terminals to compute the ratio of general overhead to their total income, which ratios were then applied to the truck-loading income. Each of the six terminals had a different rate of overhead, and none included pier rental in the overhead costs. In most cases the overhead expense was based on 1956 experience. There was no attempt to determine actual overhead during the period of the study. The same is true of machine costs per hour. One of the items of machine cost was depreciation, and this was based upon reproduction cost as reported by the manufacturer.

27. The study covered five days: April 17, 18, 22, 23, 24, 1957. The total revenue pounds loaded on trucks at the six terminals was 37,707,216. The total number of trucks loaded at "full service" rates was 1,886; at "partial service" rates, 459; and at "no service," 129. The total man-hours of truck-loading labor was 9,555.

28. The study does not purport to be minutely exact, and it does not by itself solve the question as to whether Tariff No. 3 is compensatory. It does, however, afford statistical information as to the frequency of use of full as compared to partial service, and class rates as compared to commodity rates. The accountants' report shows the financial results of the operations over the five days, in summary, as follows:

TABLE 1

	<i>Revenue</i>	<i>Expense</i>	<i>Loss</i>
Class rates.....	\$17, 405. 73	\$30, 164. 14	\$12, 758. 41
Commodity rates.....	11, 316. 72	15, 629. 72	4, 313. 00
Total, Tariff 3.....	28, 722. 45	45, 793. 86	17, 071. 41

29. The report indicates that all of the six terminals were operating at a loss under Tariff No. 3, that every commodity listed and handled under full-service truckload rates was handled at a loss, that all except one commodity handled under full service at less-than-truckload rates also was handled at a loss, and that a few commodities showed profits in partial service, but the total revenue and expense figures for partial service are so small as to be inconclusive.

30. Complainants presented an accountant in rebuttal to the cost study discussed above. His principal criticism was that respondents' accountant did not have complete charge of deciding what data was to be used, did not satisfy himself that the sample study was representative, and did not compare his study with some independently ascertained figure. From his study of respondents' accountant's report, however, he was not able to state whether or not it reflects true conditions in New York.

31. One of the terminals made a study while Tariff No. 2 was in effect, disclosing income and expense for the four-week period March 7-April 2, 1956. This study listed the 16 commodities moving in greatest volume and "Others." It projected revenue for the same commodities based upon the rates in Tariff No. 3. The results of this study, not claimed to be perfect, were shown to be as follows:

TABLE 2

	Tariff No. 2	Tariff No. 3 projection
Revenue-----	\$11, 185	\$14, 415
Expense-----	18, 228	18, 228
Loss-----	7, 043	3, 814

32. The tariff expert and consultant engaged by complainants made a study of respondents' terminal operations. He went to the terminals and conducted studies on individual trucks. As an example, he studied the loading of two trucks of a large trucker at a certain terminal. He counted the men working and the time, and found the cost to the terminal to be \$36.96 and the revenue to be \$53.90. No allowance was made for overhead, however, nor for idle labor time. The record shows the latter to be substantial.

Confidential income and expense statements.

33. Pursuant to requests of the Board's Regulation Office, each respondent submitted to the Board income and expense statements for the periods January 1-June 30, 1956, and October 1, 1956-February 28, 1957. These statements, individually and consolidated, are in confidential exhibits, and they are the principal evidence in the proceeding on the issue of the reasonableness of the level of the rates involved, i.e., whether they are compensatory. The first period repre-

sents operations under Tariff No. 2 and the second period under Tariff No. 3.

34. The consolidated experience of all the terminals during each of the two periods is shown in the following table :

TABLE 3

<i>Period</i> ¹	<i>Revenue</i>	<i>Expenses</i>	<i>Loss</i>
January-June 1956.....	\$2, 315, 989	\$3, 119, 298	\$803, 309
Oct. 1956-Feb. 1957.....	2, 261, 376	2, 807, 785	546, 409

¹ One period is 6 months the other 5 months.

35. Witnesses representing eight of the terminals testified in respect of their individual income and expense statements; four were selected by counsel for complainants and four by Public Counsel. While the sample of eight may or may not be representative of all the terminals, it furnishes a check upon the validity of the bookkeeping systems employed by the group selected. The income and expense figures of these eight terminals were subjected to exhaustive check and cross-examination at the hearing. The loss or profit results of the eight terminals during the two periods of study, after adjustments based upon cross-examination and analysis, are shown in the following table.

TABLE 4

(Profit in parentheses)

<i>First period</i>	<i>Second period</i>	<i>Second period adjusted to 6 months</i> ¹
\$44, 190	\$27, 600	\$33, 120
47, 000	34, 253	41, 104
131, 523	52, 506	63, 007
(1, 999)	(8, 784)	(10, 541)
6, 744	6, 510	7, 812
16, 742	(877)	(1, 052)
6, 681	13, 990	16, 788
(187)	(3, 269)	(3, 923)
<hr/>	<hr/>	<hr/>
Total..... 250, 694	121, 929	146, 315

¹ Since the second period consists of only five months, it is here increased by 20 percent to give a six-month series of figures to permit comparison with the first period. The assumption is that experience in the sixth month would be the average of the five month's study.

36. The aggregate losses for all the terminals, including the selected eight, are shown as follows :

<i>First period</i>	<i>Second period</i>	<i>Second period adjusted to 6 months</i>
\$803, 309	\$546, 409	\$655, 691

The measure of rate increases in Tariffs Nos. 3 and 4.

37. The record furnishes no accurate statement of the volume of each of the commodities handled under the tariffs. The following table does show, however, a few selected commodities which, the record indicates, move in large volume. The table shows the rate on the listed commodities moving under Tariffs Nos. 2, 3 and 4, and the rate increases and decreases in Tariffs Nos. 3 and 4. The class rates shown apply to truck loads, "full service," and the commodity rates apply to any quantity, "full service." The rates are in cents per hundred pounds unless otherwise noted.

TABLE 5

Commodity	Tariff 2	Tariff 3	Tariff 4
Class Rate	5½	7 (27% inc.)	11 (57% inc.)
Aluminum	5½	6 (9% inc.)	5 (17% dec.) ¹
Copper			8 (33% inc.) ²
Lead			
Newsprint			
Tin			
Zinc			
Cocoa	5½	6 (9% inc.)	8 (33% inc.)
Coffee			
Sugar	5½	7 (27% inc.)	9 (28% inc.)
Rubber	5½	4½ (18% dec.) ³	5 (11% inc.) ³
		8½ (54% inc.) ²	10½ (23% inc.) ²
Fruits and vegetables, 0-25 lb. packages	2	2½ (25% inc.)	5 (100% inc.)
26-50 lb. packages	3	3½ (16% inc.)	6 (70% in.)

¹ Open flat-bed trucks.

² Other trucks.

³ When dumped.

38. Since total volume of each commodity presently moving is not shown in the record, it is impossible to construct a weighted average percentage of increase in rates or revenues in Tariff No. 4 over Tariff No. 3, or Tariff No. 3 over Tariff No. 2. In addition, the total rates and revenues are affected by the extent to which truckers will utilize open flat-bed trucks, and thereby pay the lower rates contemplated therefor in Tariff No. 4. As shown in table 3, the totals for operations during the period October 1956-February 1957 were: revenue, \$2,261,376; expenses, \$2,807,785; loss, \$546,409. According to these figures, and assuming that expenses and volume remain the same, revenues would have to be increased slightly over 24 percent to bring the terminals to a break-even point. An increase of 33½ percent would result in a profit of \$207,383 for the five months' period, for an operating ratio of \$1.07 of revenue for each dollar of expense. We think the examiner's estimate that the over-all rate increase in

Tariff No. 4 over Tariff No. 3 will not exceed $33\frac{1}{3}$ percent, is reasonable.

Truck loading procedure and operation.

39. The piers are policed and no one may enter or leave a pier without permission. The procedure for loading a truck is fairly uniform. The truck is registered at the entrance of the pier. The driver proceeds to the delivery clerk and submits the necessary custom permits, releases, and proof of his authority to receive the cargo. If the driver's papers are approved, he is given a gate pass which permits entry of the truck to the pier area. At the same time, the driver makes known to the dock boss whether he wishes full service, partial service, or no service. The delivery clerk, from his records, ascertains the exact location of the cargo on the dock, and notes the same on the papers delivered to the checker. The checker then locates the cargo and arranges with the dock boss for loaders, if any were requested by the driver. The checker or dock boss then assigns the truck to a position on the dock or area adjacent thereto, and checks the cargo as it is loaded on the truck. After the truck is loaded, it is dispatched from the loading area and the gateman permits the truck to leave the pier and makes the necessary entries in his book.

40. Trucks, to be loaded speedily and efficiently, require the use of hilos, pushers, cranes, escalators, pallets, pallet and live rollers, and other special equipment. Such equipment is owned and maintained by the terminals at the piers they operate, and it is utilized by them for the truck loading and unloading service.

41. The principal factor affecting the efficiency and cost of the operation is the physical character of the piers themselves, described heretofore. The lineup for trucks at one pier is some three blocks away. At another it is immediately outside.

42. There is congestion on the piers due to the amount of cargo piled on them. This affects the maneuverability of the trucks within the pier. Because of such congestion and the large number and size of modern trucks, much of the loading is done outside the pier area, on land adjacent to the pier, or sometimes on the street. This area is called the "farm."

43. Truckers send a wide variety of truck types to the terminals and often the truck will not be suitable for the job at hand. Some arrive with documents not properly executed, requiring time for straightening out. Consignees very commonly leave cargo at the piers until the last day of free time, causing a great convergence of trucks and resulting congestion five days after a ship discharges. Some congestion, too, arises from hold-on-dock cargo, i.e., export

cargo from inland points consolidated at the terminal for ocean shipment.

44. Involved in the movement of cargo from ship's tackle to the truck are the terminal operators, the longshoremen who work for the terminal operators, the motor carriers, and the teamsters who drive the trucks. Any inefficiency, carelessness, or assertion of claimed rights by any one of the parties will fundamentally affect the efficiency, and the consequent costs, of the whole operation.

45. The terminals have to hire longshoremen for truck loading. They must estimate each day how great the following day's demand for truck-loading labor will be. The men are hired for the four-hour period from 8 a.m. until noon, and then may be rehired for the afternoon period from 1 to 5. If men are hired and an inadequate number of trucks arrive for cargo, the men stand idle but must nevertheless be paid for at least a four-hour period. The approximations for labor requirements are made on the experience of the individual operators. Even so, there is a substantial area of uncertainty. The magnitude of this problem is indicated by noting that the variation in number of trucks loaded and unloaded per day at some of the terminals in July and August 1957 was from none to 63, 1 to 10, 8 to 125, 11 to 35, 46 to 157, and 58 to 154.

46. The terminal's labor force is usually divided into "teams" consisting of a "hilo" operator and two laborers. In partial service, only the "hilo" operator is occupied and the men who would normally work on the truck are held idle. The terminal operators find it difficult to gainfully employ these extra men, largely due to labor union insistence that a man be employed only on the job for which he was hired.

47. Labor, both longshoremen and teamsters, contributes to the difficulties and inefficiencies existing at the piers. The number of tons of cargo handled per man-hour, which is the real determinant of efficiency, has decreased despite the increased use of hilo machines.

48. Some truckers, particularly the larger ones, have made considerable effort to facilitate operations. Those who have large fleets of trucks will dispatch, in many cases, the most efficient truck for the commodity involved. In addition, they generally arrange in advance to call for the cargo. Terminal operators have improved their facilities and increased their equipment from time to time but, on occasions, they contribute to inefficiency by failing to provide adequate labor, particularly checkers, thus creating bottlenecks in the truck loading operation. The elements of inefficiency referred to have resulted in many lengthy delays in the service, additional and burdensome ex-

pense of the service, and, according to some testimony, have caused diversion of cargo from the port of New York to other ports.

49. The port of New York is primarily a general cargo port. There is a wide variance as to the number of commodities, their size, shape, weight, volume in individual shipments, the number of consignees among whom a shipment must be distributed, and the customs observed in selling and delivering cargoes. Thus, a variety of problems arise in performing the truck-loading service. Rubber, for example, moves in large volume and is imported in bundles which are only approximately of the same size. It can be handled expeditiously at some of the terminals by being dumped into trucks with open tops. Several bundles are elevated at one time by the hilo machine to a point above the side of the truck and dumped on its floor. In this operation, no men can be stationed on the truck because of risk of injury. When the rubber is loaded into a closed-top truck it must be raised to the tailgate of the truck and then moved manually to final place in the truck. The bundles do not palletize well, and because of weight, two men are required to lift and stow each bundle when a closed-top truck is used. This is hard labor and time consuming, and subsequent trucks must wait longer for their turn. Rugs and a number of other commodities can be dumped into open-top trucks, but many items are too fragile to be handled this way. Drums of liquid are usually placed on pallets and raised to the tailgate, and then rolled by hand into position on the truck. Sugar, too, is placed on pallets, raised to the tailgate, and then stowed manually. Normally, bagged commodities, such as sugar and coffee, can be loaded much more quickly onto an open-top truck than into a closed-top truck.

50. Imported fruits and vegetables often are sold at auction while still on the dock. In such cases, samples must be taken to the auction site and then the main lot must be sorted according to purchasers and loaded onto trucks for removal. Receivers of perishables frequently congregate at the dock as cargo is being removed from a vessel, trying to sell it at that time.

51. Iron and steel are imported in various shapes, sizes, and weights. Some of it is difficult to handle and outside aid may be required to load the truck. Most of the iron and steel, however, is relatively easy to handle, is compact, and in most respects is similar to the metals listed in table 5.

52. Tin plate, thin sheet iron or steel coated with tin, is packaged in metal-covered bundles strapped to skids. The bundles weigh approximately 2,840 pounds each, with a density of 380 pounds per cubic foot. Importers of this commodity use their own trucks (van-type

trailers), on which an average of seven bundles are loaded. The hilo machine operator loads two bundles through one side door of the truck and one bundle through the other side door. He then places two bundles at the rear floor of the truck and pushes them forward by the hilo machine to complete the loading. No one is required on the truck, and the loading is accomplished in approximately 15 minutes.

53. Peat moss, an organic soil conditioner, is imported in machine-pressed bales, generally averaging approximately 100 pounds each, or $7\frac{1}{2}$ cubic feet. In 1955, about 800,000 bales were imported through New York, and in 1956 about 900,000 bales. The bales are put on pallets at the piers, 18 bales per pallet. In loading the truck the hilo machine picks up the pallets and places them on the tailboard of the truck. The terminal furnishes a loader on the truck, who, with the truck driver, stacks the bales on the truck to a height of about five feet. The trucks used are flat bed ranging from 32 to 35 feet in length, without sides or top, and hold approximately 250 bales. The loading of this commodity is accomplished in approximately one hour when there is no delay.

54. Incoming mail is in bags weighing approximately 35 to 50 pounds each. Approximately 1,500,000 bags a year are picked up at the piers. The mail is loaded into trucks in two ways: (1) when the bags are taken off the ship in slings and dropped on the pier, they are dragged by terminal employees a distance of 20-30 feet to the truck and handed to the men inside, and (2) when the bags are removed from the hold of the ship on a moving belt to a place on the pier, they are transferred at such place by terminal employees to another moving belt which carries the bags into the truck. There is no employee of the terminal in the truck in either case. The stowing of the mail in the truck is done by the trucker and his helper.

Truck unloading procedure.

55. When cargo is unloaded from the truck, the terminal, for the convenience of the truck driver, and to get the truck off the pier as quickly as possible, places pallets at the foot of the tailgate of the truck. The cargo is then stowed on the pallets, which are taken away by the terminal with hilo machines; new pallets are brought to the tailgate immediately. There is no charge for this service unless the terminal's employees remove the cargo from the truck and place it upon the pallets. The truckers unload their trucks unless the cargo is of such a nature that it cannot be physically handled by the driver. In such latter case, the service and equipment of the terminal are used. Also, the terminals unload trucks when requested

by truckers. In any event, the terminals are called upon to perform only about 10 percent of the truck-unloading service at the piers. When they perform such service they apply the same rates as for truck loading. In determining to apply such rates no particular factors were considered; the terminals "just followed the same rates."

Practices under certain provisions of Tariff No. 3.

56. Tariff No. 3, page 5, in paragraph headed OVERTIME CHARGES, provides that:

Any truck in line to receive or discharge cargo at 3 p.m. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, shall be worked at the straight-time rates, until loading or discharging is completed.

The evidence shows that some of the terminals have failed at times to comply with this provision. Truckers listed more than 50 instances of such failure from November 1, 1956, through January 31, 1957. In some of these instances, the trucker stated he was especially inconvenienced when his truck arrived at the pier at 1 p.m., waited until 4 p.m., and was then sent away without any service. A witness for one of the terminals stated that "If we're overloaded at the pier, there's no sense in a truck standing by, and we so notify them." Sometimes the terminal will start loading a truck before 5 p.m. and then stop at 5 p.m. without completing the loading, necessitating the truck's return on the following day. The terminal in this case will not work its men beyond 5 p.m. unless overtime wage rates are authorized by the steamship line the terminal serves.

57. The evidence also shows that in some instances some of the terminals have failed to comply with the tariff provision respecting "partial service," quoted in paragraph 12, above. One trucker stated that one terminal refused to provide partial service to him under all circumstances. Another stated that his trucks were held up interminably when he wanted partial service, and that in view of this, he changed his policy and now agrees to full service. Another trucker stated that his experience had been essentially the same, and that he had an "uncomfortable feeling" when he asked for partial service.

Agreement No. 8005-1.

58. The provision of this agreement in issue is quoted in paragraph 7, above. It authorizes the terminals to agree to limit all truck loading and unloading at the terminals to the terminal operators.

59. Since the outlawing of public loaders by the Waterfront Commission Compact in 1953, the longshoremen's and teamsters' labor unions have each sought to achieve control over the truck loading. The collective bargaining agreement between the International Long-

shoremen's Association (I.L.A.) provides that the terminal operators will do all they can to assure that the loading of trucks shall be done by members of the I.L.A. Teamsters normally have jurisdiction over their trucks, and longshoremen over work done upon the terminals. The great majority of trucks are loaded by teamsters and longshoremen working side by side. A witness for the terminals stated that even if the terminals elect to assert exclusive control over truck loading, it is contemplated that truck drivers will help in the loading to insure that the truck is loaded in the proper manner.

60. Terminal witnesses stated that in addition to the labor jurisdictional question as a reason for Agreement No. 8005-1, the control sought by the terminals would reduce interruptions and permit better conduct of the terminal business. The main reasons given are that the terminals could better estimate and procure labor each day, and better know and plan for the purchase of their equipment requirements.

61. In the truck-loading operation the truckers very seldom request "no service," but in unloading it is prevalent. As to the extent to which the terminals' claim for Agreement No. 8005-1 may apply to "no service," a large trucker, opposed to the agreement on the ground it might deny him some right in his operation, stated that he uses "no service" about one percent of the time only. Some consignees, by nature of their products, do not need any loading service but, under Agreement No. 8005-1, they could be required to take full service. With respect to truck unloading, exercise of authority under the agreement would constitute a major change in operations at the terminals since approximately 90 percent of the unloading is presently done by the truckers (par. 55, above).

62. If Agreement No. 8005-1 is approved, the record shows that the terminals propose to amend Tariff No. 4 so as to provide that all truck loading shall be performed by the terminal operator solely, and that unloading operations may be performed by the trucker, shipper, consignee, or any of their representatives, if the same does not unreasonably interfere with the normal activities of the terminal operator at the pier.

DISCUSSION AND CONCLUSIONS

We consider, first, complainants' contention that Tariffs Nos. 3 and 4 are agreements or modifications of an agreement within the meaning of section 15 of the Act, and require prior approval of the Board before they may become effective.

Complainants urge that the approved basic Agreement No. 8005, which authorized respondents to establish tariffs containing just and

reasonable rates, charges, classifications, rules, regulations, and practices for the loading and unloading of waterborne cargo onto and from trucks, does not, and did not at time of approval, contain the actual rates and charges for this service, nor does it set forth any of the rules, regulations, and practices governing the application of the tariffs. They contend that Tariffs Nos. 3 and 4, issued pursuant to Agreement No. 8005, not only set forth the rates and charges, but define the nature of the terminals' obligations, adopt rules with respect to their liability, describe the conditions under which other persons might load and unload trucks, and generally set forth the manner and method by which trucks may be loaded and unloaded. They argue that the issuance and adoption of Tariffs Nos. 3 and 4 therefore were more than mere routine implementation of the basic agreement, and were new agreements, or modifications of an agreement, which required specific Board approval under section 15 before being made effective.

We agree with the examiner and find that the tariffs are not modifications of the basic agreement or new agreements, within the meaning of section 15. The issuance of tariffs, including rates, charges, rules, and regulations covering the application of the tariffs, were authorized and contemplated by the approved basic agreement.

The Board and its predecessors have uniformly held since *Section 15 Inquiry*, 1 U.S.S.B. 121 (1927), that the issuance of tariffs, including rules and regulations covering their application, have been routine matters authorized by an approved basic conference agreement, not requiring separate approval under section 15. While most of the Board's activities with respect to concerted tariff activities have involved carrier conferences and tariffs issued thereunder, the same regulatory scheme under the Act applies to concerted activities and tariffs of the respondent terminals, who are "other person[s] subject to this act" (section 1).

In support of their argument that the issuance of Tariffs Nos. 3 and 4 required section-15 approval, complainants cite *Isbrandtsen Co. v. United States*, 211 F. 2d 51 (D.C. Cir. 1954) (cert. den. sub. nom. *Japan-Atlantic & Gulf Conference et al. v. United States et al.*, 347 U.S. 990), and *River Plate and Brazil Confer. v. Pressed Steel Car Co.*, 124 F. Supp. 88 (S.D.N.Y. 1954), aff'd 227 F. 2d 60 (2d Cir. 1955). These cases do not support complainants' contention, and are not in conflict with our conclusion herein. Each of the cited cases involved the institution of an exclusive patronage contract/noncontract dual-rate system. The courts and the Board have recognized that the institution of a dual-rate system involves a "prima facie"

discrimination between shippers.⁷ Furthermore, in the *Isbrandtsen* case, *supra*, the court found that institution of a dual-rate system introduced "an entirely new scheme of rate combination and discrimination not embodied in the basic agreement."⁸ Similarly, the Board case cited by complainants, *Pacific Coast European Conf.—Payment of Brokerage*, 4 F.M.B. 696 (1955), and 5 F.M.B. 225 (1957), involved a nonconference brokerage rule which was "prima facie" discriminatory in the same manner as the dual-rate system, and was a new scheme of regulation and control not embodied in the basic agreement. The issuance of Tariffs Nos. 3 and 4, including changes in the level of rates, elimination of the availability of partial service, and the promulgation of other rules and regulations governing the loading and unloading of trucks at respondents' terminals, introduced no new scheme of competition or "prima facie" discrimination, as does the institution of the dual-rate system. They were no more than implementations of the authority granted them by approval of the basic agreement to establish and maintain uniformly applicable tariffs, "containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to such [truck loading and unloading] services." No prior section-15 approval is required for the issuance of such tariff modifications.⁹

While consistently holding that issuance and modifications of uniformly applicable tariffs pursuant to an approved basic agreement are routine matters and are not new agreements or modifications of an agreement requiring prior section-15 approval, the Board and its predecessors have recognized that if such rates or practices established in a conference tariff are shown to be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act, they will be ordered canceled or modified, or approval of the basic agreement may be withdrawn. *Edmond Weil v. Italian Line "Italia"*, 1 U.S.S.B.B. 395 (1935); *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28 (1939).¹⁰ It is in this posture that the examiner and the Board have investigated Tariffs Nos. 3 and 4 to determine whether the rates, rules, or regulations therein may operate in a manner to be unjustly discriminatory or unfair, detrimental to commerce, or violative of the Act.

⁷ *Contract Rates—Trans-Pacific Freight Conf. of Japan*, 4 F.M.B. 744 (1955); *Contract Rates—Japan/Atlantic-Gulf Freight Conf.*, 4 F.M.B. 706 (1955); *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 (1937).

⁸ *Isbrandtsen Co. v. United States*, *supra*, at page 56.

⁹ We note that complainants made no argument that issuance of Tariff No. 2 constituted the effectuation of an unapproved section-15 agreement.

¹⁰ See also: *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761 (1946); *Contract Rates—Japan/Atlantic-Gulf Freight Conf.*, 4 F.M.B. 706 (1955); *Contract Rates—Trans-Pacific Freight Conf. of Japan*, 4 F.M.B. 744 (1955) (Dissent of Chairman Morse).

As to the general level of rates in Tariff No. 3, the record does not show them to be so high as to be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act.

We recognize that the record does not permit a precise and completely accurate mathematical answer as to the operating results under Tariff No. 3. On the other hand, our analysis of the cost study conducted by the terminals in the spring of 1957, the income and expense statements submitted to the Regulation Office of the Board covering comparable periods of operations under Tariffs Nos. 2 and 3, shown in the confidential exhibits of record, and the detailed and exhaustive analysis of the individual income and expense statements of the eight terminals selected at random by Public Counsel and complainants, support the conclusion in the paragraph next above. We find the financial data of record to be probative and sufficient to support the findings made herein. We have carefully considered the rebuttal exhibits, testimony, and arguments presented by complainants, and conclude that they do not support their contention that the rates in Tariff No. 3, over-all, produce an unreasonably high profit to the terminals. It would be manifestly impossible, and we do not herein attempt, to determine the reasonableness of every rate for every particular commodity as handled at every different terminal in the port of New York. Our conclusion with respect to the general level of rates in Tariff No. 3 is necessarily based upon our analysis of over-all operations as presented in the record.

In providing service under Tariff No. 3, it is apparent from the record that some of the terminals have failed in certain respects to comply with the express provisions thereof. They have refused to provide "partial service" when requested, or have charged for "full service" when only "partial service" was in fact provided. In addition, there have been numerous examples of violation of the "three o'clock rule" (par. 56, above) in that trucks checked in before three o'clock p.m. were not worked at straight-time rates until loading or discharging was completed.

The approved basic Agreement No. 8005 expressly provides that the terminals shall "assess and collect rates and charges for and in connection with such [truck loading and unloading] services *strictly in accordance with rates, charges, classifications, rules, regulations and practices set forth in said tariffs and, further, shall not in any respect whatsoever deviate from or violate any of the terms or conditions or provisions of said tariffs*" (emphasis added). The agreement provides steps to be taken against any party violating the agreement, including arbitration and expulsion from participation thereunder. It is clear that these provisions have not been carried out, and that

the terminals have not maintained the uniformity of practices required by the basic agreement.

We cannot stress too strongly the importance of uniform application of tariff provisions where competitors (herein the terminals) have been permitted to operate in concert under a joint tariff pursuant to section-15 approval of such concerted action. The parties to such an agreement must insist that the individual member terminals properly apply all charges, rules, and regulations of the tariff. In the event of violation of such tariff provisions by any member, proper corrective action should be taken, as provided by the basic agreement. Concurrence by the members in activity differing from and in derogation of the express provisions of their agreement and tariff might, under certain circumstances, amount to a tacit understanding which would modify their approved agreement. *Rates from Japan to United States*, 2 U.S.M.C. 426 (1940). Under such circumstances the Board would necessarily consider disapproval of the basic agreement unless proper corrective steps should be taken. While on this record we are unable to find that there is a tacit understanding to permit individual terminals to violate provisions of the tariff, we will insist that steps be taken to maintain uniformity of practices under the tariff. Our general discussion in this paragraph specifically applies to present and future conduct of operations under Tariff No. 4, which is now in effect, as well as past practices under Tariff No. 3.

We find further, as did the examiner, that the failure by some terminals to comply with express provisions of Tariff No. 3 was an unjust and unreasonable practice relating to the receiving, handling, or delivering of property, in violation of section 17 of the Act.

We next consider whether the rates, charges, rules, and regulations set forth in Tariff No. 4 are unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act.

As to the general level of rates in Tariff No. 4, we find that, except as to certain specific rates and practices hereinafter discussed, they have not been shown to be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act.

Complainants contend that the rates in Tariff No. 4 were arrived at in an arbitrary and capricious manner, without proper consideration of such factors as cost of service, transportation and traffic conditions, revenue derived, nature and value of commodities, degree of damage, rights of shippers, etc. They further contend that the level of rates in Tariff No. 4 are unjust and unreasonable in that they are exorbitant and allow the terminals an excessively high profit.

The rates and provisions in Tariffs Nos. 2, 3, and 4 have not been determined by precise measurement of all the standards referred

to by complainants. It is clear from the record that Tariff No. 2 was not based upon detailed cost and revenue studies, but was put into effect in August of 1955 after limited discussions and negotiations between the truckers and the terminals. The rates in this first effective tariff were admittedly set by "shooting in the dark" and were not based upon any cost or revenue experience of the terminals. The record shows, however, that Tariff No. 3 was prepared under more organized circumstances, and was based on a year's experience under Tariff No. 2. Tariff No. 4, while still somewhat of an estimate, was based upon more experience and upon certain cost and statistical studies available to the terminals in 1957.

In determining whether the general level of rates and the rules and regulations of Tariff No. 4 conform to the standards of the Act, we are more concerned with the effect of the implementation of the tariff than with the particular methods by which the tariff was constructed. Upon the full record herein, we conclude, as did the examiner, that the general level of rates in Tariff No. 4 will not allow the terminals an excessively high profit (pars. 37 and 38, above), and except as to particular rates and practices specifically considered hereafter, we find that the rates, rules, regulations, and practices in Tariff No. 4 have not been shown to be unjust or unreasonable or otherwise in violation of the Act.

Tariff No. 4 contains no provision for partial service, i.e., it eliminates partial service which had heretofore been available to truckers under previous tariffs. A description of partial service and an analysis of the effects of its abolition are set forth in paragraphs 14-17, above. After careful consideration of the full record and the contentions of the parties, we agree with the conclusions of the examiner that elimination of partial service should encourage the use of specialized trucks, thus relieving congestion at the piers and reducing costs, and would remove an important area of friction and disputes between truckers and terminals. The record does not support a finding that elimination of partial service would be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act.

We next consider whether any specific rates in Tariff No. 4 may be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act. It is contended by intervener importers of iron and steel, tin plate, fruits and vegetables, and peat moss, that the rates on these commodities are too high as compared with other rates in the tariff. The handling problems and characteristics of these commodities are discussed in paragraphs 50-53, above.

Iron and steel and tin plate move under a class rate of 11 cents per 100 pounds, while the other metals—aluminum, copper, lead, tin,

and zinc—have a rate of five cents when loaded in open flat-bed trucks and eight cents when loaded in other trucks (see table 5). The record indicates that iron and steel move in larger volume than the other metals and that shipments are generally similar to these other metals in handling characteristics. To the extent iron and steel products may come in shapes and sizes which are difficult to handle, the tariff should provide uniformly applicable special rates for such shipments.

We conclude that the rates in Tariff No. 4 on iron and steel and tin plate are unreasonably high; unless modified, Agreement No. 8005 would operate to the detriment of the commerce of the United States. Respondents will be allowed fifteen days within which to withdraw such rates and substitute therefor the same commodity rates as are applied to the other metals listed in table 5, failing which consideration will be given to the issuance of orders disapproving Agreement No. 8005.

As to the Tariff No. 4 rates on fruits and vegetables and peat moss, considering all the factors involved in the handling of these commodities, the record does not support a finding that these rates are so high as to be detrimental to commerce or in violation of the Act.

Tariff No. 4 provides for an extra charge for loading or unloading cargo weighing more than 6,000 pounds per piece, such charge to be determined by negotiation (par. 20, above). The tariff provides no standards by which individual member terminals will be guided in determining this special charge.

The provisions of respondents' tariff should be reasonably clear and precise in order that its application will be understood by the terminals, the truckers, and the general public, and so that charges will be uniform as between shippers similarly situated. We consider a tariff provision such as this one, under which it is impossible to know what a charge will be or how it will be determined, to be an unjust and unreasonable practice in violation of section 17 of the Act. We will insist that this provision be modified by the inclusion of reasonable standards by which the individual terminals will determine this extra handling charge uniformly.

We next consider whether Agreement No. 8005-1, which would authorize the terminals to modify their tariff to limit all truck loading and unloading at the terminals to the terminal operators, would be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act. If this agreement should be approved it would permit the terminals to eliminate "no service" under the tariff, and since Tariff No. 4 has eliminated "partial service," the truckers would be required to accept "full service" from the terminals in both truck loading and truck unloading.

Agreement No. 8005-1 is set forth in paragraph 7, above, and the factors involved in eliminating "no service" are set forth in paragraphs 58-62, above. We note that even if the agreement should be approved in its entirety, the terminals intend to implement the agreement only with respect to truck loading, i.e., they will eliminate "no service" on truck loading but will continue to offer "no service" as well as "full service" with respect to truck unloading.

Complainants in No. 800 and certain interveners in No. 821 urge that Agreement No. 8005-1 be disapproved, contending that approval would create in the terminals a monopoly of truck loading and unloading; that approval would cause more frequent disputes and greater confusion in the operations of the piers; that it has traditionally been the custom for truckmen to perform unloading services, and there is no showing that such activity has interfered with efficient operation of the piers; that approval will bring back the evils of the public loaders which the New York-New Jersey Waterfront Commission Compact is intended to eliminate; that federal approval of the Waterfront Commission Compact vested that commission with exclusive authority to regulate truck-loading and unloading practices at the New York terminals; and that elimination of "no service" would allow truck loading and unloading to be provided only by the terminal operators, which would be in conflict with the provisions of the Waterfront Compact. Neither the record nor the applicable law supports these contentions.

Respondents are common carriers and "other person[s]" subject to the Act, and the Board has exclusive jurisdiction over the agreements and truck loading and unloading tariffs and activities under consideration. *Status of Carloaders and Unloaders, supra; Carloading at Southern California Ports*, 2 U.S.M.C. 784 (1946). Approval by Congress of the New York-New Jersey Waterfront Commission Compact did not convert that interstate compact to federal law and thereby supersede the primary and exclusive jurisdiction of this Board as set forth in the Act. *Delaware River Joint Toll Bridge Com'n v. Miller*, 147 F. Supp. 270 (E.D. Pa. 1956); *Rivoli Trucking Corp. v. American Export Lines*, 167 F. Supp. 937 (E.D. N.Y. 1958).

We do not feel that approval of Agreement No. 8005-1 would bring back the evils of the public loaders or otherwise conflict with the purposes of the Waterfront Commission Compact. That Compact declares it "against the public policy of the States of New Jersey and New York and to be unlawful for any person * * * other than * * *" water carriers, truckers, terminal operators, shippers and consignees, and licensed stevedores, to engage in truck loading and unloading at the New York piers.¹¹ Under Agreement No. 8005-1 truck loading

¹¹ Waterfront Commission Compact, Article VII, Paragraph 2.

and unloading would be provided by terminal operators, who are permitted to carry on such activity under the terms of the Compact. We read the Compact as making it unlawful for anyone other than the five categories mentioned to load and unload trucks, but not as requiring that truckers, as one of the five mentioned categories, must be permitted to load and unload trucks.

There is merit to the contention that truckmen have historically provided most of the service of truck unloading at the piers, and there has been substantial use of "no service" in connection therewith. The record indicates that unloading by truckmen has not interfered with the efficient operation of the piers. On the record as a whole, we consider it would be detrimental to the commerce of the United States to change this practice of long standing and eliminate "no service" as to truck unloading. We will not approve so much of Agreement No. 8005-1 as would permit such a change. This conclusion is consistent with the position of respondents at the hearing that they would not eliminate "no service" as to truck unloading.

In contrast, the record shows that as to truck loading there has been much less use of "no service," and traditionally the terminals have provided substantially more truck loading services than unloading services. The record indicates that if the terminals provided all truck loading services they would be able to schedule more efficiently the use of their labor and equipment and could substantially improve the efficiency of their terminal operations. While we recognize that there are certain instances where the loading of a particular shipment might be efficiently handled by the truckmen, we feel that the record as a whole indicates that elimination of "no service" only as to truck loading would be a reasonable regulation of terminal activity, and we cannot find that Agreement No. 8005-1, as so modified, would be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act. We agree with the examiner that it has not been shown on this record that Agreement No. 8005-1, as so modified, would adversely affect the function of the Postmaster General in transporting the U.S. Mail. We will therefore approve so much of Agreement No. 8005-1 as will permit the elimination of "no service" as to truck loading.

Complainants have not discussed sections 14 and 18 of the Act, and nothing in the record supports the allegations of violations of those sections. As did the examiner, we consider the allegations under those sections to have been abandoned.

Complainants have made numerous exceptions to rulings of the examiner during the course of the hearing. We have considered these exceptions and conclude that the rulings did not constitute error.

On the record, we find no evidence that any of complainants have been injured or damaged by the violations of the Act herein found, and we conclude that there has been no proof of damages which would entitle any of complainants to an award of reparation. In their exceptions, and by letter to the Secretary of the Board dated April 30, 1958, complainants indicate that they did not intend to develop proof of damages at the hearing, but, in the event violations of the Act by respondents should be found by the Board, they desire to reserve the right to request further hearing for the purpose of proving damages.

In view of the fact that no effort was made by complainants to prove damages and respondents have not been required to meet such proof on this record, the record in No. 800 will be kept open for sixty days, within which time we shall require complainants to notify the Board in writing if they desire further proceedings, limited to the issue of proof of damages and reparation. In the event no such request is made within the sixty-day period, No. 800 will be discontinued.

An appropriate order will be entered.

Vice Chairman Guill, concurring:

I concur reluctantly in this report. I feel that the following comments are appropriate, however.

I agree that the only violations of the Act proven on the record were those found by the Board. I further agree that this record does not support findings that other violations were proven, or that any other activities of the terminals would contravene the standards of section 15 of the Act, and thus subject Agreements Nos. 8005 or 8005-1 to disapproval.

It is apparent from the record that the accounting statistics and cost studies available on this record were limited to truck loading and unloading activities only, an activity which is not the major or only function of the New York terminals. Such a limited investigation was sufficient to meet the issues raised in the proceedings, which involved only the truck loading and unloading tariffs and activities of the terminals. I feel, however, that there should be an investigation of terminal operators in which thorough and complete accounting and operational studies would be made of all their activities which are subject to the regulatory jurisdiction of the Board. Only on the basis of such a complete investigation can the Board be certain that the rules, regulations, and practices of the terminals are in all respects consistent with the provisions of the Act.

The record indicates that some carriers may be underwriting losses sustained by terminals in their truck loading and unloading operations, and it may be that shippers are suffering some degree of double

charges for truck-loading and unloading services. It further appears from the record that carriers to some extent influence the use of terminal labor engaged in truck loading and unloading. While these arrangements were not deemed by the Board to be relevant to the issues, a full investigation of all terminal activities would disclose the extent of these arrangements and would permit the Board to take corrective action if necessary.

I feel the record developed in these proceedings points up the need for such a broad and thorough investigation of terminal activities. In my opinion the Board should proceed as soon as possible with the terminal investigation now docketed as No. 816. The order of investigation in that proceeding, served by the Board on March 15, 1957, is sufficiently broad in scope to include the type of full-scale terminal investigation which I believe is essential to the proper carrying out of the regulatory functions vested in the Board.

5 F.M.B.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 24th day of February A.D. 1959.

No. 800

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC., AND
NEW JERSEY MOTOR TRUCK ASSOCIATION, INC.

v.

AMERICAN EXPORT LINES, ET AL.

No. 801

TRUCK LOADING AND UNLOADING OF WATERBORNE CARGO AT NEW YORK—INVESTIGATION OF RATES AND PRACTICES OF PARTIES TO AGREEMENT No. 8005.

No. 821

IN THE MATTER OF AGREEMENT No. 8005-1 BETWEEN AMERICAN EXPORT LINES, INC., AMERICAN PRESIDENT LINES, LTD., BULL-INSULAR LINE, INC., AMERICAN STEVEDORES, INC., INTERNATIONAL TERMINAL OPERATING Co., INC., ET AL.

Docket No. 800 being at issue upon complaint and answer on file, and Docket Nos. 801 and 821 having been instituted by the Board on its own motion, and the proceedings having been consolidated for hearing and 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 a report stating its decision and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That respondents be, and they are hereby, notified and required to cease and desist and hereafter to abstain from engaging in the violations of section 17 of the Shipping Act, 1916, as amended, herein found to have been committed by respondents; and

It is further ordered, That respondents be, and they are hereby, required, within fifteen days after the date of service of this order, to modify the provisions of their Tariff No. 4 and the rates therein on iron and steel and tin plate, in a manner consistent with our report herein; and

It is further ordered, That Agreement No. 8005-1, modified so as to eliminate "no service" with respect to truck loading only, be, and it is hereby, approved; and

It is further ordered, That respondents, within fifteen days after service of this order, shall file with the Board a copy of Agreement No. 8005-1 in form as amended and approved herein; and

It is further ordered, That respondents be, and they are hereby, required, within sixty days after the date of service of this order, to report to the Board in writing the steps taken and procedures instituted to insure that the provisions of Agreements Nos. 8005 and 8005-1, and the rules, regulations, practices, and rates set forth in tariffs issued thereunder, are properly and uniformly carried out by all respondent parties to said agreements and tariffs; and

It is further ordered, That Docket No. 800 be, and it is hereby, held open for a period of sixty days after the date of service of this order, within which time complainants shall, if they desire further proceedings directed to proof of damages and right to award of reparation, file with the Board a petition for such further proceedings in accordance with the provisions of Rule 5(j) of the Board's Rules of Practice and Procedure (46 CFR 201.69), and in the event no such petition is filed within said period, Docket No. 800 will be discontinued; and

It is further ordered, That Docket Nos. 801 and 821 be, and they are hereby, discontinued.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.
5 F.M.B.

FEDERAL MARITIME BOARD

No. 844

ASGROW EXPORT CORP., PHOENIX SHIPPING CO., INC., AGENTS

v.

THE HELLENIC LINES, LTD.

Submitted February 24, 1959. Decided March 12, 1959

Sections 14 Fourth, 16, and 17 of the Shipping Act, 1916, as amended, not shown to have been violated. Complaint dismissed.

H. Rueckheim for complainant.

Edward L. Smith and *James Proud* for respondent.

REPORT OF THE BOARD

Clarence G. Morse, *Chairman*, Ben H. Guill, *Vice Chairman*, Thos. E. Stakem, Jr., *Member*.

BY THE BOARD:

The recommended decision of the examiner was served on February 9, 1959, and no exception thereto has been filed. Upon review, we concur in and hereby adopt the recommended decision:

"By complaint filed September 23, 1958, complainant alleges that the rate charged by respondent on a shipment of seed beans moving January 31, 1957, from New York, N.Y. to Piraeus, Greece, was in violation of sections 14 Fourth, 16 and 17 of the Shipping Act, 1916, as amended. Reparation is sought. A hearing was held on December 16, 1958 in New York City at which neither party testified. The facts are as stipulated by the parties and as stated in the sworn complaint to which no answer was filed.

"Complainant, the International Division of Associated Seed Growers, Inc., is engaged at Milford, Conn. in the sale of agricultural seeds and related articles for the agricultural industry abroad. Respondent is a common carrier by water and as a member of the North Atlantic-Mediterranean Freight Conference engages in transportation between

North Atlantic ports of the United States and ports on the Mediterranean Sea.

"Prior to submitting a bid for an order of seed beans as an element of one of the government's foreign assistance programs, Asgrow Export Corp. (Asgrow) requested its foreign freight forwarders, Phoenix Shipping Co., Inc., (Phoenix), to quote the applicable ocean freight rate so as to permit establishment of the C & F Piraeus price. In November 1956, Phoenix reported that the rate would be \$27.50 per ton of 2,240 pounds, subsequently explaining that this was the rate for dry beans, in bags, rather than seed beans. However, Asgrow submitted its bid naming a C & F price based on the original quotation of \$27.50. Upon receipt of the order Asgrow notified Phoenix that it would not remit ocean freight charges billed at more than \$27.50 per long ton.

"Asgrow then, through its forwarder, on January 31, 1957, shipped on respondent's S.S. *Patria*, 499 bags of seed beans, gross weight 55,753 pounds, from New York to Piraeus consigned to order, notify ultimate consignee, the Agricultural Bank of Greece, Permanent Supplies Committee, Athens, Greece. The effective tariff of the North Atlantic-Mediterranean Freight Conference named commodity rates on numerous kinds of seeds, but no specific rate was provided for seed beans. Accordingly, respondent assessed the rate for 'Seeds, Agricultural, n.o.s.,¹ \$57.50 W/M.² Freight charges calculated on the basis of 1,248 cubic feet amounted to \$1794.00 and this was paid to the Hellenic Lines, Ltd., by Phoenix Shipping Co. Thereafter on February 11, 1957, under authorization from Asgrow, Phoenix petitioned the Conference to establish a commodity rate of \$45.00 per ton on seed beans which would be in line with related agricultural seed items and to retroactively apply such reduced rate to the shipment of January 31, 1957. The stowage factors, method of packing, values, gross and net weight per bag of seed beans were assertedly about the same as those of seed peas and seed corn for which the tariff named rates lower than the \$57.50 rate charged complainant. On February 27, 1957, the Conference notified Phoenix that at a meeting held on February 21, 1957, a rate of \$49.50 per ton of 2,240 pounds had been adopted on 'Seeds, bean', effective that date on new business but that the request for adjustment of the ocean freight on the January 31, 1957 shipment on the S.S. *Patria* had failed of adoption. Phoenix again petitioned the Conference on March 21, 1957, in an endeavor to have the new rate applied retroactively but was advised by the Conference by telephone and confirmation by letter of May 1, 1957, that

¹ Not otherwise specified.

² A tariff rule provided "Rates shown as applying W/M (weight or measurement) are per ton of 2,240 pounds or per ton of 40 cubic feet, ship's option and the rate yielding vessel the greater revenue must be charged."

the request for adjustment had been respectfully declined. On May 6, 1957 Phoenix requested the Conference to once again refer the matter to the member lines. This was done and at a meeting held on May 23, 1957 the request for adjustment failed of adoption and advice of that action was communicated to Phoenix. Thereafter by letter of June 12, 1957, Phoenix requested the Federal Maritime Board to investigate the matter. Replying to the Board's letter of June 18, 1957, the Conference, on June 28, 1957, stated that since the tariff provided no specific commodity item, the carrier had properly assessed the rate then in effect, namely 'Seeds, Agricultural, n.o.s., \$57.50 W/M' and reviewed the three requests of Phoenix for adjustment of the ocean freight on the Asgrow shipment. Formal complaint was then filed with the Board.

"Section 14 of the Shipping Act, 1916, as amended, provides in pertinent part:

That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country— * * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

"The only contract disclosed of record is the exclusive patronage contract of Asgrow with the carriers members of the North Atlantic-Mediterranean Freight Conference, but there is no contention that this is considered unlawful. Complainant's position is that the alleged discrimination results from the respondent not having established a rate on seed beans at the time its shipment moved, because as a result of its petitions filed after its shipment had been transported, a rate on seed beans was established. Complainant emphasized at the hearing that the rate of \$57.50 was discriminatory when compared with the rates on similar commodities which stow the same as seed beans and have the same values but no evidence of any comparative transportation factors was presented. Likewise, there is no evidence that respondent's failure to adjust and settle complainant's claim for application of the reduced rate has resulted in unjust discrimination against complainant in favor of any other shipper. Accordingly, no violation of section 14 Fourth is shown.

"Sections 16 and 17 of the Act, insofar as they may have application to the present proceeding, provide:

5 F.M.B.

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.

“In order to sustain the charge of unjust discrimination under these provisions of the Act, complainant must prove (1) that the preferred port, cargo, or shipper is actually competitive with complainant, (2) that the discrimination complained of is the proximate cause of injury to complainant, and (3) that such discrimination is undue, unreasonable or unjust. See *Port of New York Authority v. Ab Svenska et al.*, 4 F.M.B. 202, 205, (1953).

“The January 1957 shipment was complainant’s first and, up to the time of hearing, only shipment of seed beans to the Mediterranean and there is no evidence that any other shipper of seed beans to the Mediterranean had been charged a lower rate. To the contrary complainant’s representative stated that any other shipper of seed beans “must have paid the same rate because under the established rules of the Conference all freight rates have to be the same.” The situation here is comparable with that considered in *Afghan-Amer. Trading Co., Inc. v. Isbrandtsen Co., Inc.*, 3 F.M.B. 622, where, at page 623, the Federal Maritime Board said :

Since it is stipulated that no other shipper paid lower rates than were charged complainant in this case, there is no showing of undue prejudice in violation of section 16 of the Act or of unjust discrimination in violation of section 17 of the Act. *Remis v. Moore-McCormack Lines, Inc.*, 2 U.S.M.C. 687, 692.”

Upon this record, therefore, we find and conclude that the alleged violations of sections 14 Fourth, 16, and 17 of the Act have not been shown, and an order dismissing the complaint will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 12th day of March A.D. 1959

No. 844

ASGROW EXPORT CORP., PHOENIX SHIPPING CO., INC., AGENTS

v.

THE HELLENIC LINES, LTD.

This proceeding being at issue on complaint on file and oral answer made at the hearing, 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 the date hereof, having made and entered of record a report adopting the findings and conclusions of the examiner promulgated in his recommended decision served on February 9, 1959, which report and recommended decision are hereby referred to and made parts hereof:

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

By the Board:

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. 799

ALEUTIAN HOMES, INC.

v.

COASTWISE LINE ET AL.

Submitted October 24, 1958. Decided March 30, 1959

Coastwise Line found to have violated section 18 of the Shipping Act, 1916, as amended, and section 2 of the Intercoastal Shipping Act, 1933, as amended, in misclassifying shipments of prefabricated houses and in failing to file terminal charges with the Board.

Complainant found injured by unlawful misclassification and resulting overcharges in freight and terminal payments, and entitled to reparation except for amounts barred by the two-year limitation in section 22 of the Shipping Act, 1916, as amended.

John H. Dougherty for complainant.

James C. Dezendorf and *Nicholas H. Zumas* for Coastwise Line and West Coast Terminals Co. of California, *Richard J. Brownstein* for The Commission of Public Docks of the City of Portland, Oregon, and *Russell E. Arnett* for City of Kodiak, Alaska, respondents.

REPORT OF THE BOARD

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

BY THE BOARD:

This proceeding arose out of a complaint filed on August 10, 1956. Complainant alleges that the rates charged and collected on prefabricated houses shipped by it from Portland, Oregon, to Kodiak, Alaska, were inapplicable and in violation of sections 15, 16, 17, and 18 of the Shipping Act, 1916 (1916 Act) (46 U.S.C. 814, 815, 816 and 817), and section 2 of the Intercoastal Shipping Act, 1933 (1933 Act) (46 U.S.C. 844). Reparation is sought.

Coastwise Line (Coastwise), which transported the shipments, is a common carrier between the United States and Alaska and has a tariff on file with the Board covering such service. West Coast Terminals Co. of California, although a terminal operator at *California ports only*, is named as a respondent because it is alleged to be the successor of and the same organization as West Coast Terminals, Inc., which provided terminal services and facilities for the shipments here involved at Portland until September 1, 1953. At that time its facilities were sold to The Commission of Public Docks of the City of Portland, Oregon.¹ The latter and the City of Kodiak are terminal operators and furnished services and facilities for the shipments at Portland and Kodiak, respectively.

Hearing was held before an examiner, who served his recommended decision on July 31, 1958. Exceptions and replies thereto were filed by the parties, and oral argument has been held before the Board.

The examiner concluded that complainant had been overcharged in violation of section 18 of the 1916 Act and section 2 of the 1933 Act, to the extent freight and terminal charges were increased by improper reclassification; that the claims covering alleged overcharges paid on August 14, 1954, were seasonably filed, but that the remainder were barred by the statute of limitations; that complainant was injured by such overcharges and entitled to reparation; and that complainant should submit a reparation statement in compliance with Rule 15(b) of the Board's Rules of Practice and Procedure.

We generally agree 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 shipments here involved moved from Portland to Kodiak on seven Coastwise voyages beginning in June 1953 and ending in October 1953. The cargoes consisted of (a) wooden sections of prefabricated houses, together with (b) such articles as kitchen cabinets, closets, wardrobes, insulation, and "panel shake" siding, which are intended to be the components of 344 prefabricated homes to be erected in Kodiak. On the first three voyages Coastwise charged the prefabricated house rate on all articles, as provided by Item 1315 of its Freight Tariff 1-A (F.M.B.-F No. 2). Starting with the fourth voyage, however, it determined that the articles named in (b) were not integral parts of a prefabricated house, and reclassified such articles and retroactively assessed higher rates on them.

¹ The record shows that at all relevant times the dominant stockholders and officials of the two West Coast Terminal companies were identical; also, that the dominant stockholders of said companies and of Coastwise were identical.

Complainant contends that all the articles involved were component parts of a prefabricated house, asserts that reclassification of the articles also resulted in increased terminal charges, and demands refund of the alleged overcharges.

The two major issues for determination are: (1) were any of the shipments involved misclassified in violation of the 1916 Act or the 1933 Act, and (2) is any of the claimed reparation for injury caused by the alleged violations barred by the two-year statute of limitations contained in section 22 of the 1916 Act?

We first consider whether any of the articles involved in these shipments were misclassified. The shipments consisted of the components of 344 homes to be erected by complainant at Kodiak. Carlton Lumber Company (Carlton), the supplying manufacturer, prefabricated the wooden house parts at Portland and procured kitchen cabinets, closets, wardrobes, and panel shake siding from other suppliers. Carlton was to and did assemble the materials in house packages and transport them to docksite for shipment to Kodiak. Carlton met with Coastwise prior to shipment and discussed the articles to be shipped and the right kind of packaging.² Coastwise thereafter sent a letter to complainant quoting the Item 1315 rate applicable to "Houses, KD, prefabricated, etc."³ The components of the houses were to be shipped as ready and not broken down into specific house lots. This was at the direction of Coastwise, which stated there could be shipped "three hundred and forty-four of anything at any time * * * as long as [shipper] didn't exceed 344 of any particular item".⁴ Such arrangement suited the convenience of shipper, carrier, and terminal. Also West Coast Terminal decided the materials should be assembled in piles of uniform size regardless of the particular house.

The wooden house parts were shipped in bundles, which consisted of gables and trusses, floor, wall, plumbing, ceiling panels, plywood, and sheathing or lumber cut to size. The bundles were of uniform size and were made up of identical parts for one or more houses, laid flat, and banded together. None of the house parts was set up singly or with any other part.

The cabinets were metal, were shipped in sections in wooden crates, and had to be uncrated, bolted together, and attached to the walls after the structure had been erected. The sink sections were attached to the plumbing. The wardrobes and closets—the latter knocked down

² Carlton testified that there were to be three types of houses and 10 sub-types. Before beginning production, he prepared ten material lists—one for each of the sub-types—which shows the quantities of cabinets, etc., that each sub-type would include.

³ Complainant was advised that the same item would apply on concrete posts upon complainant's statement that they are to be a "constituent part of the prefabricated house".

⁴ Thus most of the 344 flues went forward on one vessel at the Item 1315 prefabricated house rate.

(KD)—consisted of an inclosure with side walls, back, top, bottom, and door. They were not part of the bearing wall: Except for a small broom closet, however, they formed part of an interior wall which could not be completed without the wardrobe. They could not be put in after the house was completed, nor could they be moved around the house like furniture or be removed if the house were sold.

The panel shake siding was used in varied amounts to change the exterior appearance of each house so that they would not all look alike. Some houses had the shake siding on three sides and some on four sides. In all cases the siding was attached to the panels after the house had been erected.

Cabinets, closets, wardrobes, and panel shakes were shipped to the dock by the suppliers, who were instructed by Carlton (a) to mark and pack closets and wardrobes so they would be distinguishable by house type, and (b) to mark all packages by name of consignee.

Insulation was installed in the interior panels but was shipped in bulk for the exterior panels. When shipped in bulk it was nested in bundles of gables and trusses so that the combined articles occupied no more cubic area than such bundles would have occupied without the insulation. Before shipment the insulation could have been installed in the exterior wall panels and the shake siding could have been applied to the panels. Since some of the outside panels were to be stowed on deck, these items were shipped separately in order to avoid the risk of damage from salt spray and weather to the insulation and from the rubbing together of the panel shakes.

As previously stated, on the first three voyages Coastwise classified the shipments in their entirety under Item 1315 of its Freight Tariff 1-A.⁵ This item provided for a rate by weight only on the following commodity:

Houses, KD, prefabricated, including electrical, plumbing, heating and ventilating equipment, also not to exceed one each of the following articles: Refrigerator, Stove, Wall Heater, Washing Machine, Water Heater.

The term "knocked down" (KD) was defined in Item 250 of the tariff as follows:

The term Knocked Down (KD) will apply only when the article is taken apart in such manner as to materially reduce space occupied. Merely separating article into parts without reducing bulk does not constitute knocking down or entitle article to KD rating.

Starting with the fourth voyage, however, and retroactively with respect to the first three voyages, Coastwise reclassified certain of the articles under items other than number 1315. The kitchen cabinets,

⁵ Replaced by identical Item 910, effective September 1, 1953. Reference herein to Item 1315 includes Item 910, where appropriate.

wardrobes, and closets were reclassified under Item 1260 and Item 1270 as furniture; panel shakes and insulation were reclassified under Item 120 as building material; and certain articles were reclassified under Item 1220 as freight N.O.S. (not otherwise specified).

The furniture items (1260 and 1270), which Coastwise contends are more specifically applicable to cabinets and wardrobes than Item 1315, refer to "Furniture, Wooden or Metallic, set up or not completely un-assembled", and include "Cabinets", "Chests", "Chiffoniers", etc. The building material item (120), which Coastwise contends is more specifically applicable to panel shakes and insulation than Item 1315, lists "Insulation Material, building", "Shakes", "Siding, wood or composition", etc. Practically all of the *freight* overcharges alleged by complainant result from the reclassifying of the articles above mentioned and the consequent shift from a weight to a measurement basis, which increased the freight charges.

Since the charges under the terminal tariffs were based on weight or measurement according to the ship's manifest, the shift from the weight to the cubic basis under the freight tariff automatically shifted the rating from a weight to a cubic basis under the terminal tariffs, thus increasing the terminal charges at Portland and Kodiak. Moreover, although the rating on wooden house parts was not changed from Item 1315 in the freight tariff, it was changed under the terminal tariff, resulting in substantially increased terminal charges at Portland.⁶ These parts were classified originally as per ship's manifest under Item 101 of the Portland terminal tariff applying to "Freight N.O.S." They were reclassified as "Frame work and sections" under Item 132 of that tariff, which provides a weight rate on "Building Materials, prefabricated, wooden or metallic, S.U. [set up] etc."⁷

Coastwise's rate clerk, who prepared the correction notices on both the revised freight and terminal charges, testified that wooden house parts were re-rated under Item 132 because "It would have been virtually impossible to rate them underneath anything else because I didn't have anything except the weight." He admitted, however, that they could have remained, as originally classified, under the lower freight N.O.S. classification (Item 101), which also provides a weight rate. He also testified that both the terminal tariff and Coastwise's freight tariff were difficult to apply because the commodity descriptions were not specific enough. He did not see the articles shipped.

Although Coastwise's tariff provided only a tackle-to-tackle rate

⁶ It is difficult to compute the increased terminal charges generally as Coastwise billed all such charges at Kodiak in one lump sum, and in lump sum services at Portland. Complainant computed the increases at Portland on wooden house parts to be \$11,137.83.

⁷ Item 132 provided substantially lower handling and car-unloading rates on "Millwork, N.O.S."

and published no terminal charges,⁸ Coastwise collected both freight and terminal charges, paying the latter over to the terminals. Terminal charges were calculated by Coastwise based upon the terminal operator's tariffs. No exceptions were taken by the terminal operators to these calculations.

Coastwise's rate consultant, who helped formulate its tariff, including Item 1315, testified that the four disputed items, cabinets, etc., were not parts of a KD house, and that there was no intention to include them in the KD house classification. He also asserted that the disputed items were not prefabricated. His understanding was that a KD house would include only the basic, rudimentary parts of the structure of the house—"the shell of the house"—plus the other specific equipment and articles named. However, he admitted that a prefabricated house could be essentially the same as a conventionally built house, the two differing only in the method of construction. He contended that at least cabinets, shake siding, and insulation were listed as specific commodities and could not be included in KD houses in view of the tariff rule (Item 10-f) that: "Commodity rates named in the tariff are specific and may not be applied to analogous articles." The witness pointed out that Coastwise's tariff to Valdez and Seward, Alaska, contains Item 730, which is identical with Item 1315, and that Item 730 is followed by Item 740, which covers fabricated houses with *cabinets installed*. He reasons from this that the presence of Item 740 indicates that Item 730 does not include cabinets; therefore, neither does the similar Item 1315.

Complainant relies upon the following statement in a pamphlet published by the Housing and Home Finance Agency to show the meaning of the term "prefabricated house":

The housing package varies as among manufacturers and models, but *usually* consists of panels for exterior and interior walls, ceiling, floor, and roof. Included in the housing package *may* be such *miscellaneous* materials as finish flooring, trim, roofing, heating equipment, wall cabinets, and hot water heaters. The package, no matter how complete, is far from being a finished house, and the manufacturer should be thought of more as a material supplier than as a builder of houses." (Italic supplied.)

Carlton agreed with the above definition and stated that there may be a KD prefabricated house which does not include flooring, kitchen cabinets, panel shakes, etc. He stated further that at times his company builds and ships only the shell of a house, and that at other times it provides more refinements or finishes.

⁸ Coastwise's stevedore handled the shipments from place of rest on dock at Portland to ship's tackle and into hold of vessel, for which Coastwise collected a handling charge. Coastwise's tariff did not specify the docks at which it called at Portland and Kodiak.

Complainant also referred to a magazine published by the Prefabricated House Manufacturers Institute, in which the description of some of the houses pictured listed various items which included the commodity items here in dispute. However, the floor plans of the homes set out in this magazine also indicated that some kitchens included cabinets and others did not.

We agree with the conclusion of the examiner that all articles involved in these shipments properly should have remained classified under Item 1315, "prefabricated house."

It is a well established rule of tariff interpretation that the terms used in a tariff should be construed in a manner consistent with general understanding and accepted commercial usage. *Samuel Kaye—Collection of Brokerage/Misclassification*, 5 F.M.B. 385 (1958), and cases cited therein.

The examiner properly concluded from the record that there is no clear-cut or customary meaning of the term "prefabricated house". It can refer only to the wall panels, etc., which constitute the "shell" of a house, or it can include other constituent parts of a completed house such as cabinets, siding, insulation, etc. See the definition given by the Housing and Home Finance Agency; *Prefabricated Houses in Southern Territory*, 280 I.C.C. 406 (1951); and *Texas Prefabricated H. and T. Co. v. A., T. & S.F. Ry. Co.*, 272 I.C.C. 61 (1948).

While Coastwise's witness testified that Item 1315 was intended to be limited to the "shell" of the house only, it is the meaning of the express language employed in the tariff and not the unexpressed intention of the carrier which controls the interpretation of a tariff item. *National Cable and Metal Co. v. American-Hawaiian S.S. Co.*, 2 U.S.M.C. 470 (1941); *Atlantic Bridge Co. v. Atlantic Coast Line R. Co.*, 56 F. 2d 163 (S.D. Fla. 1932). Coastwise concedes that the term "prefabricated house" is ambiguous and could reasonably be construed to include the particular items here in dispute. It contends, however, that the addition of the words "including electrical, plumbing, heating and ventilating equipment" in Item 1315 cures such ambiguity, and, as so modified, the term clearly includes only the "shell" of the house, plus the enumerated items, and necessarily excludes all other articles which might otherwise be considered as included in the term "prefabricated house".

We cannot agree with the foregoing contention. The meaning of the word "including" is far from clear and unambiguous. The cases illustrate the varied meanings which have been applied to the word "including". It has been construed as a word of enlargement, as a word of limitation or restriction, as merely prefacing an illustrative example, as specifying particularly something belonging to the class

already mentioned, and as adding to a class a genus not naturally belonging thereto.⁹ We cannot see that the addition in Item 1315 of the phrase "including electrical, plumbing, heating and ventilating equipment" cures the admitted ambiguity of the term "houses, KD, prefabricated"—rather it appears to increase the ambiguity of the item. Applying the rule applicable to written instruments generally, this ambiguity must be construed against the carrier which made and issued the tariff. *Atlantic Bridge Co. v. Atlantic Coast Line R. Co.*, *supra*; *Union Wire Rope Corporation v. Atcheson, T. & S. F. Ry. Co.*, 66 F. 2d 965 (8th Cir. 1933); *Rubber Development Corp. v. Booth S. S. Co., Ltd.*, 2 U.S.M.C. 746 (1945).

It is clear from the record that Coastwise was fully aware of the particular items to be shipped, and of the fact that the cabinets, closets, wardrobes, insulation, and shake siding were shipped separate from the basic "shell" structure of the house. With such knowledge, Coastwise quoted the Item 1315 rate, thereby directly implying that the articles should be considered as "constituent" parts of a "prefabricated house".¹⁰ Moreover, Coastwise advised Carlton to ship up to but not more than 344 of anything at any time, as the articles became ready for shipment, and indicated that it was not necessary that the shipments be broken down by house unit. This instruction was pointless if complainant was not shipping prefabricated houses but was really shipping building material or furniture, since under the tariff these latter articles could be shipped without limitation. The record clearly evinces a course of conduct strongly indicating that both the carrier and the shipper understood that the "prefabricated house" Item 1315 rate would be applicable to all these shipments.¹¹ In fact, the Coastwise rate clerk who later reclassified certain of the articles involved in these shipments had great difficulty in determining what other commodity rate should have been applied. We consider it to be reasonable and natural to construe Item 1315 as embracing those things which would become a permanent and constituent part of the completed house. Under this construction, the cabinets, wardrobes, closets, shake siding, and insulation were entitled to be so classified and properly should have moved under the

⁹ *State v. Sho-Me Power Co-op.*, 191 S.W. 2d 971 (Mo. 1946); *Illinois Cent. R. Co. v. Franklin County*, 387 Ill. 301, 56 N.E. 2d 775 (1944); *Red Hook Cold Storage Co. v. Department of Labor*, 295 N.Y. 1, 84 N.E. 2d 265 (1945); *Oil Workers Internat'l Union v. Superior Court*, 230 P. 2d 71 (Cal. 1951); *Ex Parte Martinez*, 132 P. 2d 901 (Cal. 1942); *Lotery v. City of Mankato*, 42 N.W. 2d 553 (Minn. 1950).

¹⁰ See footnote 3.

¹¹ We recognize that an understanding between a carrier and a shipper cannot vary the proper construction or application of a tariff, since the published tariff is binding on the parties. We find here, however, that the action of the carrier and the shipper are factors to be considered in determining what was a fair and reasonable interpretation of an ambiguous tariff item.

Item 1315 rate. The reclassification of the articles under items other than 1315 was improper and in violation of section 18 of the 1916 Act and section 2 of the 1933 Act.

We further find, as did the examiner, that the reclassification of wooden house parts under the Portland terminal tariff from Item 101, "Freight N.O.S.", to Item 132, "Building Materials, prefabricated, wooden or metallic, S.U. [set up] etc.—Framework and sections", was improper and in violation of section 18 of the 1916 Act and section 2 of the 1933 Act.

To the extent that the unlawful reclassifications caused complainant to pay higher freight and terminal charges, complainant has been injured, and, unless barred by the limitations contained in section 22 of the 1916 Act, is entitled to reparation for such injury. Section 22 provides in pertinent part as follows:

The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before the day named, of full reparation to the complainant for the injury caused by such violation [violation of the 1916 Act or the 1933 Act by a common carrier by water or other person subject to the 1916 Act].

Following are the details of the shipments and payments of ocean freight and terminal charges herein involved:

Voyage No.	Vessel	Date departing Portland ¹	Date of payment of freight and terminal charges		Alleged freight overcharges
			June to September 1953	Aug. 14, 1954	
(1)	(2)	(3)	(4)	(5)	(6)
13.....	<i>Tarleton Brown</i>	June 1953.....	\$37,690.79	\$5,798.16	² \$3,431.40
23.....	<i>North Beacon</i>	June 1953.....	23,458.62	1,353.78	² 397.86
15.....	<i>Charles Crocker</i>	July 1953.....	36,342.83	7,338.82	² 3,974.48 ³ (cr. 88.84)
16.....	<i>Charles Crocker</i> (B/L P-5).....	Aug. 1953.....	65,252.00	⁴ (cr. 2,149.72)	⁵ 7,153.26
16.....	<i>Charles Crocker</i> (B/L P-2).....	Aug. 1953.....	8,808.66	88.83	
17.....	<i>Charles Crocker</i> (B/L P-3).....	Sept. 1953.....	49,041.57	⁴ (cr. 2,091.44)	⁵ 3,294.37
17.....	<i>Charles Crocker</i> (other B/Ls).....	Sept. 1953.....	-----	4,046.21	-----
23.....	<i>Seafair</i>	Sept. 1953.....	-----	5,791.64	² 473.67
24.....	<i>Pacificus</i>	Oct. 1953.....	-----	5,631.73	-----
			220,594.47	25,808.01	\$18,725.04

¹ Cargo was delivered to consignee between June and October 1953.

² Alleged overcharges collected August 14, 1954.

³ Refunded by Coastwise in January 1956.*

⁴ Corrected copy of freight bill allowing these credits was issued Dec. 9, 1953.

⁵ Alleged overcharges collected in August and September 1953.

Charges of \$220,594.47 were collected on the first five voyages during June–September 1953 (col. 4 in table). Such collections were made more than two years prior to the filing of the complaint on August 10, 1956. On August 14, 1954, however, complainant made additional payments totalling \$25,808.01 (col. 5 in table), because of lien asserted by Coastwise in April 1954 against some applicances owned by complainant in the dock warehouse at Kodiak. This payment covered freight adjustment of charges on the first five voyages. When Coastwise issued correction notices covering the credit or balance due in connection with this payment, each individual charge was restated and not merely the particular adjustment which resulted in the credit or balance due.

Coastwise billed for freight charges according to its tariff, which provided that only one freight bill would be issued for freight covered by one bill of lading. The bills of lading (21) provided that full freight is considered completely earned on receipt of goods, that all charges be paid in full without offset, counterclaim, or deduction, and that the carrier is to have a lien for all charges on any or all goods designated in the bill of lading.

Coastwise's contention that the cause of action accrued at the time of delivery of the shipments is untenable. In *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 310, 311 (1934), our predecessor said:

[Complainant] was injured the moment he *paid* the charges * * *. *His claim accrued at once* * * *. (Emphasis supplied.)

See also *Louisville Cement Co. v. Int. Com. Comm.*, 246 U.S. 638 (1918), holding that, since no controlling language to the contrary is used, the cause of action accrues when the freight charges are paid; and *Accrual of Cause of Action*, 15 I.C.C. 201, 204 (1909), holding such cause accrued only when *full* payment has been made. These two cases were decided under the Interstate Commerce Act when it—like the 1916 Act now—contained no language contrary to the settled rule that “the time when a cause of action accrues [is] * * * when a suit may first be legally instituted upon it * * *.” *Louisville Cement Co. v. Int. Com. Comm.*, *supra*.

Under the foregoing rule there is no question that the claims covering overcharges paid on August 14, 1954, amounting to \$8,277.41, for voyages 13 *Tarlton Brown*, 23 *North Beacon*, 15 *Charles Crocker*, and 23 *Seafair*, were filed within the two-year period of limitation provided by section 22 of the 1916 Act (col. 6 in table). Respondents are correct, however, in challenging the claims of \$7,153.23 (voyage 16 *Charles Crocker*, B/L P-5) and \$3,294.37 (voyage 17 *Charles Crocker*, B/L P-3), totalling \$10,447.63, for charges paid in August

and September 1953, or more than two years prior to the filing of the sworn complaint. These charges are barred by the two-year statute of limitations.

Complainant's contention that the two barred claims were seasonably filed because every building was merged into a single account which was liquidated by the payment of \$25,808.01 on August 14, 1954, cannot be accepted. There is no convincing evidence to support the claim that there was an open account between complainant and Coastwise so as to "keep alive" the time within which an action could be brought on all the bills of lading. The rights and obligations of the parties were defined and limited by each separate bill of lading, and as the contract was fully paid the statute of limitations began to run as to that payment. Under the most liberal interpretation of the rule, the statute would have begun to run on December 9, 1953, when the credits of \$2,149.72 and \$2,091.55, respectively, were allowed on the shipments in question (col. 5 in table). Even then the claims would be barred. Implicit in complainant's argument is the assumption that the parties may agree to waive or postpone the running of the statute. This cannot be done since the expiration of the time limit not only bars the remedy but also extinguishes the right (*Midstate Co. v. Penna. R. Co.*, 320 U.S. 356 (1943)), thereby nullifying the jurisdiction of the Board over the claims. *Reliance Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.M.C. 794 (1938).

We find that complainant paid and bore the charges on the shipments in question; that complainant was overcharged by Coastwise to the extent freight and terminal charges were increased by the reclassifications herein found unlawful; that complainant was injured thereby; and that, except to the extent barred by section 22 of the 1916 Act, complainant is entitled to reparation from Coastwise in the amount of such overcharge.

The final question for consideration goes to the legality of the tariff publishing practices of Coastwise and the liability of respondents other than Coastwise for the overcharges for terminal service, there being no question that Coastwise alone is liable for the ocean freight overcharges. Coastwise published a tackle-to-tackle rate, as previously mentioned. It is clear from the record that the shipper was not permitted to deliver or receive cargo at the end of ship's tackle, that Coastwise assessed the terminal charges at Portland and Kodiak, and that at least at Portland it provided certain of the terminal services itself. It is the duty of a common carrier by water to provide a place for the receipt and delivery of property. This obligation may be fulfilled by the carrier itself or through an agent. In any event, the 1933 Act requires that the charges for the services

involved, regardless of who makes them, must be stated separately in the tariff of the carrier. *Intercoastal Investigation 1935*, 1 U.S.S.B.B. 400, 433, 447 (1935). The failure of Coastwise to do this, particularly when it calculated and collected such charges, resulted in a violation of section 2 of the 1933 Act and section 18 of the 1916 Act.¹²

Coastwise alone may be held responsible for the terminal overcharges. It had the duty to publish lawful terminal charges and to apply them in a lawful manner. This it failed to do. Instead, it in effect adopted the terminals' tariffs, misapplied them to the extent indicated herein, and collected the overcharges. The resulting injury to complainant was due solely to the acts of Coastwise.

Complainant contends that the liability of respondents for reparation is joint and several, citing *L. & N. R.R. v. Sloss-Sheffield Co.*, 269 U.S. 217 (1925). With this we cannot agree. Section 18 of the 1916 Act and section 2 of the 1933 Act, which require the filing of rates, rules, and regulations relating to terminal services, apply only to common carriers by water in interstate commerce—they do not apply to an independent terminal. Terminal operators as such are not subject to the same statutory obligations as are common carriers by water in interstate commerce, i.e., specifically, they are not required by the 1933 Act to file their tariffs with the Board or to meet the statutory requirements of that Act. Thus, the terminal operators herein cannot be found in violation of section 18 of the 1916 Act or of section 2 of the 1933 Act. Of course, as pointed out by the examiner, such operators may violate sections 15, 16, or 17 of the 1916 Act, and may be liable for proven damages resulting therefrom. There is no evidence, however, showing such violation by any of the terminals.

Attorneys for Coastwise and West Coast Terminals Co. of California and the attorney for complainant have indicated, in response to a request of the Board made at oral argument, that they consider the present record to be adequate to permit a determination of the amount of reparation without a conference or further hearing. We will therefore require the parties immediately to prepare, certify, and file with the Board a reparation statement in accordance with the provisions of Rule 15(b) of the Board's Rules of Practice and Procedure (46 C.F.R. 201.252).

No order will be entered at this time as to the determination of the amount of reparation due, but when such order is issued it will include an award of interest at the rate of 6 percent per annum from the date of payment of the overcharges.

¹² Also, the failure of Coastwise to specify the docks at which it called at Portland and Kodiak was a violation of these sections. In December 1956, Coastwise filed terminal charges at Portland but not at Kodiak.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 30th day of March A.D. 1959.

No. 799

ALEUTIAN HOMES, INC.

v.

COASTWISE LINE ET AL.

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

It is ordered, That respondent Coastwise Line be, and it is hereby, notified and required to cease and desist and hereafter to abstain from activities herein found to be in violation of section 18 of the Shipping Act, 1916, as amended, and section 2 of the Intercoastal Shipping Act, 1933, as amended; and

It is further ordered, That respondent Coastwise Line be, and it is hereby, required, within thirty days after the date of service of this order, to modify the provisions of its appropriate tariff on file with the Board in a manner consistent with our report herein; and

It is further ordered, That complainant and respondent Coastwise Line be, and they are hereby, required to submit, as soon as possible, and in any event not later than thirty days after the date of service of this order, a certified reparation statement in accordance with the provisions of Rule 15(b) of the Board's Rules of Practice and Procedure, 46 C.F.R. 201.252; and

It is further ordered, That the proceeding as to respondent Coastwise Line be, and it is hereby, held open pending the issuance of an order respecting reparation; and

It is further ordered, That the complaint as to respondents other than Coastwise Line be, and it is hereby, dismissed.

(Sgd.) JAMES L. PIMPER,

Secretary.

FEDERAL MARITIME BOARD

No. 771

BANANA DISTRIBUTORS, INC.

v.

GRACE LINE INC.

No. 775

ARTHUR SCHWARTZ

v.

GRACE LINE INC.

Decided May 4, 1959

Respondent, in the operation of freighters and combination vessels between ports on the west coast of South America and U.S. Atlantic ports, found to be a common carrier by water, and therefore subject to the provisions of the Shipping Act, 1916.

Respondent's practice of contracting all of its refrigerated space on these vessels to three shippers, to the exclusion of other qualified shippers, found to be unjustly discriminatory in violation of section 14 Fourth of the Shipping Act, 1916, and to be unduly and unreasonably prejudicial and disadvantageous in violation of section 16 First thereof.

Forward-booking arrangements of two-year periods, entered into pursuant to just and reasonable regulations and practices relating to the receiving, handling, stowing, transporting, and discharging of bananas, under which respondent's refrigerated space would be equitably prorated among qualified banana shippers, found to be not unjustly discriminatory in violation of sections 14 and 16 of the Shipping Act, 1916.

Marvin J. Coles, Francis B. Goertner, and Richard W. Kurrus for Banana Distributors, Inc.

John J. O'Connor, Jr., and John J. Foley for Arthur Schwartz.

John H. Hanrahan, Jr., John J. McElhinny, and Francis A. Wade for Stanley Grayson, *Robert F. Martin* for Robert Martin Associates, *Maurice Finkelstein, Thomas J. Beddow, and Douglass Hunt* for Irving B. Joselow and Compania Frutera Sud Americana (Ecuador) S.A., *George F. Galland and William J. Lippman* for Philip R. Conso, interveners.

Lawrence J. McKay, Arthur Mermin, and James E. Greeley for Grace Line Inc.

Robert J. Blackwell as Public Counsel.

SUPPLEMENTAL REPORT OF THE BOARD

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

BY THE BOARD:

As noted in our earlier report (5 F.M.B. 278), these two cases, consolidated for hearing, arose out of complaints filed by Banana Distributors, Inc. ("Banana Distributors"), and Arthur Schwartz ("Schwartz"), alleging that Grace Line Inc. ("Grace"), a common carrier by water between Ecuador and U.S. Atlantic coast ports, refused to carry complainants' bananas in its refrigerated ("reefer") space, in violation of sections 14, 15, and 16 of the Shipping Act, 1916 ("the Act"), and of sections 1 and 2 of the Sherman Antitrust Act ("the Sherman Act").¹

Schwartz and Stanley Grayson ("Grayson") intervened in No. 771; Banana Distributors intervened in No. 775; and Irving B. Joselow ("Joselow"), Compania Frutera Sud Americana (Ecuador) S.A. ("Frutera"), Philip R. Consolo ("Consolo"), Robert Martin Associates ("Martin"), and Public Counsel intervened in both proceedings. Grayson and Martin substantially supported the contentions of complainants whereas Joselow and Frutera supported the position of Grace. Consolo intervened only as his interests appeared.

Complainants asked the Board to (1) declare the contracts between Grace and the existing banana shippers in this trade contrary to law and void, (2) direct Grace to desist from further carrying out the illegal contracts, (3) require Grace to allot reefer space to complainants in an amount deemed fair and reasonable by the Board, and (4) award other relief which the Board deems proper.²

In his recommended decision the examiner concluded that (1) Grace is a common carrier of bananas in the trade, and (2) the denial of reefer space to complainants and their supporting interveners resulted in violation of sections 14 and 16 of the Act; he recommended that Grace prorate its reefer space on a fair and reasonable basis among existing shippers, complainants, and interveners under two-year forward-booking arrangements. Exceptions to this decision were filed by Grace, Joselow, Frutera, and Consolo; replies to the exceptions were filed by complainants and Public Counsel; and the matter was argued before the Board.

¹ Allegations of violation of the Sherman Act were abandoned by complainant in No. 771.

² Although reparation was demanded, all parties agreed to defer this question.

Respondent's exceptions contend that (1) it is a contract carrier of bananas in the trade under consideration, (2) its exclusion of complainants and others from participation in its reefer space was not in violation of sections 14 and 16 of the Act, and (3) a 2-year forward-booking arrangement in the banana trade is not common carriage but is a form of contract carriage, and at any rate would be unworkable. The exceptions of Joselow, Frutera, and Consolo present no issues not raised by Grace.

In our first report and order, we concluded that bananas are susceptible to common carriage, and that Grace, as a common carrier, should have carried bananas under terms of common carriage. Grace was ordered, *inter alia*, to cease and desist from entering into or carrying out contracts with banana shippers in violation of sections 14 and 16 of the Act, to equitably prorate its reefer space to all qualified banana shippers under terms of forward bookings for periods not to exceed two years, to employ uniform, fair, and reasonable standards in determining the qualifications of prospective banana shippers, and to establish and enforce just and reasonable regulations and practices relating to the receiving, handling, stowing, transporting, carrying, and discharging of bananas on its common-carrier vessels.

The report and order were reviewed by the United States Court of Appeals for the Second Circuit (*Grace Line Inc. v. Federal Maritime Board*, 263 F. 2d 709 (2d Cir. 1959)), which vacated the order and remanded the proceeding to us, specifically rejecting our sole reliance on what the court called the "susceptibility test":

This susceptibility test would appear to be clearly contrary to the Congressional purpose, for it is obvious that Congress intended that sections 14 and 16 should apply not to all carriers but only to "common" carriers by water.

We have reviewed the matter in the light of the court's decision and, upon further consideration without argument or hearing, arrive at the same conclusion without reference to the susceptibility test.

THE FACTS

Respondent is the only United States-flag operator offering a common-carrier berth service on Trade Route No. 2, which encompasses U.S. Atlantic ports and ports on the west coast of South America, and receives operating-differential subsidy aid for its service on the route. Grace also is a member of the Association of West Coast Steamship Companies, a conference of common carriers approved by the Board pursuant to section 15 of the Act, and carries over 150 different commodities northbound in this trade as a common carrier.

In this service, at the time of hearing, Grace operated three freighters with approximately fortnightly sailings and six combination pas-

senger-cargo vessels with weekly sailings, all of which vessels have reefer facilities. United Fruit Company and Standard Fruit Company have vessels plying this trade route, but they carry bananas as exclusively proprietary cargo. Grancolombiana Line and Chilean Line, both foreign-flag operators, operate berth-line vessels with reefer space in this trade, but Grancolombiana calls at Philadelphia before New York, and due to infrequent or irregular service Chilean Line is not a satisfactory banana carrier.

All of the bananas carried by Grace from Ecuador to New York since the inception of its reefer service on Trade Route No. 2 in 1934 have been by special contract, bananas being the only product carried on a contract basis; every other commodity is carried by Grace in its capacity as a common carrier.

At the time of the hearing, three shippers³ utilized all of Grace's reefer space under two-year contracts, renewable at the option of the carrier. Each shipper had exclusive use and control of individual compartments. The shipper loaded the vessel at Guayaquil, Ecuador, at his own risk and expense, and unloading was performed by Grace at the risk and for the account of the shipper. Grace followed the shipper's temperature control instructions en route. Except in rare instances, all shippers requested that their bananas be transported at the same temperature.

Loading of bananas at Guayaquil is difficult. Port limitations necessitate loading offshore from barges, and the vessel is available for loading for about 12 hours only. Each shipper moves his bananas shipside by barge, from which gangways are erected into side ports and loading is accomplished manually. When one shipper completes his loading and stowing another shipper draws his barges alongside and the entire operation is repeated.

Growing, shipping, and marketing of bananas, due to the nature of the commodity itself, requires a carefully synchronized operation. Bananas grow quickly and are subject to rapid ripening when once cut from the plants. A shipper requires an assured amount of space in order to integrate his entire operation properly. There are no shoreside refrigerated warehouses in Guayaquil, and refrigeration does not prevent the normal ripening process. Shippers rigidly inspect bananas prior to their loading and stowing in order to prevent the shipment of overripe or sigatoka-diseased bananas, since they could adversely affect otherwise "healthy" bananas. Each shipper strives to have his fruit reach destination as green as possible.

On this trade route Grace carries Chilean fruit northbound in its reefer space during the Chilean fruit season, thereby reducing the

³ Joselow, Frutera, and Consolo.

space otherwise available for bananas. There is no commingling of Chilean fruit with bananas due, in part, to the difference in temperature requirements between the two. Chilean fruit, although carried pursuant to "special arrangements" with the shippers, is carried by Grace in its capacity as a common carrier.

Banana Distributors is an experienced importer and distributor of bananas.⁴ This complainant imported a substantial quantity of bananas from Panama and, as the New York agent for Consolo, distributed Ecuadorian bananas. It had requested reefer space of Grace since 1953, but each request was denied. Schwartz has been connected with the banana business since 1928 and his business reputation is good. He had requested space since 1946 but his requests were denied. Grace offered Schwartz reefer space on the cargo vessels but because these vessels could offer a fortnightly service only, he refused it. Although Schwartz has had financial difficulties there is no evidence that respondent denied him space for that reason.

Grayson has been in this business since 1942 and has had considerable experience importing bananas. At the time of hearing he was not an importer but was associated with others in a wholesale banana business in New York. Although he himself could not finance a banana operation from Ecuador, the record establishes that he could obtain the necessary financial backing. He requested reefer space from respondent since 1945, to no avail.

Martin has had limited experience in the banana trade, but at the time of hearing was associated with others in a proposed banana importing project. One of his associates has had experience importing bananas from Ecuador. Grace has refused Martin reefer space since 1954. This intervener apparently has sufficient financial backing to engage in this trade and has agreed to post a performance bond with Grace.

DISCUSSION AND CONCLUSION

The ultimate question here is whether respondent lawfully can allocate all of its reefer space, on its vessels engaging in the trade between certain South American ports and U.S. Atlantic ports, to certain banana shippers to the exclusion of other qualified shippers of bananas.

Grace contends that it is not a common carrier of bananas because it has never held itself out to the shipping public as a common carrier of bananas, and therefore its activities with respect to its banana movement are not subject to the provisions of the Act. Respondent,

⁴ Throughout this report, unless otherwise clearly indicated, the recitation of facts and the reference to "present" shippers speak as of the time of hearing.

claims also that bananas, because they require specialized handling, constitute a specialty which justifies their being carried under special contracts. It asserts that it may refuse bananas altogether or accept them on special terms for selected shippers without running afoul of the provisions of the Act.⁵

Our first inquiry is into the scope of the Act, i.e., whether respondent, in the operation of these vessels, falls within the purview of the statute. Section 1 of the Act provides in part:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States * * * and a foreign country * * * *Provided*, that a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce".

Thus, the entity which constitutes a "common carrier by water in foreign commerce" is subject to the provisions of the Act and the jurisdiction of this Board. The term "common carrier" is not defined in the Act, but the legislative history of the Act indicates that the person to be regulated is the common carrier at common law. *Agreement No. 7620*, 2 U.S.M.C. 749 (1945). And at common law a common carrier is one who holds himself out to carry for hire the goods of those who choose to employ him. *Propeller Niagara v. Cordes et al.*, 62 U.S. 7 (1858); *Railroad Company v. Lockwood*, 84 U.S. 357 (1873); *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889). In the *Niagara* case, it was held (page 22):

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

Grace transports goods generally in this trade on these vessels. Bananas do not confront Grace with liability from extraordinary danger, and they constitute a commodity which respondent is most accustomed to convey.

What is not a common carrier has likewise been defined judicially. Generally, where the full reach of the vessel is let to a single shipper, there exists private carriage, a bailment for hire. *Lamb et al. v. Parkman*, 14 Fed. Cas. 1019 (D.C. Mass. 1857); *Sumner v. Caswell*, 20 Fed. 249 (S.D.N.Y. 1884); *The Wildenfels*, 161 Fed. 864 (2d Cir. 1908).

⁵ We are not concerned with the question of whether bananas are carried under a bill of lading or under some other form of transportation document, nor are we concerned with the lawfulness of the terms of the document of carriage (Carriage of Goods by Sea Act, 1936, 46 U.S.C. 1300 *et seq.*). Our concern is whether bananas must be carried under the provisions of the Shipping Act, 1916.

In *Lamb v. Parkman* the court said at page 1023: .

It is contended, in behalf of the respondent, that the libellants were common carriers. By the charter-party, the whole ship was let to the defendant, who was to furnish a full cargo, and the owners had no right to take goods for any other person. In no sense were they common carriers, but bailees to transport for hire * * *.

Grace admittedly is a common carrier in this trade. The record emphasizes this: the vessels employed in carrying bananas for its chosen shippers are otherwise engaged in carrying general cargo for all who choose to employ them. We therefore find that respondent, in the operation of its freighter and combination vessels between certain west coast South American ports and U.S. Atlantic ports, is a common carrier by water within the meaning of section 1 of the Act.

We next inquire whether a common carrier subject to the provisions of the Act may exempt itself, in part, from the provisions of the Act. Grace makes much of the fact that it has not held itself out as a common carrier of bananas, and argues that it has lawfully excepted bananas from its holding out, relying heavily upon *Express Cases* 117 U.S. 1, 601 (1886) to support its contention that it may legally exclude complainants and other banana shippers from sharing in its reefer space on vessels which operate as common carriers. In *Express Cases* the Supreme Court was called upon to decide whether a common carrier by rail could exclude an express company from using its facilities to conduct its own common carrier business:

The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried (page 26).

The specificity of the scope of the question is further emphasized in the Court's opinion:

The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines (page 27).

Whether the railroads could refuse express matter from the general public was not an issue, and there is no inkling in that case that the railroads could refuse to carry express matter offered by some of the general public and accept it from others:

If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented (page 28).

Of importance in the instant proceeding is the following statement by the Court:

So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security (page 25).

Similarly, in *Chicago &c. Railroad Co. v. Pullman Car Co.*, 139 U.S. 79 (1891), where a contract between a railroad and the Pullman Co., by which the railroad granted a sleeping car company the exclusive right to furnish all sleeping cars required by the railroad for a period of 15 years, was assailed as contrary to public policy and in restraint of the trade, the Court said:

The defendant was under a duty, arising from the public nature of its employment, to furnish * * * such accommodations as were reasonably required by the * * * passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own * * * cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing-room and sleeping cars, it was a matter of indifference to the public who owned them (page 89).

We believe *Express Cases* affords respondent no comfort here. Grace is a common carrier and as such owes a duty to the shipping public to serve similarly situated shippers alike. Joselow, Frutera, and Consolo are not the instrumentalities of Grace whereby it discharges its common carrier obligations to the banana-shipping public. Paraphrasing *Express Cases*, Grace, in order to perform "its whole duty to the public at large and to each individual," must afford the public all reasonable reefer accommodations.

The Act confers jurisdiction over *carriers*, specifically over "common carriers", as distinguished from types of *carriage*, i.e., common or contract, and the movement of any commodity by a common carrier, regardless of the name the carrier uses in connection with it—or any part of it—must conform to the requirements of the Act, including its discriminatory injunctions, or be stricken down. We agree with Grace that a common carrier by water may except certain goods from its holding out to carry, but whatever Grace—a common carrier by water—carries, it carries subject to the provisions of the

Act. To accept Grace's contentions would result in a perversion of the will of the legislature as expressed in the Act. In excluding some qualified banana shippers from participation in its reefer space, Grace is derelict in the performance of its duty to the public.

Grace also relies on *United States v. Louisville & Nashville Railroad Co.*, 221 F. 2d 698 (6th Cir. 1955), to support its position here. Although that case recites that "a common carrier acting outside the performance of its required duties * * * may contract as a private carrier * * *", when the statement is considered in its proper perspective it involves facts far different from the one presented here: the cargo consisted of reactors, a commodity never before carried by the railroads; they were shipped by and for the Government—the only possible shipper thereof—during war time; the cars involved in the transportation had to be substantially modified to accommodate the reactors; and the cars had to be withdrawn from their regular service during the course of their special employment. That movement can hardly be equated with the transportation of bananas from Ecuador to the United States by a carrier regularly moving them, for several shippers, in substantial quantities (one of its prime revenue producing commodities in the northbound trade), over the course of a quarter century, in facilities (reefers) which are able to, and do, accommodate all commodities requiring refrigeration. Properly analyzed, the *Louisville* case is consonant with the rule in the *Niagara* case, *supra*, which requires a common carrier to accept the goods of all who offer "unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey,"⁶ which is particularly appropriate here, as Grace has long carried bananas and they do not present liability from extraordinary danger.

What we said in *Philip R. Consolo v. Grace Line Inc.*, 4 F.M.B. 293,300 (1953) is controlling here:

Respondent admits that it has undertaken to carry general cargo from Ecuador to the United States for all persons indifferently, and has for many years done so * * *. We think this admitted fact is determinative of this proceeding and that, in spite of special arrangements of whatever sort, respondent may not lawfully assume the status of a contract carrier to any shipper on its common carrier vessels, or grant to any shipper on such vessel special rates, special privileges, or other special advantages not accorded to all persons indifferently.

We now look to respondent's actions with respect to its banana carryings to determine whether they square with the prohibitions against

⁶ Not a single case cited by Grace supports the proposition that similarly situated shippers may be treated discriminatorily by a common carrier with respect to space accommodations.

discrimination in sections 14 Fourth⁷ and 16⁸ of the Act. Under section 14 Fourth a common carrier by water may not unjustly discriminate against any shipper in the matter of cargo space accommodations or other facilities, and under 16 First such carrier may not give any undue or unreasonable preference to any particular person or subject any particular person to any undue or unreasonable prejudice or disadvantage. In summarily denying reefer accommodations to complainants and their supporting interveners, all of whom repeatedly requested such space, and in favoring Joselow, Frutera, and Consolo with that space, respondent discriminated against the former and subjected them to prejudice and disadvantage with reference to cargo space; similarly, Joselow, Frutera, and Consolo were preferred.

Whether respondent has violated sections 14 and 16, however, depends upon whether its prejudice and discrimination were undue and unreasonable. As noted above, complainants and their supporting interveners are experienced banana importers, and we find the existence of no lawful reason why Grace denied them space.

In our original report we considered Grace's contention that bananas constitute a "specialty" and therefore not "susceptible" of common carriage. Grace contended that bananas of several shippers could not be commingled. We have found the facts on this point contrary to this contention. As we stated in the prior report, there is nothing in the banana trade which prevents bananas from being transported by respondent in its capacity as a common carrier, and therefore find no merit in this argument.

We are convinced that bananas of different shippers can be commingled in the same compartment. Although we recognize that the intermingling of ripe and sigatoka-diseased bananas might adversely affect otherwise healthy bananas, in view of the facts of record—(1) good quality bananas are plentiful in Ecuador, (2) only Gros Michel bananas are exported from Ecuador, (3) all such

⁷ In pertinent part, section 14 of the Act provides:

"That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

"Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or *unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessels and the available tonnage* * * *." (Emphases added.)

⁸ Section 16 of the Act provides in part:

"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."

bananas move at the same carrying temperature, (4) all shippers rigidly inspect their fruit prior to loading, and (5) shippers desire to get their bananas to their destination in as green a condition as possible—coupled with the absence of any evidence tending to indicate that complainants and their supporting interveners would operate differently from Grace's present shippers, we believe that respondent's fear of commingling does not afford it a legal justification for its prejudicial and discriminatory treatment of otherwise qualified banana shippers. We also note that other perishable fruits and vegetables are commingled in cooled or refrigerated spaces.

It is acknowledged that banana shippers have made substantial investments in their trade, that the entire operation, from grower in Ecuador to retailer in the United States, requires careful coordination, that bananas ripen rapidly, that care in shipment is essential, that the fruit is highly perishable, and that loading is difficult and must be accomplished within a relatively short time. On the other hand, the record clearly indicates that bananas are readily available to newcomers to the trade, that bananas from different plantations have been successfully mixed in a single compartment, that all exporters carefully inspect the fruit before loading, and that carrying temperatures seldom vary. While it may be that loading and stowing difficulties will increase as the number of shippers increases, this factor is present in every trade and it is not an excuse for a common carrier discriminating against some shippers in favor of a few.

Since no valid reason has been forthcoming to justify the refusal of space to qualified shippers and the preference accorded the chosen shippers, we conclude that the discrimination was unjust in violation of section 14 First of the Act, and that the prejudice and disadvantage was undue in violation of section 16 Fourth thereof.

It is obvious that respondent cannot satisfy all the reefer space desires of its present shippers and those of complainants and their supporting interveners, and thus arises the problem of providing a plan of allocating space to qualified banana shippers.

Where the demand for space exceeds the supply, the law is clear: a common carrier must equitably prorate its available space among shippers. *Penna. R.R. Co. v. Puritan Coal Co.*, 237 U.S. 121 (1915); *Patrick Lumber Co. v. Calmar S. S. Corp.*, 2 U.S.M.C. 494 (1941). Equitable proration of space alone, however, in view of the economic factors inherent in this trade, is not a panacea. And it was with these economic factors in mind that the examiner recommended the adoption of a forward-booking arrangement.

Grace argues that a forward-booking system is an admission that bananas do constitute a specialty. We need go no further than

respondent's own operation on this very trade route to dispose of the argument: during the Chilean fruit season Grace, as a common carrier, transports such fruit under forward-booking arrangements, and when the offerings exceed the available space, the space is prorated among the shippers.

Grace further contends that there is no justification in law for a forward-booking system of the character and duration recommended. Forward booking is not new to common carriage. *Ocean S.S. Co. v. Savannah Locomotive Works & Supply Co.*, 131 Ga. 831, 63 S.E. 577 (1909). It is, then, the duration of the period connected with the system with which we must be concerned. We are mindful that once the system is initiated, qualified applicants for space would be foreclosed from any proration in the space until the end of any given period. In view of the economic problems presented here, we believe and find that the 2-year duration can be characterized as "just" and "reasonable" rather than "unjustly discriminatory" and "unreasonably prejudicial", and affords existing importers the protection they require while providing a reasonable opportunity for prospective shippers to engage in the trade.

Qualified banana shippers must not be excluded from participation in Grace's reefer space in this trade. As we stated in our earlier report, however, the making of any necessary and practical arrangements designed to minimize or eliminate commingling of bananas of several shippers shall be left to the parties involved. We here reaffirm our adoption of the examiner's recommendation that Grace prorate its reefer space, upon a fair and reasonable basis, among qualified banana shippers, under forward-booking arrangements of two years.

Grace may require prospective shippers in this trade to post a bond covering the reefer space assigned, and may otherwise establish reasonable rules covering dead freight, inspection, and loading and stowing, which prospective shippers must meet in order to qualify as users of such space.

At the end of any forward-booking period, in the event that additional qualified importers desire reefer space, it will be incumbent upon respondent to reallocate space to existing importers and the new applicants upon a fair and reasonable basis.

An appropriate order, consonant with this report, will be issued.

Although complainant in No. 771 alleged that respondent, as a member of the Association of West Coast Steamship Companies (F.M.B. Agreement No. 3302), has operated contrary to the terms of the conference agreement in violation of section 15 of the Act, the matter was not pursued, and since neither the conference nor the members thereof other than Grace were parties to the proceeding, no determination of the issue is made here.

SUPPLEMENTAL ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C. on the 4th day of May A.D. 1959.

No. 771

BANANA DISTRIBUTORS, INC.

v.

GRACE LINE INC.

No. 775

ARTHUR SCHWARTZ

v.

GRACE LINE INC.

The Board, on the date hereof, having made and entered of record a supplemental report in these proceedings, restating the findings and conclusions set forth in its report of April 29, 1957, which supplemental report is incorporated as a part hereof:

It is ordered, that respondent Grace Line Inc. be, and it is hereby, notified and required to cease and desist and to abstain from entering into, or continuing, or performing any of the contracts, agreements, or understandings for the carriage of bananas found herein to be in violation of sections 14 and 16 of the Shipping Act, 1916, as amended;

It is further ordered that respondent, unless it is now complying with our prior order herein served August 19, 1957, shall offer, within ten (10) days after the date of service of this order, to its present shippers and to all qualified shippers, including complainants and their supporting interveners, upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas on respondent's vessels from Ecuador to U.S. Atlantic ports for a period not to exceed two years, said period to begin not later than July 1, 1959, and shall thereafter offer, for periods not to exceed two years, refrigerated space available for such carriage;

It is further ordered, that respondent shall employ uniform, fair, and reasonable standards in determining the qualifications of applicant

shippers, and in exercising its judgment in this regard, respondent shall take into consideration applicant's (1) financial capacity to engage in the banana business on a scale proportionate to the refrigerated space requested, (2) ability to arrange for the purchase, loading, and stowage of the bananas to be shipped, and (3) ability to arrange for the discharge of bananas; to this end, respondent may require applicant shippers to provide verified information sufficient to enable respondent to make the necessary determinations;

It is further ordered, that respondent be, and it is hereby, notified and required to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, stowing, transporting, carrying, and discharging of bananas on or from its vessels, which regulations and practices may include the following requirements: (a) each shipper shall furnish and maintain as security for the performance of all its obligations under the two-year forward booking a deposit in cash, negotiable securities, or a bond satisfactory to respondent equal to twelve and one-half percent (12½%) of the total minimum freight charges due under said forward booking; (b) no shipper shall be permitted, without the approval of respondent, to assign the forward booking or otherwise transfer any right secured by him under said forward booking; (c) the payment by the shipper of dead freight of up to 90 percent of complete utilization of space assigned; (d) loading, stowing, and unloading shall be at the expense and risk of the shipper, and respondent shall have the right to designate the stevedore or itself perform the necessary stevedoring at the port of discharge; (e) during the Chilean fruit season respondent may proportionately reduce the refrigerated space assigned to banana shippers, without discrimination, upon reasonable notice, to permit the carriage of Chilean fruit; (f) the treatment as a single shipper of those individuals, partnerships, or corporations who are affiliated with each other to the extent of 10 percent or more common ownership;

It is further ordered, that respondent shall file with the Board (a) copies of the two-year forward bookings entered into hereunder, (b) the regulations and practices adopted by respondent relating to the receiving, handling, stowing, transporting, carrying, and discharging of bananas, and (c) the criteria used by respondent in determining what applicant shippers are qualified;

It is further ordered, that these proceedings be held open for further proceedings on the claims of complainants for reparation, if any.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-90

MOORE-McCORMACK LINES, INC.—APPLICATION UNDER SECTION 805 (a)

Submitted May 27, 1959. Decided May 27, 1959

One voyage by the SS *Mormacsun*, commencing on or about June 2, 1959, carrying a full cargo of lumber from United States North Pacific ports to United States Gulf or North Atlantic ports, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in the coast-wise or intercoastal service, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Ira L. Ewers and Randall J. Thompson for Moore-McCormack Lines, Inc.

Robert E. Mitchell, Edward Aptaker, and Robert C. Bamford as Public Counsel.

REPORT OF THE DEPUTY MARITIME ADMINISTRATOR

BY THE DEPUTY MARITIME ADMINISTRATOR:

Moore-McCormack Lines, Inc. (Mormac), has applied for written permission of the Maritime Administrator under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, for its owned vessel the SS *Mormacsun*, which is under time charter to States Marine Corporation of Delaware (States Marine), to engage in one intercoastal voyage commencing at United States North Pacific ports on or about June 2, 1959, carrying a full cargo of lumber to United States Gulf or North Atlantic ports. Notice of hearing was published in the Federal Register of May 12, 1959, and hearing has been held before the Deputy Maritime Administrator. There were no petitions to intervene and no one appeared in opposition to the application.

States Marine, the charterer of the *Mormacsun*, conducts as a part of its regular steamship operations an eastbound intercoastal lumber service. For the early June sailing under consideration it has en-

deavored unsuccessfully to obtain an appropriate vessel of the type required for this service. No exclusively domestic operators in this trade have objected to the use of the *Mormacsun* for the sailing in question.

Upon this record, it is found and concluded that the granting of written permission under section 805 (a) of the Act for the *Mormacsun*, which is under time charter to States Marine, to engage in one intercoastal voyage commencing at United States North Pacific ports on or about June 2, 1959, carrying a full cargo of lumber to United States Gulf or North Atlantic ports, 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.

This report will serve as written permission for the voyage.

5 M.A.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-94

AMERICAN PRESIDENT LINES, LTD.—APPLICATION UNDER
SECTION 805(a)

Submitted June 19, 1959. Decided June 19, 1959

The carriage of passengers booked by Military Sea Transportation Service from Hawaii to California aboard the SS *President Hoover*, Voyage No. 20, sailing for San Francisco from Hawaii on or about July 29, 1959, found not to result in 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.

Warner W. Gardner for American President Lines, Ltd.

Willis R. Deming and *Alvin J. Rockwell* for Matson Navigation Company.

Robert E. Mitchell, *Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE DEPUTY MARITIME ADMINISTRATOR

BY THE DEPUTY MARITIME ADMINISTRATOR:

American President Lines, Ltd. (APL), has applied for written permission of the Maritime Administrator, under section 805 (a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1228, to carry 19 passengers booked by Military Sea Transportation Service (MSTS) from Hawaii to California on Voyage No. 20 of the SS *President Hoover* sailing for San Francisco from Hawaii on or about July 29, 1959. The hearing, noticed in the Federal Register of June 10, 1959, was held before the Deputy Maritime Administrator on June 19, 1959. Matson Navigation Company (Matson) intervened as its interests might appear.

MSTS requested APL to indicate the number of MSTS passengers it could accommodate from Hawaii to California during July 1959.

APL advised MSTs that it could not accommodate any MSTs passengers on its SS *President Cleveland*, but could book 19 passengers on Voyage No. 20 of the SS *President Hoover*. MSTs advised that it desired to book this space.

At present APL carries passengers between California and Hawaii on two of its vessels, the SS *President Cleveland* and the SS *President Wilson*, and the application for written permission for APL to add a third vessel in this trade is now being considered by the Federal Maritime Board in Docket No. S-78. Matson has no objection to the proposed permission for the single voyage, provided the granting of the permission is without prejudice to the position of any party in Docket No. S-78.

Upon this record, it is found and concluded that the granting of written permission under section 805 (a) of the Act for the carriage of 19 passengers booked by MSTs from Hawaii to California on Voyage No. 20 of the SS *President Hoover*, commencing on or about July 29, 1959, would neither result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service nor be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage. The action herein is without prejudice to the position of any party in Docket No. S-78.

FEDERAL MARITIME BOARD

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

No. 835

FLOTA MERCANTE GRANCOLOMBIANA, S.A.—CARRIAGE OF BANANAS
FROM ECUADOR TO THE UNITED STATES

No. 841

BANANA DISTRIBUTORS, INC.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Submitted May 12, 1959. Decided June 22, 1959

Respondent, in the operation of vessels between ports on the west coast of South America and ports on the North Atlantic coast of the United States and between ports on the west coast of South America and United States Gulf of Mexico ports, found to be a common carrier by water and therefore subject to the provisions of the Shipping Act, 1916, as amended.

Respondent's practice of contracting all of its refrigerated space on its vessels operating between ports in Ecuador and ports on the North Atlantic coast of the United States to one banana shipper to the exclusion of other qualified banana shippers, found to be unjustly discriminatory in violation of section 14 Fourth of the Shipping Act, 1916, as amended, and to be unduly and unreasonably prejudicial and disadvantageous in violation of section 16 First thereof.

Forward-booking arrangements of periods not to exceed two years, entered into pursuant to just and reasonable regulations and practices relating to the receiving, handling, stowing, transporting, and discharging of bananas, under which respondent's refrigerated space would be equitably prorated among qualified banana shippers, found to be not unjustly discriminatory in violation of sections 14 Fourth and 16 First of the Shipping Act, 1916, as amended.

Robert N. Kharasch and *William J. Lippman* for Philip R. Consolo, and *Richard Kurrus* and *Paul D. Page, Jr.*, for Banana Distributors, Inc., complainants.

Renato C. Giallorenzi and *John H. Dougherty* for Flota Mercante Grancolombiana, S.A., respondent and petitioner.

Elias Rosenzweig for Panama Ecuador Shipping Corporation, and *Thomas J. O'Neill* for Newark Banana Supply, interveners.

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:

These three consolidated proceedings relate to the lawfulness of the movement of bananas by Flota Mercante Grancolombiana, S.A. (Flota), from Ecuador to United States ports in the foreign commerce of the United States. In No. 827, Philip R. Consolo (Consolo) alleges that Flota, in refusing to allocate part of its refrigerated (reefer) space to Consolo for the movement of his bananas from Ecuador to U.S. North Atlantic ports, and in granting that space to Panama Ecuador Shipping Corporation (Panama Ecuador), unjustly discriminated against Consolo in violation of section 14 Fourth¹ of the Shipping Act, 1916, as amended (the Act), and unduly prejudiced him and unduly advantaged Panama Ecuador in violation of section 16² of the Act. Consolo further alleges that in contracting all of its reefer space to a single shipper, and in refusing the shipments of others, respondent operated contrary to the terms of a duly approved agreement, in violation of section 15 of the Act.

In No. 841, Banana Distributors, Inc. (Banana Distributors), similarly alleges violation of sections 14 Fourth and 16 of the Act.

¹ Section 14 of the Act provides in part:

"That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or *unfairly treat or unjustly discriminate against* any shipper in the matter of (a) *cargo space accommodations or other facilities*, due regard being had for the proper loading of the vessel and the available tonnage * * *." (Emphasis added)

² Section 16 of the Act provides in part:

"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."

Flota, in No. 835, petitioned for a declaratory order relating to its banana practices in the Ecuador-U.S. North Atlantic trade and the Ecuador-U.S. Gulf trade. It contends that it is not a common carrier of bananas, that its contracts with Panama Ecuador are not unlawful, and that the physical characteristics of its vessels are so different from those of its competitor Grace Line Inc. (Grace) that our rule in *Banana Distributors, Inc. v. Grace Line Inc.*, 5 F.M.B. 278 (1957), and *Philip R. Consolo v. Grace Line Inc.*, 4 F.M.B. 293 (1953), is not applicable to its banana carryings.

Public Counsel, a party in each of these proceedings, contends that, in contracting all of its reefer space to Panama Ecuador to the exclusion of other qualified shippers, including complainants here, Flota has violated sections 14 Fourth and 16 of the Act. In No. 835 it is his position that Flota be ordered to cancel its present contracts and make its reefer space available to all qualified shippers.

Panama Ecuador, an intervener in all of the proceedings, argues, in effect, that the physical limitations of the Flota vessels are such that only one shipper can be accommodated on them and therefore the resulting discrimination, prejudice, and advantage, if any, are not undue, unreasonable, or unjust.

Newark Banana Supply intervened in No. 841 but did not participate further in the proceedings.

FACTS

Flota operates six vessels in its common-carrier service between ports on the west coast of South America and U.S. North Atlantic ports, with a weekly frequency. At the time of hearing it employed five new 17½-knot vessels in the trade and a sixth was scheduled to be added in early 1959. They carry general cargo northbound and southbound on this regularly advertised and maintained service. Northbound sailings commence in Peru, proceed to Ecuador where bananas are loaded, to Buenaventura, Colombia, where coffee—Flota's most important northbound commodity—is loaded, then to Philadelphia where bananas are unloaded, and thence to Baltimore and New York. Although the vessels stop at Buenaventura for about 60 hours, steaming time from Guayaquil, Ecuador, to Philadelphia generally is 11 days.

Bananas have been carried by Flota in this trade since 1950, always under special contract, and never has the company accommodated more than one shipper at any one time.

Both Consolo and Banana Distributors are experienced banana shippers. Consolo repeatedly has sought reefer space from Flota for the carriage of its bananas since 1955. Banana Distributors un-

successfully sought reefer space on Flota's vessels in 1957. Others also have requested reefer space for bananas, but Flota made no check to determine whether such applicants were financially or otherwise responsible.

In 1955 Flota presented Consolo a rate for the entire reefer space on its five vessels in the trade. Consolo then countered with an offer to take the space if the rate on the lower hold were reduced 25 percent, or in the alternative, to occupy and pay for only the upper 'tween and lower 'tween decks of the reefer hold on each ship.³ Flota rejected this bid and later (July 25, 1955) entered into an exclusive two-year contract with the predecessors in interest of Panama Ecuador covering all the reefer space on the then five vessels in the trade. Consolo was advised that the space was under contract for two years. In 1957 Consolo again submitted an offer on Flota's reefer space, which was rejected in favor of an offer from Panama Ecuador covering, this time, a period of three years. After our decision in *Banana Distributors, Inc. v. Grace Line Inc.*, *supra*, both Consolo and Banana Distributors sought an allocation of reefer space from Flota, but without success.

The single reefer hold on each of Flota's vessels has a capacity of 55,000 cubic feet, and is divided into three levels: upper 'tween, lower 'tween, and lower deck. Hatches between these levels are closed off with three 450-pound plugs each, over which are placed hatch covers. The hold was designed primarily for the accommodation of frozen commodities in contrast to such holds on the Grace vessels, which were designed for the carriage of bananas. The longer the period the hold is open for loading, the longer it takes to reduce the hold temperature to the desired 52 degrees. Uncontraverted testimony indicates that with a 15-hour loading time, 40 hours are required to reduce the hold temperature, and that for every additional hour of loading it would take two additional hours of cooling time to reach 52 degrees.

As previously noted, the single shipper utilizing Flota's reefer hold usually completes loading within 13½ to 15 hours. There are two side ports (one on each side of the vessel) at the upper 'tween deck of the hold. A ramp runs from the side port to a pontoon secured to the vessel. Barges carrying from 800 to 4,000 stems tie up to the pontoon and stevedores then carry the cargo up the ramps and stow it as directed. The side ports are somewhat smaller than those on the Grace vessels, and they are higher above the water line, causing

³ The reefer hold on each ship is divided into three decks: upper 'tween, lower 'tween, and lower hold. The lowest deck is so high that it will accommodate three upright layers of bananas, rather than two, subjecting the bottom layer to damage from excessive weight. This is not the case in Flota's new vessels: four of the five actually have less height in the lower hold than in the other two decks.

the ramp to be more steeply inclined. Too, the single ramp must be traversed both entering and leaving the ship, whereas on the Grace ships separate ramps are used for entering and exiting. Stowing begins in the lower hold, which necessitates descent via catwalks through hatches in the upper 'tween and lower 'tween decks. While the lower hold is being filled the select fruit is segregated and stowed in the upper 'tween deck. Upon completion, hatch plugs and covers must be replaced, sealing off the compartments. Ramps, catwalks, hatch plugs and covers, and bin boards impede, to some extent, the rapid loading of the compartments. The decks are fitted for stanchions, into which boards are inserted to form bins. Thus fruit is separated and more properly stowed. In unloading, generally all the fruit must be removed through one side port only. Unloading is accomplished in the inverse order of loading.

Flota also operates, as a common carrier by water, a service between ports on the west coast of South America and U. S. Gulf of Mexico ports, utilizing four older and slower vessels. These vessels have reefer facilities and involve an 8 to 10 day transit time from Ecuador to Galveston, Texas, where bananas are discharged for a single shipper (Grand Shipping, Inc.). This shipper enjoyed an exclusive-use contract of the space for a one-year period from June 1, 1957, to June 1, 1958, and it was renewed for a 6 months' period in view of the petition for the declaratory order herein. It is not apparent that other qualified banana shippers have applied for, and have been denied, reefer space in this trade.

RECOMMENDED DECISION

The presiding examiner found that (1) Flota is a common carrier of bananas from Ecuador to the Atlantic and Gulf coasts of the United States; (2) Flota's exclusion of Consolo and Banana Distributors from participation in the use of its reefer space on its vessels from Ecuador to U.S. Atlantic ports results in violation of sections 14 Fourth and 16 of the Act; (3) Flota should cancel its existing contracts for the carriage of bananas from Ecuador to the U. S. Atlantic and Gulf coasts; and (4) Flota should be required to prorate its reefer space on a fair and reasonable basis among existing shippers and all other qualified banana shippers, under forward-booking arrangements of not more than two years.

Exceptions were filed by Consolo, Flota, and Panama Ecuador. Replies were filed by Consolo, Panama Ecuador, Flota, and Public Counsel.

Although generally supporting the recommended decision, Consolo excepted to the failure of the examiner (1) to recommend that the

Board order Flota to allot to him 50,000 cu. ft. of reefer space per week, and (2) to make certain findings of fact relating to common carriage and discrimination and prejudice.

Flota excepted to the findings that (1) it is a common carrier of bananas; (2) it has violated sections 14 Fourth and 16 of the Act; and (3) it should cancel its present banana contracts and prorate its reefer space among all qualified shippers. It contends that the decision is not supported by evidence, is contrary to law, and that the findings of violation of sections 14 and 16 of the Act were beyond the scope of the proceeding.

In its exceptions Panama Ecuador claims that the findings are not supported by the record and that the conclusions are contrary to law. It contends that the contract between it and Flota is not subject to the jurisdiction of the Board since it involves contract carriage.

DISCUSSION AND CONCLUSIONS

What we said recently in the Supplemental Report in *Banana Distributors, Inc. v. Grace Line Inc.*, 5 F.M.B. 615 (herein referred to as the Supplemental Report) is appropriate here, and we feel is dispositive of the issues presented in these proceedings. It is clear that in the operation of its freighter vessels between Ecuador and U. S. North Atlantic ports and between Ecuador and U. S. Gulf of Mexico ports, Flota is a common carrier by water in the foreign commerce of the United States, and therefore is subject to the provisions of the Shipping Act and to the jurisdiction of this Board. It is of no moment that Flota has restricted its banana carryings to special contracts: “* * * the movement of any commodity by a common carrier, regardless of the name the carrier uses in connection with it—or any part of it—must conform to the requirements of the Act, including its discriminatory injunctions, or be stricken down.” (Supplemental Report, page 622) Likewise, in *Philip R. Consolo v. Grace Line Inc.*, *supra*, we stated “* * * in spite of special arrangements of whatever sort, respondent [a common carrier by water] may not lawfully assume the status of a contract carrier to any shipper on its common carrier vessels, or grant to any shipper on such vessel special rates, special privileges, or other special advantages not accorded to all persons indifferently.” (page 300) And again, in the Supplemental Report, page 622, we said that “* * * a common carrier * * * owes a duty to the shipping public to serve similarly situated shippers alike.”

It is clear from this record that both complainants are qualified banana shippers. It is similarly clear that they were denied reefer space accommodations by Flota, to their prejudice and disadvantage, and that Panama Ecuador, in receiving and using that space, was fav-

ored and advantaged. We find no justification for this conduct on the part of Flota, and conclude that in denying reefer space to complainants, and in granting that space to a single favored shipper, Flota has acted in violation of sections 14 Fourth and 16 of the Act.

The arguments relating to the differences between Flota's vessels and Grace's vessels are not impressive. Both companies are common carriers by water and the Act applies equally to both. Inferior refrigeration, smaller sideports (and higher from the water line), an additional deck, cumbersome hatch plugs, and other paraphernalia found on the Flota vessels do not exempt Flota from the discriminatory proscriptions of the statute: qualified banana shippers must not be excluded from participation in the reefer space.

The limitations of Flota's vessels relate, we believe, to operational matters which we feel may be more properly solved by an experienced carrier.⁴ Our concern is with the protection afforded by the Act to qualified shippers.

Much has been made of the loading time required. The present shipper takes from 13½ to 15 hours to complete loading. Testimony on the additional time required by multiple shippers varies. Panama Ecuador's witness believes that loading time would be increased by 7 to 12 hours if three shippers were accommodated, 10 to 15 additional hours if six shippers were granted space, and up to 50 additional hours if ten shippers were involved; on the other hand, Consolo estimated that only an additional hour would be necessary if six shippers shared the space, and Banana Distributor's witness was of the view that six shippers would cause a two hour delay. Based on the record, the examiner found that loading by multiple shippers should not add more than five hours to the present loading time. We feel that the judgment of the examiner is clearly supported by the evidence. But even if up to 15 additional hours were required to accommodate six banana shippers, that fact would not justify exclusive long term space contracts to a favored shipper and the denial of that space to a qualified competitor. Operational difficulties and vessel limitations do not justify prejudice and discrimination otherwise undue and unreasonable.

On this record we find and conclude that Flota's practices in the Ecuador-North Atlantic trade—the exclusion of Consolo and Banana Distributors from participation in its reefer space and the allocating of that space to Panama Ecuador exclusively—constitute a violation

⁴ Similarly, segregating or otherwise identifying bananas of different shippers is an operational function and was so recognized by the examiner. The solutions suggested by him do not constitute error. As he pointed out, "There may be other means of easy identification which would suggest themselves to those intimately familiar with the ramifications of the banana business."

of sections 14 Fourth and 16 First of the Act. Contracts with the present shipper must be cancelled and the reefer space on the vessels in this trade must be made available, upon fair and reasonable basis, to all qualified banana shippers. Similarly, we find that Flota, as a common carrier by water between Ecuador and U.S. Gulf of Mexico ports, must make its reefer space available to all qualified banana shippers in that trade.

As we said in the Supplemental Report, a forward-booking system under which space contracts would be firm for not to exceed two years, in view of the economic problems inherent in the banana importing business, would be characterized as "just" and "reasonable" as opposed to "unjust" and "unreasonable", which aptly describes the present system.

What we shall require of Flota is that it make its reefer space proportionally available to all qualified banana shippers, upon a fair and reasonable basis, under forward-booking arrangements of not to exceed two years. We feel, however, that the operational problems may best be solved by the parties concerned. Flota may, through reasonable rules and regulations, require bonds from shippers, provide for dead freight, inspection, loading, stowing, and discharging, as well as other reasonable requirements, taking into consideration the physical limitations of the vessels and their reefer accommodations and the like, which shippers must meet in order to qualify as users of space. At the end of any forward-booking period, Flota shall re-allocate its space for additional periods among qualified applicants consonant with our directives herein.

Since we believe that the foregoing disposes of the matter, we make no findings with reference to the allegations of violation of section 15 of the Act.

An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 22nd day of June A.D. 1959.

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

No. 835

FLOTA MERCANTE GRANCOLOMBIANA, S.A.—CARRIAGE OF BANANAS
FROM ECUADOR TO THE UNITED STATES

No. 841

BANANA DISTRIBUTORS, INC.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

The proceedings docketed as Nos. 827 and 841 being at issue upon complaints and answers on file, and the proceeding docketed as No. 835 being at issue upon a petition for a declaratory order and replies thereto on file, and the proceedings having been consolidated and duly heard with respect to all issues other than reparation, 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 conclusions, decision, and findings therein, which report is hereby referred to and made a part hereof:

It is ordered, That:

1. Respondent be, and it is hereby, notified and required, not later than August 1, 1959, to cease and desist and to abstain from entering into, or continuing or performing any of the contracts, agreements, or understandings for the carriage of bananas, found herein to be in violation of sections 14 and 16 of the Shipping Act, 1916, as amended;

2. Respondent, within ten (10) days after the date of service of this order, shall offer to its present banana shippers and to all qualified banana shippers, upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas on respondent's vessels from Ecuador to United States ports for a period of not to exceed two years, said period to begin not later than August 1, 1959, and shall thereafter offer, for periods not to exceed two years, refrigerated space available for such carriage;

3. Respondent shall employ uniform, fair, and reasonable standards in determining the qualifications of applicant shippers, and in exercising its judgment in this regard, respondent shall take into consideration (1) applicant's financial capacity to engage in the banana business on a scale proportionate to the refrigerated space requested, (2) applicant's ability to arrange for the purchase, loading, and stowing of the bananas to be shipped, and (3) applicant's ability to arrange for the discharge of bananas; and to this end, respondent may require applicant shippers to provide verified information sufficient to enable respondent to make the necessary determinations;

4. Respondent be, and it is hereby, notified and required to establish, observe, and enforce just and reasonable regulations and practices relating to, or connected with, its receiving, handling, stowing, transporting, carrying, and discharging of bananas, which regulations and practices may include the following requirements: (a) each shipper shall furnish and maintain as security for performance of all of its obligations under the two-year forward booking a deposit in cash, negotiable securities, or a bond satisfactory to respondent equal to 12½ percent of the total minimum freight charges due under said forward booking, (b) no shipper shall be permitted, without the approval of respondent, to assign the forward booking or otherwise transfer any rights secured by him under said forward booking, (c) the payment by the shipper of dead freight of up to 90 percent of complete utilization of space assigned, (d) loading, stowing, and unloading shall be at the expense and risk of the shipper, respondent to have the right to designate the stevedore or itself to perform the necessary stevedoring at the port of discharge, (e) the treatment as a single shipper those individuals, partnerships, or corporations who are affiliated with each other to the extent of 10 percent or more common ownership;

5. Respondent shall file with the Board (a) copies of the two-year forward bookings entered into hereunder, (b) the regulations and practices adopted by respondent relating to its receiving, handling, stowing, transporting, carrying, and discharging of bananas, and (c) the criteria used by respondent in determining what applicant shippers are qualified;

6. The proceedings docketed as Nos. 827 and 841 be, and they are hereby, held open for further proceedings on the claims of complainants for reparation, if any; and

7. The proceeding docketed as No. 835 be, and it is hereby, discontinued.

By the Board.

(Sgd.) JAMES L. PIMPER
Secretary.

5 F.M.B.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-96

MOORE-McCORMACK LINES, INC.—APPLICATION UNDER SECTION
805(a)

Submitted July 22, 1959. Decided July 22, 1959

One voyage by the SS *Mormacpine*, commencing on or about July 29, 1959, carrying a full cargo of lumber from United States North Pacific ports to United States North Atlantic ports, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in coast-wise or intercoastal services, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

William B. Ewers for Moore-McCormack Lines, Inc.
Robert C. Bamford as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE MARITIME ADMINISTRATOR:

Moore-McCormack Lines, Inc. (Mormac), has applied for written permission of the Maritime Administrator under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, for its owned vessel the SS *Mormacpine*, which is under time charter to States Marine Corporation of Delaware (States Marine), to engage in one eastbound intercoastal voyage commencing at a United States North Pacific port on or about July 29, 1959, carrying a full load of lumber for discharge at United States North Atlantic ports. Notice of hearing was published in the Federal Register of July 13, 1959, and hearing has been held before the Administrator. No petitions to intervene were filed and no one appeared in opposition to the application.

States Marine, the charterer of the SS *Mormacpine*, conducts as a part of its regular steamship operations an eastbound intercoastal lumber service. For this late July sailing it has endeavored to obtain an appropriate vessel of the type required for this service, but has been unable to do so. No exclusively domestic operators in this trade have objected to the use of this vessel for this sailing.

Upon this record, it is found and concluded that the granting of written permission under section 805(a) of the Act for the Mormac owned vessel SS *Mormacpine*, which is under time charter to States Marine, to engage in one intercoastal voyage commencing at a United States North Pacific port on or about July 29, 1959, carrying a full cargo of lumber to United States North Atlantic ports, 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.

This report shall serve as written permission for the voyage.

5 M.A.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-97

AMERICAN PRESIDENT LINES, LTD.—APPLICATION UNDER SECTION
805 (a)

Submitted July 27, 1959. Decided July 27, 1959

The carriage of nine privately owned automobiles and household goods in an amount not to exceed 10 measurement tons, booked by Military Sea Transportation Service, from Hawaii to California aboard the SS *President Hoover*, voyage No. 20, sailing for San Francisco on or about July 28, 1959, found not to result in 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.

Vern Countryman for American President Lines, Ltd.

Willis R. Deming and *Alvin J. Rockwell* for Matson Navigation Company.

Robert C. Bamford as Public Counsel.

REPORT OF THE DEPUTY MARITIME ADMINISTRATOR

BY THE DEPUTY MARITIME ADMINISTRATOR:

American President Lines, Ltd. (APL), has applied for written permission of the Maritime Administrator, under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, to carry 9 automobiles and household goods in an amount not to exceed 10 measurement tons, booked by Military Sea Transportation Service (MSTS), from Hawaii to California on voyage No. 20 of the SS *President Hoover*, sailing for San Francisco on or about July 28, 1959. Hearing was noticed in the Federal Register of July 21, 1959, and was held before the Deputy Maritime Administrator on July 27, 1959. Matson Navigation Company (Matson) intervened as its interests might appear.

MSTS, on or about July 10, 1959, requested APL to carry the automobiles and household goods of MSTS passengers authorized to be carried on this voyage pursuant to the decision in Docket No. S-94. Matson has no objection to the proposed permission for the single voyage provided such action is without prejudice to the position of any party in Docket No. S-78.

Upon this record, it is found and concluded that the granting of written permission under section 805(a) of the Act for the carriage of 9 automobiles and household goods in an amount not to exceed 10 measurement tons, booked by MSTS, from Hawaii to California on voyage No. 20 of the SS *President Hoover*, commencing on or about July 28, 1959, would neither result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or inter-coastal service nor be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage. The action herein is without prejudice to the position of any party in Docket No. S-78.

5 M.A.

FEDERAL MARITIME BOARD

No. 830

AGREEMENTS NOS. 8225 AND 8225-1, BETWEEN GREATER BATON ROUGE
PORT COMMISSION AND CARGILL, INC.

Submitted June 23, 1959. Decided August 6, 1959

Agreement No. 8225 between respondent Greater Baton Rouge Port Commission and its lessee, respondent Cargill, Inc., leasing the former's grain elevator to lessee to operate as a public terminal facility, and under which lessee is granted certain exclusive and preferential rights, found subject to the filing and approval requirements of section 15 of the Shipping Act, 1916. Respondents have effectuated Agreement No. 8225 prior to filing with and approval by the Board, in violation of section 15 of the Shipping Act, 1916. Agreement No. 8225 found not unjustly discriminatory or unfair, detrimental to the commerce of the United States, or in violation of the Shipping Act, 1916, and approved by the Board.

Agreement No. 8225-1, a modification of Agreement No. 8225, creating a monopoly in grain stevedoring in respondent Cargill, Inc., would operate to the detriment of the commerce of the United States, and would be an unjust and unreasonable practice relating to the receiving, handling, and storing of property, in violation of section 17 of the Shipping Act, 1916. Agreement not approved by the Board.

George Mathews and Theo F. Cangelosi for respondent Greater Baton Rouge Port Commission.

Weston B. Grimes and Samuel D. Timmons for respondent Cargill, Inc.

Walter Carroll for intervener Baton Rouge Marine Contractors, Inc.

Robert E. Mitchell, Edward Aptaker, and Robert T. Hood, Jr., as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GULL, *Vice Chairman*,
THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This proceeding is an investigation instituted on the Board's own motion to determine whether Agreement No. 8225 and/or the amend-

ment thereto, Agreement 8225-1, between respondents Greater Baton Rouge Port Commission (Port), an agency of the State of Louisiana, and Cargill, Inc. (Cargill), has been carried out prior to approval by the Board, in violation of section 15 of the Shipping Act, 1916 (46 U.S.C. 814) (the Act), and whether operation under the agreements would otherwise result in violations of sections 16 First or 17 of the Act (46 U.S.C. 815 and 816), or would contravene any of the standards of section 15.¹ Notice of the two agreements, which were filed with the Board on April 25, 1957, for approval, if required, was published in the Federal Register on May 25, 1957 (22 F.R. 3713), and a protest thereto was filed by Baton Rouge Marine Contractors, Inc. (BARMA).

Hearings were held before an examiner, briefs were filed, and the examiner issued his recommended decision on February 3, 1959. The recommended decision concluded and found that:

1. Agreement No. 3225, leasing Port's grain elevator to lessee, was not subject to the filing and approval requirements of section 15.
2. Even if the lease agreement were subject to the requirements of section 15, it was not shown that the agreement contravened section 15 in any respect, and approval should be granted if required.
3. The lease agreement as modified by Agreement No. 8225-1, giving lessee exclusive right to stevedore vessels loading grain at the terminal, was subject to section 15 and resulted in unreasonable regulations and practices in violation of section 17 and was detrimental to commerce under the standards of section 15.

Exceptions to the recommended decision and replies thereto were filed, and oral argument has been heard by the Board. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in the proceeding.

FACTS

Agreement No. 8225, dated September 7, 1955, is a lease from Port to Cargill of Port's grain elevator and wharf for 20 years, with option for renewal for another 20-year term. Article 10 thereof stipulates that the facilities shall be maintained as public port facilities; that the:

lessee further agrees to the extent economically feasible that it will give preference to this grain elevator over other grain elevators operated by lessee in the Gulf area

and that:

¹ Pertinent portions of sections 15, 16, and 17 are reproduced in the appendix.

lessee is to maintain and publish rates and charges for the handling and storage of grain upon or within the facility on a competitive basis to rates published for similar services at New Orleans and other competitive Gulf ports * * *.

Article 17 provides in part that:

The lessor agrees that its rates for any and all privileges and services shall be competitive with, and not greater than, rates for similar services and privileges charged at other Gulf ports

and that:

during the term of this lease Cargill shall have the exclusive right to operate hereunder a public grain elevator within the Port Area as such area is defined by law

and that if:

the Port decides to construct additional grain storage and handling facilities, Port must first offer such facilities to Cargill for operation * * *.²

Agreement No. 8225-1, dated March 22, 1957, amended Article 10 and provides that Cargill will render stevedoring services exclusively, at rates competitive with New Orleans and other competitive Gulf ports.

Cargill is licensed by the Department of Agriculture (Agriculture), in accordance with the United States Warehouse Act (7 U.S.C. 241, *et seq.*), to conduct the grain elevator, which is described in the license as consisting of tanks, bins, etc., located between Louisiana Highway No. 1 and the levee of the Mississippi River one mile south of Port Allen, La. Not mentioned are the wharf, loading galleries, chutes, and other paraphernalia used in the delivery of grain to vessels, which installations are located on the river side of the levee in the river itself and outside the area described in the license. Cargill, referred to as "warehousemen," is authorized to store not in excess of 2,800,000 bushels at any one time.

Agreement No. 8225-1 and a schedule of charges for receiving, unloading, handling, storing, delivering, loading, and stevedoring has been filed by Cargill with Agriculture. The rates were accepted and the agreement was not disapproved.³ The licensing by and filing with Agriculture are relied upon by Cargill in support of its contention that the primary regulatory authority over its activities rests with Agriculture and not with the Board.

Certain preliminary functions are performed by the stevedore before the ship goes to the elevator. For instance, he must know the

² The elevator is financed by Port with money received as rent from Cargill.

³ There is no showing that the Warehouse Act or the rules and regulations thereunder require the filing with Agriculture of stevedoring rates or the lease agreements.

capacity of each compartment of the ship; the terms of the charter party and the kinds of grain involved; the overtime provisions, and apply them in the best interest of the ship owner; and the ship's condition as to grain fitting, and must install or repair them as needed. The ship must be "laid out" and the stowage carefully planned with due respect to proper draft and distribution, as well as the discharge of grain in the several ports in the proper rotation. Also, he must cooperate with the various inspection services to obtain the proper authorization before loading.

The loading of grain vessels requires skill and judgment to assure the ship's seaworthiness. The relation between vessel and stevedore involves trust, reliance, and dependence on the skill, reliability, and efficiency of the stevedore in the performance of an important ship-operating function. Under the form of grain charter used in the Gulf, including Baton Rouge, the vessel owner appoints the stevedore, except where by special provision the right of appointing is given the charterer. In all instances the decision on all matters of loading rests with the master, the vessel and her owners are legally and contractually responsible for the proper loading and seaworthiness of the vessel, and they pay the cost of loading.

There is a complete separation of the function of the elevator in delivering grain and that of the vessel in receiving and stowing it. There is no physical connection between vessel and elevator except mooring and guide lines. The latter hold the spout which discharges the grain into the hatch under control of the stevedore. The elevator has completed delivery when the grain flows out of the spout. All remaining functions are those of the stevedore, who in effect takes over the ship's operation for the time being.⁴ The elevator personnel perform no function on the vessel; the stevedore personnel perform no services in the elevator or on the wharf. There is, of course, necessity for cooperation between the two groups as the stevedores must signal terminal personnel in order to control the flow of grain.

Port commenced operations as a newly expanded general cargo and grain port with the opening of the grain elevator in September 1955. Cargill published Tariff No. One, effective July 1, 1955, embodying charges for storage, receipt, and delivery of grain, but not for berthing and loading of vessels. Later, rates for berthing and loading of vessels were published in Vessel Tariff No. One, effective October 4, 1955, which gave preference to ocean liners for berthing.⁵

⁴ As grain is dropped into the ship, samples are taken to a laboratory licensed by Agriculture for inspection to determine its quality. The elevator must correct any mistakes resulting from delivery of the wrong grade or type of grain through the spout.

⁵ This tariff was superseded by a similar tariff—Vessel Tariff No. Two—effective October 1, 1957.

In the meantime, four Gulf stevedoring firms⁶—with the encouragement of Port and Cargill, and with the advice from Cargill that the elevator would be “open” to stevedores and not operated on an exclusive basis, and that the stevedore would have to deal directly with the vessel—organized BARMA to supply agency and stevedoring services, particularly on grain, at Baton Rouge. Previously, these firms had solicited and sought from Cargill (unsuccessfully) an exclusive stevedoring agreement, but finally decided to organize a joint company in view of the substantial capital investment required for trimming machines. BARMA purchased equipment, including grain trimming machines, opened and staffed an office in Baton Rouge, and commenced procuring supervisory personnel and labor, most of which had to be trained. Because of this and difficulties encountered with the new elevator, which has only one delivery belt, efficiency and turnaround of vessels was not up to par, beginning with loading of the first grain vessel in September 1955. By spring of 1956, however, after many meetings between Cargill and BARMA relative to means of improvement, efficiency was improved and the operation compared favorably with that at other Gulf elevators having only one delivery belt. Due to inexperienced labor, plus the unknown quantities involved in handling the new grain facilities, BARMA’s original stevedoring rates were fixed somewhat higher than at New Orleans. They are still slightly higher although the labor rate per hour at Baton Rouge has been lower than at New Orleans.

In August 1956, after renewing complaints to BARMA about dispatch,⁷ Cargill brought into Baton Rouge its wholly owned subsidiary, Rogers Terminal and Shipping Corporation (Rogers), and advised BARMA that it was no longer welcome at the elevator, and that thereafter all the grain stevedoring would be done by Rogers. BARMA refused to withdraw, and in March 1957, respondents, without notice to BARMA, entered into the exclusive stevedoring arrangement by execution of Agreement 8225-1. Port made no inquiry as to how Cargill would conduct the stevedoring operation. After this ar-

⁶ Texas Transport and Terminal Corp., Atlantic & Gulf Stevedores, Inc., Strachan Shipping Co., and T. Smith & Son, Inc., which serve Gulf ports generally and perform approximately 75 percent of grain stevedoring at New Orleans. These companies designate BARMA as Baton Rouge agent for all vessels represented by them in New Orleans.

⁷ Cargill’s elevator superintendent testified that at a meeting on August 9, 1956, he complained to BARMA’s officials about the efficiency of its superintendent. This, the officials could not recall. Cargill’s superintendent also testified as to other complaints, but he could recall only one instance of what he termed a lack of cooperation, which was explained by BARMA’s general manager as due to the orders of the master of the vessel. At this meeting BARMA presented data to Cargill showing that dispatch and turnaround at Baton Rouge compared very favorably with that at New Orleans and other Gulf ports as to vessels handling only one grade or type of grain. Neither Cargill nor Port made any complaints in writing.

rangement the Baton Rouge elevator was the only one of nine elevators in the Gulf area not "open" to stevedores.

The reason given for the amended agreement is that the loading of vessels may be "integrated into the over-all elevator operation so as to provide a more efficient service." The performance records indicate, however, that the average hourly tonnage loaded by BARMA has exceeded that of Rogers by a substantial percentage, both before and after the exclusive arrangement. Rogers hired away from BARMA some of its key supervisory personnel. Both use the same type of equipment and the same union labor force and pay the same wages. Their stevedoring rates are the same except for such discount as is given by BARMA for an annual contract with the shipowner.

Since the advent of Rogers, Cargill's affiliates⁸ have appointed it as stevedore. BARMA has been able, however, to hold on to half of the grain stevedoring business at Baton Rouge and 80-85 percent of business on vessels having the right to select the stevedore. BARMA is in a sound financial position, but its vice-president testified that the loss of grain business, which provides its largest income, probably would force it to go out of business.

In *D. J. Roach, Inc. v. Albany Port District et al.*, 5 F.M.B. 333 (1957), the Board decided that the Warehouse Act relates to the storage of grain as opposed to its movement, and that it did not limit the jurisdiction of the Board over Cargill's activities at Albany, N.Y., as an "other person subject to this act." Soon thereafter, Cargill published at Baton Rouge Tariff No. Two, effective November 7, 1957, which superseded both its tariff covering storage, etc. (Tariff No. One) and its tariff covering berthing and loading (Vessel Tariff No. Two), the latter of which had been in effect only since October 1, 1957. (See footnote 5.) The new tariff, which, as stated, was filed with Agriculture, combines into one document the hitherto separate elements of its two predecessors—storage of grain and berthing and loading of vessels. It publishes for the first time rates for stevedoring services, and provides for vessel owner's application for and Cargill's approval of berth occupancy, which constitutes a contract between them to abide by the terms of the tariff. Like its predecessor, the new tariff provides that ocean liners shall be given preference. The elevator is open to both common and contract carriers. No change in practice resulted from publishing Tariff No. Two. Cargill has not required the exclusive use of its stevedoring service, or charged the stevedoring rates in Tariff No. Two, or required signed applications for berthing service. Thus it appears that Agreement 8225-1 has not been carried out prior to approval by the Board.

⁸ By itself or through affiliates, Cargill is a substantial charterer of grain vessels.

We first conclude, as did the examiner, that the fact that Cargill's grain storage activities are regulated by the Secretary of Agriculture under the Warehouse Act, in no way limits our jurisdiction over Cargill's terminal activities under the Shipping Act, 1916. *D. J. Roach, Inc. v. Albany Port District et al., supra.*

Cargill operates terminal facilities in Baton Rouge and in other areas, and is clearly an "other person" subject to the Act. Port operates a public general cargo dock and admits that it is an "other person" subject to the Act, and we find that the agreements here involved are between such "other person[s]."

If agreement No. 8225 and amendment No. 8225-1 are agreements in any way—

* * * fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement—

then section 15 of the Act requires filing with and approval by the Board before they may be carried out.

We consider first the original lease, Agreement No. 8225.

Cargill urges, and the examiner found, that this agreement was purely and simply a lease establishing Cargill as a tenant and Port as a landlord; that it did not limit and restrain competition between the parties; and that it did not fix rates, or prevent, destroy, etc., competition, or constitute a working arrangement within the meaning of section 15. With this we cannot agree.

Agreement No. 8225 goes far beyond the usual provisions of a mere lease of property. Article 10 recognizes that Cargill operates other grain elevator facilities in the Gulf area, and provides that Cargill will prefer the Baton Rouge facility over such other facilities in the Gulf area. Article 17 provides that Cargill will maintain rates competitive with but not greater than rates at other Gulf ports; that Cargill has the exclusive right to operate the terminal for up to 40 years; and that if Port should construct additional grain facilities, such facilities would be first offered to Cargill for operation.

These provisions fix and regulate transportation rates or fares, give special privileges or advantages, control, regulate, prevent, or destroy competition, and provide for an exclusive, preferential, or cooperative working arrangement within the meaning of section 15. This exclusive lease has never been approved by the Board as required by sec-

tion 15, but has been carried out by the parties since September 7, 1955. To this extent, Cargill and Port have acted unlawfully and in violation of section 15.

We find nothing in the record, however, which indicates that Agreement No. 8225 in any way is unjustly discriminatory or unfair, detrimental to the commerce of the United States, or in violation of the Act. Publication of notice of Agreement No. 8225 in the Federal Register on May 25, 1957, elicited no protest other than that of BARMA, which was primarily directed to the subject matter of the amendment, Agreement No. 8225-1. In view of the foregoing, we will approve Agreement No. 8225.

We next consider whether the modification of the lease agreement, Agreement No. 8225-1, requires approval under section 15, and if so, whether such approval should be given.

Agreement No. 8225-1 clearly is within the coverage of section 15. It is between "other person[s]" subject to the Act and provides that Cargill will render stevedoring services exclusively at the grain terminal here involved. This modification of the lease agreement controls and regulates competition, and requires approval by the Board under section 15 before it may be carried out. It is apparent that the agreement has not been carried out by the parties without approval, in violation of section 15.

The clear purpose and intent of Agreement No. 8225-1 is to vest in Cargill the exclusive right to provide stevedoring at this grain terminal in Baton Rouge. The effectuation of this monopoly would result in all the grain trimming on vessels using the terminal being done by Cargill's wholly owned subsidiary, Rogers, while neither BARMA nor any other stevedore could provide such service. Vessels using the grain facility would be foreclosed from choosing any stevedore except Rogers to trim grain as it is loaded into the vessel.

The particular operation performed by the stevedores at this grain elevator involves merely the trimming of the grain in the vessel; none of the stevedore activity here in issue involves the use of any of the property or facilities of the terminal. Responsibility for the proper loading and seaworthiness of the vessel rests with the master, and to permit Port and Cargill to prohibit the vessel from participation in the selection of a stevedore would require strong justification.

We do not consider the justification advanced by Cargill and Port to be persuasive. The record does not show that a monopoly of stevedoring in Cargill's subsidiary, Rogers, will improve the efficiency of the grain terminal, but does show that BARMA has gradually improved its stevedoring service, which has, in fact, evidenced some superiority over that of Rogers.

In view of the foregoing, and the further fact that Agreement No. 8225-1 would create in Cargill a monopoly over activities which take place exclusively on the vessel and not on terminal property, we conclude that Agreement No. 8225-1 would be detrimental to the commerce of the United States, and would be an unjust and unreasonable practice relating to the receiving, handling, and storing of property, in violation of section 17 of the Act. We will not approve Agreement No. 8225-1.

The conclusion here reached is not in conflict with our decision in *Roach, supra*, where there was no showing that Cargill had been granted an exclusive stevedoring right by the Albany lease, and the issue involved was the right of Cargill, where it had entered into a stevedoring contract with the vessel, to appoint a sub-agent of its own choosing.

An appropriate order will be entered.

Appendix

Section 15, Shipping Act, 1916, in part:

That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character or sailings between ports: limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Section 16, Shipping Act, 1916, in part:

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 17, Shipping Act, 1916, in part:

* * * 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.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 6th day of August A.D. 1959

No. 830

AGREEMENTS NOS. 8225 AND 8225-1, BETWEEN GREATER BATON ROUGE PORT COMMISSION AND CARGILL, INC.

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 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 Agreement No. 8225 be, and it is hereby, approved; and

It is further ordered, That Agreement No. 8225-1 not be approved; and

It is further ordered, That this proceeding be, and it is hereby, discontinued.

BY THE BOARD.

(Sgd.) GEO. A. VIEHMANN,
Assistant Secretary.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-99

FARRELL LINES INCORPORATED—APPLICATION UNDER SECTION 805(a)

Submitted August 19, 1959. Decided August 19, 1959

One voyage of the SS *African Pilot*, commencing on or about August 25, 1959, carrying lumber or lumber products from United States Pacific ports to United States North Atlantic ports, or general cargo to United States Gulf ports, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in the coastwise or intercoastal service, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Ronald A. Capone for Farrell Lines Incorporated.

Robert E. Mitchell, Edward Aptaker, and Robert C. Bamford as Public Counsel.

REPORT OF THE DEPUTY MARITIME ADMINISTRATOR

BY THE DEPUTY ADMINISTRATOR:

Farrell Lines Incorporated (Farrell) has applied for written permission of the Maritime Administrator, under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, for its owned vessel the SS *African Pilot*, which is under charter to States Marine Lines, Inc. (States Marine), to engage in one intercoastal voyage commencing at United States Pacific ports on or about August 25, 1959, carrying lumber or lumber products to United States North Atlantic ports, or general cargo to United States Gulf ports. Notice of hearing was published in the Federal Register of August 13, 1959 (24 F.R. 6584), and hearing was held before the Chief Examiner. There were no petitions to intervene and no one appeared in opposition to the application.

The Chief Examiner issued an oral initial decision at the close of the hearing. He found and concluded that since no intervener appeared after proper publication of notice, and since no exclusively domestic operator has indicated opposition to the requested sailing, the granting of the requested written permission 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, and that written permission should be granted. The parties stipulated that no exceptions to these findings and conclusions would be filed.

I adopt the foregoing findings and conclusions of the Chief Examiner, and this report will serve as written permission for the requested voyage.

5 M.A.

FEDERAL MARITIME BOARD

SPECIAL DOCKET No. 242

KETCHIKAN SPRUCE MILLS

v.

COASTWISE LINE

*Submitted September 17, 1959. Decided September 17, 1959**

Rate charged by respondent on a shipment of insulating material from Long Beach, California, to Seward, Alaska, destined to Fairbanks, Alaska, not shown to be unreasonable. Application denied.

INITIAL DECISION OF C. W. ROBINSON, EXAMINER

Pursuant to Rule 6 (b) of the Board's Rules of Practice and Procedure, sworn application has been submitted by respondent to permit it voluntarily to pay reparation to complainant.

By bill of lading dated October 8, 1958, respondent accepted from Johns-Manville Products Corporation 15,512 pounds of mineral wool (insulating material) for carriage by respondent from Long Beach, California, to Seward, Alaska, thence by Alaska Railroad to Fairbanks, Alaska, consigned to Fairbanks Lumber Supply. The material was purchased by complainant, which was billed by the shipper for the freight charges.

Measuring 3,695 cubic feet, the commodity involved was billed as 55,425 pounds in accordance with Item 102, First Revised Page 18-B, of respondent's Freight Tariff 3-A, F.M.B.-F No. 6.¹ The rate charged was \$4.14 per 100 pounds, plus surcharge of 15 percent (or a total rate of \$4.76), in accordance with Item 750, 13th Revised Page 35, and Item 57, 4th Revised Page 15, of the said tariff, plus wharf-

*In the absence of exceptions thereto by the parties, and upon notice by the Board, the initial 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).

¹ Item 102 provides as follows:

"When light and bulky articles are accepted, the weight of which is less than fifteen (15) pounds per cubic foot of space occupied, the charges on such light and bulky shipments will be computed by applying the commodity or class rate applicable, based on a weight of fifteen (15) pounds for each cubic foot of space occupied."

age at Long Beach of \$5.43. The total charges collected by respondent for its portion of the transportation amounted to \$2,643.66, including Long Beach wharfage.²

Complainant states that the assessed charges did not come to its attention until the invoice for the shipment was received from the shipper, and it contends that if it had been informed by the shipper, prior to shipment, what the charges would have been via the route actually used, it would have instructed routing from Long Beach to Seattle, Washington, by rail, thence by Alaska Steamship Company to Seward, and thence by rail to Fairbanks, at a total cost of \$1,792.42. Refund of \$1,422.08 is asked from respondent (refund of \$1,468.80 is being sought from Alaska Railroad), on the basis set out in footnote 3.

The application of the rate was explained by respondent to the shipper prior to acceptance of the shipment. Thus, the shipment was made with full knowledge of the legal rate on file with the Board. Having accepted the shipment, respondent was obligated to charge the applicable rate. The payment of reparation under the special docket procedure, whereby the shipper is willing to receive and the carrier is willing to pay, can be approved only upon an affirmative finding that the rate charged was in fact unreasonable, in the same manner as if the carrier were opposing the payment. *Swift & Co. v. C. & A.R. R. Co.*, 16 I.C.C. 426, 428 (1909); *Pabst Brewing Co. v. C., M. & St. P. Ry. Co.*, 17 I.C.C., 359, 360 (1909). The mere fact, without more, that the ultimate consignee (complainant here) would have routed the shipment via an alternative route, at a lesser total cost, does not justify the conclusion that the rate charged was unreasonable. As there has been no showing that the rate under consideration was unlawful, respondent may not refund the difference between such rate and the rate which would have been applicable had the shipment been routed in the manner outlined by complainant.

The application is denied.

² The application states that respondent collected \$2,039.64 for Alaska Railroad as the latter's share of the transportation, in accordance with Item 1540 of Tariff No. 5-M of the latter. The rail tariff is not on file with the Board.

Respondent's share of rate charged.....	\$2, 638. 23
Respondent would have received on actual weight.....	738. 37
	1, 899. 86
Less additional cost via alternative route.....	477. 78
	1, 422. 08
Refund sought.....	1, 422. 08

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-100

MOORE-McCORMACK LINES, INC.—APPLICATION UNDER SECTION 805(a)

Submitted November 10, 1959. Decided November 10, 1959

Moore-McCormack Lines, Inc., granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for its own vessel the SS *Mormacpine*, presently under time charter to States Marine Lines, Inc., to be subchartered to Luckenbach Steamship Co., Inc., for one intercoastal voyage carrying general cargo from the San Francisco Bay area to United States North Atlantic ports, commencing on or about November 14, 1959, since granting of the permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, and (2) not to be prejudicial to the objects and policy of the Act.

Ira L. Ewers and R. J. Thompson for applicant.

J. Alton Boyer for Luckenbach Steamship Co., Inc., *Ira L. Ewers* of counsel.

Ira L. Ewers for States Marine Lines, Inc.

Robert E. Mitchell, Edward Aptaker, and Robert C. Bamford as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE ADMINISTRATOR:

Moore-McCormack Lines, Inc., filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1223) (the Act),¹ for its owned vessel the SS *Mormacpine*, presently under time charter to States Marine Lines, Inc., to be subchartered to Luckenbach Steamship Co., Inc., for one

¹ See appendix.

intercoastal voyage in Luckenbach's intercoastal service, carrying general cargo, commencing San Francisco Bay area on or about November 14, 1959, for discharge at United States North Atlantic ports. The *Mormacpine* is to be redelivered by the subcharterer at an east coast port on or about mid-December.

The application was duly noticed in the Federal Register of October 27, 1959 (24 F.R. 8683), and hearing was held on November 10, 1959. No one intervened in opposition to the granting of the requested permission.

The uncontroverted evidence is that Luckenbach is a common carrier of general commodities in the intercoastal trade; that regular service between United States Pacific coastal ports and North Atlantic ports north of Baltimore has been provided by Luckenbach for many years; that Luckenbach has supplemented its regular service with additional sailings with owned or chartered vessels when sufficient cargo is available to require additional sailings; that current cargo requirements are such that Luckenbach's regular vessels are unable to meet the needs of shippers; and that the *Mormacpine* is required to meet these needs.

On this record it is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report will serve as written permission for the voyage.

APPENDIX

Section 805(a), Merchant Marine Act, 1936:

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

5 M.A.

FEDERAL MARITIME BOARD

No. S-67

T. J. MCCARTHY STEAMSHIP COMPANY—APPLICATION UNDER SECTION 805(a)

Submitted June 19, 1957. Decided December 4, 1959

Continuation of its automobile carrying service between Detroit and Cleveland and between Detroit and Buffalo by T. J. McCarthy Steamship Company, in the event it is awarded an operating-differential subsidy contract, found not to constitute unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, or to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended, within the meaning of section 805(a) thereof, and written permission for the continuation of such service, in the event subsidy is awarded, granted.

Continuation of a bulk cargo service, relating to ore and coal as presently constituted, between United States ports on the Great Lakes by T. J. McCarthy Steamship Company, in the event it is awarded an operating-differential subsidy contract, found to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended, and written permission for the continuation of such service in the event subsidy is awarded, denied.

Paul D. Page, Jr., and Arthur E. Tarantino for T. J. McCarthy Steamship Company.

John H. Eisenhart, Jr., for Great Lakes Ship Owners Association, and *Donald A. Brinkworth* for Eastern Territory Railroads, interveners.

Robert E. Mitchell, Edward Aptaker, Edward Schmeltzer, and Robert B. Hood, Jr., as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*,
THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This proceeding relates to a request by T. J. McCarthy Steamship Company (McCarthy), an applicant for an operating-differential sub-

sidy contract, for written permission, under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act),¹ to continue certain domestic water-carrier operations in the event it is awarded a subsidy contract. The domestic services which applicant proposes to continue are (1) an automobile-carrier service from Detroit to Cleveland and from Detroit to Buffalo, and (2) a bulk service between any and all United States ports on the Great Lakes (the Lakes).

Eastern Territory Railroads² (the railroads) and Great Lakes Ship Owners Association³ (the Association) intervened in opposition to the request for permission.

Because we felt that the first record presented in this proceeding did not contain facts sufficient to determine the issues, we remanded the matter to the examiner for further hearing. Hearing has been held, a recommended decision has been served, exceptions and replies have been filed, and we have heard oral argument thereon.

FACTS

Automobiles.—The principal shipper of automobiles by water from Detroit to Duluth, Cleveland, and Buffalo is Chrysler Corporation (Chrysler). McCarthy has long been engaged in the water movement of automobiles from Detroit to Cleveland and to Buffalo. It has operated one vessel in the trade continuously since 1935, and two other vessels have been operated by it or its predecessor in interest since 1937, except for the years of World War II. Its three automobile carriers have been specially converted for the trade and each vessel accommodates from 420 to 450 vehicles. Cleveland and Buffalo are served on separate voyages, usually, and the vessels ballast back to Detroit after discharging. Cleveland voyages require a 24-hour turnaround whereas Buffalo voyages require a 48-hour turnaround. McCarthy owns and maintains specialized shoreside facilities at these three cities, but similar facilities other than those of McCarthy are available at those places.

Like McCarthy, Nicholson owns three bulk carriers specially converted for the automobile trade and, from 1955 through 1957, also engaged in the movement of automobiles from Detroit to Cleveland and to Buffalo.

¹ See appendix.

² Engaged in the transportation of persons and property between points in northeastern United States—including Detroit, Cleveland, Buffalo—and North Atlantic ports.

³ Bison Steamship Company (Bison), Copper Steamship Company (Copper), Gartland Steamship Company (Gartland), Nicholson Transit Company (Nicholson), Oglebay Norton Company (Columbia Transportation Division) (Columbia), and Roen Steamship Company (Roen). McCarthy and the Association members are certificated by the Interstate Commerce Commission to operate common-carrier services on the Great Lakes.

In 1957, after McCarthy's application for operating-differential subsidy aid had been filed, Chrysler decided to give all of its Cleveland and Buffalo business to McCarthy and all of its Duluth business to Nicholson. It is not economically feasible, however, for Nicholson to employ its specially converted automobile carriers in the Detroit-Duluth service (the turnaround time being six days), and vessels must be employed which can accommodate return bulk cargoes, principally iron ore and grain. Thus, since 1957, Nicholson's three converted auto carriers have been tied up for lack of business. The record shows that these three vessels were employed exclusively between Detroit and Cleveland and Buffalo.

Gartland and Columbia occasionally carry automobiles but they do not compete with Nicholson or McCarthy.

In 1953 both McCarthy's and Nicholson's auto carriers were fully utilized, but offerings have decreased since that time, and the establishment of an assembly plant by Chrysler in Delaware will tend to prevent the 1953 eastward volume of automobiles from Detroit from occurring in the foreseeable future. McCarthy's own witness is of the view that three automobile vessels can accommodate all the automobiles offered in the foreseeable future.

Bulk trades.—Between 1953 and 1956, about 98 percent of all traffic moving on the Lakes between U.S. ports and U.S. and Canadian ports was bulk cargo, most of it being proprietary cargo and consisting, chiefly, of iron ore, coal, limestone, and grain. The domestic bulk movement on the Lakes has declined from 165,000,000 short tons in 1954 to 153,000,000 short tons in 1956. In 1956 the Association carried less than 10 percent of the available bulk cargoes. In 1957 McCarthy acquired four bulk carriers from Wilson Transit Company, at which time it obligated itself to carry part of the ore which Wilson had contracted to carry for Republic Steel. This contract has three years to run and Wilson has the option to continue it for another five years. Under the contract, McCarthy is required to carry a maximum of 700,000 tons of ore per season for Wilson.

McCarthy's bulk vessels, at the opening of the navigation season, sail for Lake Superior to load ore or other available cargo and generally unload at Lake Erie ports. Occasionally, coal is carried north but more often the vessels travel light in that direction. Grain, salt, sand, and stone are also carried. Although a profit was realized in 1957, McCarthy's bulk service resulted in a loss of \$100,000 in 1958.

In 1957, McCarthy made about 300 calls at approximately 20 ports, carrying about 1,093,584 short tons. The capacity of its four vessels is slightly under 30,000 tons or about 3 percent of the capacity of all the independent companies on the Lakes.

In addition to the three converted vessels operated in the eastbound automobile trade, Nicholson also operates nine vessels on the Lakes: four are engaged in the transportation of automobiles to Duluth and bulk cargoes on return, four are used chiefly on Lake Erie in the regulated trade, and one is used generally in the regulated trade, sometimes carrying bulk goods. Grain is the principal bulk commodity handled, and Nicholson is chiefly competitive with McCarthy in the grain and coal carrying business. Nicholson's vessels have served Canada, and under its grain contracts it may be required to call at Canadian ports. Nicholson's vessels are not suitable for carrying ore.

Columbia operates nine bulk carriers on the Lakes. None of its vessels were laid up for lack of cargo in 1956 or 1957, but four were inactive in 1958. Its vessels have consistently called at Canadian ports, and its witness testified that all its vessels are available for Canadian calls.

Four bulk carriers are operated on the Lakes by Gartland, carrying grain, coal, and ore. All its vessels sailed substantially full in 1958, and Canadian ports are served as attractive cargoes are offered.

Bison, Roen, and Copper took no active part in the hearings. Bison owned no floating equipment and had no operating revenue for 1948, the last year for which it filed an annual report with the Interstate Commerce Commission. Copper owns no floating equipment and carried only manufactured goods from Detroit to Duluth. Roen operates tugs and barges only, and has served Canadian ports with its equipment.

Since McCarthy entered the bulk trades, the carryings of coal and grain by the Association members have declined: the combined grain movement of Nicholson, Gartland, and Columbia decreased from 33,000,000 bushels in 1957 to 32,000,000 bushels in 1958, and the coal movement of Nicholson and Columbia decreased from 988,000 tons in 1957 to 433,000 tons in 1958.

DISCUSSION AND CONCLUSION

Written permission to continue its two separate domestic services cannot be granted McCarthy, absent a finding that applicant qualified for the permission under the so-called "grandfather" rights proviso,⁴ if it is found that the continuation of such service or services (1) would result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, or (2) would be prejudicial to the objects and policy of the Act.

⁴ "Grandfather" rights were not asserted by McCarthy, hence we have no concern with that proviso.

Not being an entity engaged in the operation of vessels in the coast-wise or intercoastal service, and in order to prevail, intervener railroads must show that "the objects and policy of this Act" relate somehow to railroad interests. It is clear, however, as the examiner found, that we are concerned with the objects and policy of *this* Act as opposed to an over-all transportation policy, and that the policy of the Act is specified in section 101: "* * * to foster the development of * * * a merchant marine." The contentions of the railroads therefore must be rejected.

Automobiles.—The record supports the finding that in the operation of its three specially converted automobile carriers from Detroit to Cleveland and Buffalo, Nicholson is an operator "furnishing [a domestic] service that does not include foreign ports," and regardless of the Canadian calls made by this operator in its bulk operations, it is, as to the eastbound automobile trade from Detroit, entitled to the protection which section 805(a) affords exclusively domestic operators. *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 F.M.B.—M.A. 457 (1951); *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B.—M.A. 488 (1954). Therefore, if the grant of permission would result in unfair competition to Nicholson in this trade, the permission must be denied.

There is no indication here that the grant of permission to McCarthy would result in McCarthy's ability to compete with Nicholson for additional automobile business. We are called upon to decide whether the retention by McCarthy of its present business would result in unfair competition to Nicholson, and we are urged to apply the so-called "fundamentally entitled" doctrine here, with the result that applicant would be ousted from a business which it long ago established.

The doctrine, we feel, has no applicability to this peculiar situation. It had its beginning in *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17, supra*. An application for section-805(a) permission was denied in that proceeding because the proposed service would "deprive the regular intercoastal lines of cargo which they need, have the capacity to carry, and to which they are fundamentally entitled." There was involved an established subsidized operator's attempt to inaugurate a new intercoastal service in conjunction with an unsubsidized foreign service. In *American President Lines, Ltd.—Subsidy, Route 17, supra*, again the situation presented involved an application to institute a new domestic service, and the Board applied the rule: "* * * those operators who provide exclusively intercoastal services are entitled, as against primarily offshore operators such as APL, to

whatever intercoastal cargo they can carry.” In *Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii*, 5 F.M.B.—M.A. 287 (1957), a subsidized operator sought to initiate a service to Hawaii and the Board, relying upon the doctrine here under discussion, denied the permission: “* * * in conformity with principles previously announced * * * we feel that Matson, an exclusively domestic operator in the California/Hawaii trade, has the capacity to carry such cargoes and, as opposed to PFEL, primarily a subsidized offshore operator, is fundamentally entitled to such cargoes.” In *Isbrandtsen Co., Inc.—Subsidy, E/B Round the World*, 5 F.M.B. 448 (1958), the doctrine was relied upon to deny permission to applicant for an eastbound intercoastal service to ports north of Baltimore and for a Puerto Rico-Philadelphia-Baltimore service, as an integral part of the proposed subsidized service. In invoking the doctrine in the former service we noted that the exclusively domestic operator, long established in the trade, had the ability to carry the cargoes and the need for them. Similarly, in the Puerto Rico-Philadelphia-Baltimore service, the long-established exclusively domestic operator was protected by the doctrine.

The facts in the instant application present an entirely different situation: McCarthy, a long-established domestic operator, desirous of pioneering a foreign service on Trade Route 32, is seeking permission to retain a domestic service with which it has been long identified and which would be separate and apart from its proposed subsidized service. The fundamentally entitled doctrine has been employed (a) to deny permission to a subsidized operator to inaugurate a new domestic service where established domestic operators entitled to protection have the need for, and capacity to carry, cargoes which the applicant would attract (*Am. Pres. Lines, Ltd.—Unsubsidized Operation Route 17, American President Lines, Ltd.—Subsidy, Route 17*, and *Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii, supra*), and (b) to deny permission to a subsidy applicant to continue domestic services as part of subsidized offshore services using subsidized vessels where such domestic services have been served by domestic operators who need the cargo and have the ability to carry it (*Isbrandtsen Co., Inc.—Subsidy, E/B Round the World, supra*). We will not extend the fundamentally entitled doctrine to deny the continuation of an exclusively domestic service by a subsidy applicant where, as here, the applicant has a long and continued association with the protected trade, and where he proposes to operate such service separate from his subsidized service. If we did, such an operator could not participate in the development of our merchant marine by

inaugurating a separate and distinct subsidized service without suffering the penalty of being ousted from his unconnected traditional domestic service. We find that the continuation of the automobile business by McCarthy, in the event subsidy is awarded, would not result in unfair competition to any person, firm, or corporation engaged exclusively in the coastwise or intercoastal service.

Nor can we find that the granting of the permission would be prejudicial to the objects and policy of the Act. The denial of the application on this ground would, as the examiner found, result merely in the deactivation of McCarthy's three automobile carriers and the reactivation of Nicholson's three carriers. This would not constitute a furtherance of the policy of the Act, and would result in a denial to the principal shipper of his choice of carriers. We therefore find that permission to engage in the automobile carrying business from Detroit to Buffalo and to Cleveland, in the event subsidy is awarded, would not be prejudicial to the objects and policy of the Act. Section-805(a) permission for this service will be granted, as a separate and distinct service from the proposed subsidized service.

Bulk trades.—None of the interveners operates, within the meaning of section 805(a), an exclusively domestic service in the bulk trades; hence, whether or not the requested permission should be granted depends upon whether the continued operation would be prejudicial to the objects and policy of the Act. *Isbrandtsen Co., Inc.—Subsidy, E/B Round the World, supra.*

Ore, coal, and grain are the chief commodities carried in the bulk trades by McCarthy. About one-half of its total movement—1,093,000 tons—consists of ore which it is obligated to carry for Wilson Transit Company—a maximum of 700,000 tons per year. The balance is mainly coal and grain. With the opening of the St. Lawrence Seaway, it is expected that much of the grain which moved to Buffalo and then overland to an Atlantic port will move directly to foreign destinations, resulting in a total movement reserved to Lakes carriers somewhat smaller than in pre-Seaway days.

Although the intervening carriers have not been exclusively engaged in the domestic trades, it is clear on this record that they have been long associated with the movement of bulk cargoes on the Lakes, devoted primarily to the protected services. This area of McCarthy's operations was inaugurated only in 1957.

The volume of domestic ore carryings has been down for the past few years—although it was anticipated that it would improve in 1959—and with the opening of the new Seaway, the future of the domestic grain movement eastbound is not bright. The result will be additional vessel space competing for existing bulk cargoes.

The facts presented here are very similar to those presented, in part, in the *Isbrandtsen* case, *supra*. We refer to that portion of Isbrandtsen's application requesting 805 (a) permission to continue, as a subsidized operator, a Gulf-North Atlantic bulk service. Isbrandtsen was a comparative newcomer to the trade, and in denying the permission, on the ground that the continuation of the service would be prejudicial to the objects and policy of the Act, the Board found that the interveners—primarily domestic operators traditionally associated with the trade—were capable of handling the needs of the domestic shippers, particularly in view of a declining sulphur movement. Here ore has a generally declining recent history, the future of the domestic grain movement is bleak, interveners—primarily domestic operators—have vessel space to accommodate all of the offerings, and McCarthy has been in the trades only since 1957. There is no material difference between this case and the *Isbrandtsen* case in this respect.

We find that the continuation by McCarthy of its bulk-trade service, in the event subsidy is awarded, would be prejudicial to the objects and policy of the Act, and written permission for such service, in the event subsidy is awarded, will be denied.

In the absence of later action by the Board, this report shall serve as written permission for the waivers granted herein, in the event subsidy is awarded.

APPENDIX

Section 805 (a), Merchant Marine Act, 1936:

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona fide operation as a common carrier by water in the domestic intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

ORDER

At a Session of the **FEDERAL MARITIME BOARD**, held at its office in Washington, D.C., on the 14th day of December A.D. 1959.

No. S-57

STATES MARINE CORPORATION AND STATES MARINE CORPORATION OF DELAWARE—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON THEIR TRICONTINENT, PACIFIC COAST/FAR EAST, AND GULF/MEDITERRANEAN SERVICES

No. S-68

MATSON ORIENT LINE, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE No. 12 (U.S. ATLANTIC/FAR EAST)

No. S-72

ISTHMIAN LINES, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY AGREEMENT

United States Lines Company (USL), an intervener in these proceedings, has filed a petition for their reopening and consolidation for the purpose of holding further hearings. States Marine Corporation and States Marine Corporation of Delaware (both as SML), joint applicants for subsidy in No. S-57, and Isthmian Lines, Inc. (Isthmian), an applicant for subsidy in No. S-72, have filed a joint reply in opposition to the petition. Matson Orient Line, Inc. (Matson Orient), the applicant in No. S-68, and Public Counsel also filed replies in opposition to the petition.

The gravamen of the petition is that Agreements Nos. 8337 and 8337-1 between SML, Matson Orient, and Isthmian, as amended, and relating to their proposed subsidized services on Trade Route No. 12, present far different issues of undue prejudice under section 605(c) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1175 (the Act), than were developed at the hearings in these proceedings.

We note that in Nos. S-57 and S-68 it was specifically found by the Board that the service already provided by vessels of United States registry on Trade Route No. 12 is inadequate and that in the accomplishment of the purposes and policy of the Act the 12 to 24 direct sailings, plus 12 additional sailings per year proposed by SML and the 18 to 24 sailings per year proposed by Matson Orient, in Nos. S-57 and S-68, respectively, should be operated thereon. In view of this conclusion, undue prejudice could not be a dispositive issue. *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F.M.B. 304 (1957).

There remains for consideration whether granting of the proposed subsidy to Isthmian in No. 72 for the Trade Route 12 leg of its west-bound round-the-world service would result in undue prejudice to petitioner. In that proceeding the record has been closed and there remains pending only the decision of the Board. In the event it is found, in that proceeding, that Trade Route No. 12 is inadequately served and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon, the issue of undue prejudice likewise would be obviated.

In view of the foregoing:

It is ordered, That the petition for reopening and consolidated further hearings be, and it is hereby, denied.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.
5 F.M.B.

FEDERAL MARITIME BOARD

No. S-72

ISTHMIAN LINES, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL
SUBSIDY

No. S-74

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR INCREASE IN SUB-
SIDIZED SAILINGS, ROUND-THE-WORLD SERVICE

No. S-75

AMERICAN EXPORT LINES, INC.—APPLICATION FOR INCREASED SAILINGS
ON TRADE ROUTE 18

No. S-76

CENTRAL GULF STEAMSHIP CORPORATION—APPLICATION FOR OPERATING-
DIFFERENTIAL SUBSIDY

Submitted June 16, 1959. Decided December 14, 1959

1. Isthmian Lines, Inc., is operating an existing service in its westbound round-the-world service to the extent of 21 sailings annually, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of subsidy to Isthmian for this service.
2. Without the cargo carryings of approximately 7 sailings per year in addition to the 21 existing sailings of Isthmian Lines, Inc., the service provided by vessels of United States registry in the westbound round-the-world service of Isthmian would be inadequate, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of subsidy to Isthmian for such additional 7 sailings.
3. Including the cargo carryings of the 21 existing annual sailings of Isthmian Lines, Inc., and the 7 additional annual sailings, service provided by ves-

- sels of United States registry in the westbound round-the-world service of Isthmian is adequate, and section 605(c) of the Merchant Marine Act, 1936, as amended, is a bar to the award of subsidy for the operation of vessels on such service in excess of 28 sailings per year.
4. The service provided by vessels of United States registry in the westbound round-the-world service of American President Lines, Ltd., is adequate, and section 605(c) of the Merchant Marine Act, 1936, as amended, is a bar to the award of subsidy to American President Lines for the operation of additional vessels thereon.
 5. Inbound service provided by vessels of United States registry from the Red Sea and Gulf of Aden to U.S. North Atlantic and California ports is inadequate, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the modification of American President Lines' operating-differential subsidy contract for the operation of its existing westbound round-the-world vessels in such service.
 6. Isthmian Lines, Inc., is operating an existing service in its India-Pakistan-Ceylon service to the extent of 16 sailings annually, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of subsidy to Isthmian for this service.
 7. Service provided by vessels of United States registry in the India-Pakistan-Ceylon service is inadequate to the extent of 8 sailings per year over the 16 annual existing sailings of Isthmian, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of a subsidy contract to Isthmian for the operation of such additional vessels thereon. Section 605(c) does interpose a bar to the award of subsidy for annual sailings in excess of 24.
 8. Isthmian Lines, Inc., is operating an existing service in its Persian Gulf service to the extent of 14 sailings annually, and section 605(c) is not a bar to the award of subsidy to Isthmian for this service.
 9. Neither Central Gulf Steamship Corporation nor American Export Lines, Inc., is operating an existing service in the Persian Gulf service.
 10. Service provided by vessels of United States registry in the Persian Gulf service is inadequate to the extent of 20 sailings per year over the 14 annual existing sailings of Isthmian, but section 605(c) interposes a bar to the award of subsidy in excess of 34 sailings per year.
 11. Continuation of Isthmian's Atlantic-Gulf/Hawaii service will not result in unfair competition to any person, firm, or corporation operating exclusively in any domestic service, and would not be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended. Permission to continue such service under section 805(a) of the Act granted.
 12. Continuation by States Marine Corporation of Delaware of its intercoastal service between United States Gulf ports and United States Pacific ports will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and would not be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended. Permission to continue such service under section 805(a) of the Act granted.
 13. Continuation of States Marine's intercoastal Pacific coast to Atlantic coast lumber service will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and would not be prejudicial to the objects and policy of the Merchant

Marine Act, 1936, as amended. Permission to continue such service under section 805(a) of the Act granted.

Herman Goldman, Elkan Turk, Irving Zion, George F. Galland, and Robert N. Kharasch for Isthmian Lines, Inc.

Warner W. Gardner and Vern Countryman for American President Lines, Ltd.

Carl S. Rowe and James D. Simpson for American Export Lines, Inc.

Ronald A. Capone, Robert E. Kline, Jr., Joseph M. Jones, and George Denegre for Central Gulf Steamship Corporation.

Odell Kominers and J. Alton Boyer for Lykes Bros. Steamship Co., Inc., Weyerhaeuser Steamship Company, Luckenbach Steamship Co., Inc., and Pacific Far East Line, Inc., *Willis R. Deming and Alvin J. Rockwell* for Matson Orient Line, Inc., and Matson Navigation Company, *John J. O'Connor and Richard W. Kurrus* for Isbrandtsen Company Inc., and *Ronald A. Capone, Robert E. Kline, Jr., and Russell T. Weil* for United States Lines Company, interveners.

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:

Docket No. S-72:

By application filed January 7, 1957, as amended, Isthmian Lines, Inc. (Isthmian), seeks an operating-differential subsidy on its west-bound round-the-world service, India-Pakistan-Ceylon service, and Persian Gulf service, and requests the Board to make the findings required under section 605(c)¹ of the Merchant Marine Act, 1936, as amended (the Act).

Applicant requests a single subsidy contract covering the three services, with permission to interchange vessels freely, with a minimum of 24 and a maximum of 36 sailings a year in each service. Permission also is requested under section 805(a) of the Act² to continue operation of a joint service with Matson Navigation Company (Matson) between United States Atlantic and Gulf ports and Hawaii under Joint Service Agreement No. 7707-5, approved by the Board on October 18, 1956. Applicant further seeks permission

¹ See appendix A.

² See appendix B.

under section 805(a) for its parent company, States Marine Corporation of Delaware (States Marine), to continue two intercoastal services—one between United States Gulf ports and United States Pacific ports, and the other confined to lumber from United States Pacific ports to United States Atlantic ports as part of its tri-continent service.

Docket No. S-74:

By application filed April 17, 1957, as amended, American President Lines, Ltd. (APL), seeks an increase in the number of subsidized sailings under its operating-differential subsidy agreement from the present 24 to 28 a year to 34 to 38 a year in its westbound round-the-world service, by the employment of three additional owned vessels, and for the privilege of calling all westbound round-the-world subsidized voyages at ports in the Red Sea and Gulf of Aden, Mediterranean, Spain, and the Gulf of Cadiz (but not to load cargo in Spain for United States North Atlantic ports). Applicant requests the Board to make the findings required under section 605(c) of the Act. Section-805(a) permission is requested for the additional subsidized sailings to carry intercoastal cargoes westbound.

Docket No. S-75:

American Export Lines, Inc. (Export), by application dated June 11, 1957, as amended, seeks amendment of its operating-differential subsidy agreement by increasing the present 22 minimum—26 maximum sailings a year in its Line "E" India service (Trade Route No. 18) to 34 to 50 sailings a year, the additional 12 to 24 sailings to provide service between United States Atlantic and Gulf ports and ports in the Persian Gulf. Applicant requests the Board to make the findings required under section 605(c) of the Act.

Docket No. S-76:

By application dated February 21, 1958, as amended, Central Gulf Steamship Corporation (Central Gulf) requests operating-differential subsidy for a minimum of 16 and a maximum of 24 sailings a year between United States Gulf and Atlantic ports and Trade Route No. 18 ports on the Red Sea and Persian Gulf, and in India, East Pakistan, West Pakistan, and Ceylon, with the privilege of calling at Beirut and Port Said. Applicant requests the Board to make the findings required under section 605(c) of the Act.

The four proceedings were consolidated for hearing, which was held before an examiner between February 10 and April 4, 1958.

In No. S-72, interveners were APL, Export, United States Lines Company (U.S. Lines), Lykes Bros. Steamship Co., Inc., Matson Orient Line, Inc. (Matson Orient), and Matson Navigation Co. (Matson). Pope and Talbot, Inc., and Weyerhauser Steamship Company intervened to oppose applicant's request for section-805(a) permission. Pope and Talbot, Inc., withdrew before hearing, Weyerhauser Steamship Company withdrew on March 10, 1958, and Matson Orient and Matson Navigation did not participate in the hearing.

In No. S-74, interveners were Isthmian, Export, U.S. Lines, Luckenbach Steamship Co., Inc., Pacific Far East Line, Inc. (PFEL), and Matson Orient. PFEL was directed by the examiner to furnish applicant certain traffic data, and on appeal therefrom we ordered compliance. Upon failure to comply, we then reconsidered and by order of April 3, 1958, denied the petition of PFEL for leave to intervene.

In No. S-75, interveners were APL, Isbrandtsen Company, Inc., (Isbrandtsen), Isthmian, and Central Gulf, and in No. S-76 interveners were APL, Isbrandtsen, Isthmian, and Export.

In his recommended decision the examiner concluded and found:

(1) That Isthmian is operating an existing westbound round-the-world service to the extent of 19 sailings annually, within the meaning of section 605(c) of the Act;

(2) That the effect of the granting of an operating-differential subsidy contract to Isthmian for its westbound round-the-world service would not be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines;

(3) That section 605(c) does not interpose a bar to the award of subsidy to Isthmian for its existing westbound round-the-world service;

(4) That present and authorized service provided and to be provided by vessels of United States registry in Isthmian's westbound round-the-world service is not shown to be inadequate, within the meaning of section 605(c), and additional vessels of United States registry are not required to be operated in such service in the accomplishment of the purposes and policy of the Act;

(5) That section 605(c) does interpose a bar to the granting of an operating-differential subsidy contract to Isthmian for the operation of additional vessels in its westbound round-the-world service;

(6) That present and authorized service provided and to be provided by vessels of United States registry in APL's westbound

round-the-world service is not inadequate, within the meaning of section 605(c), and that in the accomplishment of the purposes and policy of the Act additional vessels should not be operated thereon;

(7) That section 605(c) does interpose a bar to the granting of an operating-differential subsidy contract to APL for the operation of additional vessels on its westbound round-the-world service;

(8) That Isthmian is operating an existing service of 15 sailings annually between United States Gulf and Atlantic ports and ports in India, Pakistan, and Ceylon, within the meaning of section 605(c), and that the effect of granting an operating-differential subsidy contract to Isthmian for this service would not be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines;

(9) That Isthmian is not operating an existing India-Pakistan-Ceylon service to the extent of the nine to 21 additional sailings here requested, within the meaning of section 605(c);

(10) That present United States-flag service in the India-Pakistan-Ceylon service is inadequate, within the meaning of section 605(c), and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon;

(11) That section 605(c) is not a bar to the granting of the subsidy requested by Isthmian for the additional sailings in the India-Pakistan-Ceylon service;

(12) That Isthmian is an existing operator, within the meaning of section 605(c), to the extent of 14 sailings a year in the Persian Gulf service, and that an award of subsidy covering this service would be neither unduly advantageous to Isthmian nor unduly prejudicial to citizens of the United States operating United States-flag vessels in competition with Isthmian;

(13) That section 605(c) does not interpose a bar to the award of subsidy to Isthmian for its existing Persian Gulf service;

(14) That Central Gulf does not have the status of an existing operator, within the meaning of section 605(c), on the Trade Route No. 18 service;

(15) That the service already provided by vessels of United States registry in the Persian Gulf service is inadequate, within the meaning of section 605(c), and in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon;

(16) That section 605(c) does not interpose a bar to granting the applications of Isthmian, American Export, and Central Gulf for subsidization of proposed Persian Gulf services;

(17) That Isthmian and its predecessor have been in continuous bona-fide operation in the Atlantic and Gulf/Hawaii trade since 1934, and that Isthmian is entitled as a matter of law to the requested permission under section 805(a) of the Act;

(18) That Luckenbach Gulf Steamship Co. and its successor, States Marine, were in bona-fide operation as a common carrier by water in 1935 over the route or routes or in the trade or trades (Gulf intercoastal) for which application is here made, and that States Marine has so operated since that time except as to interruptions over which its predecessor in interest had no control;

(19) That granting the application for permission under section 805(a) for States Marine to continue its Gulf intercoastal general cargo service and its Pacific to Atlantic lumber service will not result in unfair competition to any domestic operator, will serve the public interest and convenience, and will not be prejudicial to the objects and policy of the Act; and

(20) That the service description in APL's operating-differential subsidy agreement should be amended to permit privilege calls by vessels in its westbound round-the-world service at ports on the Red Sea and Gulf of Aden for cargo destined to California ports.³

Exceptions to the recommended decision and replies thereto were filed, and the matter has been orally argued. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in this proceeding.

The operations of each of the applicants at the time of hearing were as follows:

Isthmian:

(1) Westbound round-the-world service—from United States Atlantic ports to California via the Panama Canal, thence to ports in the Philippine Islands, Indonesia, Vietnam, Thailand, Singapore, Malayan and Indonesian ports on the Straits of Malacca, Ceylon, Malabar Coast of India, Djibouti, and occasionally other Red Sea ports, Suez Canal, thence to United States North Atlantic ports via Halifax, N.S. If subsidized, the itinerary will remain the same.

(2) India-Pakistan-Ceylon service (Trade Route No. 18)—between United States Gulf and Atlantic ports and ports in Lebanon, Egypt,

³ This finding was made in a recommended supplemental decision.

Aden, Saudi Arabia, Pakistan, east India, East Pakistan, and Ceylon. Inbound cargo is loaded at east India, East Pakistan, Ceylon, and Red Sea ports, the vessels usually returning to United States South Atlantic and Gulf ports. If subsidized, the route would remain the same, except that more frequent inbound calls are to be made at North Atlantic ports.

(3) Persian Gulf service (Trade Route No. 18)—between United States Gulf and Atlantic ports and ports in Iran, Saudi Arabia, Iraq, West Pakistan, and India, with occasional calls at ports in Lebanon and Egypt, and with frequent inbound calls at Halifax. If subsidized, the itinerary will remain the same.

(4) Atlantic-Gulf-Pacific Far East service—vessels in this service, which was inaugurated in June 1956, load at United States Atlantic and/or Gulf ports and proceed via the Panama Canal to California to complete loading for ports in Japan, Korea, Formosa, and occasionally Vietnam. Subsidy is not requested on this route.

(5) Hawaiian Islands service—between United States Atlantic and Gulf ports and the Hawaiian Islands. Since 1934 this service has been operated jointly with Matson under Joint Service Agreement (F.M.B.) No. 7707, as amended. Section 805(a) permission is sought to continue this service.

Isthmian also operated an eastbound round-the-world service from 1952 until October 1956, when it was suspended. Vessels in this service loaded at United States Gulf and Atlantic ports, proceeded through the Suez Canal and Red Sea to west India, Indonesia-Malaya, and some southern Far East ports. Those which continued eastward usually called at Hawaii to load cargo for United States Atlantic and Gulf ports. During the period 1952-56, the average number of sailings in this service was 11.2 a year, of which an average of 6.2, instead of continuing eastward around the world, turned at Indonesia-Malaya and returned via the Suez Canal to Halifax and United States Atlantic and Gulf ports.

Isthmian's services have been operated with a fleet of 24 owned C-3 type vessels, with a speed of about 16½ knots, and some time-chartered vessels.

APL:

(1) Westbound round-the-world service—from United States North Atlantic ports via the Panama Canal to California, thence to Japan, Korea, Okinawa, Formosa, Hong Kong, Vietnam, Thailand, Malaya, Ceylon, west coast of India, Pakistan, Egypt, Italy, Mediterranean France, United States Atlantic ports. Service to the Philippine Islands was suspended late in 1957. Applicant's present

operating-differential subsidy contract authorizes a minimum of 24 and a maximum of 28 sailings a year on this route; its application is for 10 additional sailings. The application also seeks written permission under section 805(a) to carry intercoastal cargo from Atlantic to Pacific ports on the ten additional sailings.

(2) Atlantic/Straits service—from United States Atlantic ports via the Panama Canal to San Francisco, Hong Kong, Philippine Islands, Indochina, Thailand, Indonesia, and Malaya, returning via the Philippine Islands and California to United States Atlantic ports. Current authority is for a minimum of 24 and a maximum of 28 subsidized sailings a year.

(3) Transpacific passenger and cargo service (Trade Route No. 29-E)—from California to Hawaii, Japan, Philippine Islands, Hong Kong, and return to California via Japan and Hawaii. Sailings are about twice a month under authorization for 24 to 26 sailings a year.

(4) Transpacific freight service (Trade Route No. 29-F)—between California, Japan, Hong Kong, and the Philippine Islands, with calls in Korea, Okinawa, Formosa, Indochina, and Thailand as traffic offers. Sailings are approximately fortnightly under authority to make 24 to 26 sailings a year.

APL has employed six Mariners and two C-3P type passenger combination vessels in its round-the-world service. The Mariners operate at 20½ knots and the C-3P's at 16½ knots. In its Atlantic/Straits service it employs two AP-3 vessels and six C-3's, both of which operate at 16½ knots. Three combination vessels are operated in the transpacific passenger/cargo service, and the transpacific freight service is operated with two Mariners and three C-3 type vessels.

American Export:

(1) Passenger service (Trade Route No. 10)—30 sailings a year with two P-3 type vessels between New York, Naples, Genoa, and Cannes.

(2) Line D—Alexandria express service (Trade Route No. 10)—between United States North Atlantic ports and French Mediterranean ports, ports on the west coast of Italy, Egypt, Palestine, Israel, Syria, Lebanon, and Greece. Sailing frequency is fortnightly with four C-3 type vessels.

(3) Line F—Mediterranean freight service (Trade Route No. 10)—between United States North Atlantic ports and ports in the Mediterranean Sea (excluding Egypt), Black Sea, Aegean Sea, Adriatic Sea, other minor seas which are arms of the Mediterranean, and Atlantic ports from the northern boundary of Portugal to the south-

ern boundary of French Morocco. Eight sailings a month are provided by two VC-2 vessels, four C-2, and 10 C-3 type vessels.

(4) Line E—India service (Trade Route No. 18)—between United States Atlantic ports and ports in the Gulf of Suez, Red Sea, Gulf of Aden, Pakistan, India, Ceylon, and Burma, with privilege of calling at any other ports within the limits of Lines D and F. Eight C-3 type vessels provide semimonthly sailings under the current authorization for a minimum of 22 and a maximum of 26 sailings. This is the service proposed to be enlarged by the application.

Central Gulf:

Central Gulf was formed in April 1947, and until September 1957, operated owned and chartered vessels in the bulk cargo trades. In September 1957 applicant inaugurated an American-flag liner service from United States Gulf and Atlantic ports to Beirut and ports on the Red Sea and Persian Gulf and in Ceylon and Pakistan, on Trade Route No. 18. It is on this service that applicant seeks subsidy. Applicant's two owned AP-2 type vessels and six chartered vessels are employed.

Under section 605(c), if the proposed service to be subsidized is not an "existing service", within the meaning of that section, then, in order to enter into a subsidy contract, we must determine under the first part of the section that the existing service by United States-flag vessels is inadequate. If, however, the service proposed for subsidy is an "existing service", then the second part of section 605(c) is controlling, and inadequacy of United States-flag service is not a requirement unless we find that the effect of awarding the subsidy contract would be to give undue advantage or be unduly prejudicial as between citizens of the United States operating a competitive service.

I. WESTBOUND ROUND-THE-WORLD SERVICE

A. Isthmian:

Isthmian claims a performance record on its westbound round-the-world service (WRW) of 33 sailings per year, on an average, and asserts that this justifies the finding that it has maintained an "existing service" of 33 annual sailings which would support the grant of the requested subsidy for 24 to 36 WRW sailings. This total is based upon four classes of sailings:

First, by vessels which loaded at Atlantic and California ports and proceeded westward to the southern Far East and Indonesia-Malaya, the so-called "terminal area", there loaded inbound cargo and returned to United States Atlantic ports by way of the Suez Canal. Average turnaround time was 124 days. These sailings are herein-

after designated "WRW-PS", indicating westbound round-the-world-Panama-Suez sailings.

Second, by vessels that had been loaded at Atlantic and California ports with the full intention of continuing the voyage westward, but which, because of unforeseen operational difficulties, turned at Indonesia-Malaya and returned to the United States eastward via Hawaii and the Panama Canal. These sailings are identified as "WRW-PP", indicating westbound round-the-world-Panama-Panama sailings.

Third, by vessels loaded at United States Gulf and Atlantic ports and sailing east through the Mediterranean Sea, Suez Canal, and Red Sea to west India and Indonesia-Malaya. Some of these vessels then proceeded to the Philippine Islands and Hawaii, thence through the Panama Canal to United States Gulf and Atlantic ports, and are designated "ERW-SP", meaning eastbound round-the-world-Suez-Panama sailings.

Fourth, by those vessels assigned to the eastbound round-the-world service, which, upon reaching Indonesia-Malaya, were turned and routed westward via Suez to United States Atlantic ports. These sailings are designated "ERW-SS", meaning eastbound round-the-world-Suez-Suez.

Table I shows for the years 1952 through 1956 the number of sailings conducted by Isthmian in its four classes of services.

TABLE I. *Round-the-world sailings of Isthmian (1952-56)*

OUTBOUND							
Class	1952	1953	1954	1955	1956	Total	Average
WRW-PS.....	20	18	19	19	18	94	18.8
WRW-PP.....	1	4	6	4	0	15	3.0
ERW-SP.....	4	2	7	8	4	25	5.0
ERW-SS.....	9	10	4	3	5	31	6.2
Total.....	34	34	36	34	27	165	33.0
INBOUND							
WRW-PS.....	22	18	20	18	19	97	19.4
WRW-PP.....	1	4	6	4	0	15	3.0
ERW-SP.....	4	1	5	8	7	25	5.0
ERW-SS.....	8	11	6	3	6	34	6.8
Total.....	35	34	37	33	32	171	34.2

We agree with the conclusion of the examiner that only the WRW-PS sailings, i.e., those voyages which made a complete westbound sailing around the world, constitute "existing service" on Isthmian's WRW service within the meaning of section 605(c).

The WRW-PP vessels proceeded only half way around the world, and were actually complete voyages on Trade Route No. 17, Service

No. 1, i.e., "U.S. Atlantic (via Panama Canal) and California to Indonesia-Malaya and return, including Far East Ports-Hong Kong and south en route."

The ERW-SS vessels proceeded only half way around the world and were actually complete voyages on Trade Route No. 17, Service No. 2, i.e., "U.S. Gulf and Atlantic via Suez to Indonesia-Malaya and return."

We agree with the conclusion of the examiner that the fact that the sailings in Services Nos. 1 and 2 of Trade Route No. 17 furnished service at some of the ports served by the true WRW sailings is not a basis for considering the outbound portion of each WRW-PP sailing and the inbound portion of each ERW-SS sailing as constituent parts of one WRW sailing. This patchwork service was not in general accord with the WRW service for which subsidy is sought, and cannot be considered "existing service" within the meaning of section 605(c).

It is apparent from the record that the ERW sailings also differed substantially from the WRW service for which subsidy is requested. These vessels generally served Gulf ports and provided no California service, while the westbound sailings did not serve the Gulf but provided an inbound and outbound service to California. Furthermore, even if it could be concluded that these eastbound sailings were in general accord with the service provided by the westbound service, the eastbound service was suspended several months before the application for subsidy was filed, and should not for that reason be considered as "existing service" within the meaning of section 605(c).

During the period 1952 through 1956, Isthmian operated from a low of 18 to a high of 22 annual sailings in its WRW service. We think it reasonable to conclude, and we so find, that Isthmian is operating an existing service in such service to the extent of 21 sailings annually; that the effect of granting an operating-differential subsidy contract to Isthmian for such service will 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; and that section 605(c) does not interpose a bar to the award of subsidy to Isthmian for such service.

Applicant has requested subsidy on the WRW service up to a maximum of 36 annual sailings. In order to find that section 605(c) does not interpose a bar to the award of subsidy for sailings in excess of the 21 existing sailings per year, we must determine under the **first part** of that section that the present service by United States-flag vessels is inadequate, and that in the accomplishment of the purposes

and policy of the Act additional vessels should be operated in the service.

In the outbound portion of the WRW service, for the period 1953 through 1956, bulk (nonliner) cargo carryings were small. On the inbound portions of the route bulk carryings have been somewhat larger but have declined. Isthmian's participation in the nonliner carryings during this period have been minor, and nothing in the record indicates a future trend toward significant bulk carryings on liner vessels in the Isthmian WRW service. We will therefore consider only liner commercial cargo carryings in determining United States-flag participation on this route.

We do not agree with the examiner that the cargo carryings of the WRW-PP sailings and the ERW sailings of Isthmian should be excluded from our calculations of United States-flag carryings on this route, for the reason that they were considered not to be "existing service" within the meaning of section 605(c). Regardless of the direction and the route traveled by these vessels, the fact is that they carried cargoes under United States flag, and such carryings cannot be ignored in determining United States-flag participation on the route.

Table II shows the average annual movement, in thousands of long tons, of liner commercial cargo, outbound and inbound, on the various segments of Isthmian's WRW route for the period 1953 through 1956.

TABLE II. *Liner commercial cargo carried on Isthmian's westbound and round-the-world service, 1953-56*

[In thousands of long tons]

OUTBOUND			
	All flags	U.S. flag	Percent U.S.
From Atlantic:			
To southern Far East.....	399	138	35
To Indonesia-Malaya.....	132	57	43
From California:			
To southern Far East.....	338	207	61
To Indonesia-Malaya.....	64	35	55
Total outbound.....	933	437	47
INBOUND			
To Atlantic:			
From southern Far East.....	1,399	238	17
From Indonesia-Malaya.....	500	169	34
From India-Pakistan-Ceylon.....	224	127	57
From Red Sea.....	37	14	39
To California:			
From India-Pakistan-Ceylon.....	10	3	36
From Indonesia-Malaya.....	74	32	43
Total inbound.....	2,244	583	26
Total outbound and inbound.....	3,177	1,020	32

The foregoing statistics indicate 47 percent United States-flag participation outbound, 26 percent inbound, and 32 percent over-all; however, they do not present the full picture of United States-flag participation which we must consider in making our determinations under section 605(c). As stated in *American Pres. Lines, Ltd.—Increased Sailings, Route 17*, 5 F.M.B.—M.A. 359 (1957), at page 368,

*** 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 be unduly concerned with conditions in the past.

In considering present and probable future conditions on Isthmian's WRW service it is necessary to evaluate certain additional factors affecting United States-flag participation.

In *American Pres. Lines, Ltd.—Increased Sailings, Route 17, supra*, section 605(c) was found to present no bar to an increase of APL's subsidized sailings on Service No. 1 of Trade Route No. 17⁴ from a minimum of 12 and a maximum of 16 per year to a minimum of 24 and a maximum of 28 sailings per year. From 1952 through 1956⁵, APL averaged 12.8 sailings per year from United States Atlantic and California ports to areas included in Isthmian's WRW service. APL carryings of liner commercial cargo to those areas averaged about 50,000 tons per year, or approximately 3,900 tons per sailing.⁶ At this rate the authorized maximum of 28 sailings would furnish capacity for approximately 109,000 tons per year, or 59,000 tons in excess of the 1952-56 average carryings of 50,000 tons.

In *United States Lines Co.—Increased Sailings, Route 12*, 5 F.M.B. 379 (1958), it was found that the present service on Trade Route No. 12⁶ by vessels of United States registry was inadequate, and that section 605(c) interposed no bar to the granting of an operating-differential subsidy contract to U.S. Lines for the operation of 12 sailings a year in addition to its then existing service of a maximum of 24 sailings. In the period 1952 through 1956, U.S. Lines averaged 20 sailings per year on this route, on which an annual average of about 30,000 tons of liner commercial cargo were carried outbound to points on Isthmian's WRW service, or approximately 1,500 tons per sailing. Nearly all these sailings were made with C-2 vessels having a sub-

⁴ Service No. 1 of Trade Route 17 is described as: "U.S. Atlantic (via Panama Canal) and California to Indonesia-Malaya and return, including Far East ports—Hong Kong and South en route."

⁵ This figure is higher than the examiner's comparable figure of 2,804 tons, since it includes California carryings excluded by the examiner.

⁶ Described as: "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)."

stantially smaller capacity than the Mariner vessels now being used exclusively by the company on the route. In 1956, using a mixed fleet of C-2's and Mariners, U.S. Lines carried approximately 1,800 tons of liner commercial cargo outbound from the Atlantic to points in the southern Far East served on Isthmian's WRW service. We consider it reasonable to assume that the exclusive Mariner service will carry at least 2,000 tons of such cargo per sailing. It is apparent, therefore, that U.S. Lines will have the capacity to carry approximately 70,000 tons outbound on Isthmian's WRW service, or about 40,000 tons per year more than it has been carrying.

In *Matson Orient Line, Inc.—Subsidy, Route 12*, 5 F.M.B. 410 (1958), it was held that section 605(c) presented no bar to an award of subsidy to Matson Orient for up to 24 sailings per year. Assuming the use by Matson Orient of C-2 vessels, the smallest which could be used in this service, and further assuming that such vessels would carry the same proportion of cargo outbound to points on Isthmian's WRW service as did U.S. Lines with C-2 vessels, or 1,500 tons per sailing, then Matson Orient will offer additional capacity on Isthmian's outbound WRW service of at least 36,000 tons per year.⁷

In summary, if the total liner commercial cargo moving outbound on Isthmian's WRW service remains at approximately the 1956 level, then United States-flag present and authorized participation would be adjusted as shown in table III.

TABLE III

[In thousands of long tons]

	All flags	U S. flag	Percent U S.
1956 total average outbound traffic—Atlantic and California to Far East, Indonesia, and Malaya.....	1,041	483	46
APL.....		59	
U.S. Lines.....		40	
Matson Orient ¹		36	
	1,041	618	59

¹ See footnote 7.

If we assume an annual increase in the total outbound cargo movement of 2 percent each year for 1957 and 1958, the present and authorized United States-flag participation would be 57 percent, calculated as in table IV.

⁷ In certain tables following, adjustments are made for Matson Orient additional capacity. In each instance, if cargo statistics for Matson Orient were not included, the resulting change would not affect the conclusions we reach hereafter.

TABLE IV

[In thousands of long tons]

	All flags	U S. flag	Percent U S.
1956 total outbound traffic—Atlantic and California to Far East, Indonesia, and Malaya.....	1,041	483	46
2 percent increase in 1957 and 1958.....	42		
APL.....		59	
U S. Lines.....		40	
Matson Orient ¹		36	
	1,083	618	57

¹ See footnote 7.

As to inbound traffic on Isthmian's WRW service, certain adjustments also must be made in calculation of present and future United States-flag participation. From the southern Far East to Atlantic ports, table II shows that for the period 1952 through 1956, an average of 1,399,000 tons of liner commercial cargo moved per year, of which only 238,000 tons, or 17 percent, was on United States-flag vessels. This cargo consisted primarily of sugar and ores from the Philippine Islands, and moved predominantly the shortest route eastward through the Panama Canal. Isthmian carries none of this cargo westward through Suez, and Isthmian's president testified that they should be excluded from the inbound carryings on its WRW service. Thus, a meaningful analysis of United States-flag participation inbound can be achieved only if the Philippine cargo is excluded. In 1956, 1,440,277 tons of liner commercial cargo moved from the Philippines to the Atlantic, of which 266,202 tons was on United States-flag vessels. This cargo properly should be excluded from the 1956 inbound statistics with respect to Isthmian's WRW service.

As previously noted, APL's Atlantic/Straits service in the future may operate up to 28 sailings inbound from countries on Isthmian's WRW service. In the period 1952 through 1956, APL's Atlantic/Straits vessels carried an average of approximately 30,000 tons of liner commercial cargo per year on an average of 12.4 annual sailings. Based upon this past record of about 2,400 tons of such cargo per sailing, APL can, through its 28 annual sailings, offer inbound capacity on this route for 67,000 tons of cargo, or approximately 37,000 tons per year more than it has carried in the past.

U.S. Lines' inbound Trade Route No. 12 vessels carry only negligible amounts of cargo from points on Isthmian's WRW service, and since Matson Orient's Trade Route No. 12 service is projected to follow an itinerary substantially similar, it is reasonable to assume that its service similarly will have negligible effect on United States-flag carryings inbound on Isthmian's WRW service.

In summary, assuming that the total inbound cargo movement on Isthmian's WRW route remains at about the 1956 level, United States-flag participation should be adjusted in accordance with table V.

TABLE V

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
1956 inbound traffic—southern Far East, Indonesia-Malaya, India-Pakistan-Ceylon to Atlantic and California.....	2,353	585	25
Less. Philippine to Atlantic.....	1,440	266	-----
Subtotal.....	913	319	-----
Add: APL.....	-----	37	-----
Total.....	913	356	39

The foregoing adjustments are generally in accord with the procedure followed by the examiner. Minor variations in calculations have caused our estimate of projected United States-flag participation to differ slightly from the estimates of Public Counsel and the examiner. The difference is only one percent on the outbound and inbound portion of the route, and our estimate of 49 percent United States-flag participation on the route as a whole is identical to the figure arrived at by Public Counsel and the examiner.

In its reply brief and exceptions, Isthmian contends that the foregoing method of projecting future United States-flag participation on its WRW service is based upon an erroneous assumption that additional sailings of APL, U.S. Lines, and Matson Orient will divert cargo only from foreign-flag competition and none from existing United States-flag sailings. While we recognize that new United States-flag sailings on the route will not divert cargo exclusively from foreign-flag lines, it is apparent that to the extent some cargo may be diverted from other United States-flag service, such diversion will increase free space on United States-flag vessels and thus increase available United States-flag capacity in the trade. We therefore consider the foregoing statistics as reasonably indicative of present and projected United States-flag participation on the Isthmian WRW route.

Combining tables IV and V, the total projected inbound and outbound United States-flag participation on Isthmian's WRW service, assuming a 2-percent increase in outbound traffic for 1957 and 1958, and assuming that inbound traffic remains at 1956 levels, would be as shown in table VI.

TABLE VI

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
Outbound.....	1,083	618	57
Inbound.....	913	356	39
	1,996	974	49

The foregoing computation includes cargo which has been carried by Isthmian on certain sailings which we have not considered to be part of Isthmian's "existing service" on its WRW service, within the meaning of section 605 (c), but which have made a contribution on this route. These sailings were the WRW-PP sailings, the ERW-SP sailings, and the ERW-SS sailings previously discussed.

Isthmian WRW sailings averaged approximately 5,500 tons of liner commercial cargo per sailing outbound and inbound during the period 1953-56. During the same period, the WRW-PP sailings and the WRW-SP and the ERW-SS sailings carried an annual average of approximately 40,000 tons of liner commercial cargo outbound and inbound to and from foreign ports on Isthmian's WRW service.

We recognize that Isthmian, under subsidy, will not be providing services which correspond to its past WRW-PP, ERW-SP, and ERW-SS sailings, but all its carryings on this route will be provided by complete WRW-PS sailings. Based upon the prior average carryings per sailing of about 5,500 tons inbound and outbound on its 21 existing WRW sailings, it is apparent that the past carryings by Isthmian on its WRW-PP, ERW-SP, and ERW-SS sailings are the equivalent of approximately seven complete WRW sailings per year. Without these annual carryings of about 40,000 tons inbound and outbound, United States-flag participation of 57 percent outbound, 39 percent inbound, and 49 percent over-all, as shown in table VI, would become 53 percent, 35 percent, and 45 percent, respectively. This cargo has been captured in the past by United States-flag vessels operated by Isthmian, and without the availability of vessel capacity would, at least to some extent, be lost to United States-flag sailings. We conclude, therefore, that without approximately seven sailings per year in addition to its existing service of 21 sailings per year, United States-flag service on Isthmian's WRW service would be inadequate, and that in the accomplishment of the purposes and policy of the Act such additional vessels should be operated thereon.

We are convinced, however, that projected United States-flag participation on this route of 57 percent outbound, 39 percent inbound,

and 49 percent over-all, which includes the carryings of Isthmian's existing service plus the approximately seven additional sailings we have found to be needed, is adequate.

Outbound, Isthmian's carryings have been declining, and free space available at last port of loading has averaged 14 percent on a weight basis during the period 1953 through 1956. Inbound, Isthmian's carryings also have been declining, and free space at first port of arrival has risen in recent years to over 50 percent.

In view of these factors, we cannot find that projected United States-flag participation on this route of 57 percent outbound, 39 percent inbound, and 49 percent over-all, is inadequate.

Isthmian has applied for a subsidy contract to operate up to a maximum of 36 sailings per year in its westbound round-the-world service. Under the standards of section 605(c), we have found an "existing service" of approximately 21 sailings per year, and that without operation by Isthmian of approximately seven additional annual sailings, United States-flag participation on this route would be inadequate. It is apparent that under these findings subsidy cannot be permitted for the maximum of 36 sailings per year, but must be limited under the standards of section 605(c) to no more than 28 sailings per year.

We conclude that section 605(c) does not interpose a bar to the award of subsidy to Isthmian for the operation of up to a maximum of 28 sailings per year in its proposed westbound round-the-world service, but that section 605(c) does interpose a bar to the award of subsidy to Isthmian for the operation of vessels on such service in excess of 28 sailings per year.

B. American President Lines:

The round-the-world westbound service of APL differs from the service of Isthmian, previously considered, in that Isthmian omits Japan, Korea, Formosa, and Okinawa, all of which APL serves; Isthmian calls regularly at Indonesia while APL does not; Isthmian omits Bombay and Karachi, which APL serves; and Isthmian confines its Mediterranean calls to the eastern area while APL calls in the western Mediterranean.

APL does not claim that it is operating an existing service as to any of the ten additional subsidized sailings requested. The only issues for determination under section 605(c), therefore, are whether United States-flag service on APL's round-the-world westbound route is adequate, and whether in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

Since the record indicates that APL participates only slightly in the carriage of nonliner cargo over its RWW route, our conclusion as to

cargo movement on this route will be limited to liner commercial carryings.

Table VII shows the total outbound and inbound liner commercial cargo moving over APL's RWW service, and the percentage of United States-flag participation therein.

TABLE VII. *Liner cargo movements on RWW route of American President Lines*

[In thousands of long tons]

Year	Outbound			Inbound			Over-all U.S. percent
	Total	U.S. flag	U.S. percent	Total	U.S. flag	U.S. percent	
1953.....	2,852	1,071	38	2,563	933	36	37
1954.....	3,064	1,217	40	2,414	698	29	35
1955.....	3,269	1,398	43	2,496	740	30	37
1956.....	3,843	1,766	46	2,652	808	30	40
Average.....	3,257	1,363	42	2,531	795	31	37

The foregoing statistics include traffic to and from the Philippine Islands. Since the record indicates that APL's RWW service will be of limited significance in the carriage of cargo to and from the Philippine Islands, we agree with the examiner that Philippine traffic should be excluded from our calculations.

The average annual volume of all liner commercial cargo moving outbound to the Philippine Islands from the North Atlantic and California during the period 1953-56 was 470,630 tons, of which 213,045 tons moved on United States-flag vessels. Inbound, the total movement was 1,300,621 tons, of which 211,997 tons were carried on United States-flag vessels. For the reasons above stated, these figures should be deducted in calculating United States-flag participation on the route.

Also included in table VII is an annual outbound movement of approximately 1,000,000 tons of coal from the United States Atlantic coast to the Far East, of which approximately 800,000 tons were for Japan. The examiner relied on *American President Lines—Calls, Round-the-World Service*, 4 F.M.B. 681 (1955), and *United States Lines Co.—Increased Sailings, Route 12*, 5 F.M.B. 379 (1958), and retained the coal statistics in his analysis of United States-flag service on APL's RWW service.

The great bulk of the coal movement here under discussion is carried by Japanese vessels which take on a large base load of coal and then carry relatively small amounts of general cargo as common carriers. For this reason the coal traffic is included in over-all compu-

tations as liner cargo, though it is apparent that the carryings are in many respects similar to nonliner tramp operations. We are convinced, therefore, that to leave these carryings in the statistics gives an unrealistic and artificial picture of United States-flag participation in liner commercial carryings over the route.

APL has carried none of this coal cargo in its RWW service since 1951, does not contemplate such carriage in the future, except possibly as distress cargo, and the record indicates that APL's RWW service is not well adapted to any sizeable bulk movement of coal from the Atlantic to Japan. We agree with the analysis of Public Counsel, who pointed out the artificial traffic base which is created by including this bulk coal movement. For example, in 1956 the total liner cargo moving from the Atlantic to Japan was 1,338,000 tons, of which approximately 800,000 tons were bulk coal, leaving only about 538,000 tons of regular liner commercial cargo. Even if United States-flag operators carried every ton of this liner cargo, United States-flag participation would be only 40 percent of the total outbound movement, including coal. Thus, United States-flag participation would appear to be under the conventional 50-percent standard of adequacy when in reality United States-flag vessels would have secured 100 percent of all liner cargo, except coal, moving on the route.

While we recognize that in prior proceedings we have not excluded these coal statistics, we are persuaded that their exclusion is proper in this case. In *American President Lines—Calls, Round-the-World Service, supra*, APL urged that the most realistic approach to this problem would be to give the coal traffic one-quarter weight only by deducting three-fourths of the movement from the traffic data. Public Counsel urges that we adopt that approach here. We agree, and conclude that three-fourths of the annual coal movement, or 600,000 tons, should be eliminated from the total outbound traffic statistics on APL's RWW service.

From 1952 through 1956, APL's Atlantic/Straits vessels carried an average of 2,100 tons per sailing outbound to countries (other than the Philippines) on APL's RWW route. With a maximum of 28 sailings per year authorized in *American Pres. Lines, Ltd.—Increased Sailings, Route 17, supra*, APL will have the capacity to load about 58,000 tons of Atlantic and California cargo, or approximately 31,000 tons more outbound per year than its past average carryings.

Recent authorizations to U.S. Lines and Matson Orient (*United States Lines.—Increased Sailings, Route 12, supra*, and *Matson Orient Line, Inc.—Subsidy, Route 12, supra*) will provide for approximately 513,000 additional tons of capacity for liner commercial cargo

from Atlantic ports to the Far East. Agreeing with APL's contention that approximately 85 percent of this capacity should reasonably represent future carryings, and assuming, very conservatively, that 50 percent of such carryings would be to areas served by APL's RWW service, projected future United States-flag outbound carriage should be increased by 218,000 tons per year.

As we have previously shown, APL's Atlantic/Straits service, under its increased authorization up to a maximum of 28 sailings per year, will have inbound capacity to carry approximately 37,000 additional tons per year from countries on APL's RWW route (excluding the Philippines). Inbound on Trade Route No. 12, U.S. Lines and Matson Orient will provide additional capacity from the Far East to the Atlantic. APL points out, however, that it does not purport to carry any appreciable inbound cargo on its RWW service from Trade Route No. 12 areas to the Atlantic, and that such cargo is not included in the inbound statistics in table VII. For these reasons, we agree that no adjustment should be made in projected United States-flag capacity because of authorized sailing increases for U.S. Lines and Matson Orient on Trade Route No. 12.

If we assume that 1956 figures for total outbound liner commercial cargo on APL's RWW service are increased by 2 percent per year for 1957 and 1958, and apply the adjustments we have found necessary, the present and authorized United States-flag participation outbound would be as shown in table VIII.

TABLE VIII

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
1956 outbound traffic.....	3,843	1,766	46
2 percent increase in 1957 and 1958.....	155		
	3,998		
Deduct—Philippine Islands.....	470	213	
	3,528	1,553	
Deduct Japanese coal.....	600		
Add—APL Atl./Straits.....		31	
Add—U.S. Lines and Matson Orient, T. R. 12 ¹		218	
	2,928	1,802	62

¹ See footnote 7

Applying the same adjustments to annual average figures for the 1953-56 total cargo movement, instead of 1956 carryings alone, we would reach the projected United States-flag participation figures shown in table IX.

TABLE IX

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
Average 1953-56 outbound traffic.....	3,257	1,363	42
Add—2 percent increase for 1957 and 1958.....	131		
	3,388		
Deduct—Philippine Islands.....	470	213	
	2,918	1,150	
Deduct—Japanese coal.....	600		
Add—APL Atl./Straits.....		31	
Add—U.S. Lines and Matson Orient, T.R. 12 ¹		218	
	2,318	1,399	60

¹ See footnote 7.

Assuming that the liner commercial cargo movement inbound on APL's RWW service remains at approximately the 1956 level, and applying the adjustments which we have found necessary, the present and authorized United States-flag participation inbound would be as shown in table X.

TABLE X

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
1956 inbound traffic.....	2,652	808	30
Deduct—Philippine Islands.....	1,301	212	
		596	
Add—APL Atl./Straits.....		37	
	1,351	633	47

Applying the same adjustments to annual average figures for the 1953-56 total inbound cargo movement, instead of to 1956 carryings alone, we would reach the projected United States-flag participation figures shown in table XI.

TABLE XI

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
Average 1953-56 inbound traffic.....	2,531	795	31
Deduct—Philippine Islands.....	1,301	212	
		583	
Add—APL Atl./Straits.....		37	
	1,230	620	50

In summary, combining tables VIII and X, based on 1956 carryings, present and authorized United States-flag participation on APL's RWW route would be as shown in table XII.

TABLE XII

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
Outbound.....	2,928	1,802	62
Inbound.....	1,351	633	47
Total.....	4,279	2,435	57

Combining tables IX and XI, based on average total carryings for the years 1953-56, present and authorized United States-flag participation on APL's RWW route would be as shown in table XIII.

TABLE XIII

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
Outbound.....	2,318	1,399	60
Inbound.....	1,230	620	50
Total.....	3,548	2,019	57

Upon the foregoing analysis of present and authorized service on APL's RWW route, we conclude that service by vessels of United States registry is adequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should not be operated thereon. Section 605(c) does interpose a bar to the award of an operating-differential subsidy contract to APL for the operation of additional vessels on its round-the-world westbound service.

In his recommended supplemental decision the examiner recommended that APL's application for the privilege of calling at Red Sea and Gulf of Aden ports on its present round-the-world westbound sailings be granted insofar as service to California is concerned, but denied insofar as service to the North Atlantic is concerned.

The liner commercial cargo carryings from the Gulf of Aden and Red Sea to United States North Atlantic and California ports for the years 1953 through 1956 are shown in table XIV.

TABLE XIV

	To North Atlantic			To California		
	Total tons	Tons U.S. flag	Percent U.S.	Total tons	Tons U.S. flag	Percent U.S.
1953.....	42,033	20,413	49	1,982	1,846	93
1954.....	30,664	13,040	42	2,590	1,443	56
1955.....	41,911	15,893	38	2,876	339	12
1956.....	31,375	6,955	22	3,683	264	7
Average.....	36,496	14,075	39	2,782	973	35

The basis for the examiner's conclusion that APL should not be permitted to serve the North Atlantic on this service appears to be that Export's inbound service from the Red Sea and Gulf of Aden to the North Atlantic has substantial free space, and therefore service from the Red Sea and Gulf of Aden should be found adequately serviced by United States-flag vessels, even though United States-flag participation averaged only 39 percent for the period 1953 through 1956 and has steadily declined from 49 percent in 1953 to only 22 percent in 1956.

We cannot agree with the examiner that available free space on an inbound service which covers a long and comprehensive trade route should, of itself, require a finding that such service is adequate as to certain isolated segments on that route. We consider that the record supports the finding, and we so conclude, that inbound service from the Red Sea and Gulf of Aden to North Atlantic and California ports is inadequate, that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon, and that section 605(c) does not interpose a bar to the modification of APL's operating differential subsidy for the operation of its existing round-the-world westbound vessels in such service.

II. INDIA-PAKISTAN-CEYLON SERVICE

Isthmian:

Isthmian has continuously operated the only United States-flag service to India, Pakistan, and Ceylon since 1923 (I-P-C service). At present, and as proposed under subsidy, vessels load at United States Gulf and Atlantic ports and sail eastward to Beirut, Lebanon, Alexandria, Egypt, Red Sea ports, Karachi, West Pakistan, Bombay, east India, and East Pakistan. Homeward voyages commence at Chittagong, East Pakistan, or Calcutta, east India, proceed thence to Ceylon, Red Sea ports, through the Suez Canal and Mediterranean Sea usually to United States South Atlantic ports, and complete discharging at Gulf ports. With subsidy, more frequent inbound calls would be made at North Atlantic ports.

Sailings by Isthmian on its I-P-C service have averaged 15.3 per year outbound and 15.5 per year inbound throughout the period 1953-1956. In addition, Isthmian operated an average of 11.2 sailings per year during this period on its eastbound round-the-world service; part of the outbound cargo was carried to some of the areas on the I-P-C route. Isthmian asserts that adding its 15 regular I-P-C sailings to the 11 ERW sailings works out to an average of 26 sailings per year as an "existing service", within the meaning of section 605(c).

Since the ERW sailings served the I-P-C service only incidentally and were suspended in October 1956, some months before the application for subsidy was filed, we will not consider any of them as part of an "existing" I-P-C service. We conclude, therefore, that Isthmian is operating an existing service in its I-P-C service to the extent of 16 sailings annually; that the effect of granting an operating-differential subsidy contract to Isthmian for such service will 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; and that section 605(c) does not interpose a bar to the award of subsidy to Isthmian for its existing I-P-C service.

Since Isthmian has requested subsidy up to a maximum of 36 annual sailings on its I-P-C service, the question of whether section 605(c) interposes a bar to subsidy for sailings in excess of 16 "existing" annual sailings depends upon whether the service already provided by vessels of United States registry is inadequate, and whether, in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon.

The average annual volume of liner and nonliner commercial cargo, in thousands of long tons, outbound and inbound, on the various segments of Isthmian's I-P-C route, for the period 1953 through 1956, appears in table XV. Included in the statistics are carryings of Isthmian's eastbound round-the-world vessels to eastern Mediterranean, Red Sea, and I-P-C destinations, consisting of an annual average of 44,000 tons outbound and 23,000 tons inbound. While these sailings have not been included in the 16 "existing sailings" of Isthmian on this route, they have contributed to United States-flag participation on the route. Without the cargo carried by the ERW vessels, United States-flag participation in liner carryings would be only 46 percent outbound, 48 percent inbound, and 47 percent over-all, as compared with 52 percent, 50 percent, and 51 percent, shown in table XV, including these ERW cargo carryings.

The I-P-C cargo carried by these ERW sailings has been captured in the past by United States-flag vessels operated by Isthmian, and without the availability of vessel capacity to move such cargo it would, at least to some extent, be lost to United States-flag sailings. We further recognize that to some degree the bulk-type nonliner cargoes are susceptible of liner movement in this trade. We do not agree with the examiner, however, that all such movement should be considered in our determinations of adequacy of United States-flag service, since the special circumstances found to exist in *States Steamship Co.—Sub-*

TABLE XV. *Outbound and inbound movement of commercial cargo on Isthmian's I-P-C service route, average per year, 1953-56*

[In thousands of long tons]

	Liner			Nonliner			Total		
	All flags	U.S. flag	Percent U.S.	All flags	U.S. flag	Percent U.S.	All flags	U.S. flag	Percent U.S.
OUTBOUND									
From N. Atlantic:									
To I-P-C.....	270	161	59	109	39	36	379	200	53
To Red Sea.....	46	30	65	10	2	20	56	32	58
To Med. Egypt, Leb.....	163	90	56	159	41	26	322	131	41
Sub total.....	479	281	59	278	82	29	757	363	48
From So. Atl. & Gulf:									
To I-P-C.....	195	84	43	256	61	24	451	145	32
To Red Sea.....	39	14	37	4	0	0	43	14	33
To Med. Egypt, Leb.....	74	29	39	58	11	19	132	40	30
Subtotal.....	308	127	40	318	72	23	626	199	32
Total.....	787	408	52	596	154	26	1,383	562	41
INBOUND									
To N. Atlantic:									
From I-P-C.....	576	287	50	720	119	17	1,296	406	31
From Red Sea.....	37	14	39	132	28	21	169	42	25
From Med. Egypt, Leb.....	24	13	55	-----	-----	-----	24	13	55
Subtotal.....	637	314	49	852	147	17	1,489	461	31
To So. Atl. & Gulf:									
From I-P-C.....	153	88	58	59	10	17	212	98	46
From Red Sea.....	3	-----	-----	-----	-----	-----	3	-----	-----
From Med. Egypt, Leb.....	13	7	54	-----	-----	-----	13	7	54
Subtotal.....	169	95	56	59	10	17	228	105	46
Total.....	806	409	50	911	157	17	1,717	566	33
Total outbound and inbound.....	1,593	817	51	1,507	311	21	3,100	1,128	36

sidy, Pacific Coast/Far East, 5 F.M.B. 304 (1957), do not here exist.⁸

It is apparent that without the vessel capacity to carry the cargoes in this service previously carried by the ERW vessels, United States-flag participation of 46 percent outbound, 48 percent inbound, and 47 percent over-all, previously referred to, would be inadequate. We do not feel, however, that the service is inadequately served to the extent of the maximum of 36 annual sailings per year requested by Isthmian, which is 20 more than the 16 we have previously found to be existing. Considering the traffic previously carried by the ERW sailings, and the availability of some of the nonliner-type cargoes for liner movement, we find that the service is inadequate to the extent of 8 sailings per annum in addition to the 16 existing sailings of Isthmian.

⁸ (1) " * * * tremendous—and growing—volume of bulk commodities available * * * "; (2) " * * * increasing ability of lines to convert these bulk-type cargoes to liner type "; (3) " * * * comparatively small amount of free space on liners * * * "; (4) " * * * meager participation by American-flag vessels in this nonliner cargo movement * * * "

We conclude that the service already provided by United States-flag vessels is inadequate to the extent of 8 sailings per year over the 16 annual sailings in the existing service of Isthmian, and that in the accomplishment of the purposes and policy of the Act such additional vessels should be operated thereon. We further conclude that with a total of 24 sailings per year by United States-flag vessels, service by vessels of United States registry in the I-P-C service would be adequate. Section 605(c) does interpose a bar to the award of an operating-differential subsidy contract for the operation of additional vessels thereon for service in excess of 24 sailings per year.

III. PERSIAN GULF SERVICE

Isthmian, Central Gulf, and Export all seek subsidy for service to the Persian Gulf. The total number of subsidized sailings requested is from a minimum of 52 to a maximum of 84 sailings per year, consisting of Isthmian's request for 24 to 36 sailings, Central Gulf for 16 to 24 sailings, and Export for 12 to 24 sailings. Only Isthmian and Central Gulf claim existing service in the trade.

A. *Isthmian:*

Isthmian's United States-flag ships inaugurated the first direct service from the United States to the Persian Gulf in 1936, and until late September 1957 operated the only United States-flag service. In the present service, which is proposed to be continued under subsidy, the vessels load at United States Gulf ports, proceed to Atlantic ports, thence to the eastern Mediterranean ports of Beirut and Alexandria, through the Suez Canal and Red Sea direct to Persian gulf ports. The inbound trade being substantially less than the outbound, some of the sailings have returned by way of Bombay or Karachi, as cargo offered. Under subsidy, at the requested minimum of 24 sailings a year, Isthmian contemplates that about half of the outbound sailings will come home by way of Karachi-Bombay. Vessels sailing outbound have been virtually fully loaded, on the basis of a stowage factor of 110 cubic feet, and throughout the period 1953-56 usable open space, on sailing from the last United States port has averaged but 4 percent of weight capacity and 6 percent of bale cubic capacity. Cargo for Persian Gulf and Red Sea ports aggregated 93 percent and 6 percent, respectively, of the total carryings. Inbound vessels have arrived at the first United States port with increasingly large percentages of open cargo capacity. For the four-year period this has averaged 59 percent of the weight capacity. During this period there was an average of 14 outbound sailings a year, with an average of approximately 4,000 long tons of commercial cargo, and 14.3 inbound sailings, with an average of approximately 1,200 tons.

Isthmian's service to the Persian Gulf continued at approximately monthly frequency until July 1957, at which time it was increased to two sailings a month. According to applicant, if the service applied for, namely, 24 to 36 sailings a year, is compared with the present level of service, then "existing service" is at the level of 24 sailings a year or better. Sailings commenced subsequent to the date of filing the subsidy application (in this case, January 7, 1957) will not be considered in determining existing service.

We conclude that Isthmian is an existing operator in the Persian Gulf service, within the meaning of section 605(c), to the extent of 14 sailings a year, and that an award of subsidy covering this service would be neither unduly advantageous to Isthmian nor unduly prejudicial to citizens of the United States operating United States-flag vessels in competition with Isthmian. Section 605(c) does not interpose a bar to the award of subsidy to Isthmian for its existing service of 14 sailings per year.

To reach a favorable finding under section 605(c) with respect to the balance of 22 sailings per year, we must determine that United States-flag service in the Persian Gulf trade is inadequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

B. *Central Gulf:*

Central Gulf requests an operating-differential subsidy for a minimum of 16 and a maximum of 24 sailings a year in a service between United States Gulf and Atlantic ports and Trade Route No. 18 ports on the Red Sea and Persian Gulf, in India, East Pakistan, West Pakistan, and Ceylon, with the privilege of calling at Beirut and Port Said. From the time of its organization in April 1947 until September 1957, Central Gulf operated owned and chartered ships in full cargo trades. Deciding to engage in berth operations, a fortnightly service to the Persian Gulf was initially advertised in August 1957, and service began with the sailing in late September 1957 of one of the two owned United States-flag AP-2 type vessels. Thereafter, and up to February 25, 1958, when the application for subsidy was filed, there were nine additional sailings, two of which were made by owned vessels, one by a chartered foreign-flag vessel, and the others by six chartered United States-flag vessels. Most of the vessels called at Beirut and Red Sea ports, all called at Persian Gulf ports and Karachi, and two went to East Pakistan. None served either west India or east India.

Outbound, the vessels sailed fully loaded and with full deck loads; there has been no homeward cargo, all vessels returning in ballast.

Four voyages had been terminated prior to the filing of the application. At the time of hearing Central Gulf had become a member of the Persian Gulf Outward Freight Conference, the Calcutta U.S.A. Conference, and the West Coast of India and Pakistan/U.S.A. Conference. If subsidy be granted, applicant proposes to acquire five C-3 or equivalent type vessels and to operate from United States Gulf and Atlantic ports to Beirut, Red Sea and Persian Gulf ports, Karachi, east India, and East Pakistan; homeward, from East Pakistan and east India to United States North Atlantic and Gulf ports. The estimated turnaround time is 103 days. Central Gulf anticipates securing about 1,500 weight tons of cargo for each sailing.

On the foregoing facts Central Gulf asks that it be found to be operating an existing service on Trade Route No. 18, within the meaning of section 605(c). Existing service is not claimed on inbound service. The foreign-flag vessel was operated by Central Gulf to spread its cost factors, but this does not entitle the sailing to be included as part of an existing United States-flag service.

In *States Steamship Co.—Subsidy, Pacific Coast/Far East, supra*, the Board said at page 311:

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.

Eight sailings in the five months preceding the filing of the application fail to constitute a base sufficiently broad to support a finding that Central Gulf has an existing service entitling it to subsidy, without examination as to need. Even if the operations should be found to embrace most of the other elements, probable permanency of the operations cannot be inferred from service during such a short period. Accordingly, we find that Central Gulf does not have the status of an existing operator, under section 605(c), on Trade Route No. 18. Under such circumstances, for applicant to prevail there must be a determination that United States-flag service in the Persian Gulf trade is inadequate and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

C. American Export:

Export originally requested, in 1940, authority to operate a subsidized service to the Persian Gulf; this was denied, without preju-

dice, however, to the right to resubmit the request if supplemented by a factual showing that the existing service performed by Isthmian Steamship Company was inadequate to meet the needs of commerce on the route. Export has never operated to the Persian Gulf but is now carrying a small quantity of Persian Gulf cargo to Beirut, from whence it is transported overland in various ways to destination.

The instant application, as amended, is for subsidization of a proposed new service of 12 to 24 annual sailings from United States Gulf and Atlantic ports to Port Said, thence through the Suez Canal to Red Sea and Persian Gulf ports. Inbound the vessels would proceed from the Persian Gulf to Karachi, Bombay, Malabar Coast ports in southwest India, thence to Aden and calling at Red Sea ports if cargo offers, and through the Suez Canal to the United States. At first it is intended to use six ships to operate 18 sailings a year, six of the sailings to be from and to the Gulf of Mexico and omitting calls on the Malabar Coast. Turnaround time is estimated at about 120 days, including service to United States Gulf ports. Each outbound sailing is expected to carry from 4,000 to 4,500 tons of cargo to the Persian Gulf and approximately 800 tons to Red Sea ports and Aden, but no cargo to Karachi or Bombay. Inbound carryings are estimated to be about 500 tons a sailing for Atlantic ports; very little cargo is expected for Gulf ports.

As previously noted, export does not claim to be an existing operator in the Persian Gulf service, and to make a favorable finding under section 605(c) with respect to Export's application we must find that United States-flag service in that trade is inadequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

United States-flag participation in the cargo movement in the Persian Gulf trade, for the years 1953 through 1956, is shown in table XVII. It is apparent from the table that the Persian Gulf service is predominantly an outbound one. Isthmian has operated outbound with negligible free space. For the reasons previously stated with respect to the I-P-C service, we will exclude the nonlinear carryings from our determination of adequacy of United States-flag service.

Isthmian's president believes that liner cargo in the Persian Gulf trade will increase gradually, perhaps 3 to 4 percent annually, over the 1956 volume. A consulting economist on behalf of Export estimated that loadings of commercial cargo in this trade may be expected to increase by 7.5 percent a year, and an economist for Isbrandtsen believes the volume of liner commodities in the trade, while continuing to fluctuate, nevertheless will increase during a five-year period but

TABLE XVII. *Commercial cargo movement between United States Atlantic and Gulf ports and Persian Gulf*

[In thousands of long tons]

	Liner			Nonliner			Total		
	All flags	U.S. flag	U.S. percent	All flags	U.S. flag	U.S. percent	All flags	U.S. flag	U.S. percent
Outbound:									
1953.....	178	62	35	4			182	62	34
1954.....	182	40	22				182	40	22
1955.....	217	54	25	20	20	99	237	74	31
1956.....	253	65	26	79	30	38	332	95	29
Average.....	208	55	27	26	12	48	233	68	29
Inbound:									
1953.....	36	25	70	7			44	25	58
1954.....	34	21	63	9			42	21	50
1955.....	44	12	28				44	12	28
1956.....	38	10	26	10			48	10	20
Average.....	38	17	45	6			44	17	39
Total — outbound — inbound.....	246	72	29	32	12	38	277	85	31

not more than 3 to 5 percent over the 1956 level. If the 1956 total of 253,000 tons of liner cargo should increase by 3 percent a year, by 1961 the level would be 293,000 tons. Export's estimate of 7.5 percent annual increase would raise the total to 364,000 tons. Transportation by United States-flag vessels of half of these estimates would require 33 to 40 sailings, respectively, with an average loading of approximately 4,500 tons, or 19 to 26 sailings, respectively, in addition to the 14 sailings in Isthmian's existing service. We believe the most realistic forecast is an annual growth of between three and four percent, which will require approximately 34 sailings per year, or 20 sailings in addition to Isthmian's existing service, in order to reach 50-percent United States-flag participation.

The foregoing facts establish, and we conclude, that the service already provided by United States-flag vessels in the Persian Gulf trade is inadequate to the extent of 20 sailings per year over the 14 sailings in the existing service of Isthmian.

The Persian Gulf applications request authorization to serve ports in the eastern Mediterranean and on the Red Sea and certain ports in the I-P-C area, in conjunction with and to support the primary services. The record indicates that these areas are incidental to the service to be provided to the Persian Gulf area, and they are included in the analysis we previously made in connection with the I-P-C services, wherein we found such services inadequately served by United States-flag vessels. We therefore see no reason to isolate and segmentize the traffic statistics for these secondary areas.

The primary Persian Gulf area is patently inadequately served by United States-flag vessels, and our findings under section 605 (c) with respect to the Persian Gulf service extend to and include all the areas included in the various applications for subsidy on the Persian Gulf route.

We find and conclude that the Persian Gulf service already provided by United States-flag vessels is inadequate to the extent of 20 sailings per year over the 14 annual sailings in the existing service of Isthmian, and that in the accomplishment of the purposes and policy of the Act such additional vessels should be operated thereon. Section 605 (c) does not interpose a bar to the award of an operating-differential subsidy for the operation of such additional vessels thereon. We further conclude that with a total of 34 sailings per year by United States-flag vessels, service by vessels of United States-flag registry would be adequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should not be operated thereon. Section 605 (c) does interpose a bar to the award of an operating-differential subsidy for the operation of additional vessels thereon for service in excess of 34 sailings per year.

The selection of which applicant or applicants may be granted subsidy contracts for the 20 sailings in the Persian Gulf service is not within the scope of section 605 (c) proceedings, and such determination will be made under other sections of the Act.

IV. APPLICATION FOR SECTION-805 (a) PERMISSION

As previously noted, Isthmian requests section-805 (a) permission for the following services :

1. Atlantic-Gulf/Hawaii service of Isthmian.
2. United States Gulf and Pacific coast intercoastal service of its parent company, States Marine.
3. United States Pacific coast ports to Atlantic coast ports lumber service of its parent company, States Marine.

In *States Marine Corp.—Subsidy, Tricontinent, Etc., Services*, 5 F.M.B. 537 (1959), States Marine, Isthmian's parent corporation, requested permission under section 805 (a) for all the domestic services here under consideration. All the testimony and exhibits on the domestic issues in that proceeding were incorporated by stipulation into this record, and there was no opposition in this proceeding to the granting of the requested permissions.

1. *Atlantic-Gulf/Hawaii service.* Isthmian began operating in the Atlantic-Gulf/Hawaii trade in 1923, and in 1934 it organized a joint service with Matson Navigation. Except for interruption from 1942

through 1946 because of World War II, service has continued to the present time.

As to the eastbound and westbound Atlantic coast sailings, the pattern of service establishes that Isthmian has "grandfather" rights, within the meaning of section 805(a). It is further apparent that in the eastbound trade to the Gulf, Isthmian similarly is entitled to "grandfather" rights. Isthmian is therefore entitled as a matter of law to the required permission under section 805(a) as to those portions of the Atlantic-Gulf/Hawaii service.

As for the westbound service from the Gulf to Hawaii, however, little or none was provided until 1939, and Isthmian has no "grandfather" rights as to this portion of its Atlantic-Gulf/Hawaii service.

Since 1939, Isthmian has provided a regular and fairly substantial westbound service from the Gulf, which appears to be vital to the economy of Hawaii. No party has protested the grant of permission for the service, and nothing in the record indicates that its continuation would result in unfair competition to any other domestic operator.

We conclude that continuation of Isthmian's Atlantic-Gulf/Hawaii service will not result in unfair competition to any person, firm, or corporation operating exclusively in any domestic service, and that it would not be prejudicial to the objects and policy of the Act. This report will serve as written permission to continue such service.

2. *Gulf and Pacific coast intercoastal service of States Marine.* In 1929, Luckenbach Gulf Steamship Corp. started a general cargo service between the Gulf and the Pacific coast, and in 1953 the company was purchased by States Marine. Except for a period during World War II, the service has been in bona-fide operation since 1935. Under section 805(a), Isthmian is entitled as a matter of law to the required permission for continuation of its Gulf and Pacific coast intercoastal service.

We conclude that continuation of States Marine's Gulf and Pacific coast intercoastal service will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and would not be prejudicial to the objects and policy of the Act. This report will serve as written permission to continue such service.

3. *Pacific coast to Atlantic coast lumber service of States Marine.* States Marine has had Interstate Commerce Commission authority since 1953 to carry intercoastal lumber from the Pacific to the Atlantic, and has operated such a service as an adjunct of its tricontinent service. Only Weyerhaeuser, Pope & Talbot, Inc., Quaker Line, Inc., and Calmar Steamship Corp., in addition to States Marine, operate

in this trade, and of these, Weyerhaeuser, Pope & Talbot, and Quaker Line have proprietary lumber interests. Cargo offered in this service exceeds vessel capacity, no protests were made to States Marine's continuation of such service, and independent lumber shippers need the service.

We conclude that continuation of States Marine's Pacific coast to Atlantic coast lumber service will not result in unfair competition to any person, firm, or corporation operating exclusively in the coast-wise or intercoastal service, and that it would not be prejudicial to the objects and policy of the Act. This report will serve as written permission to continue such service.

APL requests section-805 (a) permission to carry intercoastal cargo in the increased westbound round-the-world service for which it seeks subsidy. The conclusion we have reached, that additional vessels of United States registry should not be operated on such service, makes it unnecessary to grant the requested permission.

APPENDIX A

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 duly 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.

APPENDIX B

Section 805(a) :

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route

or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

5 F.M.B.

FEDERAL MARITIME BOARD

No. 833

MAATSCHAPPIJ "ZEETRANSPORT" N.V. (ORANJE LINE) ET AL.

v.

ANCHOR LINE LIMITED ET AL.

No. 834

AGREEMENT NO. 8400, BETWEEN ANCHOR LINE LIMITED,
THE BRISTOL CITY LINE OF STEAMSHIPS LTD. ET AL.

No. 840

PETITION OF ANCHOR LINE LTD. ET AL., PARTIES TO AGREEMENT
No. 8400

No. 843

IN THE MATTER OF AGREEMENT NO. 8440, BETWEEN ANCHOR LINE
LIMITED, THE BRISTOL CITY LINE OF STEAMSHIPS LTD. ET AL., AND
THE PROTEST OF ORANJE LINE ET AL. AGAINST APPROVAL THEREOF

Submitted November 3, 1959. Decided December 14, 1959

Respondents in No. 833 have not been shown to have engaged in concerted rate action, cooperative pooling and sailing arrangements, or a conspiracy to drive complainants from the United States Great Lakes-United Kingdom trade, in violation of sections 14 Second and 15 of the Shipping Act, 1916. Complaint dismissed.

The Board has power to act, under the Shipping Act, 1916, with respect to Agreements Nos. 8140 and 8130, covering the trades between United States and Canadian Great Lakes ports and ports on the St. Lawrence River, in Nova Scotia, Newfoundland, and New Brunswick, on the one hand, and ports of

the United Kingdom, on the other hand, notwithstanding that the agreements embrace also the foreign commerce of nations other than the United States. The agreements have not been shown to be detrimental to the commerce of the United States or otherwise to be in contravention of the Shipping Act, 1916. Petition in No. 840 denied.

Approval of Agreements Nos. 8400 and 8440, in substantially the same trade area as is covered by existing approved agreements, would be detrimental to the commerce of the United States. Agreements not approved and Nos. 834 and 843 discontinued.

George F. Galland, G. Nathan Calkins, Jr., Robert N. Kharasch, and Thomas K. Roche for Oranje Line et al.

Ronald A. Capone, Cletus Keating, Elmer C. Maddy, and Robert E. Kline, Jr., for Anchor Line Limited et al.

John J. O'Connor for Isbrandtsen Company, Inc., intervener in No. 834.

Edward Schmeltzer, Edward Aptaker, and Robert E. Mitchell as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*,
THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

These proceedings present related issues and were consolidated for hearing and recommended decision of the examiner. Exceptions were filed to the recommended decision and the matters were orally argued before us. Our findings and conclusions generally comport with those of the examiner.

Pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. 814 (the Act), Anchor Line Limited, The Bristol City Line of Steamships Ltd., Canadian Pacific Railway Company, The Cunard Steam-Ship Company Limited, Ellerman's Wilson Line, Limited, Furness, Withy & Company Limited, Manchester Liners Limited, and The Ulster Steamship Company Limited (Head & Lord Line) (respondents) filed for approval an agreement providing for the creation of a conference to be known as United Kingdom-United States Great Lakes Westbound Freight Conference (the British westbound conference), for the establishment and maintenance of agreed rates, charges, and practices for or in connection with the transportation of cargo in the trade from Great Britain, Northern Ireland, and Eire to United States Great Lakes ports. The agreement was assigned No. 8400, and notice of its filing was published in the Federal Register of January 18, 1958 (23 F.R. 349).

A protest against approval of Agreement No. 8400 was filed February 6, 1958, on behalf of Maatschappij "Zeetransport" N.V. (Oranje Line), A/S Luksefjell, A/S Dovrefjell, A/S Falkefjell, and A/S Rudolf, operating a joint service known as Fjell Line under approved Agreement No. 7763, and And. Smith Rederi A/B and Rederiaktiebolaget Ragne, operating a joint service known as Swedish Chicago Line under approved Agreement No. 8036 (complainants¹). Complainants are members of Great Lakes-United Kingdom Westbound Conference (the approved westbound conference), created under approved Agreement No. 8140 and covering the westbound trade from ports of the United Kingdom to ports of the Great Lakes of the United States and Canada, the St. Lawrence River, Nova Scotia, Newfoundland, and New Brunswick, and also are members of Great Lakes-United Kingdom Eastbound Conference (the approved eastbound conference), created under approved Agreement No. 8130 and covering the eastbound trade in the same area covered by the approved westbound conference.

On the protest of complainants and upon our own motion, we instituted an investigation by order of April 7, 1958 (No. 834), pursuant to section 22 of the Act, 46 U.S.C. 821, to determine whether operation under Agreement No. 8400 would be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States within the meaning of section 15 of the Act. No action approving or disapproving Agreement No. 8400 was taken by us.

By complaint filed March 31, 1958, as amended (No. 833), it is alleged that (1) respondents had engaged in concerted rate action, cooperative pooling and sailing arrangements, and a conspiracy to drive complainants from the United States Great Lakes-United Kingdom trade, in violation of sections 14 Second, 46 U.S.C. 812 Second, and 15 of the Act; (2) the operations of the British westbound conference contemplated port allocation arrangements not reflected in Agreement No. 8400 as filed; (3) Agreement No. 8400 is unlawful *per se* because it is duplicative of Agreement No. 8140; and (4) Agreement No. 8400 would be detrimental to the foreign commerce of the United States. Complainants request disapproval of Agreement No. 8400; and ask that respondents be enjoined from carrying out such agreement and from continuation of violation of the Act found to exist.

¹ Where the context so indicates, the term "complainants" also will include Liverpool Liners Limited, which was made a party complainant in No. 833 by stipulation of the parties filed May 21, 1958, and Nordlake Line, which was admitted as a party with status similar to that of the other complainants upon stipulation of the parties accepted of record on September 22, 1958.

On May 14, 1958, respondents filed a petition (No. 840) alleging that Agreements Nos. 8140 and 8130 creating the approved westbound and eastbound conferences were and are beyond our authority to approve because they inseparably embrace foreign trade between Canada and the United Kingdom, result in unjust discrimination, are unfair as between carriers, and are detrimental to the commerce of the United States. The petition requests a finding that we are without jurisdiction to approve Agreements Nos. 8140 and 8130, and requests that we withdraw approval thereof, dismiss the complaint in No. 833 and discontinue the investigation in No. 834, and approve Agreement No. 8400. By order of July 11, 1958, we denied complainants' motion to dismiss the petition, and denied the petition insofar as it sought the dismissal of the complaint in No. 833 and the discontinuance of the investigation in No. 834, and set for hearing and investigation, on a consolidated record with Nos. 833 and 834, the remaining issues presented by the petition.

Subsequently, respondents filed for approval under section 15 of the Act an agreement, assigned Agreement No. 8440, providing for the creation of a conference to be known as United States Great Lakes-United Kingdom Eastbound Freight Conference (the British eastbound conference), covering the eastbound trade in the same area covered by Agreement No. 8400. Notice of the filing of the agreement was published in the Federal Register of July 12, 1958 (23 F.R. 5311), and a protest against approval thereof was filed by complainants on August 1, 1958. By order of September 22, 1958 (No. 843), we set for hearing and investigation the issues presented by the filing of Agreement No. 8440 and the protest against approval thereof, consolidated No. 843 for hearing and report with Nos. 833, 834, and 840, and ordered that section-15 action with respect to Agreement No. 8440 be held in abeyance pending decision in the consolidated proceedings.

Complainants intervened in Nos. 834, 840, and 843. Public Counsel intervened in No. 833, pursuant to rule 3(b) of our Rules of Practice and Procedure (46 CFR 201.42). Isbrandtsen Company, Inc., intervened in No. 834 but took no active part in the proceeding.

Up to the date of the hearing, operations into the Great Lakes ports of the United States and Canada, through the St. Lawrence River and connecting waterways, have been limited to smaller vessels because of size and draft limitations imposed by locks and canals. Generally, the vessels operated by complainants and respondents, in the services detailed below, have ranged in capacity from 940 to 2,875 deadweight tons, with the deadweight capacity for transit into the Great Lakes limited to about 1,500 tons. At ports on the St. Lawrence River

below and including Montreal, Qué., and ports in Nova Scotia, Newfoundland, and New Brunswick (Canadian seaboard ports), however, no such size and draft limitations apply and operations may be and have been conducted with regular ocean-going cargo vessels. With the opening of the St. Lawrence Seaway in 1959, with its deep-draft locks, canals, and channels, draft limitations are those applicable at particular ports only, and it is likely that changed patterns of operation will ensue.

Fjell Line is the pioneer line in the trade, inaugurating in 1935 a service between Rotterdam, Antwerp, Oslo, London, Liverpool, and Manchester, and ports on the Great Lakes. Except for the period of World War II, it has operated continuously since that time in the Great Lakes-United Kingdom trade. Oranje Line inaugurated a service between the Great Lakes and the United Kingdom and Europe before World War II, and except for the war years, has since been operating in the Great Lakes-United Kingdom trade. These two carriers operate a joint service, known as Fjell-Oranje Line, under approved Agreement No. 8067, and the westbound itinerary generally is London, Antwerp, Glasgow, Montreal, Toronto, Ont., Cleveland, Ohio, Detroit, Mich., Chicago, Ill., and Milwaukee Wis.; eastbound, Chicago, Milwaukee, Sarnia, Ont., Detroit, Cleveland, Hamilton, Ont., Toronto, Montreal, London, Antwerp, Rotterdam, and Glasgow. The order of call changes frequently in both directions.

Swedish Chicago Line commenced operations at the beginning of the 1956 Great Lakes open season of navigation, and its vessels generally follow a westbound itinerary from Scandinavian ports to London or Liverpool and thence to Montreal, Toronto, Buffalo, N.Y., Cleveland, Detroit, Chicago, and Milwaukee, and an eastbound itinerary from Chicago, Milwaukee, Detroit, Cleveland, Hamilton, Toronto, and Montreal to Liverpool and thence to Scandinavian ports. The vessels usually do not call at Bordeaux-Hamburg range ports although calls were made at Rotterdam on two eastbound voyages in 1958. Swedish Chicago Line and Fjell-Oranje Line operate under a port and sailing allocation agreement approved as Agreement No. 8077.

Liverpool Liners inaugurated service at Great Lakes ports in 1958, and its vessels generally follow a westbound itinerary from Liverpool and Dublin to Montreal, Toronto, Hamilton, Cleveland, Detroit, Chicago, and Milwaukee, and eastbound from Chicago, Milwaukee, Cleveland, Toronto, and Montreal to Liverpool and Dublin. Nordlake Line became a party to the approved westbound and eastbound conference agreements in September 1958, but no evidence concerning its operations was presented.

Respondents have operated in the trade between the United Kingdom and Canada for many years, but they did not commence operations individually² to and from United States Great Lakes ports until the opening of navigation in 1957. Ellerman's Wilson Line had not offered service to United States Great Lakes ports up to the date of the hearing. Anchor Line advertised sailings in its own name early in 1958 between Glasgow and Chicago, Detroit, Cleveland, Milwaukee, and other United States ports on the Great Lakes, of vessels owned or operated by Head & Lord Line and Bristol City Line, but these advertisements were later changed to show Anchor Line as loading agent at Glasgow for undisclosed principals. There is no indication that any services from the United Kingdom or Eire to United States Great Lakes ports actually have been operated by Anchor Line. Cargo statistics covering the sailings out of Glasgow advertised by Anchor Line were included in the data furnished by the owners or operators of the vessels. Complainants contend that the record confirms the common-carrier status of Anchor Line. To qualify as a common carrier, Anchor Line's undertaking to carry must continue, for a certain period of time at least, subsequent to the receipt of goods for the purpose of transportation. *Agreement No. 7620, 2 U.S.M.C. 749, 752-3 (1945)*. We conclude on this record that Anchor Line has not been shown to have operated as a common carrier in the United Kingdom-United States Great Lakes trade.

The remaining respondents have conducted operations to and from United States Great Lakes ports and their vessels, in conjunction with such operations, made calls at Canadian Great Lakes ports, but the identity of the Canadian ports is not shown.

A joint advertising circular was distributed early in 1958, in which the eight respondents announced their intention to conduct individual direct liner services to United States Great Lakes ports. Furness, Withy in 1957 advertised certain of its sailings to United States Great Lakes ports in its own name, but generally, so far as the record shows, the sailings of Canadian Pacific Railway, Cunard, and Furness, Withy were advertised jointly during that year. These advertisements indicated clearly the names of the operators of the respective vessels. No evidence was presented concerning advertising practices of these three respondents during 1958. Practices of the other respondents

² The record indicates that a service known as London Liners was advertised in 1956 to and from certain United States Great Lakes ports, under the auspices of Canadian North Atlantic Westbound Freight Conference, detailed *infra*, which was succeeded in 1957 by the individual Canadian-United Kingdom operations of respondents. This service was apparently conducted with vessels operated by Furness, Withy and Canadian Pacific Railway, with London as the sole United Kingdom port of call, but no further details are shown.

are noted below. Advertisements of record relate principally to the westbound services offered by respondents, and were reproduced from publications circulated in the United Kingdom. Because of relatively short distances within Great Britain, cargo originating at inland points may be attracted to any one of several ports served by one or more of the respondents, as indicated below.

Bristol City Line commenced operations to United States Great Lakes ports in 1958. The ports served were Glasgow, Avenmouth, Cleveland, Detroit, Milwaukee, and Chicago westbound, and the same United States ports and Swansea, Avenmouth, Liverpool, Belfast, and Glasgow eastbound. So far as the record shows, Bristol City Line advertised its westbound sailings in its own name out of Avenmouth and other South Wales ports only. Westbound sailings out of Glasgow were advertised by Anchor Line in its own name through April 1958, and thereafter by Anchor Line as loading broker for undisclosed principals. Bristol City Line also advertised certain sailings out of Avenmouth and other South Wales ports of Head & Lord Line vessels, at first in its own name and later by identifying the sailings as those of Head & Lord Line vessels and indicating that Head & Lord Line bills of lading would be issued.

Head & Lord Line, on its westbound voyages in 1957, served Liverpool, Belfast, Glasgow, Cleveland, Detroit, Milwaukee, and Chicago; eastbound, the same United States ports and Belfast and Liverpool. In 1958, the ports served eastbound and westbound were Belfast, Liverpool, Dublin, Avenmouth, Glasgow, Cleveland, Detroit, Milwaukee, and Chicago, with Cork as a port of call on one eastbound voyage. Head & Lord Line, so far as the record shows, advertised its 1958 westbound services in its own name out of Liverpool only. The sailings from Glasgow were advertised by Anchor Line, and those from Avenmouth by Bristol City Line, each in its own name at first and later as loading broker or agent as stated above. Sailings to and from Belfast and Dublin, so far as the record shows, were advertised by Head & Lord Line only.

Canadian Pacific Railway inaugurated service to United States Great Lakes ports at the end of the 1957 season of navigation on the Lakes, operating one westbound and two eastbound sailings. In that year the ports served were London and Detroit westbound, and Detroit, Liverpool, and London eastbound. In 1958 it operated approximately alternate sailings from London and Liverpool to Detroit and Cleveland. Eastbound, Detroit and Cleveland were served, with London as the United Kingdom port of call on all voyages except one, on which Liverpool only was served. Buffalo was served on one westbound and eastbound round voyage.

Cunard conducted operations throughout the 1957 and 1958 seasons. Eastbound and westbound the ports served in 1957 were London, Cleveland, and Detroit. Liverpool was added in 1958 as a port of call, and a few calls were made at Buffalo to load or discharge cargo.

Furness, Withy likewise conducted operations in 1957 and 1958 between London, Buffalo, Cleveland, Detroit, Milwaukee, Chicago, and Muskegon, Mich. Eastbound, two calls also were made in 1957 at Liverpool and one at Manchester. Manchester Liners, in 1957 and 1958, served only Manchester in the United Kingdom and the United States Great Lakes ports of Cleveland, Detroit, Milwaukee, and Chicago.

Respondents except Anchor Line, together with The Cairn Line of Steamships Limited and The Donaldson Line Limited, are members of Canadian North Atlantic Westbound Freight Conference and Canada-United Kingdom Freight Conference (the Canadian conferences), regulating their operations westbound and eastbound, respectively, between Canadian Great Lakes and seaboard ports and Great Britain, Northern Ireland, and Eire. These conferences employ exclusive-patronage contract/noncontract rate systems, obligating both shippers and freight brokers, which limit the ability of complainants to procure cargo moving to and from Canadian ports.

Complainants have applied for membership in the Canadian conferences since 1952 but their applications have been denied consistently. Their latest applications were pending at the time of the hearing. Numerous shippers and forwarders in the United States have executed contracts with these conferences in order to take advantage of contract rates out of Montreal. The latter port enjoys inland rate advantages over North Atlantic ports of the United States, and is therefore an important gateway for United States import and export cargo moving to and from the midwestern States. At least 75 percent of the shippers in the westbound United Kingdom-Canadian trade have executed contracts with the Canadian conference covering that trade, and regular shippers rather than occasional shippers are most likely to execute such contracts. Complainants have offered to delete the coverage of Canadian ports from the approved eastbound and westbound conferences, provided they are admitted to membership in the Canadian conferences.

Respondents are unwilling to join the approved westbound and eastbound conferences, with their existing coverage of Canadian Great Lakes and seaboard ports, for several reasons. Such action would require respondents, because of provisions in the conference agreements, to withdraw from the existing Canadian conferences.

They consider that this would be a breach of faith with Cairn Line and Donaldson Line, members of the Canadian conferences not signatories to Agreements Nos. 8400 and 8440. Also, there would then be either multiple conferences or a conference and independent operators (Cairn Line and Donaldson Line) in the United Kingdom-Canadian trade.

Respondents also object to the fact that the headquarters of the approved westbound conference is at Rotterdam, although the conference agreement by its terms relates only to service from the United Kingdom. They fear that, because of the orientation of the approved conferences to the continental trades, and the unanimous vote procedures regarding rate matters followed by those conferences, complainants would be in a position to accord more favorable rates to continental shippers than to shippers in the United Kingdom, and at the same time veto any efforts of respondents to revise rates should it be necessary to do so in order for United Kingdom manufacturers to meet the competition of continental manufacturers. In this connection, respondents make reference to several instances wherein the tariff of the approved westbound conference provides for higher rates from United Kingdom ports to United States Great Lakes ports than the tariff of the United States Great Lakes-Bordeaux/Hamburg Range Westbound Conference provides from continental ports to the same destinations.

The approved westbound and eastbound conferences do not employ exclusive-patronage contract systems in their operations,³ nor do any of the other conferences whose members serve United States Great Lakes ports. On the other hand, all conferences which serve Canadian Great Lakes or seaboard ports exclusively, so far as here pertinent, employ such systems.

Nordlake Line, Fjell Line, and Oranje Line are members of the United States Great Lakes-Bordeaux/Hamburg Range Eastbound Conference and United States Great Lakes-Bordeaux Range Westbound Conference (approved Agreements Nos. 7820 and 7830), covering the eastbound and westbound trades between United States Great Lakes ports and continental European ports in the Bordeaux/Hamburg range. These conferences at one time also covered London, which was deleted when the approved westbound and eastbound con-

³ A modification of Agreement No. 7830, which for the first time would institute an exclusive patronage system, with dual contract/noncontract rates, in the United States Great Lakes trades, is under consideration in No. 795, *In the Matter of Agreement No. 7830-2*, which is pending decision of the Board.

ferences were established in 1953, and also included Canadian Great Lakes and seaboard ports, which were deleted in 1957. Between 1946 and 1949, these conferences were in competition in the trade between Canadian seaboard ports and Bordeaux/Hamburg range ports with Canadian seaboard-continental eastbound and westbound conferences, among the members of which were some of the respondents. During this period of competition between differently constituted conferences, rate cutting resulted in substantial disruption of the trade. Ultimately, the members of the conferences established under Agreements Nos. 7820 and 7830 joined the competing Canadian seaboard-continental conferences, which ended the conflict. Present membership of the latter conferences includes complainants Fjell Line and Oranje Line and respondents Cunard and Canadian Pacific Railway.

Complainants and respondents agree that the existence of competing conferences in a particular trade, with differently constituted memberships, will ultimately result in rate wars and complete disruption of that trade, and that such disruption will be more severe than in the case of a single conference faced with the competition of several individual carriers. The reason given is that under a conference the members can offer coverage of broad ranges of ports whereas the port coverage of the lines individually would be much more limited.

There are several other conferences in existence or proposed which have some bearing on the issues here. Those of the complainants whose vessels make calls at Bordeaux/Hamburg range ports are members of the Canadian Great Lakes-Bordeaux/Hamburg Range eastbound and westbound conferences, covering the trade indicated by the titles. Respondent Canadian Pacific Railway at one time made inquiry about membership in the eastbound conference, but submitted no formal membership application. Complainants state that Canadian Pacific Railway would have been admitted to membership had it applied.

Fjell Line and Swedish Chicago Line are members of the U.S. Great Lakes, Scandinavian and Baltic Eastbound Conference, established under approved Agreement No. 8180, covering the trade between United States Great Lakes ports and Icelandic, Scandinavian, and Baltic Sea ports.

Tables I and II show the cargo in revenue tons carried by complainants' vessels in the westbound and eastbound Great Lakes-United Kingdom services. They do not include any statistics relating to the separate Great Lakes-Bordeaux/Hamburg range services.

TABLE I. *Complainants' westbound cargo, United Kingdom-Great Lakes service*

Year	U.K. to U S. Lakes	U.K. to Canada		Continent to U S. Lakes	Continent to Canada	
		Lakes	Seaboard		Lakes	Seaboard
1953.....	24, 580	3, 024	2, 446	49, 061	5, 452	7, 198
1954.....	32, 836	3, 440	426	36, 058	5, 991	10, 819
1955.....	36, 480	5, 035	3, 716	43, 279	4, 760	7, 361
1956.....	44, 565	6, 277	1, 477	25, 853	3, 906	9, 819
1957.....	49, 316	7, 846	2, 324	16, 390	3, 208	13, 657
1958 ¹	26, 628	4, 125	2, 127	17, 559	4, 861	9, 119

¹To August 1, 1958.TABLE II. *Complainants' eastbound cargo, Great Lakes-United Kingdom service*

Year	U.S. Lakes to U.K.	Canada to U.K.		U.S. Lakes to Continent	Canada to Continent	
		Lakes	Seaboard		Lakes	Seaboard
1953.....	14, 134	9, 868	12, 236	39, 170	6, 238	8, 936
1954.....	25, 474	14, 592	19, 753	38, 005	5, 665	14, 053
1955.....	36, 984	3, 471	9, 739	21, 807	4, 211	10, 829
1956.....	43, 133	4, 207	19, 391	17, 893	1, 192	9, 428
1957.....	39, 428	13, 143	16, 065	15, 310	992	16, 441
1958 ¹	18, 235	5, 561	6, 781	9, 674	2, 448	8, 133

¹To August 1, 1958.

Tables III and IV show the cargo in revenue tons carried by those respondents which conducted operations to and from United States Great Lakes ports in 1957 and 1958. No data were presented showing the amount of Canadian seaboard cargo carried.

TABLE III. *Respondents' westbound Great Lakes traffic*

Line	1957		1958 to Aug. 1	
	U.K. to U S. Lakes	U K. to Canadian Lakes	U.K. to U S. Lakes	U K. to Canadian Lakes
Bristol City Line.....			1, 470	544
Canadian Pacific Railway.....	412	1, 021	2, 709	8, 112
Cunard.....	826	4, 647	1, 408	5, 680
Furness, Withy.....	3, 167	7, 383	875	5, 096
Head & Lord Line.....	6, 570	1, 049	5, 501	1, 426
Manchester Liners.....	4, 696	18, 420	2, 488	11, 387
Totals.....	15, 671	32, 520	14, 451	32, 245

TABLE IV. Respondents' eastbound Great Lakes traffic

Line	1957		1958 to Aug. 1	
	U.S. Lakes to U.K.	Canadian Lakes to U.K.	U.S. Lakes to U.K.	Canadian Lakes to U.K.
Bristol City Line.....			564	468
Canadian Pacific Railway.....	338	1,965	845	2,201
Cunard.....	1,582	7,049	824	3,441
Furness, Withy.....	5,152	2,546	1,899	1,333
Head & Lord Line.....	4,186	4,325	2,487	3,387
Manchester Liners.....	10,586	5,062	4,027	4,682
Totals.....	21,844	20,947	10,646	15,512

Tables I and II show that complainants have been able, as the trade between the United States Great Lakes ports and the United Kingdom has developed, to concentrate primarily upon the Great Lakes-United Kingdom service with progressively less reliance upon traffic to and from the Continent. Westbound traffic originating at continental and Scandinavian ports declined from 67 percent in 1953 to 37 percent in 1957, and eastbound traffic destined to continental and Scandinavian ports declined from 60 percent in 1953 to 32 percent in 1957, of the total carryings in that service.

Tables III and IV demonstrate that respondents, on the whole, have devoted their efforts more to the trade between the United Kingdom and Canada rather than that between United States Great Lakes ports and the United Kingdom, although there are variations as between the individual respondents.

The statistics demonstrate, together with data concerning the number of sailings made, the effectiveness of the exclusive-patronage contract systems employed by the Canadian conferences. In 1957 and to August 1, 1958, respondents had 76 westbound and 68 eastbound sailings between the United Kingdom and Canadian Great Lakes ports, averaging 852 and 536 tons, respectively, per sailing. In the same period, complainants had 72 westbound and 58 eastbound sailings between the same areas, averaging 166 and 324 tons, respectively, per sailing. Complainants' eastbound average carryings from Canadian Great Lakes ports are somewhat distorted by reason of the 1957 figures shown in table II. Average carryings eastbound in 1958 for 23 voyages was 241.8 tons per voyage. It appears, therefore, that the exclusive-patronage contract systems of the Canadian conferences are somewhat more effective westbound than eastbound.

The statistics also show that, from an economic standpoint, complainants and respondents alike have found it necessary to serve all

Great Lakes ports, Canadian and United States, in sailings to and from the United Kingdom.

In their preliminary meetings leading up to the organization of the British westbound conference, respondents nominated conference secretaries to draft the conference agreement, to make representations to the Board leading up to approval of the agreement, and to proceed with the compilation of a draft conference tariff. A draft of tariff was prepared by the conference secretaries and was circulated to the members of the proposed conference. At least 79 copies of this draft tariff were prepared. Revisions of particular items also were circulated by the secretaries, at the suggestion of the member lines. The only revisions of record were issued February 7, 1958, before the secretaries received notice from the Board that complainants' protest against approval of Agreement No. 8400 had been filed. There is no direct evidence that joint action has been taken by respondents to adopt the draft tariff, or that respondents have agreed to be bound thereby. The conference secretary testified that the members of the proposed British westbound conference were free to use the draft tariff as a basis for their rate quotations if they so desired, that to his knowledge the individual respondents did not like the tariff in many instances, and that the tariff was not binding on them.

There are shown of record a number of instances in which respondents other than Anchor Line and Ellerman's Wilson Line have quoted identical rates in soliciting westbound traffic, and in many of these instances the rates were the same as those shown in the draft tariff.⁴ For example, Canadian Pacific Railway, Bristol City Line, Furness, Withy, and Manchester Liners all quoted rates at about the same time of 252 shillings sixpence per ton, weight or measurement, on needles up to a value of £125 per ton from United Kingdom ports to Cleveland and Detroit; and Cunard, Canadian Pacific Railway, and Manchester Liners all quoted rates of 125 shillings per ton, weight or measurement, on chocolate confectionery over 70 cubic feet per 20 hundredweight to and from the same ports, all of which rates were the same as shown in the draft tariff. The rate quotations of the five respondents first mentioned above on linoleum tiles, while differing from the rate shown in the draft tariff, were the same.

It is the general practice in the shipping industry for one line to meet exactly the rates of its competitors to the extent they can be ascertained, unless a policy of rate cutting is embarked upon. Numerous

⁴ The record also shows rate quotations by Anchor Line, which, except in one instance, were the same as those given by the other respondents, but which are not further considered in view of our conclusion *infra* that Anchor Line cannot be found to have operated as a common carrier to and from United States Great Lakes ports.

instances are cited wherein complainants rates are the same as those quoted by respondents and the same as those shown in the draft tariff. On the other hand, some of the rates in the draft tariff, and in some instances those quoted by respondents, were lower than those established by complainants in their tariff on file with the Board.

DISCUSSION AND CONCLUSIONS.

The issues for determination are (1) whether the Board has jurisdiction to approve Agreements Nos. 8140 and 8130; (2) whether the operations of the approved westbound and eastbound conferences are in contravention of section 15 of the Act; (3) whether the operations of the proposed British westbound and eastbound conferences would be detrimental to the commerce of the United States, or otherwise in contravention of section 15; and (4) whether respondents have violated sections 14 Second and 15 of the Act.

The examiner found that our jurisdiction over Agreements Nos. 8140 and 8130 is not defeated by reason of the fact that they embrace the trade between Canada and the United Kingdom in addition to foreign commerce of the United States; that operations under the approved westbound and eastbound conference agreements are not detrimental to the commerce of the United States or otherwise in contravention of section 15 of the Act, and that there is no justification for withdrawal of the existing approval of those agreements; that approval of proposed Agreements Nos. 8400 and 8440 would be detrimental to the commerce of the United States, in that it would permit the operation of competing conferences with resulting rate instability and rate wars, and approval should therefore be withheld; and that the complaint in No. 833 should be dismissed on findings that no violations of the Act had been shown.

Jurisdiction. Respondents contend that Agreements Nos. 8140 and 8130 inseparably embrace Canadian trade with the United States Great Lakes trade, that the Board cannot lawfully regulate the commerce between Canada and the United Kingdom under the Act, and that we therefore have no jurisdiction to approve those agreements and must withdraw our prior approval. Section 1 of the Act provides, so far as is pertinent :

The term "common carrier by water in foreign commerce" means a common carrier * * * engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade * * * .

* * * * *

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce * * * .

Section 15 of the Act provides, so far as is pertinent:

That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

We need not here determine whether, under section 15, we have or do not have jurisdiction over agreements between common carriers by water in foreign commerce, as defined in the Act, which relate solely to the foreign commerce of foreign nations. Although Agreements Nos. 8140 and 8130 embrace trade between Canada and the United Kingdom, they also cover the foreign commerce of the United States. It is clear that in this case, where the agreements cover both the foreign commerce of the United States and also the intimately related foreign commerce of Canada, our jurisdiction under section 15 exists.

By vesting in us power to disapprove any agreement that we find to be unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors, section 15 recognizes that a single agreement may embrace the foreign commerce of the United States and the foreign commerce of other nations. Thus, it is clear that we are not, and were not, precluded by the statute from taking action with respect to Agreements Nos. 8140 and 8130.

In exercising jurisdiction under section 15 with respect to agreements embracing the foreign commerce of other nations as well as that of the United States, we do not thereby assert regulatory power over the foreign commerce of any other nation. We are required by the Act to approve agreements submitted for approval, in the absence of findings that they are unjustly discriminatory or unfair, or detri-

mental to the commerce of the United States, or are otherwise in contravention of the Act. Approval by us of any agreement carries with it, by the terms of section 15, exemption from the antitrust laws of the *United States*, and actions taken pursuant to the approved agreement are exempt from such laws.

The impact upon the foreign commerce of nations other than the United States which may result from approval of any agreement which embraces the foreign commerce of such nations as well as that of the United States, stems from the actions of the carriers parties to the agreement. There is nothing in the Act, nor in our actions thereunder with respect to any particular agreement, which in any way purports to regulate the foreign commerce of other nations. Our approval does not affect the authority of a foreign country over its commerce. It does, however, pursuant to the specific terms of section 15, exempt the approved agreements from the provisions of the anti-trust laws. It is axiomatic that any sovereign nation is free to take any action which it deems necessary or prudent for the furtherance or protection of its own foreign commerce.

Our conclusion that we have jurisdiction over Agreements Nos. 8140 and 8130 finds support in decisions of the Supreme Court concerning the jurisdiction of the Interstate Commerce Commission. The Interstate Commerce Act, in section 1, 49 U.S.C. 1, vests in that agency jurisdiction over railroad rates in foreign commerce only insofar as the transportation takes place within the United States, but it was held in *News Syndicate Co. v. N.Y.C.R.R.*, 275 U.S. 179 (1927), and *Lewis, Etc. Co. v. Southern Pac. Co.*, 283 U.S. 654 (1931), that the Interstate Commerce Commission has jurisdiction to determine the reasonableness of joint through rates applicable on international shipments from points in Canada to points in the United States.

Agreements Nos. 8140 and 8130. Respondents argue that Agreements Nos. 8140 and 8130 are unjustly discriminatory and unfair as between carriers, since in order to become members they would be compelled to withdraw from the Canadian conferences and thus break faith with Cairn Line and Donaldson Line, with which companies they have been in association over a long period of time in a trade over which the Board has no jurisdiction, and that the agreements are detrimental to the commerce of the United States in that respondents are compelled to operate as independents in the United States Great Lakes trade should they elect to remain with the Canadian conferences and the Board fails to approve the British eastbound and westbound conference agreements. Respondents also urge that the unanimous

vote procedures maintained by the approved eastbound and westbound conferences are discriminatory.⁵

Respondents have made no effort to join the approved eastbound and westbound conferences. Their arguments concerning the voting procedures maintained by those conferences are therefore entirely speculative. In the absence of evidence concerning the actual results of operations under the voting rules, no findings concerning them may be made. In *Pacific Coast European Conference*, 3 U.S.M.C. 11 (1948), it is stated at p. 20:

There are conferences which have the unanimous, two-thirds, three-fourths, or majority voting rules. No one of these can be disapproved as an organizational procedure, but the lawfulness of any of them must be based upon evidence as to their working in practice as introduced in a public hearing. Tests of lawfulness are found in actions or courses of conduct, not in organizational procedure.

With respect to respondents' arguments concerning Agreements Nos. 8140 and 8130, we recognize, as did the examiner, that underlying these proceedings is the conflict between complainants and respondents over the trade between the United Kingdom and Canada. Respondents appear determined to preserve their dominant position in that trade. It is obvious that their refusal to admit complainants to membership in the Canadian conferences underlies their effort to establish the proposed British eastbound and westbound conferences and their refusal to join with complainants in the approved eastbound and westbound conferences. This impasse, however, is extraneous to the issue presented here, that is, the lawfulness of the existing conference agreements.

The statutory standards set forth in section 15 relate only to the foreign commerce of the United States and the actions of carriers operating in that commerce, and the issue here must be determined in the light of the effect of the approved eastbound and westbound conferences upon the foreign commerce of the United States. The inclusion in those conferences agreements of the trade between Canada and the United Kingdom has not been shown to be detrimental to the commerce of the United States. To the contrary, it seems clear from the data presented that from an economic standpoint vessel operation between the Great Lakes and the United Kingdom, under the conditions shown of record, requires the lifting of cargo to and from

⁵ Respondents made reference during the argument to provisions of these agreements, not mentioned at the hearing, that arbitration procedures set up to resolve disputes between parties to the agreements must be governed by Dutch law, but the record is devoid of any evidence showing that such provisions would be discriminatory as between carriers or otherwise in violation of the Act. Nor can any such provision affect the rights of any person or limit our jurisdiction under the Act.

ports on both borders of the Great Lakes. Complainants are denied admission to the Canadian conferences and in self-defense must maintain their own conference organization in the Canada-United Kingdom trade.

The claimed discrimination between carriers does not stem from the actions of the parties to the existing approved agreements, since they are willing to and have offered to admit respondents to membership. The discrimination, if any exists, stems from the refusal of respondents to admit complainants to membership in the Canadian conferences. It lies in respondents' discretion to eliminate any discrimination. Subsequent to the examiner's decision, in the exceptions and during the argument, the suggestion was made that complainants be required to admit respondents to membership in the approved east-bound and westbound conferences on a limited basis, with respect to operations between United States Great Lakes ports and the United Kingdom only. As provided in section 15, we may order modification of any existing agreements only upon findings that they are in contravention of the Act. No such findings can here be made. As a whole, the record fails to show that Agreements Nos. 8140 and 8130 are unjustly discriminatory or unfair as between carriers, or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States, or are otherwise in violation of the Act. There is consequently no justification for withdrawal by us of the existing approval of those agreements.

Agreements Nos. 8400 and 8440. Complainants contend that the approval of more than one conference in a particular trade is illegal *per se*. This contention is not supported by the language of the Act nor by its legislative history.

Complainants and Public Counsel also argue that the approval of competing conferences in a single trade would be detrimental to the commerce of the United States, and that Agreements Nos. 8400 and 8440 should therefore be disapproved. Complainants and respondents agree that the existence of competing conferences in a particular trade, with differently constituted memberships, ultimately will result in rate wars and complete disruption of that trade, and that such disruption will be more severe than in the case of a single conference faced with the competition of several individual carriers.

We and our predecessors consistently have based approval of agreements at least partly on the anticipated rate stability which would result therefrom. *Secretary of Agriculture v. N. Atlantic Cont'l Frt. Conf.*, 5 F. M. B. 20, 37 (1956), and *Contract Rates—North Atlantic*

Cont'l Frt. Conf., 4 F.M.B. 355, 372 (1954). In the face of evidence that approval of Agreements Nos. 8400 and 8440 in all likelihood would result in rate instability and rate wars, since the opposing parties are in some respects the same as were involved in the conflict detailed above in the Canadian seaboard-continental trades, we find that the approval of Agreements Nos. 8400 and 8440 would be detrimental to the commerce of the United States.

We are constrained to state that our conclusions here and with respect to the existing agreements do not result in a completely satisfactory solution of the problems presented, although they find justification in the record and the statute. They will require, as respondents urge, that the respondent carriers, if they persist in refusing to reach some understanding with complainants resolving the conflict between them over the Canadian-United Kingdom trade, will be forced to operate as independents in competition with the approved eastbound and westbound conferences in the United States Great Lakes-United Kingdom trade. We can only express the hope that some reasonable accommodation can be achieved by complainants and respondents which will redound to the benefit of the commerce of our nation and of Canada, particularly since, through cooperation between these governments, the ports of the Great Lakes have been opened to the world by completion of the St. Lawrence Seaway.

Alleged Violations. Complainants contend that respondents are parties to arrangements, understandings, or agreements which provide for a system of territorial divisions, port assignments, combinations, and restrictions whereby respondents allocate ports or ranges of ports among themselves in the United Kingdom and Eire as well as those on the United States Great Lakes.⁶ The basis for this contention rests upon a study made by complainants of the advertising of sailings by respondents, and not upon the evidence presented herein, which details the actual ports served by respondents. For example, complainants assert that respondents have agreed among themselves that Bristol City Line should serve only Avonmouth and Bristol Channel ports in the United Kingdom, and that Head & Lord Line alone should serve Belfast and Dublin, whereas the record discloses service by Bristol City Line at Avonmouth, Glasgow, Liverpool, and Belfast. The contentions are without merit. The evidence concerning the issuance of joint advertisements, of itself, does not justify a finding that the action was taken pursuant to agreement. See *Los Angeles*

⁶ Similar contentions are made with regard to asserted allocation of Canadian ports and the entire range of North American Atlantic ports, which relate to matters not within the scope of these proceedings nor supported by the record, and which need not be given further consideration.

By-Products Co. v. Barber S.S. Lines, Inc., 2 U.S.M.C. 106, 108 (1939).

Complainants and Public Counsel urge that the record supports a finding that respondents have engaged in concerted rate action. The contentions rest largely upon the preparation, in advance of the approval by the Board of Agreement No. 8400, of the draft tariff introduced into evidence, and the somewhat consistent policy, as shown in the record, of respondents to quote uniformly the rates named in that draft of tariff or other uniform rates. Bearing in mind the chronology of events leading up to the inception of these proceedings, however, and the lengthy and complex tasks involved in the preparation of a comprehensive tariff, there is no justification for a conclusion that the mere preparation of the draft tariff of itself is evidence that respondents agreed to be bound thereby. As stated, there is evidence of record on this point to the contrary.

The evidence concerning the quotation of uniform rates by respondents is subject to two inconsistent inferences, i.e., that respondents followed the normal practice of quoting rates to meet exactly those of their competitors, or that respondents agreed among themselves to quote uniform rates. In view of the fact that there are here involved violations of the Act alleged by complainants and that the burden is upon complainants to prove such violations, the inference properly to be drawn is that most favorable to respondents. We conclude that complainants have failed to sustain their burden with respect to this issue. Cf. *Dipson Theatres v. Buffalo Theatres*, 86 F. Supp. 716 (1949), cert. den. 342 U.S. 926 (1952).

Complainants further contend, with respect to the alleged violations of section 14 Second of the Act, that respondents have deliberately conceived Agreement No. 8400 so as to force a dichotomy of service as between United States and Canadian Great Lakes ports, with the aim of driving complainants from the Canadian Great Lakes trade and thus eliminating them from service at United States Great Lakes ports, since it is economically impossible to serve only United States Great Lakes ports under present circumstances. Whether service is conducted by a particular vessel at ports on both borders of the Great Lakes does not depend upon the territorial coverage of particular conference agreements. This is clearly demonstrated by the number of separate conferences which have been established in the trade between Canada and the Great Lakes, on the one hand, and the Bordeaux/Hamburg range, on the other hand, all of which are served by vessels of complainants which also serve in the Great Lakes-United Kingdom trade. Our conclusions above indicate our understanding of the reasons for the organization of the British westbound conference

and the presentation of Agreement No. 8400 for approval, and the record does not support complainants' allegations. No violations by respondents of section 14 Second of the Act have been shown.

Requested findings and conclusions not embraced herein are not justified by the record, or are unnecessary for determination of the issues.

FINDINGS

We find:

1. In No. 833, that respondents have not been shown to have engaged in concerted rate action, cooperative pooling and sailing arrangements, or a conspiracy to drive complainants from the United States Great Lakes-United Kingdom trade, in violation of sections 14 Second and 15 of the Act. The complaint also seeks disapproval of Agreement No. 8400. This will follow as a result of our findings in No. 834, and the complaint will accordingly be dismissed.

2. In No. 840, that with respect to Agreements Nos. 8140 and 8130, the Board has power to act thereon notwithstanding that the agreements embrace also the foreign commerce of other nations; and that Agreements Nos. 8140 and 8130 have not been shown to be detrimental to the commerce of the United States or otherwise in contravention of the Act. Respondents' petition will be denied.

3. In Nos. 834 and 843, that the approval of Agreements Nos. 8400 and 8440 would be detrimental to the commerce of the United States, and should therefore not be granted. These proceedings will be discontinued.

An appropriate order will be entered.

Board Member STAKEM, dissenting in part:

I agree with the majority that we have power to act under the Act with respect to Agreements Nos. 8140 and 8130, covering the trades between United States and Canadian Great Lakes ports and ports on the St. Lawrence River, in Nova Scotia, Newfoundland, and New Brunswick, on the one hand, and ports of the United Kingdom, on the other hand, notwithstanding that the agreements embrace also the foreign commerce of nations other than the United States.

I further agree that the above agreements have not been shown to be detrimental to the commerce of the United States or otherwise to be in contravention of the Act, and that the petition in No. 840 should be denied.

I agree also that the approval of Agreements Nos. 8400 and 8440 would be detrimental to the commerce of the United States and that approval should be denied and that the proceeding should be discontinued.

I would find, however, that respondents Bristol City Line of Steamships Ltd. and Ulster Steamship Company Limited, between themselves, and respondents Canadian Pacific Railway Company, The Cunard Steamship Company Limited, and Furness, Withy & Company, Limited, among themselves, have entered into agreements, understandings, or arrangements for the provision of joint service or the allocation of sailings between ports in the United Kingdom and ports in the United States on the Great Lakes, and that such respondents and Manchester Liners Limited have entered into agreements, understandings, or arrangements for the maintenance of uniform rates in the trade between the United Kingdom and United States Great Lakes ports, and that such agreements, understandings, or arrangements have been carried out without the prior approval of the Board, in violation of the Act.

The majority of the Board concludes that the evidence concerning the issuance of joint advertisements, of itself, does not justify a finding that the action was taken pursuant to agreement, and cites *Los Angeles By-Products Co. v. Barber S. S. Lines, Inc.*, 2 U.S.M.C. 106, 108 (1939). While I agree with the principle, I am of the opinion that the evidence here discloses the existence of close working arrangements which could only result from understandings reached between parties thereto. With respect to the Anchor Line-Bristol City Line-Head & Lord Line services, it is true that after the commencement of these proceedings the advertisement of the two carriers was changed to indicate some sort of agency arrangements, but I do not feel that the absence of such designation in the first instance occurred through inadvertance. Further, the record is devoid of evidence from the principals involved to rebut the clear inference that some cooperative action was taken.

Insofar as the Cunard-Canadian Pacific Railway-Furness, Withy services are concerned, the record, in my opinion, shows a consistent pattern of joint advertising and invitations through these joint advertisements to interested shippers to apply for rates or other information through any one of the carriers or their offices or agencies.

Further, there appears a consistent sailing pattern under which no more than one vessel of any of the carriers was on berth at London at the same time. For example, the record discloses Cunard's vessels having sailed from London on April 17, May 22, and July 12; those of Furness, Withy on March 28, April 30, June 23, and July 3; and those of Canadian Pacific Railway on April 8 and 23, May 31, June 14, and July 18 and 31. In view of the length of time over which the last mentioned situation was maintained, I do not believe that it occurred solely through coincidence, and the only reasonable conclusion

I may arrive at is that these circumstances are the outward manifestation of an agreement or understanding between the parties involved. Again, I consider it significant that the principals involved failed to present any substantial countervailing evidence.

It has been found that Ellerman's Wilson Line had not up to the date of the hearing operated in the trade involved and that, on this record, Anchor Line could not be found to have operated as a common carrier. As to the remaining respondents, the Board concludes that the evidence concerning the quotation of uniform rates by them is subject to inconsistent inferences, namely, that they followed the normal practice of quoting rates to meet exactly those of their competitors, or that respondents agreed among themselves to quote uniform rates; that the burden is upon complainants to prove the alleged violations of the Act; and that the inference properly to be drawn is that most favorable to respondents. I do not agree. In my opinion, the circumstances of the conference secretaries preparing a large number of copies of a draft tariff and circulating it among the respondents; the circulation of suggested rate revisions; the following of the draft tariff by the operating carriers; and the fact that when rates of competitors were undercut, the rates applied by the operating respondents were identical, leads me to the conclusion that there existed among these respondents an arrangement, agreement, or understanding to maintain uniform rates, which has been carried out without our prior approval, in violation of section 15 of the Act.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 14th day of December A.D. 1959.

No. 833

MAATSCHAPPIJ "ZEETRANSPORT" N. V. (ORANJE LINE) ET AL.

v.

ANCHOR LINE LIMITED ET AL.

No. 834

AGREEMENT No. 8400, BETWEEN ANCHOR LINE LIMITED, THE BRISTOL CITY LINE OF STEAMSHIPS LTD. ET AL.

No. 840

PETITION OF ANCHOR LINE LTD. ET AL., PARTIES TO AGREEMENT No. 8400

No. 843

IN THE MATTER OF AGREEMENT No. 8440, BETWEEN ANCHOR LINE LIMITED, THE BRISTOL CITY LINE OF STEAMSHIPS LTD. ET AL., AND THE PROTEST OF ORANJE LINE ET AL. AGAINST APPROVAL THEREOF

These proceedings presenting related issues 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 conclusions, decision, and findings therein, which report is hereby referred to and made a part hereof:

It is ordered, That the complaint in No. 833 be, and it is hereby, dismissed; and

It is further ordered, That the petition in No. 840 be, and it is hereby, denied; and

It is further ordered, That Agreements Nos. 8400 and 8440 be, and they are hereby, disapproved; and

It is further ordered, That the proceedings in Nos. 834 and 843 be, and they are hereby, discontinued.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

5 F.M.B.

FEDERAL MARITIME BOARD

No. S-57

STATES MARINE CORPORATION AND STATES MARINE CORPORATION OF
DELAWARE—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY
ON THEIR TRICONTINENT, PACIFIC COAST/FAR EAST, AND GULF/
MEDITERRANEAN SERVICES

Submitted April 10, 1959. Decided December 14, 1959

Report of the Board, 5 F.M.B. 537, modified in certain respects.

SUPPLEMENTAL REPORT OF THE BOARD

Clarence G. Morse, *Chairman*, Ben H. Guill, *Vice Chairman*, Thos. E.
Stakem, Jr., *Member*

BY THE BOARD:

Petitions for reconsideration of our report herein served February 18, 1959 (5 F.M.B. 537, which contains the appearances), have been filed by Pacific Far East Line, Inc. (PFEL), United States Lines Company (USL), American President Lines, Ltd. (APL), Lykes Bros. Steamship Co., Inc. (Lykes), and the Commission of Public Docks of the City of Portland, Oregon (Portland Docks). States Marine Corporation and States Marine Corporation of Delaware (both as SML), joint subsidy applicants herein, have filed a reply.

USL's contentions are dealt with first. It complains that the Board has failed to define North Atlantic "top-offs", and argues that the finding of inadequacy on the North Atlantic routes and the finding that in the accomplishment of the purposes and policy of the Merchant Marine Act, 1936 (the Act), additional vessels should be operated thereon, is insufficient, and that we should have limited or defined the number of sailings or the amount or type of cargo to be carried. Where a particular trade or trades are found to be inadequately

served, however, and it is also found that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon, the requirements of section 605(c) thereof are satisfied, and the provisions of that section do not interpose a bar to the award of subsidy to the applicant in relation to such trade or trades. Those requisite findings were made in our report. But as the report pointed out, whether a definite contract, if one is awarded, will permit North Atlantic top-offs or will restrict the top-off operation, are matters which the Board will consider and determine in the exercise of its discretion under other sections of the Act. It is well settled that a favorable section 605(c) determination, without more, does not result in the award of subsidy. *Matson Orient Line, Inc.—Subsidy, Route 12*, 5 F.M.B. 410 (1958).

Next, USL contends that the Board, in concluding that section 605(c) does not interpose a bar to the North Atlantic top-offs, neglected to consider the harmful effects of such top-offs on Trade Routes Nos. 26 A and B, which, under the purposes and policy clause of that section, would interpose a bar to them. Not offering a service from the Pacific coast to Europe, USL cannot be heard¹ as to what constitutes "harmful effects" on Nos. 26 A and B. As our report indicated, applicant provides the only United States-flag liner service between the Pacific coast and Europe. Hence, without the carryings of SML in the trade, the route manifestly would be inadequately served, and in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon. But, as indicated in the paragraph next above, under other sections of the Act the Board may permit, deny altogether, or otherwise restrict, such top-offs.

USL next argues that the Board erred in concluding that section 605(c) interposed no bar to SML's proposed topping-off operations on Trade Route No. 11 in conjunction with its Trade Routes Nos. 26 A and B sailings. Since the Atlantic termini of Trade Route No. 11 do not encompass North Atlantic ports, and since the application does not contemplate a topping-off service on Trade Route No. 11, the issues under section 605(c) with respect thereto were not before us, and the findings required to be made under that section prior to the award of subsidy cannot be made. We will therefore delete any reference to topping off on Trade Route No. 11 made in the report.

¹ If SML's application contemplated a direct service on Trade Routes Nos. 26 A and B, i.e., from the Pacific coast to Europe without North Atlantic top-offs, USL would not have an interest therein. Hence, the extent of its intervention in the premises is the North Atlantic top-offs.

USL also contends that the Board erred in finding that the outbound North Atlantic/Europe trades (the trades on which SML proposes a top-off service in conjunction with Trade Routes Nos. 26 A and B) are inadequately served, in that the Board applied an arbitrary statistical standard and did not weigh factors relating to the special conditions attendant on each of the routes. We disagree. The report does not rely solely upon statistical data to support the findings (1) of inadequacy and (2) that in the accomplishment of the purposes and policy of the Act additional vessels should be operated in the trades between the North Atlantic and Europe. Consideration also was given the facts (1) that North Atlantic trades involve the largest movement of outbound liner commercial traffic, and (2) that United States-flag vessels in the trades enjoy a comparatively high utilization ratio. See *Bloomfield S.S. Co.—Subsidy, Routes 13(1) and 21(5)*, 4 F.M.B. 349 (1953).

USL also claims the Board erred in concluding that *inbound* sailings by SML from Europe to North Atlantic ports are not barred by section 605(c). We found, on the record presented, that the North Atlantic trades are inadequately served, and that in the accomplishment of the purposes and policy of the Act additional sailings should be operated thereon. Our report is specific in this regard: "As the routes in their entirety are inadequately served, section 605(c) is not a bar to either the inbound or outbound movement" (5 F.M.B. 546).

Lykes argues, first, that the tricontinent service is not an "essential" service, and that the Board has failed to decide its "essentiality". It is to be noted at the outset, however, that the Board, in its report, considered the component trade routes comprising the tricontinent service and found them to be inadequately served by United States-flag vessels. The tricontinent service has been determined to be an essential trade route by the Maritime Administrator, pursuant to section 211 of the Act. Determination of "essentiality" is a quasi-legislative function, exercised by the Administrator, and is independent of the Board's actions under section 605(c). *States Marine Corp.—Subsidy, Tri-continent Service*, 5 F.M.B. 60 (1956). A favorable section 605(c) determination, followed by other favorable determinations under other sections of the Act, cannot result in the award of a subsidy contract unless and until the Administrator, pursuant to section 211 of the Act, determines the route to be essential. *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F.M.B. 304 (1957). It is not necessary for the Board, in a section 605(c) proceeding, to determine the essentiality of a particular trade route.

Lykes also cites as error the Board's failure to make specific findings as to whether applicant conducted "existing services" within the meaning of section 605(c). In view of our findings that United States-flag service on each of the component essential trade routes comprising the tricontinent service, as well as the over-all service on the tricontinent service as a unit, are inadequately served and that in the accomplishment of the purposes and policy of the Act additional United States-flag vessels should be operated thereon, the determination of whether applicant's service was "existing" is largely academic. The record establishes, and we find, that it is necessary to enter into a contract covering the tricontinent trades to provide adequate service by vessels of United States registry and to accomplish the purposes and policy of the Act.

We reject, on grounds stated in our report, the claim of Lykes that an alleged unlawful agreement between Bloomfield Steamship Company is properly before the Board in a section 605(c) proceeding. It has no relevance to the provisions of that section. Likewise, Lykes' contention that we erred in failing to determine section 605(a) issues in this proceeding is without merit.

The contention that the Board erred in reserving such matters as vessel interchange, sailing spreads, foreign-flag relationships, and applicant's proposed flexibility of operations, is not well taken. Such matters were properly excluded from our decision under section 605(c). We reiterate, however, that SML's proposed flexibility of operations, including vessel interchange and minima-maxima sailing spreads, together with other facets of its application, will be scrutinized under other sections of the Act.

Lykes complains that the Board did not find that the award of subsidy to SML for services on Trade Routes Nos. 13 and 22 would not result in undue prejudice to Lykes and in undue advantage to SML, asserting such a finding could not be supported by the record. Since those trades, without the carryings of SML, clearly are inadequate, and since we find that additional United States-flag vessels should be operated thereon in the accomplishment of the purposes and policy of the Act, the issue of undue advantage and prejudice was not before us. Although it is unnecessary for a determination of the issues raised under section 605(c), the record establishes, and we so find, that the granting of subsidy to SML for the operation of its vessels on Trade Routes Nos. 13 and 22 would not result in undue advantage to SML or in undue prejudice to Lykes.

Lykes also seeks reconsideration of the finding that its claim of undue prejudice resulting from SML top-offs in California in con-

junction with its Trade Route No. 22 service is not supported by the record. Lykes sails directly to the Far East on Trade Route No. 22 and it has not requested California top-off privileges in conjunction with the service. In topping off in California, SML will not be offering a direct or as fast a Far East service to Gulf shippers as does Lykes, and SML will not have the full reach of its vessel on berth in the Gulf. We reiterate that the claim of undue prejudice is not supported by the record.

The petitions include prayers for clarification of our disposition of requests on the application for calls at privilege ports. At the outset we find that the application does not include a request for the privilege of moving cargoes from Atlantic or Gulf ports to Canal Zone and Mexican ports. Nor did the notice of hearing in the Federal Register reflect that such service would be in issue. Since neither the application nor the notice included the request for the privilege of moving cargo from Atlantic and Gulf ports to Canal Zone and Mexican ports on westbound tricontinent sailings, the issue was not before us and we cannot, in this proceeding, make the requisite findings under section 605(c), which are antecedent to the entering of a contract providing for such service.

The noticed privilege calls are (1) ports in Mexico, the Canal Zone, and Okinawa in conjunction with the proposed westbound tricontinent service; (2) Hawaii (inbound from the Far East on Trade Route No. 30 and outbound to Europe on Trade Routes Nos. 26 A and B), British Columbia (inbound on Trade Route No. 30), the Canal Zone and west coast of Mexico (on Trade Routes Nos. 26 A and B), and Iceland (outbound on North Atlantic trade routes), all in conjunction with the proposed eastbound tricontinent sailings; (3) the east coast of Mexico, West Indies, and the Azores, Casablanca, and Spanish Morocco in conjunction with the proposed eastbound or outbound Trade Route No. 13 service; (4) Mexico and Okinawa in conjunction with the proposed Trade Route No. 29 service; and (5) British Columbia and Okinawa in conjunction with the proposed Trade Route No. 30 service.

We found, in our earlier report, that: (a) the proposed inbound service to Hawaii from the Far East was barred by the provisions of section 605(c) (see *Matson Orient Line, Inc.—Subsidy, Route 12, supra*), (b) the proposed service to the Azores was also barred by the provisions of that section (see *Isbrandtsen Co., Inc.—Subsidy, E/B Round The World*, 5 F.M.B. 448 (1958)), (c) service from Hawaii to Europe was not barred by the provisions of that section. We reaffirm those findings.

While we found, in our previous report, that inbound service to British Columbia from the Far East was barred by the provisions of

section 605(c), with respect to tricontinent sailings, and that such service was not barred with respect to outbound sailings from the United States Northwest, i.e., the Trade Route No. 30 service; upon further consideration we conclude that the provisions of section 605(c) are not specifically applicable to foreign sailings. This does not mean, however, that the rights of United States-flag operators conducting services between foreign points will be ignored. It means that in framing the service description of an operating-differential subsidy contract the section 605(c) tests will be considered as a guide to, as distinguished from a control on, the Board, and hence no hearing is required under section 605(c). That, in addition to other provisions of the statute, will be considered by the Board in determining whether permission to carry foreign-to-foreign offerings will be granted. One of the chief purposes of the Act, as set forth in section 101, is to develop and maintain a merchant marine sufficient to carry "a substantial portion of the water-borne export and import foreign commerce of the United States," and the provisions of title VI of the Act assist in the attainment of that purpose through the medium of operating-differential subsidies.

Within the sound discretion of the Board, and consonant with the principles just announced, the Board in fixing the service description of an operator in a given operating-differential subsidy contract, will take into consideration, in keeping with the purposes and policy of the Act, data relating to (1) the financial support afforded the essential service of the applicant by the foreign-to-foreign or way-port calls, (2) the ability of the applicant to accommodate such way-port cargo without imparing the needs of United States importers and exporters, and (3) the manner and type of competition of competing carriers in the trade.

Applying the above tests to the instant application, we have no hesitancy in denying SML the privilege of moving Far East cargoes to British Columbia on tricontinent sailings. The remaining foreign-to-foreign privileges requested by SML, including the privilege of carrying eastbound cargo from the Far East to British Columbia on sailings originating in the United States Northwest, will be considered in the light of the foregoing antecedent to the execution of a contract, if any, with SML.

The remaining requested privileges involving the foreign commerce of the United States, which privileges do fall within the purview of the provisions of section 605(c), are dealt with next. We note that Casablanca and Spanish Morocco are specifically designated as integral parts of essential Trade Route No. 13, and since we specifically

found that United States-flag service on the route is inadequate and that in the accomplishment of the purposes and policy of the Act additional United States-flag vessels should be operated thereon, the privilege of serving Casablanca and Spanish Morocco is not barred by the provisions of section 605(c).

Okinawa constitutes an integral part of our essential foreign trade routes to the Far East. Since we found that United States-flag service on Trade Routes Nos. 12 and 22 (SML's proposed westbound tricontinent service) is inadequate and that in the accomplishment of the purposes and policy of the Act additional United States-flag vessels should be operated thereon, and since we found SML's transpacific service to be "existing" within the meaning of section 605(c), and that the award of subsidy therefore would not be to give undue advantage to SML or be unduly prejudicial to its United States-flag competitors, the privilege of serving Okinawa is not barred by the provisions of section 605(c), nor is the privilege of serving Iceland on eastbound tricontinent sailings barred by the provisions of section 605(c). We found in our prior report that the provisions of that section did not bar SML's proposed topping-off operation on its Trade Routes Nos. 26 A and B sailings. Since Iceland constitutes an essential part of Trade Route No. 6—one of the tricontinent components—the proposed calls are included within the scope of our prior determination.

We emphasize, however, that our conclusion that 605(c) does not interpose a bar to privilege ports is not tantamount to granting a subsidy contract containing such privileges. Those privileges which involve trade between the United States and foreign ports, i.e., the foreign commerce of the United States, *may* be included in any contract resulting from the instant application, except those specifically found to be barred by the provisions of section 605(c).

The claims of APL and PFEL, which differ from those of other interveners above considered, and not specifically referred to herein, have been considered, and are found, as are other contentions raised by the petitions not explicitly referred to, not justified by the facts or not related to material issues.

Portland Docks does not raise any issues cognizable under section 605(c).

An order consistent herewith is attached.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 14th day of December A.D. 1959.

No. S-57

STATES MARINE CORPORATION AND STATES MARINE CORPORATION OF
DELAWARE—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY
ON THEIR TRICONTINENT, PACIFIC COAST/FAR EAST, AND GULF/
MEDITERRANEAN SERVICES

Petitions for reconsideration of our report herein served February 18, 1959, having been filed by Pacific Far East Line, Inc., United States Lines Company, American President Lines, Ltd., Lykes Bros. Steamship Co., Inc., and the Commission of Public Docks of the City of Portland, Oregon, and States Marine Corporation and States Marine Corporation of Delaware, joint applicants for subsidy herein, having replied thereto, and the Board, on the date hereof, having entered of record a supplemental report, which report is hereby referred to and made a part hereof:

It is ordered, That, to the extent not hereinabove granted, the petitions be, and they are hereby, denied.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

5 F.M.B.

FEDERAL MARITIME BOARD

No. S-83

GULF & SOUTH AMERICAN STEAMSHIP CO., INC.—EXTENSION OF SERVICE ON TRADE ROUTE NO. 31 (U.S. GULF/WEST COAST SOUTH AMERICA)

Submitted September 9, 1959. Decided December 16, 1959

Gulf & South American Steamship Co., Inc., is not operating an existing service between United States Gulf ports and the Panama Canal Zone, within the meaning of section 605(c) of the Merchant Marine Act, 1936.

The service already provided by vessels of United States registry in the service between Gulf Ports other than New Orleans, on the one hand, and the Panama Canal Zone, on the other hand, and in the service from the Panama Canal Zone to New Orleans, is inadequate. In the accomplishment of the purposes and policy of the Merchant Marine Act, 1936, the additional service proposed by Gulf & South American Steamship Co., Inc., in these services should be permitted. Section 605(c) of the Act does not interpose a bar to the grant of the permission requested by Gulf & South American Steamship Co., Inc., for such services.

The service already provided by vessels of United States registry in the service from New Orleans to the Panama Canal Zone, except for cargoes which United Fruit Co. refuses to carry in its refrigerated vessels, is adequately served, and in the accomplishment of the purposes and policy of the Merchant Marine Act, 1936, the additional service proposed in this service by Gulf & South American Steamship Co., Inc., should not be permitted. Section 605(c) of the Act does interpose a bar to the grant of permission requested by Gulf & South American Steamship Co., Inc., for such service.

Section 605(c) of the Merchant Marine Act, 1936, does not interpose a bar to the carriage by Gulf & South American Steamship Co., Inc., of cargoes which United Fruit Co. refuses to carry in its refrigerated vessels from New Orleans to the Panama Canal Zone, provided that special permission for such carriage is granted by the Maritime Administrator.

Odell Kominers and J. Alton Boyer for applicant.

Francis T. Greene for United Fruit Company, intervener.

Robert E. Mitchell, Edward Aptaker, and Robert B. Hood, Jr.,
as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*,
THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

Gulf & South American Steamship Company, Inc. (G. & S.A. or applicant), seeks permission to lift cargo on its five subsidized C-2 cargo vessels, on a privilege basis, between United States Gulf ports and the Panama Canal Zone in connection with its subsidized service on Trade Route No. 31 (U.S. Gulf/west coast of South America), and requests the Board to make the findings required under section 605(c) of the Merchant Marine Act, 1936, as amended ("the Act").¹ By notice published in the Federal Register on January 28, 1959, the matter was set down for public hearing. United Fruit Company (United Fruit) intervened in opposition to the application. Hearing was held before an examiner, and in his recommended decision he concluded and found:

1. That G. & S.A. is not operating an existing service between United States Gulf ports and the Panama Canal Zone, and that its proposed service would be in addition to the existing services;

2. That the service already provided by vessels of United States registry in such 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 the additional service proposed by G. & S.A. should be permitted; and

3. That section 605(c) of the Act is not a bar to granting the requested permission.

Exceptions to the recommended decision and replies thereto were filed, and oral argument has been held before the Board. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in the proceeding.

THE FACTS

Applicant, a Louisiana corporation owned in equal proportions by W. R. Grace and Co. and Lykes Bros. Steamship Co., Inc. (Lykes), began the operation in 1947 of a common-carrier freight, mail, and limited passenger steamship service between United States Gulf ports and the west coast of South America, by way of the Panama Canal. Effective April 1, 1954, it entered into an operating-differential sub-

¹ See appendix.

sidy contract with the Board (No. FMB-28), to expire December 31, 1963, providing for service on Trade Route No. 31 between Houston and Galveston, Texas, and New Orleans, Louisiana (other United States Gulf ports as traffic offers), and west coast of South America ports in Chile, Peru, Ecuador, and Colombia. Addendum No. 3 to the contract, dated August 16, 1955, amended the service description to read:

Between Houston, Galveston, New Orleans (other United States Gulf Ports as traffic offers) and West Coast of South America ports in Chile, Peru, Ecuador and Colombia, with the privilege, subject to cancellation upon ninety (90) days' notice, of carrying cargo, as traffic offers, between ports in the Panama Canal Zone and West Coast of South America ports in Chile, Peru, Ecuador and Colombia.

Applicant never carried any cargo from Gulf ports to Panama Canal Zone ports, i.e., Cristobal and Balboa.² While it had made no survey of the traffic moving or which potentially might move, officials of the company had knowledge that two foreign-flag competitive lines to the west coast of South America were carrying good quantities, and believed that the company could get its share of that cargo. Accordingly, applicant requested expansion of the trade route description, and in a new subsidy contract (No. FMB-75), dated December 23, 1958, superseding No. FMB-28 effective January 1, 1959, the service description was amended to read:

Trade Route No. 31—United States Gulf/West Coast South America.

Required: Between United States Gulf ports (Key West to Mexican border) and ports on the West Coast of South America (Colombia, Ecuador, Peru, Chile).

Privilege: Between a port or ports on the required service and a port or ports in the Panama Canal Zone.

A subparagraph provides that the privilege calls shall be subject to cancellation by the United States for good cause and after due notice to the operator and after the operator has had an opportunity to be heard.

Following the execution of contract FMB-75, applicant, on January 5, 1959, announced simultaneously in Panamanian and United States newspapers and otherwise that it was inaugurating a new service be-

² Its only northbound carryings from the Canal Zone have been two lots of MSTs household goods transported to Gulf ports in 1955 under special permission from the Maritime Administration.

tween Gulf ports of the United States and ports in the Canal Zone, and solicited cargo for its ship scheduled to sail from New Orleans on January 13, 1959, the first sailing in the new service. Some 50 or 60 tons of cargo were booked to Cristobal but were not lifted. As a result of objections on behalf of United Fruit, the Board telegraphed applicant on January 8, 1959, instructing it not to exercise the privilege of giving service between the Gulf and Panama until further advice from the Board. The bookings then were cancelled.

In 1958 G. & S.A. stepped up its sailing frequency from fortnightly to every eleven days, this pattern of operation presently being maintained. On a typical voyage, and as scheduled at the time of hearing, a vessel will call at Houston, Galveston, Mobile, Alabama, and New Orleans, and proceed from New Orleans through the Panama Canal to Colombia, Ecuador, Peru, and Chile. Two or more other Gulf ports also are served as traffic demands require, an offering of 200 tons of cargo to the entire range of South American ports being sufficient to induce a call. Approximately 50 percent of applicant's cargo originates at New Orleans and the balance at the other Gulf ports. Deadweight free space on sailing from New Orleans averaged 24 percent in 1957 and 44 percent in 1958. On the return voyage, calls are made at the same range of ports, and the deadweight free space on arrival at the first United States port averaged 40 percent in 1957 and 61 percent in 1958. If the requested permission be granted, calls at the Canal Zone ports can and will be made without in any way disturbing the present service.

Lykes, one of applicant's coowners, operates about seven United States-flag sailings a month in its Gulf/Caribbean berth service, with an approximately monthly sailing to Cristobal. The route traversed is from Gulf ports to Puerto Rico or Cuba, Venezuela, north coast of Colombia, Cristobal, and return to United States Gulf ports. During the period January-June 1958, Lykes had 43 sailings, eight of which had cargo for Cristobal but only two actually discharged at the Canal Zone.

The only other United States-flag service is that provided by United Fruit with its fully refrigerated vessels. This is a scheduled weekly service maintained since construction of the Panama Canal, a vessel sailing every Saturday from New Orleans, the only Gulf port served, for Havana, Cristobal, Balboa, Guayaquil and Bolivar, Ecuador, returning to New Orleans by way of the Panama Canal. Transit time from New Orleans to Cristobal is seven days. As all vessels in this service carry full cargoes of United Fruit's bananas on the return trip, they are not put on any general cargo berth homebound. The 52 sailings in 1958 carried a total of 26,492 long tons of cargo for dis-

charge at Cristobal and Balboa, or an average of 509 tons per sailing, and had unused capacity available for 116,715 additional long tons of cargo, or an average free space of 2,245 tons per sailing. Operations in 1957 and 1956 are fairly comparable.

In order to maintain a rounded service, United Fruit necessarily employs an additional number of dry cargo type vessels to supplement its fruit service and for the purpose of being in position to accommodate shippers of rough or obnoxious cargo.³ Cargo of this nature, some of which is proprietary cargo for intervener's own divisions, cannot be handled in the refrigerated ships without damaging the insulation. All of the extra vessels so used are under foreign registry and none carry any of the company's fruit. They usually call at various Gulf ports before loading at New Orleans, and sail from this last loading port at intervals of from one to 21 days. The following itinerary is considered by intervener to be fairly representative of the voyages: Houston, Port Arthur, Texas, New Orleans, Cartagena and Barranquilla, Colombia, Limon, Costa Rica, Cristobal, Golfito, Costa Rica, Acajutla, La Libertad, and Cutuco, Salvador, Balboa, Cristobal, Houston, New Orleans. During the period 1956-1958 these foreign-flag vessels handled an average of 5,109 tons of cargo from Gulf ports to Cristobal.

Two of the principal competitors of G. & S. A. are West Coast Line and Coldemar Line. West Coast Line, operating Danish-flag vessels, maintains a regular fortnightly service from Houston, Galveston, Mobile, and New Orleans, and from other ports as cargo offers, to Cristobal, west coast of Colombia, Ecuador, Peru, and Chile, returning via Chile and the Canal Zone to United States Gulf ports. Transit time from New Orleans to Cristobal is five days. Carryings to the Canal Zone ports amounted to 11,610 weight tons in 1957 and 9,028 tons in 1958. With chartered German- or Liberian-flag vessels, Coldemar Line operates two sailings a month to the Canal Zone and the north and west coasts of Colombia from the same United States Gulf ports served by West Coast Line. From its last loading port, which varies, transit time to Cristobal is six days. This line discharged 3,742 weight tons of cargo at Canal Zone ports in 1957 and 3,401 tons in 1958. Other foreign-flag lines operating between United States Gulf ports and the west coast of South America, with occasional calls at Canal Zone ports, are Chilean Line, Grancolombiana, Ltd., and Mamenic Line.

³ Identified by intervener as creosoted materials, essential oils, hides, hoofs and horns, pimento, odorous fertilizers, gasoline, kerosene and other similar items having flash point between 80 and 150 degrees Fahrenheit, tetraethyl lead and similar Class B poisons, cement, copper sulphate, ammonium nitrate, Christmas trees, and certain types of dust-forming commodities that might be injurious to the refrigeration equipment.

Table I shows the total liner commercial cargo, in long tons, moving between United States Gulf ports and Cristobal-Balboa from 1954 through the first six months of 1958, and the participation therein by United States-flag vessels. Outbound and inbound volume is shown since applicant proposes to serve the trade in each direction.

TABLE I

	Outbound			Inbound		
	Total	U.S. flag	Percent U.S.	Total	U.S. flag	Percent U.S.
1954	40, 672	26, 509	65	15, 528	6, 738	43
1955	41, 611	29, 346	71	13, 325	3, 044	23
1956	44, 782	28, 658	64	12, 043	3, 346	28
1957	53, 730	31, 559	59	11, 947	2, 190	19
January-June 1958	22, 737	13, 829	61	6, 664	41	0.7

Table II shows the volume of liner commercial cargo moving from and to New Orleans and from and to the other Gulf ports, collectively:

TABLE II

Total Gulf	Total New Orleans	Percent New Orleans	New Orleans			Other Gulf		
			U.S.	Foreign	Percent U.S.	U.S.	Foreign	Percent U.S.
<i>1958</i> ¹								
Outbound 22,737	16, 350	72	*13, 624	2, 726	83	204	6, 183	3
Inbound 5,664	4, 206	74	-----	4, 206	0	41	1, 417	3
<i>1957</i>								
Outbound 53,730	42, 474	79	*30, 748	11, 726	72	811	10, 445	7
Inbound 11,347	6, 719	59	-----	6, 719	0	2, 190	2, 438	47
<i>1956</i>								
Outbound 44,782	35, 575	79	*25, 965	9, 610	73	2, 693	6, 514	29
Inbound 12,043	5, 521	46	110	5, 411	2	3, 236	3, 286	50
<i>1955</i>								
Outbound 41,611	34, 896	84	*27, 838	7, 058	80	1, 508	5, 207	22
Inbound 13,325	9, 316	70	540	8, 776	6	2, 504	1, 505	62
<i>1954</i>								
Outbound 40,672	32, 957	81	*25, 136	7, 821	76	1, 373	6, 342	18
Inbound 15,528	7, 893	51	1, 511	6, 382	19	5, 227	2, 408	68

*All by United Fruit. ¹ 1st 6 months.

DISCUSSION

It is apparent from the record that G. & S.A. is not operating an "existing service" within the meaning of section 605(c) of the Act, and under the requirements of the first clause of that section subsidy may not be awarded for a service which would be in addition to existing service unless the Board shall find "that the service already provided by vessels of United States registry in such service * * * is

inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon * * *.”

Based primarily on the fact that United Fruit's United States-flag service from New Orleans is provided with refrigerated vessels which have certain limitations with respect to carriage of rough or obnoxious cargoes, the examiner concluded that the service both inbound and outbound between the whole Gulf, including New Orleans, and the Canal Zone is inadequately served by vessels of United States registry. We think a careful consideration of the record leads to a different conclusion with respect to the New Orleans southbound service.

The record indicates that the predominant movement of cargo in this trade is through New Orleans: over three-fourths of the liner commercial outbound cargo and only slightly less than three-fourths of the inbound cargo. As compared to the other Gulf ports, New Orleans so dominates the service that we consider it realistic to consider separately the adequacy of United States-flag service for New Orleans and for the other Gulf ports. In the past, the Board has indicated that normally it will consider adequacy of United States-flag service for a trade route as a whole and not for particular ports or segments within the route description. Where, however, the applicant seeks the privilege of extending service on its subsidized route to ports not within the route description; where one port (New Orleans in this instance) is by far the dominant port for the movement of outbound cargo as compared with the other Gulf ports; and where United States-flag participation through the dominant port of New Orleans is extremely high as compared with United States-flag participation outbound from the other secondary Gulf ports, we consider it realistic to look to adequacy of United States-flag service separately for New Orleans and for the other Gulf ports.

It is apparent from table II, *supra*, that United States-flag participation between Gulf ports, other than New Orleans, and the Canal Zone has amounted to only 3 percent in the most recent period of record, and the conclusion reasonably follows that such participation is inadequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated in that service. Similarly, service from the Canal Zone to New Orleans by United States-flag vessels is almost nonexistent, and the record supports the conclusion that such service 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.

As to the service from New Orleans, however, the record indicates there is a high percentage of United States-flag participation, reaching 83 percent for the most recent period of record. Furthermore,

the United Fruit refrigerated vessels which provide this southbound service have had substantial free space and offer sufficient capacity to carry virtually all the New Orleans-to-Canal Zone traffic. The obnoxious or undesirable cargoes which United Fruit will not carry in its refrigerated vessels make up a relatively minor portion of the cargo moving from New Orleans to the Canal Zone, and should not affect our findings as to adequacy of United States-flag service as to the service as a whole.

From the foregoing it follows that the present service offered by vessels of United States registry in the trade from New Orleans to the Canal Zone is adequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should not be operated thereon. This finding does not apply, however, to such cargoes as United Fruit refuses to carry in its reefer vessels, and G. & S.A. should be permitted to carry such cargoes on special permission from the Maritime Administrator.

CONCLUSIONS

1. G. & S.A. is not operating an existing service between United States Gulf ports and the Canal Zone, and its proposed service would be in addition to the existing services;

2. The service already provided by vessels of United States registry in the service between Gulf ports other than New Orleans and the Canal Zone, and in the service from the Canal Zone to New Orleans, is inadequate, and in the accomplishment of the purposes and policy of the Act the additional service proposed by G. & S.A. should be permitted;

3. Section 605(c) of the Act is not a bar to the grant of permission to G. & S.A. to provide the service set forth in paragraph (2), above;

4. The service already provided by vessels of United States registry in the service from New Orleans to the Canal Zone, except for cargoes which United Fruit refuses to carry on its refrigerated vessels, is adequately served, and in the accomplishment of the purposes and policy of the Act the additional service proposed by G. & S.A. should not be permitted;

5. Section 605(c) of the Act does interpose a bar to the granting of permission for G. & S.A. to provide service from New Orleans to the Canal Zone, except as to cargoes which United Fruit refuses to carry on its refrigerated vessels; and

6. Section 605(c) of the Act does not interpose a bar to the carriage by G. & S.A. of cargoes which United Fruit refuses to carry on its refrigerated vessels from New Orleans to the Canal Zone, provided, special permission as to such cargo movement is granted by the Maritime Administrator.

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.

5 F.M.B.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-102

FARRELL LINES INCORPORATED—APPLICATION UNDER SECTION 805(a)

Submitted December 21, 1959. Decided December 21, 1959

Farrell Lines Incorporated granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for its owned vessel, the SS *African Patriot*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage carrying lumber or lumber products from one Pacific port to North Atlantic ports, commencing on or about December 26, 1959, since granting of the permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coast-wise or intercoastal trade, and (2) not to be prejudicial to the objects and policy of the Act.

Ronald A. Capone for applicant.

Robert E. Mitchell, Edward Aptaker, and Robert B. Hood, Jr., as Public Counsel.

REPORT OF THE ACTING MARITIME ADMINISTRATOR

BY THE ACTING MARITIME ADMINISTRATOR:

Farrell Lines Incorporated (Farrell) filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1223) (the Act), for its owned vessel, the SS *African Patriot*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage commencing at a Pacific port on or about December 22, 1959, carrying a full load of lumber or lumber products to Atlantic ports north of Cape Hatteras. Notice of hearing was published in the Federal Register of December 17, 1959 (24 F.R. 10234). No one appeared in opposition to the application.

States Marine Lines, Inc., the charterer of the *African Patriot*, conducts as part of its regular steamship operations an eastbound intercoastal lumber service. The evidence indicates that the company has cargo bookings of approximately six million feet of lumber and lumber products, that it has been unable, for the late December sailing, to ob-

tain an appropriate vessel of the type required for the service, and that the *African Patriot* is required to meet the needs of the lumber shippers. No exclusively domestic operators in the trade have objected to the use by Farrell of the vessel for the December sailing.

It is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise and intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

5 M.A.

FEDERAL MARITIME BOARD

No. S-81

PRUDENTIAL STEAMSHIP CORPORATION—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE No. 10

Submitted November 16, 1959. Decided December 28, 1959

The present service on Trade Route No. 10 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 Prudential Steamship Corporation for the operation of vessels on Trade Route No. 10 between North Atlantic ports and ports in the Mediterranean Sea, Black Sea, Portugal, Spain south of Portugal, and Spanish and French Morocco.

Francis T. Greene for applicant.

Carl S. Rowe and *James D. Simpson* for American Export Lines, Inc., and *Warner W. Gardner* for American President Lines, Ltd., interveners.

Robert B. Hood, Jr., 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 application dated November 26, 1958, as amended February 25, 1959, Prudential Steamship Corporation (Prudential or applicant) seeks an operating-differential subsidy for a minimum of 20 and a maximum of 32 sailings a year on Trade Route No. 10 (North Atlantic ports/ports in the Mediterranean Sea, Black Sea, Portugal, Spain south of Portugal, and Spanish and French Morocco). Pursuant to section 605(c) of the Merchant Marine Act, 1936 (the Act), hearing on the application was held by an examiner. American Export

Lines, Inc. (Export), and American President Lines, Ltd. (APL), intervened.¹

The examiner found that (1) Prudential is operating an existing service on Trade Route No. 10 (the route), (2) the present service on the route by vessels of United States registry is inadequate, and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon, and (3) section 605(c) of the Act does not interpose a bar to the granting of an operating-differential subsidy to Prudential. Exceptions were filed by Export and replies thereto were filed by applicant and by APL. There was no oral argument. Our conclusions agree in general with the recommendations of the examiner.

Incorporated in New York in 1933, Prudential engaged in worldwide shipping, principally in the tramp trades, until World War II, utilizing United States-flag vessels. Following the termination of the war, Prudential inaugurated a regular liner service on the route, which has continued to the present. Its fleet is composed of five AP-2 vessels, three owned and two chartered. Two vessels of similar type have been purchased recently to replace the chartered units. In the main, applicant has offered fortnightly sailings with a turnaround of approximately 63 days.²

SERVICE ON THE ROUTE

Applicant had 18 sailings in 1954, 19 in 1955, 23 in 1956, 30 in 1957, and 23 in 1958, or a yearly average of 22.3 sailings. Deducting two sailings in 1956 and one in 1957, which lifted full bulk or military cargo, the average was 22 sailings a year. One of the sailings for 1958, departing from New York on December 31, called at Norfolk on January 2, 1959.

During 1958 there were eight United States-flag operators regularly serving the route, either exclusively or as part of other services. Export, the predominant carrier, accounted for 130 outbound sailings, distributed among its various services, out of a total of 325 outbound sailings by United States-flag vessels during 1958. Foreign-flag vessels made 439 outbound sailings in that year, which was 95 over the total for 1957. The liner commercial cargo, in long tons, moving outbound and inbound on the route between 1954 and 1958, the percentage thereof handled by United States-flag vessels, and the percentage thereof handled by Prudential, are set out in table I.

¹ Export serves the area with four of its services. APL serves the area inbound only, with its round-the-world vessels.

² Includes repair days.

TABLE I

	Percent U.S. in and out	Outbound			Inbound		
		Tons	Percent U.S.	Percent Prudential	Tons	Percent U.S.	Percent Prudential
1954.....	42	1,385,664	40.1	2.6	774,949	45.6	1.4
1955.....	46	1,608,230	43.8	3.0	833,022	50.5	2.0
1956.....	49	1,681,093	48.2	3.7	884,152	51.1	6.5
1957.....	44	1,572,289	42.0	3.8	868,430	49.5	7.7
1958.....	40	1,405,436	34.6	4.7	882,534	49.2	12.8

Between 1954 and 1958 a total of 3,836,837 long tons of defense cargo moved outbound on United States-flag liner vessels, which was 16.1 percent of their total carryings. Prudential handled 367,155 tons of defense cargo during the period, or 26 percent of its outbound carryings.

Table II shows clearly that a large volume of commercial cargo moved on the route on other than liner vessels between 1954 and 1958.

TABLE II

	Outbound		Inbound	
	Tons	Percent U.S.	Tons	Percent U.S.
1954.....	5,760,089	14.8	359,739	-----
1955.....	9,008,167	9.5	515,090	17.4
1956.....	11,508,089	6.4	531,265	16
1957.....	13,400,779	8.8	366,134	5.5
1958.....	9,283,751	5	420,644	6.5

Vessel-space utilization on the route during 1958, outbound and/or inbound, of applicant, of Export's Mediterranean freight and Alexandria express services, and of APL appears in table III. The figures for the other United States-flag operators are not shown in the record.

TABLE III

	Outbound		Inbound	
	Bale cubic capacity	Free space	Bale cubic capacity	Free space
Prudential.....	10,591,964	8.5	11,499,047	41.6
Export.....	49,209,140	9.7	50,052,686	33.3
APL.....	-----	-----	17,206,952	14.3

DISCUSSION AND CONCLUSIONS

Existing service. Prudential's average of 22 sailings a year between 1954 and 1958, which continued on the same general level up to the time of hearing, constitutes an existing service under section 605(c) of the Act. Prudential maintains, however, that the requested

maximum of 32 sailings a year would reasonably accord with its present operation. In view of our findings with respect to inadequacy, *infra*, we need not discuss this contention further. *States Marine Corp.—Subsidy, Tricontinent, Etc., Services*, 5 F.M.B. 537 (1959). We are therefore not concerned with the issue of undue advantage or undue prejudice. *American President Lines—Calls, Round-the-World Service*, 4 F.M.B. 681 (1955); *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F.M.B. 304 (1957).

While not objecting to the subsidization of applicant to the extent of its existing service, Export opposes a subsidy to the full geographical area requested, contending that applicant has not been serving the entire range of ports on the route, which it could not do with five vessels. Having itself filed an application for operating-differential subsidy on the route (Docket No. S-98), APL considers that it is neither proper nor feasible to confine the theory of existing service to the particular ports at which an applicant has called with some frequency during a given period. In view of our findings with respect to adequacy, no further discussion of these positions is necessary.

Adequacy of service. Prudential's share of the outbound traffic on the route has increased respectably since 1954; it has increased more noticeably in the inbound trade. Applicant thus has improved its position while United States-flag participation as a whole has declined. United States-flag participation in the outbound carryings has decreased from a high of 48.2 percent in 1956 to 34.6 percent in 1958. Participation in the inbound movement remains at about 50 percent. United States-flag participation as a whole on the route has been consistently below 50 percent. It has declined since 1956, when it reached 49 percent, the highest during the years of record, to 40 percent in 1958, a drop of almost nine percent. In that year Prudential had its highest participation—4.7 percent outbound and 12.8 percent inbound. In the heavy movement of commercial cargo outbound on other than liner vessels, United States-flag participation decreased from a high of 14.8 percent in 1954 to a low of 5 percent in 1958, whereas the participation inbound decreased from a high of 17.4 percent in 1955 to 5.5 percent in 1957 and 6.5 percent in 1958. During 1958, an unfavorable year in the foreign trade, Export had free space outbound of only 9.7 percent; for Prudential it was only 8.5 percent. Exports states, however, that some of its tonnage was laid up in 1958 because of the decline in business.

Although Export contends that consideration should be given to nationalistic pressures, currency problems, and nonconference foreign-flag competition on the route, which effectively prevent United States-

flag vessels from obtaining a larger share of the available cargo, these are insufficient reasons to block the efforts of United States-flag operators to improve their position. Moreover, the record does not justify the conclusion that any additional cargo which Prudential might secure would be taken solely from the other United States-flag operators.

The record fully supports the conclusion that United States-flag service on the route is inadequate. The result would be even more true if Prudential's participation be excluded. We find that the route is not adequately served by vessels of United States registry and that in furtherance of the purposes and policy of the Act additional United States-flag vessels should be operated thereon. We conclude, therefore, that section 605(c) does not interpose a bar to the award of an operating-differential subsidy to Prudential for service on the route.

It is noted that Prudential has applied for a maximum of 32 annual sailings. We have stated many times that the favorable section 605(c) determination does not in itself result in the award of subsidy. *Matson Orient Line, Inc.—Subsidy, Route 12*, 5 F.M.B. 410 (1958). In *States Marine Corp.—Subsidy, Tricontinent, Etc., Services*, 5 F.M.B. 739, 742 (1959), we specifically stated that “minima-maxima sailing spreads [requested in the application] * * * will be scrutinized under other sections of the Act.” Thus, in the instant case, despite a finding of inadequacy and the conclusion that the provisions of section 605(c) of the Act do not interpose a bar to the award of the subsidy here requested, any contract offered Prudential shall reflect the provisions of the remainder of the statute, due regard being had for applicant's ability to provide the service with its present and/or future vessels.

FEDERAL MARITIME BOARD

No. S-57 (SUB. NO. 4)

STATES MARINE LINES, INC.—APPLICATION UNDER SECTION 805(a)

*Submitted January 4, 1960. Decided February 4, 1960**

States Marine Lines, Inc. granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, permitting continuance, in the event an operating-differential subsidy is awarded States Marine Lines, Inc., of the operation of the SS *Texan*, a tanker owned by Oil Transport, Incorporated, an affiliate of States Marine Lines, Inc., in the transportation of chemicals, petro-chemicals and lubricating oil in domestic commerce between U.S. Pacific ports on the one hand and U.S. Gulf and Atlantic ports on the other, since granting of the permission found (1) not to result in unfair competition to any person, firm or corporation operating exclusively in the coastwise or intercoastal service, and (2) not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Elkan Turk, George F. Galland and Robert N. Kharasch for applicant.

Robert J. Blackwell as Public Counsel.

INITIAL DECISION OF C. B. GRAY, EXAMINER

By application dated November 6, 1959, States Marine Lines, Inc., seeks written permission of the Federal Maritime Board under Section 805 of the Merchant Marine Act, 1936, as amended,¹ to permit the continuance, in the event the Board awards an operating-differential subsidy to States Marine Lines, Inc.,² of the operation of the SS *Texan*, a tanker owned by Oil Transport, Incorporated, an affiliate of States Marine Lines, Inc., in the transportation of chemicals, petro-chemicals and lubricating oil in domestic commerce between U.S. Pacific ports

*In the absence of exceptions thereto by the parties, and upon notice by the Board, the initial 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).

¹ Section 805(a) is set forth in Appendix "A" hereto.

² For which applications are pending in Dockets No. S-57, S-57 (Sub. No. 1) and No. S-57 (Sub. No. 2).

on the one hand and U.S. Gulf and Atlantic ports on the other. Notice of hearing was published in the Federal Register of December 18, 1959, and hearing was held before an examiner on January 13, 1960. There were no petitions to intervene and no one appeared in opposition to the application.

Global Bulk Transport Corporation, owner of one-half of the stock of States Marine Lines, Inc. also owns one-half of the outstanding capital stock of Oil Transport, Incorporated, a Delaware corporation which owns the SS *Texan*. This is a steel tanker which was converted from a C-4 type dry cargo vessel and subsequently purchased by Oil Transport, Incorporated in 1956. After further conversion for the carriage of bulk liquids in special compartments, it was chartered in February 1957, to Joshua Hendy Corporation, owner of 50% of the stock of Oil Transport, Incorporated, under a 10-year bareboat charter. With its numerous tank compartments of various sizes and capacities and special piping and pumping arrangements it is equipped to and continuously since February 1957, has been carrying various liquid commodities³ shipped in bulk between all U.S. Pacific ports and U.S. Gulf and Atlantic ports.

As a subsidized carrier States Marine Lines Inc., could not divert cargo from this intercoastal operation because its vessels are not equipped for the carriage of liquid commodities in bulk. Furthermore, U.S. Coast Guard regulations prohibit standard dry cargo ships carrying such inflammable commodities in bulk. No exclusively domestic operator in the intercoastal trade has objected to continuation of the *Texan's* operation.

On this record it is found that granting of the requested permission will not result in unfair competition to any person, firm or corporation operating exclusively in the coastwise or intercoastal service, or be prejudicial to the objects and policy of the Act.

This report shall serve as such written permission in the event an operating differential subsidy is awarded States Marine Lines, Inc.

³ Xylene and paraxylene, toluène, various alkylates, propylene, methyl isobutyl ketone, isopropanol acetate, butyl acetate and vinyl acetate, acetone, isopropanol, methanol, benzene, methyl amyl acetate, ethylene glycol, lubricating oil, and similar commodities.

APPENDIX "A"

Section 805(a) :

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: Provided, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-107

MOORE-McCORMACK LINES, INC.—APPLICATION UNDER
SECTION 805(a)

Submitted April 1, 1960. Decided April 1, 1960

Moore-McCormack Lines, Inc., granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for its vessel, the SS *Mormacguide*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage carrying a full cargo of lumber and/or lumber products from North Pacific ports to North Atlantic ports, commencing on or about April 9, 1960, since granting of the permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, and (2) not to be prejudicial to the objects and policy of the Act.

Ira L. Ewers for applicant.

Robert E. Mitchell, Edward Aptaker, and Robert B. Hood, Jr., as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE MARITIME ADMINISTRATOR:

Moore-McCormack Lines, Inc., filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1223) (the Act), for its vessel, the SS *Mormacguide*, presently under time charter to States Marine Lines, Inc. (States Marine), to engage in one intercoastal voyage carrying a full cargo of lumber and/or lumber products, commencing at North Pacific ports on or about April 9, 1960, for discharge at North Atlantic ports. Notice of hearing was published in the Federal Register of March 26, 1960 (25 F.R. 2603). No one appeared in opposition to the granting of the application.

States Marine, as charterer of the *Mormacguide*, conducts an east-bound intercoastal lumber service. It has bookings of approximately six to seven million feet of lumber and lumber products but has been unable to obtain any other suitable vessel for this April sailing. Furthermore, the sailing of the *Mormacguide* would not increase the normal pattern of scheduling in States Marine's eastbound intercoastal service.

It is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

5 M.A.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 7th day of April A.D. 1960

No. S-73

WATERMAN STEAMSHIP CORPORATION—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY

RULING ON APPEAL FROM EXAMINER'S RULING DENYING INTERVENER'S MOTION TO DISQUALIFY PUBLIC COUNSEL

On June 16, 1959, interveners Alcoa Steamship Company, Inc., and Bull-Insular Line, Inc., moved (1) to strike that portion beginning with the second paragraph on page 1 through the end of the second full paragraph on page 3 of Public Counsel's reply of June 3, 1959, which opposed their motion to dismiss Waterman's application for section 805(a) permission for Pan-Atlantic Steamship Corporation to operate in the domestic Puerto Rican trade; and (2) to disqualify Public Counsel from further participation in the section 805(a) proceeding as Public Counsel.

As grounds for their motion interveners assert that during the course of hearings they subpoenaed the Comptroller of the Federal Maritime Board and Maritime Administration (Mr. Nichols) to elicit certain information, and that Public Counsel objected to Mr. Nichols testifying, not as Public Counsel, but as attorney for Mr. Nichols. They contend that this representation by Public Counsel of the Administration's Comptroller makes him an advocate for a particular partisan interest and that thereafter in this same proceeding he cannot represent the public interest because of this alleged conflict of interest.

Public Counsel did not object to the issuance of a subpoena; Mr. Nichols appeared and was duly sworn by the examiner; counsel for interveners asked the Comptroller a question and Public Counsel objected thereto on the grounds that it was outside the scope of the

proceeding, was speculative, and counsel for interveners had no standing to ask the question; counsel for Waterman also objected to the Comptroller answering the question; the examiner ruled that the question proposed “appears to be outside the scope of the hearing and not relevant”; and on August 4, 1959, the examiner denied interveners’ motion to disqualify Public Counsel, assigning reasons therefor.

On August 7, 1959, interveners appealed from the examiner’s ruling denying the motion to disqualify Public Counsel, alleging that the examiner did not decide or even mention the issue, which they stated is “whether Public Counsel can properly appear as an advocate for a particular partisan interest and thereafter in the same proceeding seek again to represent the public interest”.

By order dated September 8, 1959, the Board rejected the appeal, stating that since the appeal related to that portion of the proceeding which is still in the hearing stage before an examiner, and that since the examiner had not referred the matter to the Board for determination, the appeal was not properly before the Board and its “merits cannot now be considered”.

By letter dated April 4, 1960, interveners’ attorney requested that the Board, prior to oral argument on exceptions to the examiner’s recommended decision on the merits, pass on their motion to disqualify Public Counsel.

It is clear that Public Counsel objected to the questioning of the Comptroller on the grounds that the questions propounded, and those to be propounded, to Mr. Nichols were outside the scope of the proceedings and were speculative and that counsel for interveners had no standing to ask them.

Certainly it is the proper function of an attorney to object, in a proceeding such as this, to questions on the ground of irrelevancy. As we understand the argument of interveners, they contend that if a witness is an employee of the Maritime Administration the activities of Public Counsel in objecting to questions indicate partisanship, and that thereafter Public Counsel may not in the same proceeding seek again to represent the public interest, asserting that “Parties in proceedings such as these have a right to be free from the possibility that Public Counsel’s analysis or conclusions *qua* Public Counsel may even subconsciously reflect the position he took as an advocate”. We assume that interveners would not object to Public Counsel objecting to testimony by a witness other than a member of the Maritime Administration or Federal Maritime Board staff. We are unable to see how Public Counsel’s objection to testimony by a member of the Board’s staff makes him an advocate of a position any more than if

he objected to the testimony of someone other than a member of the Board's staff. If the position of counsel for interveners is that any time Public Counsel objects to a person testifying on the grounds of relevancy he becomes an advocate and therefore must be disqualified, we disagree. Moreover, Mr. Nichols has no personal interest in this proceeding, and even if Public Counsel raised objections on his behalf, there could be no conflict of interest on the part of Public Counsel.¹

Now, therefore, For the foregoing reasons, among others, and upon consideration of the motion and the memorandum in support thereof and the reply thereto:

It is ordered, That the motion be, and it is hereby, denied.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

¹ In addition, the General Counsel of the Federal Maritime Board/Maritime Administration was present as the attorney for Mr. Nichols when the question of Mr. Nichols testifying was considered and ruled on by the examiner.

FEDERAL MARITIME BOARD

No. S-73

WATERMAN STEAMSHIP CORPORATION—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY

Submitted December 1, 1959. Decided April 11, 1960

Waterman Steamship Corporation is operating an existing service on Trade Route No. 21 to the extent of 20 sailings annually, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of subsidy to it for this service.

The present service provided by vessels of United States registry on Trade Route No. 21 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 Waterman Steamship Corporation for its proposed service on Trade Route No. 21, including monthly top-off calls at North Atlantic ports.

Waterman Steamship Corporation is operating an existing service on Trade Route No. 22 to the extent of 23 annual sailings, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of subsidy to it for this service.

The present service provided by vessels of United States registry on Trade Route No. 22 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 Waterman Steamship Corporation for its proposed service on Trade Route No. 22, including twelve California top-off calls annually.

Waterman Steamship Corporation is not operating an existing service between the Far East to the North Atlantic within the meaning of section 605(c) of the Merchant Marine Act, 1936, as amended. The present service provided by vessels of United States Registry on Trade Route No. 12 inbound is inadequate, 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 Water-

man Steamship Corporation for the operation of vessels on the service described in the paragraph next above.

Waterman Steamship Corporation is operating an existing service on Trade Routes Nos. 29 and 30 (now Trade Route No. 29) to the extent of 24 sailings annually, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of subsidy to it for this service.

The service provided by vessels of United States registry on Trade Routes Nos. 29 and 30 (now Trade Route No. 29) is adequate, and section 605(c) of the Merchant Marine Act, 1936, as amended, is a bar to the award of subsidy for the operation of vessels on such service in excess of the existing service set forth in the paragraph next above.

Waterman Steamship Corporation is not operating an existing service on the U.S. North Atlantic/Continent service (Trade Routes Nos. 7, 8, and 9) within the meaning of section 605(c) of the Merchant Marine Act, 1936, as amended. The present service by vessels of United States registry on Trade Routes Nos. 7, 8, and 9 is inadequate within the meaning of section 605(c), 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 Waterman Steamship Corporation for the operation of additional vessels on Trade Routes Nos. 7, 8, and 9.

Sterling F. Stoudenmire, Jr., Donald Macleay, Harold E. Mesirow, and Warren Price, Jr., for applicant.

Russell T. Weil, Robert E. Kline, Ronald A. Capone for United States Lines Company, *Odell Kominers* and *J. Alton Boyer* for Lykes Bros. Steamship Co., Inc., and Pacific Far East Line, Inc., *Vern Countryman* and *Warner W. Gardner* for American Mail Line Ltd. and American President Lines, Ltd., *George F. Galland* and *Herman Goldman* for States Marine Corporation, States Marine Corporation of Delaware, and Isthmian Lines, Inc., *Thomas J. White* and *Alan Wohlstetter* for City of Portland, Commission of Public Docks, *Willis R. Deming* and *Alvin J. Rockwell* for Matson Orient Line, Inc., *John Mason* for Bloomfield Steamship Company, and *Vincent F. Kilborn* for Alabama State Docks Department, interveners.

Edward Schmeltzer, Edward Aptaker, and Robert E. Mitchell as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, and THOS. E. STAKEM, JR.,
Vice Chairman

BY THE BOARD:

Waterman Steamship Corporation (Waterman or applicant) filed on January 30, 1957, an application for operating-differential subsidy covering the following four services:¹

¹ Waterman also filed an application on April 2, 1957, for permission to continue by related companies various services in the domestic trade. The present report deals only with the application for operating-differential subsidy.

1. U.S. Gulf/U.K. and Continent: between U.S. ports (Key West to Mexican border) and ports in the United Kingdom, Eire, and continental Europe north of Portugal, with the privilege of calling approximately one sailing per month outbound only at North Atlantic ports for cargo destined to continental Europe north of Portugal (but not including Baltic and Scandinavian ports)—30 to 42 sailings per year.

2. Gulf-California/Far East—westbound: from U.S. ports (Key West/Mexican border) via Panama Canal, completing at California ports, to Far East (Japan, Formosa, the Philippines, and the Continent of Asia from Union of Soviet Socialist Republics to Siam, inclusive); eastbound: from Far East to U.S. Atlantic and Gulf ports—18 to 30 sailings per year.

3. Pacific coast/Far East: between California, Washington, and Oregon ports and ports in the Far East, with approximately one sailing per month last from California ports and one sailing per month last from Washington and Oregon ports, the third monthly sailing usually calling at both California, Washington, and Oregon ports, alternating each month the last call at such areas—30 to 42 sailings per year.

4. U.S. North Atlantic/Continent: between U.S. ports (Maine-Virginia inclusive) and ports in continental Europe north of Portugal (but not including Baltic and Scandinavian ports)—18 to 30 sailings per year.

These services involve many essential trade routes. The Gulf/United Kingdom-Continent service plies Trade Route No. 21, and the proposed North Atlantic top-off in connection therewith serves Trade Routes Nos. 7, 8, and 9. Nos. 7, 8, and 9 also are involved in the proposed North Atlantic/Continent service. The Gulf/Far East service traverses Trade Route No. 22, and the California top-off of that service involves Trade Route No. 29.² The inbound Far East/North Atlantic segment of the Gulf/Far East service involves Trade Route No. 12. Finally, the Pacific coast/Far East service falls within Trade Routes Nos. 29 and 30 (now TR 29).

The following parties intervened: Lykes Bros. Steamship Company, Inc. (Lykes), operating on Trade Routes (TR) Nos. 21 and 22; Pacific Far East Line, Inc. (PFEL), operating on TR No. 29; American President Lines, Ltd. (APL), and American Mail Line Ltd. (AML), respectively operating on TR Nos. 29 and 30; United States

² Prior to April 9, 1959, California ports were on Trade Route No. 29 and Pacific Northwest ports were on Trade Route No. 30. By notice dated April 9, 1959, the Maritime Administrator redefined Trade Route No. 29 to include U.S. Pacific Northwest ports.

Lines Company (USL), operating on TR Nos. 7, 8, 9, and 12. Some interveners withdrew; ³ others presented no evidence.⁴

Hearings were held before an examiner between October 28, 1958, and April 9, 1959. In his recommended decision the examiner concluded and found:

1. On Trade Route No. 21 Waterman is operating an existing service on the U.S. Gulf/U.K. and Continent service within the meaning of section 605(c) of the Merchant Marine Act, 1936 (the Act), as amended, to the extent of twenty sailings annually, and section 605(c) of the Act is not a bar to the award.

2. The effect of the granting of an operating-differential subsidy contract to Waterman for the service referred to in paragraph No. 1, above, including monthly top-off calls at North Atlantic ports, 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.

3. The present service provided by vessels of United States registry on the services, routes, or lines encompassed in paragraph 1, above, is inadequate within the meaning of section 605(c), and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon.

4. Section 605(c) does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman for its proposed operation of vessels in the U.S. Gulf/U.K. Continent service, including the monthly top-off calls at North Atlantic ports.

5. On Trade Route No. 22 Waterman is operating an existing service on the U.S. Gulf-California/Far East service, as defined by the Maritime Administrator, within the meaning of section 605(c).

6. The effect of the granting of an operating-differential subsidy contract to Waterman for the service described in paragraph No. 5, above, including the California top-off calls to the full extent of the service provided, 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.

³ Isthmian Lines, Inc., States Marine Corporation and States Marine Corporation of Delaware.

⁴ Matson Orient Line, Inc., Alabama State Docks Department, and Bloomfield Steamship Company intervened and appeared at the prehearing conference but thereafter made no further appearance and submitted no traffic data or testimony. It may therefore be assumed that Bloomfield does not oppose the application. PFEL failed to furnish any of the material agreed to at the prehearing conference or required by the prehearing order.

7. The present service provided by vessels of United States registry on the services, routes, or lines encompassed in paragraph No. 5, above, is inadequate within the meaning of section 605(c), and in the accomplishment of the purposes and policy of the Act, additional vessels of United States registry should be operated thereon.

8. Section 605(c) does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman for its proposed operation of vessels in the U.S. Gulf-California/Far East service, including its California top-off calls to the full extent of the service provided.

9. On Trade Route No. 12 Waterman is not operating an existing service between the Far East and the North Atlantic, within the meaning of section 605(c).

10. The present service by vessels of United States registry between the Far East and the North Atlantic is inadequate, and in the accomplishment of the purposes and policy of the Act the additional service proposed by Waterman should be permitted.

11. Section 605(c) does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman for the operation of vessels on the service described in paragraph No. 9, above.

12. On Trade Routes Nos. 29 and 30 (now TR 29) Waterman is operating an existing service on the Pacific coast/Far East service within the meaning of section 605(c).

13. The effect of the granting of an operating-differential subsidy contract to Waterman for the service described in paragraph No. 12, above, would not be to give undue advantage to applicant or be unduly prejudicial to any intervener.

14. The present service provided by vessels of United States registry on the services, routes, or lines encompassed in paragraph No. 12, above, is adequate.

15. Section 605(c) does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman covering its existing service described in paragraph No. 12, above. Applicant's proposed additional service is barred, however, by section 605(c).

16. On Trade Routes Nos. 7, 8, and 9, Waterman is not operating an existing service on the U.S. North Atlantic/Continent service within the meaning of section 605(c).

17. The present service by vessels of United States registry is inadequate for the routes described in paragraph No. 16, above,

within the meaning of section 605(c), and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon.

18. Section 605(c) does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman for the operation of additional vessels on the routes described in paragraph No. 16, above.

Exceptions to the recommended decision and replies thereto were filed; and oral argument was heard. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in this proceeding.

APPLICANT'S OPERATIONS

Waterman, organized in 1919, with its principal headquarters in Mobile, Alabama, has operated United States-flag vessels in the foreign commerce of the United States during the past 40 years. It has no operating-differential subsidy contract. It owns 27 C-2 vessels, all acquired prior to 1950, 25 of which are operated in foreign commerce and two in the Gulf/Puerto Rico trade by a subsidiary.

Except during World War II, applicant's Gulf/Far East service has been operated since 1939, its Gulf/United Kingdom-Continent service since 1919, and its Pacific coast/Far East service since 1949. A direct Atlantic coast/Continent service was operated from 1946 to late 1953, when the carryings were limited to military cargoes as a top-off operation in conjunction with the Gulf/United Kingdom-Continent service. Top-off calls have been made each year at California ports in connection with the Gulf/Far East service.

With the exception of the Far East/Atlantic service on Trade Route No. 12,⁵ proposed in conjunction with the Gulf/Far East service, applicant's operations over all of its services have been predominantly outbound. Under subsidy, unless otherwise required by the Board, applicant desires to continue to operate its outbound services in reasonable conformity with its past operations except for possibly more frequent calls at certain loading and discharging ports. Inbound service also would be provided on all the routes.

In the Gulf/Far East service, applicant would continue to load at Gulf ports, stop off at a single California port, and proceed to the Far East; it prefers to limit calls to ports in the northern half

⁵ Not commenced until 1958, after the filing of the present application.

of the Far East. On return voyages, as has been the case since 1958, applicant's vessels would return to Atlantic ports over Trade Route No. 12 with cargo for the Atlantic and thence to the Gulf.

In the Gulf/U.K.-Continent service, the vessel would load at Gulf ports, and, except for the privilege of calling one sailing per month for top-offs at North Atlantic ports, would proceed directly to Atlantic Continent and U.K. ports. A regular inbound service also would be furnished.

The Pacific coast/Far East service would continue to serve both California and Pacific Northwest ports. Calls would be made at each area last on every other voyage and the third sailing would alternate between such areas. Unless otherwise required, calls in the Far East would be confined to the northern half. An inbound service would be provided, but applicant has stated it would return in ballast if required to do so.

The Atlantic/Continent service would operate on approximately a fortnightly basis between U.S. Atlantic ports and Atlantic Continent ports, such service to be supplemented by the Atlantic top-off service on a privilege basis once a month in connection with the Gulf/Continent service.

This report is limited to the application for operating-differential subsidy as it relates to section 605(c) of the Act.⁶ If the proposed service is not an "existing" one within the meaning of that section, we must determine under the first part that the existing service by United States-flag vessels is inadequate, in order to enter into a subsidy contract. If, however, the proposed service is an "existing" one, then the second part of the section is controlling, and a finding of inadequacy of United States-flag service is not a requirement unless we find that the effect of awarding a subsidy contract would be to give undue advantage or be unduly prejudicial as between citizens of the United States.

Gulf/U.K. and Continent service (Trade Route No. 21). Applicant claims an existing service over this route to the extent of at least 26 sailings per year. Table I sets forth the sailings on which at least four tons of general cargo were carried for the four-year period prior to the filing of the application, a period which the Board heretofore has held to be a reasonable one in which to measure an existing service. *Lykes Bros. S.S. Co., Inc.—Increased Sailings, Route 22, 4 F.M.B. 455, 461 (1954).*

⁶ See appendix.

TABLE I.—*Applicant's existing service on TR 21 outbound (Gulf/U.K. and Continent)*

Loading calls at	1953	1954	1955	1956	Average
Gulf.....	19	29	11	21	20

Set forth in table II is applicant's existing service on Trade Route No. 21 inbound for the four-year period 1953 through 1956.

TABLE II.—*Applicant's existing service on TR 21 inbound*

Discharge calls at	1953	1954	1955	1956	Average
Gulf.....	19	28	7	1	13.7

As may be seen from the above tables, applicant's service inbound has been less frequent than outbound. Trade Route No. 21, however, is predominantly an export trade. In 1957, 2,983,100 tons of liner commercial cargo moved outbound as compared with only 686,700 tons inbound. Under such circumstances, we will judge applicant's existing operation on the basis of its outbound service. *States Marine Corp.—Subsidy, Tricontinent, Etc., Services*, 5 F.M.B. 537, 548 (1959).

In order to qualify as an existing service an operation must have been in "reasonable general accord" with the proposed subsidized service. *Isbrandtsen Co., Inc.—Subsidy, E/B Round the World*, 5 F.M.B. 448 (1958).

The proposed North Atlantic top-offs are not in reasonable general accord with applicant's operation on this route for the period of record. Sailings from the Gulf of Europe usually topped off at North Atlantic ports but lifted military cargo exclusively. A service confined to military cargo to the complete exclusion of all commercial cargo will not be considered as a part of an existing service. *States Marine Corp., supra*.

While Waterman contends that the examiner erred in his conclusion with respect to its existing service on Trade Route No. 21, insofar as ports in the Gulf west of New Orleans and ports in France are concerned, we believe that such conclusions are supported by the record. Waterman made four calls in 1956 and one in 1957 to but one port in the area; this is not sufficient to justify a finding of existing service. Nor does it appear that the service to France is in reasonable general accord with the type of berth commercial service required of a subsidized operator. Until May 1955, applicant called at LeHavre regularly and at the other French ports sporadically. Its last call at LeHavre was in June 1955, when it appears to have discontinued all

service to France from that date until March 1956, when it called at Saint Nazaire. During the remainder of 1956 Waterman served France only infrequently, and such service was largely confined to the military ports of Saint Nazaire and La Palice. Since 1956, service to France has been restricted almost exclusively to the two military ports.

We find that applicant had an existing service, within the meaning of section 605(c), of 20 sailings annually between ports in the east Gulf (including and east of New Orleans) and ports in Germany, Belgium, and the Netherlands, that the effect of granting an operating-differential subsidy to Waterman for such service will 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, and that section 605(c) does not interpose a bar to the award of subsidy to Waterman for such existing Trade Route No. 21 service.

Subsidy is requested up to a maximum of 42 sailings per year on Trade Route No. 21 between U.S. ports on the Gulf (Key West to Mexican border) and ports in the United Kingdom, Eire, and continental Europe (Atlantic Spain to North Sea coast of Germany), with the privilege of topping off at North Atlantic ports in the United States on approximately one sailing per month. In order to determine that section 605(c) does not interpose a bar to the award of subsidy for sailings in excess of the 20 existing sailings per year, we must determine under the first part of that section that the present service by United States-flag vessels is inadequate and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

Table III shows that commercial liner traffic on Trade Route No. 21 has substantially increased since 1953. Nonliner cargo has increased three-fold since that date. Defense cargo constitutes only a small part of the total traffic in this trade.

TABLE III.—*Gulf/U.K. and Continent, Trade Route 21—level of traffic, total outbound traffic*

[In thousands of long tons]

Year	Liner traffic		Nonliner traffic		Both	
	Commercial	Defense	Commercial	Defense	Commercial	Defense
1953.....	2,480	161	1,613	0	3,093	161
1954.....	3,072	109	1,696	0	4,768	109
1955.....	2,764	99	3,382	0	5,858	99
1956.....	2,828	121	4,378	0	7,206	121
1957.....	2,983	110	4,590	0	7,573	110

Table IV shows participation in commercial liner traffic on Trade Route No. 21 of all United States-flag carriers and of Waterman separately.

TABLE IV.—*Participation of U.S./flag carriers in liner commercial traffic on trade route 21*

(In thousands of long tons)

	Total	United States	Percent participation	Waterman	Percent participation
1953.....	2,480	999	40	116	5
1954.....	3,072	1,127	37	169	6
1955.....	2,764	939	34	66	2
1956.....	2,828	963	34	134	6
1957.....	2,983	1,167	39	203	7

Witnesses for applicant and for Lykes, the only intervener opposing the award of subsidy on Trade Route No. 21, agreed that the increasing traffic trend came to a halt in 1958 when the amount of sulphur and phosphate offered for shipment decreased. They differed as to whether liner traffic will improve. Applicant's witness Childe forecast a traffic annual increase of 4 percent on the routes to Europe covered by the application, including No. 21. His forecast is based upon rapid world population increases, accompanied by corresponding increases in world commerce, larger foreign markets for agricultural products, United Kingdom, Eire, and western Europe demands for American grains and fats, increases in American foreign investments and tourist expenditures abroad, decreased trade restrictions, resulting in increased trade of the United States and the development of the European common market, which eventually will provide an increase in trade between the United States and western Europe. Mr. Cocke of Lykes testified that the movement of general cargo on Trade Route No. 21 will decrease considerably unless the United States continues its foreign aid programs in European countries, that carbon black plants and synthetic rubber plants have been built recently in England and France, thus reducing the export of these commodities, that the export of automobiles has decreased, that the St. Lawrence Seaway will divert cargo from the Gulf, that during 1958-1959 cotton exports were reduced, and that tankers have begun to carry an increasing volume of grain out of the Gulf at reduced prices.

From the foregoing it appears that the level of future liner traffic can be fixed at a point not less than the average for the five years of record, or approximately 2,825,000 tons annually. This is somewhat lower than the 1957 level of 2,983,000 tons annually, yet it should be observed that commercial liner traffic has increased 21 percent on this

service since 1953, and that nonliner cargo has trebled during that time. The average annual outbound liner movement for the five years of record, 1953–1957, was 2,825,000 tons, approximately 5½ percent less than in 1957. As shown above, United States-flag participation in outbound liner traffic on Trade Route No. 21 has ranged between 34 percent and 40 percent. It was 40 percent in 1953, 34 percent in 1955 and 1956, and 39 percent in 1957. There were 170 United States-flag liner sailings in 1957 compared with 339 foreign flag. Interveners competing with applicant on the route had free cubic space in 1956 in the aggregate of 2 percent; in 1957, 8 percent. The outbound carryings of applicant in 1956 and 1957 could not have been handled by its United States-flag competitors.

American-flag participation on Trade Route No. 21 has been 40 percent or less in every year of record. Without the services of Waterman it would have been 35 percent in 1953, 31 percent in 1954, 32 percent in 1955, 28 percent in 1956, and 32 percent in 1957. Other American-flag carriers did not have the excess capacity in 1956 and 1957 to carry the cargo carried by Waterman.

In discussing adequacy of service on Trade Route No. 21, in *Bloomfield S. S. Co.—Subsidy, Routes 13(1) and 21(5)*, 4 F.M.B. 305, 318 (1953), the Board said that “United States-flag service must be deemed inadequate unless dependable United States-flag liner sailings are available sufficient to carry at least one-half of the outbound commercial cargo that may be expected to move in liner service.” The record discloses no reasons to indicate that United States-flag participation on the route should be less than the standard of participation set in 1953 after a careful study of the trade. United States-flag participation has been and continues to be inadequate. United States-flag liners had good utilization in 1956, when 98 percent of the aggregate cubic space was occupied, and in 1957, when 92 percent of the aggregate cubic space was utilized. In 1956 there was capacity of only one million cubic feet to carry the 11.5 million cubic feet moved by Waterman, and in 1957 there was capacity of only 5 million cubic feet to move 16.9 million cubic feet handled by Waterman. Applicant’s participation in commercial cargo on the route, for all practical purposes, would have been forfeited to foreign lines if applicant had not been serving the trade. There is no significant source of additional United States-flag capacity forthcoming in the foreseeable future on the route, other than the subsidized sailings Waterman proposes to make in addition to the number actually provided by it in 1957. Waterman asks for a maximum of 42 annual sailings, or nine more than were made in 1957. Assuming that the proposed additional sailings will

have the same capacity per vessel as its 33 sailings had in 1957, the additional nine proposed sailings would have a capacity to carry 71,800 tons of cargo. Making all of this capacity available for commercial cargo, United States-flag projected capacity, including the 42 Waterman sailings, becomes 1,346,000 tons, and this in turn represents 48 percent of the projected liner commercial traffic, which is short of bringing future American-flag participation to 50 percent of liner commercial cargo.

We find and determine that service on Trade Route No. 21 is inadequate and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

Lykes excepts to the examiner's finding of no undue prejudice to it, contending that it will be prejudiced by the dilution of available general cargo and by the top-off calls in the North Atlantic. In view of our finding that additional United States-flag vessels should be operated on this route in order to accomplish the purposes and policy of the Act—the carriage of a substantial portion of our foreign commerce—a route found to be inadequately served by United States-flag vessels, we see no merit to Lykes' exception. Obviously Lykes, receiving a subsidy, cannot object to competition from another subsidized operator on a route inadequately served by United States-flag vessels. With respect to top-offs, Lykes calls direct from the Gulf on both Trade Routes Nos. 21 and 22, and since Waterman in topping off will not be offering as direct or fast a service to Gulf shippers, and the full reach of Waterman's vessels will not be available on berth in the Gulf, we fail to see that there would be undue prejudice to Lykes, or that the top-offs would result in undue advantage to Waterman. If Lykes feels that the service descriptions in its contract "do not provide for efficient service, their relief is to petition for modification of [its] contract." *States Marine Corp., supra*. The record does not support a claim of undue prejudice to Lykes or undue advantage to Waterman.

Lykes further contends, as to Trade Routes Nos. 21 and 22, that the Act requires a finding that it is necessary to enter into "the proposed contract", inferring that the actual contract to be consummated must be subject to examination in a public hearing both as to the undue prejudice issue and as to the issue of whether "it is necessary to enter into such contract in order to provide adequate service."

In view of our finding of inadequacy and the need for the operation of additional vessels to overcome this inadequacy, the precise terms of the contract are immaterial. Any contract entered into, after a finding of inadequacy under section 605(c), necessarily will aid in the accomplishment of the purposes and policy of the Act, and we so

find on this record. This is true whether the contract merely requires the service proposed by the applicant, or whether the Board requires, under other sections of the Act, a service on the route at variance with that proposed by the applicant.

We find as to the proposed U.S. Gulf/U.K. and Continent service (Trade Route No. 21) that Waterman has an existing service of 20 sailings annually between ports in the east Gulf (including and east of New Orleans) and ports in Germany, Belgium, and the Netherlands, and that the award of subsidy covering such service would not result in undue advantage to applicant or in undue prejudice to any intervener.

We further find that Trade Route No. 21 is inadequately served by vessels of United States registry, that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon, and that the award of a subsidy contract covering applicant's proposed U.S. Gulf/U.K. and Continent service is not barred by the provisions of section 605 (c).

The question of U.S. North Atlantic top-offs will be dealt with hereinafter.

Gulf-California/Far East service (Trade Route No. 22) outbound and Trade Route No. 12 inbound. Applicant proposes a subsidized service of 18 to 30 annual sailings from the Gulf, with top-off at ports in California, to ports in the Far East (Japan, Formosa, Philippines, and the Continent of Asia from the Union of Socialist Republics to Siam), and returning on Trade Route No. 12 to North Atlantic ports and thence to the Gulf. It claims an existing service of 18 to 30 sailings outbound, including the California top-offs, on the basis of 26 annual berth sailings from 1952 to 1956.

Table V shows applicant's existing service on Trade Route No. 22 outbound.

TABLE V.—Applicant's existing service on TR 22 outbound (Gulf/Far East)

Loading calls at—	1953	1954	1955	1956	1st half 1957	Last half 1957 ¹	1st half 1958 ²
Gulf.....	22	24	20	25	10	14	10
California top-off.....	10	24	19	21	10	14	10
General.....	10	15	18	17	4	—	—
Military only.....	0	9	11	14	5	—	—

¹ In addition to the sailings counted, there was one call by a vessel which did not load general cargo in the Gulf.

² In addition to the sailings counted, there were 3 military top-offs on vessels which did not load general cargo in the Gulf.

³ Because of the limitations in the underlying data for this period, it cannot be determined in which of the ranges the general cargo on board was loaded, or whether it was loaded on both ranges.

During the period 1953-1956, applicant made a total of 91 Gulf/Far East voyages, each of which carried at least four tons of general cargo from the Gulf, for an average of 23 annual sailings. There was a minimum of 20 sailings in 1955 and a maximum of 25 in 1956, with the frequency of outbound sailings remaining about the same. The preponderance of traffic on Trade Route No. 22 is outbound. In 1957, 1,818,000 tons of liner commercial cargo moved outbound as compared with 175,000 tons inbound. We find existing service to the extent of 23 average annual sailings calling regularly at the Gulf, Japan, and Korea, and occasionally at Formosa and Okinawa, since only infrequent calls were made to these areas in the past. See *Isbrandtsen, supra*. Applicant has not served the Philippine Islands since 1953, and has served Thailand once during the period of record. We find no existing service to those countries.

Applicant contends that it has an existing service for all of its California top-offs, and the examiner, in agreeing, included all of the sailings which carried general cargo from the Gulf and topped off at California with military or general cargo. We disagree. A service loading exclusively military cargo does not, in our opinion, qualify as an existing service. Since about half of applicant's top-off calls at California on its Trade Route No. 22 service during the period 1953-1956 loaded at least four tons of general cargo at California, only those sailings, in our opinion, qualify in determining existing service under section 605(c).

We find that Waterman has an existing service for its California top-off calls to the extent of 12 top-offs annually in connection with its Gulf/Far East service, separate and distinct from its Trade Route No. 29 service.

Applicant proposes to lift outbound cargo in the Gulf, top off in California, discharge in the Far East, and there load inbound cargo on Trade Route No. 12 for discharge first in the North Atlantic and then in the Gulf. This service traverses, outbound, Trade Route No. 22 (Gulf to the Far East) and Trade Route No. 29 (California to Far East), and inbound, Trade Route No. 12 (Far East to the North Atlantic). We will now consider adequacy of service on Trade Routes Nos. 22 and 12 in view of applicant's request for 18 to 30 subsidized sailings.

As will be seen from table VI, there has been an increase in both liner and nonliner outbound commercial traffic on Trade Route No. 22 during the years of record, with commercial traffic about equally distributed between liners and nonliners.

TABLE VI.—Trade route 22—level of traffic, total outbound traffic¹

[In thousands of long tons]

Year	Liner traffic		Nonliner traffic		Both	
	Commercial	Defense	Commercial	Defense	Commercial	Defense
1953.....	950	385	870	4	1,820	389
1954.....	1,116	144	1,028	0	2,145	144
1955.....	1,451	108	1,666	3	3,117	111
1956.....	1,713	178	1,774	0	3,488	178
1957.....	1,818	166	2,276	0	4,094	166

¹ Predominantly an export trade route—outbound leg only will be considered here.

Total traffic on Trade Route No. 22 increased from 1,820,000 tons in 1953 to 4,094,000 tons in 1957. Liner commercial traffic increased from 950,000 tons in 1953 to 1,818,000 tons in 1957. Bulk cargoes, which account for a substantial portion of the liner and nonliner movement, although the rates are currently depressed, continue to hold up well. The average annual liner movement for 1955–1957 was 1,661,000 tons, some 157,000 tons under the 1957 movement. There is a large proportion of general cargo moving over this trade route, and its availability did not noticeably decrease in 1958. The principal general commodities moving included cotton, carbon black, chemicals, flour, rice, metals, and miscellaneous grain products. The decrease in liner movement in 1958 is not significant, and some of it is accounted for by the slow-up in the movement of pig iron to the Far East to meet the shipbuilding needs of Japan. The record discloses no reasons to indicate that traffic for the years 1955, 1956, 1957 were affected by any abnormal short-run conditions. It is therefore concluded that future commercial liner traffic will move on the route at the level or slightly above the average rate for the 1955–1957 period, or approximately 1,675,000 tons annually.

TABLE VII.—Participation of U.S.-flag carriers in liner commercial traffic on trade route 22

[In thousands of long tons]

	Total	United States	Percent participation	Waterman	Percent participation
1953.....	950	500	53	17	2
1954.....	1,115	550	49	82	7
1955.....	1,451	826	57	129	9
1956.....	1,713	935	54	104	6
1957.....	1,818	865	48	98	5
Total.....	7,048	3,676	52	430	6

As shown in table VII, participation by United States-flag liners in the outbound service ranged from a low of 48 percent in 1957 to a high of 57 percent in 1955, and was 52 percent for the period 1953-1957. Without the service of Waterman, American-flag participation would have averaged only 46 percent for the full period. In *States Marine Corp., supra*, largely on the basis of traffic figures up to 1955, the Board held that Trade Route No. 22 outbound would have been inadequately served without the contribution of States Marine. United States-flag participation has fallen from 57 percent in 1955 to 48 percent in 1957. United States-flag liner cubic free space was 5 percent in 1956 and 6 percent in 1957. Excluding applicant's vessels, the cubic utilization of the fleet was 97 percent in each year. In 1956 there was unused capacity of only 2.5 million cubic feet to handle the 12.9 million cubic feet occupied by applicant's cargoes, and in 1957 there was only 1.7 million feet available compared to 10 million cubic feet actually utilized by Waterman cargo. Lykes, a competitor and intervener, turned down cargo in both years.

We find that Waterman has an existing service of 23 annual sailings calling regularly in the Gulf, Japan, and Korea, and occasionally in Formosa and Okinawa, with 12 top-offs at California ports, and that the award of subsidy covering this service, including 12 California top-offs, will not result in undue advantage to applicant or undue prejudice to any intervener, and is not barred by section 605(c).

We further find that Trade Route No. 22 outbound is inadequately served by vessels of United States registry, and in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon to the extent contemplated in Waterman's application.

We will next discuss Waterman's application dealing with service inbound on Trade Route No. 12. Waterman entered this trade in 1958 and makes no claim of existing service. It does contend, however, that the route is not adequately served. Intervener USL takes the position that the route is adequately served.

Table VIII shows the level of commercial liner traffic and United States-flag participation, both outbound and inbound, on Trade Route No. 12.

TABLE VIII.—*Trade route 12, liner traffic and U.S.-flag participation*

[In thousands of long tons]

Year	Commercial liner traffic		Percent participation		Inbound defense ¹ liner traffic
	Inbound	Outbound	Inbound	Outbound	
1953.....	1,547.5	1,672.3	20	12	1
1954.....	1,598.3	1,625.7	14	12	11.5
1955.....	1,739.7	1,731.8	16	16	23.0
1956.....	1,938.9	1,982.0	20	22	20.0
1957.....	1,592.4	2,482.9	21	24	14.7

¹ All defense cargo moved on U.S. vessels.

This trade is fairly evenly balanced between inbound and outbound liner traffic. Inbound carriage fell from 1,938,000 tons in 1956 to 1,592,000 tons in 1957, the latter being the lowest inbound movement of any of the years 1954 through 1957. The liner commercial cargo inbound has increased each year except 1957. The annual 5-year average movement has been approximately 1,700,000 tons, and the Board recently has found that the inbound movement for the foreseeable future would equal the 1956 movement of approximately 1,935,000 long tons of liner commercial cargo.⁷ American-flag participation has been very low in both directions, and the 1957 inbound participation of 21 percent is approximately the same participation as the 1953 inbound figure of 20 percent. In the outbound trade, however, there has been an increase from 12 percent in 1953 to 24 percent in 1957. The past level of participation has been inadequate in both directions. In 1957 United States-flag liner sailings totalled 29⁸ compared with 295 foreign-liner sailings.

The principal United States-flag operator on this route is USL, which provides the only direct United States-flag service inbound, and was the only intervener who participated in the proceeding and furnished testimony. USL's capacity on this entire route is estimated at about 343,000 tons in 1957, or sufficient, if fully utilized, to accommodate some 20 percent of the total five-year average commercial liner inbound movement of 1,700,000. Public Counsel points out that

⁷ *Matson Orient Line, Inc.—Subsidy, Route 12*, 5 F.M.B. 410, 414 (1958).⁸ Excludes States Marine and Waterman sailings, which were either military or in ballast.

the Board approved for USL, under section 605(c), an increase in its maximum sailings from 24 to 36 annually, and that similarly Matson Orient was granted section 605(c) approval for a minimum of 18 and a maximum of 24 sailings annually, and that in so doing United States-flag capacity would be increased to 941,000 tons. *Matson Orient, supra*. These section 605(c) determinations, based upon the low 1957 inbound commercial liner cargo figure of 1,592,000 (the lowest inbound movement of any of the years 1954 through 1957), would put into the trade enough United States-flag vessel capacity to carry 59 percent of the liner commercial cargo. As of now, however, Matson Orient has no tonnage on the route and has not signed a subsidy contract. We agree with the examiner that the total annual average commercial liner movement in the foreseeable future will approximate 1,700,000 tons, the recent annual 5-year average inbound movement. Waterman has demonstrated its ability, since beginning in 1958 a homebound service from the Far East to the North Atlantic, to attract cargo on this route and to contribute to United States-flag participation thereon.⁹ USL and Public Counsel contend that there is no need for more United States-flag capacity than that already available—enough to carry 59 percent (55 percent if the average annual commercial liner movement of the 5 years 1953–1957 of 1,700,000 tons is used) of the 1957 inbound commercial movement if the USL increase in sailings and the proposed Matson Orient service is included. This contention overlooks the fact that the *Matson Orient* decision was handed down in May 1958, that Matson Orient owns no vessels for operation on the route, and that Matson Orient has not yet executed a contract and it is not known whether it will ever operate in this service. As we said in *Matson Orient*: * * * 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.

Adequacy or inadequacy should be determined on the basis of present requirements and not necessarily on the basis of earlier favorable section 605(c) determinations for other applicants which have indicated no immediate intention of commencing a service and which have not participated in this proceeding and made their intentions known.

We find that Waterman does not have an existing service between the Far East and the North Atlantic (inbound on Trade Route No. 12), and that its proposed service would be in addition to the existing

⁹ In eleven months of 1958, part of the first year it entered the inbound trade, on some ten voyages it carried a total of approximately 15,000 long tons.

service. We further find that Trade Route No. 12, inbound, is inadequately served by vessels of United States registry, within the meaning of section 605(c), that in the accomplishment of the purposes and policy of the Act the additional service proposed by applicant should be permitted, and that section 605(c) is not a bar to the granting of a subsidy therefor.

*Pacific coast/Far East service (Trade Routes Nos. 29 and 30—now Trade Route No. 29).*¹⁰ Waterman is seeking subsidy for 30–42 sailings annually, serving both California (Trade Route No. 29) and Oregon–Washington (Trade Route No. 30) on each voyage, half the sailings clearing from the California range and the other half from the Oregon–Washington range. In addition, as previously shown, applicant proposes to top off in California on each of the 18–30 sailings in its Gulf-California/Far East service. In the following table (No. IX) voyages will be credited to the different port ranges which lifted at least four tons of commercial general cargo in the particular port range. Voyages loading only bulk cargo in the Oregon–Washington range will be treated the same as voyages which load general cargo and included as part of applicant's existing service from that range.¹¹ For the period 1953–1956, applicant had 98 regular liner sailings outbound¹² from the Pacific coast to the Far East carrying general, bulk, and military cargo, averaging 24.5 annual sailings with a maximum of 36 in 1953 and a minimum of 10 sailings in 1954. There were 35 sailings in 1957. In 1953, general cargo was loaded on one sailing in the Northwest and 35 in California, while in 1956 general cargo was loaded on 19 sailings from each range. Applicant's sailing frequency has not diminished since the filing of the application, and its existing port coverage is in reasonably general accord with its proposed service in that the existing service includes regular calls at San Francisco, occasional calls in the Los Angeles–Long Branch area, and regular calls in the Pacific Northwest. Past coverage of foreign ports indicates that applicant has an existing service of regular calls in Japan and Korea and occasional calls in Formosa and Okinawa.¹³ Applicant's past transpacific operation justifies a finding that applicant has

¹⁰ See footnote 2.

¹¹ This is in accordance with the decision in *States Marine Corp., supra*, where the Board counted sailings which carried exclusively MSTs and bulk cargo "in recognition of the nature of the trade on TR 30", since on Trade Route No. 30 the overwhelming preponderance of cargo is bulk.

¹² Includes California and Northwest sailings carrying more than four tons of general cargo and Northwest sailings carrying full bulk and full bulk and military cargoes.

¹³ Since the "transpacific foreign commerce of the United States is overwhelmingly export trade . . . it is on this basis that applicant's operations" should be judged. *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F.M.B. 304, 309 (1957).

an existing service of 24.5 sailings annually providing regular calls to the aforementioned ports.

TABLE IX.—*Applicant's existing service on trade routes 29 and 30 outbound (now TR 29) (West coast/Far East)*

Commercial loading calls at—	1953	1954	1955	1956	1st half 1957	Last half 1957	1st half 1958
Northwest only.....	1	1	4	11	7	2	2
California only.....	35	8	11	11	6	1	0
Both ranges.....	0	1	2	8	9	10	6
Total.....	36	10	22	30	22	13	7
Sailed Northwest.....	0	0	0	1	0	0	4
Sailed California.....	0	1	2	7	9	10	1

¹ 12 of these voyages loaded military cargo in the Northwest before loading in California; the other 23 loaded cargo only in California.

² Loaded military cargo in California before loading in the Northwest.

³ 3 of these voyages loaded military cargo in the Northwest before loading in California; 2 topped off in the Northwest for military; and 3 did not load cargo in the Northwest.

⁴ 5 of these voyages loaded military cargo in California before loading in the Northwest; the other 4 topped off in California for military cargo.

⁵ 4 of these voyages loaded general cargo in the Northwest before loading in California, and the other 7 topped off in the Northwest for military cargo.

⁶ 6 of these voyages topped off in California for military cargo; 4 loaded military in California before loading in the Northwest; and 1 loaded only in the Northwest.

⁷ 3 of these voyages topped off in the Northwest for military cargo; 4 loaded military in the Northwest before loading in California; and 4 loaded only in California.

⁸ 5 of these voyages loaded military cargo in California before loading in the Northwest, and 2 loaded only in the Northwest.

⁹ 4 of these voyages loaded military cargo in the Northwest before loading in California, and 2 loaded only in California.

Table X shows that both liner and nonlinear commercial traffic on Trade Route No. 29 have increased steadily each year, the nonlinear from 593,000 tons in 1953 to 2,103,000 tons in 1957.

TABLE X.—*Trade route No. 29 (California/Far East) level of traffic—total outbound traffic*

[In thousands of long tons]

Year	Liner traffic		Nonliner traffic		Both	
	Commercial	Defense	Commercial	Defense	Commercial	Defense
1953.....	1,026	1,109	593	40	1,619	1,149
1954.....	1,255	585	470	70	1,735	654
1955.....	1,360	485	894	43	2,254	528
1956.....	1,663	573	1,899	44	3,561	617
1957.....	1,851	526	2,103	48	3,954	574

The sizeable increase in commercial liner traffic from 1,026,000 tons in 1953 to 1,851,000 tons in 1957 is largely attributable to the movement of grain, coal, and iron ore, the three principal commodities carried; only American iron ore to Japan fell off at the end of 1957 as new Indian ore production became available to meet Japan's requirements. Because of the shipping recession during the past two years and the elimination of the iron ore movement on the route, it is concluded that commercial liner traffic, for the immediate foresee-

able future, will remain at a level somewhat below that reached in 1957, and this movement can hardly be expected to exceed 1.5 million tons in the next few years.

As shown below in table XI, and excluding applicant, United States-flag participation has stood at about 70 percent on Trade Route No. 29, and there is very little chance of increasing American-flag participation to more than 75 percent, including Waterman's service. We find on this record that the route is adequately served and that it is not, in the accomplishment of the objects and policy of the Act, necessary to operate additional vessels thereon.

TABLE XI.—Participation of U.S.-flag carriers in liner commercial traffic on trade route No. 29

[In thousands of long tons]

Year	Total	United States	Percent participation	Waterman	Percent participation
1953.....	1,026	770	74	32	3
1954.....	1,265	932	74	34	3
1955.....	1,360	1,039	76	32	2
1956.....	1,663	1,229	74	127	7
1957.....	1,851	1,377	75	76	4

As noted from table XII, traffic on Trade Route No. 30 has shown continuing growth.

TABLE XII.—Trade route No. 30 (Pacific Northwest/Far East)—level of traffic, total outbound traffic

[In thousands of long tons]

Year	Liner traffic		Nonliner traffic		Both	
	Commercial	Defense	Commercial	Defense	Commercial	Defense
1953.....	454	249	1,068	4	1,522	253
1954.....	511	258	1,322	28	1,833	286
1955.....	627	237	1,533	16	2,160	253
1956.....	748	339	2,113	44	2,861	345
1957.....	787	251	3,019	52	3,806	302

Liner traffic increased from 454,000 tons in 1953 to 787,000 tons in 1957. Nonliner traffic trebled during the same period. As we observed in discussing Trade Route No. 21, the general shipping recession of 1957 and 1958, coupled with the loss of the iron ore business to Japan, had an adverse effect on the Oregon-Washington range, as it did on California ports, with the result that traffic on Trade Route No. 30 fell off at the end of the 1957-1958 period. In line with the reasons set forth in our discussion relating to Trade Route No. 29, the evidence indicates that commercial liner traffic on Trade Route No. 30

will not exceed approximately 725,000 tons annually in the foreseeable future, a figure somewhat less than the commercial liner traffic out-bound for both 1956 and 1957.

As shown by table XIII, American-flag participation has been high during the period 1953-1957, ranging from 53 percent to 76 percent, with even higher participation in 1955 of 79 percent and in 1956 of 84 percent. United States-flag liner sailings on former Trade Route No. 29 in 1957 were 467 as compared with 493 foreign-flag sailings. On former Trade Route No. 30, United States-flag sailings were 206 compared with 343 foreign-flag sailings.

TABLE XIII.—*Participation of U.S.-flag carriers for liner commercial traffic on trade route No. 30*
(In thousands of long tons)

Year	Total	United States	Percent participation	Waterman	Percent participation
1953.....	454	241	53	1	.....
1954.....	511	301	59	1	.....
1955.....	627	495	79	69	11
1956.....	748	627	84	83	11
1957.....	787	597	76	107	14

As shown in table XIII, American-flag participation was 76 percent in 1957, and even during that year, when liner cargo was at an all-time high, the lines which serve the Northwest exclusively had significant quantities of free space available.¹⁴ In view of the amount of free space on United States-flag vessels during 1957 and the high level United States-flag participation in the liner movement, we find on this record that service provided on Trade Route No. 30 is adequate and that it is not in the accomplishment of the purposes and policy of the Act to operate additional vessels thereon.

We find that Waterman has an existing service of 24 sailings annually, calling regularly at San Francisco, occasionally at the Los Angeles-Long Beach area, regularly in the Pacific Northwest, regularly in Japan and Korea, and occasionally in Formosa and Okinawa, and that the award of subsidy covering such service will not result in undue advantage to Waterman or undue prejudice to any intervener.

We further find that former Trade Routes Nos. 29 and 30 (now TR 29) are adequately served by vessels of United States registry.

¹⁴ Vessel utilization for all U.S.-flag liners serving this route taken together averaged 90 percent of deadweight capacity and 84 percent of cubic capacity. American Mail Line's subsidized Pacific Northwest/Far East service with 30 sailings in 1957 filled an average of 87 percent of deadweight capacity and 75 percent of cubic capacity. Its unsubsidized bulk cargo service, consisting of 10 sailings, averaged 81 percent of deadweight capacity and 70 percent of cubic capacity, and States Steamship Company's Pacific Northwest/Japan line, which provided five sailings, averaged 88 percent utilization of deadweight capacity and 73 percent of cubic capacity.

We further find that section 605(c) does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman for its existing Pacific coast/Far East service but that it is a bar to the award of subsidy to applicant for any service in addition to its existing service, including top-offs in its Trade Route No. 22 service in excess of the 12 top-offs found to be existing.

We will limit the carriage of inbound cargoes to the Pacific Northwest to vessels in the Pacific coast/Far East service which cleared the Northwest outbound. See *States Marine Corp., supra*.

U.S. North Atlantic/Continent service (Trade Routes Nos. 7, 8, 9). Waterman seeks subsidy on 18 to 30 sailings between North Atlantic ports and European ports on Trade Routes Nos. 7, 8, and 9, supplemented by a top-off service on a privilege basis of 12 sailings a year to be provided in connection with its Gulf/U.K.-Continent service on Trade Route No. 21. It claims an existing service to the extent of 18 to 30 sailings on an asserted average of 50 annual sailings during the period 1946 to 1956. This service was discontinued in late 1953. During the period 1954-1956 Waterman carried only military cargo outbound in this service. While applicant carried 2,313,000 tons of general, bulk, and military cargo outbound during the period 1946-1956, an average of approximately 210,000 tons per year, with sailings from North Atlantic ports to continental ports, the evidence is insufficient to show an existing service at the time the application was filed on January 31, 1957. An applicant for subsidy must demonstrate an existing service at the time the application is filed, the service performed must have been in "reasonably general accord" with the proposed subsidized service, and "regardless of the wisdom of [an operator's] decision to interrupt service" or "its intention to resume service * * * at some later date", an interruption of service negates any claim to an existing service. *Isbrandtsen, supra*.

We find that Waterman cannot qualify under section 605(c) as an existing operator on Trade Routes Nos. 7, 8, 9.

TABLE XIV.—*Past participation of U.S.-flag carriers in outbound liner commercial traffic on trade routes Nos. 7, 8, and 9*
(In thousands of long tons)

Year	TR 7	TR 8	TR 9	Total	Percent U.S.-flag participation			
					TR 7	TR 8	TR 9	Total
1953.....	552	1,486	244	2,282	32	15	29	21
1954.....	546	1,583	248	2,377	29	15	25	19
1955.....	534	1,742	309	2,585	34	16	38	22
1956.....	561	1,768	482	2,811	33	17	38	24
1957.....	637	1,529	335	2,501	25	14	22	18

TABLE XV.—*Outbound commercial nonlinear traffic*
 [In thousands of long tons]

Year	TR 7	TR 8	TR 9	Total
1953.....	1, 636	2, 514	422	4, 572
1954.....	1, 045	2, 591	387	4, 023
1955.....	3, 933	10, 327	1, 038	15, 298
1956.....	5, 899	16, 584	5, 090	27, 573
1957.....	9, 348	18, 082	5, 804	33, 234

Commercial liner traffic on Trade Routes Nos. 7, 8, 9 increased from 2,282,000 to 2,811,000 long tons, or 23 percent, from 1953 to 1957, with a drop-off to 2,501,000 tons in 1957. Combined liner and nonlinear traffic has more than doubled during the same period. From 1953 to 1957, the routes showed a growth for all outbound commercial cargo, excluding defense cargo, from 6,853,000 tons in 1953 to 35,744,000 tons in 1957. Over the period, United States-flag participation in the commercial liner movement remained relatively static, and in 1957, its lowest point, declined about 18 percent. Commercial liner and nonlinear traffic moves in substantial amounts outbound on the routes. Liner traffic for the aggregate of the three routes increased each year from 1953 until 1957, when it dropped off to the 1955 level. It dropped in 1957 on Trade Routes Nos. 8 and 9 but increased from 561,000 tons in 1956 to 637,000 tons in 1957 on No. 7. Nonlinear traffic increased eight times in 1957 over the 1953 level, the total movement in the latter year being 33,234,000 tons. The average annual outbound commercial liner movement, 1953-1957, was 2,500,000 tons, about the same as 1955 and 1957. Public Counsel contends that the future level of commercial liner traffic on the routes will not exceed 2,500,000 tons in the foreseeable future.

USL, the only carrier competing with applicant on these routes, contends that they are adequately served. Nevertheless, table XIV shows that American-flag participation on the combined routes did not exceed 24 percent in the period of record, and fell to about 18.0 percent in 1957. USL takes the position that a 50-percent participation on the routes is an unrealistically high goal which cannot be achieved by American-flag liners because of intense foreign-flag competition, nationalistic preferences, nonconference carriers, third-flag carriers, and gross overtonnaging. The conditions however existed during 1955 and 1956, when USL's vessels sailed substantially full. Without doubt additional sailings could have improved United States-flag participation. USL's free space on the two services operated by it on the routes was 11 percent in 1956 and 19 percent in 1957. A sizeable portion of the 33,000,000 tons of nonlinear cargo moving out-

bound over the routes is available and could be carried by United States-flag liners. USL has a total available capacity of 605,000 tons, or capacity for 24 percent of the average annual liner movement of an estimated 2,500,000 tons, Isbrandtsen has 136,000 tons, and States Marine has 35,000 tons. This total capacity, if used, would move only 30 percent of the outbound projection, assuming that the latter two lines will fill their full capacity devoted to the routes. With the addition of some 24 direct sailings per year in Waterman's Atlantic/Continent service, this additional capacity would provide, along with other existing and prospective United States-flag sailings, sufficient capacity to move 38 percent of the projected liner movement of 2,500,000 tons. If Waterman's top-off service of one sailing a month is included, thus adding approximately 30,000 tons per year, United States-flag capacity would amount to only 39 percent of a 2,500,000 ton movement.

These routes constitute the very heart of the North Atlantic trade, involving "the largest movement of U.S. outbound liner" cargo in the world. *States Marine Corp., supra*. In the past, American-flag participation in commercial liner traffic on the routes has been notoriously poor as compared to other routes in this proceeding,¹⁵ and will, in our opinion, be improved by an increase in United States-flag capacity.¹⁶ Indeed, we found recently that the North Atlantic trade routes, including Nos. 7, 8, and 9, have been inadequately served. *States Marine Corp., supra*.¹⁷

USL argues that the shipping recession of 1957 and the first half of 1958 resulted in a decrease in the level of commercial liner traffic on these routes, in a decrease of American-flag participation, and in substantial free space on USL's vessels. It contends that the record does not portend a foreseeable end to the recession. We reject the contention that conclusive weight must be given to the last year of record, and we will, as in the past, consider a number of recent years. The level of commercial liner traffic on these routes rose steadily from 2.2

¹⁵ On Trade Routes Nos. 7, 8, and 9 combined, U.S.-flag participation in commercial liner traffic was only 21 percent in 1953, 19 percent in 1954, 22 percent in 1955, 24 percent in 1956, and 18 percent in 1957.

¹⁶ USL, substantially the only carrier of U.S. commercial liner cargo on these routes, had a comparatively high utilization ratio in 1955 and 1956. *States Marine Corp., supra; Isbrandtsen Co., Inc.—Subsidy, Trade Route 32*, 5 F.M.B. 525 (1959).

¹⁷ Even if the successful applicants in these two sections 605(c) proceedings eventually are awarded subsidy contracts to operate vessels on Trade Routes Nos. 7, 8, and 9, they will supply only a relatively small amount of capacity compared to the total commercial liner cargo moving on the routes. If subsidized, Isbrandtsen would make, at the most, 30 annual sailings on Trade Routes Nos. 5, 7, 8, and 9, sufficient to carry about 240,000 tons of outbound cargo, and States Marine would lift about 70,000 tons on Trade Routes Nos. 5, 6, 7, 8, 9, and 11. Even if no military cargo were loaded and all of the space were available for commercial cargo on Nos. 7, 8, and 9, it would be sufficient to handle only 12 percent of the 2,501,000 tons which moved outbound on the routes in 1957, during which year U.S.-flag participation reached its lowest percentage—18 percent.

million tons in 1953 to 2.8 million tons in 1956, and then fell off to 2.5 million tons in the world-wide recession year of 1957. We feel that conditions will improve and that additional vessels should be operated on these routes.

USL excepts to the examiner's decision on the following grounds:

(1) That he failed to determine the appropriate level of United States-flag participation reasonably to be sought on the North Atlantic;

(2) That he based his ultimate determination of inadequacy upon the return at some indefinite future date of more normal conditions and not upon conditions existing at the time of the hearing;

(3) That his finding as to the level of future liner cargoes on the North Atlantic was erroneous and failed to consider and to properly evaluate the historic decline of North Atlantic cargoes and changes accelerating that decline;

(4) That he erred in finding that conditions on the North Atlantic do not limit the levels of participation and do not preclude an increase beyond the present capacity of United States-flag vessels on the North Atlantic routes.

We do not believe that, if we are to have the type of merchant marine envisioned by the Act, United States-flag capacity should be limited to an amount sufficient to carry only 30 percent of the average annual outbound commercial liner movement during the period 1953 through 1957. Without deciding the exact level of United States-flag participation, we find that capacity sufficient to carry 39 percent of the outbound commercial liner movement over the 1953-1957 period certainly is not in excess of that which is needed to accomplish the purposes and policy of the Act.

We base our finding of inadequacy on the North Atlantic routes on an estimate of a movement of 2,500,000 tons—the annual average of the five year period 1953 through 1957—and in the firm belief that in the future at least this much cargo will be moving on the routes. The present capacity of the USL vessels, plus those of States Marine and Isbrandtsen, is, in our opinion, insufficient to provide adequate United States service on the routes.

We find that Waterman is not operating an existing service on Trade Routes Nos. 7, 8, and 9, between North Atlantic ports and ports in continental Europe north of Portugal, and that its proposed service would be in addition to the existing services; that the service already provided by vessels of United States registry in such services is inadequate within the meaning of section 605(c), and that in the ac-

complishment of the purposes and policy of the Act the additional service proposed by Waterman should be permitted; and that section 605(c) is not a bar to the granting of an operating-differential subsidy contract to Waterman for the operation of additional vessels on these routes, including the proposed 12 top-offs in connection with its operations on Trade Route No. 21.

5 F.M.B.

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.

5 F.M.B.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-108

MOORE-McCORMACK LINES, INC.—APPLICATION UNDER SECTION 805(a)

Submitted April 15, 1960. Decided April 15, 1960

Moore-McCormack Lines, Inc., granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for its vessel, the SS *Robin Mowbray*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage carrying a cargo of lumber and/or lumber products from North Pacific ports to Atlantic ports, commencing on or about April 24, 1960, since granting of the permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, and (2) not to be prejudicial to the objects and policy of the Act.

Ira L. Ewers for applicant.

Robert E. Mitchell, Edward Aptaker, and Robert B. Hood, Jr., as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE MARITIME ADMINISTRATOR:

Moore-McCormack Lines, Inc., filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1223) (the Act), for its vessel, the SS *Robin Mowbray*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage carrying a cargo of lumber and/or lumber products commencing at North Pacific ports on or about April 19, 1960, for discharge at Atlantic ports. Notice of hearing was published in the Federal Register of April 5, 1960 (25 F.R. 2869). No one appeared in opposition to the application.

States Marine has cargo bookings of approximately six million feet of lumber and lumber products, and has been unable to obtain

any other suitable vessel for an April sailing which, according to the witness, is now scheduled to commence on or about April 24 rather than April 19. The sailing of the *Robin Mowbray* would not increase the normal pattern of scheduling in States Marine's eastbound intercoastal service.

It is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

TABLE OF COMMODITIES

- Bananas.* Ecuador to Atlantic ports. 278, 615, 633.
Fruit. Loading and unloading at New York. 565.
Glass Tumblers. Misclassification. 515.
Glassware. Misclassification. 509.
Houses, Prefabricated. Portland, Ore., to Kodiak, Alaska. 602.
Iron. Loading and unloading at New York. 565.
Mahogany Logs. Philippines to Atlantic and Gulf ports. 467.
Mineral Wool. Long Beach, Calif., to Seward, Alaska. 661.
Peat Moss. Loading and unloading at New York. 565.
Pineapple, Canned. Hawaii to Pacific Coast. 347.
Pineapple Juice, Canned. Hawaii to Pacific Coast. 347.
Seed Beans. New York, N.Y., to Piraeus, Greece. 597.
Steel. Loading and unloading at New York. 565.
Tinplate. Loading and unloading at New York. 565.
Vegetables. Loading and unloading at New York. 565.

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

ADMINISTRATIVE PROCEDURE ACT. See Agreements under Section 15; Charter of War-Built Vessels; Evidence; Jurisdiction; Practice and Procedure.

ADMISSION TO CONFERENCES. See Agreements under Section 15.

ADVERTISEMENTS. See Common Carriers; Evidence.

AGREEMENTS UNDER SECTION 15. See also Contract Rates; Jurisdiction; Ports, Tariffs.

—In general

Considerations of whether an agreement to impose condition on applicant for conference membership is "just and reasonable" under basic approved agreement, or is "unjustly discriminatory or unfair as between carriers," or "operates to the detriment of the commerce of the United States," or is in "violation of this Act," are factors for Board consideration in determining whether such an agreement shall be approved or disapproved, but are not factors in determining whether the agreement is one which must be filed with and approved by the Board. Pacific Coast European Conference-Limitation on Membership, 247 (269, 270).

Neither the language nor the legislative history of the Shipping Act of 1916 support contention that approval of more than one conference in a particular trade is illegal per se. *Oranje Line v. Anchor Line Ltd.*, 714 (731).

—Agreements required to be filed

Board's decision to hold rule-making proceeding to guide conferences in meeting the burden of filing copies or memoranda of agreements, which has been imposed on them by section 15 of the Shipping Act, is not inconsistent with its decision, made as a matter of law, that agreement relating to boycotting of broker in certain circumstances was not encompassed within approval of conference agreement permitting the making of uniform rules and regulations concerning brokerage. Pacific Coast European Conference—Payment of Brokerage, 65 (71).

More than an agreement by conference members to file a complaint with the Board is necessary to prove an allegation that there exists an unfiled, unapproved agreement among conference lines to take action to deprive carrier of cargo to force it out of the trade. Members of conference had to "agree" to file the complaint, but since the conference is a "person" under the Shipping Act, which pursuant to section 22 thereof, may file a complaint, it would be absurd to hold that approval under section 15 is necessary before the "person" could exercise the right granted by section 22. *United States Atlantic and Gulf-Puerto Rico Conference v. American Union Transport, Inc.*, 171 (176).

Where basic approved agreement authorized conference members to consider and pass upon brokerage matters, and tariff rule permitted members to pay

brokerage when earned, at their discretion, but historically brokerage was paid to forwarder-brokers who were merely "identified with the cargo," conference action denying payment to complainant as forwarder because it had competed as carrier for the business of carrying locomotives to Brazil, amounted to a new course of conduct in relation to payment of brokerage, i.e., it prohibited payment regarding specified shipments. Thus there was a modification of an existing agreement which, because it was calculated to control, regulate, prevent, or destroy competition, and provided for an exclusive, preferential, or cooperative working arrangement, was required to be filed under section 15 for Board approval prior to its effectuation. *American Union Transport v. River Plate & Brazil Conferences*. 216 (221).

Conference agreement to condition admission of new member upon its withdrawal from proceedings before the Board in which it had taken positions opposite to the conference, is an agreement or modification of an agreement between carriers, controlling, regulating, preventing, or destroying competition, and is a preferential or cooperative working arrangement within the meaning of section 15 which requires approval by the Board prior to effectuation. To the extent the applicant for membership might be precluded by the condition from joining the conference, the condition clearly controlled and regulated competition in the trade. To the extent it forced the applicant to withdraw from pending proceedings and deprived the applicant of its right under section 22 to continue as a party in such proceedings in which it had argued that certain competitive practices of the conference were unlawful, the condition was calculated to have an effect upon competitive practices in the trade. Furthermore, conference members themselves recognized that the condition was calculated to affect competitive conditions and was part of an effort to meet nonconference competition. *Pacific Coast European Conference—Limitation on Membership*, 247 (262).

The Board and its predecessors have consistently treated conditions affecting admission to conference membership as agreements or modifications to agreements, which require approval or disapproval under the provisions of section 15 of the Act. *Id.* (260).

An agreement among member lines of a conference to impose condition on application for membership that applicant withdraw from proceedings before the Board in which it had taken positions opposite to the conference, cannot be considered a routine action within the cover of authority of the approved basic agreement. It clearly creates an entirely new scheme of membership requirements not embodied in the basic agreement. It must be filed with the Board. *Id.* (269).

Agreement among conference members to impose condition on applicant for membership that it withdraw from proceedings before the Board in which it had taken position opposite to the conference, is an agreement or modification to an agreement, within the purview of section 15, which has not been approved by the Board, and which may not be lawfully effectuated without prior approval. *Id.* (269).

Lease agreement between State respondents, owners and operators of terminal facilities, and operator of a terminal facility used in the grain trade at the port involved, may be within the purview of section 15, and if so, its effectuation prior to Board approval would be violative of that section. *D. J. Roach, Inc. v. Albany Port District*, 333 (335).

Section 15 does not require that parties adopt and file for approval at one and the same time an agreement which encompasses all possible areas of activity within the purview of that section. There must be room for subsequent

expansion and retraction. However, all agreements and understandings covered by section 15 which exist at the time of filing must be included in the agreement filed for approval, and all such agreements and understandings, subsequently entered into by the parties, must be filed for separate approval. *Associated-Banning Co. v. Matson Navigation Co.*, 336 (342).

Agreement between port and terminal company (performing, inter alia, stevedoring services) for lease of a pier, owned and previously operated by the port, to the terminal company will be approved. The pier license is not unlike others which the Board has approved and operation of the pier by the licensee was not opposed by competing stevedores. The agreement provides for the assignment of rights by the license to a subsidiary with the approval of the licensor. Any such assignment is subject to the Board's prior approval under section 15. *Id.* (343, 344).

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. While it was not necessary to determine whether stevedores are "other persons," within the meaning of section 1, an agreement between persons subject to the Act to establish a stevedoring operation does constitute an agreement within the purview of section 15. *Associated-Banning Co. v. Matson Navigation Co.*, 432 (434).

Issuance of tariffs, including rules and regulations covering their application, has uniformly been held to be a routine matter authorized by an approved basic conference agreement, not requiring separate section 15 approval. *Empire State Highway Transportation Assn. v. American Export Lines, Inc.*, 565 (585).

Agreement for lease of grain elevator and wharf from Port, which provides for preference by the lessee of the elevator over others in the area, maintenance of rates competitive with but not greater than rates at other ports in the area, exclusive right to operate the terminal for up to 40 years, and preference to the lessee to lease any additional grain facilities which might be constructed by the lessor, requires approval of the Board under section 15 of the Act. *Agreements Nos. 8225 and 8225-1, Between Greater Baton Rouge Port Commission and Cargill, Inc.*, 648 (654).

Agreement between persons subject to the Shipping Act of 1916 providing for the rendering of stevedoring services exclusively by the lessee at the grain terminal under lease from the Port, controls and regulates competition, and requires approval by the Board under section 15 of the Act before it may be carried out. *Id.* (655).

—Approval of agreements

Agreement between port and terminal company (performing, inter alia, stevedoring services) for lease of a pier, owned and previously operated by the port, to the terminal company will be approved. The pier license is not unlike others which the Board has approved and operation of the pier by the licensee was not opposed by competing stevedores. The agreement provides for the assignment of rights by the licensee to a subsidiary with the approval of the licensor. Any such assignment is subject to the Board's prior approval under section 15. *Associated-Banning Co. v. Matson Navigation Co.*, 336 (343, 344).

Agreement for lease of grain elevator and wharf from Port, which provides for preference by the lessee of the elevator over others in the area, maintenance of rates competitive with but not greater than rates at other ports in the area, exclusive right to operate the terminal for up to 40 years, and preference to the lessee to lease any additional grain facilities which might be constructed by the lessor, is not, on the record, unjustly discriminatory or unfair, detrimental to the commerce of the United States, or in violation of the Shipping Act of 1916.

Agreements Nos. 8225 and 8225-1, Between Greater Baton Rouge Port Commission and Cargill, Inc., 648 (654, 655).

—*Conference membership*

Where concerted action under conference agreement is approved by the Board, it is apparent that the degree to which common carriers operating in the trade are free to enter the conference and operate under the conference system, vitally affects the extent to which conference agreements control and regulate competition. The Board has consistently recognized that admission or nonadmission of an applicant to conference membership directly affects the competitive conditions in a particular trade. Pacific Coast European Conference—Limitation on Membership, 247 (260).

In recognition of the fact that restrictions on conference membership will have a real effect on competition in a trade, the Board and its predecessors have repeatedly refused to approve conditions and restrictions on membership other than a requirement of operating, or giving intention to operate, regularly in the trade. *Id.* (261).

If a member line, in connection with its transportation activities, refuses or is unable to abide by any provision of the conference agreement, tariff rates, or rules and regulations, it may be expelled from the conference, and, likewise, an applicant for conference membership who refuses or is unable to abide by the agreement and the uniform tariff rates, rules and regulations, may be properly denied admission to the conference. Such actions by conferences are proper and within the scope of approved basic agreements. *Id.* (263).

The Board would not approve an agreement between carriers, which would interfere with the statutory right of "any person" to complain to the Board of activities which may be violative of the Shipping Act of 1916, and which might interfere with the Board's carrying out of its regulatory functions. Thus the imposition on applicant for membership in a conference of a condition that it withdraw from Board proceedings in which it had taken position opposite to the conference, was not required to place the applicant on equal terms with other conference members, by reason of the fact that other members could not file a complaint before the Board. *Id.* (266).

Cover of authority theory that conference may impose condition on conference membership requiring applicant to withdraw from proceedings before the Board, under provision of agreement that "no eligible applicant shall be denied membership except for just and reasonable cause," and await Board's final determination as to whether the agreement to impose the condition was "just and reasonable," is inconsistent with the regulatory powers vested in the Board and is not contemplated by section 15. *Id.* (266, 267).

Board's past approval of conference article, including its reference to "just and reasonable cause" for denial of conference membership, is not a continuing pre-approval of any new or modified condition on membership which may thereafter be found to be "just and reasonable." Nor is past approval of another article, including its provision that all members shall be bound by conference rules and regulations which "in the opinion of the conference, are necessary or desirable to further the ends of the conference," a continuing pre-approval of any condition on admission to membership later found to be "necessary or desirable to further the ends of the conference." *Id.* (269).

Conference agreements are not unjustly discriminatory and unfair as between carriers merely because certain carriers in order to join such agreements would be compelled to withdraw from Canadian conferences and business associations thereunder which they desire to maintain. The Board cannot order modification of the agreements to require that the carriers be admitted on a limited basis

with respect to operations between United States Great Lakes ports and the United Kingdom only. The Board may order modification only upon findings that existing agreements are in contravention of the Act. *Oranje Line v. Anchor Line Ltd.*, 714 (731).

—Detriment to commerce of the United States

The inclusion in conference agreements of trade between foreign countries is not detrimental to the commerce of the United States where it is clear that from an economic standpoint vessel operation between the Great Lakes and the United Kingdom, under conditions shown of record, requires the lifting of cargo to and from ports on both borders of the Great Lakes. Complainants are denied admission to the Canadian conferences and in self-defense must maintain their own conference organization in the Canada-United Kingdom trade. *Oranje Line v. Anchor Line Ltd.*, 714 (730, 731).

Approval of more than one conference in a particular trade would be detrimental to the commerce of the United States where in all likelihood such approval would result in rate instability and rate wars. *Id.* (731, 732).

—Disapproval of agreements

Approval of an agreement between a carrier and a terminal operator which provided for creation of a corporation to engage in the business of furnishing wharfage, stevedoring, dock, warehouse, and for other terminal facilities, and which did not disclose, nor could it be inferred from reading the agreement, (1) that the creators would transfer to the new corporation part or all of their similar businesses, or (2) that they would seek business for the new entity rather than for their existing and continuing separate enterprises, will be withdrawn since it did not reflect the true and complete agreement between the parties. *Associated-Banning Co. v. Matson Navigation Co.*, 336 (342); *Id.* 432 (433).

—Effectuation of agreement prior to approval

An agreement between carriers was effectuated prior to Board approval, in violation of section 15, where conference by agreement required applicant for membership to withdraw from Board proceedings as a condition for approval of its application; new member informed Board that it was withdrawing; member was then admitted to conference; conference later "suspended" the condition, but as a practical matter conference considered that new member would take no further part in Board proceedings; conference again insisted that member withdraw from proceedings when it later appeared before the Board for limited purpose and not to participate activity in the proceedings; and member finally refiled motion to withdraw and discontinue its participation in the proceedings wherein its position was opposed to that of the conference. *Pacific Coast European Conference—Limitation on Membership*, 247 (271, 272).

Section 15 was violated where the parties, without seeking formal Board approval, operated pursuant to a license agreement between a stevedoring company and a port, under the terms of which a pier previously owned and operated by the port would be operated by the stevedoring company as licensee. Such an agreement is an agreement between "other persons" subject to the Act, and in that it provides for "the fixing or regulating of transportation rates and fares" and the "apportioning of earnings" resulting from the operation of the pier, falls within the meaning of section 15. *Associated-Banning Co. v. Matson Navigation Co.*, 336 (343); *Id.* 432 (433).

The mere preparation of a draft tariff is not evidence that carriers had agreed to be bound thereby. *Oranje Line v. Anchor Line Ltd.*, 714 (733).

—*Modification of agreements*

An order to modify an agreement necessarily includes a disapproval of that agreement in part, a declaration that effectuation of the part disapproved will be thenceforth unlawful, and a requirement that the parties to the agreement thereafter cease and desist from effectuation of that which has been disapproved. Pacific Coast European Conference—Payment of Brokerage, 65 (67).

—*Penalties*

Action aimed at collection of section 15 civil penalties is one between the Government and the offending parties. The remedy of persons other than the Government, in the event of injury resulting from violation of section 15, is an action for reparation commenced under sections 15 and 22. Pacific Coast European Conference—Payment of Brokerage, 65 (72).

—*Rates and tariffs*

Issuance of tariffs, including rules and regulations covering their application, has uniformly been held to be a routine matter authorized by an approved basic conference agreement, and not to require separate section 15 approval. While most of the Board's activities with respect to concerted tariff activities have involved carrier conferences, and tariffs issued thereunder, the regulatory provisions of the act thus applied, also apply to concerted activities and tariffs of terminal operators, who are "other persons subject to the Act." *Empire State Highway Transportation Assn. v. American Export Lines, Inc.*, 565 (585).

No prior section 15 approval is required for the issuance of tariffs by terminal operators, including changes in the level of rates, elimination of the availability of partial service in truck loading, and the promulgation of other rules and regulations governing the loading and unloading of trucks at terminals, since no new scheme of competition or "prima facie" discrimination was being introduced, as is the case in the institution of a dual-rate system. Such tariffs were no more than implementations of the authority granted to the terminal operators by approval of the basic agreement to establish and maintain uniformly applicable tariffs, "containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to such (truck loading and unloading) services." *Id.* (586).

—*Stay or suspension of agreements*

It is inconceivable that Congress would have granted antitrust law immunity to agreements between carriers which might, in the absence of such immunity, offend those laws, and yet have denied the agency charged with supervision over those agreements the power to protect the public by declaring a given agreement to be unlawful, as unapproved, and/or by requiring the carriers to cease and desist from effectuating the agreement prior to approval or after disapproval. None of these powers is specified in the 1916 Shipping Act, yet each has been vested implicitly in the Board as necessary to effective Government supervision contemplated by the Act. Section 22, in permitting the Board to make such an order as it deems proper, gives the Board that authority. Pacific Coast European Conference—Payment of Brokerage, 65 (68).

In view of the explicit prerequisites to disapproval under section 15, and since a stay of an approved agreement is tantamount to a disapproval for the duration of the stay, it is clear that the Board has no power to suspend or stay an approved agreement. *Id.* (69).

The Board has the power to issue cease and desist orders, or the equivalent, to stay an unapproved agreement between carriers in view of the Supreme Court's equation of section 15 with other sections of the Shipping Act, in relation to the

Board's power under section 22 to make such orders as it may deem proper upon complaint, or on its own motion, alleging violations of the Act. *Id.* (69).

The Board has the power to issue cease and desist orders in the event of violation of section 15 of the Shipping Act, and power to issue declarations of unlawfulness of agreements under section 15. The latter power is necessarily implicit in the authority to issue a cease and desist order under section 15, and is explicitly contained in section 5(d) of the Administrative Procedure Act. Accordingly the Board will modify its prior report so as to reverse its decision that it has no authority to suspend or stay unapproved section 15 agreements. *Id.* (70).

AGREEMENTS WITH SHIPPERS. See Contract Rates.

ANTITRUST LAWS. See Agreements under Section 15; Brokerage; Charter of War-Built Vessels.

BANANAS. See Common Carriers.

BOOKING. See Common Carriers.

BROKERAGE. See also Agreements under Section 15; Rebates.

Brokerage, which is securing cargo for the ship, cannot be recovered from a carrier unless earned. Where transportation of locomotives was sold directly by conference to consignee which reserved right to select individual carrier and the services performed by complainant were ordinary freight forwarder services, except for preparing bills of lading which is the carrier's duty arising only after the shipper supplies a complete description of the goods, brokerage was not earned by complainant. *American Union Transport v. River Plate & Brazil Conferences*, 216 (223).

Brokerage fee is earned only as compensation for securing cargo for the ship. Brokerage may be paid to the same persons who act as freight forwarders, and while forwarding services rendered for the shipper are of benefit to the carrier, such benefit is incidental, and the only real service rendered for the carrier is securing cargo for the ship. *Pacific Coast European Conference—Payment of Brokerage*, 225 (234).

Brokerage practices of long standing, prohibiting payment with respect to some commodities and limiting payment to less than 1¼ percent with respect to others, which practices have not been shown to be, by themselves, detrimental to commerce, should not be disrupted pending an investigation by the Board to reconsider and finally determine the lawfulness of concerted conference prohibitions and limitations on brokerage payments. *Id.* (237, 238).

With respect to a conference brokerage rule which appears only to prohibit members from paying brokerage to any broker who solicits for or receives brokerage from a nonconference line competitor, but which as applied and implemented prohibits payment to a forwarder-broker who has neither solicited for nor received brokerage from a nonconference line, but merely delivered cargo to such line solely in carrying out forwarding duties at the direction of the shipper, the Board must consider the rule, not as written, but as applied. *Id.* (238).

A conference brokerage rule, which prohibits payment by members of brokerage to a forwarder-broker who delivers cargo to a nonconference competitor in carrying out forwarding duties only, and which would by practical necessity foreclose a nonconference line from obtaining cargoes through forwarders in the trade and deprive shippers who desire to ship nonconference of the services of freight forwarders, is prima facie discriminatory as between carriers and shippers. Furthermore, the rule involves black-listing of forwarders-brokers for their independent activities as forwarding agents for shippers, and embodies some of the characteristics of a secondary boycott. Nothing in the record justifies such

prima facie discrimination and apparent invasion of the prohibitions of the antitrust laws and, therefore, the brokerage rule must be considered as unjustly discriminatory and unfair and as detrimental to the foreign commerce of the United States, within the meaning of section 15 of the Shipping Act. *Id.* (239-241).

A conference rule which would merely prohibit payment of brokerage to a broker who actually solicits for or receives brokerage payments from a competing nonconference line, might under certain circumstances be shown to be proper and might be approved under section 15. *Id.* (241).

Collection of brokerage by freight forwarder on shipments of companies which he fully owned and controlled, which collection was willful and knowing, is a violation of the first paragraph of section 16 of the Shipping Act, section 16-Second, and General Order 72. Samuel Kaye—Collection of Brokerage/Misclassification, 385 (386).

Collection of brokerage by freight forwarder on shipments of companies which he fully owned and controlled was willful and knowing violation where, on applications for issuance of a forwarder registration number, he twice filed false statements with the Board to hide his true business as an exporter and shipper; he gave false answers to questions in an application he signed and filed with a conference, in order to collect brokerage as a forwarder; he was repeatedly put on notice by the Board, the Conference, and by endorsement on brokerage checks that collection, under conditions whereby any part of such brokerage reverted to the shipper or consignee, would violate section 16 and General Order 72; and he continued to receive and accept such brokerage even after advising the Board that he would desist. *Id.* (395).

Fact that illegal brokerage collections were finally repaid to the carrier is irrelevant to the determination of whether such collections, when made, were violations of the Act or of Board orders. *Id.* (396).

BROKERS. See Brokerage.

BURDEN OF PROOF. See Evidence.

CARLOADING AND UNLOADING. See Terminal Facilities.

CEASE AND DESIST ORDERS. See Agreements under Section 15; Contract Rates.

CHARTER OF WAR-BUILT VESSELS—P. L. 591, 81st CONGRESS

—In general

Public Law 591 does not require the Board to make a finding of emergency as a prerequisite to granting charter of Government-owned vessels. Lykes Bros. S.S. Co., Inc., 105 (107).

Section 211(h) of the 1936 Act authorizing the Administrator to determine the advisability of enacting legislation to aid coal producers, inter alia, in exporting their products "in an economic or commercial emergency" does not apply where an applicant desires to charter Government-owned vessels to carry coal to foreign ports and the applicant admitted that the market for coal in Europe would not disappear if the application were denied. Moreover the procedure for chartering vessels under section 5 of the Merchant Ship Sales Act is not dependent upon any findings or determinations under section 211(h). American Coal Shipping, Inc., 154 (163).

A commitment by a shipper for carriage of cargo, contingent upon the granting of a charter of Government-owned vessels, may be an indication of special qualifications by an applicant under section 5(e); it does not, however, entitle the

applicant ipso facto to a grant. Other factors should not be ignored. Isbrandtsen Co., Inc., 196 (200, 201).

In proceedings under section 5(e) of the 1946 Act for charter of vessels for use in regular berth services, and not for services in bulk carriage, applicant will not be restricted to the carriage of commercial bulk, because another competing line, in its present operation of privately owned nonsubsidized vessels is so restricted, where no other valid reason for such restrictions appears in the record. Restrictions on operations of nonsubsidized vessels which do not arise out of any proceeding under the 1946 Act are irrelevant to the issues in charter proceedings under section 5(e). Lykes Bros. S.S. Co., Inc., 205 (207).

—Allocation of charters

In considering the various factors which will determine the allocation of chartered Government-owned vessels to particular applicants, the mere fact that a particular applicant has obtained a commitment for carriage of Government-sponsored cargoes conditioned upon the granting of a charter of Government-owned vessels, should not be a conclusive factor in granting or denying particular applications. American Export Lines, Inc., 188 (192).

It was error for a hearing examiner to refuse to recommend under section 5(e) that—consistent with the policy of the Act—preference be given to applicants who use predominantly American-flag vessels, on the ground that delegation of authority by the legislative branch to the executive branch, without any reasonable standards, is an unconstitutional delegation of legislative authority. The Secretary's discretionary authority is granted to him by the 1946 Act, not by the Board. The Board only makes recommendations, which the Secretary is "authorized," not "required" to follow. Isbrandtsen Co., Inc., 196 (201).

Section 5(e) of the 1946 Act provides that the Secretary of Commerce may, in his discretion, reject or approve a charter application, but may not approve unless in his opinion the chartering would be consistent with the policies of the Act. Recommendation to the Secretary that preference be given to applicants who, together with their closely affiliated companies, use predominantly American-flag vessels when operating in the commerce of the United States, is within the discretionary authority granted to the Secretary by Congress. The recommendation is sufficiently clear and precise to enable the Secretary to follow it. Section 804 of the 1936 Act and section 10 of the 1946 Act recognize the reasonableness of "affiliated interests" as a standard and guide. "Predominantly" has a clearly understood meaning and its reasonableness as a legal standard has been recognized. *Id.* (201, 202).

The Board will recommend to the Secretary of Commerce under Section 5(e) that in allocating charters of Government vessels—consistent with the policy of the 1936 and 1946 Acts—preference be given to applicants who, together with their closely affiliated companies, use predominantly American-flag vessels in the foreign commerce of the United States. *Id.* (203).

The question of whether preference should be given to charter applicants on the basis of the ships operating in particular trade routes and sailing frequency, in proportion to the service provided, is not an issue under Public Law 591. If vessel allocation priority becomes necessary it can be handled administratively. Lykes Bros. S.S. Co., Inc., 205 (IX).

—Charter conditions

While applicant has met the statutory requirements for bareboat charter, the public interest requires that conditions be incorporated in the charter to ensure reimbursement to the Government of all costs of breaking out the ship and putting it in class. Thus conditions will be recommended to the Secretary that applicant

pay for break-out, readying, and lay-up costs. Gulf & South American S.S. Co., 109 (111).

Except in special circumstances where the urgency of the situation overrides the desire to recoup average activation, repair and deactivation expenses, as a desired goal, charters should be for a period which will enable the Administration to recoup substantially all such expenses. Where the charter is earlier terminated at charterer's option, then at the option of the Administrator a consideration for such early termination should be charged against charterer in an amount which, when added to charter hire already paid, will aggregate one year's charter hire. Since the Government will have recouped substantially all of said expenses during the first year of operation, in charters made for a longer period consideration should be given to reducing the rate of charter hire in the second and subsequent years, always consistent with the policies of the 1946 Act. Grace Line Inc., 143 (148).

In event that subsidization for a vessel which applicant seeks to charter is allowed, the charter party executed should include provisions to protect the interest of the Government under its operating-differential subsidy agreement with applicant. *Id.* (148).

The Board will not recommend that charters under section 5(e) be conditioned upon a minimum freight rate for coal, determined by the Administrator, where the possibility that applicant would charge a rate that would result in a loss and produce chaos among other operators in the coal trade is so remote as to be almost impossible; foreign-flag vessels dominate the trade and could make applicant's minimum rate their maximum; and there is little likelihood that applicant's vessels will be able to take cargoes away from American-flag vessels because they will be able to carry only 25 percent of the estimated increase in coal exports. American Coal Shipping, Inc., 154 (167, 168).

Charters granted principally to permit carriage of coal to foreign ports should be for an indefinite period to permit applicant to build or convert vessels. A year would be a reasonable time in which to complete plans and undertake definite commitments for new ships. The Administrator should renew the progress made, after charters have been in effect for six months, to determine whether continuation is warranted, and if applicant lacks reasonable excuse for insufficient progress, the option to terminate should be exercised. *Id.* (168).

An applicant for charter of Government-owned vessels under section 5(e) to carry coal to Europe will be limited to the carriage of coal outbound but will be permitted to carry ores inbound in order to obtain revenues needed for its successful operation in the coal trade. *Id.* (168).

Charters granted under section 5(e) need not be conditioned on the applicant paying break-out, lay-up, and incidental expenses. The Board will recommend that, with reference to such costs, the Secretary should establish uniform rates of charter hire which take into consideration the NSA fair and reasonable rates, and authorize the use of vessel operations revolving fund for the activation, repair, and deactivation cost provided for in Public Law 890, 84th Congress. *Id.* (168).

Charters under section 5(e) for foreign-aid cargoes will be awarded on conditions that vessels return home in ballast unless it is shown to the satisfaction of the Administrator that inbound cargoes would otherwise be declined by private owners of American-flag vessels. Pacific Far East Line, Inc., 177 (182).

—Charter to contract carrier

Unopposed application to charter vessel for contract carriage of sulphur from the Gulf to the Pacific Northwest and lumber from the Pacific Northwest to the North Atlantic recommended to the Secretary as the service is required in the

public interest, the service is not adequately served, and privately owned American-flag vessels are not available on reasonable conditions and at reasonable rates. Terminal S.S. Co., Inc., 214 (215).

—*Inadequacy of service*

(a) *In general*

Under section 5(e) there is inadequacy of American-flag service where, although applicant's sailings as well as foreign-flag sailings had decreased in the past year, this was due to weather conditions and mishaps; applicant recently had to decline very substantial amount of cargo on the routes involved; new farm legislation will substantially increase the movement of cotton; shippers were making sales of cotton subject to space availability; and the vessels involved will operate at capacity on berth. Lykes Bros. S.S. Co., Inc., 105 (106).

The adequacy of service contemplated by section 5(e) of the 1946 Act is the adequacy of American-flag vessels. The facts that American-flag vessels carried from 4 to 5 percent of American coal exports in 1955 and only 1 percent during the first 6 months of 1956, although coal exports increased 17 percent over 1955, conclusively establish that the export coal service is not adequately served by American-flag vessels. That such inadequacy may be due to rates which are too low to support an American-flag operation is not an issue. American Coal Shipping, Inc., 154 (164).

The inadequacy of service contemplated by section 5(e) is inadequacy of all American-flag operations in the service, not merely of a particular applicant or line. However, where a clear showing is made by an applicant that its American-flag vessels are unable to provide adequate service, a prima facie showing is made, and, in the absence of evidence to the contrary from competitive or other sources, a finding of inadequacy may be made. Lykes Bros. S.S. Co., Inc., 205 (206, 207).

Evidence of (1) inability to move 1,000 tons of asphalt in one instance from the Pacific Northwest to Juneau, (2) declination of a substantial number of privately owned motor vehicles of armed services personnel, and (3) an intra-Alaska shipment of about 4,000 tons of lumber, is insufficient to show inadequacy of service with reference to the Alaska trade, and statutory finding of inadequacy of service in the California, Pacific Northwest, British Columbia, Alaska service cannot be made. Coastwise Line, 209 (210).

The facts that applicant's vessels have been sailing full for at least six months; that firm offerings in excess of 150,000 tons of cargo recently have been declined for lack of vessel space; and that there is a continuing backlog of cargoes to be moved, fully supports a finding that the services are not adequately served. Isthmian Lines, Inc., 242 (245).

(b) *Foreign trade*

Service is inadequate where, although no other American-flag vessel serves the route, there is foreign competition and increased industrial and commercial development substantiate that there is need for an additional vessel. Gulf and South American S.S. Co., 109 (110).

Charter of vessels will be restricted to movements of grain to Israel solely in instances where intervenor cannot carry the cargo offered, where it is shown that the intervenor is willing and able to carry the cargo in question on its regular liner services. Pacific Far East Line, Inc., 177 (181).

The facts that charter applicant has been operating its vessels without any substantial free space for 9 months, that there is considerable newsprint, applicant's dominant cargo, available, that one shipper had to ship by rail because vessel space was not available, and that additional goods will be available for shipment in the future, substantiate the conclusion that the service (Cal-

ornia, Pacific Northwest and British Columbia) is not adequately served. Coastwise Line, 209 (211).

Application to charter Government-owned ships for use between the Great Lakes and the Caribbean granted, where the service would relieve a shipping bottleneck; the present service is inadequate as to sailings, regularity and capacity; area to be served offers a natural outlet for a wide variety of Mid-western goods; and shipping rates are lower than rail-ocean rates and there are savings in handling costs. Grace Line Inc., 553 (555, 556).

Application to charter Government-owned vessels for use between the Great Lakes and United Kingdom and Continental ports granted, where large portion of the cargo will move by water rather than by rail; no American-flag vessels are in service on the trade route in question; the only ships available are the Government ships; and service by the foreign-flag ships engaged is not adequate. *Id.* (556, 557).

(c) Intercoastal trade

Inadequacy of service is shown by applicant for charter and operation of chartered vessels in intercoastal trade, where evidence establishes that there is a continuous and growing shortage of cargo space in the trade, ships are fully loaded, applicant is constantly receiving requests from shippers for additional service, all lumber space has been booked through June, and 57 million feet of lumber offered for shipment in May, June and July have been turned down for lack of space. Pope & Talbot, Inc., 99 (101, 103).

(d) Government—military—national defense requirements

Within the meaning of Public Law 591, 81st Congress, the service (transportation of coal from North Atlantic ports to France) is not adequately served by American-flag vessels where ICA claimed that there was such a shortage of American-flag vessels that some of its programs had not been announced; regular brokers for the French importing association found that only four such vessels in the charter market had been fixed at the time of hearing (against 15 applied for); only two vessels were definitely offered to the French association; owners of 18 others preferred to have them available to handle cargoes for the United States Government; and the volume of coal to be transported would require more vessels than the 15 sought and the 2 vessels mentioned above. Isbrandtsen Co., Inc., 95 (96, 97).

Where charter applicant is not able to accommodate all cargo offered on Trade Route 25 and both commercial and Government-sponsored cargoes will materially increase within the next ten months on the route, the service is not adequately served. Grace Line Inc., 143 (144).

Application to bareboat charter war-built vessels from the Government for the carriage of Government-sponsored bulk cargoes and other approved bulk cargoes approved; the fact, *inter alia*, that only 27.2% of the cargo moved on American-flag vessels in a previous month substantiates the fact that the service is not adequately served; and privately owned American-flag vessels are not available. American Export Lines, Inc., 188 (190, 191).

Applications under section 5(e) will be denied where the record 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 requested. Prudential S.S. Corp., 420 (425).

—Notice and hearing

Under Rule 13(g), permitting taking official notice of material facts outside the record under certain circumstances, the Board will be influenced in its

decision with regard to an application for charter under section 5(e) of the 1946 Act for use of chartered vessels in intercoastal trade by the fact that, subsequent to hearing before an Examiner and oral argument before the Board, applicant's subsidiary, a subsidized operator, had diverted one of its owned vessels to operation in foreign trade. *Pope & Talbot, Inc.*, 99 (103).

Telegrams received by the Board before and after the record was closed in a proceeding under section 5 of the Merchant Ship Sales Act, urging denial of the application, will be disregarded as inappropriate and contrary to the Administrative Procedure Act. *American Coal Shipping, Inc.*, 154 (155).

Failure of applicants for bareboat charter of Government-owned vessels to appear does not result in prejudice, as the proceeding was held open "for the purpose of considering requests from any Government agency which is unable to secure privately owned vessels at reasonable rates and upon reasonable conditions to transport its cargoes." *American Export Lines, Inc.*, 188 (192).

Proceedings under section 5(e) do not require a technical hearing procedure. Whether or not a given period of time constitutes timely notice depends upon the circumstances surrounding each case, including the urgency of the situation and the complexity of the issues. If intervenor felt that it had insufficient time to prepare its case, it should have asked for a postponement pursuant to Rule 7(e). Motion to dismiss application for charter was moot in any event because intervenor was not being prejudiced since it did not offer a service to British Columbia, the service for which the affirmative statutory findings were being made. *Coastwise Line*, 209 (212).

Interest in chartering vessels expressed by another steamship company prior to hearing will not be considered by the Board since no formal application was filed as is required by General Order 60, nor was the company represented at the hearing. *Grace Line Inc.*, 553 (554).

—Service required in the public interest

(a) In general

While a service in which one commodity is carried from one port to another for but a single shipper is not in the public interest unless exceptional circumstances are shown, such circumstances are shown where, under mandate of Congress, wheat financed by ICA is to be moved to Pakistan in Government-owned chartered vessels, and no privately owned tonnage is available. *Pacific Far East Line, Inc.*, 136 (138).

Under Public Law 591, the "public interest" issue is not satisfied by a showing merely that the promotion of the coal industry and the exportation of coal are in the public interest. The test is whether the proposed "service" is "required in the public interest." Proposed service (mainly carriage of coal to foreign ports) would not injure the American merchant marine as contended by opponents of the application to charter vessels for such carriage. Other objections that (1) such transportation, when performed by a newly formed company (and particularly by a company owned by the United Mine Workers, three railroads that carry coal to Hampton Roads and which handle more than 85 percent of the coal exported by sea, and seven coal mine operators and producers, including some of the largest) with Government-owned ships in competition with privately owned American-flag vessels, is not in the public interest, (2) that the objective of the applicant is to benefit the coal industry and not the American privately owned merchant marine, (3) that applicant will operate at a loss, depress coal rates, "break the market," which will drive tramp ships out of the coal trade, (4) that the combination of three such powerful elements of the coal industry to "stabilize" ocean freight rates constitutes an illegal combination in restraint of trade in violation of the antitrust laws, (5) that the applicant will seek

proprietary cargoes, (6) that the solution should be sought under section 211(h) of the Act, and (7) that the applicant is not qualified, do not sufficiently outweigh the benefits of the proposed service, i.e., assistance to the economy of many friendly countries; help to the American coal industry to retain its European markets, and thus benefits to the miners, the operators, the railroads, and the general economic welfare; and employment of 1,200 American seamen and use of American repair yards. Therefore, such service is "required in the public interest." American Coal Shipping, Inc., 154 (155-160).

Applicant for charter of 30 Government-owned vessels primarily to carry coal to foreign ports has not been shown to intend to operate at a loss or to break the market or unduly depress rates, where several directors testified to the contrary; the railroads which own stock in the applicant have pointed out that it would be illegal for them to engage in a loss venture; an experienced charter broker testified that the applicant could not break the market with 30 vessels; and coal exports were increasing so that even if the increase reached only one quarter of the estimate, cargoes would not be taken away from American-flag operators. *Id.* (160).

While the Board would not wish to charter Government-owned vessels to a company which it thought intended to use them in violation of the antitrust laws, and weight should be given to the antitrust policy of the nation in considering a charter application, the Board cannot decide authoritatively such questions as whether the transaction contemplates an illegal price-fixing device, an undue restraint of trade, or an attempt to monopolize; it can only express an opinion for the purpose of deciding whether the service is "required in the public interest." *Id.* (161).

Enforcement of the antitrust laws, except where superseded by the Shipping Act, 1916 (not here relevant) is primarily the responsibility of the Department of Justice, and the Board is satisfied that, if the Department deems it necessary it will review the operation of the applicant for charter of Government-owned vessels to carry coal to foreign countries from an antitrust point of view. Since the charters provide for annual review and termination by the Administrator for any reason upon 15 days' notice, the public interest will be amply protected against the continuance of any improper practices of the charterer should they develop (depressing of rates or breaking of the market, discrimination against coal shippers, or preference to applicant by the mine owners who owned one-third of applicant). *Id.* (162).

It would not be against the public interest to charter Government-owned vessels to a company which is owned one-third each by the United Mine Workers, three railroads that carry coal to a port, and seven coal mine operators and producers, where none of the coal to be carried by the company would be owned by it; some may be coal mined by one of the coal producing stockholders, but most will not be owned by a stockholder because it is customarily sold f.o.b. the mine; the company does not itself operate coal mines and its certificate of incorporation will not permit it to act as a coal dealer or coal broker; the company will carry for all shippers "first come, first served"; and the company will operate as an independent shipping line and offer its vessels on the market to any charterer and not confine them to the stockholders. *Id.* (162, 163).

On the issue of public interest under section 5(e) of the 1946 Act, the responsibility to pass upon an applicant's qualifications to charter vessels with respect to its "practical experience" or "any other factors that would be considered by a prudent businessman in entering into a transaction involving a large investment of his capital," required to be considered under section 713 of the 1936 Act, which is made a part of section 5 of the 1946 Act, rests with the Administrator. The

Board, however, will invite attention to the fact that although the applicant has never operated a vessel and has only a skeleton staff, its president is a steamship executive of 40 years' experience; two of its stockholders who own and operate United States-flag vessels have agreed to furnish the necessary experienced operating personnel; and its officers and directors are responsible men of wide business experience. *Id.* (164).

Under section 5(e) use of Government-owned vessels to service offshore oil and gas wells in the Gulf of Mexico is in the public interest where substantial conversion work will be performed in American shipyards, employment will be provided for American seamen, our offshore oil and gas resources will be more efficiently exploited, and the proposed charters would greatly reduce the dangers to workover crews during storms on the present nonself-propelled barges. Advantages to the American merchant marine and to our economy in general sufficiently distinguish the application from the case of Grace Line Inc., 3 FMB 703. Boston Shipping Corp., 372 (376, 377).

Use of Government-owned vessels in servicing offshore oil and gas wells is within the meaning of "service" in section 5(e) of the Merchant Ship Sales Act of 1946. This term is not to be interpreted so narrowly that only a charter application proposing to furnish an ordinary commercial shipping service may be approved. The prime purpose of section 5(e) was to eliminate, and to prevent in the future, competition between privately owned American-flag ships and Government-owned tonnage. *Id.* (377).

(b) *Foreign trade*

Vessels sought to be chartered under section 5(e) are clearly to be used in a service which is in the public interest where the routes involved are essential, and with the services thereon, form important arteries for the movement of cotton, sulfur and other products from United States Gulf ports. Lykes Bros. S.S. Co., Inc., 105 (106).

Vessels sought to be chartered for use on Trade Route No. 25 would be used in a service which is in the public interest. Although one vessel would not be integrated in applicant's voyage sequence and turnaround schedule on the route, it will operate without serving the full range of United States Pacific coast ports and will carry Public Law 480 cargoes. Grace Line Inc., 143 (144).

Charter of 30 Government-owned vessels to carry coal to foreign countries and to carry other suitable bulk cargoes, including manganese, bauxite, and iron ores, the vessels to be operated under the American flag with American crews, would be a service under Public Law 591 which is clearly in the public interest, as one of the policies of the Act is to promote an American merchant marine sufficient to carry a substantial portion of the waterborne export and import commerce of the United States. American Coal Shipping, Inc., 154 (158).

Operation of a Government-owned vessel by an American-flag charterer in the California, Pacific Northwest, British Columbia trade would be in the public interest. Coastwise Line, 209 (210).

Services for which applicant desires to use Government-owned vessels, being on Trade Route No. 18 declared essential by the Administrator under section 211 of the Merchant Marine Act, 1936, are clearly in the public interest. Isthmian Lines, Inc., 242 (245).

Application to charter Government-owned vessels for use between Great Lakes ports and North Atlantic European ports granted, where the area to be served was declared an essential foreign trade route by the Maritime Administrator; no American-flag vessels operate on the route; and the Government vessels are the only suitable United States-flag vessels available. Grace Line Inc., 553 (558).

(c) *Intercoastal trade*

The intercoastal service is an integral part of the domestic commerce of the United States and is in the public interest. Its importance has been recognized by the Congress, the Interstate Commerce Commission, the Maritime Administration, and the Board. *Pope & Talbot, Inc.*, 99 (100).

(d) *Government—military—national defense requirements*

Within the meaning of Public Law 591, 81st Congress, vessels clearly are to be used in a service which is in the public interest where they are to carry coal from North Atlantic ports to Belgian, Dutch, and French ports; the French economy needs a greater quantity of coal because of winter weather conditions; imports from other European countries have fallen off; the welfare of France as a member of NATO and OEEC is extremely vital to that of the United States; the economic stability of France is contingent in large measure upon its ability to obtain coal from the United States; and the mining of coal and its exportation is advantageous to those industries. *Isbrandtsen Co., Inc.*, 95 (96).

Charter of vessels for transportation exclusively of Government-sponsored aid cargoes is in the public interest where the failure to authorize charters, in the face of the inadequacy of other American-flag tonnage, would frustrate our national foreign-aid programs and would result in a disservice to the American merchant marine. *Pacific Far East Line, Inc.*, 177 (180).

The Board is authorized to award charters for the carriage of Government-sponsored cargoes on other than essential trade routes under section 5(e) and need not proceed under section 11(a) which authorizes a Government agency operation for account of the particular department having cargo to move. *Id.* (182, 183).

—Unavailability of privately owned vessels

Where a lesser rate than \$11.60 per ton for the carriage of coal would be unprofitable and where no privately owned American-flag vessels were available, other than those few which were fixed prior to hearing or were offered during the hearing at the rate of \$11.60, granting of application to charter 15 Government-owned vessels under Public Law 591, 81st Congress, would be recommended to the Secretary of Commerce. *Isbrandtsen Co., Inc.*, 95 (97).

Where evidence discloses that an applicant for charter of three vessels under section 5(e) for use in intercoastal trade acquiesced in the action of its subsidiary in diverting one owned vessel from its subsidized service to presumably more lucrative operation in foreign trade, the Board would recommend that grant of the application be limited to two vessels and conditioned upon the placing the privately owned vessel in the intercoastal trade and its remaining therein until expiration of the charters, unless the vessel should be again required in the subsidized service of the subsidiary in which event the third vessel may be chartered. *Pope & Talbot*, 99 (103).

Under section 5(e) privately owned vessels are not available at reasonable rates for use in the service involved where several months earlier applicant had been offered only one vessel (several were needed) at a rate applicant considered too high, and which would have resulted in a loss, rates had risen since that time, and applicant was willing to charter the vessels involved at a 15 percent basic charter hire rate, possibly at a small loss, since it felt that it owed a duty to its shippers to furnish adequate service. *Lykes Bros. S.S. Co., Inc.*, 105 (107).

Where the record establishes that actual and immediate need by Government agencies for cargo space on American-flag vessels in excess of the capacity of available privately owned vessels has not yet materialized; that all Government requirements are in terms of estimates and projections; that approximately half

of ICA's backlog of 1956 grain has been booked for shipment; that there is not now offering any cargo under programs of the Department of Agriculture that cannot obtain ocean transportation at reasonable rates; that there is no cargo that will be available for movement beyond the capacity of available tonnage; that there is no dearth of tramp ships for early employment; and that the berth operators will be able to accommodate substantially increased volume of Government-sponsored cargoes in the ensuing fiscal year, the Board cannot find that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions, and at reasonable rates for use in the worldwide service under consideration, and application to bareboat charter Government-owned vessels will be denied. *Marine Transport Lines, Inc.*, 112 (116, 117).

Polarus and members of ATSA had knowledge of cargoes of wheat, financed by ICA, to be moved from the Pacific Northwest to Pakistan, and had ample time, if they had no vessel available, to canvass the market to determine the availability of privately owned vessels, and if found not available at reasonable rates, to initiate a request for charter of Government-owned vessels. This was not done by Polarus or members of ATSA until the date of the hearing on the PFEL application. There is no reason why Polarus should be given preference over PFEL. The argument that the cargo is tramp type and should be limited to tramp operators is without merit. *Pacific Far East Line, Inc.*, 136 (137, 138).

Although the record is clear that at the time of the hearing privately owned American-flag service was not adequate to accommodate the cargoes involved, an applicant to charter Government-owned vessels should have established the extent to which the market for privately owned vessels was canvassed—when, by whom, and in what manner—and should have produced a witness who could testify directly in the matter. *Id.* (138).

While the Board has held that an applicant to charter Government-owned vessels under section 5(e) should establish the extent to which the market for privately owned vessels was canvassed, the record in the instant case shows that no American-flag owner has offered a ship for charter at any rate since notice of hearing, although applicant's need was so well known that the filing of the application had a depressing effect on the charter market. Thus while not condoning applicant's failure to try to charter vessels, the Board believes that United States-flag owners who oppose the application, and who own ships which they say may be forced out of business if the application is granted, should use self-help to the extent of offering their vessels to a prospective charterer. *American Coal Shipping, Inc.*, 154 (165, 166).

Where privately owned American-flag vessels are offered at the going market level but not in excess of NSA fair and reasonable rates and upon reasonable conditions, no Government-owned vessels should be allowed to carry cargo until such privately owned vessels have been employed. The going market level is established by the supply of and demand for privately owned vessels, not by offerings conditioned upon obtaining Government charters. *Pacific Far East Line, Inc.*, 177 (182).

Application for bareboat charter of Government-owned vessel approved where vessel was needed to take place of a stranded vessel, full capacity of the vessel was obligated by firm commitments, applicant had been turning down cargo for the past 45 days, and applicant had checked the charter market and was advised by its broker that there was no American-flag vessel available, regardless of type or rate. *States S.S. Co.*, 186 (187).

Specific commitments, offers, arrangements, etc. by shippers for carriage of a commodity (coal), contingent upon the obtaining of Government vessels, are an indication of the need for charter of such vessels for carriage of that commodity.

However, there are other significant factors which must be considered in determining the number of vessels which may be chartered without seriously affecting the employment of privately owned vessels. Where the record shows that privately owned American-flag vessels might become available as well as other Government vessels for which charters had been previously recommended, the Board would recommend the charter of a maximum of 50 vessels, although commitments had been obtained for 69. Isbrandtsen Co., Inc., 196 (199, 200).

Where privately owned vessels chartered by applicant are at the rate of \$9,400 per month, operation at this rate affords a profit, and the most attractive offer applicant secured for an additional vessel was at \$15,000 per month, which it considered exorbitant, privately owned vessels are not available on reasonable conditions and at reasonable rates. Coastwise Line, 209 (211).

CHARTERS. For Charter of War-Built Vessels under Public Law 591, 81st Congress, see Charter of War-Built Vessels.

CHECKING CHARGE. See Service Charge; Terminal Facilities.

CLASSIFICATIONS. See also Tariffs.

Terms in a tariff are to be construed in a manner consistent with general understanding and commercial usage. It is an unrealistic and strained interpretation of a tariff for a shipper to describe kerosene stoves and portable ovens as "Pans, Enameled, Iron or Steelware" and classify them under tariff item "ENAMELED IRON OR STEELWARE" when there were specific items for "Stoves—Coal, Gas, Gasoline, Oil or Wood Burning" and "Ovens, Not Electric." Samuel Kaye—Collection of Brokerage/Misclassification, 385 (398).

Where, 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 appeared alphabetically in the tariff, the misclassification (under "ENAMELED IRON OR STEELWARE") was done knowingly and willfully as a device to obtain lower freight on the shipments involved. To the extent that the forwarder and shipper had any doubt they should have made inquiry. Indifference is tantamount to outright and active violation. Attributing admitted misclassification of electric refrigerators to clerical error was not persuasive in the light of the forwarder's demonstrated disregard for the truth. *Id.* (398).

Freight forwarder and 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 have been applicable, in violation of the first paragraph of section 16. Freight forwarder, being an "other person subject to this Act," also violated section 16 Second in that he allowed a shipper to obtain transportation at less than regular rates or charges, by means of false classification of stoves, ovens, and refrigerators. *Id.* (399).

Where in shipping glassware items, the traffic manager of an export company resorted to a dictionary definition of a jar which did violence to the clear meaning of the tariff, there is, at best, such an indifference and lack of care in construing the tariff as to constitute a deliberate violation of section 16 by the exporter. When in doubt as to proper tariff designation of his commodity, a shipper has the duty to make diligent and good faith inquiry of the carrier or conference publishing the tariff. Markt & Hammacher Co.—Misclassification of Glassware, 509 (511).

A shipper who knowingly and willfully misclassifies a commodity violates section 16 of the Shipping Act, even though he receives no benefit therefrom as in the case where title passes to a foreign buyer prior to shipment and freight

and related costs are paid by the buyer. Benefit to a shipper is not a sine qua non to a finding of a knowing and willful misclassification by a shipper and lack of motive or reason is not necessary for a finding of a violation. *Id.* (511).

Manufacturer-shipper which has considered packer's tumblers as separate and distinct from bottles or jars was guilty of a misclassification when it classified packer's tumblers as "Bottles or Jars, Empty, Glass" rather than "Tumblers," each of the classifications being contained in the applicable ocean tariffs. *Hazel-Atlas Glass Co.—Misclassification of Glass Tumblers, 515 (518)*.

An unwitting failure to comply with the statute (section 16, Shipping Act, 1916) is not sufficient to constitute a violation. In order to show a knowing and willful violation, however, it is not necessary to establish an intentional violation of law or an evil purpose, particularly, as here, where the statute does not involve moral turpitude. A conscious purpose to avoid enlightenment, where there is a duty to know, supports a charge of a violation. Knowledge may be presumed where one, upon whom a duty to know has been cast, intentionally or willfully keeps himself in ignorance. Indifference to diligent inquiry on the part of a shipper or a forwarder constitutes knowing and willful conduct tantamount to an outright and active violation. *Id.* (519).

Having not found the specific tariff classification for packer's tumblers, the manufacturer-shipper had two alternatives: (1) to designate the articles as tumblers or (2) to inquire of the carrier or the conference as to the correct classification. The failure to designate the shipments properly, together with the failure to inquire—a manifest lack of due diligence in view of the surrounding circumstances—evinces a knowing and willful attempt on the part of the shipper to avoid the proper tariff rate. The shipper knowingly and willfully violated section 16. *Id.* (519, 520).

A freight forwarder, in following written instructions from its principal, is not thereby insulated from a finding of a violation of section 16 of the Act. A registered freight forwarder holds itself out to the shipping public as an expert in the handling of ocean freight, and its expertise includes a knowledge of applicable tariffs. If the forwarder prepared the necessary bills of lading, procured cargo insurance, consular invoices and customs declaration as forwarders generally do, the nature of the cargo necessarily should be within the forwarder's knowledge. The forwarder has a duty to take reasonable steps to inform itself as to the nature of the cargo it is handling and to act lawfully with respect thereto. *Id.* (520).

COMMON CARRIERS. See also Agreements under Section 15; Evidence, Ports.

—Who is common carrier

The entity which constitutes a "common carrier by water in foreign commerce" is subject to the provisions of the 1916 Act and the jurisdiction of the Board. The legislative history of the Act indicates that the person to be regulated is the common carrier at common law. And at common law a common carrier is one who holds himself out to carry for hire the goods of those who choose to employ him. He must take the goods of all who offer "unless his complement for the trip is full, or the goods be of such kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey." *Banana Distributors, Inc. v. Grace Line Inc., 615 (620)*.

Since bananas do not confront Grace with liability from extraordinary danger and they constitute a commodity which Grace is most accustomed to carry, Grace is a common carrier of bananas. *Id.* (620, 623).

Where the vessels of Grace employed in carrying bananas for its chosen shippers are otherwise engaged in carrying general cargo for all who choose

to employ them, Grace is a common carrier by water within the meaning of section 1 of the Act. *Id.* (621); *Philip R. Consolo v. Flota Mercante Gran-colombiana*, 633 (638).

To qualify as a common carrier, a carrier's undertaking to carry must continue for a certain time at least, subsequent to the receipt of goods for the purpose of transportation. A carrier which advertised sailings in its own name between Glasgow and ports on the Great Lakes of vessels operated by other lines, but later changed the advertisements to show itself as loading agent for undisclosed principals, and which did not actually operate any services from the United Kingdom to Great Lakes ports, has not been shown to have operated as a common carrier in the United Kingdom-United States Great Lakes trade. *Oranje Line v. Anchor Line Ltd.*, 714 (719).

—*Duties of common carrier*

Since bananas are susceptible to common carriage, it follows that respondent, a common carrier of general cargo, has carried under contract a commodity which is capable of being and should have been carried under terms of common carriage. *Banana Distributors, Inc. v. Grace Line Inc.*, 278 (283).

The so-called specialty cases, dealing with the question whether common carrier obligation is owed by one common carrier to another common carrier who is a shipper do not apply to cases where a normal shipper-carrier relationship has been presented. *Id.* (283).

The specialty cases, other than those involving common carrier—common carrier relationships, involve commodities which, by their very nature, are not capable of being carried under the terms of common carriage, and since they dealt with the question of liability, they do not stand for the proposition that shippers similarly situated could legally be denied space. It is therefore unnecessary for the Board to examine the authorities which say that a common carrier may at the same time and with the same facility be both a common carrier and contract carrier. *Id.* (284).

A common carrier would be held guilty of discrimination against qualified banana shippers, in violation of sections 14 and 16, where it refused to carry bananas for them. Tender of the merchandise need not be proved, where record discloses that space had been demanded and refused. *Id.* (284).

Where the demand for space exceeds the supply a common carrier must equitably prorate its available space among shippers. *Id.* (284).

Having chosen to act as common carriers subject to the 1916 and 1933 Acts, carriers 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. Carriers are not excused from their duties because they have maintained books and records, where the books and records are such that it is difficult to extract relevant and material data from them, or where such data is inextricably intertwined with other operations, or is confidential. *U.S. Atlantic and Gulf/Puerto Rico Rate Increase*, 426 (430).

A common carrier, subject to the provisions of the Act, may not exempt itself, in part, from the provisions of the Act with respect to the carriage of bananas of qualified shippers. Cases sanctioning the exclusion of carriers from facilities of another carrier, do not apply to the exclusion from such facilities of the general public. *Banana Distributors, Inc. v. Grace Line Inc.*, 615 (621, 622).

A common carrier by water may except certain goods from its holding out to carry, but whatever it does carry, it carries subject to the provisions of the Shipping Act and may not prefer certain shippers in the carriage of certain commodities (bananas) to the exclusion of others. *Id.* (622, 623).

Even if up to 15 additional hours were required to accommodate six banana shippers that fact would not justify exclusive long term space contracts to a favored shipper and the denial of that space to a qualified competitor. Operational difficulties and vessel limitations do not justify prejudice and discrimination otherwise undue and unreasonable. *Philip R. Consolo v. Flota Mercante Grancolombiana*, 633 (639).

—*Forward booking*

Prorated forward booking of refrigerated space for bananas for a period of two years is proper, since forward booking is not new to common carriage, and the two-year duration is reasonable in that it would afford existing importers the protection they require while providing a reasonable opportunity for prospective shippers to engage in the trade. *Banana Distributors, Inc. v. Grace Line Inc.*, 278 (285).

Qualified banana shippers must not be excluded from participation in the trade in refrigerated compartments of common carrier's vessels. However, practical arrangements designed to minimize or eliminate commingling of bananas of several shippers should be left to the parties involved. Prospective shippers may be required to post a bond covering the reefer space assigned, and the carrier may otherwise establish reasonable rules covering dead freight, inspection, and loading and stowing, which prospective shippers must meet to qualify as users of such space. Space must be reallocated at the end of the forward-booking period, if additional qualified importers desire reefer space. *Banana Distributors, Inc., v. Grace Line Inc.*, 615 (626).

Forward-booking system for carriage of Ecuador bananas is not an admission that bananas constitute a specialty. During the Chilean fruit season, Grace, as a common carrier, transports such fruit under forward booking arrangements, and when the offerings exceed the available space, the space is prorated among the shippers. *Id.* (626).

Forward booking is not new to common carriage. In view of the economic problems in the banana trade, a two-year period can be characterized as "just" and "reasonable" rather than "unjustly discriminatory" and "unreasonably prejudicial," and affords existing banana importers the protection they require while providing a reasonable opportunity for prospective shippers to engage in the trade. *Id.* (626).

COMPLAINTS. See Agreements under Section 15.

CONTRACT RATES.

—*In general*

Initiation of dual-rate system is necessary as a competitive measure to offset the effect of nonconference competition where, without the system, the conference's percentage participation in total commercial movement has been decreasing and conference carriage of the more remunerative general cargo has decreased in volume while nonconference carriage of such cargo has increased. *Secretary of Agriculture v. North Atlantic Continental Freight Conference*, 20 (33).

Provisions of tariffs, permits, dock receipts, bills of lading or other shipping documents may not be controlling over provisions of dual-rate contract in any case where they may operate directly or indirectly to change the amount of spread between contract and noncontract rates, impose on contract shippers additional requirements not imposed on all shippers, or otherwise be inconsistent with provisions of the dual-rate contract. *Id.* (36).

The foreseeable advantages of proposed dual-rate system outweigh the foreseeable disadvantages where the increased carriage of cargo by conference lines

is not likely to tend toward monopoly in view of the number of active independents in the trade, the large volume of free cargo for which all carriers will compete, and the existing direct and indirect rate competition to the conference lines on cargoes originating in areas other than those served by conference vessels; where the existence of the contracts guaranteeing to shippers levels of rates for the period of the contract will decrease pressure on conference lines to wage a rate battle with nonconference lines; and where stability of rates and assurance of basic core of cargo will enable conference lines to put improved service on berth and more efficiently plan sailings and service. *Id.* (37).

—Antitrust laws

Shippers' rate agreement which requires its signatories to ship exclusively via conference vessels all goods sold by such signatories for export in the trade served by the conference, depends for approval on the competitive need shown to exist in keeping with command of court that concerted conduct approved by the Board and thus exempted from the antitrust laws must not offend the spirit of those laws any more than necessary to serve the purposes of the Shipping Act. *Mitsui S.S. Co., Ltd. v. Anglo Canadian Shipping Co., Ltd.*, 74 (92).

—Detriment to commerce

Proposed dual-rate system will not be detrimental to the commerce of the United States where the rates will remain stable for at least successive 6 months periods, and will enable nonconference carriers to stabilize rates at customary lower levels if desired; and a general increase in rates charged to shippers, alleged to be likely because of increased cargo carryings on conference vessels, is highly improbable in view of (1) the effectiveness of nonconference competition, (2) effectiveness of competition of other carriers and conferences serving the ports of discharge in this trade from ports of loading not served by conference involved, (3) effectiveness of carrier competition at other gateways to areas served by conference involved, and (4) power of the Board over conference rates which are found to be detrimental to the commerce of the United States. *Secretary of Agriculture v. North Atlantic Continental Freight Conference*, 20 (35).

Where, upon complaint of nonconference carrier and shipper, the Board finds that a new conference interpretation of a shipper's rate agreement is an agreement or modification of an approved agreement which requires approval under section 15 and which has been effectuated prior to such approval, it need not consider whether the new interpretation is detrimental to the commerce of the United States, but will require the conference to cease and desist from effectuation of the interpretation until such time as the agreement has been approved under section 15. Detriment to the commerce of the United States would then be ground for disapproval. *Mitsui S.S. Co., Ltd. v. Anglo Canadian Shipping Co., Ltd.*, 74 (92).

—Discrimination; Unfairness

Although the use of dual rates is prima facie discriminatory, the discrimination is not unjust where the shippers will retain complete freedom of choice between signing and not signing the contract; no shippers will be preferred as all will have an equal opportunity to avail themselves of the contract rate; shippers will not be coerced to sign since collectively the non-conference carriers provide complete port coverage and frequent and regular service; no greater handicap will be placed on cargoes moving at noncontract rates than the handicap placed on cargoes moving on conference vessels as compared with those

moving on nonconference lines at rates as low as or lower than the differential; and there is no indication that, collectively, nonconference vessels do not offer the same types of facilities as those offered by conference vessels. *Secretary of Agriculture v. North Atlantic Continental Freight Conference*, 20 (34).

Proposed dual-rate system will not be unfair as between carriers where membership in the conference is open to independent carriers regularly operating, or furnishing evidence of intention to so operate in the trade; the independent carrier is free to remain outside conference and maintain its rate advantage; and independent carriers will not be eliminated from the trade since there is a large volume of bulk-type commodities which will not be subject to the system, they will remain able to compete with conference carriers because of their comprehensive coverage and service, and it is probable that conference vessels will carry no more than 75 percent of total liner cargo. *Id.* (34, 35).

—*F.o.b., f.a.s., etc., shipments*

Where proposed dual-rate contract provision might be construed as requiring signatory exporter to refuse to sell his products to an f.o.b. or f.a.s. buyer if the buyer should insist on routing shipments via nonconference carrier, the Board will require, in lieu thereof, a provision which limits the restriction of the contract to ship exclusively via conference vessels to those circumstances wherein the contract signatory is in fact the shipper and which states, in the absence of fraud, that the person indicated as shipper in the ocean bill of lading shall be deemed the shipper. The amended provision must not prevent shipments by an exporter as agent for the buyer, at the buyer's request and expense, where the exporter merely renders aid in obtaining the documents required for purposes of exportation. *Secretary of Agriculture v. North Atlantic Continental Freight Conference*, 20 (35, 36).

Interpretation of conference shippers' rate agreement as including all goods of contract signatories sold for shipment in the conference trade, whether sold f.o.b., f.a.s., c.i.f., or c. and f. basis, was found to be a new agreement between carriers, effectuated in violation of section 15 of the Shipping Act of 1916, since the agreement does not specify that f.o.b. and f.a.s. shipments of a signatory must move via conference vessels; shippers disagree as to whether the agreement imposes that obligation; the custom of the industry contemplates that ordinary f.o.b. and f.a.s. shipments are those of the buyer; the conference previously expressed a broad opinion to the effect that f.a.s. shipments are not included within the coverage of the agreement; and the new agreement has a secondary effect on nonsignatory buyers, not the natural and logical result of the agreement as written. *Mitsui S.S. Co., Ltd. v. Anglo Canadian Shipping Co., Ltd.*, 74 (91).

Interpretation of conference shippers' rate agreement as including all goods of contract signatories sold for shipment in the conference trade, whether sold f.o.b., f.a.s., c.i.f., or c. and f. basis, found not to have resulted in violations of sections 14, 16, 17, and 18 of the Shipping Act of 1916, as no injury to any exporter has been shown to have resulted from conference termination of the exporter's right to contract rates in circumstances where a shipment of the exporter has moved via nonconference vessel under f.o.b. or f.a.s. terms; one party was, for a period, denied contract rates, but the right to such rates has been restored and a refund of excess charges over contract rates has been agreed to; while certain shippers' rate agreements have been terminated, complainants have not established that the movement which resulted in termination of those agreements had been made on f.o.b. or f.a.s. terms in circumstances where those companies did not have the right to control the movements; there is no evidence of any actual loss by specific discrimination against a car-

rier, nor against any foreign consignee; and unjust rates have not been charged by the conference. *Id.* (98).

—*Institution of dual-rate system*

Filing of statement under General Order 76 with respect to dual-rate system will be considered by the Board as also filing under section 15 which is required where conference intends to institute or reinstitute the system. *Secretary of Agriculture v. North Atlantic Continental Freight Conference*, 20 (37).

—*Stability of rates*

Initiation of dual-rate system is necessary to insure stability of rates and service to shippers where, despite present stability of rates, the competitive pressure on conference lines has been increasing; it is impossible for conference lines to maintain stability of rates and at the same time a proportionate share of the desirable general cargo; and a guarantee of rates for the 6-month period contemplated will facilitate forward trading by shippers and minimize the threat of rate wars, with their disastrous effects on carriers and on shippers. *Secretary of Agriculture v. North Atlantic Continental Freight Conference*, 20 (34).

DEFERRED REBATES. See Rebates.

DETRIMENT TO COMMERCE. See Agreements under Section 15; Brokerage; Contract Rates; Port Equalization; Practices; Terminal Facilities.

DEVICES TO DEFEAT APPLICABLE RATES. See also Classifications; Rebates.

Whether a particular arrangement violates the statute in that it amounts to a direct or indirect securing of transportation at less than applicable rates, willfully 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 the Board looks to the substance and reality of the matter. 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. *Brokerage on Ocean Freight—Max Le Pack*, 435 (440).

Violation of section 16 of the Act and section 244.13 of G.O. 72 is obtaining transportation at less than applicable rates by unfair device was "willful," within the meaning of section 16, where respondents had competent counsel to advise them, had wide knowledge and business experience in the export business and were aware of, or, at least should have known by diligent inquiry, the requirements of the law. *Id.* (444).

DISCRIMINATION. See also Agreements under Section 15; Brokerage; Common Carriers; Contract Rates; Evidence; Port Equalization; Preference and Prejudice; Tariffs; Terminal Facilities.

Evidence of confusion and misunderstanding on the part of both the shipper and the carrier as to the rate to be charged for shipment of dismantled aluminum plant is insufficient to show that there was any arrangement or agreement to carry the cargo at rates other than the applicable tariff charges, in violation of section 14-Fourth of the Shipping Act of 1916; nor does the record indicate that any actions of respondent were retaliatory within the meaning of section 14-Third of the Shipping Act of 1916. *Aluminum Products of Puerto Rico, Inc. v. Trans-Caribbean Motor Transport, Inc.*, 1 (VII).

No discriminatory treatment violation of section 14-Fourth is shown where conference charged rate on seed beans under item "Seeds, Agricultural, n.o.s."; rates on similar commodities which stow the same as seed beans and have the

same values were lower, but no evidence of any comparative transportation factors was presented; an item of seed beans lower than the "n.o.s." item was established by the conference after complainant shipped its beans; and there was no evidence that carrier's failure to adjust and settle shipper's claims for application of the reduced rate had resulted in unjust discrimination against the shipper in favor of any other shipper. *Asgrow Export Corp. v. The Hellenic Lines, Ltd.*, 597 (599).

In order to sustain a charge of unjust discrimination under section 16-First or section 17, complainant must prove (1) that the preferred port, cargo, or shipper is actually competitive with complainant, (2) that the discrimination complained of is the proximate cause of injury to complainant, and (3) that such discrimination is undue, unreasonable, or unjust. There was no violation of these sections where complainant's shipment of seed beans was its first and only shipment and there was no evidence that any other shipper of seed beans to the same range had been charged a lower rate. *Id.* (600).

Provision of agreement that arbitration procedures set up to resolve disputes between parties to the agreement must be governed by Dutch law, was not shown to be discriminatory as between carrier or otherwise in violation of the Act. Such a provision cannot affect the rights of any person or limit the Board's jurisdiction under the Act. *Oranje Line v. Anchor Line Ltd.*, 714 (730).

DOCKAGE CHARGE. See *Freas Formula*; *Rates*; *Service Charge*.

DUAL COMMON AND CONTRACT CARRIERS. See *Common Carriers*.

DUAL-RATE CONTRACTS. See *Contract Rates*.

EQUALIZATION. See *Port Equalization*.

ESSENTIAL TRADE ROUTES. See *Subsidies, Operating-Differential*.

EVIDENCE. See also *Practice and Procedure*.

Letters, though hearsay, may be introduced in evidence in Board proceedings subject to the requirement that rules or orders issued by the Board be supported by reliable, probative and substantial evidence. In any event the question of admissibility is moot where the Examiner found contrary to the proposition for which the letters were offered. *City of Portland v. Pacific Westbound Conference*, 118 (128).

Summary evidence without reasonable access to supporting and underlying books, records, and accounts by which the accuracy and sufficiency of the evidence may be tested, is not "reliable, probative, and substantial evidence" as required by section 7(c) of the Administrative Procedure Act and, therefore, not sufficient basis for findings as to the lawfulness of rates under section 18 of the 1916 Shipping Act and the Intercoastal Shipping Act of 1933. *U.S. Atlantic and Gulf/Puerto Rico Rate Increase*, 426 (429).

Having chosen to act as common carriers subject to the 1916 and 1933 Acts, carriers 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. Carriers are not excused from their duties because they have maintained books and records, where the books and records are such that it is difficult to extract material data from them, or where such data is inextricably intertwined with other operations, or is confidential. *Id.* (430).

Evidence concerning issuance of joint advertisements of sailings purporting to show allocation of ports as between carriers does not justify, of itself, a finding that ports were so allocated by agreement when the record details the actual ports served. *Oranje Line v. Anchor Line Ltd.*, 714 (732).

Complainants alleging concerted rate action in violation of the Shipping Act of 1916 have the burden of proof and the inference properly to be drawn is that most favorable to the respondents. *Id.* (733).

EXCLUSIVE-PATRONAGE CONTRACTS. See Contract Rates.

FAIR RETURN. See Rates.

FIGHTING SHIP.

Section 14-Second of the Shipping Act of 1916 is not violated by the action of carriers in conceiving an agreement which would allegedly force a dichotomy of service as between United States and Canadian Great Lakes ports, with the aim of driving complainants from the Canadian trade and thus eliminating them from service at United States ports, since it is economically impossible to serve only United States ports under present circumstances. Whether service is conducted by a particular vessel at ports on both borders of the Great Lakes does not depend upon the territorial coverage of particular conference agreements. *Oranje Line v. Anchor Line Ltd.*, 714 (733).

FINDINGS IN FORMER CASES.

Decision in *Intercoastal S.S. Freight Assn. v. Northwest Marine Terminals Assn.*, 4 FMB 387, will not be reversed. Assuming the Board could properly set aside the report and order in this proceeding, there is no valid reason for so doing. Whether carriers are entitled to reparation from terminals does not depend upon whether the terminals have suffered a general deficiency in revenue. The principal portion of the report was premised on the theory that a terminal may not assess charges for checking not performed for the carrier. Implicit also in the report, in relation to other component elements of the service charge, was a similar but more fundamental principle, namely, that under tackle-to-tackle rates a carrier's duty to receive cargo does not arise until delivery to a point within reach of ship's tackle, whether the actual delivery to that point is performed, in whole or in part, by the terminal or by the shipper himself. The Board will not depart from that principle. The Board did not determine in *Intercoastal* that terminals may not recover from the person for whom performed the cost of performance of those services which were rejected as charges against carriers. *Terminal Rate Structure—Pacific Northwest Ports*, 53 (58).

Under authority of section 25 of the Act, the Board will modify its report (4 FMB 696) by eliminating the words "or unapproved" appearing on page 704, the words "or an unapproved" appearing in the ultimate paragraph, and the sentence beginning "In the present case we are not authorized . . .", appearing at page 704. *Pacific Coast European Conference—Payment of Brokerage*, 65 (72).

FORWARD BOOKING. See Common Carriers.

FORWARDERS AND FORWARDING. See also Agreements under Section 15; Brokerage, Classifications; Devices to Defeat Applicable Rates; Rebates.

Although the regulatory provisions of the 1916 Act do not apply to brokers as brokers are not "other persons subject to this Act" within the meaning of section 1, forwarders are "other persons," and the Board has jurisdiction to issue rules regulating practices of freight forwarders, including the collection of brokerage fees by freight forwarders and the payment of brokerage fees by common carriers by water. *Proposed Rules Governing Freight Forwarders*, 328 (330).

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 expressly grants authority to the Board to promulgate rules relating to the business practices of freight for-

warders since the activities of forwarders, including collection of brokerage payments, are intimately connected with the "receiving, handling, storing, or delivery of property", within the meaning of section 17. *Id.* (330).

Arguments directed to the merits of proposed rules relating to the business practices of freight forwarders, or conjecture as to procedural steps which may be followed in adopting the rules, are not germane to the question of the Board's jurisdiction to issue such rules. *Id.* (332).

A freight forwarder is "another person" subject to the Act. Brokerage on Ocean Freight—Max Le Pack, 435 (439).

FREAS FORMULA. See also Rates.

Application of the Freas Formula is not precluded in the Northwest because a disparity between Northwest and California dockage charges would be created by assignment of charges against the vessel for use of working areas to the handling rather than to the dockage charge. The level of terminal rates is not at issue and it is the total of terminal charges rather than the level of a single charge which affects competition between the two areas. Terminal Rate Structure—Pacific Northwest Ports, 53 (54).

The function of the Freas Formula is not to delineate or abridge the right of ship and cargo to enter lawful contracts relating to the carriage of goods. The division of responsibility is assumed only, and, where the assumption is rendered inapplicable by express contract between shipper and carrier as in a tackle-to-tackle contract of affreightment, the terminal's charges must be adjusted to fall on the party for whom, under the contract, they have been incurred. Recognition that the point of rest does not necessarily delineate responsibility between carrier and shipper or consignee is not tantamount to a denial of compensation to the terminal for services performed as encompassed in the service charge. Where such services are performed, the terminal is entitled and obliged to recover compensation therefor, from the person for whom the services have been performed. 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. *Id.* (56, 57); *id.* (326).

GENERAL ORDER 60. See Charter of War-Built Vessels.

GENERAL ORDER 71. See Rates.

GENERAL ORDER 72. See Brokerage; Devices to Defeat Applicable Rates; Rebates.

GENERAL ORDER 76. See Contract Rates.

GEOGRAPHICAL ADVANTAGES AND DISADVANTAGES. See Port Equalization.

HANDLING CHARGE. See Freas Formula; Rates.

INTERCOASTAL OPERATIONS (Sec. 805(a)).

—In general

Agreements and understandings between subsidy applicant and shippers covering present or future movements of cargo in domestic trade are relevant and material to section 805(a) issues. Section 805(a) deals with any and every domestic intercoastal or coastwise trade in which an applicant is engaged, and is not merely confined to a situation where the domestic service is a part of the route for which subsidy is sought. Findings by the Board that permission to engage in domestic coastwise or intercoastal trade may or may not result in

unfair competition or be prejudicial to the objects and policy of the 1936 Act must be predicated on relevant facts, among which is the amount of cargo available for carriage in the domestic trade. *Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service*, 140 (142).

A subsidy applicant's vessel replacement program, although a matter in which the Board is interested, has no relationship to 605(c) or 805(a) issues. *Id.* (142).

"Confidential" information in a subsidy application is submitted to the Board pursuant to section 601 of the 1936 Act for its exclusive use in carrying out its functions under that section. Such confidential information is not subject to scrutiny in either a 605(c) or an 805(a) proceeding since it is not material to the issues under those sections. *Id.* (142).

—Competition to domestic operators

There is no basis for a finding of unfair competition under section 805(a) where the only carrier opposing an application does not carry the same merchandise and does not serve the same ports as proposed by applicant, except one. *Pope & Talbot, Inc.*, 99 (101).

Data concerning way cargo carried on subsidy applicant's round-the-world vessels are not germane to section 805(a) issues. Way cargoes carried on foreign legs of such proposed service cannot adversely affect carriers engaged solely in the domestic commerce of the United States. Similarly, agreement between shippers and applicant covering present and future cargo movements in the foreign commerce of the United States cannot unduly prejudice United States coast-wise and intercoastal operators. *Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service*, 140 (141, 142).

Where *Matson*, an exclusively domestic operator, has engaged in the California/Hawaii trade for more than 73 years; the service has been developed and maintained by private investment without benefit of subsidy; in contrast, applicant (PFEL) for section 805(a) permission to call at Hawaii is primarily a subsidized operator in foreign commerce; *Matson* has been operating at a modest profit; and applicant would "skim the cream" off the trade, *Matson* needs the available cargo, has the capacity to carry it, and as opposed to applicant is fundamentally entitled to such cargoes. Furthermore, the diversion of the volume of cargo which the applicant would carry would seriously jeopardize *Matson's* vessel-replacement program and would impede development and continuation of its service. The Board should be particularly careful to protect the existing operator in an offshore territorial trade. To permit PFEL to carry cargoes in the trade would result in unfair competition to *Matson* and would be prejudicial to the objects and policy of the Act. *Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii*, 287 (297-300).

Prior decisions of the Board and Administrator have stated the principle that a subsidized operator should not be permitted to deprive regular domestic carriers of cargoes which they need, have the capacity to carry, and to which they are fundamentally entitled. *Id.* (299).

Matson as the predominant carrier in the Pacific coast/Hawaii trade should not be protected from free competition. Denial of section 805(a) permission to applicant to make calls at Hawaii in connection with its unsubsidized trans-pacific voyages does not protect *Matson* from such competition. Any unsubsidized United States-flag carrier may at any time, and without restriction or permission from the Board, enter into competition with *Matson* in the trade. *Id.* (300).

Continuation of intercoastal service from California ports to ports north of Baltimore by subsidized operator would constitute, under section 805(a), unfair

competition to an operator engaged exclusively in domestic trade, and would be contrary to the objects and policies of the Act, where the domestic operator has long been associated with the trade; adequately served the ports at which it called, has had comparatively little free space and operates at a loss, but can carry the small cargoes carried by the subsidy applicant. *Isbrandtsen Co., Inc.—Subsidy E/B Round The World, 448 (460, 461).*

Continuation of intercoastal service between Philadelphia-Baltimore and Puerto Rico by subsidized operator would constitute unfair competition where it is obvious that applicant's carryings could easily have been made by its chief competitor, an exclusively domestic operator. *Id. (462).*

Proposed intercoastal service by applicant for subsidy 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, where there is no showing that the service of exclusively domestic operators in this trade (lumber and wood pulp trade) is inadequate; and the proposed service would take cargo which the exclusively intercoastal operators need, have the capacity to carry and to which they are fundamentally entitled. *Id. (463).*

While the Board will not extend permission under section 805(a) to authorize a subsidized operator to serve a particular port at some future time when it deems the service feasible, the Board does hold that the service would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, nor would it be prejudicial to the objects and policy of the Act. The finding may be modified or vacated if service is not re-established at the port within a reasonable time. *Isbrandtsen Co., Inc.—Subsidy, E/B Round The World, 483 (484).*

Argument of intervenor that in serving both New York and Boston it adequately serves the needs of New Haven intercoastally is not controlling in a section 805(a) proceeding. To accept such an argument would prejudice New Haven consignees of intercoastal cargo. Granting of section 805(a) permission for subsidized operator to serve New Haven from California would be consonant with the congressional policy favoring port development, as manifested in section 8 of the Merchant Marine Act of 1920. *Id. (484, 485).*

In section 805(a) proceedings, the burden of proof is on applicant, and a protestant has only the burden of rebuttal. Domestic operators will be protected even where they have not operated exclusively in the domestic trade. Doubts should be resolved in favor of the exclusively domestic operator. *T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 531 (534).*

Continuation of SML's Pacific/Atlantic lumber service would not result in unfair competition to any exclusively domestic operator nor be prejudicial to the objects and policy of the Merchant Marine Act of 1936, where applicant for subsidy has conducted the service for 5 years as an integral part of its tri-continent service; offerings have exceeded available vessel space for 6 years; applicant has carried about 12% of the movement; and growing offerings have resulted in the intercoastal trade becoming unbalanced. *States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (550, 551).*

The "fundamentally entitled" doctrine, under which application for section 805(a) permission is denied where a subsidized operator seeks to inaugurate intercoastal service in competition with an exclusively domestic operator long established in the trade; or where a subsidy applicant seeks to continue domestic services as part of subsidized offshore services using subsidized vessels where such domestic services have been served by domestic operators who need the cargo and have the ability to carry it, will not be extended or applied to deny the continuation of an exclusively domestic service by a subsidy applicant where the

applicant has a long and continued association with the protected trade, and where he proposes to operate such service separate from his subsidized service. Application of the doctrine would mean that such an operator could not participate in the development of our merchant marine by inaugurating a separate and distinct subsidized service without suffering the penalty of being ousted from his unconnected traditional domestic service. T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 666 (670-672).

Application for written permission under section 805(a) of the Merchant Marine Act of 1936 to continue bulk cargo service between any and all United States ports on the Great Lakes, in the event of an award of a subsidy contract, was denied where applicant was a comparative newcomer to the trade, the movement of the commodities involved was declining or would decline in the future, and intervening carriers, although not exclusively engaged in the domestic trades, have been long associated with the movement of bulk cargoes devoted primarily to the protected services. Id. (672, 673).

—*“Domestic intercoastal or coastwise service”*

An operator furnishing a service that includes foreign ports is not engaged exclusively in the coastwise or intercoastal trade within the meaning of section 805(a). Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii, 287 (297).

An operator which provides a service between Philadelphia and Baltimore and Puerto Rico, which is separate and distinct from a service which it provides between New York and Puerto Rico with calls at the Dominican Republic, is entitled to the protection of section 805(a), as an exclusively domestic operator for the former service. Isbrandtsen Co., Inc.—Subsidy, E/B Round The World, 448 (461).

Section 605(a) clearly relates only to the Board's authority to pay subsidy. It was not intended to increase or enlarge the number or class of persons specified in section 805(a) “exclusively operating in the coastwise or intercoastal service”. An operator on the Great Lakes engaged in foreign commerce with Canada, is not “exclusively operating” in domestic trade within the meaning of section 805(a). T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 531 (533, 534).

—*Grandfather rights*

Isthmian qualifies under the “grandfather” clause of section 805(a) for continued operation in the Atlantic/Hawaii Trade in the event subsidy is awarded to its parent corporation, SML. There is some question as to its “grandfather” rights in the Gulf/Hawaii Service, but it is not necessary to resolve the issue, since no exclusively domestic operator contends that the continuation of the service would result in unfair competition, and it is apparent from the record that continuation would be in furtherance of the objects and policy of the Act. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (550).

The “grandfather” clause of section 805(a) requires that SML be granted permission to continue its Gulf/Intercoastal service. In any event no unfair competition would result to any exclusively domestic operator nor would there be prejudice to the objects and policy of the Act, since SML offers the only general cargo service in the trade, a large number of shippers are served, and SML's carryings have been substantial. Id. (551).

The “grandfather” clause of section 805(a) requires that permission be given to subsidy applicant for its Pacific/Gulf intercoastal service. In addition, there is no evidence of unfair competition since the applicant offers the only general cargo service in the trade, a large number of shippers are served and the applicant's carryings have been substantial. Id. (551).

—Intervention and hearing

Examiner properly denied motion of intervenor domestic operators to require subsidy applicant to produce in section 805(a) proceeding, traffic data from 1950 to date, rather than from 1951, where the work and expense entailed would be great and the value of such additional data would be disproportionate to such work and expense. *Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service*, 140 (142).

Where applicant requests permission to carry cargo between the Pacific coast and Hawaii on vessels which would not proceed beyond Guam, whereas, before the hearing, it requested permission to perform the transportation between the Pacific coast and Hawaii as part of a service that would include calls in the Far East, the difference is insufficient to warrant a finding that the operation proposed is outside the scope of the authorized hearing. *Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii*, 287 (294).

The burden of proving the statutory requirements of section 805(a) is upon the applicant, and the domestic operator has only the burden of rebutting the prima facie proof required by section 805(a). The Board and its predecessors have indicated a special concern for the protection of coastwise and intercoastal operators. Doubts should be resolved in favor of the domestic operator. *Id.* (297).

The status of Oceanic's (subsidized subsidiary of Matson) permission with respect to Matson's domestic services is irrelevant to the question of whether Matson is operating "exclusively" in the domestic coastwise or intercoastal trade. To the extent that Matson is an operator in the California/Hawaii service it is clearly entitled to the protection of section 805(a) and has standing to oppose application of subsidized operator for permission to call its vessels at Hawaii on unsubsidized transpacific voyages. *Id.* (297).

An applicant may not, in a petition for reconsideration, request permission under section 805(a) of the Merchant Marine Act of 1936, for a service substantially different from that in the original application, upon which public hearings were held. The denial is without prejudice, however, to the filing of another application. *Isbrandtsen Co., Inc.—Subsidy, E/B Round The World*, 483 (484).

Proceedings under section 805(a) will be remanded, where the Board needs a more complete record to determine the controversy on the merits, though a remand would afford a protesting intervenor a second opportunity to establish his case. *T. J. McCarthy S.S. Co.—Sec. 805(a) Application*, 531 (534).

Whether section 605(a), which relates solely to the Board's authority to pay subsidy, prohibits such payment on a particular voyage which includes a domestic leg is, like other issues, to be considered by the Board precedent to tender of a contract. It cannot be collaterally attacked in an 805(a) proceeding. *States Marine Corp.—Sec. 805(a) Application*, 537 (550).

—Prejudice to objects and policy of the Act (See also Competition to domestic operators, infra, and single voyages; unopposed applications, supra)

Since no exclusively domestic operator carried general cargo intercoastally eastbound to Norfolk and Baltimore, it cannot be found that subsidy applicant's service to these ports would result in the unfair competition proscribed by section 805(a). Nor would granting of permission to serve these ports be prejudicial to the objects and policy of the Act. Such permission, like all grants of section 805(a) permission, save where grandfather rights are concerned, may be withdrawn where changed conditions warrant. *Isbrandtsen Co., Inc.—Subsidy, E/B Round The World*, 448 (461).

Continuation of intercoastal service from Puerto Rico to New York by subsidized operator would be prejudicial to the objects and policies of the Act,

although the competing operator is not exclusively engaged in domestic trade because it calls at the Dominican Republic, where the competitor engages primarily in domestic trade; the carryings of the subsidy applicant have been negligible and are not needed to constitute a successful round-the-world service; and the competitor would and could accommodate the cargoes carried by the applicant without impairing the requirements of the Puerto Rican shippers. *Id.* (462).

Participation by subsidized operator in Gulf-North Atlantic bulk trade would be prejudicial to the objects and policy of the Act, where applicant is a relative newcomer to the trade whereas the intervenors have been in the trade for many years; applicant completely neglected this trade for over a year; intervenors have served applicant's principal shippers, apparently satisfactorily; the trade could be adequately served by intervenors without the contribution of applicant; and applicant's carryings have been substantial. *Id.* (463, 464).

A charter will not be barred by the provisions of section 805(a) as prejudicial to the objects and policy of the Act on the ground that the American-flag tramp fleet is a vital part of the American merchant marine and that to permit the charter would deprive an unsubsidized tramp vessel of needed cargo, where it is shown that the only available tramp vessel was refused because of the inadequacy of capacity for charterer's requirements, it was unavailable at the time of the hearing, and no other tramp vessel was available. *Oceanic S.S. Co.—Sec. 805(a) Application, 560 (562).*

Application for written permission under section 805(a) of the Merchant Marine Act of 1936 to continue domestic water carrier operations (automobiles from Detroit to Buffalo and Cleveland) in the event of an award of a subsidy contract was granted by the Board where the applicant had been engaged for many years in such operations; denial of the application would result merely in the deactivation of applicant's carriers and the reactivation of a competitor's carriers, which would not further the policy of the Act; and the principal shipper would be denied his choice of carriers. *T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 666 (672).*

—Single voyages, unopposed applications

Application by subsidized operator for section 805(a) permission for its parent intercoastal company to operate the S.S. Lurline on one voyage in January, carrying passengers and their automobiles between San Francisco and Seattle, Seattle and Hawaii, and Seattle and ports in California via Hawaii, would not result in unfair competition to any exclusive domestic operator, or be prejudicial to the objects and policy of the Act, where the vessel is regularly engaged in the California-Hawaii passenger trade; there is a lull in January but a demand for a voyage between the ports in question; and by granting the application the operator would avoid the possibility of laying up the vessel. *Oceanic S.S. Co.—Sec. 805(a) Application, 505 (506).*

Application under 805(a) to engage in one intercoastal voyage carrying a full cargo of lumber from North Pacific ports to North Atlantic ports was granted, upon finding that it would not result in unfair competition to carriers operating exclusively in domestic service, and would not be prejudicial to the objects and policy of the Act. *Moore-McCormack Lines, Inc.—Sec. 805(a) Application, 523.*

Grant of applications of American President Lines under section 805(a) to carry passengers, automobiles and household goods, booked by MSTs, from Hawaii to California on the S.S. President Hoover on two voyages would not result in unfair competition to any exclusive domestic operator, or be prejudicial to the objects and policies of the Act. APL carries passengers between California and Hawaii on two vessels and has pending an application under 805(a) to add a

third vessel, and Matson does not object to the single voyages provided they are without prejudice to the position of any party in APL's "third vessel" application. American President Lines, Ltd.—Sec. 805(a) Application, 535; 631; 646.

Under section 805(a) single voyages of vessels owned by subsidized operator, and time chartered to intercoastal operator, to carry lumber from North Pacific ports to Gulf or North Atlantic ports, would not result in unfair competition to any exclusively domestic service, or be prejudicial to the objects and policy of the Act. The intercoastal operator has tried unsuccessfully to obtain an appropriate vessel for the service and no exclusively domestic operator has opposed the application. Moore-McCormack Lines, Inc.—Sec. 805(a) Application, 629; 644.

Application for written permission under section 805(a) of the Merchant Marine Act of 1936 for a single voyage to carry lumber from Pacific ports to North Atlantic and Gulf ports, was granted by the Administration where no intervenor appeared after proper publication of notice and no exclusively domestic operator had indicated opposition thereto. Farrell Lines, Inc.—Sec. 805(a) Application, 659.

Application for written permission under section 805(a) of the Merchant Marine Act of 1936 for a single voyage in intercoastal service, carrying general cargo, was granted by the Administrator where no intervenor appeared after proper publication of notice, and the regular vessels of the steamship line to which the vessel in question was to be subchartered were unable to meet the needs of shippers. Moore-McCormack Lines, Inc.—Sec. 805(a) Application, 663 (664).

Permission under section 805(a) of the Merchant Marine Act of 1936 granted where the service (Gulf/Hawaii) appeared to be vital to the economy of Hawaii, no party protested, and there was no indication that continuance of the service would result in unfair competition to any other domestic operator. Isthmian Lines, Inc.—Subsidy Applications, 677 (710).

Application for written permission under section 805(a) for a single voyage to carry lumber from one Pacific port to North Atlantic ports was granted where no intervenor appeared after proper publication of notice, no exclusively domestic operator objected, and the vessel in question was required to meet the needs of shippers. Farrell Lines, Inc.—Sec. 805(a) Application, 756.

Permission under section 805(a) granted to subsidy applicant for the continuance of operation, by an affiliate, of a tanker in intercoastal trade where the applicant could not divert cargo from the operation because its vessels were not suitable, U.S. Coast Guard regulations would prohibit applicant's vessels from carrying the type of cargo involved, and no exclusively domestic operator opposed the continuance of the operation. States Marine Lines, Inc.—Sec. 805(a) Application, 763.

Application for permission under section 805(a) for a vessel under time charter to engage in one intercoastal voyage, carrying lumber from Pacific ports to North Atlantic ports, was granted, since no unfair competition to anyone operating exclusively in the intercoastal trade would result and no prejudice to the objects and policy of the Act existed, where the charterer had been unable to obtain any other suitable vessel for the particular sailing, the normal pattern of scheduling in the charterer's intercoastal service would not be increased and no party intervened in opposition. Moore-McCormack Lines, Inc.—Sec. 805(a) Application, 766.

Application for written permission under section 805(a) for a single voyage, carrying lumber from North Pacific ports to Atlantic ports, was granted where no intervenor appeared after proper publication of notice, no other suitable vessel was available, and the sailing would not increase the normal pattern of

scheduling in the charterer's intercoastal service. *Moore-McCormack Lines, Inc.*—Sec. 805 (a) Application, 799.

INTERCOASTAL SHIPPING ACT, 1933. See also Tariffs.

The charging and demanding of rates for shipment from Florida to Puerto Rico of dismantled aluminum plant, different from those specified in tariff, are in violation of section 2 of the Intercoastal Shipping Act of 1933. *Aluminum Products of Puerto Rico v. Trans-Caribbean Motor Transport, Inc.*, 1 (XI).

Under section 3 of the Intercoastal Shipping Act of 1933 the burden is upon the carriers to prove that their rates are just and reasonable. *U.S. Atlantic and Gulf/Puerto Rico Rate Increase*, 426 (427); *General Increases in Alaskan Rates and Charges*, 486 (495).

Failure of carrier to state separately in its tariff charges for ocean freight and terminal services (and to specify docks at which it called) resulted in a violation of section 2 of the 1933 Act and section 18 of the 1916 Act, particularly when it calculated and collected such charges. *Aleutian Homes, Inc. v. Coastwise Line*, 602 (612, 613).

Section 18 of the 1916 Act and section 2 of the 1933 Act, which require the filing of rates, rules and regulations relating to terminal services, apply only to common carriers by water in interstate commerce, not to an independent terminal. Terminal operators as such are not required by the 1933 Act to file their tariffs with the Board or to meet statutory requirements of that Act. Of course, such operator may violate sections 15, 16, or 17 of the 1916 Act, and may be liable for proven damages resulting therefrom. *Aleutian Homes, Inc. v. Coastwise Line*, 602 (613).

Where carrier had the duty to publish lawful terminal charges and apply them lawfully but failed to do so—rather in effect adopting the terminals' tariffs, misapplying them, and collecting overcharges—the carrier alone may be held responsible for the overcharges. *Id.* (613).

JURISDICTION. See also Discrimination; Forwarders and Forwarding; Reparation.

Under Reorganization Plan No. 21 of 1950 determinations of essentiality of services, routes, and lines under sections 211 (a) and (b) were assigned exclusively to the Secretary of Commerce to be exercised in consonance with the general maritime policy laid down in section 101 of the 1936 Act. These determinations, delegated to the Administrator, may be appealed only to the Secretary and not to the Board. *States Marine Corp.—Subsidy, Tri-Continent Service*, 60 (62).

While the Board has been allocated, under Reorganization Plan No. 21 of 1950, the functions of making, amending, and terminating subsidy contracts, it is clear from the congressional hearings that the Board determinations are limited and circumscribed, in effect, by route patterns and requirements as established by the Administrator under section 211 of the 1936 Act. The Secretary has no power to alter, limit, modify, or review Board determination made under sections 605 (c) or 601 (a) of the Act. *Id.* (63).

While the Board, after advisory hearings under section 605 (c), determines whether that section is a bar to award of subsidy, other determinations to be made by the Board under section 601 (a) may operate as a bar whether or not section 605 (c) is a bar, and the Administrator's findings under section 211 may similarly bar or limit award of subsidy on a particular route. Neither the Board's findings under section 601 (a) nor the Administrator's section 211 findings as to essentiality of service affect the Board's section 605 (c) findings. All three findings are necessary independent steps to be taken prior to final award of subsidy by the Board. *Id.* (63).

In discharging its duties under section 605(c), where the precise route, the sailing frequencies thereon, or types of vessels to be operated thereon, is an issue in relation to the purposes and policies of the 1936 Act, the Board is obliged to determine the issues without regard to the Administrator's section 211 determinations, and the Board's findings are final. Where the determinations are in conflict, no effect may be given to the Board's determinations to the extent they are in excess of the Administrator's section 211 findings unless and until the Administrator, acting on advice of the Board or on the record compiled in the section 605(c) proceedings, alters his prior determination. *Id.* (63, 64).

Section 605(c) determinations are quasi-judicial in nature and subject to the Administrative Procedure Act. The section 211 determination is purely an *ex parte* exercise of delegated legislative power whereby the Administrator defines the limits within which the Board may award subsidy. Section 211 determinations are not relevant in a section 605(c) proceeding; they are, rather, a legislative limitation on the Board's power to award subsidy. Within that limitation, however, Board determinations relative to making, amending, or terminating subsidy contracts are independently arrived at and are final. *Id.* (64).

The Maritime Board is not rigidly limited in its findings and conclusions by the precise language of a complaint or order of remand, regardless of the facts which may be developed and argued by the parties to a proceeding. A provision in the Interstate Commerce Act similar to Section 22 of the 1916 Act has been interpreted to require the Interstate Commerce Commission to investigate a complaint and take proper action on its own motion, provided the respondent has a full opportunity to make its defense; and to require the Commission to look to the substance of the complaint rather than its form, without being limited by strict rules of pleading and practice which govern the courts. The Maritime Board has an affirmative duty to investigate as well as to decide, in consonance with its position as trustee of the public interest in matters within its jurisdiction. *City of Portland v. Pacific Westbound Conference*, 118 (129, 130).

While it was unnecessary for the Board to decide whether it was estopped from declaring that it had no jurisdiction over shipments originating in Canada and destined for South America because of a position it allegedly took in court, the Board would point out that its jurisdiction is as set out in statute, and cannot be enlarged or divested by any act or omission of its own. *American Union Transport v. River Plate & Brazil Conferences*, 216 (224).

The United States Warehouse Act, which relates to the storage of grain as opposed to its movement, does not limit the jurisdiction conferred on the Board by the 1916 Shipping Act. Thus a terminal operator, although licensed under the Warehouse Act, is subject to the Board's jurisdiction. *D. J. Roach, Inc. v. Albany Port District*, 333 (334).

Board has jurisdiction over a person engaging in terminal activities, as an "other person" within section 1 of the Shipping Act of 1916. Company which leases and operates loading galleries, chutes, and other paraphernalia which constitute the only means by which grain vessels operating as common carriers by water in interstate and foreign commerce are loaded at the port in question, is a terminal operator. *Id.* (334, 335).

Respondents are common carriers and [terminal operators] "other persons" subject to the Act, and the Board has exclusive jurisdiction over their terminal operation agreements and the truck loading and unloading tariffs issued thereunder. Approval by Congress of the New York-New Jersey Waterfront Commission did not convert that interstate compact to federal law and thereby supersede the primary and exclusive jurisdiction of the Board as set forth in the 1916 Shipping Act. *Empire State Highway Transportation Assn. v. American Export Lines, Inc.*, 565 (591).

Operator of grain elevator whose grain storage activities are regulated by the Secretary of Agriculture under the Warehouse Act is subject to the jurisdiction of the Board in its terminal activities under the Shipping Act of 1916. Agreement Nos. 8225 and 8225-1, Between Greater Baton Rouge Port Commission and Cargill, Inc., 648 (654).

The Board has jurisdiction under section 15 of the Shipping Act of 1916 over agreements between common carriers where the agreements cover both the foreign commerce of the United States and the intimately related foreign commerce of Canada. *Oranje Line v. Anchor Line Ltd.*, 714 (728).

In exercising jurisdiction under section 15 of the Shipping Act with respect to agreements embracing the foreign commerce of other nations as well as that of the United States, the Board does not assert regulatory power over the foreign commerce of any other nation. Approval of an agreement does not affect the authority of a foreign country over its commerce, although it does exempt the approved agreement from the provisions of the antitrust laws. *Id.* (728, 729).

LEASES. See Agreements under Section 15; Terminal Facilities.

LOADING AND UNLOADING. See Jurisdiction; Practices; Tariffs; Terminal Facilities.

MERCHANT MARINE ACT OF 1936. See Intercoastal Operations; Jurisdiction; Pooling Agreements.

MERCHANT SHIP SALES ACT OF 1946. See Charter of War-Built Vessels.

MONOPOLY. See Agreements under Section 15; Practices.

NEW YORK-NEW JERSEY WATERFRONT COMMISSION. See Jurisdiction.

OPERATING-DIFFERENTIAL SUBSIDIES. See Subsidies, Operating-Differential.

POOLING AGREEMENTS.

A pooling agreement among three American-flag and nine foreign-flag lines which places a ceiling on the amount of cargo that can be carried by American-flag lines, without guaranteeing them a minimum, is not commensurate with the purposes, policy and provisions of the Shipping Act of 1916. Consequently, where two of the American-flag lines involved are subsidized and, under the terms of the subsidy contracts, they may participate in a pool only with the consent of the Administrator, such consent will be denied to a pooling agreement whereby American-flag vessels are allocated 34.5 percent of rubber originating from Thailand, unless the agreement is modified to provide that such vessels will carry "not less" than 34.5 percent of the cargo covered by the agreement. *American President Lines, Ltd.*, 323 (324).

PORT EQUALIZATION.

Where port equalization charges as between Puget Sound port and California port on shipments of dynamite originating in Puget Sound area will result in unjust discrimination if carrier, as indicated by the record, should resume direct service from Puget Sound to the Philippines, the Board must inform itself as to whether carrier will institute such service. The Board has an affirmative duty to investigate as well as to decide, and is not limited by the scope of court order (which allowed Board to modify findings of fact, or make new findings by reason of additional evidence, or modify or set aside its prior order), or its own order reopening the proceeding to take additional evidence, or of the complaint which involved past equalization practices. *City of Portland v. Pacific Westbound Conference*, 118 (129, 130).

Where traffic in explosives would move, but for equalization, through Blake Island, which is the explosives loading area for vessels calling at Seattle, the Board's jurisdiction under Section 22 to determine whether there is unjust discrimination between ports does not depend on whether complainant Port of Seattle is injured, rather than another port area. *Id.* (130).

Where complaint is brought by Northwest ports alleging discrimination as the result of port equalization charges between such ports and California port, the discrimination is not justified because a foreign-flag carrier only would serve Northwest ports. American-flag carriers and the commerce of the United States are not promoted by quasi-judicial discrimination against vessels of other nations, nor does the Shipping Act contemplate such discrimination. The Board must decide the issue in the same way as if the foreign-flag carrier were the equalizing carrier and the American-flag carrier the one unable to procure cargo because of equalization. *Id.* (131).

Diversion of cargo from a port through which it would normally move would be unjustly discriminatory and unfair between ports within the meaning of section 15 of the Shipping Act and detrimental to the commerce of the United States as contrary to section 8 of the Merchant Marine Act of 1920, if accomplished by transshipment to the same extent as if accomplished by equalization. *Id.* (134).

PORTS. See also Agreements under Section 15; Port Equalization; Terminal Facilities.

The port of San Francisco is the "nearest port" with respect to the ports of Alameda, Oakland, Richmond, and Stockton, within the meaning of section 205. *Encinal Terminals v. Pacific Westbound Conference*, 316 (320).

A conference agreement which prevents individual lines from extending any service to the ports of Oakland, Alameda, Richmond and Stockton, California, at the lower rates established for the "nearest port" (San Francisco) and compels the line to charge higher local rates, is clearly unlawful under section 205. *Id.* (321).

Section 205 does not authorize the Board to require an individual carrier to extend any service to particular ports. It is directed only to the prevention of an individual common carrier from extending service to ports described in the section. *Id.* (321).

Where conference carriers' action is held in violation of section 205 of the 1936 Act as preventing carriers from serving ports at same rate charged at "nearest port," it becomes unnecessary to consider allegations of violations of sections of the 1916 Act. Conference carriers must modify their tariff to permit members, at their individual discretion, to serve complainant ports at the same rates applicable from the "nearest port." *Id.* (321, 322).

PRACTICE AND PROCEDURE. See also Charter of War-Built Vessels; Evidence; Intercoastal Operations (Sec. 805(a)); Subsidies, Operating-Differential.

—Notice requirements; Bills of particulars

Minimum requirements stated in section 5(a) of the Administrative Procedure Act do not necessarily contemplate issuance of bills of particulars on demand of a respondent to an agency proceeding. Granting of bills of particulars is discretionary. *Pacific Coast European Conference—Limitation on Membership*, 39 (41, 42).

The Board, in the exercise of its discretion, has authorized filing of requests for bills of particulars in proceedings commenced by complaint but not in Board-initiated proceedings. *Id.* (42).

The standards set by section 5(a) of the Administrative Procedure Act with respect to notice of the issues of law and fact with which a party is to be confronted in administrative proceedings are minimum standards; when those standards are satisfied, the method of protecting a respondent from surprise as a result of ambiguous pleading is in the sound discretion of the Board, and the Board may, in the exercise of such discretion, authorize or deny demands for bills of particulars. *Id.* (42).

Absence of a rule for a bill of particulars does not permit this agency, by ambiguous pleading, to limit a respondent's opportunity to frame a reply or to prepare his case. In such a case, respondent may resolve his uncertainties as to the matters alleged by informal request, in prehearing conference, by motion to terminate the proceeding, or by other motion. A right of this nature is clearly distinguishable from the right to a bill of particulars. The right extends only to clarification of ambiguity or vagueness as to material issues and does not extend to amplification of ultimate facts in pleadings. *Id.* (42, 43).

The moving party has a burden of showing that it is entitled to a bill of particulars and that the demand is made in good faith and not for the purpose of delay. *Id.* (43).

A Board order requiring a conference to show cause at a hearing before an examiner why the Board should not (1) find that effectuation without Board approval of an agreement to condition admission of a new member to its withdrawing from pending litigation in which its position is opposed to that of the conference, is in violation of section 15 of the Shipping Act, (2) find that the agreement should be disapproved as unjustly discriminatory and unfair as between carriers or detrimental to the commerce of the United States, and (3) order the condition to be cancelled by the conference, meets the requirements of section 5(a) of the Administrative Procedure Act to give sufficient notice of the issues of fact and law with which a party is to be confronted. A request by the conference for a bill of particulars will be denied. *Id.* (43).

—Objections to evidence

Public Counsel may properly object, on grounds of irrelevancy, to questions put to a witness who is an official of the Board/Administration. By making such an objection, Public Counsel does not thereby indicate partisanship or become an advocate of a particular partisan interest any more than if he objected to the testimony of someone else. The official had no personal interest in the proceeding, and even if Public Counsel raised objections on his behalf, there could be no conflict of interest on the part of Public Counsel. *Waterman S.S. Corp.—Sec. 805(a) Application, 768.*

—Oral argument

There has been no violation of the Board's Rules or of the Administrative Procedure Act or of section 23 of the Shipping Act where, on the question of whether an amendment to a conference brokerage rule was unlawful as an unapproved agreement, the Board gave notice to the conference that the issue would be decided after oral argument and oral argument was held, at which counsel for the conference appeared. *Pacific Coast European Conference—Payment of Brokerage, 65 (71, 72).*

—Record, matters included in

Motion to strike portion of exceptions which alluded to an alleged legal opinion of the General Counsel of the Administration, not a part of the record, will be granted. *Boston Shipping Corp., 372 (377).*

—Rule Making

Section 2(c) of the Administrative Procedure Act defines a "rule" as "the whole or any part of any agency statement of general 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 Act. Proposed Rules Governing Freight Forwarders, 328 (329).

While it was unnecessary for the Board to determine whether the 1916 Act itself, despite the lack of express statutory authority, necessarily includes the power to make rules in a proper proceeding, in view of the language of the Supreme Court in *California v. United States*, 320 U.S. 577, 582, the Board believes that the rule-making power is implicit in the regulatory powers vested in it. *Id.* (329).

Section 204 of the Merchant Marine Act of 1936 confers on the Board general rule-making power with respect to the regulatory provisions of the 1916 Act. To the extent 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. *Id.* (329, 330).

As the administrative agency charged under the 1916 Act with the regulation of the shipping industry, the Board has the power, where practices in conflict with regulatory provisions of the Act are found, to issue rules prohibiting such practices. *Id.* (329).

PRACTICES. See also Brokerage; Rates; Tariffs; Terminal Facilities.

Where the tariff involved provides that charges shall be determined on the basis of cube or weight, whichever yields the greater revenue, carrier's failure to properly determine the cube is clearly an unjust and unreasonable practice within the meaning of section 18 of the Shipping Act of 1916. Further, an "exchange fee" for transfer of funds from Puerto Rico back to the United States where no payments were made to carrier in Puerto Rico, and a "heavy lift cargo" charge where carrier failed to show that any piece weighed in excess of 2,000 pounds, are unjust and unreasonable practices within the meaning of this section. *Aluminum Products of Puerto Rico v. Trans-Caribbean Motor Transport, Inc.*, 1 (X).

Provision in tariff for extra charge for loading or unloading cargo weighing more than 6,000 pounds per piece, such charge to be negotiated, is an unjust and unreasonable practice in violation of section 17 of the Shipping Act, as it provides no standards by which terminals, truckers and the general public can be guided in knowing what the charge will be or how it will be determined. *Empire State Highway Transportation Assn. v. American Export Lines, Inc.*, 565 (590).

Agreement for the rendering of stevedoring services by a grain elevator operator on a monopolistic basis would be detrimental to the commerce of the United States and would be an unjust and unreasonable practice relating to the receiving, handling, and storing of property in violation of section 17 of the Shipping Act of 1916, since the responsibility for proper loading and seaworthiness of a vessel rests with the master and to prohibit the vessel from participation in the selection of a stevedore would require strong justification; there is no evidence that such a monopoly will improve the efficiency of the grain elevator involved; and the stevedoring activities take place exclusively on the vessel and not on the

grain elevator property. Agreements Nos. 8225 and 8225-1, Between Greater Baton Rouge Port Commission and Cargill, Inc., 648 (655, 656).

PREFERENCE AND PREJUDICE. See also Common Carriers; Contract Rates; Rates; Terminal Facilities.

In order for there to be unreasonable preference or advantage, or unreasonable prejudice or disadvantage, there must be unequal treatment of two or more persons or shippers. Where the record fails to show that any actions of carrier subjected shipper to any undue or unreasonable prejudice or disadvantage in relation to any other shipper, section 16 of the Shipping Act of 1916 has not been violated. *Aluminum Products of Puerto Rico, Inc. v. Trans-Caribbean Motor Transport, Inc.*, 1 (VII).

In summarily denying reefer space for bananas to certain shippers who had requested space and in favoring others, a carrier would be guilty of discriminating against the former and subjecting them to prejudice and disadvantage with reference to cargo space, while the latter would be preferred. *Banana Distributors, Inc. v. Grace Line Inc.*, 615 (624).

Where no valid reason [the carrier alleged that bananas of different shippers could not be commingled] justifies the refusal of space to qualified shippers of bananas and the preference accorded the chosen shippers, the discrimination will be held unjust in violation of section 14—Fourth and the prejudice and disadvantage will be held undue in violation of section 16—First. *Id.* (625); *Philip R. Consolo v. Flota Mercante Grancolombiana*, 633 (638, 639).

PUBLIC LAW 591 81st CONGRESS. See Charter of War-Built Vessels.

RATES. See also Agreements under Section 15; Contract Rates; Intercoastal Shipping Act, 1933; Tariffs.

—Allocation of costs

Freas formula as a proper method of segregating terminal costs and carrying charges will be approved as not unreasonable or unjust within the meaning of section 17 of the Shipping Act, provided that charges against the vessel for use of working areas in connection with the terminal's handling operation are assigned to handling rather than dockage charge, and that the service charge be so defined that it will fall on those persons for whom services have been performed. *Terminal Rate Structure—Pacific Northwest Ports*, 53 (54).

Approval of Freas formula for segregating terminal costs and carrying charges and apportioning such costs and charges to the various wharfinger services is not rate making. The regulations and practices of terminal operators must conform to a standard of justice and reasonableness as required by section 17 of the Shipping Act. A system of cost accounting which may result in assessment of charges against persons not directly benefited by services rendered may be an unjust and unreasonable practice and is subject to the Board's jurisdiction. *Id.* (54, 55).

Board has the power under section 17 to find that public terminals are entitled to a fair return on investment. A terminal practice of cost allocation where under no allowance is made for terminal equipment maintenance, depreciation, and replacement, and which threatens future steamship operations and port efficiency is prima facie unreasonable and a matter for the Board's attention. *Id.* (57).

Under tackle-to-tackle rates, terminals may not assess charges against carriers for services performed or facility usage incurred prior to delivery within reach of ship's tackle or subsequent to delivery at the end of ship's tackle. *Id.* (59).

—Commodity rates

Different rate treatment, i.e., a lesser increase, is justified for transportation of raw sugar from Hawaii based upon competition with local beet sugar and decreased handling costs for sugar. General Increase in Hawaiian Rates, 347 (353, 358).

Different rate treatment, i.e., a lesser increase, is justified for transportation of automobiles and strapped lumber to Hawaii because they are easily and speedily loaded and because the carrier is trying to convert a lumber shipper to the method of shipping strapped lumber. *Id.* (353, 357, 358).

A lower rate on transportation of tin plate to Hawaii is justified where the commodity makes a substantial contribution to vessel operating and overhead expenses, and an unregulated tramp carrier is carrying full shipments of tin plate to Hawaii and unless the competition is met ratewise, loss of the contribution would result. *Id.* (353, 357).

A lower rate on canned pineapple as compared with other commodities requiring the same services is unjust and unreasonable where the movement of pineapple is substantial and the rate applied to other commodities would, if applied to pineapple, produce substantial revenue. The increase in transportation cost would result in a retail increase of less than $\frac{1}{10}$ of one percent per can, and thus there is no competitive reason for favoring canned pineapple. *Id.* (357).

While conference rates are not to be used as a device for equalizing the competitive position of domestic manufacturers of wood products and their foreign competitors, as a corollary, 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. *Nickey Brothers, Inc. v. Manila Conference*, 467 (477).

As in the case of the ICC, 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. The Board is therefore concerned only with the impact of an assailed rate differential, and the lawfulness of the differential must be determined with regard to surrounding transportation circumstances and conditions. *Id.* (477).

Where generally in the foreign commerce of the United States the rates on shipping logs do not exceed those on lumber, except as here from the Philippines to Gulf/Atlantic ports, 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, *Id.* (478).

Rates on Philippine mahogany logs from the Philippines to Gulf/Atlantic ports are unduly prejudicial to, and unjustly discriminatory against, such logs and the receivers thereof, and unduly preferential of Philippine mahogany lumber and the shippers and receivers thereof, in violation of sections 16-First and 17, to the extent rates on logs exceed rates on bundled lumber where, as to the value of the commodities, the claim experience of the carriers, and the cost of service, 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 because of their wet condition when loaded, and the possibility of minor ship damage upon loading, and these disabilities were not proven to be detrimental to the only conference carrier presenting evidence. *Id.* (478).

Rates in tariff found to be unreasonably high in relation to other rates and therefore detrimental to commerce where the record discloses that the goods (iron and steel) move in larger volume than other metals moving at a lower rate, and that shipments are generally similar to the other metals in handling characteristics. *Empire State Highway Transportation Assn. v. American Export Lines, Inc.*, 565 (590).

—Eastbound-westbound rates

Proposed increased rate on eastbound refrigerated cargo which would be less than increased rate on such cargo westbound is justified by the fact that there is far less demand for eastbound space and otherwise the cargo might be lost altogether. *General Increase in Hawaiian Rates*, 347 (353).

—Fair return

In determining reasonableness of 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. *General Increase in Hawaiian Rates*, 347 (350).

Carrier is entitled to a return on its investment 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. *Id.* (357).

Under section 3 of the Intercoastal Act carriers are entitled to a fair return on the reasonable value of property at the time it is being used for the public. Neither the Board nor its predecessors has ever followed the operating-ratio theory which has been used in motor carrier rate cases by the ICC, where the ratio of operating revenues (and expenses) to investment in capital equipment is relatively large, i.e., four or five to one or better. Here, the carrier's ratio of revenue (and expenses) to capital investment is only slightly in excess of two to one, and the Board will not depart from its fair-return-on-fair-value standard previously used. *General Increase in Alaskan Rates and Charges*, 486 (495).

—Vessel and other property values

Where vessels were purchased at a time when their cost was considerably lower than they are at present and if the fleet were liquidated it would have twice the amount of its book value available for other investment, book value (under which proposed tariffs would yield an unreasonably high return), as the measure of the fair value of property devoted to the trades, is entirely unrealistic for use as a rate base. *General Increase in Hawaiian Rates*, 347 (356).

Depreciated reproduction cost (under which proposed tariffs would yield an unreasonably low return) of vessels alone does not provide an appropriate base for use as a rate base since it assumes for rate-making purposes that the carrier presently has reproduced its capital assets. *Id.* (356).

Since proposed tariffs would produce net profits which are within the zone of reasonableness as applied to any of three proposed "fair values"—(a) market value plus "working capital" and "property other than vessels"; (b) an adjustment of (a) to eliminate claimed short term peak in vessel values; (c) average of book value and depreciated reproduction cost—and the increased rates are closely correlated to actual cost increases, they are just and reasonable. It is therefore unnecessary for the Board to determine with exactitude the "fair value" of the carrier's property to establish a rate base. *Id.* (357).

In order to carry out its duty under the 1916 and 1933 Acts to determine whether rates are just and reasonable, the Board must have before it a record

of the operating and financial results of the common-carrier operations, 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 the service and properly includable in a rate base upon which to determine a fair return. U.S. Atlantic and Gulf/Puerto Rico Rate Increase, 426 (429).

In ascertaining fair value of vessels for purposes of a rate base, the Board will consider as excessively high the use of net book value weighted 30 percent and reproduction cost depreciated weighted 70 percent, since this gives unreasonable emphasis to hypothetical reproduction costs where the record shows that the vessels will probably not be reproduced and that the carrier has historically never operated with newly constructed tonnage. Furthermore, book value alone is unrealistic. General Increase in Alaska Rates and Charges, 486 (497).

Where owned property other than vessels is appraised at \$684,418.00 although the net book value is only \$183,445.00, and the value of much of the property has been charged off as depreciation in operating expenses, and certain of this equipment is depreciated in only one or two years and is treated more as an expense item than as capital equipment, the proper valuation of the property is book value. *Id.* (498).

In ascertaining fair value for a rate base, the Board will include a fair value for vessels chartered from the Government rather than allowing the charter hire as an item of operating expense. Such inclusion is more realistic and less subject to market fluctuations. However, it would be improper to allow a return on the value of non-owned property and at the same time allow the cost of using such property, i.e., charter hire, to remain as an operating expense. Therefore, projected operating expenses will be reduced by the amount of annual charter hire. *Id.* (498).

Neither the Board nor any of its predecessors has ever included a separate "going concern value" in a rate base; on the contrary, such a separate value in rate proceedings has been specifically rejected. The Board will not include such a value in the rate base. *Id.* (500).

—Working capital

For rate-base purposes a calculation in accordance with General Order No. 71 is a fair and reasonable valuation of working capital, no sound reason justifying a higher value having been presented. General Increase in Alaskan Rates and Charges, 486 (500).

REBATES. See also *Devices to Defeat Applicable Rates.*

Where, under an arrangement by which freight-forwarding service and broker-age service, if any, was to be performed for a consignee without compensation, the forwarder relying upon the carrier for full compensation, the consignee was having property transported at less than the rate of transportation therefor, together with the cost of the incidental services in connection therewith. This is the evil which Congress had in mind in providing, inter alia, in section 16 of the Shipping Act that it shall be unlawful for any consignee by any unjust or unfair device to obtain transportation at less than rates otherwise applicable. Waiving of a freight-forwarding fee from the consignee and collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent the brokerage service included the cost of freight-forwarding services, and therefore an "unjust or unfair device or means." *American Union Transport v. River Plate & Brazil Conferences*, 216 (222).

Where freight forwarder performed services for consignee gratis and expected compensation from carriers in the nature of brokerage payments, the payment of such brokerage would have resulted in an indirect rebate to the consignee which

the Board cannot permit. Even if brokerage were otherwise recoverable, the Board would not order it paid where such payment would countenance a violation of section 16 and thus be illegal. *Id.* (223).

Nothing in the Shipping Act exempts from the provisions of section 16 any designated shipper, such as a government, or class of shippers. *Id.* (223).

To the extent individual substantially owned and effectively controlled a forwarding company, collection of brokerage payments by the company on the individual's shipments in the names of his 100 percent owned corporations inured to the benefit of the shipper. To the extent of such benefit there has been an obtaining of transportation by the shippers at less than rates otherwise applicable. It is not necessary that there be complete 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" rebates. 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. 400 (407, 408).

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. *Id.* (407).

Violations of the first paragraph of section 16, 16-Second and General Order 72 have been clearly shown where freight forwarder (controlled by an individual) collected brokerage on shipments of companies wholly owned by the same individual; two witnesses testified that the individual knew such collection was illegal; forwarder made knowingly false statement in application to the Board for registration under General Order 72 that it was not affiliated with or engaged in any other business; and forwarder had been furnished with a copy of General Order 72 which clearly stated that it was unlawful for a forwarder to collect brokerage when it has a beneficial interest in a shipment or directly or indirectly controls or is controlled by the shipper or consignee. *Id.* (408, 409).

A shipper who forms a dummy freight forwarding corporation and indirectly siphons off forwarding fees by providing a job and salary for a relative, in effect pays an ocean freight which is diminished to the extent of the brokerage payment to the forwarding corporation, and thus violates section 16 and the Board's General Order 72, even though there is no evidence to show that any of the brokerage fees received by the corporation were turned over to the shipper. *Brokerage on Ocean Freight—Max Le Pack*, 435 (439, 440).

Collection of brokerage by freight forwarding corporation from carriers on shipments made by companies, where the companies were owned by individuals who also owned and controlled the forwarding corporation, was a forbidden rebate and violated section 16 of the Shipping Act, and General Order 72. *Id.* (442).

REPARATION. See also Findings in Former Cases.

While shippers are not included in section 1 of the 1916 Act within the definition of the term "other person subject to this Act," the express subjection of shippers to section 16 may effect an inclusion of shippers within the term "other person subject to this Act" as it appears in section 22, and thus may permit a carrier to seek reparation against a shipper for violation of section 16. *Aluminum Products of Puerto Rico v. Trans-Caribbean Motor Transport, Inc.*, 1 (2).

Shipper is not entitled to reparation under section 22 of the Shipping Act of 1916, even though the tariff filed by carrier and its actions in connection with the shipments involved were violative of the Shipping Act of 1916, and the Inter-

coastal Shipping Act of 1933, where shipper has not shown that it has paid in excess of applicable tariff charges or has otherwise suffered injury as a result of such violations. *Id.* (XI).

Under section 22 of the 1916 Act, cause of action for carrier's overcharges accrues when the freight charges are fully paid, not at the time of delivery of shipments. The parties may not agree to waive or postpone the running of the statute. The expiration of the time limit not only bars the remedy but also extinguishes the right, thereby nullifying the jurisdiction of the Board over claims. *Aleutian Homes, Inc. v. Coastwise Line*, 602 (611, 612).

Under Section 22 of the 1916 Act, cause of action for carrier's overcharges accrues when the freight charges are fully paid, not at the time of delivery of the shipments. Both the Supreme Court and the Interstate Commerce Commission so held in cases decided under the Interstate Commerce Act when it—like the 1916 Act now—contained no language contrary to the settled rule that the time when a cause of action accrues is when a suit may first be legally instituted upon it. *Id.* 611.

Application by carrier pursuant to Rule 6(b) of the Board's Rules to pay voluntarily to purchaser of goods reparation for freight charges was denied where the application of the rate was explained by the carrier to the shipper prior to acceptance of the shipment, carrier was obligated to charge the applicable rate, and there was no showing that the rate was unreasonable. *Ketchikan Spruce Mills v. Coastwise Line*, 661 (662).

Payment of reparation under the special docket procedure can be approved only upon an affirmative finding that the rate charged was in fact unreasonable, in the same manner as if the carrier were opposing the payment. The mere fact, without more, that the ultimate consignee would have routed the shipment via an alternative route, at a lesser total cost, does not justify the conclusion that the rate charged was unreasonable. *Id.* (662).

RETALIATION.

Evidence of confusion and misunderstanding on the part of both the shipper and the carrier as to rate to be charged for shipment of dismantled aluminum plant is insufficient to show that there was any arrangement or agreement to carry the cargo at rates other than applicable tariff charges, in violation of section 14-Fourth of the Shipping Act of 1916; nor does the record indicate that any actions of respondent were retaliatory within the meaning of section 14-Third of the Shipping Act of 1916. *Aluminum Products of Puerto, Inc. v. Trans-Caribbean Motor Transport, Inc.*, 1 (VII).

RULE MAKING. See Agreements under Section 15; Forwarders; Practice and Procedure.

SERVICE CHARGE. See also Freas Formula; Rates; Terminal Facilities.

In view of the high proportion of nonchecked cargo which moves through Pacific Northwest public terminals, reasonableness and justice require that a checking charge be assessed only when earned and only against the party for whom the service was performed. Charge for checking may not be included in a service charge. *Terminal Rate Structure—Pacific Northwest Ports*, 53 (55).

Terminals may not recover, through a service charge, deficiencies in revenue attributable to a totally different operation. Since some of the component elements of the service charge may fall on either party to the contract of affreightment, dependent on its terms, it is manifestly unjust to recover a deficiency in dockage, always a charge against the vessel, through a charge which may, under tackle-to-tackle rates, fall on the shipper. *Id.* (56).

"Providing terminal facilities" is too broad a term and should be eliminated from the service charge definition. Similarly, "arranging berth for vessel" is an administrative expense connected with dockage and should be eliminated from the service charge. *Id.* (56).

Decision in *Intercoastal S.S. Freight Assn. v. Northwest Marine Terminals Assn.*, 4 FMB 387, will not be reversed. Assuming the Board could properly set aside the report and order in this proceeding, there is no valid reason for so doing. Whether carriers are entitled to reparation from terminals does not depend upon whether the terminals have suffered a general deficiency in revenue. The principal portion of the report was premised on the theory that a terminal may not assess charges for checking not performed for the carrier. Implicit also in the report, in relation to other component elements of the service charge, was a similar but more fundamental principle, namely, that under tackle-to-tackle rates a carrier's duty to receive cargo does not arise until delivery to a point within reach of ship's tackle, whether the actual delivery to that point is performed, in whole or in part, by the terminal or by the shipper himself. The Board will not depart from that principle. The Board did not determine in *Intercoastal* that terminals may not recover from the person for whom performed the cost of performance of those services which were rejected as charges against carriers. *Id.* (58).

A uniform service charge to be applied to California terminals not party to this proceeding may not be prescribed here. *Id.* (58, 59).

STEVEDORING. See Agreements under Section 15; Practices; Terminal Facilities.

SUBSIDIES, CONSTRUCTION-DIFFERENTIAL. [No Cases.]

SUBSIDIES, OPERATING-DIFFERENTIAL.

Accomplishment of the purposes and policy of the Act (§ 605(c)).

Where existing service is found to be inadequate, little need be said as to the required finding on accomplishment of the purposes and policy of the Act. Finding of inadequacy is the primary reason for making the second finding. *Arnold Bernstein Line, Inc.—Subsidy, Route 8, 46 (50).*

Assuming the contracts are awarded to both U.S. Lines and *Matson Orient.*, United States-flag vessels would carry a combined total of only 46.7 percent of the inbound and outbound liner movements on Route 12 if they go out with capacity loads and if cargo offerings do not exceed those of 1956. The foregoing is well within the grasp of United States-flag vessels on this service and additional vessels should be operated on the route in furtherance of the purposes and policy of the Act. *Matson Orient Lines, Inc.—Subsidy, Route 12, 410 (415).*

Granting of application for operating-differential subsidy for service in winter months would be consonant with the purposes and policy of the Merchant Marine Act of 1936, where United States-flag service on the routes in question is inadequate and the service proposed by applicant would increase United States-flag participation in the commercial movement. Further, unless the operation was allowed, applicant's vessels would be tied up during the winter months, with resulting unemployment and the jeopardizing of the open season service. *Isbrandtsen Co., Inc.—Subsidy, Trade Route 32, 525 (529).*

The policy of the Merchant Act of 1936 is "to foster the development of . . . a merchant marine" and the Board is concerned with that policy and not with an over-all transportation policy which would take into account the interests of railroads. *T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 666 (670).*

—*Adequacy of service*

(a) *In general*

United States-flag service is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, as amended, where there is no American-flag "combination passenger and freight vessel" service on the route in question, and participation by United States-flag carriers in both passenger and cargo carryings is small. Arnold Bernstein Line, Inc.—Subsidy, Route 8, 46 (49, 50).

In considering adequacy of service under section 605(c), determination of adequacy must be based on present and probable future conditions, and cannot be unduly concerned with conditions in the past. American President Lines, Ltd.—Increased Sailings, Route 17, 359 (368).

Present service on trade route by vessels of United States registry is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, where there has been a relatively low participation of United States-flag vessels in this trade and a high rate of United States-flag vessel utilization, particularly outbound. Adequacy refers to the "service *already provided* by vessels of United States registry in such service." Matson Orient Line, Inc.—Subsidy, Route 12, 410 (414, 415).

Adequacy or inadequacy should be determined on the basis of present requirements and not necessarily on the basis of earlier favorable section 605(c) determinations for other applicants which have indicated no immediate intention of commencing a service and which have not participated in this proceeding and made their intentions known. Waterman S.S. Corp.—Subsidy Route 21 Etc., 771 (788).

(b) *Bulk-type cargoes*

In determining adequacy of service, bulk-type commodities must be considered to the extent that they may reasonably be expected to be carried by liners. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (313).

Where, in the outbound portion of the Westbound Round-The-World service, for the period 1953 through 1956, bulk (nonliner) cargo carryings were small; on the inbound portions such carryings have been somewhat larger but have declined; and the subsidy applicant's participation in the nonliner carryings have been minor, and nothing in the record indicates a future trend toward significant bulk carryings on liner vessels in applicant's westbound Round-the-World service, only liner commercial cargo carryings will be considered in determining United States-flag participation on the route. Isthmian Lines, Inc.—Subsidy Applications, 677 (689).

In determining United States-flag participation in APL's RWW service, inclusion of coal traffic to Japan in liner commercial carryings would give an unrealistic and artificial picture of such participation. Japanese vessels carry the great bulk of the coal movement but the carryings are in many respects similar to nonliner tramp operations. In prior proceedings, these coal statistics were not excluded, but the Board is persuaded that their exclusion is proper in this case. Three-fourths of the annual coal movement should be eliminated from the total outbound traffic statistics in APL's RWW service. Id. (696, 697).

In proceedings under section 605(c) of the Merchant Marine Act of 1936 all movement of bulk-type nonliner cargoes will not be considered in determination of adequacy of American-flag service, in the absence of special circumstances which were not found to exist in this proceeding. Id. (702, 703).

(c) *50% test*

United States-flag participation in a trade of over 50 percent does not necessarily preclude a finding of inadequacy of United States-flag service. The 50 percent test is a general guide and must not defeat more cogent factors.

Where, although United States-flag participation in the present liner carryings in the Northwest/Far East service exceeded 50 percent, a tremendous—and growing—volume of bulk commodities is available in the Northwest, the ability of liners to convert these bulk-type cargoes to liner type is increasing, there is a comparatively small amount of free space on liners, and United States-flag vessel participation in this nonliner cargo movement is meager, the Northwest/Far East service, without the 10 to 16 annual sailings of the subsidy applicant, is not adequately served by vessels of United States registry. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (314, 315).

United States-flag service is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936 where it is apparent that its participation inbound, outbound, and overall is substantially below the general goal of 50 percent, that at no time in the past 4 years did such participation reach or exceed 50 percent, and there probably will be an increase in cargo in the future. Therefore, additional vessels should be operated in the service for the accomplishment of the purposes and policy of the Act. American President Lines, Ltd.—Increased Sailings, Route 17, 359 (370).

(d) *Outbound-inbound legs; segments of routes*

In view of the recognition by the Board and its predecessor that service to and from the Philippines, Hong Kong, Indochina, and Thailand is required to sustain the Atlantic/Straits service, it is proper in determining adequacy of United States-flag service for the Board and the Administrator, in a 605(c) proceeding, 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. American President Lines, Ltd.—Increased Sailings, Route 17, 359 (370).

Present service provided by United States-flag vessels is inadequate in outbound trade within the meaning of section 605(c) where, to the farthest point (Malaya), United States-flag participation reached 50 percent in only one year and had declined to 44 percent in 1955; to Italy, United States-flag participation reached 51 percent in 1952 but in 1954 and 1955, when more tonnage moved, had declined to 28 and 29 percent respectively; and cargoes will increase substantially in the near future due to the expanding economies of the countries along the route and the continuing aid these areas will receive from the Government. Isbrandtsen Co., Inc.—Subsidy, E/B Round the World, 448 (455, 456).

Present service provided by United States-flag vessels is inadequate in inbound trade within the meaning of section 605(c) where, overtonnaging notwithstanding, there is a low percentage of carryings by United States-flag vessels, cargo offerings are increasing, and the ability of fast modern vessels to attract additional cargoes leads to the finding that United States-flag vessels may reasonably be expected to increase their carryings. *Id.* (457).

Overall trade route statistics are appropriate for a determination of adequacy of service under section 605(c) of the Merchant Marine Act of 1936, in view of the comparatively small geographical areas defined by the trade routes in question (Services A and B, Routes 5, 7, 8, 9) and the preponderance of the movement on these routes passing through the ports applicant proposes to serve. Isbrandtsen Co., Inc.—Subsidy, Trade Route 32, 525 (528).

Section 605(c) is a bar to the carriage of cargoes on subsidized vessels of applicant on Trade Route 30 inbound (Far East to the Pacific Northwest) on the Tricontinent service, since the applicant does not conduct an existing service and there is no evidence to support a finding of inadequacy of service to the extent of 60 to 84 sailings (over and above those proposed in the applicant's

transpacific services). However, this is not to be construed as a bar to the inbound carriage of cargoes on such vessels for discharge at Gulf or Atlantic ports. Furthermore, as the record fails to show inadequacy of United States-flag service from the Far East to Hawaii, and as applicant does not operate an existing service there, section 605(c) is also a bar to award of subsidy for such service. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (544, 545).

While the applicant proposes mainly outbound service on Trade Routes 26A and B, the Board may well insist upon certain inbound service under sections of the Act other than 605(c), but since the routes in their entirety are inadequately served, section 605(c) does not interpose a bar to the award of subsidy for operation of United States-flag vessels thereon. Topping-off on Trade Routes 26A and B at North Atlantic ports is not being done by foreign-flag vessels and whether a definitive contract, if one is awarded, will permit such top-offs as proposed, or will restrict the number of sailings on which top-offs will be permitted, is an issue to be considered by the Board under other sections of the Act, not section 605(c). *Id.* (546); *id.* (740).

With respect to proposed North Atlantic top-offs on Trade Routes Nos. 26A and B, the routes involved in the topping-off operation (Nos. 5, 6, 7, 8, and 9) are inadequately served. Since United States-flag participation has been well below 50 percent, since United States-flag vessels have a comparatively high utilization record, and since these routes enjoy the largest movement of United States outbound liner commercial traffic, additional vessels should be operated. As the routes in their entirety are inadequately served, section 605(c) is not a bar to either the inbound or the outbound movement. *Id.* (546); *id.* (740, 741).

Section 605(c) interposes a bar to applicant's proposal to carry inbound cargo from Europe to the Gulf, while traversing Trade Route 21, so as to be in position then for outbound sailings on Trade Route 22 to the Far East, since there has been no showing that there is an existing service on Trade Route 21 or that the Route is inadequately served. However, there is no prohibition against carriage of inbound cargo on Trade Routes 26A and B (where there is inadequate service) from Europe to the Pacific coast on vessels sailing from Europe to the Gulf. Such service may be required by the Board under other sections of the Act. *Id.* (546, 547).

Available free space on an inbound service which covers a long and comprehensive trade route does not of itself require a finding that such service is adequate as to certain isolated segments on that route. The record supports the finding that inbound service from the Red Sea and Gulf of Aden to North Atlantic (average participation in liner commercial cargo carryings 39 percent) and California (average participation in liner commercial cargo carryings 35 percent) is inadequate, and additional vessels should be operated thereon. Isthmian Lines, Inc.—Subsidy Applications, 677 (701).

In the past, the Board has indicated that normally it will consider adequacy of United States-flag service for a trade route as a whole and not for particular ports or segments within the route description. Where, however, the applicant seeks the privilege of extending service on its subsidized route to ports not within the route description; where one port (New Orleans) is by far the dominant port for the movement of outbound cargo as compared with the other Gulf ports; and where United States-flag participation is extremely high through the dominant port as compared with such participation outbound from the other secondary Gulf ports, it is realistic to look to adequacy of United States-flag service separately for New Orleans and for the other Gulf ports. Gulf & S.A. S.S. Co.—Service Extension, Route 31, 747 (753).

Where United States-flag participation between Gulf ports, other than New Orleans, and the Canal Zone has amounted to only 3 percent in the most recent period of record, it follows that such participation is inadequate and that additional vessels should be operated in the service. *Id.* (753).

Where, in the most recent period of record, United States-flag participation between New Orleans and the Canal Zone was 83 percent; United Fruit-refrigerated vessels which provide this southbound service have had substantial free space and offer sufficient capacity to carry virtually all the New Orleans-to-Canal Zone traffic; and the obnoxious or undesirable cargoes which United Fruit will not carry are a relatively minor portion of the cargo moving from New Orleans to the Canal Zone, and should not affect findings as to adequacy of United States-flag services to the service as a whole, it follows that present service is adequate. Gulf & S.A. S.S. Co. should be permitted to carry cargoes which United Fruit refuses to carry in its reefer vessels on special permission from the Maritime Administrator. *Id.* (754).

(e) *Privilege calls*

Where United States-flag liners have virtually no foreign competition (Hawaii-Far East) and the service is not inadequately served, section 605(c) interposes a bar to the award of subsidy for privilege calls at Hawaii to load and discharge cargo in the foreign commerce of the United States, which off-route point would be a segment of applicant's proposed service. To subsidize an obviously off-route point simply because the remainder of the proposed route is inadequately served would militate against the very purpose of the subsidy program. Matson Orient Line, Inc.—Subsidy, Route 12, 410 (418).

Casablanca and Spanish Morocco are specifically designated as integral parts of Trade Route No. 13, and since the Board specifically found that United States-flag service on the route is inadequate and that additional vessels should be operated thereon, the privilege of serving Casablanca and Spanish Morocco is not barred by the provisions of section 605(c). For similar reasons privilege calls at Okinawa on Trade Routes Nos. 12 and 22, and Iceland on eastbound tricontinent sailings are not barred. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 739 (745).

(f) *Round-the-World services*

Cargo carryings of the Westbound Round-the-World Panama—Panama sailings and the Eastbound Round-the-World sailings of subsidy applicant should not be excluded from calculations of United States-flag carryings on the Westbound Round-the-World service because they were considered not to be "existing service" within the meaning of section 605(c). Regardless of the direction and the route travelled the vessels carried cargoes under United States flag, and such carryings cannot be ignored in determining United States-flag participation on the route. Isthmian Lines Inc.—Subsidy Applications, 677 (689).

Upon analysis of present and authorized service on APL's RWW route, service by vessels of United States registry is adequate (60 percent outbound, 50 inbound participation in liner commercial cargo carryings), and additional vessels should not be operated on the route. Section 605(c) interposes a bar to the award of subsidy to APL for the operation of additional vessels. *Id.* (700).

Without the vessel capacity to carry the cargoes in the India-Pakistan-Ceylon service previously carried by Isthmian's ERW vessels, United States-flag participation of 46 percent outbound, 48 percent inbound, and 47 percent over-all would be inadequate. However, the service is not inadequately served to the extent of the maximum of 36 annual sailings requested by Isthmian, which is 20 more than the 16 previously found to be existing. Considering the traffic previously

carried by the ERW sailings, and the availability of some of the nonliner-type cargoes for liner movement, the services is inadequate to the extent of 8 sailings per year in addition to the 16 existing sailings of Isthmian. Id. (703).

(g) *Trade Route No. 10*

Where United States-flag participation in outbound carryings on Trade Route 10 has declined from a high of 48.2 percent in 1956 to 34.6 percent in 1958; participation inbound remains at about 50 percent; in 1948 participation by the applicant itself was its highest, 4.7 percent outbound and 12.8 percent inbound; and a large volume of commercial cargo moved on the route on other than liner vessels, in which cargo United States-flag participation had decreased to 5 percent outbound in 1958 and to 6.5 percent inbound in 1958, the record fully supported the conclusion that United States-flag service on the route is inadequate. This result would be even more true if Prudential's participation be excluded. The route is not adequately served and additional vessels of the United States registry should be operated thereon. Prudential Steamship Corp.—Subsidy, Route 10, 758 (761, 762).

(h) *Trade Route No. 12*

United States-flag service on Trade Route 12 is inadequate and additional vessels should be operated thereon within the meaning of section 605(c), where United States-flag participation in liner commercial traffic, outbound, inbound, and overall, did not exceed 22, 30, and 25 percent respectively for the past five years of record; United States-flag sailings did not exceed 36 percent of total liner sailings in either direction for the only 3 years of record; and the general trend of traffic on the route has been upward. United States Lines Co.—Increased Sailings, Route 12, 379 (382-384).

The Board will take note that Japanese vessels have been strongly entrenched in the transpacific trade on Routes 29 and 30, yet United States-flag participation in each of those trades exceeds 60 percent. In 1956 when United States Lines introduced its Mariners to the Route 12 trade, its outbound free space remained low. On the record, and considering the recent history of United States-flag liner services to the Far East, to limit adequacy to 40 percent of the total liner movement on Route 12 at the 1956 traffic level would not be warranted. Matson Orient Line, Inc.—Subsidy, Route 12, 410 (415).

United States-flag participation on Trade Route 12 is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, where it has not kept pace with the offerings, declining from 19 percent to 16 percent in recent years; there is no evidence that offerings will decline in the future; and United States-flag vessels can capture offerings, as evidenced by the high space utilization of such vessels. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (543, 544).

Where previous subsidy awards would put into the trade on Route 12 enough United States-flag vessel capacity to carry 59 percent of the liner commercial cargo, but one carrier has no tonnage on the route, has not signed a subsidy contract, and it is not known whether it will ever operate in the service, Trade Route 12 inbound is inadequately served by vessels of United States registry and additional service proposed by Waterman should be permitted. Waterman S.S. Corp.—Subsidy, Route 21 Etc., 771 (789).

(i) *Trade Route No. 13*

United States-flag service on Trade Route 13 is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, though United States-flag participation has been above 50 percent, where the commercial movement has

experienced growth; the service would be inadequate without applicant's carryings; and because of physical limitations, the remaining United States-flag lines could not accommodate more than a small fraction of applicant's carryings. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (547).

(j) *Trade Route No. 21*

If the United States is to have the type of merchant marine envisioned by the Act, United States-flag capacity should not be limited to an amount sufficient to carry only 30 percent of the average outbound commercial liner movement (on Trade Route Nos. 7, 8, and 9) during the period 1953 through 1957. Without deciding the exact level of United States-flag participation, capacity sufficient to carry 39 percent of the outbound commercial liner movement over the 1953-1957 period certainly is not in excess of that which is needed to accomplish the purposes and policy of the Act. Finding of inadequacy on the North Atlantic routes will be based on an estimate of a movement of 2,500,000 tons—the annual average of the five-year period 1953-57—and on the firm belief that in the future at least this much cargo will be moving on the routes. The present capacity of USL vessels, plus those of States Marine and Isbrandtsen (total 30 percent) is insufficient to provide adequate United States service on the routes. Additional service proposed by Waterman should be permitted, including proposed top-offs in connection with its operations on Trade Route No. 21. Waterman S.S. Corp.—Subsidy, Route 21, Etc., 771 (796, 797).

(k) *Trade Route No. 22*

United States-flag participation on Trade Route 22 is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, where, without applicant's contribution, it would be considerably less than 50 percent. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (544).

Where, without the service of the applicant, United States-flag participation in liner commercial traffic on Route 22 outbound would have averaged only 46 percent for the period 1953-1957; excluding applicant's vessels, the cubic utilization of the fleet was 97 percent in 1956 and 1957; in 1956 there was unused capacity of only 2.5 million cubic feet to handle the 12.9 million cubic feet occupied by applicant's cargoes, and in 1957, 1.7 million feet to handle 10 million cubic feet utilized by applicant's cargoes; and a competitor had turned down cargoes in both years, Trade Route 22 outbound is inadequately served by vessel of United States registry, and additional vessels should be operated thereon to the extent contemplated in the application. Waterman S.S. Corp.—Subsidy, Route 21, Etc., 771 (786).

(l) *Trade Routes Nos. 26A and B*

United States-flag service on Trade Routes 26 A and B is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, where it is extremely low (about 8 percent); applicant provides the only United States-flag liner service and there is no evidence that the commercial offerings will not remain at least at the present level during the foreseeable future. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (545); 739 (740).

(m) *Trade Route No. 29*

Where United States-flag participation on Trade Route 29 has stood at about 70 percent and there is very little chance of increasing it to more than 75 percent, including Waterman's service, the route is adequately served and it is not necessary, in the accomplishment of the objects and policy of the Act, to operate additional vessels thereon. Waterman S.S. Corp.—Subsidy, Route 21, Etc., 771 (791).

(n) *Trade Route No. 30*

Where United States-flag participation in Trade Route No. 30 traffic was 76 percent in 1959, with the lines serving the Northwest exclusively having significant quantities of free space available, service on the route is adequate and additional vessels are not required in the accomplishment of the purposes and policy of the Act. Waterman S.S. Corp.—Subsidy, Route 21, Etc., 771 (791).

(o) *Trade Routes Nos. 5, 6, 7, 8, 9, 11*

United States-flag participation on Trade Routes 5, 6, 7, 8, 9, and 11 is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936. Since United States-flag participation has been well below 50 percent; United States-flag vessels have a comparatively high utilization ratio; and the routes enjoy the largest movement of United States outbound liner commercial traffic, additional vessels should be operated thereon. As the routes in their entirety are inadequately served, section 605(c) is not a bar to either the inbound or outbound movement. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (546).

(p) *Space utilization*

Service by vessels of United States registry is inadequate under section 605(c) where United States-flag participation in the liner commercial movement has been well below 50 percent and intervenor's free space factor has ranged from 5 to 17 percent during the past several years. In addition, the combined liner/non-liner commercial offerings have shown a marked growth, with an attendant overall decline in United States-flag participation, and applicant's experience as a transatlantic bulk hauler should lead to success in converting some of the non-liner offerings. Isbrandtsen Co., Inc.—Subsidy, Trade Route 32, 525 (528).

Existing service under section 605(c) of the Merchant Marine Act of 1936 is adequate where projected American-flag participation is 57 percent outbound, 39 percent inbound, and 49 percent overall, which includes the carryings of the subsidy applicant plus approximately 7 additional sailings found to be needed and applicant's free space has been increasing. Isthmian Line, Inc.—Subsidy Applications, 677 (694, 695).

—*Authority of the Board*

Section 605(a) refers to payment of subsidy, and, as respects trade between the United States and Canada on the Great Lakes, it prohibits the Board from subsidizing such voyages. T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 531 (533).

It is well settled that a favorable 605(c) determination does not of itself result in a subsidy contract, and precedent to any award the Board must make other determinations with respect to the application under other sections of the Act. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (543); 739 (740).

—*Confidential information*

Confidential information in a subsidy application is not subject to scrutiny in a section 605(c) proceeding since it is not material to the issues under that section. States Marine Corp.—Subsidy, Tri-Continent Service, 149 (152).

"Confidential" information in a subsidy application is submitted to the Board pursuant to section 601 of the 1936 Act for its exclusive use in carrying out its functions under that section. Such confidential information is not subject to scrutiny in either a 605(c) or an 805(a) proceeding since it is not material to the issues under those sections. Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service, 140 (142).

—*Contract provisions*

After section 605(c) issues are resolved, the Board under other sections of Title VI of the Act may well insist on a contract at variance with the service proposed by the applicant. It is obvious that an applicant cannot limit the scope of the ports of call which the Board might require under a contract by applying only for those which he might wish to serve. If such were the case, the function of the Maritime Administrator under section 211 of the Act and those of the Board under Title VI of the Act would become meaningless. Isbrandtsen Co., Inc.—Subsidy, Trade Route 32, 525 (528).

Where a subsidy applicant proposes chiefly outbound service on Trade Route 12, and there is substantial inbound movement on the Route—1,740,000 long tons inbound as compared to 1,722,000 long tons outbound in 1955—the Board, if subsidy is awarded, under sections of the Act other than section 605(c), may well insist upon substantial inbound service being rendered by vessels on the Route. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (544).

Section 605(c) does not interpose a bar to award of subsidy where an applicant seeks the privilege of calling at Hawaii for outbound cargoes destined for Europe, applicant moved 26,000 tons in the trade in 1956, and applicant is the only United States-flag operator providing a liner service there. However, the fact that section 605(c) is not a bar is not a commitment that the Board will include the privilege in a contract under section 601. *Id.* (546).

A section 605(c) proceeding does not afford an applicant an election to carry inbound cargoes as it chooses and to exercise selectively regarding outbound port and area service; service descriptions in subsidy contracts are not measured solely by the application. *Id.* (549).

Section 605(c) does not interpose a bar to the award of subsidy to SML for its proposed number of transpacific sailings, including top-offs with tricontinent vessels. Under section 601(a), the Board may well insist upon a service description quite different from that contemplated in the application and may require all of applicant's Trade Route 12 and Trade Route 22 sailings to be direct, thereby foreclosing California top-offs which are not barred by section 605(c). *Id.* (549).

The Board in fixing the service description of an operator in a given operating-differential subsidy contract, will take into consideration, in keeping with the purposes and policy of the Act, data relative to (1) the financial support afforded the essential service of the applicant by the foreign-to-foreign or way-port calls, (2) the ability of the applicant to accommodate such way-port cargo without impairing the needs of United States importers and exporters, and (3) the manner and type of competition of competing carriers in the trade. States Marine Corp.—Subsidy Tricontinent, Etc., Services, 739 (744).

In view of a finding of inadequacy and the need for the operation of additional vessels to overcome this inadequacy, the precise terms of the subsidy contract are immaterial. Any contract entered into, after a finding of inadequacy under section 605(c), necessarily will aid in the accomplishment of the purposes and policy of the Act. This is true whether the contract merely requires the service proposed by the applicant or whether the Board requires, under other sections of the Act, a service on the route at variance with that proposed by the applicant. Waterman S.S. Corp.—Subsidy, Route 21, Etc., 771 (782, 783).

—*Definitions of terms used*

The word "service" in section 605(c) is used broadly to cover the entire scope of operations; 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. None of these elements alone is determinative—nor would a deficiency in any one necessarily be fatal. A finding that applicant's proposed service is in general accord with its existing operation is sufficient to establish "existing service" within the meaning of the section. *States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (311).*

—Dual or multiple subsidies

The Merchant Marine Act of 1936 does not require a finding that the extent of existing inadequacy of United States-flag service be determined. Since the granting of all pending subsidy applications on Trade Route 12 would mean about 52 percent United States-flag vessel participation, assuming no increase in cargo offerings in the future, an additional five percent is not so great that the Board can say that it cannot or will not be achieved. Where there has been no section 605(c) hearing in one pending application, and no recommended decision in two others, the Board cannot find that 52 percent of United States-flag participation would constitute a "substantial portion of the water-borne export and import foreign commerce of the United States." In any event, a favorable 605(c) determination does not in itself result in award of subsidy, pending applications may be amended or withdrawn, and the record in later 605(c) hearings may indicate that cargo offerings have changed materially. *Matson Orient Line, Inc.—Subsidy, Route 12, 410 (416).*

The purposes and policy clause of section 605(c) is not intended to determine which of several subsidy applications is best suited to achieve adequacy on a given trade route. Thus comparative consideration of such applications is not necessary in a section 605(c) hearing. *Id. (417).*

A motion for comparative consideration of subsidy applications under section 605(c), advanced on the ground that the Administrator might fix the number of certain subsidized voyages on trade routes too low to allow subsidy on all such voyages requested by all applicants, will be denied, since at this time the effect of a possible future section 211 determination by the Administrator upon the applications is unknown, and findings under section 605(c) do not guarantee a subsidy contract or award subsidy to any particular applicant, and are not, therefore, "mutually exclusive" within the meaning of the Ashbacker doctrine. *States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 507 (508).*

—Effect of approval under section 605(c)

Approval under section 605(c) alone is not tantamount to award of subsidy, nor is such action an indication that award of a contract necessarily follows. *States Marine Corp.—Subsidy, Tri-Continent Service, 149 (152).*

—Essential Trade Route determinations

Section 605(c) proceedings need not be delayed until the Administrator has determined under section 211 that the trade route in question is essential. *States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (308).*

Determination of "essentiality" is a quasi-legislative function, exercised by the Administrator, and is independent of the Board's actions under section 605(c). A favorable section 605(c) determination, followed by other favorable determinations under other sections of the Act, cannot result in the award of a subsidy contract unless and until the Administrator, pursuant to section 211, determines the route to be essential. It is not necessary for the Board, in a section 605(c) proceeding to determine the essentiality of a particular trade route. *States Marine Corp.—Subsidy Tricontinent, Etc., Services, 739 (741).*

—*Existing service*

Under section 605(c), foreign-flag operations have no place in the determination of whether or not subsidy applicant has an existing United States-flag service on the route or routes on which subsidy is sought. States Marine Corp.—Subsidy Tricontinent Service, 149 (151).

Sailings commenced subsequent to the date of filing application for subsidy cannot be considered in determining existing service. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (311).

Although the Examiner found that applicant had an annual average of nine sailings in the Pacific Northwest/Far East service, four of those sailings were also relied upon to support a finding of existing service in applicant's 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 four sailings in question originated in California and called at the Northwest on route to the Far East. Id. (312).

Five sailings annually cannot support a finding of an existing service of 10 to 16 sailings annually within the meaning of section 605(c). Id. (312).

In determining whether a subsidy applicant is operating an "existing service" within the meaning of section 605(c), the Board 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. Isbrandtsen Co., Inc.—Subsidy, E/B Round The World, 448 (453).

Where subsidy applicant which proposes 24 to 29 sailings fortnightly to the Azores, has carried only small parcels of MST'S cargoes to the Azores, and has averaged but two calls per year, in an irregular pattern, it does not qualify as an existing operator, since, under section 605(c), its past operation must have been reasonably in accord with its proposed subsidized service. Id. (453, 454).

An applicant for subsidy does not qualify as "an existing operator" in so far as service to Genoa, the Philippines, Los Angeles, or New Haven is concerned where service to such ports was interrupted and nonexistent at the time of hearing. Id. (454).

Where subsidy applicant topped off, annually, an average of 39 sailings from California with its Trade Routes Nos. 12 and 22 vessels, carrying, generally, slightly less than 400 tons of general cargo per voyage, this average is sufficient to establish applicant as an existing operator, within the meaning of section 605(c) as to 36 proposed California top-offs on the Routes. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (548, 549).

Where applicant proposes 24 to 36 sailings on Trade Route 29 and 12 to 24 sailings on Trade Route 30, it has established itself as conducting an existing service under section 605(c) by reason of having averaged 24.5 direct sailings per year between 1952 and 1955 on Trade Route 29; 4 per year on Trade Route 30; and 33.25 per year integrated sailings from California and Northwest ports. The integrated sailings proposed, 12 to 24, are to sail half from California and half from the Northwest and are included in the total proposed on each route, and although past integrated sailings were mainly from California, it is proper to credit them 50 percent to each Route since they served both areas. Id. (548).

The fact that sailings in Services Nos. 1 and 2 of Trade Route No. 17 furnished service at some of the ports served by true Westbound Round-the-World sailings is not a basis for considering the outbound portion of each Westbound Round-the-World-Panama—Panama sailing and the inbound portion of each Eastbound-Round-the-World-Suez—Suez sailing as constituent parts of one Westbound Round-the-World sailing. This patchwork service was not in general accord with the Westbound Round-the-World service for which subsidy is sought, and cannot

be considered "existing service" within the meaning of section 605(c). Isthmian Lines, Inc.—Subsidy Applications, 677 (688).

If applicant's eastbound sailings could be considered to be in accord generally with the service provided by the westbound service, the eastbound service was suspended several months before the application for subsidy was filed, and should not for that reason be considered as "existing service" within the meaning of section 605(c). Id. (688).

Since Isthmian's ERW sailings serviced the India-Pakistan-Ceylon service only incidentally and were suspended some months before the application for subsidy was filed, they will not be considered as part of an "existing" I-P-C service. Isthmian is operating an existing service in its I-P-C service to the extent of 16 sailings annually. Section 605(c) does not interpose or bar the award of subsidy for such existing service. Id. (702).

A service under section 605(c) of the Merchant Marine Act of 1936 is not an existing one where there were only 8 sailings in the five months preceeding the filing of application for subsidy. Probable permanency of operations cannot be inferred from such service. Id. (706).

In view of the Board's findings that United States-flag service on each of the component essential trade routes comprising the tricontinent service, as well as the overall service on the tricontinent service as a unit are inadequately served and that additional vessels should be operated thereon, the determination of whether applicant's service was "existing" is largely academic. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 739 (742).

Trade Route No. 21 is predominantly an export trade. In 1957, 2,983,100 tons of liner commercial cargo moved outbound as compared with only 686,700 tons inbound. Under such circumstances, an applicant's existing operation will be judged on the basis of its outbound service. Waterman S.S. Corp.—Subsidy Route 21 Etc., 771 (778).

In order to qualify as an existing service an operation must have been in "reasonable general accord" with the proposed subsidized service. Id. (778).

Proposed North Atlantic top-offs are not in reasonable general accord with applicant's operation on the Gulf/U.K. and Continent service were military cargo exclusively was lifted. A service confined to military cargo to the complete exclusion of all commercial cargo will not be considered as a part of an existing service. Id. (778, 784).

An applicant for subsidy must demonstrate an existing service at the time the application for subsidy is filed, the service performed must have been in "reasonably general accord" with the proposed subsidized service, and "regardless of the wisdom of [an operator's] decision to interrupt service," or "its intention to resume service," an interruption of service negates any claim to an existing service. Id. (793).

—Foreign-flag affiliations

Data pertaining to a subsidy applicant's foreign-flag affiliations on routes and services other than those for which subsidy is sought, are not relevant to issues raised in either a section 605(c) or a section 805(a) proceeding. These matters will be determined by the Board under section 804 before final determination on the subsidy application. Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service, 140 (141).

Subsidy applicant's foreign-flag affiliations on routes not under consideration can have no bearing on issues of existing United States-flag service, adequacy of service, or undue advantage and undue prejudice in a section 605(c) proceeding, or the issues of unfair competition or the objects and policies of the Merchant Marine Act of 1936 in a section 805(a) hearing. Id. (141).

For purposes of a section 605(c) hearing statistics compiled on a semi-annual basis identifying all of the cargo carried by subsidy applicant for affiliated interests is sufficient. Moreover, details of all of the affiliated interests' shipments on all vessels regardless of flag, in connection with the carriage of cargo for affiliated interests by the applicant, are not required for 605(c) proceedings. States Marine Corp.—Subsidy, Tri-Continent Service, 149 (151).

Foreign-flag operations of a subsidy applicant are subject to thorough scrutiny by the Board prior to award of subsidy, but this is made under section 804 and not section 605(c) of the 1936 Act. Id. (152).

Board would not compel subsidy applicant to produce data relating to its foreign-flag relationships in a section 605(c) hearing, other than data which it has agreed to furnish relating to foreign-flag sailings on the routes and services involved. Id. (152).

Questions regarding citizenship of subsidy applicant in light of foreign-flag relationships will be given thorough examination when the application is considered pursuant to section 601, and need not be the subject of inquiry in a 605(c) proceeding. Id. (152).

—*Hearing and Findings (See Dual or Multiple Subsidies, supra, and Scope of section 605(c) hearing, infra)*

—*Scope of section 605(c) hearing; issues*

Intervenor is not permitted in section 605(c) proceeding to go into the question of whether Trade Route 8, Service No. 1, is essential under section 211 of the Act. The Board has previously determined the route and service to be essential. Arnold Bernstein Line, Inc.—Subsidy, Route 8, 46 (49).

Where the Maritime Administrator published tentative findings in the Federal Register in reaffirmance of the essentiality of Trade Route No. 8, among other routes, and in the exercise of his discretion extended to interested persons an opportunity to be heard, intervenor should have presented arguments as to essentiality of service proposed for Trade Route No. 8 to the Administrator rather than to the Board. Id. (51).

In a section 605(c) proceeding, the Board will not receive in evidence either the Administrator's section 211 determination or the data upon which it was based. States Marine Corp.—Subsidy, Tri-Continent Service, 60 (64).

The Board's determination under the 1936 Act and its disposition of pending problems are made in an orderly fashion although not necessarily in sectional sequence. It would serve no useful purpose to conglomerate in one proceeding all the several matters which require serious consideration by the Board antecedent to the subsidy contract award. To the extent there remains to be made any determination, all prior actions are subject to or dependent thereon before finality has been achieved. States Marine Corp.—Subsidy, Tri-Continent Service, 149 (152).

Examiner's ruling denying request of intervenors in a section 605(c) hearing for list of all common stockholders of subsidy applicant and of its affiliate Anderson, Clayton, and details as to the holdings of each such stockholder will be sustained on ground that such data are irrelevant to the issues in the hearing. Id. (153).

Intervenors' request in a section 605(c) proceeding for record of performance of agreements between subsidy applicant and another steamship company and its stockholders, will be denied as based on alleged possible violations of the 1936 Act which have no bearing in a 605(c) hearing and should not be considered. Id. (153).

Where there is no showing of existing service, it must be determined, in order for applicant to prevail, that American-flag service is inadequate and that addi-

tional service is required to accomplish the purposes and policy of the Act. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (312).

Although the Board finds that section 605(c) interposes no bar to the subsidization of applicant's proposed services, award of subsidy must depend upon a determination by the Administrator that such services are essential within the meaning of section 211. *Id.* (315).

Failure by subsidy applicant to disclose the time when it intends to inaugurate a specific service does not preclude a favorable section 605(c) determination. However, the Board will insist upon action by the applicant to insure prompt determination of its application, and will review its 605(c) determinations unless the subsidy contract, if offered, is executed and operations commenced within a reasonable time. Matson Orient Line, Inc.—Subsidy, Route 12, 410 (417, 418).

It is well settled that a favorable 605(c) determination does not of itself result in a subsidy contract, and precedent to any award the Board must make other determinations with respect to the application under other sections of the Act. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (543); 739 (740).

In a section 605(c) proceeding the Board is not concerned with such matters as vessel interchange, sailing spreads and "round voyages." *Id.* (543); (742).

Allegation of an unlawful agreement between subsidy applicant, SML, and Bloomfield is beyond the scope of a section 605(c) proceeding. *Id.* (549); (742).

The provisions of section 605(c) are not specifically applicable to foreign sailings. This does not mean that the rights of United States-flag operators conducting services between foreign ports will be ignored. It means that in framing the service descriptions of an operating-differential contract the section 605(c) tests will be considered as a guide to, as distinguished from a control on, the Board, and hence no hearing is required under section 605(c). *Id.* (744).

—Service in addition to existing service

Although it is apparent that an applicant under section 605(c) does not have existing service in the trade in question 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 the Board would not regard the service in that regard as in addition to the existing service, especially in view of applicant's 25 and 26 sailings in two previous years. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (309).

—Statistical data required

Where ports and areas in a subsidy applicant's proposed service vary materially from the ports and areas covered by services and trade routes which the proposed service overlaps, it is obvious that the statistical data with respect to number of sailings and amount of cargo from and to each port proposed to be served are relevant and material to issues of existing service, adequacy of service, and undue advantage and prejudice raised in a section 605(c) proceeding. Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service, 140 (141).

—Undue advantage or prejudice as between citizens

In determining whether the effect of a subsidy award would result in undue advantage or will be unduly prejudicial, the prime responsibility is one of providing adequate service by vessels of United States registry in the "competitive services, routes, or lines." Foreign-flag relationships and operations which pertain to routes and services other than those involved in section 605(c) proceeding or which represent nonmaritime foreign activities are not relevant or material to the resolution of the issue of "undue advantage" and "unduly prejudicial." States Marine Corp.—Subsidy, Tricontinent Service, 149 (151, 152).

The burden of proving undue advantage and undue prejudice under section 605(c) rests upon the party claiming it, and a subsidized operator has a greater

burden than a nonsubsidized operator. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (309, 310).

Any undue prejudice which might result to intervenor because subsidy applicant would be able to secure quick-loading bottom cargoes in the Northwest and then stop off in California, while intervenor is required to shift from berth to berth in the Northwest before sailing directly to the Far East, is offset by intervenor's ability to offer the shippers of such easy, quick-loading cargoes a direct service to the Far East, which the applicant 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 the Board is considering undue prejudice to intervenor. *Id.* (310).

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 stopping off in California before sailing out-bound—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. *Id.* (310).

Undue prejudice under section 605(c) does not necessarily result from the fact that one operator is subsidized and a competing operator is not. The unsubsidized operator must prove that award of subsidy would result in undue prejudice to itself or undue advantage to the subsidy applicant. *Id.* (310, 311).

Where the Board determines that a trade is not adequately served, the operation of additional vessels is necessarily in furtherance of the purposes and policy of the Act, and whether the granting of subsidy would result in undue advantage or undue prejudice is not in issue. *Id.* (315).

In a section 605(c) proceeding, where additional subsidized sailings requested would be in addition to existing service, only the issues of whether United States-flag participation in the service is adequate and whether additional vessels should be operated in the accomplishment of the purposes and policy of the Act, will be determined. When considering such a service the Board does 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. American President Lines, Ltd.—Increased Sailings, Route 17, 359 (367).

Where a subsidy application involves a service which would be in addition to existing services, the only issues for determination under section 605(c) are whether the service already provided by United States-flag vessels is inadequate, and whether, in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon. No consideration need be given to the question of undue advantage or prejudice. U.S. Lines Co.—Increased Sailings, Route 12, 379 (381).

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 United States-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. Isbrandtsen Co., Inc.—Subsidy, E/B Round-The-World 448 (454).

The effect of granting an operating-differential subsidy contract 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, as claim that an award of subsidy as to ports and areas not falling within applicant's existing service would result in prejudice is untenable; intervenor en-

joys a rather broad latitude in port coverage; argument that there will be prejudice where applicant carries only outbound cargoes while intervenor must carry both out and inbound is without merit; and the frequent and comprehensive service offered by intervenor under its subsidy contracts is sufficient protection to offset any advantage applicant would derive from subsidy. *Id.* (454, 455).

Intervenor's claim of undue prejudice by the inbound carriage of cargoes on Trade Route 30 has been removed by the conclusion that the operation inbound of tricontinent vessels on the route is barred by section 605(c). Any prejudice which it might suffer by reason of subsidy applicant's carriage of inbound cargoes by vessels sailing *outbound from the Pacific Northwest* springs not from the fact of subsidization but from the fact of the applicant's presence in the field. *States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (549).*

Intervenor, a competitor, cannot complain, in the context of section 605(c), that subsidy applicant would be in a better position than itself if subsidy is awarded, merely because the subsidy applicant petitions for ballasting many voyages home and limited service to certain areas and might receive something different from that which intervenor petitioned for and received. To hold that such facts constitute undue prejudice would result in the Board's requiring all operators on any given trade route to receive identical contracts and provide identical services. If applicant's competitors feel that the service descriptions in their contracts do not provide for efficient service, their relief, if any, is to petition for modifications of their contracts. *Id.* (549).

Findings by the Board, in proceedings under section 605(c) of the Merchant Marine Act of 1936, that service already provided by vessels of United States registry on a particular trade route is inadequate, dispose of the issue of undue prejudice raised by an intervenor. *States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 675.*

Since trades on Routes Nos. 13 and 22 are clearly inadequate without the carryings of SML, and since the Board finds that additional vessels should be operated thereon, the issue of undue advantage and prejudice was not before the Board. However, the record establishes and the Board finds, that the granting of subsidy to SML for the operation of its vessels on Trade Routes Nos. 13 and 22 would not result in undue advantage to SML or in undue prejudice to Lykes. *States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 739 (742).*

Nationalistic pressures, currency problems, and nonconference foreign-flag competition on the route, which effectively prevent United States-flag vessels from obtaining a larger share of the available cargo are insufficient reasons to block the efforts of United States-flag operators to improve their position. Moreover, the record does not justify the conclusion that any additional cargo which Prudential might secure would be taken solely from the other United States-flag operators. *Prudential Steamship Corp.—Subsidy Route 10, 758 (761, 762).*

A subsidized operator cannot object to competition from another subsidized operator on a route inadequately served by United States-flag vessels. With respect to top-offs, Lykes calls direct from the Gulf on both Trade Routes Nos. 21 and 22 and since Waterman in topping off will not be offering as direct or fast a service to Gulf shippers, and the full reach of Waterman's vessels will not be available on berth in the Gulf, there would be no undue prejudice to Lykes or undue advantage to Waterman. Lykes' remedy is to request modification of its service descriptions. *Waterman S.S. Corp.—Subsidy, Route 21, Etc., 771 (782).*

Waterman has an existing service of 23 annual sailings calling regularly in the Gulf, Japan, and Korea, and occasionally in Formosa and Okinawa, with 12 top-offs at California ports, and award of subsidy covering this service, in-

cluding 12 California top-offs, will not result in undue advantage to applicant or undue prejudice to any intervenor, and is not barred by section 605(c). *Id.* (786).

—*Vessels, suitability of*

In a section 605(c) hearing, evidence relating to vessel types to be employed, exact route, source of the vessels, ability and willingness to acquire new vessels, design features to be incorporated in new vessels, exact time the new service will be inaugurated, and the like, are immaterial and irrelevant. *Matson Orient Line, Inc.—Subsidy, Route 12, 410 (417).*

A subsidy applicant's vessel replacement program, although a matter in which the Board is interested, has no relationship to 605(c) or 805(a) issues. *Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service, 140 (142).*

TARIFFS. See also Agreements under Section 15; Classifications; Contract Rates; Intercoastal Shipping Act, 1933; Jurisdiction; Ports; Practices; Rates; Terminal Facilities.

It is a settled rule of tariff construction that where a tariff is ambiguous or doubtful it is to be construed against the carrier who prepared it. *Aluminum Products of Puerto Rico, Inc. v. Trans-Caribbean Motor Transport, Inc., 1 (VI).*

In failing to undertake its obligations of loading and discharging cargo and furnishing adequate terminal facilities, tariff, by reason of its *exclusive* f.i.o. rates applicable to each and every shipper, is unjustly discriminatory to small shippers in violation of section 14—Fourth of the Shipping Act of 1916, as amended, and by reason of its failure to specify terminals it is in violation of section 2 of the Intercoastal Shipping Act of 1933. *United States Atlantic & Gulf-Puerto Rico Conference v. American Union Transport, Inc., 171 (176).*

Although a tariff which has been replaced by an unobjectionable one cannot be cancelled, it can and will be declared defective where the record is complete and each of the parties has been fairly and fully heard. The record showed unjust discrimination, by reason of exclusive f.i.o. rates, in violation of section 14—Fourth of the 1916 Act and failure to specify terminals in violation of section 2 of the 1933 Act. *Id.* (176).

Tariff provisions must be applied uniformly where terminals have been permitted to operate in concert under a joint tariff pursuant to section 15 approval of such concerted action. Parties to such an agreement must insist that individual member terminals properly apply all charges, rules, and regulations of the tariff. If the tariff is violated by any member, proper corrective action should be taken, as provided by the basic agreement. Concurrence by members in activity differing from and in derogation of the express provisions of their agreement and tariff might, under certain circumstances, amount to a tacit understanding which would modify their approved agreement. *Empire State Highway Transportation Assn. v. American Export Lines, Inc., 565 (588).*

While, on the record [which showed that some terminals failed at times to comply with tariff provision that any truck in line to receive or discharge cargo at a certain time should be worked at straight-time rates, and with a provision permitting partial service in truck loading], the Board could not find that there is a tacit understanding to permit individual terminals to violate tariff provisions, the Board would insist that steps be taken to maintain uniformity of practices under the tariff. The Board would necessarily consider disapproval of the basic agreement if such a tacit understanding existed, unless corrective steps were taken. *Id.* (588).

In determining whether the general level of rates and the rules and regulations of a tariff conform to the standards of the Act, the Board is more concerned

with the effect of the implementation of the tariff than with the particular methods by which tariff is constructed. A general level of rates which would permit an operating ratio of \$1.07 of revenue for each dollar of expense would not allow terminal operators an excessively high profit. *Id.* (589).

It is a well established rule of tariff interpretation that the terms used in a tariff should be construed in a manner consistent with general understanding and accepted commercial usage. *Aleutian Homes, Inc. v. Coastwise Line*, 602 (608).

Addition in tariff item of the phrase "including electrical, plumbing, heating and ventilating equipment" did not cure the admitted ambiguity of the term "houses, KD, prefabricated"—rather it appeared to increase the ambiguity of the item. Applying the rule applicable to written instruments generally, this ambiguity must be construed against the carrier which made and issued the tariff. *Id.* (609).

An understanding between a carrier and a shipper cannot vary the proper construction or application of a tariff, since the published tariff is binding on the parties. However, the action of the carrier and shipper may be factors to be considered in determining what was a fair and reasonable interpretation of an ambiguous tariff item. *Id.* (609).

Carrier's reclassification of articles was in violation of section 18 of the 1916 Act and section 2 of the 1933 Act where components of prefabricated houses were accepted for shipment by the carrier at its prefabricated house rate and later certain articles such as kitchen cabinets, wardrobes and panel shake siding were retroactively assessed higher rates; the term "prefabricated house" is ambiguous; an ambiguity must be construed against the carrier issuing the tariff; and both the carrier and shipper understood that the "prefabricated house" item would be applicable to all shipments. Reclassification of wooden house parts under terminal tariff from "Freight, N.O.S." to "Building Materials, prefabricated, wooden or metallic, . . ." was also improper and in violation of section 18 of the 1916 Act and section 2 of the 1933 Act. *Id.* (609, 610).

TERMINAL FACILITIES. See also Agreements under Section 15; Findings in Former Cases; Intercoastal Shipping Act, 1933; Rates; Tariffs.

—Loading regulations

Proposed exclusive terminal loading tariff regulation applicable to lumber, which on its face applies to all who utilize the terminal, is not unduly preferential under section 16 of the 1916 Shipping Act. However, possibility that the equality contemplated by the regulation will, in practice, be disregarded is relevant to the reasonableness of the regulation under section 17. *Lopez Trucking, Inc. v. Wigin Terminals, Inc.*, 3 (14).

Proposed exclusive terminal loading tariff regulation is not unduly prejudicial to a port, in violation of section 16 of the 1916 Shipping Act where there is no evidence showing unequal treatment of localities by the terminal operator. Evidence of diversion of traffic by the lumber dealers involved which may occur upon application of the regulation is immaterial to allegation of violation of section 16, but is relevant to the issue of reasonableness of the regulation under section 17. *Id.* (15).

Proposed exclusive terminal loading tariff regulation applicable to lumber only is not unduly preferential of other cargoes, in violation of section 16 of the 1916 Shipping Act, since neither injury to such cargoes nor an existing and effective competitive relationship between lumber and other commodities was shown, as is required before such a violation may be established. *Id.* (15).

Proposed exclusive terminal tariff regulation applicable to lumber is an unreasonable regulation, and the effectuation thereof is an unreasonable practice. in

violation of section 17 of the 1916 Shipping Act, where considerable uncertainty exists as to whether the regulation would be applied uniformly to all lumber dealers. Not only the potential discrimination in unequal application of a tariff regulation, but the mere possibility of a variance between regulation and practice, renders both unreasonable. *Id.* (15).

Proposed exclusive terminal loading regulation is unreasonable under section 17 of the 1916 Shipping Act where the disadvantages and injurious effects, such as increased costs of truck loading and diversion of the commodity (lumber) to other ports, would outweigh the benefits, such as efficiency of operations, which benefits can be secured by other uncontested and innocuous means, such as enforcement of other rules and regulations relating to traffic control. *Id.* (16).

In determining the reasonableness of a proposed tariff regulation under section 17 of the 1916 Shipping Act, it is the reasonableness of the regulation itself and the contemplated practice thereunder which must be considered and not the motivating reason for the regulation, such as that it resulted from demands of a labor union. *Id.* (17).

Record does not support a finding that elimination of partial service in truck loading would be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Shipping Act, where such elimination should encourage the use of specialized trucks, thus relieving congestion at the piers and reducing costs, and would remove an important area of friction and disputes between truckers and terminals. *Empire State Highway Transportation Assn. v. American Export Lines, Inc.*, 565 (589).

Agreement permitting terminals to eliminate "no service" in connection with truck unloading, i.e., prohibiting truckers from unloading trucks themselves, would be detrimental to the commerce of the United States as unloading by truckmen is a much-used long standing practice which has not interfered with efficient operation of the piers. *Id.* (592).

Agreement permitting terminals to eliminate "no service" in connection with truck loading, i.e., prohibiting truckers from loading their own trucks, would not be unjustly discriminatory or unfair, detrimental to the commerce of the United States or in violation of the Shipping Act, where traditionally the terminals have provided substantially more such services than unloading services, and if the terminals provided all truck loading services they would be able to schedule more efficiently the use of their labor and equipment and could substantially improve the efficiency of their terminal operations. *Id.* (592).

—Stevedoring

Refusal by terminal operator to employ stevedoring subcontractor is not unduly prejudicial in violation of section 16-First of the 1916 Act, where terminal operator agreed with vessels to perform stevedoring services, and merely subcontracted certain of its stevedoring operations to other stevedoring contractors, who, in turn, performed the work for the terminal operator, and not for the vessel or the cargo. Likewise, employment of one stevedoring subcontractor to the exclusion of another, under the above circumstances, does not constitute an unreasonable regulation or practice in connection with the receiving, handling, or storing of property, under section 17 of the Act. *D. J. Roach, Inc. v. Albany Port District*, 333 (335).

Joint decision of terminal operators to end complainant's services in connection with grain stevedoring is not an agreement such as described in section 15 of the Shipping Act, and the record failed to show that such decision in any way affected 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. *Id.* (335).

An agreement between Matson Navigation Co. and Encinal Terminals, filed with and approved by the Board, which is only evidence of a general intention of the parties to enter the stevedoring, terminal and carloading and unloading business as partners acting through a new corporate entity, Matcinal, is incomplete where it fails to mention that Matcinal would operate a pier as sublicensee of Encinal, that Encinal would endeavor to secure certain stevedoring facilities for Matcinal, that the stevedoring of Matson's vessels at Encinal's terminal would be performed by Matcinal rather than by Matson Terminals, and that Matson Navigation would endeavor to transfer certain stevedoring services from Matson Terminals to Matcinal. *Associated-Banning Co. v. Matson Navigation Co.*, 336 (342).

—*Terminal operator as "other person" subject to Act*

Operator of terminal facilities in Baton Rouge and other areas is clearly an "other person" subject to the Shipping Act of 1916. Agreements Nos. 8225 and 8225-1, Between Greater Baton Rouge Port Commission and Cargill, Inc., 648 (654).

TRADE ROUTES. See Subsidies, Operating-Differential.

TRUCK LOADING AND UNLOADING. See Jurisdiction; Terminal Facilities.

UNITED STATES WAREHOUSE ACT. See Jurisdiction.

UNJUST OR UNFAIR DEVICES. See Devices to Defeat Applicable Rates; Rebates.

VESSEL VALUES. See Rates.

VOLUME. See Practices.

WEIGHT OR MEASUREMENT. See Practices.

WORKING CAPITAL. See Rates.

WHARFAGE. See Agreements under Section 15; Terminal Facilities.