FEDERAL MARITIME COMMISSION

No. 1188

INCREASED FREIGHT RATES—ALASKA LOWER YUKON RIVER AREA

Rates, charges, and practices of respondent found not to be unjust, unreasonable or otherwise unlawful.
Investigation discontinued.

H. B. Jones, Jr., for respondent Northern Commercial Company River Lines.

William G. Ruddy, Michael M. Holmes and *Warren C. Colver* for intervener State of Alaska.

Norman D. Kline and *Robert J. Blackwell*, Hearing Counsel.

INITIAL DECISION OF GUS O. BASHAM, CHIEF EXAMINER[1]

The Commission, by order served June 16, 1964, as amended by order served December 3, 1964, placed under investigation, to determine their lawfulness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, the rates, charges, and practices of respondent Northern Commercial Company River Lines (River Lines) applying to interstate transportation between Seattle-Tacoma, Wash., and points in Alaska on the Lower Yukon River and the eastern coast of Norton Sound in the Bering Sea. These rates are published in River Lines Tariff FMC-F No. 45 (Tariff 45).

The State of Alaska intervened, but introduced no evidence at the hearing held on November 24, 1964; and on brief filed February 1, 1965, concluded (1) that respondent River Lines is performing a needed service in an area with little water transportation; and (2) that no changes are warranted in the interstate rates involved herein.

History of respondent. Initially owned by Canadian interests, River Lines predecessor began operations during the gold rush days, carrying a sizable amount of general merchandise up the Yukon River to the gold fields in Yukon Territory and the Klondike. It discontinued service in 1922 or 1923, when it was acquired by, and became

[1] This decision became the decision of the Commission on Mar. 26, 1965.

a division of Northern Commercial Co., which, since the time of the czars in Alaska, has operated trading posts, and later department stores throughout Alaska and Yukon Territory.

Ever since, River Lines has provided a common-carrier service on the Lower Yukon, primarily to carry cargo of its parent company, which consists mainly of general merchandise, machinery, and other equipment. Northern Commercial also has a saltery at Sheldon's Point, where it mild cures fish and ships them to Seattle. River Lines provides the only common-carrier service in the area, and Northern Commercial considers it to be so essential to its business that it operates the service regardless of profit or loss.

Service of respondent. River Lines owns and operates five tugboats, four covered wooden barges, one large steel flattop barge, and three bulk-oil barges, all shallow draft. It also operates a shipyard year-around at St. Michael (the base of its operations), to shelter and maintain its equipment.

During the last 5 years the cargo carried by River Lines has divided, on the average, about 44 percent intrastate, over which the Commission now has no jurisdiction,[2] and about 56 percent interstate. The latter portion is transported under through rates with Alaska Steamship Co. (Alaska Steam), applying from and to Seattle-Tacoma (published in Tariff 45), which makes such transportation interstate in character, and therefore subject to the jurisdiction of the Commission.

River Lines makes connection at St. Michael with vessels of Alaska Steam three times a year, usually in late June, after breakup of the ice, in early August, and in early October, after which the freezeup occurs. Transfer of cargo is made directly from vessel to lighter. Alaska Steam's vessel is then loaded with canned and salt-cured salmon destined to Seattle, which has been collected by River Lines at commercial fishing villages on the Lower Yukon. Salmon constitutes the bulk of the outbound movement, its volume is about one-third of the volume of the inbound movement, and like the inbound cargo, is charged the Tariff 45 rates.

The cargo received by River Lines from Alaska Steam at St. Michael, consisting mainly of groceries, lumber, and freight, not otherwise specified, is sorted and restowed in barges. Some of its goes to nearby Stebbins on St. Michael Island; and some to Unalakleet on

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[2] The Commission, under the misapprehension that it had jurisdiction over local intrastate rates in Alaska, placed all of the rates of River Lines under investigation, and suspended four items in Tariff No. 2–K, FMC–F No. 53, which published increased rates on intrastate traffic between the port of St. Michael and destinations on the Lower Yukon, and between points on the Lower Yukon. The increases were to become effective June 15, 1964, and were suspended to Oct. 14, 1964. Upon motion of Hearing Counsel dated Oct. 30, 1964, the Commission, by order served Dec. 3, 1964, amended its order of investigation to confine the investigation to interstate traffic.

Norton Sound, 50 miles from St. Michael. But most of it goes to villages on the Lower Yukon. The Yukon has a north mouth and a south mouth. The barges enter the north mouth, under considerable difficulties due to tide conditions,[3] and proceed to Kotlik first and then to Hamilton, a distributing point. Barges destined to upriver points continue, in geographical sequence, to Mountain Village, Pitkas Point, Andreafski, St. Mary's, Pilot Station, Fortuna Ledge, and Marshall.

Cargo destined to downriver points on the south mouth is resorted and reloaded at Hamilton and delivered, in geographical sequence, to Kwiguk, Emmonak, Alakanuk, and Sheldon's Point (Saltery). Severe tides are encountered on the downward leg from Hamilton to Sheldon's Point.

The total river distance between St. Michael and Marshall, plus the diversion to the south mouth, is approximately 500 miles.

River Lines also receives cargo at St. Michael from the USMS *North Star III*, operated by the Bureau of Indian Affairs, and from bulk petroleum barges of the Standard Oil Co. This traffic is transported by River Lines in intrastate commerce.

Lastly, River Lines rents tugs and barges on a per-diem basis to contractors for moving their construction equipment from one job to another. It was testified that the tariff was not designed to cover such items and would produce excessive charges.

The patronage of River Lines on inbound cargo comes from the natives who receive small shipments of merchandise from Sears, Roebuck and Montgomery Ward, and groceries from commission houses in Seattle; from some 25 to 30 native traders; from the Government and Standard Oil Co.; and from six sizable shippers, including a Catholic Mission at St. Mary's, a trading company which competes with Northern Commercial, and from Northern Commercial itself, which supplies about 25 percent of the total traffic. Practically all of the cargo from Seattle destined for Kotlik, Hamilton, and Sheldon's Point (Saltery) is consigned to Northern Commercial which pays the tariff rate like other shippers.[4]

Respondent's income, profit, and loss. River Lines carried, in all of its operations—interstate and unregulated local and contract services—an average of 6,533 tons a year for the last 5 years (1959–64). During this period it lost $6,000. It lost money in 3 out of the 5 years, and in the 2 profitable years its rate of return was 7.8 percent in 1961–62, and 2.4 percent in 1963–64. In view of the Commission's holding that a return as high as 10 percent is reasonable in the Alaska trade

[3] Delay awaiting a favorable tide may amount to a week.

[4] Northern Commercial also has trading posts at Kwiguk and Emmonak. Usually, trading posts are operated by a man and wife team.

(*Alaska S.S. Co.—General Increase in Rates in the Peninsula, etc.* F.M.C. Docket No. 969, 1067, decided March 5, 1964) respondent's general rate structure cannot be found to be unjust or unreasonable.

From exhibits of record Hearing Counsel constructed an income statement, in accordance with Commission General Order 11, pertaining only to respondent's interstate traffic carried during 1963. This study reveals that in 1963 respondent carried 3,232.5 tons of interstate cargo, that it collected $93,431 in revenue thereon, and that it incurred expenses of $109,275 in carrying such traffic with a resulting loss of $15,844. Upon this basis it is found and concluded that respondent's interstate operations are unprofitable.

Respondent's rates. The general pattern of respondent's F-45 rates inbound is illustrated by those on "Freight n.o.s." per 100 pounds to the three port groups served as follows: $7.64 to Kotlik, Hamilton (60 miles from St. Michael); $7.89 to Pilot Station, etc. (163 miles); and $8.03 to Marshall (190 miles). The villages on the south mouth, i.e., Kwiguk to Sheldon's Point, are grouped with Marshall. These points are about as far distant by water-miles as Marshall, and the grouping appears to be justified by virtue of the small volume of cargo involved, and because of the strong tides encountered in delivering the cargo to these points. While the record does not afford a precise basis for determining a rate relationship between river destination based on cost of service, the evidence is clear that the traffic to such points as Kotlik and Hamilton, which is predominantly Northern Commercial's cargo, is bearing a significantly larger burden than shipments to other river points, based on the distances involved. The explanation given by River Line's traffic manager is that the consignees at the more distant points cannot bear further increases due to their substandard economic condition. Much of the cargo moving to such points consists of the necessities of life, and the inhabitants eke out a bare existence from fishing, longshoring, and relief checks from the State of Alaska.

Except on a few items, the rates of River Line have not been increased since May 1962, except to reflect a 10-percent increase which Alaska Steam added to its proportion of the through rate. This increase did not accrue to respondent but was made by it to preserve its existing portion of the through rate.

Respondent's outbound rates on salmon are promotional in nature, designed to foster salmon packing in the Lower Yukon area. As stated, Northern Commercial operates a salt-curing plant at Sheldon Point.[5] It hires fishermen, provides them with necessary equipment,

[5] It has not engaged in the cannery business since its plant at Kwiguk was destroyed by water in 1962.

and purchases their entire catch. The fishing industry provides a substantial part of the livelihood of the native population, which in turn contributes to the merchandising activities of Northern Commercial.

Findings and conclusions. Upon basis of the foregoing facts it is found and concluded that the rates, charges and practices of River Lines are not unjust, unreasonable, or otherwise unlawful.

(Signed) GUS O. BASHAM,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

No. 1201

APPLICATION FOR FREIGHT FORWARDING LICENSE

MORSE SHIPPING CO. (REBECCA RUTH MORSE, D/B/A)

149 MADISON AVENUE, NEW YORK, N.Y.

Application for license as independent freight forwarder granted on the condition that applicant move her office from the space occupied by a shipping company.

Applicant appeared *pro se.*

Robert J. Blackwell and *Thomas Christensen* appeared as hearing counsel.

INITIAL DECISION OF E. ROBERT SEAVER, PRESIDING EXAMINER [1]

Rebecca Ruth Morse, d/b/a Morse Shipping Co. (hereinafter called Morse) has applied to the Commission for a license as an independent freight forwarder in ocean commerce under Public Law 87–254; 46 U.S.C. 1245. Applicant has grandfather rights under the statute and is continuing in business pending action on her application.

The issue that led to the hearing is whether applicant's relationship with the shipping companies owned by Mr. Morse's brother is such that she is not an "independent" forwarder; that is, whether she controls or is controlled by a shipper. Section 1 of the Shipping Act, 1916 [2] and section 2 of Public Law 87–254 (which is sec. 44(a) of the 1916 Act) forbid the grant of a license to an applicant who is not "independent" from shippers or consignees in our foreign commerce. If a shipper uses an employee or someone else as a pretended forwarder—a mere "front"—brokerage paid by the carrier would place the shipper in a favored position over other shippers.

[1] This decision became the decision of the Commission on May 13, 1965 and an order was signed granting the application.

[2] "An 'independent ocean freight forwarder' is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indiectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest."

As will be seen, the agency staff had interviews and correspondence with applicant, pursuant to which applicant changed her operations in several respects in order to free and divest herself of any control by or over her brother's shipping companies. The staff was satisfied that this divestiture will meet the requirements of the statute except in the matter of her physically moving her offices out of the space occupied by her brother's enterprises.

Applicant has now made arrangements to relocate her office. Hearing counsel therefore urge that the license be granted subject to the applicant actually making this move by June 30, 1965. Thus all controversy between the parties has been eliminated. The examiner perceives of no reason to withhold the license, provided the applicant's office is relocated as planned.

Hearing counsel's requested findings of fact are fully supported by the record. They are concise and complete and are adopted here, with only the minor changes needed to place them in the context of an initial decision.

1. Morse's office is located on the premises of I. Freiberg & Son, Inc. (Freiberg) and Metropolitan Industries Trading Corp. (Metropolitan), 149 Madison Avenue, New York, who are sellers and shippers of used clothing, military surplus, electrical appliances, and other general commodities to the Middle East and Africa.

2. Both Freiberg and Metropolitan are owned and operated by Mr. Samuel Freiberg, Mrs. Morse's brother. Freiberg was founded by their father in 1914, was incorporated in 1943, and has been continuously in the same business since its inception. Metropolitan was founded by Mr. Freiberg in 1963.

Mr. Freiberg bought his father's share of Freiberg at market value approximately 1 year before the latter's death in 1957. Upon Mr. Freiberg's death, the business will go to his wife, and he has advised her to have it liquidated.

3. Morse began operation in 1948 and has acted as Freiberg's freight forwarder since that time. Morse has acted as Metropolitan's forwarder since it was founded in 1963. Prior to 1958, Morse forwarded exclusively for Freiberg; in that year Morse began forwarding for other exporters. Today Morse forwards for Freiberg, Metropolitan, and three other shippers. Ninety percent of Morse's present business is derived from Freiberg and Metropolitan, and of that 90 percent Freiberg supplies 60 percent and Metropolitan 40 percent.

4. Morse's office has always been on Freiberg's premise, accompanying it through a series of changes of location. Freiberg and Morse moved to their present location in 1963. Prior to 1963, Morse occupied its space rent-free; since then Morse has paid Freiberg $100 per month for the space it occupies.

5. Since 1963 Morse has charged all its shipper accounts, including Freiberg and Metropolitan, a $10 per shipment freight forwarding fee; prior to that time, Morse charged no shipper, including Freiberg, a freight forwarding fee. The forwarding fee covers the following services: Ascertaining rates, booking space, and preparing and processing export declarations, dock receipts, and bills of lading.

6. Morse has at all times collected, and retained for its own account, brokerage on shipments forwarded for its clients, including Freiberg and Metropolitan.

7. Morse earns approximately $2,500 per year in forwarding fees and $1,000 per year in brokerage. Approximately 85 percent of both amounts is derived from Freiberg and Metropolitan shipments. Mrs. Morse is not dependent upon that income for her livelihood; she is supported by her husband.

8. Pursuant to an oral agreement between Mrs. Morse's father and her brother, Samuel Freiberg, in 1946, began paying her $75 per week. The amount of the payments was increased in 1957 to $150 per week. The payments were a continuing gift, not contingent upon Mrs. Morse's performing any services for Freiberg. Had she discontinued forwarding for Freiberg, she would have continued to receive the payments. Mrs. Morse was carried on the Freiberg payroll solely for the purpose of receiving the payments. Since April 30, 1964, Freiberg has made no payments to Mrs. Morse and she is not longer on its payroll. Mrs. Morse now receives the equivalent of $150 per week from her brother's personal funds.

9. Mrs. Morse's husband was at one time vice president of Freiberg, but resigned on the advice of the Commission staff. He was, and is, otherwise employed and drew no compensation from Freiberg nor took part in its management. Peter Morse, one of Mrs. Morse's sons, is employed by Metropolitan. His duties include formulating CIF quotations on orders from overseas.

10. Morse has its own office equipment and has a telephone listing different from those of Freiberg and Metropolitan. Freiberg, Metropolitan, and Morse maintain separate books of accounts. Neither Freiberg nor Metropolitan have ever loaned money to Morse.

11. Mrs. Morse does not draw a regular salary; she withdraws money from the Morse account (hers is the only authorized signature) as she requires it, to support another son, Edward, in college, and to meet Morse's expenses.

12. Pursuant to discussion and correspondence with personnel of the Bureau of Domestic Regulation, Mrs. Morse has taken the following actions to disassociate herself from her brother's companies, according to her sworn statement sent to the Agency on January 13, 1965, and her testimony:

(*a*) Forego any salary or remuneration from her brother's companies other than compensation for forwarding services.

(*b*) Discontinue to utilize any employees of Freiberg in her operations or perform any services for these concerns other than freight forwarding.

(*c*) Pay no remuneration to Freiberg except office rental, and this only until she moves.

(*d*) Neither Mrs. Morse or her husband will be an officer, director, or stockholder in Freiberg or its affiliates.

(*e*) Morse expresses the intention to hold herself out to the shipping public as an independent ocean freight forwarder and actively solicit shipper clients in addition to Freiberg and its affiliates.

(*f*) Agrees to report any deviation from the foregoing to the Commission.

A disagreement or misunderstanding arose as to the date Morse would move her office space. The staff, on January 28, 1965, set a deadline for her to move prior to April 30, 1965, as there had been some evidence that she was stalling for time. She desires to have her office in the building where she is presently located. The management of the building advised her that suitable space will not be available until June 30, 1965, but they expect to have it available then. Because of a communications problem, the staff was not aware of this until the hearing.

In view of the circumstances, the delay in moving her offices from April 30, 1965, to June 30, 1965, does not seem unreasonable. Hearing counsel states that this probably would have been acceptable to the Commission staff had they known of the proposal.

None of the other aspects of applicant's operations and relationships, changed in accordance with her sworn statement, take her outside the definition of independent freight forwarder in section 1. The application will therefore be granted. The license will be subject to the condition subsequent, as urged by hearing counsel, that the removal of her office from the space occupied by Freiberg actually be accomplished by June 30, 1965.

(Signed) E. ROBERT SEAVER,
Presiding Examiner.

APRIL 20, 1965.

FEDERAL MARITIME COMMISSION

No. 921

River Plate and Brazil Conferences et al.[1]

v.

Lloyd Brasileiro (Patrimonio Nacional) and Moore-McCormack Lines, Inc.

No. 928

Agreement No. 8545 Between Lloyd Brasileiro (Patrimonio Nacional) and Moore-McCormack Lines, Inc.

Decided May 25, 1965

Agreement No. 8545 approved, subject to the deletion therefrom within 60 days, (a) of all references to commercial cargo, and (b) of Article 10 in its entirety, otherwise such approval to be null and void.

Elmer C. Madddy and *Baldvin Einarson* for certain complainants, *Bernard D. Atwood*, *Thomas K. Roche*, and *Sanford C. Miller* for certain other complainants, in No. 921.

W. B. Ewers and *Ira L. Ewers* for Moore-McCormack Lines, Inc., *Frank J. McConnell* for Lloyd Brasileiro (Patrimonio Nacional), respondents in both proceedings.

Donald Macleay and *Harold E. Mesirow* for Delta Steamship Lines, Inc., *Cyrus C. Guidry* for Board of Commissioners of the Port of New Orleans, and *Robert L. Shortle* for Mississippi Valley Association, interveners.

Norman D. Kline, hearing counsel.

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[1] The Booth Steamship Co., Ltd.; (Bordin Line) Joint Service of Rederiaktiebolaget Disa, Rederiaktiebolaget Poseidon; Angfartygsaktiebolaget Tirfing; Hamburg-Suedamerikanische Dampfschifffahrtsgesellschaft Eggert & Amsinck (Columbus Line); Dovar S. A. International Shipping & Trading Co. (Dovar Line); Van Nievelt, Goudriaan & Co.'s Stoomvaart Maatschappij N. V. (Holland Pan-American Line); (Ivaran Lines) Aktieselskapet Ivarans Rederi; Lamport & Holt Line, Ltd.; the Northern Pan-American Line, A/S; (Norton Line) Joint Service of Rederiaktiebolaget Svenska Lloyd, Stockholms Rederiaktiebolage Svea, Rederiaktiebolaget Fredrika; (Scansa Line) Rederiet Svend Hellesen; Dampskibsselskabet Torm (Torm Line). Dovar Line and Scansa Line were deleted as complainants at the hearings, having withdrawn from the trade since the filing of the complaint.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett and George H. Hearn, *Commissioners*)

These consolidated proceedings are before us on exceptions to the initial decision of Hearing Examiner C. W. Robinson.[2] The exceptions merely constitute a reargument of the same issues, allegations, and contentions considered by the examiner in his initial decision. After a careful review and consideration of the record in these proceedings, we conclude that the examiner's disposition of the issues herein was well founded and proper. Accordingly, we hereby adopt the examiner's decision (a copy of which is attached hereto and made a part hereof) as our own, and for the reasons set forth in the decision,[3]

It is ordered, That Agreement No. 8545 is approved subject to the following conditions:

1. That within sixty (60) days from the date hereof the parties to Agrement 8545 modify the agreement so as to,

(*a*) delete therefrom all references to commercial cargo, and

(*b*) delete therefrom article 10 in its entirety.

2. If the above modifications are not submitted within sixty (60) days hereof, the approval herein granted is null and void.

COMMISSIONER JOHN S. PATTERSON, CONCURRING SEPARATELY

I concur in the results reached in the foregoing report, but disassociate myself from the failure to do more about the application of section 15 to the facts. There were more than allegations that other agreements requiring approval had not been filed. There were facts indicating this to be a possibility, but more evidence will be needed to prove or disprove the case. Unless I am mistaken about the evidence, the respondents Moore-McCormack and Lloyd Brasileiro have as much to gain as anyone in removing the suspicion created by the allegations. I would either immediately remand this part of the proceeding to the examiner or institute a new investigation for the purpose of develop-

[2] Respondents filed no exceptions or replies to exceptions but during oral argument before the Commission, respondents took exception to that portion of the initial decision which would have modified the agreement to exclude therefrom "commercial cargo." While oral argument cannot take the place of written exceptions, in view of the Commission's decision in this docket, we will in this instance give the same consideration to respondents' oral argument as we would had they properly filed written exceptions and/or replies to exceptions.

[3] In taking this action we are not unmindful of the allegations that other agreements between respondents requiring approval under sec. 15 have not been filed with the Commission. Further consideration will be given to these allegations and appropriate action will be taken.

ing any additional evidence that might be available before this evidence gets stale. It is not enough to state in a footnote that "further consideration" will be given to the allegations and "appropriate action will be taken." Such a statement does not involve significant actions. In fairness to the public and to respondents, this matter should not be left unresolved through vague commitments to do something unspecified at an indefinite time later.

(Signed) THOMAS LISI,
Secretary.

Attachment.

FEDERAL MARITIME COMMISSION

No. 921

RIVER PLATE AND BRAZIL CONFERENCES ET AL.[1]

v.

LLOYD BRASILEIRO (PATRIMONIO NACIONAL) AND MOORE-MCCORMACK LINES, INC.

No. 928

AGREEMENT NO. 8545 BETWEEN LLOYD BRASILEIRO (PATRIMONIO NACIONAL) AND MOORE-MCCORMACK LINES, INC.

Agreement No. 8545 would be unjustly discriminatory and unfair as between complainants and respondents and would operate to the detriment of the commerce of the United States, within the meaning of section 15 of the Shipping Act, 1916, as amended, and would subject complainants and shippers of commercial cargo to undue and unreasonable disadvantage, in violation of section 16 of the Act. The agreement is disapproved, but if the parties thereto will delete therefrom all references to commercial cargo, as well as Article 10 thereof, the agreement will be approved.

Elmer C. Maddy and *Baldvin Einarson* for certain complainants, and *Bernard D. Atwood*, *Thomas K. Roche*, and *Sanford C. Miller* for certain other complainants, in No. 921.

W. B. Ewers and *Ira L. Ewers* for Moore-McCormack Lines, Inc., and *Frank J. McConnell* for Lloyd Brasileiro (Patrimonio Nacional) respondents in both proceedings.

Donald Macleay and *Harold E. Mesirow* for Delta Steamship Lines, Inc., *Cyrus C. Guidry* for Board of Commissioners of the Port of New

[1] The Booth Steamship Co., Ltd.; (Brodin Line) Joint Service of Rederiaktiebolaget Disa, Rederiaktiebolaget Poseidon; Angfartygsaktiebolaget Tirfing; Hamburg-Suedamerikanische Dampfschifffahrtsgesellschaft Eggert & Amsinck (Columbus Line); Dovar S. A. International Shipping & Trading Co. (Dovar Line); Van Nievelt, Goudriaan & Co.'s Stoomvaart Maatschappij N. V. (Holland Pan-American Line); (Ivaran Lines) Aktieselskapet Ivarans Rederi; Lamport & Holt Line, Ltd.; the Northern Pan-American Line, A/S; (Norton Line) Joint Service of Rederiaktiebolaget Svenska Lloyd, Stockholms Rederiaktiebolag Svea, Rederiaktiebolaget Fredrika; (Scansa Line) Rederiet Svend Hellesen; Dampskibsselskabet Torm (Torm Line). Dovar Line and Scansa Line were deleted as complainants at the hearing, having withdrawn from the trade since the filing of the complaint.

Orleans, and *Robert L. Shortle* for Mississippi Valley Association, interveners.

Norman D. Kline, hearing counsel.

INITIAL DECISION OF C. W. ROBINSON, PRESIDING EXAMINER [2]

Complainants in No. 921 are the conferences and certain of their members operating from U.S. ports (except the Pacific coast) and Canadian Atlantic ports to the east coast of South America. Respondents in both proceedings (Lloyd [3] and Mormac) are members of the conferences. The complaint alleges, in substance, that respondents' Agreement No. 8545 (dated Oct. 15, 1960), filed with the Commission for approval under section 15 of the Shipping Act, as amended (sec. 15 and the act), and providing (1) for the pooling of revenue on all cargo, with certain exceptions, carried by respondents from U.S. Atlantic ports to Brazil, and (2) for cooperation by them to assure that all cargo controlled by the Government of the United States and by the Government of Brazil, moving in the trade, will be carried by either respondent, is unjustly discriminatory and unfair as between complainants and respondents and detrimental to the commerce of the United States.

As further elaborated on brief, complainants allege that the agreement: (1) is not a true and complete copy of memorandum of the agreement between the parties because it fails to contain the understanding that the purpose of the agreement is to eliminate complainants from the trade; (2) fails to specify that articles 6, 7, and 10 (see hereafter) are designed to implement this purpose; (3) does not contain the parties' agreement to create a similar northbound pool; [4] (4) does not specify that it will be implemented prior to Commission approval—in fact, the major parts of the agreement already are in effect; (5) does not provide for the admission of other carriers; (6) by excluding complainant carriers from the trade, will reduce the frequency and regularity of service to both importers and exporters in the United States, since it is impractical for complainants to operate a northbound service once they have been excluded from the southbound trade, and upon elimination of complainants, the conferences will be effectively destroyed, thus ending their usefulness to American commerce in maintaining fair, reasonable, and stable rates and regularity of service; (7) enables the parties to divert cargo from the gulf coast to the Atlantic coast, thus operating to the detriment of commerce; and (8) has not been shown to serve the purposes of the act,

[2] This decision was adopted by the Commission May 25, 1965.

[3] Lloyd is owned by the Government of Brazil.

[4] This point was not pressed.

therefore representing an unnecessary invasion of the prohibitions of the antitrust laws and being contrary to the public interest.

No. 928 is an investigaton by the Commission to determine "(1) whether Agreement No. 8545, if approved, would be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters of the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, within the meaning of section 15 of the Shipping Act, 1916, as amended, and (2) whether Agreement No. 8545, if approved, would subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, in violation of section 16 First of said Act * * *." The order of investigation directs "that this proceeding be * * * consolidated with the proceeding in docket No. 921."

Mississippi Valley Association (Mississippi Valley) and the Board of Commissioners of the port of New Orleans (New Orleans) intervened in opposition to the agreement. Delta Steamship Lines, Inc. (Delta), an American-flag line operating between the gulf and Brazil, intervened as its interests might appear.[5]

Terms of the Agreement

The salient parts of the agreement are as follows:

Whereas: Lloyd and Mooremack are the national flag carriers of the two nations directly concerned in the carriage of cargo in this trade route and wish to establish just and economical cooperation in order to promote the commerce between such nations and to provide more efficient service for shippers, and,

Whereas: Equal participation in the freight revenues should be established in the carriage of cargoes as herein defined between the two nations.

* * * * * * *

ARTICLE 1. This agreement covers the apportioning of freight revenue of Lloyd and Mooremack on all cargo that they carry as hereinafter described, transported by the parties on owned or chartered vessels from any port or point on the Atlantic coast of the United States from Maine to Key West inclusive, and destined to any part or point in Brazil.

* * * * * * *

ARTICLE 2. Cargoes included in this agreement are:

Paragraph 1. All cargoes that they carry imported into Brazil transported as described in article 1, whether controlled and subsized, or commercial cargoes.

SECTION A. By controlled or subsidized cargoes it is understood to be those subject to any control by the Governments of the United States of Brazil or by the United States of America in regard to the routing of the respective carriage:

SECTION B. By commercial cargoes it is understood to be those not subject to any government control in regard to the routing of such cargo.

[5] The name of this company was Mississippi Shipping Co., Inc., at the time its petition to intervene was filed.

ARTICLE 3. Cargoes excluded from this agreement are:

Paragraph 1. Mail, bulk and low paying cargoes to be jointly designated in writing by the parties from time to time. A copy of such designation shall be submitted promptly to the Federal Maritime Board and to the Brazilian Maritime Commission.

Paragraph 2. Cargoes under title 1—Public Law 480—83d Congress.

Paragraph 3. Cargoes carried on the passenger ships SS *Argentina* and SS *Brasil* belonging to Mooremack, provided, however, that Brazilian subsidized cargoes carried on the said passenger ships are included. When Lloyd places passenger ships in this trade, this paragraph 3 will be reviewed.

ARTICLE 4. The gross freight revenues on all included cargoes shall be apportioned between the two carriers on the following basis:

Paragraph 1. Any excess in revenue by one carrier as compared to the other less carrying charges amounting to 50% of such excess will be apportioned and distributed between the lines in accordance with the following percentages:

50 percent to Lloyd.
50 percent to Mooremack.

* * * * * * *

ARTICLE 5. In order for the two lines to participate, on equal conditions, in the carriage of cargoes defined in Section A of Paragraph 1 of Article 2, the parties will do everything possible through appropriate channels with their respective Governments:

Paragraph 1. To assure that Mooremack carry those cargoes that cannot be carried by Lloyd.

Paragraph 2. To assure that Lloyd carry those cargoes that cannot be carried by Mooremack.

* * * * * * *

ARTICLE 6. Without hindering the consideration in Article 5, Paragraph 1, Lloyd may, at its option, subject to mutually agreeable conditions, charter vessels of Mooremack, in part or in whole * * *.

* * * * * * *

ARTICLE 7. In the event that Lloyd does not have available ships to adequately cover the berth, they may charter additional vessels regardless of flag. In the event that Mooremack does not have available ships to adequately cover the berth, they may charter additional vessels regardless of flag.

* * * * * * *

ARTICLE 9. Lloyd and Mooremack will do everything practicable to maintain a minimum number of sailings during each six (6) months period as follows:

Lloyd 15
Mooremack 24

or as otherwise mutually agreed in accordance with Article 9 hereof.

* * * * * * *

ARTICLE 10. The participating parties shall continue efficient and energetic solicitation of cargoes, following a rule of strict cooperation, but shall not offer any special concession for particularly favoring any one line or for any other objective, contrary to the rules and regulations of the freight conferences in effect at the time shipments move.

* * * * * * *

ARTICLE 12. Mooremack agrees not to promote nor sponsor the deviation of cargoes from the Atlantic coast ports of the United States of America to the Pacific coast ports of the United States of America.

THE FACTS

In appraising the agreement it is necessary to understand the atmosphere in which it was conceived. For some time prior to 1959 the Government of Brazil, through "instructions," regulated exchange and other matters connected with the economic development of the country. Although these instructions did not refer directly to shipping, much import cargo received preferential consideration thereunder and moved on Lloyd's vessels; some was carried in chartered vessels. Under Instruction No. 113 of the Brazilian Legislature (the date thereof does not appear of record, but it became effective no later than 1958), American-flag vessels did not have the same opportunity of sharing Brazilian Government-controlled cargo as the Brazilian Government did (and continues to do) in the case of American Government-controlled cargo.[6]

At the request of American officials, Brazilian officials came to the United States in 1958 to explain the meaning of Instruction No. 113. This was followed by SUMOC Instruction No. 181,[7] published in the Brazilian Official Diary on April 22, 1959, which stated, among other things, that "the principle that merchandise imported with exchange subsidies, including those not dependent on bidding in auction, be transported by vessels bearing the Brazilian flag is maintained, for this purpose those ships freighted or leased to national companies also being included * * *" (a translation). American-flag vessels were free to compete for noncontrolled cargo. Brazilian Decree No. 47.225, of November 12, 1959, provided that the transportation of imported cargo with the benefit of any government favors or official credit establishments must move on Brazilian-flag vessels unless they are unable to carry it; vessels chartered by Brazilian firms are considered as vessels of Brazilian flag.

There being dissatisfaction in this country with Instruction No. 113, negotiations were conducted between officials of the two countries and also by representatives of American-flag lines in an effort to work out a solution, particularly as it was difficult to determine whether some

[6] Under Public Resolution No. 17, 73d Cong., approved Mar. 26, 1935, cargo which is financed by a lending agency of the Government, such as the Export-Import Bank, must move on American-flag vessels. By statement of policy adopted by the Maritime Administration on July 24, 1959, the Maritime Administration may grant a waiver to national-flag vessels of the recipient nation to carry up to 50 percent of such cargo. Public Law 664, 83d Cong., approved Aug. 26, 1954, provides that at least 50 percent of cargoes moving under Government account or credits must move on American-flag vessels, but this requirement may be waived under the circumstances enumerated therein.

[7] "SUMOC" is a grouping of letters denoting Superintendency of Money and Credit, an agency of the Brazilian Government.

imports were American Government-controlled or actually controlled by the Brazilian Government under SUMOC 181. Pending clarification of SUMOC 181, waivers on American Government-controlled cargoes were held up. The position of Mormac, the only American-flag carrier in the trade, was that Brazilian officials should grant waivers to American-flag vessels in the same manner as the United States granted waivers to Brazilian-flag vessels on Brazilian-controlled cargoes, and it feels that Mormac and Lloyd each should be entitled to 50 percent of the controlled cargo in this trade. On May 21, 1962, in its Bulletin No. 341 (Resolution No. 2216), the Merchant Marine Commission of Brazil declared as follows (a translation):

The transportation of commodities referred in the decree No. 47.225, of November 12, 1959, always when coming from the United States of America will be made in accordance with the following order of priority:

(*a*) By vessels of Brazilian flag.

(*b*) By vessels of American flag when referring to cargoes whose transportation can not be made by vessels of Brazilian flag and

(*c*) By vessels of other flags when referring to cargoes whose transportation can not be made by the National Lines, Brazilian and American.

* * * * * * *

* * * the Lloyd Brasileiro * * * will indicate to the Merchant Marine Commission expressly the name of the navigation line in favor of which should be liberated the cargo, obeyed always the order of the reciprocity established.[8]

Although forced to live with this concession, the American-flag lines have not been happy about it. It had long been the intention of Mormac officials "to carry on discussions with our counterparts in Brazil which could very well have led up to a pooling agreement. There is no hesitancy on our part to point this out" (Mormac's executive vice president). The company holds the door open for admission of other lines to the agreement, but no direct discussions have been had with any but Delta. The agreement itself contains no specific provision for the admittance of a third-flag line[9] since, in Mormac's view, it is "an equal-access type of agreement, to give American-flag lines equal access to Brazilian-controlled cargoes, to give the Lloyd Brasileiro, the Brazilian-flag line equal access to American-controlled cargoes." A pool was suggested by Mormac as a possible means of solving the difficulties created by SUMOC 181 and lessening the effect of it on Mormac's cargo. This purpose was conveyed to Brazilian officials. Although commercial cargo may move on the vessel of any flag in the trade, this type of cargo was included in the agreement at the request of Lloyd even though Mormac did not particularly want it. As Mormac was faced with the possibility of future Brazilian decrees that might affect

[8] The Merchant Marine Commission actually grants the waiver.

[9] One which serves the areas under consideration but operates under another flag.

commercial cargo for all carriers, the company thought it best to include such cargo in the agreement.

Between 1958 and 1963, Lloyd and Mormac carryings averaged about 19 percent of the total volume in the trade. If bulk coal and coke are excluded (these commodities constitute a large part of the total—80 percent in 1963), the average would be about 67 percent (76 percent in 1963). In the same period, United States- and Brazil-controlled cargoes carried by Mormac averaged about 3 percent of the total (about 11 percent if coal and coke are excluded). Revenue from cargo which would have been subject to the pool, between 1958 and 1963, was estimated by Mormac as about $81,500,000. Of this, Mormac was the overcarrier to the extent of about $625,000. Deducting half of this as expenses, in accordance with the formula in the agreement, leaves Mormac the overcarrier to about $312,500. Half of this, or about $156,250, would have been payable to Lloyd.

Mormac's percentage of total carryings, excluding coal and coke, has increased steadily, and amounted to 57 percent in 1963. Conversely, Lloyd's total has decreased considerably since 1960, and amounted to only 19 percent in 1963. The volume of cargo out of the North Atlantic which is controlled by the United States and Brazil is about one-third of the total.

Opposition to the Agreement

Ivaran Line. This complainant, operating four owned vessels under the Norwegian flag, has been in the United States/Brazil trade for 26 years, which is longer than any other line except Lloyd, and has been a member of the conferences from the beginning. It has a fortnightly service and has been carrying commercial as well as Brazilian Government owned or controlled cargo; the latter presumably comes to it when neither Lloyd nor Mormac can carry it, and is considered important to the company. Bulk oil, coal, and coke, and woodpulp are included in its carryings under SUMOC 181, which has not stood in its way.

Ivaran operates between the United States and the east coast of South America only, and unless it obtains southbound cargo it cannot remain in business. About two-thirds of its southbound payable tons in 1962 were destined to Uruguay and Argentina. Approval of the agreement would remove any reason for the company staying in the conferences, although the agent would not necessarily advise its principals to withdraw therefrom. As an independent operator, it would attempt to offer to shippers in both the United States and Brazil something not offered by the conferences, including lower rates.

The combined sailings of Lloyd and Mormac under the agreement would create a trend toward monopoly, and would choke off a small company like Ivaran. The avowed purpose of the parties to the agree-

ment is to share cargo, share solicitation, and make every effort with their governments to such end, and their combined sailings probably would be sufficient to carry all the cargo in the trade.[10] This would not be an advantage to either the American shipper or the Brazilian importer. As a direct result of approval of the agreement, there possibly would be only four conference lines left in the trade. Although Lloyd and Mormac would not be able to control commercial cargo entirely as a matter of government edict, the pressure of "the tremendous cartel" would influence such cargoes away from Ivaran, for if a shipper supplying subsidized, controlled Brazilian cargo also has commercial cargo, it is natural and sensible for him to look from whence his main business comes. Whenever a waiver has been granted to Ivaran it has been because of a little pressure by a shipper who has dealt with the company and finds the vessel convenient.

The agreement gives Mormac no more access to Brazilian-controlled cargo than it already has under SUMOC 181 and Bulletin No. 341, but in soliciting and obtaining commercial cargo the parties to the agreement are in a favorable position as to cargo which otherwise would be available to Ivaran, possibly resulting in the shutting off of the small amount of controlled cargo Ivaran has been getting. Under the pool, Mormac would make an additional effort to carry more Brazilian cargo, and there would be more resistance to the granting of waivers to other lines. There is an incentive to charter a ship for cargoes that otherwise might have to be waived in favor of a third line.

Removal of article 10 of the agreement, which provides for "efficient and energetic solicitation of cargoes," would not do away entirely with Ivaran's objection to the agreement. On the other hand, it probably would be removed if the article were construed as independent, energetic solicitation on a comparative basis, recognizing each party's interest. Pooling the fleets will produce a tremendous weight, whether by joint solicitation or cooperative solicitation. The parties will cooperate jointly beyond the terms and scope of SUMOC 181.

Columbus Line. This complainant, which is the United States/Brazil operating unit of complainant Hamburg-Sued (popular name), employs German-flag vessels and entered the trade in 1957, but had been trading there prior to World War I. It averages a little over three sailings a month and serves the same general areas as Mormac. The company has not carried any SUMOC 181 cargo since 1963, but it believes that if the agreement is approved, and as long as SUMOC 181 is in effect, it probably will not lift any Brazil-controlled cargo. It has the same fears as Ivaran about the future of commercial cargo in the trade if the agreement is approved. If the company were in

[10] By virtue of the agreement, Lloyd would increase its annual sailings out of Atlantic ports by 12.

a pool similar to No. 8545, its freight solicitors would be instructed to turn cargo over to its partner in case the company itself could not accommodate it.

The agreement would result in such strength to the parties as to make competition by Columbus Line a negligible factor. The 70 sailings proposed by the agreement would be sufficient for all cargo moving in the trade. There are no present thoughts as to whether the company should withdraw from the conference if the agreement is approved, although the agent would prefer not to do so.

Cocoa Merchants Association of America. The association is composed of all importers in the United States of cocoa beans and cocoa products. Lloyd and Mormac are the principal carriers of Brazilian cocoa, and it is assumed that under the agreement the two lines would carry a larger share of general cargo, hence, if complainants are excluded from the trade, it would result necessarily in a decrease in the number of sailings *from* Brazil *to* the United States. The association opposes the agreement to the extent it would decrease the frequency and regularity of service to importers. Decreased service *northbound* could result in more frequent warehousing of cocoa beans and products, increased financing charges, and possibly demurrage. The present service is satisfactory to the association, but the proposed pool has the danger of becoming monopolistic.

Mississippi Valley. Principally because of the wording of article 12, the agreement would be unjustly discriminatory and prejudicial to Mississippi Valley and gulf ports, in that Atlantic ports are protected against deviation of traffic from the Pacific coast but no protection is provided for the gulf. As a consequence, there is the possibility of diverting cargo from normal trade channels through the gulf. The equalization of South Atlantic and gulf rates from interior points makes solicitation very important. Article 12 makes deviation "more of a bugbear" than under the old differential rates to the South Atlantic and the gulf. Diversion to Atlantic ports would mean a curtailment of rail, truck, and barge facilities in the valley, and would work a hardship on them and their shippers. Shippers would be required to pay higher rates by using Atlantic ports. If the agreement is approved, there should be safeguards for the gulf. It would be satisfactory if there were a provision not to promote or sponsor the deviation of cargoes from gulf ports to Atlantic ports.

New Orleans. It adopts the position of Delta (see hereafter) and Mississippi Valley. From certain areas in the midwest the rail rates are differentially lower to New Orleans than to Atlantic ports, which makes those areas naturally tributary to New Orleans. While it is conceded that it is not the purpose of the parties to the agreement to divert cargo from New Orleans to Atlantic ports, it is inevitable that

Lloyd will grant waivers only to Mormac on controlled cargo. The concerted efforts of the parties as to commercial cargo will divert such cargo in the same manner. The agreement permits a diversion of traffic and territories by withholding waivers to all lines except Mormac and Lloyd, thus eliminating the gulf lines. Where the differential of the inland rate to New Orleans is small, exporters shipping in volume could effect substantial savings in inland freight charges if waivers could be granted to Delta, without violating either the "cooperation" or other parts of the agreement, or without violating the financial interest of Lloyd by its sharing in the pool.

Delta. Delta has no objection to pooling agreements as such, does not believe that No. 8545 was conceived for the purpose of injuring Delta and the commerce of the gulf ports, and does not doubt the sincerity of the testimony by Mormac that there is no present intention of diverting cargoes from the gulf. As written, however, the agreement affords both the opportunity and the incentive for an intensification of that competition, and Delta is convinced that it will be an inevitable result of the agreement. Mormac admits that article 10 "boils down to soliciting for each other", and Lloyd expressed the intent of following the same pattern of solicitation. The agreement would have a detrimental effect upon the commerce of the gulf ports and its shippers who are dependent upon service through those ports.

From certain midwest areas there are economic factors which serve to offset the modest rate advantage to the gulf: service, point of origin, storage facilities. There are some commodities produced at or near the gulf and South Atlantic, often by the same producers. Of the 55 principal commodities moving via Delta to Brazil, the majority also move via Atlantic ports. This traffic is vital to Delta if it is to continue to provide adequate service in an economical and efficient manner. Over 50 percent of the 1963 traffic moving via Delta could have gone via gulf or Atlantic ports. Delta handled a minimum of 32 percent of *all* controlled cargo to Brazil out of the gulf in 1960, 10 percent in 1961, 43 percent in 1962, and 69 percent in 1963. These volumes represent 34 percent, 17 percent, 40 percent, and 60 percent, respectively, of Delta's total revenue from carryings to Brazil.[11] Because it serves the Atlantic as well as the gulf, Lloyd normally does not influence traffic to one coast or the other. The agreement would provide each party with added incentive to influence, to the extent of its ability, all such traffic through the Atlantic where each would stand to benefit from the pool.

[11] If consideration be confined to cargo controlled by Brazil alone, the percentages were 7 in 1960, 8 in 1961, 4 in 1962, and 4 in 1963. The volume in 1962 and 1963 represents 2 and 3 percent, respectively, of Delta's total revenue from carryings to Brazil.

Although the cooperation provided for in article 5 relates to controlled cargo, it would be less than human, by virtue of the nature of the agreement, if the parties did not make every effort to influence those commercial cargoes which they cannot themselves obtain, to move through Atlantic ports in order to share in the proceeds. The situation is compounded as to controlled cargo, where there would be incentive for Brazil to arrange routings in such fashion that those which Lloyd could not satisfactorily handle would move through Atlantic ports via Mormac, in order for Lloyd to share in the proceeds. This could be done by routing instructions to midwest suppliers, by placing orders with strategically located suppliers in the coastal areas, or by letter of credit claused to read "Ship via Lloyd or Moore-McCormack". Chartering could influence cargo away from a normal area onto vessels of the partners.

Delta does not want to stand in the way of the parties as far as concerns traffic naturally tributary to the Atlantic, but the Commission should assure safeguards for gulf interests. It is the fear of what the agreement might bring about that makes Delta apprehensive.[12]

DISCUSSION AND CONCLUSIONS

The two issues of main concern are the inclusion in the agreement of commercial cargo and the possibility of diversion through Atlantic ports of cargo which might normally be expected to move through the gulf. These will be treated first.

Commercial cargo. Article 2 specifically draws commercial cargo within the ambit of the agreement; article 5 states that "the parties will do everything possible through appropriate channels with their respective Governments" to assure that one will carry the cargo if the other cannot; and article 10 ensures that "the participating parties shall continue efficient and energetic solicitation of cargoes, following a rule of strict cooperation." As seen, the two complaining third-flag lines mentioned earlier are afraid that Lloyd and Mormac will gather unto themselves so much of the commercial cargo that complainants will not be able to stay in the trade. They do not quarrel with the right of nations to control the routing of noncommercial cargo. Since about 65 percent of the total traffic in the trade is commercial, the third-flag lines have a large stake in it. One would be naive indeed to believe, under the circumstances here present, that Lloyd and Mormac would not do everything legitimately possible, and using

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[12] Although Delta's witness had no thoughts as to the type of safeguards that are needed, it is suggested on brief, "after much careful thought," that Delta should be included in the pool or that there be a "concurrent establishment of a parallel southbound pool between Delta Line and Lloyd on their gulf operations."

large and experienced sales staffs, to insure the routing of commercial cargo via the other when one is not able to accommodate it. In fact, this need not be left to surmise, for the witnesses for both Lloyd and Mormac confirm it.

As already seen, the overall percentage of cargo carried by Lloyd and Mormac in recent years has risen, at the concomitant expense of the third-flag lines. If Lloyd and Mormac are permitted to further this increase by soliciting commercial cargo for each other—not as technical agents for each other but as well-organized partners—it is not hard to visualize what could happen to the third-flag lines. Shippers of controlled cargo, if astute, or from indirect prodding, would more than likely route their commercial cargo as well via Lloyd and Mormac. With Lloyd's stepped-up service called for by the agreement, Lloyd and Mormac probably would have sufficient sailings between them to handle most if not all of the commercial cargo, in which case the services of the third-flag lines might be lessened or even completely abandoned. An agreement permitting such a monopoly, in the absence of a compelling reason therefor, would be against the public interest, would be unjustly discriminatory and unfair as between complainants and respondents, and would operate to the detriment of the commerce of the United States, within the meaning of section 15 of the act. No such compelling reason appears on this record. Under the circumstances, complainants and shippers of commercial cargo would be subject as well to undue and unreasonable disadvantage, in violation of section 16 of the act.

Diversion of cargo. With the elimination of commercial cargo from the scope of the agreement, the issue of diversion of cargo from the gulf to the Atlantic assumes less importance. As the volume of Brazilian-controlled cargo is much larger than that of American-controlled cargo (428,568 tons as compared with 134,813 tons between 1958 and 1961), the routing of this type of cargo already can be dictated without the help of the agreement, and other things being equal, it is more than likely that such cargo which could or might move equally well via the gulf or the Atlantic would be steered to the Atlantic, where Lloyd has many more sailings that it does from the gulf. Lloyd also has a priority position for American-controlled cargo that can move out of the Atlantic or the gulf. As previously seen, interveners concede that it is not the purpose of the agreement to divert cargoes from the gulf; Lloyd normally does not influence traffic to one coast or the other; and Delta's interest in Brazilian-controlled cargo was only about 4 percent in 1962 and 1963, and its revenues therefrom were only 2 percent in 1962 and 3 percent in 1963 of its total revenues from cargo to Brazil. The gulf still retains inland rate advantages.

It is problematical at best whether, under the agreement, the gulf would be deprived of any more Brazilian-controlled cargo than in the past. To insure itself against possible loss of revenue, however, Delta could negotiate a pooling agreement with Lloyd along the same general lines as the one here under consideration. The matter already has been discussed by them, the desire for such a pool was expressed by their witnesses, and the proper division of revenue seems to be the principal obstacle in the way of an agreement. The Commission cannot order Lloyd to enter into such an agreement, as is requested by Delta. Furthermore, there is no rational basis in this record upon which the Commission should order that Delta be included as a party to Agreement No. 8545, assuming, but not deciding, that the Commission has such authority.

Need for the agreement. Under section 15, the Commission must approve an agreement if it does not violate the act or if it is not in contravention of that section. With the elimination of those parts of the present agreement pertaining to commercial cargo, the possibility of monopoly disappears. Although it is true that the agreement, as it concerns controlled cargo, does no more, in essence, than does Bulletin No. 341, it permits Mormac to share in the revenue from Brazilian-controlled cargo moving on Brazilian-controlled vessels.

As appears earlier, the situation in the trade, prior to 1960, was rapidly worsening, and had changed from the competitive carrier level to the level of conflict between Brazil and the United States. Brazilian Embassy Note No. 162/685 (42) (22), dated May 19, 1964, a copy of which was transmitted by the Department of State to the Commission and made a part of the record herein upon offer by counsel for Lloyd, sets forth the background of the matters here under consideration. Therein it is stated that "Agreement No. 8545 will give added meaning to this parity [between American- and Brazilian-flag vessels flowing from Bulletin No. 341] by avoiding differences between the Government of Brazil and the United States resulting from conflicting legislation which in the past also accounted for friction between the national carriers of the two countries." The document verifies that No. 341 was promulgated "primarily as a result of the signature of Agreement No. 8545 and its approval by Brazil." It is further stated that "Agreement No. 8545 is consonant with the Brazilian Government's policy of primary cooperation with reciprocal vessels in all parts of the world. This policy recognizes the undeniable fact that trade is of primary interest to the two countries directly concerned and, in the view of the Brazilian authorities, said policy constitutes the only solid ground for the establishment of an overall stable and fair shipping policy."

Although the foregoing document was accepted merely as a statement of the position of the Government of Brazil and did not constitute evidence in the strict sense of the word, the excerpts therefrom substantiate the testimony to the same effect of the witness for Lloyd and Mormac. Furthermore, Lloyd's witness is fearful of what may happen in the trade if the Commission does not approve the agreement, and he states that there still may be many difficulties ahead. He concludes that Mormac handled a difficult situation in a very intelligent manner.

Unapproved agreements. Complainants argue that Lloyd and Mormac entered into the following agreements which have not been filed for approval: (1) that Lloyd would not charter third-flag vessels for use in the trade; (2) that Lloyd would waive to Mormac any controlled cargo which Lloyd cannot carry; and (3) that the parties would cooperate to eliminate third-flag carriers in the trade. The gravamen of the complaint and the purpose of the investigation, however, is to determine the lawfulness of the agreement itself, as written and now before the Commission for approval. If the Commission should see fit to do so, it can, in a proper proceeding, inquire into the alleged unfiled agreements. No discussion of them will be had in this initial decision.

Admission of other carriers. As already alluded to, the agreement has no provision for admission of other carriers. This does not, in itself, result in unjust or unfair discrimination. *Alcoa S.S. Co. Inc.* v. *Cia. Anonima Venezolana*, 7 F.M.C. 345 (1962). Third-flag carriers cannot be of the same value to Lloyd as can Mormac, under the policies of Public Resolution No. 17. Under any circumstances, the admission of other carriers ceases to be of concern when the provisions as to commercial cargo are removed from the agreement.

ULTIMATE CONCLUSIONS

Agreement No. 8545 would be unjustly discriminatory and unfair as between complainants and respondents and would operate to the detriment of the commerce of the United States, within the meaning of section 15 of the act, and would subject complainants and shippers of commercial cargo to undue and unreasonable disadvantage, in violation of section 16 of the act. The agreement is disapproved, but if the parties thereto will delete therefrom all references to commercial cargo, as well as article 10 thereof, the agreement will be approved.

C. W. ROBINSON,
Presiding Examiner.

AUGUST 5, 1964.

FEDERAL MARITIME COMMISSION

No. 1196

APPLICATION FOR FREIGHT FORWARDING LICENSE DEL MAR SHIPPING CORPORATION, 354 SOUTH SPRING STREET, LOS ANGELES, CALIFORNIA

An incorporated freight forwarder which has 50 percent of its stock owned by a shipper in the foreign commerce of the United States, is not an independent ocean freight forwarder, notwithstanding the intention of the forwarder not to permit the shipper to exercise control over the forwarder, and notwithstanding the intention of the shipper not to exercise any control over the forwarder. Application for freight forwarding license denied, but effective date of denial postponed to allow time for divestiture by shipper of control of forwarder.

Arthur J. Banuelos and *Robert Waldeck* for respondent.

M. J. McCarthy for the Pacific Coast Customs & Freight Brokers Association, intervener.

Robert J. Blackwell and *Thomas Christensen* as Hearing Counsel.

INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER [1]

The Del Mar Shipping Corp. (Del Mar) timely filed [2] its application for a license as an independent ocean freight forwarder pursuant to section 44 of the Shipping Act, 1916, as amended (the Act). Del Mar was advised by the Commission that it intended to deny the application because an exporter in the foreign commerce of the United States, Overseas Operations, Inc., was owned by Mr. Robert L. Waldeck (Waldeck), who also was a stockholder and officer of Del Mar. The Commission further advised Del Mar that it could request the opportunity to show at a hearing that denial of the application would not be warranted. Del Mar made this request, and this proceeding was

[1] This decision became the decision of the Commission on June 3, 1965, and an order was issued denying the application.

[2] The application under Public Law 87-254 was filed originally under the name of Del Mar Shipping Co., a corporation, on January 17, 1962, within the statutory period. By amended application in November, 1962, the name of the applicant was changed to Del Mar Shipping Corp.

instituted on August 12, 1964. The Commission's order designated Del Mar as the respondent. Hearing was held in Los Angeles, California, on November 19, 1964.

The Pacific Coast Customs and Freight Brokers Association intervened. This intervener and Hearing Counsel oppose granting the application. No question was raised as to the fitness, willingness, and ability of the president of Del Mar to carry on the business of forwarding.

The issue in this proceeding is whether the respondent Del Mar is an *independent* ocean freight forwarder, which is defined in the Act as "a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest." More specifically, the issue herein is whether Del Mar is controlled by a shipper in the foreign commerce of the United States. Or, does Waldeck, the owner of Overseas Operations, Inc., control Del Mar?

In July, 1950, Overseas Operations, Ltd., a partnership composed of Waldeck and his wife applied for and received a certificate of registration as a freight forwarder from the Federal Maritime Board. Overseas Operations, Ltd. primarily was an exporter, but also had operated as a freight forwarder since 1948. In October, 1955, it was decided that these two functions should be handled by two separate companies, and accordingly steps were taken so that the original freight forwarder certificate of registration was cancelled, and it was reissued in the name of Overseas Freight Forwarders, Ltd., another partnership of Waldeck and his wife.

It developed that the name, Overseas Freight Forwarders, Ltd., and another proposed name both were confusingly similar to names of other freight forwarders, so as a result, an application was made in November, 1955, to change the name of the forwarding company to Del Mar Shipping Co., which again was listed as a partnership of Waldeck and his wife. A registration certificate was issued in December 1955, in the last name. In actuality Waldeck considered the freight-forwarder partnership to consist of himself and Mr. Arthur J. Banuelos (Banuelos) instead of Mrs. Waldeck, but she and Waldeck were listed because their credit rating was higher than that of Banuelos.

In January, 1962, the respondent filed its application for a license as an independent ocean freight forwarder, showing that Del Mar Shipping Co. was organized as a corporation on March 10, 1961, with

Banuelos, its president, as one of the two stockholders, and Waldeck, its secretary-treasurer, as the other stockholder.

Banuelos first was employed by Overseas Operations, Inc., in July, 1952, as its shipping manager when this export company was growing steadily and had need for a full-time shipping manager. Both Waldeck and Banuelos were well acquainted with exporters in Los Angeles, and as time went on many exporters requested that Banuelos handle the freight-forwarding of their shipments. Because of this volume of forwarding for "outside" firms, it became apparent to Waldeck and Banuelos that there was room in Los Angeles for another freight-forwarding company.

In November, 1955, as seen, Banuelos and Waldeck became partners in the freight forwarding company, Del Mar Shipping Co. From the beginning of this forwarding company, Waldeck and Banuelos understood that it (Del Mar) was jointly owned by Waldeck and Banuelos. Waldeck furnished the financial backing, and Mr. Banuelos provided the freight-forwarding know-how, and the effort needed to run Del Mar. From that beginning, Del Mar functioned entirely separately from Overseas Operations. Del Mar had its own offices, although in the same building, and had its own personnel under the sole direction of Banuelos. Del Mar has grown steadily, realizing a gross income for 1963 of about $80,000. It has six employees in Los Angeles and three in San Francisco. Del Mar has an excellent reputation in the business community.

Del Mar performs the same freight-forwarding services and charges the same freight-forwarding fees in connection with all of its more than 100 freight-forwarding accounts, including the Overseas Operations' account. During the last 4 months of 1963, Del Mar received total freight-forwarding fees of $13,580.69, including $1,631.53 or 12 percent from Overseas Operations, Inc. During the same 4-month period Del Mar earned total freight brokerage of $10,190.20, including $450.50 or 4.4 percent on shipments of Overseas Operations, Inc. During the same period, Del Mar's total income was $28,801.24, including $2,081.98 or 7.2 percent on shipments of Overseas Operations, Inc.

Del Mar has not paid and intends never to pay any rebate of any kind to anyone with whom it does business.

Waldeck generally has not taken any part in the management of the affairs of Del Mar, except for minimum or nominal duties as its secretary-treasurer. Waldeck was consulted on the location of a branch office of Del Mar. Banuelos has had nothing to do with the operation or management of Overseas Operations, Inc., since November 1955. Waldeck is kept busy attending to the affairs of Overseas

Operations, Inc., and he intends to take no part in the management of Del Mar. He intends not to control Del Mar in any fashion. Banuelos intends not to permit any control of Del Mar by Waldeck or by Overseas Operations, Inc.

Waldeck originally provided the entire capitalization of Del Mar when it was a partnership with his investment amounting to around $11,000 or $12,000. When Del Mar became a corporation, Banuelos purchased 40 percent of the stock for $4,000. He later purchased an additional 10 percent of the stock from Waldeck, so that Banuelos and Waldeck each now own 50 percent of the stock. The two men orally agreed at the time of the incorporation of Del Mar that Banuelos would in time purchase all of the stock when Banuelos found it convenient to do so. Besides Waldeck's stock ownership of $5,000, the corporation presently has unsecured notes payable to Waldeck of about $12,000 at 6 percent interest. This loan goes up and down from time to time, as does Del Mar's needs for cash used to make freight advances for its shippers in accordance with the practices generally prevailing at the port of Los Angeles.

Del Mar has shown only a nominal or modest profit each year of its existence, with the only good profit in 1964. The profits have been retained in the business, and not paid out as dividends. Del Mar, itself, is not a shipper, consignee, seller, or purchaser of goods. It has no beneficial interest in the shipments which it forwards.

Del Mar pays Waldeck $100 a month for his services as secretary-treasurer. He works on profit and loss statements at the end of the year, and on taxes. While Del Mar has a full-time bookkeeper, Waldeck set up the books and he makes a quarterly review of them. Del Mar's ability to advance ocean freight money to the carriers in part has depended upon the loans from Waldeck.

Waldeck's interest in Del Mar is as an investor. Eventually, for overseeing Del Mar's books, Mr. Weldeck would like to take more than the $100 a month, which he has received for about the last 3 years, and before which he took nothing. Waldeck will not take any moneys from Del Mar which would not permit it to remain a sound business. His primary interest and business is with Overseas Operations, Inc., which pays him well and takes almost 100 percent of his time. This company assumes title to the goods which it sells overseas. It is export manager for 12 manufacturers in Southern California.

Respondent emphatically denies that Del Mar was intended to be, or is, a so-called "dummy forwarder" formed for the express purpose of permitting a shipper to receive or recover unlawful rebates. Del

Mar was formed not as a convenience to Overseas Operations, Inc., but as a benefit to Banuelos.

In determining the applicable law, the principal fact herein is that Waldeck, the owner of an exporting firm, owns 50 percent of the stock of the respondent freight-forwarder. As owner of 50 percent of the stock Waldeck is in a position where he might exercise control over the forwarder. His intention not to exercise control and the intention of Banuelos not to let Waldeck exercise control are immaterial. See *Application for Freight Forwarder License—Wm. V. Cady*, — F.M.C. —, order served December 23, 1964. Accordingly, it is concluded and found that respondent is not an independent ocean freight forwarder. The application should be denied.

Nevertheless, bearing in mind that the Commission exercises continuing jurisdiction over the licensing of forwarders, and that it could suspend or terminate an existing license after appropriate notice and hearing, it is concluded and found also, that fairness to the respondent requires that any denial order herein be postponed for a reasonable period, such as 90 days beyond the time when exceptions are filed. This time could provide an opportunity for Waldeck to dispose of his stock in Del Mar and to effect divestiture of his control over Del Mar. Such divestiture presumably could result in the granting of Del Mar's application and the saving of the jobs of its nine employees, thereby preserving a freight-forwarding firm that has been in existence for a number of years prior to enactment of the present law.

If respondent does not certify that steps are being taken to effect divestiture of control as above, an order will be entered denying respondent's application.

(Signed) CHARLES E. MORGAN,
Presiding Examiner.

April 21, 1965.

FEDERAL MARITIME COMMISSION

Docket No. 901

GENERAL INCREASES IN RATES PACIFIC-ATLANTIC/GUAM TRADE

Decided June 8, 1965

Allocation of administrative and general expense and allowance for working capital made previously in this proceeding affirmed upon remand.

Eugene L. Stewart, for the Government of Guam.
Mark P. Schlefer, for Pacific Far East Line, Inc.
William Jarrel Smith, Hearing Counsel.

REPORT ON REMAND

BY THE COMMISSION: (JOHN HARLLEE, *Chairman;* ASHTON C. BARRETT AND JOHN S. PATTERSON, *Commissioners.*)**

On January 23, 1964, the United States Court of Appeals for the District of Columbia Circuit remanded this case to the Commission in order that the Commission might state its findings and conclusions on two issues. In all other respects, the Court of Appeals affirmed our previous Report and Order entered in this proceeding. The two issues remanded are (1) our allocation of administrative and general expense to the Guam trade, and (2) the inclusion of working capital as an item in the rate base. These issues will be discussed *seriatim.*

ADMINISTRATIVE AND GENERAL EXPENSE

As the Court recognized, the absence of extensive time and motion studies indicating the precise amount of administrative effort devoted to the subsidized and unsubsidized services respectively, makes necessary the allocation of administrative and general expenses (overhead) "upon some doctrinal basis." The Commission, in arriving at this doctrinal basis, has selected the "voyage expense prorate," the

**Commissioners James V. Day and George H. Hearn did not participate.

same method used by the Maritime Administration, Department of Commerce,[1] in allocating administrative and general expense to the subsidized sector of the trade.

The voyage expense prorate allocates as administrative expense in the unsubsidized trade, an amount bearing the same ratio to total administrative expenses as the voyage expense for the unsubsidized trade bears to total voyage expenses. This method is based on the assumption that "since administrative and general expenses are a mixture of salaries and expenses that pertain to the overall management and operation of [the carrier], * * * their allocation should follow those expenses (i.e. vessel operating expenses) that management must control to profitably operate the business." *Alaska Steamship Company—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska*, Docket Nos. 969 and 1067 (March 6, 1964).

We believe the voyage expense prorate, although lacking in absolute mathematical precision, to be the fairest of the "doctrinal bases" on which overhead expense may be allocated. It has been used by the Maritime Administration and by us in the past based on a long record of actual experience in the shipping industry, in which the relation of overhead expenses to operating expenses has been shown.

Guam contends, however, that the use of the voyage expense formula in this case fails to consider the additional burdens of accounting and other administrative activity borne by the subsidized service. The reasonableness of the voyage expense prorate is reinforced, however, when compared with other significant data. The allocation of 31.5 percent of overhead expense to the unsubsidized service bears a close relationship to the ratio of the number (12) of completed voyages in the unsubsidized service (32.4 percent) to the number (25) of completed voyages in the subsidized sector of Pacific Far East Line, Inc. (PFEL) operations (68.6 percent). That proportion of overhead is also closely comparable to the ratio of revenue in the unsubsidized trade (30 percent) to total revenue. There is no indication from the record that overhead expenses in the subsidized trade comprise more than 70 percent of the total.

The use of the voyage expense prorate is also amply justified by equitable considerations. As a subsidized carrier, PFEL, for subsidy accounting purposes, is required to compute overhead expense pursuant to General Order 31, using the voyage expense prorate. To require the use of another formula in this proceeding, producing a lower figure for overhead expense, would result in a failure to charge to any service part of PFEL's actually incurred overhead expenses.

[1] Maritime Administration General Order 31.

Because of the limitations which are imposed on PFEL's return in each of the services, the company would thus be precluded from recovering from its revenues the full expense incurred by it in serving the public.

It is significant that the Government of Guam, while condemning the voyage expense prorate as inadequate, fails to offer a reasonable alternative. Guam calls attention to a large increase in overhead allocated to the unsubsidized service in 1960 as compared with the amount so allocated in the year 1957, and claims that allowable administrative overhead "should exclude a revenue ton mile proration of the excessive overhead expense transferred to the unsubsidized service in 1960 in comparison with 1957." The Commission has used the year 1960 as the test year for revenues and expenses throughout this proceeding.[2] It would be unjustifiable to arbitrarily shift to 1957 as a test year for overhead expenses. Guam chooses this year because its use would produce the lowest allocation of overhead expenses of any year covered by the record. However, the year 1957 has no more to recommend it as a test year for overhead expenses than years following when more overhead was allocated to the unsubsidized service. Moreover, the 1957 allocation was based on a revenue prorate, not a voyage expense prorate as in the test year of 1960. The Commission has rejected that method of allocation in *Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii, General Increases in Rates*, 7 F.M.C. 260, 288 (1962):

> If revenues were used as a basis of allocating expenses, the increase in revenue resulting from a freight rate increase would result in an increased allocation of expenses. A rate increase might be used as the basis for justifying a further increase in rates.

The use of 1957 as a test year for overhead allocation cannot be supported by the record.

WORKING CAPITAL

In past rate cases, we have used as an allowance for working capital in the rate base an amount equal to one round average voyage expense for each vessel in the trade. This formula was used in our prior Report in this case, and the Court of Appeals remanded because we failed to state any findings and conclusions as to why this formula was appropriate. The Court of Appeals was concerned with the fact that the allowance must be realistic in the light of the carrier's needs and it was also concerned in this particular case with the fact that the

[2] Actual figures for the 6-month period January to June 1960 were multiplied by 2, in order to give a projection of revenues and expenses for the entire year.

allowance of working capital constituted such a large percentage of the rate base (47 percent).

The need for working capital arises, as the Court of Appeals observed, because "a business concern must have funds for current operating purposes and to meet other imperative needs, especially until such time as revenues begin to come in." This need for funds to meet current operating costs arises regardless of the amount of fixed assets held by a business. Thus, if two steamship companies are substantially identical in their operations, but one has made a substantial investment in new vessels and equipment, while the other is operating with obsolete, or substantially depreciated fixed assets, the working capital requirements of the second company, although similar in dollar amount to the first, would represent a greater proportion of its rate base. Actually its need for working capital could be considerably greater due to the age of its vessels, resulting in increased repair and maintenance costs.

PFEL's position is similar to that of the second company. Since its terminal facilities are leased, vessels and working capital make up over 95 percent of the total rate base. The six vessels used by PFEL in the trade have an average age of approximately 17 years from the date of construction, are near the end of their depreciable life, and hence have a low and diminishing net book value. The low value of PFEL's few owned fixed assets, however, does not diminish PFEL's total requirements for a fund to meet current operating expenses even though that amount may be high in relation to the value of its assets.

Since working capital is the fund from which current operating costs must be met, a more meaningful comparison is the ratio working capital bears to those expenses, rather than to the total rate base. PFEL's allowable working capital under the round voyage formula is 19 percent of its annual cash operating expenses of $5,669,245 ($5,840,413 less $171,168 depreciation charges), as projected by the Commission. This compares favorably with ratios of working capital to operating expenses which have been allowed by the Interstate Commerce Commission. (See e.g., *Florida East Coast Ry.*, 84 I.C.C. 25, 32–33 (1924)—17.5 percent; *Louisville & W.R. Co.*, 103 I.C.C. 252, 253 (1925)—31 percent; *Boston Terminal Co.*, 103 I.C.C. 707, 718 (1925)—29 percent.)

Guam contends that to the extent freight charges are prepaid PFEL is not required to supply working capital from its own funds. Guam looks upon working capital in terms of a fund used to meet a time lag between expenses incurred and revenue received. But working capital is more than this. It must sustain the carrier when emergen-

cies or unforeseen events result in large outlays of cash not met by corresponding inflows of revenue. The carrier must be financially prepared for vessel accidents, vessel layups, strikes, declines in traffic, and delays in the adjustments of rates which are necessary to meet increased costs. During these periods when revenue may be cut off or curtailed, certain of the carrier's expenses continue, such as overhead, vessel insurance, maintenance and repairs, van and container, and other property rentals, principal and interest on mortgages.

Working capital to meet these unforeseen circumstances is not capable of measurement in terms of the carrier's actual experience. They are by nature speculative. That strikes occur with some frequency in the shipping industry and affect all trades, however, is not speculative. Although prepaid freight may to some extent meet a carrier's normal current operating expenses, the carrier must be allowed to sustain itself when the unforeseen causes these revenues to be cut off.

The practice of other regulatory agencies, namely the Federal Power Commission, the Interstate Commerce Commission, and the Civil Aeronautics Board, is in accord with this approach. Despite the fact that air fares and charges are prepaid, the CAB allows as working capital approximately 90 days of cash operating costs. The rules for railroad tariffs specify quite clearly that payment for freight must usually be made within 120 hours, but the ICC allows approximately 16 days of cash operating needs as working capital. These allowances are clear recognition that working capital does more than provide funds to meet the "revenue lag."

The Commission's allowance of working capital, based on one round voyage expense for each ship in the trade is a realistic one. The operator is, of course, responsible for the expenses involved in the completion of a round voyage, the length and duration of which vary from trade to trade. These differences render the average voyage expense formula a more equitable formula than a time allowance, since it gives recognition to resulting increases in costs of the longer voyage.

Based on the foregoing, we adhere to our previous determination, and find PFEL's allowable working capital in the Guam trade to be $1,118,524, and allowable administrative and general expenses to be $570,290.

As our previous Report has in effect been affirmed by this decision, this proceeding is discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 884

UNAPPROVED SECTION 15 AGREEMENTS—JAPAN, KOREA, OKINAWA TRADE

Decided June 17, 1965

Respondents found to have entered into certain unapproved agreements or understandings in the trade between United States and Japan, Korea, and Okinawa and to have failed immediately to file the said agreements or understandings with the Federal Maritime Commission all in violation of section 15, Shipping Act, 1916.

Wharton Poor and *R. Glenn Bauer*, on behalf of A. P. Moller-Maersk Lines Joint Service.

Elkan Turk, Jr., and *Sol D. Bromberg*, on behalf of Barber-Wilhelmsen Lines Joint Service.

Elmer C. Maddy and *Baldvin Einarson*, on behalf of United States Lines Company.

Howard A. Levy and *Robert J. Blackwell*, as Hearing Counsel.

REPORT

BY THE COMMISSION: (JOHN HARLLEE, *Chairman;* JAMES V. DAY, *Vice Chairman;* ASHTON C. BARRETT, GEORGE H. HEARN, and JOHN S. PATTERSON, *Commissioners*)

FACTS

We instituted this proceeding to resolve the questions (1) whether respondents [1] entered into certain agreements within the purview of section 15 of the Shipping Act, 1916, without filing them for approval under that section and (2) whether the agreements were effectuated without the approval of the Commission.

[1] Respondents are three common carriers by water in the inbound foreign commerce of the United States, namely Barber–Wilhelmsen—Joint Service ("Barber"), A. P. Moller-Maersk Line—Joint Service ("Maersk"), and United States Lines Company (American-Pioneer Line) ("U.S. Lines").

During the period in question, Barber, Maersk and U.S. Lines were members of the Japan Atlantic and Gulf Freight Conference ("the Conference").[2] Prior to World War II, there was little if any independent competition in the Conference trade and freight rates were maintained at relatively stable levels. In 1951–52, the Japanese flag lines returned to the trade as Conference members.

Postwar commercial trading was resumed in 1947–48. About this time, the Isbrandtsen Line entered the trade as an independent or nonconference operator, sailing westbound from Japan to the United States via Suez. Isbrandtsen's rates were maintained below Conference levels; but it does not appear that Isbrandtsen was an important competitive factor in the trade until about 1949. In that year, Isbrandtsen commenced an improved eastbound service, and by this improved service coupled with rates pegged at some 10 percent below those of the Conference, Isbrandtsen was able to secure a substantial amount of the traffic. In order to meet Isbrandtsen's competition, the Conference took steps to institute an exclusive patronage (dual rate) system.

In 1953, as a result of a suit by Isbrandtsen, the U.S. Court of Appeals for the District of Columbia Circuit enjoined the institution of the dual rate system pending formal board hearing on protests filed by Isbrandtsen. The Conference respondent by opening rates on some 10 principal commodities constituting a sizable portion of the prevailing traffic. Thereafter, additional rates were opened and by January 21, 1954, the date the Court of Appeals decision in *Isbrandtsen Co., Inc.* v. *U.S.*, 211 F. 2d 51 (1954) was rendered,[3] the Conference had opened rates on substantially all commodities moving in the trade.

The opening of rates led to their severe decline and a resulting rate war, and by mid-1954, certain rates had then actually fallen below handling costs. Although Isbrandtsen's competition had been seriously curtailed, the Conference nevertheless continued its open rate policy, in the belief that closing the rates, without the protection of a dual rate system, would lead to increased competition by Isbrandtsen which would again upset the trade. In addition it was feared that if rates were closed, the efforts of the members to secure cargo would lead to malpractices within the Conference itself which would create an atmos-

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[2] The Conference organized under Agreement No. 3103 encompasses the trade from ports in Japan to ports on U S. Atlantic and gulf coasts.

[3] The court held that section 15 of the Shipping Act required the board to hold a hearing on the proposed contract system before it could be effectuated. On November 9, 1956, the Court of Appeals held that the dual rate system was unlawful, *per se* (*Isbrandtsen Co., Inc.* v. *U S*, 239 F 2d 933 (1956)), and the Conference petitioned for certiorari in the Supreme Court. (*Cert.* granted, 353 U.S 908 (1957)) On May 17, 1958, the Supreme Court disapproved the Conference dual rate system on the grounds that it was intended to drive Isbrandtsen from the trade in violation of section 14 Third of the Shipping Act (*F.M.B.* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958).)

phere of mistrust and suspicion. Thus, most Conference members opposed the closing of rates until adequate internal safeguards and assurances were brought about.

From mid-1954 until April or May 1958, when the Supreme Court finally held the Conference's proposed dual rate system unlawful, respondents were allegedly engaged in a series of actions involving discussions of rate policy, exchanges of rate information and various arrangements, understandings, and agreements, designed to increase their level of open rates.

As one official of U.S. Lines described the situation in an intraorganization letter:

> Open rates, as far as the Japan Homeward Conference is concerned, in theory, means exactly what it says—that any individual line can quote a rate which they feel can attract the business.
>
> However (and this is confidential within our own organization) we discuss competitive open rates with both Barber and Maersk, and endeavor to allign [sic] ourselves in a firm pattern of rates on this homeward traffic from Japan.

Examiner Edward C. Johnson in his Initial Decision found that the three respondents entered into numerous rate agreements during the period under investigation, without having filed them for approval with the board, as required by section 15 of the Act.

The examiner stated that:

> In this proceeding there is no so-called "Master Agreement" as such which was entered into and carried out by the respondents named herein which allegedly violated section 15 of the Act. On the contrary, there were literally dozens and dozens of understandings and/or agreements consented to or arrived at by the parties herein over a period of weeks, months, and years, both in the United States and overseas which were never filed with the Commission or received Commission approval that contravene the statute.

Generally, these agreements were of two types: (a) Agreements among the respondent lines to maintain their rates at certain levels in relation to each other and to other lines in the trade, and to "narrow the differentials" between these levels; and (b) agreements setting rates on specific commodities.

It is unnecessary for the purposes of this opinion to engage in an extensive inquiry into the "dozens and dozens" of agreements alluded to by the examiner. The significant issues here can be amply treated by limiting our findings to one sample of each of the above categories of agreements.

The Bellevue Agreement

On June 12, 1957, high ranking officials of both Barber and Maersk met with representatives of other Scandinavian and Japanese shipowners in the Japan-United States trades at the Bellevue Strand Hotel

in Copenhagen, Denmark. The subject under discussion was the rate levels of those attending the Bellevue meeting, and their relationship to each other, and to rates of lines in the trade who were not present.

Mr. Ariyoshi, speaking on behalf of the Japanese lines stated that although the Japanese lines had planned a rate increase on June 1, 1957, shippers had threatened a boycott if the increase was made, and the Japanese lines were forced to abandon their plans for increased rates. Nevertheless, according to Mr. Ariyoshi, the Japanese lines felt that an increase might be possible in October or November 1957, and urged that the non-Japanese lines bring their rates up to the level of the Japanese.

Despite this urging, the non-Japanese representatives expressed their reluctance to establish uniform rates in the trade. At that time, decision was pending before the Supreme Court in *Isbrandtsen* v. *U.S.*, wherein the court was deciding the legality of the dual rate system—a system which these lines considered essential to their competitive survival. It was the feeling of the non-Japanese lines, that uniform rates would give the appearance of stability in the Japan-United States trade. This outward appearance of stability, it was felt, might influence the Supreme Court to decide that the dual rate system was unnecessary.

In the alternative, representatives of Barber and Maersk agreed to explore the possibility of increasing the rates of the non-Japanese lines not to achieve parity with the Japanese rate level, but to narrow the differential between the rates of the Japanese lines, and those of the non-Japanese. Mr. Ariyoshi felt that Maersk's present rate level would be satisfactory if all the non-Japanese lines quoted the same rates, and appealed to the other Scandinavian lines to consider adopting the Maersk rate level. Maersk expressed the belief that if Barber increased its open rates, U.S. Lines would follow. At the close of the meeting, the lines agreed to explore the possibility of narrowing the differentials between the Japanese and non-Japanese lines.

The events following the Bellevue meeting demonstrate the efforts of Maersk, Barber and U.S. Lines toward that end. Upon his return to New York from Europe and the Bellevue meeting, Barber's Mr. Barnett, telephoned Mr. William Rand, vice president of U.S. Lines, and advised him of the transactions of the Bellevue meeting. An account of the Bellevue meeting was also contained in a "confidential" letter from a Mr. Barnett to Mr. Rand dated July 3, 1957. Mr. Barnett advised the U.S. Lines' official that (a) the Japanese lines agreed not to press for any further closed rates before the end of the year; (b) Maersk's Mr. Andersen, as well as Mr. Ariyoshi, each asked Barber to examine its tariff in an effort to narrow the differentials on open-rated commodities. Mr. Andersen supplied a comparative rate sched-

ule showing the respective open rates and differentials of the various lines for this purpose;[4] (c) Barber had instructed Dodwell, its Tokyo agent, to discuss the matter with U.S. Lines in Tokyo, and ascertain whether Isbrandtsen would adjust its rates; and (d) "In view of the pressure exerted by N.Y.K. and Maersk Line, my people thought it might be a good idea to meet the Japanese Lines about halfway, and with this in mind, they inserted the rates which they have suggested to their Tokyo agents should be quoted by the Barber-Wilhelmsen Line from August 1st, or, if this notice is too short, from September 1st. These rates are shown in handwriting in the fourth column from the end. As you weil see, generally speaking, they have reduced the spread by about 50 percent, but in cases where the rates quoted by Maersk Line are lower than those quoted by the Japanese Lines, Barber-Wilhelmsen of course, only increased its rates to the same level as Maersk."

On July 3, 1957, Mr. Barnett reported his discussions with U.S. Lines' Mr. Rand to Barber's headquarters in Oslo, stating that Mr. Rand was "prepared to bring [U.S.L.'s] rates up to a level with [Barber], should it be decided that the latter's rates be increased to narrow the spread with Maersk Line, on which ever date is agreed upon * * *"

On July 4, 1957, Dodwell advised its principals in Oslo that they were in accord with the revised rates suggested by Oslo. Dodwell confirmed that Isbrandtsen continued its policy of quoting the same open rates as Barber and U.S. Lines on parcels of 50 tons or more and assured Oslo that they would "take every care to see that Isbrandtsen's undertaking to fall in line is obtained before going ahead with the implementation of the new rates." Moreover, Dodwell advised that they had "confidentially and unofficially" discussed the matter fully with U.S. Lines, Tokyo, and that the latter was "quite prepared to increase their rates similarly." Finally, Dodwell reported that a meeting with Mr. Ariyoshi was scheduled for the following day and although Dodwell favored an August 1st effective date for the Barber–U.S. Lines increases, "no decision can be made on this point until we have discussed matters with Mr. Ariyoshi * * * and had an opportunity of finding out whether the Japanese lines would be prepared to make increases at a date earlier than 1st October 1957."

On July 5, 1957, in a letter marked "(Confidential)", Mr. Rand replied to Mr. Barnett as follows:

> Many thanks for your letter of July 3 with attachments [comparative rate schedules], which we are returning to you today, having served our purpose.
>
> As we informed you on the telephone on Wednesday, the U.S. Lines will most assuredly increase [open] rates in order to narrow the differential pro-

[4] Although rates were open at this time, it was the practice of the lines to file their open rates with the Conference secretary. The comparative rate schedule referred to was attached to Mr. Barnett's letter to Mr. Rand.

vided, of course, such increases do not exceed rates quoted by Maersk, or for that matter the Japanese lines. We have so instructed our headquarters in the Far East."

Mr. Rand's letter was transmitted by Barber, New York, to Barber, Oslo, with the suggestion that a copy be "personally" passed on to Maersk's Mr. Andersen.

On July 30, 1957, U.S. Lines' Mr. Walker advised Mr. Rand that at a meeting in Tokyo on July 22, Mr. Ariyoshi, acting as spokesman for the Japanese lines announced that those lines would neither sponsor nor agree to further increases during the balance of 1957. Despite this statement of the Japanese Lines, however, Barber and U.S. Lines decided to go ahead with their proposed rate plans. According to Mr. Walker's letter, on July 26, 1957, representatives of Maersk, Barber, and U.S. Lines met in Tokyo "to discuss rate differentials between Japanese lines and their respective lines" and that:

> * * * it was agreed to narrow the differentials between USL/Barber and Maersk by approximately 50 percent.
>
> Sixty days' notice will be given to shippers on August 1, 1957. Rate increases will be effective October 1, 1957.
>
> The Maersk Line representative decided against recommending to his home office decrease of the Maersk rates to the USL/Barber level.

This evidence of agreement is reinforced by the testimony of a U.S. Lines official, admitting that U.S. Lines and Barber agreed on rates during the period from May–October 1957.

On October 1, the date of the scheduled increase, U.S. Lines effectuated the agreed tariff increase. However, Mr. Ariyoshi had not yet succeeded in obtaining a commitment from Isbrandtsen not to undercut the Barber/USL rates. Barber, under the impression that this commitment was a condition precedent to effectuation of the proposed increases, did not increase its rates.

Barber's Tokyo agent advised Barber's Oslo headquarters that:

> Unfortunately, it seems that U.S. Lines here [Tokyo] misunderstood the agreement between their principals [U.S. Lines, New York] and your goodselves [Barber, Oslo].

In view of all the circumstances, Barber, Oslo, decided to effectuate the October open rate increases, as agreed with U.S. Lines, as soon as possible and so instructed its Japan agent, Dodwell. Oslo decided to forego the condition of the Isbrandtsen commitment because of the proximity of the hearing in the U.S. Supreme Court in the dual rate case; in order "to avoid any controversy" with U.S. Lines; and in view of the comparatively small extent of the increases. Oslo further instructed Dodwell to "confer" with U.S. Lines and cable its views.

On October 21, 1957, U.S. Lines, Tokyo, confirmed to U.S. Lines, New York, the Barber decision to adhere to the increased October

open rates for its vessel, "Triton," loading in early November, and recommended that U.S. Lines continue to quote October rates rather than revert to the old rates for the one U.S. Lines vessel which would load parallel with a Barber vessel at different open rates. A copy of this communication was transmitted to Barber.

U.S. Lines, New York, adopted this recommendation, and agreed to maintain the October rates if Barber would meet those rates on November 1.

Thus, through the agreement of Maersk, Barber, and U.S. Lines, the rates of these lines were set at agreed levels in relation to each other and to the Japanese lines. Although Maersk's open rates on the one hand and Barber/USL on the other hand were not identical on all tariff items, their respective open rates as of November 1st were identical on 87 percent of the open rate traffic moving in the trade.

The Silk Agreements

In May 1954, Maersk Line and U.S. Lines both quoted the rate of $2.25 per 100 pounds on raw silk moving from Japan to the United States. As a result of this rate being lower than rates of competitive carriers of silk (the Japanese Lines, Isbrandtsen, Barber, and De La Rama Line), Maersk and U.S. Lines were successful in carrying a greater share of this cargo than these competing lines. Maersk was the top carrier for that month, with 1938 bales, followed by U.S. Lines with 710 bales. Apparently concerned with Maersk's high carryings of silk, Barber reduced its rate for its first June vessel to the Maersk/U.S. Lines level of $2.25,[5] and further reduced its rate to $2.15 for its second June vessel. The following month, July 1954, Maersk and U.S. Lines adjusted their rates to the Barber level.

Against this background of competition and declining rates, the silk-rate dialogue between U.S. Lines, Barber, and Maersk commenced, which resulted in an agreement between those lines to charge uniform rates on raw silk.

On June 11, 1954, Maersk, Copenhagen, inquired of its Japan office whether Maersk's silk rate could be increased to $2.40 or $2.50. In response, the Japanese office recommended against any such rate increase, unless simultaneous increases were effected by U.S. Lines, Barber, and De La Rama, and further advised that "if you should wish us to do so, we shall be glad to talk it over with their agents here."

In response to this recommendation from Japan, Maersk, Copenhagen, cabled its Japanese office suggesting cooperation between Barber, De La Rama and U.S. Lines, in fixing a rate of $2.40 on raw silk, commencing July 5, 1954. However, Japan responded that since

[5] These rates are per 100 pounds.

Barber was quoting $2.15 for the entire month of July, "cooperation stabilizing silk rate only possible commencing August."

After discussions between U.S. Lines, Barber, and Maersk, the three lines agreed to set the rate for raw silk at $2.40 per hundred pounds, commencing August 5, and charged that rate during the month of August.

DISCUSSION AND CONCLUSIONS

Numerous exceptions were filed to the examiner's findings of violations of section 15 on the part of respondents for failure to file agreements arising from the Bellevue transactions, the silk transactions and the other "dozens and dozens" of agreements referred to by the examiner. These exceptions raise issues both as to the substantive conclusions reached by the examiner and to the procedural conduct of the hearing. Exceptions not specifically treated in this report have been considered by the Commission and rejected.[6]

Respondent U.S. Lines excepts to the admission in evidence of all but 76 of the more than 500 exhibits introduced because no proper foundation was laid.[7] Most of the documents ultimately received in evidence were obtained by hearing counsel pursuant to an order of the Commission directing respondents to "produce for inspection and copying or photographing" certain specified documents. The originals of these documents were not produced at the hearing. Rather, bound volumes of photostatic copies of documents were distributed, prior to the hearing, to each of the respondents. On the opening day of the hearing the examiner received them for identification. These bound volumes were then shown to witnesses from each of the respondents, who were asked whether the documents before them were in fact copies of documents from their files. The questioning resulting in the following colloquies between hearing counsel and the witnesses:

(1) Mr. Richter, assistant general freight manager of U.S. Lines.

Q. Sir, do you have a pile of exhibits in front of you marked "U.S. Lines No. 1 to 105"? And have you had a chance to look through those?

A. To a certain extent I have had that opportunity.

Q. Would you identify those as documents from the U.S. Lines Co.?

A. Yes, I do.

(2) Mr. Alvin, assistant to the president of Moller Steamship Line, general agents for Maersk.

Q. Mr. Alvin, * * * I wonder if you could identify for the record, the documents contained in the books marked Maersk Numbers 1–105, Maersk Number (s)

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[6] Maersk has excepted to violations found against it which go beyond those enumerated by hearing counsel during prehearing conference. The issues raised by this exception were disposed of in an interlocutory appeal to the Commission during the course of this proceeding. The Commission rejected Maersk's arguments in an order served March 20, 1963, and no further discussion of these issues will appear in this report.

[7] A substantial part of the findings herein are based on exhibits within this group of 76.

106–202. Would you identify the documents contained therein as coming from the files of Maersk Line?

A. The Maersk Line in response to a Federal Maritime Commission subpoena furnished several hundred documents. I understand that (of) all those hearing counsel selected 202 which on the first date of the hearing you put into evidence. As far as I know, substantially speaking, running through this very quickly, these are the 202 documents so selected.

(3) Mr. Barnett, chairman of the board, Barber Steamship Lines, general agent for Barber-Wilhelmsen Lines.

Examiner Johnson: Then, we will take a few moments' recess while Mr. Barnett has a chance with his counsel in order to look at these documents in order to be sure whether they came from the files of Barber-Wilhelmsen.

[Whereupon, a short recess was taken.]

Q. Mr. Barnett, can you identify those as having been taken from Barber-Wilhelmsen files?

A. I would say most of them had been photostated in our own office. I would be sure they are from our files. I haven't got the originals, but in my opinion they look like they are from our files.

U.S. Lines takes the position that because these witnesses did not read each of these documents while on the witness stand they could not properly testify as to their authenticity, and therefore, hearing counsel failed to sustain his burden of establishing that the photostats introduced in evidence were authentic copies of documents appearing in the files of respondents.

Copies of the documents ultimately admitted in evidence were given to respondents long before the opening of hearings. On the first day of hearings these documents were identified. Officers of the respondent lines or their agents testified that the documents introduced were from their files. The testimony of these responsible officials is not stripped of value merely because they did not take the opportunity of reading through each and every one of the proposed exhibits on the witness stand. Certainly this opportunity was available, if desired. In fact, one of the three identifying witnesses was granted a recess during the hearing to inspect the documents with his counsel. Moreover, despite repeated urgings by hearing counsel and the examiner, respondents did not challenge the authenticity of any particular document, and at no point during the hearing did respondents claim that any single document received in evidence was not a true photostat of the original from respondent's files. At the very least hearing counsel had made a *prima facie* showing of authenticity after he had elicited the testimony referred to above. It was then incumbent on respondents to specify which of the documents in question (if any) were not authentic copies of documents from their files. *National Labor Relations Board* v. *Service Wood Heel Co.* 124 F. 2d 470 (1941). Failing this their excep-

tion is not well taken and the examiner's rulings were well founded and proper.

U.S. Lines excepts to the examiner's failure to treat its charge that this proceeding is discriminatory against respondents. U.S. Lines' position may be summarized as follows: The record in this proceeding demonstrates that certain Japanese carriers followed a similar and equally unlawful course of conduct. This unlawful course of conduct was also apparent from testimony before the "Celler Committee" (hearings on the Ocean Freight Industry, Monopoly Problems in Regulated Industries, H. Rept. 86th Cong., 1st and 2d Sess., 1960–61, part 3, v. 1, pp. 256–264). The allegedly unlawful conduct by the Japanese carriers was not made the subject of this or any other Commission investigation. Thus, in U.S. Lines' view, it follows that the Commission's institution of this investigation amounted to discrimination in violation of its right to "equal protection of the laws" under the 14th amendment to the Constitution.

The respondent recognizes that the alleged discrimination must be the result of:

> * * * an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the [laws] as adopted, they are applied by the public authorities charged with their administration * * * with a mind so unequal and oppressive as to amount to a practical denial * * * of the equal protection of the laws which is secured to the petitioners * * * by the broad and benign provisions of the Fourteenth Amendment. * * * (*Yick Wo* v. *Hopkins*, 118 U.S. 356 at 373–4.)

Yet in all fairness, respondent U.S. Lines does not appear to be actually charging the Commission with any conscious or deliberate pattern of unequal or oppressive administration of section 15. Rather, respondent poses a series of questions which it urges "The Commission must ask itself." Aside from its charges concerning this proceeding, respondent offers no other instances of alleged discrimination in our administration of section 15. Thus, the essence of respondent's argument is that all must "hang" or all must "go free." This is simply not the law and the adoption of any such philosophy would make effective regulation a practical impossibility. As the Supreme Court stated in *U.S.* v. *Wabash R. Co.*, 321 U.S. 403 (413–14), a case stemming from an order of the Interstate Commerce Commission:

> Appellees complain of the Commission's long delay * * * in investigating * * * Staley's competitors, but any of the appelles have been free to initiate proceedings to eliminate any unlawful preferences or discriminations affecting them if they so desired, § 13(1), and no reason appears why they could not have done so. There are other modes of inducing the Commission to perform its duty than by setting aside its order * * * because it has not made like orders against other offenders. The suppression of abuses resulting from violations of [the Act] would be rendered practically impossible if the Commission were required to suppress all simultaneously or none. * * *

The examiner did not explain his failure to treat the "discriminatory enforcement" issue. He merely stated at page 10 of his Initial Decision—"The examiner will not treat this constitutional question in this decision but leave this matter for ultimate resolution by the Commission." It is not enough for an examiner to leave an issue "for ultimate resolution by the Commission," since all issues are for our ultimate resolution. If a valid reason for failing to treat an "issue" exists (e.g. it is spurious or without the scope of the proceeding, etc.), it is incumbent upon the examiner to state the reason. This is the meaning of section 8(b) of the Administrative Procedure Act and our own rule 13(f). Thus, insofar as the decision failed to treat this question, it is not in compliance with the requirement of the Administrative Procedure Act or rule 13(f) of the Commission's Rules of Practice and Procedure.[8] But this is not to say, as respondent urges, that the proceeding must be dismissed or remanded. The examiner's reluctance to decide the issue may have been due to the nature of the issue and the way in which respondent sought to raise it. Respondent asks that we review our past policy in administering section 15. This it would seem is something which only we can do. Resolution of this particular issue, no matter which way it is decided, can have no bearing on the outcome of this proceeding. As the Supreme Court found in the *Wabash* case *supra*, there are other ways of inducing an agency to perform its functions than by setting aside an order in one proceeding simply because another was not instituted. Even were we to decide that some form of discrimination had crept into our administration of section 15, the remedy would not be dismissal here. Rather it would be broader enforcement, for respondents have violated the act and the presence of possible violations by others cannot alter that fact.[9]

Furthermore, we see nothing to be gained by remanding this portion of the proceeding to the examiner. However, even though we don't think it necessary, we will allow respondent U.S. Lines, if it so desires, to treat the portion of this decision dealing with the allegation of discriminatory enforcement of section 15 as an initial decision by the Commission, and respondent may file exception hereto within 15 days from the date of service of this opinion.

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[8] This is not to say, of course, that each and every allegation or "issue" need be discussed by the examiner; see Attorney General's Manual on the Administrative Procedure Act (1947), p. 86.

[9] Respondents attempted analogy between this case and dockets 924–925, *Unapproved Section 15 Agreements—Gulf/United Kingdom Conference and Gulf/French Atlantic Hamburg Conference*, 7 F.M.C. 536 (1963) is inappropriate. In that case the proceeding was not dismissed because of any discriminatory enforcement but was discontinued after final decision in which no violation of the Act was found, but respondents therein were found to have violated a General Order of the Federal Maritime Board. No order was issued because the violation had ceased.

Maersk and Barber except to the examiner's findings of violations of section 15 because they are not supported by reliable and probative evidence, but by hearsay.

We had thought the "hearsay" question was laid to rest in our decision in *Unapproved section 15 Agreements—South African Trade*, 7 F.M.C. 159. Respondents attempt to reargue the question notwithstanding our remarks in that decision are equally applicable here and no further discussion is necessary.[10] The record contains ample reliable and probative evidence to demonstrate that respondents entered into the agreements in question.

Barber and Maersk contend in substance that the examiner's findings of unlawful agreements between respondents were based solely on the fact that the rates of these lines were the same or similar during the period under investigation, and that the examiner failed to consider the surrounding circumstances existing at that time which produced this relative rate uniformity. The substance of these contentions is expressed by Barber as follows:

> [During the period of the rate war in the Japan-United States trade] the three strong lines left to the interplay of competitive forces were the respondents here. Each, in order to secure cargo, felt it imperative to underquote the Japanese. None could substantially exceed the rates of the other two without risking a prohibitive decline in its patronage. Each had to keep itself fully and promptly informed of the rate intentions of the others, not as a fact of conspiracy, but purely for the sake of its individual financial survival in the trade.

Barber and Maersk contend that the rate uniformity prevalent during the period under investigation was merely the result of unilateral decisions by the respondent lines, made in response to existing conditions in the trade. Thus, Maersk contends, the uniform rates were the product of "conscious parallelism" rather than agreements between the respondents, and the mere proof of "conscious parallelism" is not proof of an agreement.

"Conscious parallelism" is an antitrust term which in the words of the Attorney General's National Committee To Study The Antitrust Laws "is a phrase of uncertain meaning and legal significance." It is a label for one type of evidence which may or may not be relevant in proof of conspiracy under the antitrust laws. (Report of the Attorney General's National Committee To Study The Antitrust Laws, March 31, 1955, p. 36.) Whatever the relevance of this antitrust doctrine may be to a section 15 Shipping Act case, the record here establishes far more than proof of mere parallel business behavior. See *Theatre Enterprises Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, but Cf. *Interstate Circuit Inc.* v. *U.S.*, 306 U.S. 208. It

[10] It should be noted that respondents did not avail themselves of the opportunity to cross-examine hearing counsels' witnesses nor did they introduce any witnesses of their own.

establishes agreements between the parties which were entered into in violation of section 15.

Barber also excepts to the examiner's findings of violations of the Act from respondents' failure to file agreements which Barber deems merely "contingent agreements." In particular, the examiner refers to an agreement among the respondent lines to raise their rates if the Japanese lines raised their rates. Since no such increase was effected by the Japanese lines, the alleged agreement among respondents was never implemented. The presence or absence of a "contingency" in a rate fixing agreement has no bearing on the requirements of section 15 that such agreement be filed with and approved by the Commission. Moreover, none of the agreements found herein were contingent in nature.

In a final exception, Barber contends that even if certain agreements were made by respondents, they were made in response to a damaging rate-war situation in the trade, which if unchecked might have resulted in a curtailment of service, and the interference with the flow of U.S. import commerce. Thus, any agreements made should have been approved, and any violation based on failure to file was "purely technical." The fact that an agreement would probably have been approved is, of course, no excuse for failing to obtain the required approval. See *Unapproved Section 15 Agreements—South African Trade*, *supra*.

Based on the foregoing, we find:

(1) That in August 1957, Barber and U.S. Lines agreed to narrow the differentials between their rates and those of Maersk by approximately 50 percent. This agreement was not filed with the Commission, in violation of section 15, Shipping Act, 1916.

(2) That Barber, Maersk, and U.S. Lines agreed to charge a rate of $2.40 per hundred pounds for the carriage of raw silk for the month of August 1954. This agreement was not filed with the Commission, in violation of section 15, Shipping Act, 1916.

Since the violations found herein have ceased there is no necessity for issuing an order, and the proceeding is hereby discontinued.

By the Commisison.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1207

SEATRAIN LINES, INC.—APPLICATION OF RATES ON SHIPMENTS IN RAILROAD CARS

Decided June 21, 1965

Seatrain Lines, Inc. by unloading at its own cost rail cars rated and moved under a tariff providing *inter alia* for unloading by consignees, violated sections 16 and 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act

Joseph Hodgson, Jr. and *S. S. Eisen* for respondent, Seatrain Lines, Inc.

C. H. Wheeler for Sea-Land Service, Inc.

Amy Scupi for American Union Transport, Inc.

Robert J. Blackwell and *Donald J. Brunner* as Hearing Counsel

REPORT

BY THE COMMISSION: (JOHN HARLLEE, *Chairman;* JAMES V. DAY, *Vice Chairman;* ASHTON C. BARRETT and GEORGE H. HEARN, *Commissioners*)[1]

This is an investigation to determine the validity of (1) a proposed rule intended to allow Seatrain Lines, Inc. to apply its per trailer or container rates to railroad car shipments;[2] and (2) Seatrain Lines, Inc.'s practice of having its Puerto Rican longshoremen unload cargo from railroad cars, which moved under a rate predicated on the condition that "shipper load/consignee unload," was violative of sections 16, 17, and 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933.

In his initial decision, Examiner Paul D. Page, Jr. found that:

(1) Seatrain's practice was contrary to the tariff provision under which the cargo was rated and carried in violation of section 18(a) of

[1] *Commissioner* Patterson did not participate.

[2] This rule was suspended by the Commission and subsequently withdrawn by Seatrain Lines, Inc. before it became effective, thereby mooting the first issue in this proceeding.

the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933;

(2) That Seatrain's practice allowed persons to obtain transportation at less than the regular rates by unjust means in violation of section 16 of the Shipping Act, 1916; and

(3) That Seatrain's practice constituted an unjust and unreasonable practice in violation of section 17 of the Shipping Act, 1916.

No exceptions to the initial decision have been filed. This proceeding is before us upon our own motion to review.

After careful consideration of the record we are of the opinion that the Examiner's finding and conclusions were well founded and proper, except insofar as he found a violation of section 17 of the Shipping Act, 1916. This proceeding involves a practice of Seatrain, a common carrier by water operating in the domestic offshore commerce only. Section 17 by its express terms is limited to "common carriers by water in foreign commerce" and thus has no applicability to this proceeding. Therefore, except insofar as the Examiner found that Seatrain had violated section 17 of the act, we adopt the initial decision as our own and make it a part hereof, and the proceeding is hereby discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1207

SEATRAIN LINES, INC.—APPLICATION OF RATES ON SHIPMENTS IN RAILROAD CARS

Seatrain Lines, Inc. by unloading at its own cost rail cars rated and moved under a tariff providing *inter alia* for unloading by consignees, violated sections 16, 17, and 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933.

Joseph Hodgson, Jr. and *S. S. Eisen* for respondent, Seatrain Lines, Inc.

C. H. Wheeler for Sea-Land Service, Inc.

Amy Scupi for American Union Transport, Inc.

Robert J. Blackwell and *Donald J. Brunner* as Hearing Counsel.

INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER[1]

The order of investigation and suspension herein raised two questions, the first as to the prospective effect of a proposed rule intended to allow respondent, Seatrain Lines, Inc. (Seatrain) to transport rail cars at the same flat rate as the flat rate per trailer or container currently provided in Seatrain's tariff. The proposed rule (which the Commission suspended) was withdrawn before it became effective, and the first question became moot. The second question involved Seatrain's practice of unloading in Puerto Rico shipments in rail cars moving under a tariff which required the consignee to unload, as possibly in violation of sections 16, 17, and 18(a) of the Shipping Act, 1916 and section 2 of the Intercoastal Shipping Act, 1933, and this is the question to be decided here.

There is no dispute as to the facts, which were stipulated by Seatrain and hearing counsel, and are substantially as follows:[2]

(1) During the period involved, Seatrain carried three southbound rail car shipments (Edgewater, N.J. to San Juan, P.R.) under

[1] This decision was adopted by the Commission on June 21, 1965.

[2] Neither Sea-Land Service, Inc. nor American Union Transport, Inc. objected to the stipulation or closing the record; nor did either of them brief the case.

"shipper load/consignee unload" tariff provisions (Seatrain's Outward Freight Tariff No. 1, F.M.C.—F. No. 1), and each of these rail cars was unloaded by Seatrain's longshoremen at Seatrain's expense.[3]

(2) During the same period Seatrain similarly handled more than 320 southbound rail shipments under tariffs which contained no "shipper load/consignee unload" provisions (see Seatrain Brief, page 4).

Discussion and Conclusions

The three shipments involved moved in a 10-day period (September 2–September 12, 1964) shortly after Seatrain instituted service in the trade.

There is no reason to question the accuracy and sincerity of Seatrain's statement on page 13 of its brief, which reads as follows:

> When it became aware that controversy existed concerning the application of its tariff, Seatrain's management, out of an abundance of caution and in an effort to comply fully and wholly with all regulatory rules and regulations, directed that no future shipments be transported in railroad cars where the freight involved was subject to a rate carrying the provision "consignee to unload carrier's trailer."

Discontinuation of a practice, however, has no bearing upon its legality or illegality. The only question here is if Seatrain's admitted acts violated the law. They did.

Seatrain argues (and it may well be true) that it was obligated to make the freight in these rail car shipments available to the consignees, and that it could do this only by unloading at its expense. It by no means follows, however, that when freight moves under a "consignee unload" tariff provision, the carrier can unload at its own expense without violating provisions of law specifically and in effect requiring strict adherence to tariff rates and provisions.

Seatrain contends further that its tariff, because it provides that the consignees must unload "trailers" and not "railroad cars," should not be construed to require consignees to unload cars. But plainly if the tariff (which did not mention railroad cars at all) could be applied at all it had to be applied fully. Actually, the meaning of the "consignee unload" provision is that the consignee shall remove *the cargo*, and it is not relevant that it is removed from a "trailer,"

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[3] The three shipments were the following:

(a) Shipment of frozen french fried potatoes via SS *Seatrain New Jersey*, voyage No. 497/S, B/L No. 13–4442, dated Sept. 2. 1964.

(b) Shipment of furniture, n.o.s. (wooden step ladders), via SS *Seatrain Texas*, voyage No. 488/S, B/L No. 13–4579, dated Sept. 9, 1964.

(c) Shipment of pigs feet (50 lbs. net per wooden box), via *SS Seatrain New Jersey*, voyage No. 498/S, B/L No. 13–4684, dated Sept. 12, 1964.

There was one northbound shipment involving a rail car which was loaded in San Juan by Seatrain's stevedores at Seatrain's expense, but this moved under Homeward Freight Tariff No. 3, which contains no "shipper load/consignee unload" provision.

a "car," or from some other kind of "container." Here, not the consignees but Seatrain removed the cargo, and the cost of removal was borne by Seatrain, not the consignees, and this is precisely contrary to the tariff provision under which the cargo was rated and carried. There is considerable doubt if Seatrain had a tariff under which it was authorized to carry these commodities, but it carried them under a "consignee unload" provision, and is bound by that provision.

Seatrain's free unloading (1) allowed persons to obtain transportation at less than the regular rates by unjust means in violation of section 16 of the Shipping Act, 1916; and (2) constituted an unjust and unreasonable practice in violation of sections 17 and 18(a) of the Shipping Act, 1916; and (3) extended a privilege not in accordance with its tariff schedules, in violation of section 2 of the Intercoastal Shipping Act, 1933.

Seatrain by action which the Commission refused to suspend, and which became effective December 9, 1964:

(1) made per trailer rates inapplicable to railroad car shipments, and

(2) specifically provided for rail car unloading by Seatrain longshoremen.

There is therefore no reason for these violations to continue, and no reason for cease and desist orders.

An appropriate order will be issued.

PAUL D. PAGE, JR.
Presiding Examiner.

FEDERAL MARITIME COMMISSION

No. 1128

AGREEMENT NO. T-4: TERMINAL LEASE AGREEMENT AT LONG BEACH, CALIFORNIA

No. 1129

AGREEMENT NO. T-5: TERMINAL LEASE AGREEMENT AT OAKLAND, CALIFORNIA

Decided June 18, 1965

Respondents port of Long Beach and port of Oakland, as parties to agreements T-4 and T-5 with respondent Sea-Land of California, are persons subject to the Shipping Act. Sea-Land of California and Sea-Land Service are also subject to the Shipping Act.

Agreement No. T-4, a terminal lease at Long Beach, and agreement No. T-4-1, a truck terminal lease at Long Beach, will be considered as a composite arrangement since the leases cover nearby areas and both are essential to Sea-Land's integrated containerized operations. Agreements No. T-5 and T-5-1 at Oakland will be considered as one arrangement for the same reasons.

In determining whether an agreement is subject to section 15, the Commission is not limited to the terms of the agreements as filed but may consider extrinsic evidence of the competitive consequences which may be expected to result from the agreements. Whether an agreement is per se contrary to section 1 of the Sherman Act is not determinative of the question of whether an agreement is or is not subject to section 15.

Agreements No. T-4 and T-5, between persons subject to the Shipping Act, are subject to section 15 since they grant to Sea-Land a special rate, significantly different from the otherwise applicable tariff rates, for the use of terminal facilities.

Agreements No. T-4 and T-5 are approvable under section 15. It has not been shown that the agreements are unjustly discriminatory between ports, terminal operators, or carriers or that their approval will disrupt the present terminal rate structure on the Pacific coast.

J. Kerwin Rooney, for respondent port of Oakland.

Leonard Putnam, city attorney, and *Leslie E. Still, Jr.*, deputy city attorney for respondent port of Long Beach.

Sterling F. Stoudenmire, Jr., and *C. H. Wheeler* for respondent Sea-Land of California.

Miriam E. Wolff, deputy attorney general, and *Thomas C. Lynch*, attorney general of the State of California for intervener San Francisco Port Authority.

Edward D. Ransom, *Robert Fremlin*, *William H. King*, and *R. Federic Fisher* for intervener Encinal Terminals.

Roger Arnebergh, *Arthur W. Nordstrom*, and *Walter C. Foster*, for intervener port of Los Angeles.

Sidney Goldstein, general counsel, *F. A. Mulhern*, attorney, *Arthur L. Winn, Jr.*, *Samuel H. Moerman*, *J. Raymond Clark*, *James M. Henderson*, *Gordon P. MacDougall*, and *Jacob P. Billig* for intervener port of New York Authority.

Richard J. Gage for intervener New York Terminal Conference.

Donald E. Leland and *Thomas J. White* for intervener Northwest Marine Terminal Association.

William L. Marbury and *John C. Cooper III* for intervener Maryland Port Authority.

Donald J. Brunner and *Robert J. Blackwell*, hearing counsel.

Report

BY THE COMMISSION: (JOHN HARLLEE, *Chairman*, JAMES V. DAY, *Vice Chairman;* ASHTON C. BARRETT, GEORGE H. HEARN, *Commissioners*)

Proceedings

The Commission instituted these consolidated proceedings to determine whether certain leases of terminal property are subject to section 15 of the Shipping Act, 1916 (46 U.S.C. 814), and, if so, whether the agreements should be approved, disapproved, or modified. Agreement No. T–4, a marine terminal lease from the city of Long Beach to Sea-Land of California, is the subject of docket No. 1128. A similar lease, agreement No. T–5, from the city of Oakland to Sea-Land of California, is the subject of docket No. 1129.

On October 13, 1964, Examiner Benjamin A. Theeman served an initial decision in which he found that Long Beach and Oakland were persons subject to the Shipping Act. However, he found that the leases were simply the ordinary arrangement between landlord and tenant and, as such, were not section 15 agreements. Consistent with this holding that the leases were not section 15 agreements, the examiner did not consider the issue of section 15 approvability.

After adverse parties filed exceptions to this initial decision, the Commission remanded the preceeding to the examiner since it appeared that the agreements in question might fall within the purview of section 15. The Commission directed the examiner to determine whether

the agreements should be approved, disapproved, or modified so that it might have the benefit of an initial decision on all issues.

In accordance with the remand, the examiner issued a supplemental initial decision on February 15, 1965. Based upon an assumption (with which the examiner did not agree) that the agreements were section 15 agreements, he found that the agreements should be approved.

The proceeding is now before us on exceptions to the initial decision and supplemental initial decision.

FACTS

Agreements T-4 and T-5 are similar. The initial term of each lease is for 3 years with two 3-year options to renew. Oakland and Long Beach receive monthly rent of approximately $12,000 in lieu of terminal charges. In return, Sea-Land is granted the exclusive use of the pier in connection with its steamship operation. In addition, the leases provide that Sea-Land will pay utilities and keep the premises in good repair, and lessors agree to make certain improvements. The Oakland lease is specifically subject to certain State statutes and local ordinances.

Agreement T-4 at Long Beach covers two open berths and the adjacent water area. Together the berths form one long pier to be used for the docking of Sea-Land's vessels. Adjoining the berths is an open space for use as a marshaling and storage yard for Sea-Land's containers.

Agreement No. T-5, the lease at Oakland, covers one long pier without transit sheds with adjacent marshaling and storage yards.

Sea-Land has also negotiated with Long Beach and Oakland for the lease of an adjacent area on which Sea-Land maintains its general offices and a truck and drayage terminal. The truck terminal lease at Long Beach is designated agreement No. T-4-1, and at Oakland it is designated No. T-5-1. Both leases cover a period of 20 years.

Sea-Land Service, a Delaware corporation wholly-owned by McLean Industries, Inc., is a common carrier engaged in transportation by water of "containerized" goods between the Atlantic and Pacific coasts of the United States. On the eastbound voyage, the vessels call at Puerto Rico for the loading and discharge of Pacific coast freight. Sea-Land operates its Pacific Coast/Puerto Rico service pursuant to a published tariff on file with the Commission.

Sea-Land of California, a Delaware corporation also wholly-owned by McLean Industries, is husbanding agent on the Pacific coast for Sea-Land Service. Sea-Land of California engages in trucking operations and performs pickup and delivery service to and from the marine terminals at Long Beach and Oakland. Since September

1962, Sea-Land of California in its own name has applied for and received from Oakland and Long Beach temporary wharf assignments. Under these temporary wharf assignments, the wharf allocated to Sea-Land of California is made available to Sea-Land Service to berth and service Sea-Land Service vessels. Sea-Land of California loads and discharges cargo (containers) at both ports. Sea-Land Service pays Sea-Land of California 105 percent of its expenses for the services rendered to Sea-Land Service.

For some years prior to 1961, carriage of goods in the intercoastal trade generally declined. In 1961, Sea-Land established a regular intercoastal service between the Atlantic and Pacific coasts of the United States with a stop at Puerto Rico using break-bulk type vessels. However, in September 1962, Sea-Land put its first container ship into the trade. Currently Sea-Land assigns four container vessels and one container barge to this service.

At present, Sea-Land's containerized service between the Atlantic and Pacific coasts of the United States operates on a 2-weeks' sailing schedule. The eastbound voyage commences at Long Beach. The vessel calls at Oakland and then clears from the Pacific coast for Puerto Rico for the discharge and loading of Pacific coast cargo. The voyage terminates at Elizabeth, N.J. The westbound intinerary excludes the Puerto Rico call.

Sea-Land offers a modernized concept in intercoastal and domestic offshore transportation through the use of cargo containers. For land transportation Sea-Land uses a fleet of trailer-trucks to which the containers are attachable. For water transportation the container is loaded aboard and discharged from vessels especially constructed to carry and handle 476 containers. Each vessel is self-sustaining; it is able to load and discharge the containers without land-based assistance. Consequently, Sea-Land requires only an open dock or wharf to berth its vessels, an open backup area contiguous to the wharf to park and marshal detached containers and trailer-trucks, and an adjacent truck terminal building to assemble or consolidate cargo and to use as a garage and repair shop.

With the commencement of its containerized service, Sea-Land instituted a single factor rate including in one amount all transportation charges. In the intercoastal trade (subject to the jurisdiction of the Interstate Commerce Commission) this rate covers door-to-door transportation. In the Puerto Rican trade, however, the single factor rate covers dock-to-dock transportation; and Sea-Land separately assesses an additional charge for wharfage.

Oakland is a municipal corporation in the State of California which owns and leases terminal facilities in the port of Oakland through its Board of Port Commissioners. Oakland's terminal facilities are

used by common carriers by water pursuant to port of Oakland Tariff No. 2. Under its tariff, Oakland makes temporary wharf assignments to common carriers by water granting them the right to moor the vessel, to assemble, distribute, load and unload cargo, and to perform other related activities. Oakland leases certain of its facilities to terminal operators. Under the leases, the terminal operator's (lessee's) charges for terminal operations are required to be the same as those set forth in Oakland's tariff. Oakland reserves the right to disapprove any of the terminal operator's rates, charges, or practices; to require the terminal operator to file rates and charges; and to require the lessee to conform to such practices as Oakland may determine. The leases provide that the terminal operator shall pay to Oakland all revenue collected for dockage, wharfage, wharf demurrage, and storage up to a certain specified amount; over that figure, the lease agreements provide for a division of revenue between Oakland and the terminal operator. The terminal operator also must maintain a detailed account of revenues received and submit revenue reports to Oakland at regular intervals.

Long Beach is a municipal corporation organized under the laws of the State of California. The Harbor Department, under the control of the Board of Harbor Commissioners, is a department of Long Beach created to promote the development of the port. In this connection, Long Beach furnished wharfage, dock, and other terminal facilities in connection with common carriers by water at its wharfinger facilities. Long Beach Tariff No. 3 prescribes the rates, rules, and regulations applicable at these facilities.

The traditional pattern of terminal charges on the Pacific coast has consisted of the assessment, pursuant to published tariff, of dockage wharfage, and other terminal charges against either the vessel or the cargo for the use of the terminal facilities or for terminal services. These charges have been substantially uniform at California ports. This uniformity is partially the result of previous Commission regulation in this area [1] and partially the result of cooperation among California terminal operators through the California Association of Port Authorities, Agreement No. 7345, which is designed to foster the establishment of a reasonably compensatory rate structure based upon uniform terminal rates and practices as far as may be practicable. Oakland and Long Beach are parties to this agreement.

Sea-Land began preliminary discussion with ports and terminal operators in the San Francisco Bay area concerning the rental of terminal facilities in 1960. Subsequently, Oakland and Sea-Land entered into a terminal lease, agreement No. 8845, which was filed with

[1] *Practices, etc., of San Francisco Bay Area Terminals*, 2 U.S.M.C. 589 (1941); *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 (1948).

the Commission for approval on May 8, 1962. Several protests were filed to agreement No. 8845, and the Commission instituted an investigation of the agreement; Sea-Land and Oakland then canceled agreement No. 8845, and the Commission discontinued its investigation.

During this same period Sea-Land inaugurated its containerized intercoastal domestic offshore service. Oakland provided Sea-Land with terminal accommodations at berth 9, which had previously been used only intermittently, under a temporary wharf assignment pursuant to Oakland's regular terminal tariff. After expressing the view that the wharfage charge of 80¢ per ton was unreasonable, Oakland granted Sea-Land a reduction in this charge to 50¢ per ton. Sea-Land operates under this arrangement at present.

From the outset, in discussions both with Oakland and other prospective lessors, Sea-Land attempted to obtain a flat-rental lease. Finally, Oakland concluded that a flat monthly rental of $12,150 for berth 9 would be a fair rental. In arriving at that flat monthly rental, Oakland gave some consideration to a comparison of the rental with revenue to be derived from the regular terminal charges; however, the principal concern was to insure that Oakland received an adequate return for the use of berth 9.

At the time of the negotiations for agreement No. 8845, Oakland and Sea-Land Service also negotiated a truck terminal lease (T-5-1) near the marine terminal facility at berth 9. The lease provided for a truck transfer terminal, a truck maintenance garage, and a Pacific coast headquarters office for Sea-Land. This lease is for a 20-year term at a monthly rental of $1,208.90 for the land and $3,063 for the truck terminal.

While Sea-Land negotiated with Oakland for a terminal lease, it also began discussions with Long Beach regarding the lease of an open berth with adjacent backup area at that port. Sea-Land's first container ship called at Long Beach in September 1962. Initially, Long Beach assigned to Sea-Land berths 208 and 209. Since February 1963, Long Beach has assigned its newly constructed berths 214 and 215, the area included within the lease under consideration here (T-4). Long Beach offered to Sea-Land a preferential assignment at a specified rental plus the regular dockage and wharfage charges. Sea-Land took no action on this offer but reiterated its desire for a flat rental arrangement. Thereafter, Long Beach offered such an arrangement to Sea-Land, but this scheme was withdrawn upon the administrative determination by the Commission that the arrangement would fall within the proscriptions of section 15. Finally, in August 1962, Long Beach and Sea-Land agreed to a lease (T-4) covering berths 214 and 215 at a monthly rental of about $12,000. Long Beach calculated this rental to yield a reasonable return on its investment.

Prior to the execution of the pier lease, Sea-Land and Long Beach also consummated a truck terminal lease (T–4–1) including a garage, a warehouse, and an office building.

Encinal Terminals is a privately owned California corporation engaged in the business of furnishing wharfinger and other terminal services, trucking, warehousing, and stevedoring. Encinal's principal operation is located at Alameda, Calif. It leases additional waterfront facilities from Oakland.

Encinal, although the largest tenant of Oakland, was a competitor of Oakland in locating Sea-Land. Encinal conducted negotiations with Sea-Land beginning in 1960 and in order to accommodate Sea-Land attempted to negotiate a lease with Oakland for berths 8 and 9. Throughout Encinal's negotiations with Sea-Land concerning the accommodation of Sea-Land at Alameda or Oakland, Sea-Land insisted that it must not only exercise complete control over the facilities, but that it would agree only to a flat annual rental as well. Because Encinal would not depart from principle of maintaining the full level of wharfage and dockage in negotiating a lease with Sea-Land, Encinal was not able to reach final agreement with Sea-Land.

The port of San Francisco also attempted to locate Sea-Land at its facilities. But San Francisco was unsuccessful since Sea-Land sought a flat rental lease, and San Francisco refused to discuss the matter with them on that premise. San Francisco had available its Islais Creek Facilities with sufficient backup area to accommodate the Sea-Land container operation; however, Sea-Land would have been given a preferential berth assignment only.

The port of Los Angeles also negotiated with Sea-Land regarding the location of Sea-Land at that port; however, Los Angeles never discussed leases with Sea-Land on other than a full wharfage and dockage basis.

Sea-Land also considered terminal facilities at Richmond and Stockton, Calif.

Discussion

The examiner found that the lessors, Long Beach and Oakland, were persons subject to the act over strong argument to the contrary by these two ports. However, the ports did not except to this finding. The examiner predicated his finding upon the fact that Oakland and Long Beach own certain terminal facilities and retain wharfage and dockage charges at these facilities. To that extent, they furnish terminal facilities within the meaning of section 1 of the Shipping Act and are, therefore, other persons subject to the act. We adopt this finding.

Sea-Land Service is a common carrier by water in interstate and domestic offshore commerce, and Sea-Land of California is a terminal operator; both are subject to our jurisdiction. Therefore, the leases fall within the initial prerequisite of section 15; they are agreements between persons subject to the Shipping Act.

At the outset, the Commission is confronted with the question of whether it will consider agreements No. T–4 and T–4–1 as one arrangement or two. The same question arises with regard to T–5 and T–5–1. The record indicates that the "pier" lease and the "truck terminal" lease cover areas in the same locale, and the activities accomplished on this property are essential to Sea-Land's integrated containerized operations. Irrespective of the execution of separate leases for the two plots, we will consider the entire understanding between Sea-Land and the respective port as a composite. Reference to T–4 and T–5 will include T–4–1 and T–5–1.

In determining whether the agreements were subject to section 15, the examiner measured each clause of the leases against the language of section 15. Throughout his discussion, the examiner refers to "provision," "clause," "article," etc. For example, the examiner states his major premise as follows: "[T]he Commission has not required the filing of ordinary leases, but has required the filing of those lease-type agreements or arrangements wherein a *provision* of the lease gives a party a special preference or advantage." Likewise, the examiner defines a lease-type arrangement (one subject to sec. 15 in the examiner's nomenclature) as a lease that contains "some type of preferential or anticompetitive *clause*."

Encinal, Los Angeles, San Francisco, and Hearing Counsel argue that the examiner erred in considering only the terms of the leases.

Encinal excepts to the examiner's consideration of the leases limited to the terms of the written instruments alone. Encinal argues that the Oakland city charter and applicable State law should be incorporated into the leases. They contend that these statutory provisions give Oakland and Long Beach power and responsibility to control rates and charges at these facilities; therefore, the Commission must look, not only to the lease, but to pertinent state and local law as well, to determine what the true understanding between the parties is.

Los Angeles also argues that State law and local ordinance must be read into the leases. In addition, Los Angeles asserts as error the examiner's failure to consider extrinsic evidence to show what the agreements will accomplish. Los Angeles contends that only upon appraisal of all of the objectives of the agreements and the circumstances under which the leases will operate can the Commission determine whether a lease is cognizable by section 15. In other words, they

argue that if a lease has a substantial competitive impact, this evidence is material to the issue of subjectivity to section 15 no matter what the written phraseology of the lease may provide.

Hearing Counsel argue that resolution of this issue requires reference to terminal tariffs, promulgated by Long Beach or Oakland, to determine if the leases give special rates, privileges, or accommodations.

In discharging our duties under section 15, we are not limited to those matters parties to agreements wish us to see. We are required to go further. Where agreements are strongly protested, as here, we must examine not only the terms of an agreement, but also the competitive consequences which may be expected to flow from the agreement and other facts which show the objectives and results of the agreements. Section 15 is concerned with competitive relationships and the limited lessening of competition in the furtherance of our maritime transportation policy. Thus, to determine if an agreement falls within the requirements of section 15, we must consider in the interest of uniform, enlightened regulation to what extent the agreements affect competition. To decide otherwise is merely to reward the clever draftsman at the expense of our regulatory responsibility.

After a lengthy analysis of a distinction between leases that need not be filed (ordinary leases) and leases that must be filed (lease-type arrangements), the examiner concludes that none of the provisions of the leases expressly creates one of the anticompetitive devices enumerated in section 15. Consequently, the leases are no more than the ordinary landlord-tenant relationship and not agreements subject to section 15. We disagree with the examiner's determination that agreements No. T-4 and T-5 are not agreements subject to section 15.

Los Angeles, Encinal, San Francisco, and Hearing Counsel, in general, claim that the leases fall within the scope of section 15 as a result of the incorporation of State and local law or by reference to contemporaneous facts. Los Angeles and Oakland contend that, if the leases are read in the legal climate to which they are subject, local and State law, lessors are empowered to control rates and charges at the leased facilities.

Hearing Counsel argue that the rental terms of the leases, vis-a-vis the otherwise applicable tariff rates, bring them within the scope of section 15. This comparison between the rent and the tariff demonstrates that the leases give special rates for terminal services. Although Hearing Counsel do not suggest that the straight rental in lieu of ordinary terminal charges is unfair, they submit that the rental charges are significantly different than otherwise applicable charges specified in the terminal tariffs of Oakland and Long Beach. Since the charges for the use of the facilities are other than the regular tariff

rates, Hearing Counsel contend that the leases give a special rate and consequently fall within the meaning of section 15.

Hearing Counsel also urge that the examiner erred in finding the leases were not subject to section 15 since they specifically provide for the exclusive use by Sea-Land of the berths. They consider this to be a special privilege resulting in an advantage to Sea-Land which brings the leases within the meaning of section 15.

Encinal argues that the leases place Sea-Land in a position of charging to itself whatever terminal rates it wishes. Encinal contends that this amounts to a special preference and privilege which is unavailable to other terminals and carriers using these ports. Also the leases, it is argued, free Sea-Land from restrictions to which other terminal operator must adhere. These restrictions include the obligation to maintain public wharves, to conform their charges as nearly as possible to those of the respective port tariff, and to file tariffs with the port on thirty days' notice. There are no such requirements in agreements T-4 or T-5.

The rental provisions in agreements T-4 and T-5 are expressly stated to be "in lieu of" all terminal charges prescribed in the tariffs of lessors. The tariffs of Oakland and Long Beach provide that the regular charges to be assessed the user of a terminal facility are the charges which appear in their respective terminal tariffs, and it is equally clear that agreements T-4 and T-5 provide for the assessment of a charge based on other than tariff rates. All other users of lessors' facilities are assessed terminal charges by gross register ton of the vessel in the case of dockage and by the number of tons in the case of wharfage.

In docket 1097—*In the Matter of Agreement 8905, Seattle-Alaska Steamship Co.*, March 20, 1964, the Commission found that a terminal lease which provided for payment at tariff rates not to exceed a specified maximum was a special rate, accommodation, or privilege sufficient to bring that agreement within the ambit of section 15. Thus, the Commission in agreement 8905 found a lease to be a section 15 agreement because it contained a rental charge based upon other than tariff rates. This is the fact pattern present in agreements T-4 and T-5. On this record, we find that Long Beach and Oakland, in granting Sea-Land, through a terminal lease, the exclusive use of a berth for a consideration which substantially deviates from tariff charges applicable to others, have given Sea-Land a special rate which brings the leases within the meaning of section 15. Since we have determined the leases to be section 15 agreements on this ground, we need not further discuss nor make findings on other theories offered by parties on this issue.

We will comment on an additional, novel argument that the agreements are not subject to section 15. The Port of New York Authority, an intervener, argues that only agreements which are intended to restrain competition in per se violation of the Sherman Act must be filed under section 15. We reject this argument. First of all, the effect of the agreement, not its intent, is the basis for inclusion or exclusion from the requirements of section 15.[2] Section 15 describes in unambiguous language those agreements that must be filed; it does not speak of agreements per se violative of the Sherman Act. Since the wording of section 15 is clear, we need not refer to the legislative history; there simply is no ambiguity to resolve. Section 15 is not explicitly limited to those agreements that are per se violative of the Sherman Act; therefore, we will not, as we cannot, amend the section to limit it.

We consider now the question whether we should approve, disapprove, or modify the leases in accordance with the criteria of section 15. The examiner, assuming that the agreements were subject to section 15, found them to be approvable. Encinal, Los Angeles, and San Francisco except. They contend that the leases should be disapproved because they are unjustly discriminatory as between ports, terminal operators, and carriers; because they are detrimental to the commerce of the United States; and because they are contrary to the public interest. Encinal, Los Angeles, and San Francisco assert that the agreements should be disapproved because their implementation will disrupt the traditional Pacific coast system of assessment of terminal charges in accord with published tariffs. They claim that the present system, which has worked for many years, will deteriorate if proposed leases are approved and that other carriers will demand similar flat-rental arrangements and the tediously developed uniformity of terminal charges on the Pacific coast will be destroyed.

We first consider the question of unjust discrimination. Protesting interveners base their arguments upon the fact that Sea-Land pays a flat rental and others must pay tariff rates and upon their allegation that the rents reserved in the leases are noncompensatory. In neither situation do we find that the leases should be disapproved because they are unjustly discriminatory.

Since the consideration for terminal leases is a flat rental rather than a tariff basis contrary to their usual practice, Oakland and Long Beach were on new ground in computing a fair rent. Long Beach, for instance, followed or attempted to follow the so-called New York approach under which the annual rents were based upon the average cost per square foot of the facility. Protestants argue that the rentals de-

[2] Certainly here the parties intended, indeed designed, these leases not to be subject to sec. 15.

termined under this method were grossly understated since certain values of land and improvements were not included.

While we believe that factual computations of the amount of rental in a terminal lease are material to the question of whether the agreement is approvable, a determination that the lease of one facility does not return as much revenue as it might do ideally is not in itself determinative. We have already found that the difference in treatment afforded to Sea-Land brings the lease arrangement within section 15. But we are not prepared to hold on the basis of this fact alone that the agreements are unapprovable.

The interveners contend that the leases are unjustly discriminatory and therefore unapprovable because the rents reserved are noncompensatory. The examiner found that the rental under each lease represents a reasonable rate for the use and occupancy of the pier facilities. We agree.

The record demonstrates that the leases provide adequate revenue on their investment. The primary conclusion to be drawn here is that Sea-Land was able to negotiate a favorable rental, and that Oakland and Long Beach in their own judgment voluntarily entered into these arrangements. This was exactly the situation we considered in *Port of Seattle—Alaska Steamship Co.*, *supra*, where we stated at page 9:

"An agreement for the use of public terminal facilities at a rental which deviates from the terminal's regular tariff provisions, may run afoul of the Shipping Act's proscription and is deserving of our scrutiny for any illegal discrimination or prejudice that may result. Such an agreement, however, is not unlawful or unreasonable merely because it does not follow the terminal's tariff charge."

In addition, the Commission pointed out that a section 15 investigation of a terminal lease was not a rate case to determine the level of return on the port's investment. Since the port as a public body experienced in terminal management was satisfied with the arrangement, the Commission would not dispute the judgment of the port in negotiating with prudent regard for the public's investment.

Here there is sufficient evidence that the rent provides adequate revenue. It is, of course, practical also to note that the premises covered by agreement T–5 was not being used to any substantial degree prior to the entry of Sea-Land into the trades, that the newly constructed pier covered by agreement T–4 will be put to immediate, long-term use, that the absence of transit sheds on the facilities rendered them inappropriate for normal terminal use, and that by leasing the premises to Sea-Land the ports have been able to utilize the area adjacent to the piers which previously had been unused. Finally, the record shows that the two ports, by entering into flat rental arrangements, have guaranteed to themselves a consistent

source of revenue. At other terminal facilities where revenue is a function of the tonnage handled, no such guarantee exists since no revenue would accrue when cargo does not move. The rentals reserved in the leases are reasonable under the circumstances.

The record discloses no unlawful discrimination or prejudice against any carrier, port, or terminal. There is no showing at all of any adverse effect upon another carrier. Insofar as unlawful discrimination or prejudice against another terminal within the port of Oakland or Long Beach, once again the record does not disclose the requisite competition between the terminals. The terminals covered by agreements No. T–4 and T–5 have a specialized use. The fact that these facilities earn revenue in a different manner and on a different basis than other facilities within the respective port does not render the arrangements unapprovable.

Neither can we find on this record that there is any unjust discrimination against other ports. There is no showing that anything beyond the loss of a potential customer—Sea-Land—will occur to protesting ports.

A related argument is based upon the claims of the protesting interveners that approval of these leases will undermine the traditional uniformity of terminal charges on the Pacific coast. Much of the argument is premised on the allegation that terminal regulations will deteriorate. We find, however, that the dire consequences predicted by these interveners may be mitigated by the legal responsibilities of Sea-Land. Irrespective of the type of terminal arrangement it makes, Sea-Land is charged with the legal duty to establish and enforce just and reasonable regulations concerning the handling of cargo. There is no evidence that Sea-Land would do otherwise. Accordingly, we will not impute such motives to Sea-Land. We simply cannot predict that other ports will rapidly follow the flat-rental arrangements existing between respondents. The operations of most carriers are not now susceptible to this system. Likewise, there is no likelihood that a one terminal/one carrier ratio will result from our approval of the leases.

It is suggested that the leases are unapprovable because they are contrary to agreement No. 7345, the California Association of Port Authorities' agreement. This, however, is not the case. The agreement simply permits uniform, stable terminal rates as far as may be practicable. The agreement does not require uniformity. We find that Long Beach and Oakland were justified in departing from the concept of uniformity in this situation.

Encinal and Los Angeles also contend that the leases are unapprovable because they are contrary to the laws of the State of California. While we might consider State or local law in determining

what the public interest may be, we cannot in this case disapprove the agreements on this basis. The record does not show that any adverse ramifications will ensue upon approval of the agreements. Since we cannot anticipate any consequences which might be contrary to the public interest, the legality of the terms of the leases under California law is a matter for the State, not for the Commission in a section 15 proceeding.

There is insufficient evidence to warrant our finding that the leases will have an unlawful impact or will be detrimental to commerce or will be contrary to the public interest. We will not disapprove the agreements on the basis of speculation alone. In fact, the leases have much to commend them. Long Beach and Oakland have acted to develop and improve their ports. Sea-Land and the shipping public benefit as well. Of course, it is in the public interest to preserve the traditional, enlightened system of terminal charges on the Pacific coast, but we do not see these leases as endangering this system. Accordingly, we approve agreements No. T–4, T–4–1, T–5, and T–5–1.

An appropriate order will be entered.

Commissioner John S. Patterson concurring and dissenting:

I concur that the leases between the city of Long Beach and Sea-Land of California, Inc., entered into the 10th day of July 1963 (exhibit 60), identified as agreement No. T–4, and between the city of Oakland and Sea-Land of California, Inc., entered into the 31st day of December 1962 (exhibit 1), identified as agreement No. T–5, wherein the lessee (1) takes the property "for the berthing of vessels" (par. 1, p. 1—Long Beach) and "for the docking and mooring of seagoing vessels" (par. 4, p. 4—Oakland), to the exclusion of the public use, and (2) pays a fixed monthly rental "in lieu of all charges for dockage, wharfage" and other normal port charges (par. 3, p. 2, exhibit 60—Long Beach, and par. 3, as revised, p. 2, First Supplemental Agreement of May 20, 1963, exhibit 1–B—Oakland), are agreements giving special privileges and giving special rates and are subject to filing and approval under Section 15 of the Shipping Act, 1916, as amended (act).

I dissent from the conclusion that the leases between the city of Long Beach and Sea-Land Service, Inc., entered into the 8th day of August 1962 (exhibit 94), assigned to Sea-Land of California, Inc., identified as agreement No. T–4–1, and between the city of Oakland and Sea-Land Service, Inc., entered into May 22, 1962 (exhibit 37), assigned to Sea-Land of California, Inc., identified as agreement No. T–5–1, are agreements subject to filing and approval under Section 15 of the Act. The truck terminal leases cover land used for the purpose of parking, storage, repair and maintenance of trucks, trailers, and containers, and a small office for the conduct of business.

The majority seeks to join the two agreements with the words: "* * * the 'pier' lease and the 'truck terminal' lease areas in the same locale, and the activities accomplished on this property are essential to Sea-Land's integrated containerized operations." The facts are that neither lease incorporates the other by reference, the leases were not executed at the same time, and the Oakland properties are two blocks apart and the Long Beach properties are about a half-mile apart. The monthly rental is not made dependent on transportation rates or related to wharfage and other charges, but is related solely to the value of the property just as any other rent. Absent express provisions joining two agreements such as these into one, a principle making essentiality to "integrated containerized operations" a justification for joining two separate agreements, covering different properties and measures of rent, into one agreement for the purposes of section 15 is not acceptable, and I am not persuaded by the reasoning of the majority to make such a conclusion or finding on the facts of this proceeding. Neither are any of the competitive factors referred to by the majority acceptable tests for replacing the seven tests of agreements subject to filing pursuant to the first paragraph of section 15. Agreements Nos. T–4–1 and T–5–1 do not meet the tests of section 15 by having competitive consequences or relationships or by affecting competition, assuming these factors proven on this record. Accordingly, each agreement has been examined and adjudicated separately for the purpose of applying the provisions of section 15.

Based on my examination of agreements Nos. T–4 and T–5, I concur that each should be approved. I conclude that agreements Nos. T–4–1 and T–5–1 need not be filed.

FEDERAL MARITIME COMMISSION

No. 1128

AGREEMENT No. T-4; TERMINAL LEASE AGREEMENT AT LONG BEACH, CALIFORNIA

No. 1129

AGREEMENT No. T-5; TERMINAL LEASE AGREEMENT AT OAKLAND, CALIFORNIA

ORDER

The Commission instituted and later expanded docket No. 1128 to determine whether agreements No. T-4 and T-4-1 between the port of Long Beach and Sea-Land of California should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916. The Commission instituted and later expanded docket No. 1129 to determine whether agreements No. T-5 and T-5-1 between the port of Oakland and Sea-Land of California should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916. The Commission has this date entered its report stating its findings and conclusions, which report is made a part hereof by reference, and the Commission has found that agreements No. T-4, T-4-1, T-5, and T-5-1 are not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, ports or between exporters from the United States and their foreign competitors, nor detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916.

Therefore, it is ordered, That agreements No. T-4, T-4-1, T-5, and T-5-1 be and they are hereby approved, effective this date, pursuant to section 15 of the Shipping Act, 1916.

By the Commission.

(Sgd) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1088

JORDAN INTERNATIONAL COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, ET AL.

Decided June 21, 1965

Rates on logs from Colombia to New Orleans not shown to be unduly prejudicial, unjustly discriminatory, or detrimental to the commerce of the United States. Complaint dismissed.

Finley J. Gibbs, for complainant.
William W. Schwarzer and *B. K. Zimmerman*, for respondents.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett, George H. Hearn, *Commissioners*)

This complaint case is before us on complainant's exceptions to the Initial Decision of Examiner Benjamin A. Theeman and the reply of respondents thereto. The matter was considered upon submission to the Commission.

Complainant Jordan International Co. (Jordan) caused three parcels of virola logs to be shipped from Tumaco, Colombia, to New Orleans in the first half of 1961 on vessels of respondent Flota Mercante Grancolombiana, S.A. (Grancolombiana). Respondent Balfour, Guthrie and Co. (Balfour) is Grancolombiana's agent, and respondent Association of West Coast Steamship Companies (the Conference), is the rate-making organization of which Grancolombiana is a member. The Conference filed with the Commission the tariffs that are pertinent here.

Prior to the instant action, Grancolombiana instituted a suit against Jordan in the U.S. District Court for Northern California to recover asserted sums due it for the movement of the logs in question. The Court stayed the proceeding pending the exercise of the Commission's

primary jurisdiction in the matter. Upon the issuance of the stay order, Jordan filed this suit.

Jordan contends, principally, that its log shipments were made pursuant to lawful contracts which called for rates less than the then published N.O.S. log rate, that Grancolombiana wrongfully repudiated the contracts, and that the N.O.S. log rate is unlawful under sections 15, 16, and 17 of the Shipping Act. Complainant demands reparation in the amount of $15,000, an order declaring the contracts lawful, and the establishment of a log rate not higher than those set out in the contracts.

Within the context of the issues framed by the pleadings, the Examiner found that the log rates had not been shown to be unduly prejudicial, unjustly discriminatory, or detrimental to our commerce in contravention of the Act, and recommended that the complaint be dismissed. He also found (1) that complainant had knowingly and willfully obtained transportation of its logs at rates less than the lawful ones in violation of section 16 of the Act, (2) that respondent Grancolombiana permitted complainant to obtain transportation of its logs at less than the applicable rate through an unjust or unfair device or means in violation of section 16 Second of the Act, and recommended that the Commission undertake an investigation into the weighing and shipping practices in connection with the movement of logs.

We agree with the examiner's finding that the record does not establish that the rates on logs from Colombia to New Orleans has been unjustly discriminatory or detrimental to our foreign commerce and that the complaint should be dismissed.

The pertinent facts are these. Jordan is an established log importer and is familiar with ocean freight rates and conference tariffs. His principal place of business is in California. Grancolombiana has its home office in Bogota, and its headquarters in the United States is in New York. At all times here relevant, Grancolombiana was a member of the Conference which published the tariff here in question. As previously noted, Balfour is Grancolombiana's agent and as such solicits cargo.

In the fall of 1960, Jordan considered the feasibility of importing virola logs from Colombia to U.S. Gulf ports, and to this end entered into rate discussions with a Balfour employee. While Jordan stated that he desired a rate which would work out to $40.00 per recovered thousand board feet of lumber, he stressed that the rate would have to be under $50.00 and that even a $45.00 rate would be a difficult one.

Jordan then purchased logs from a Colombian producer, Marquez & Co., sold them to Freiburg Mahogany Co., and caused them to be

shipped via Grancolombiana vessels. The first shipment, moving on the *Granada*, arrived at New Orleans in February, 1961. This shipment consisted of 231 logs, and 195 of these were virola. This movement was treated as a sample or test shipment by the parties.

At all times here pertinent, the conference tariff rate on virola lumber was $40.00 per 1,000 board feet when bundled, and $46.00 when loose. The rate on logs, an N.O.S. rate, was $32.00 per 2,000 pounds. Although there has been a substantial movement of virola lumber from Colombia to the United States, until the log shipments in question occurred, virtually no virola log movement existed. These logs do not make attractive cargo for carriers; they are loaded from water, unloaded into water, are transported wet, cannot be stowed with other cargo, involve vermin and fungus growth, and a stench which precludes its admixture with other cargo.

The lumber yield from a virola log varies from 35 percent to 65 percent with an average yield of about 50 percent. At a 50 percent yield recoverable lumber would equal a rate of about $80.00 per 1,000 board feet, approximately twice the bundled lumber rate.

On the first *Granada* shipment the logs were not weighed at destination, but the logs were represented on the bill of lading as containing 49,268 Doyle feet.[1] Based upon the tariff rate of $32.00 per 2,000 pounds, freight was calculated at $3,985.82. Complaint was then made to Balfour that the rate did not work out to the $41.00 or $42.00 per thousand board feet agreed to, and in response to Balfour's request for additional information measurement, weight and out-turn of each of the 231 logs was furnished Balfour. On February 20, 1961, Grancolombiana, New York advised Balfour that rate was to be kept at $32.00 per ton converted at 2.3 kilos per Doyle foot.

Shortly thereafter, on March 7, 1961, Jordan wrote Balfour that he had some 500,000 feet of logs ready to move in the trade with the understanding that "freight will be evaluated at $41.25 per thousand board feet Scribner-Doyle scale." Balfour's solicitation agent, Mallet, wrote "agreed" on this paper. One week later Jordan sold logs containing 395,000 feet Scribner-Doyle scale, and on March 18, caused 685 logs to be lifted on the *Medellin*.

The bill of lading indicates that these logs contained 180,252 Doyle feet, weighed 913,983 pounds, and calculated at $32.00 per 2,000 lbs. yielded freight of $14,623.73. The logs actually weighed almost double that stated in the bill of lading. The cargo was discharged at a New Orleans pier, rather than at Frieburg's mill site up river from

[1] Doyle Feet–Scribner Doyle is a measurement scale by which the recoverable lumber of a log is estimated. The conversion factor of 2.3, multiplied by the number of Scribner-Doyle feet in the log, is designed to compensate the vessel for carrying so much of the log that exceeds the recoverable lumber.

New Orleans, as Frieburg, Jordan's customer and the consignee of these logs, and Jordan had agreed between themselves.[2]

The final movement of logs in issue consisted of 800 logs carried by the *Granada* and cleared Tumaco on April 22, 1961. These logs were out turned at the mill site, and although they were not weighed the bill of lading reflects that they contained 218,022 Doyle feet, weighed 1,154,990 lbs. and at a $32.00 per 2,000 lb. rate, yielded freight of $18,479.84.

Negotiations toward the fixing of a rate of $41.25 per thousand board feet of recoverable lumber continued during these latter shipments. Apart from Mallet's "agreement" to "evaluate at $41.25" on March 7, 1961, Mallet had been advised by his New York superior, on February 20, 1961, that the log rate was to be $32.00 and on May 3, 1961, just prior to the delivery of the second *Granada* shipment, Grancolombiana New York directed Mallet to tell Jordan that the March 7 "agreement" was not binding and that the tariff rate of $32.00 with the 2.3 [3] conversion factor would be assessed. On June 9, 1961, Grancolombiana New York suggested to the home office in Bogota that the conversion factor be reduced from 2.3 to 1.6 thereby effectively reducing the log rate, although not apparent from a scanning of the tariff. The July reply from Bogota emphasized that logs were not attractive cargo and that the $32.00 rate with the 2.3 conversion factor must be maintained, although it felt that a 3.3 factor was the actual one.

Discussion

This is a complaint case and the issues before us are those framed by the pleadings. Some matters ruled on by the examiner were not in issue. Hence, we shall not adopt the examiner's findings (1) that complainant had violated the introductory paragraph of section 16, or (2) that Grancolombiana violated section 16 Second; see *Associated-Banning* v. *Matson Nav. Co.* 5 FMB 336 (1957). In regard to both of these findings, following our precedent in *Associated-Banning*, *supra*, we shall handle these matters, as appears appropriate, beyond the context of this case. Similarly, in the context of this case, we reject the examiner's recommendation that an investigation be undertaken into the weighing and shipping practice of logs.

As previously noted, we do agree with the examiner, however, that complainant has not shown that the tariff rates on logs are unduly prejudicial, unjustly discriminatory, detrimental to our commerce;

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[2] There is no substantial evidence that these logs were to be discharged at the consignee's mill. Drayage costs between New Orleans and the mill, therefore, were correctly assessed against the cargo.

[3] The record establishes that this 2.3 conversion factor had been in effect since 1958.

or in contravention of the Shipping Act, and with his conclusion that the complaint should be dismissed.

The record establishes that the tariff rate on logs, throughout the period covered by these shipments, was $32.00 per 2,000 pounds. That rate was duly filed with the Commission, and Jordan was charged with knowledge of it. That he attempted to have the rate adjusted downward is his prerogative, and it is understandable that a freight solicitor, and even the New York office of the Bogota-based carrier, would favor a lower rate—particularly on a commodity that had no established historical movement. It is equally clear that the home office insisted upon the collection of the $32.00 rate—albeit with the 2.3 conversion factor—and that established rate is precisely what the carrier has been trying to enforce in the court.

The record also establishes, we believe, that there is no justification for the claim that the log rate would be one which, when the log is reduced to recovered lumber, should approach the ocean rate for loose or bundled lumber. With an average salvage of 50 percent, it becomes immediately apparent that the carrier, in lifting logs, is lifting exactly twice as much as it would had it lifted the lumber. The record convincingly establishes the inherent properties of the logs which make them far less attractive than lumber to carriers. In addition to their bulk, they are more difficult to load and discharge than lumber; they have a malodorous property; and they contain vermin. All of these considerations justify a carrier in treating logs substantially different from lumber, although their end result may be the same. In sum, we find that the requisite showing of substantial similarity of transportation conditions between the lumber and logs to rule that the dissimilarity in rates is unlawful, has not been made, *Phila Ocean Traffic Bureau* v. *Export S S Corp.*, 1 USSBB 538 (1936).

Finally, we turn to the "agreement" between Jordan and Mallet of March 7, 1961. Whatever was the understanding of Jordan and Mallet, in light of *United States Lines—Gondrand Bros.* 7 FMC 464 (1962), the rate obligation between Jordan and Grancolombiana is the rate obligation set forth in the published tariff, i.e. $32.00 per 2,000 pounds.

An order dismissing the complaint will be entered.

Commissioner JOHN S. PATTERSON *dissenting:*

The following facts have been shown:

1. Respondent Grancolombiana, as a common carrier by water, had a regular rate in its tariff of $32 per ton weight of 2,000 pounds, covering the shipment of virola logs (see articles 14 and 21 of Agree-

ment No. 3302 and Freight Tariff No. 7, issued by the Association of West Coast Steamship Companies).

2. The regular tariff rate was to be "quoted, charged and collected * * * on actual weight * * * of cargo, strictly in accordance with the tariff rates * * *, and no cargo shall be accepted for carriage at less than its actual gross weight or measurement * * *, or at less than rates provided in said tariffs."

3. Respondent, with one exception, failed to weigh the logs, even though the tariff required weighing and bills of lading provided "subject to reweighing at destination." The logs were not weighed either at loading or unloading, but were estimated to determine the recoverable lumber, and the estimated number of feet of lumber was multiplied by a factor of 2.3 to obtain the kilograms of weight, and the product was multiplied by 2.2046 (the number of pounds in one kilogram) to obtain the number of pounds. Such number of pounds was multiplied by the tariff rate to obtain the freight charges. There is evidence that the factor of conversion should be 3.3 kilos per Doyle foot, if anything, but there was no effort made in any event to relate these computations to the true weight of the logs.

4. In one case the logs were weighed and found to be about twice the weight shown on the bill of lading, which was based on the estimate and formula.

5. There is no evidence to show any freight adjustment based on actual weight, and freight charges as calculated were less than the applicable tariff rate.

In my opinion, these facts lead to the conclusion that the examiner should be reversed in finding a violation of section 16 of the Act by the complainant, and should be sustained in finding a violation of section 16 by the respondent. A violation of section 16 by the complainant was not an issue in the complaint or in the reply thereto.

By not weighing the virola logs and by not charging the correct tariff rates and by applying an estimate and formula instead which bore no relation to the true weight of the logs, resulting in a lower rate, the respondent allowed complainant to obtain transportation of property consisting of logs at less than the regular rates than established and enforced on the line of Grancolombiana by an unfair means contrary to subparagraph "Second", second paragraph, of section 16 of the Act.

There is no complaint of a violation of section 18.

The examiner should also be sustained in his conclusions in regard to sections 15 and 17 of the Act.

There is also a question as to whether a violation by respondent was an issue in the complaint because of its wording. It is recognized that the complaint refers only to Agreement No. 3302 as "unduly and un-

reasonably preferential, prejudicial and disadvantageous in violation of Section 16 of the Shipping Act, 1916", and not to whether respondent's other acts violate section 16, but I do not believe we should apply this language so as to disregard the provisions of the second paragraph of section 16, subparagraph "Second," in relation to the other facts of this case, even though to do so may amend the complaint. Both complainant and respondent seem to have known subparagraph "Second," second paragraph of section 16, was applicable to the other facts herein as shown by their arguments to the examiner at the San Francisco hearings on May 6, 1963. We ought not to deal with complainant's pleading simply by stating that "the issues before us are those framed by the pleadings" in discussing the factual niceties of this case. By this rhetoric, we obscure what is happening in relation to the terms of the laws we administer. We also may be disregarding a responsibility to tell the District Court for the Northern District of California, Southern Division, about the way the Act applies to all the facts in relation to Judge Wollenberg's order as to our determination of "the related issue as to the validity of the alleged agreement for a freight rate less than the tariff rate" in his Order Staying Suit in Civil No. 40810 dated November 28, 1962. The judge seems to be aware of what is going on and is only deferring to our primary jurisdiction in the premises.

We should investigate on our own motion the facts found by the examiner regarding a possible violation of section 16 by complainant and possible violation of section 18(b) by respondent. It is only the technicality of not being complained against that relieves the complainant from an adjudication of the consequences of his actions.

If the foregoing is not an entirely appropriate way to proceed and to guide the District Court, the Commission ought at least to remand the proceeding to the examiner and have him get the complaint revised as well as put the complainant on notice that he may have to defend himself in an investigation of charges of violating section 16. Other courses of action may be open in this unusually confused proceeding which should be straightened out rather than dismissed, leaving as the only alternatives either starting all over again or ignoring apparent violations of law.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1088

JORDAN INTERNATIONAL COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, ET AL.

ORDER

This proceeding having been duly heard and the Commission having considered the matters involved and having this date entered a report thereon containing its findings and conclusions, which report is made a part hereof by reference:

It is ordered, That the complaint of Jordan International Co. is dismissed.

By the Commission,

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1211

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 542—AETNA FORWARDING CO., INC. REVOCATION OF LICENSE

Application for license as independent freight forwarder, denied.

Alexander J. Lekus, Esq. appearing for Applicant-Respondent.

Robert C. Cullen, Esq. (Special Appearance) for General Foods Corporation.

Helmut Klestadt, Esq. for Trans-World Shipping Corp.

Philip Schlau, Esq. for New Hampshire Insurance Company.

H. B. Mutter, Esq. and *Thomas M. P. Christensen, Esq.* as Hearing Counsel.

INITIAL DECISION OF EDWARD C. JOHNSON, PRESIDING EXAMINER [1]

PRELIMINARY

On September 10, 1964, the Federal Maritime Commission (Commission) notified Aetna Forwarding Co., Inc. (Aetna), that it intended to revoke,[2] pursuant to Public Law 87–254 (75 Stat. 522), Aetna's Independent Ocean Freight Forwarder License No. 542, because it appeared that: (1) Aetna had ceased doing business as an

[1] This decision became the decision of the Commission on July 23, 1965, and an order was issued revoking the license.

[2] "[Sec. 44.] (d) Any such license may * * * on the Commission's own initiative, after notice and hearing be suspended or revoked for willful failure to comply with any provision of this Act, or with any lawful order, rule, or regulation of the Commission promulgated thereunder."

"[F.M.C. General Order 4] Section 510.9 * * *

"A license may be revoked * * * for any of the following reasons:

* * * * * * *

"(b) Failure * * * to comply with any lawful rules, regulations, or orders of the Commission.

* * * * * * *

"(d) Change of circumstances whereby the licensee no longer qualified as an independent ocean freight forwarder.

"(e) Such conduct as the Commission shall find renders the licensee unfit or unable to carry on the business of forwarding" (46 C.F.R. 510.9(b), (d), (e)).

independent ocean freight forwarder, (2) Aetna was financially unable to properly carry on the business of forwarding and (3) Aetna was unable to conform to the provisions of the Shipping Act, 1916, and the Commission's requirements, rules and regulations applicable to licensed independent ocean freight forwarders.

Aetna requested a hearing and this proceeding was thereafter instituted to determine whether or not Aetna's license should be revoked.

CONTENTIONS

Hearing Counsel contends that Aetna has made itself financially unable and therefore unfit to carry on the business of forwarding; and that it did this by accepting some $40,000 advanced to it by shippers for the specific purpose of paying ocean freight charges on their shipments and failed to do so; that Aetna signed carriers' due bills covering the ocean freight charges for which shippers had advanced the funds, and that Aetna did not honor those due bills; that Aetna has received and retained more than the sum of $40,000 which did not belong to it, and has defaulted on written promises to pay this amount to steamship companies; that Aetna had its bond canceled on December 12, 1964, and has therefore failed to maintain a bond as required by section 44(c) of the act; that Aetna has ceased to qualify as an "independent ocean freight forwarder" as defined in section 1 of the act, because it has ceased "carrying on the business of forwarding," as defined in section 1, and is therefore not entitled to retain its license in the light of the requirements as set forth in section 510.9(d) of General Order 4.

Respondent in part states by way of a defense that certain other forwarders have undertaken to liquidate part of Aetna's financial forwarding obligations and that the carrier creditors involved herein have, or they will eventually be, paid for all of the services rendered.

FACTS

Aetna is licensed by the Federal Maritime Commission (Commission) as an independent ocean freight forwarder holding license No. 542 which became effective on April 16, 1964. The New Hampshire Insurance Company (New Hampshire) issued the independent ocean freight forwarder's bond required of Aetna by Public Law 87-254 [3]

[3] "[Sec. 44.] (c) The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders and no such license shall be issued or remain in force unless such forwarder shall have furnished a bond or other security approved by the Commission in such form and amount as in the opinion of the Commission will insure financial responsibility and the supply of the service in accordance with contracts, agreements, or arrangements therefor."

in the form prescribed by Commission regulations governing forwarders and this bond became effective December 18, 1963. Pursuant to the terms of the bond (and section 510.5(h) (2)),[4] New Hampshire, on November 10, 1964, sent the Commission notice of cancellation of Aetna's bond. The Commission received the notice on November 12, 1964, and notified New Hampshire that the cancellation would become effective December 12, 1964.

A due bill, to which further reference will hereinafter be made, is a written promise to pay made by a forwarder to a steamship company in return for which the steamship company releases to the forwarder a bill of lading involving certain cargo shipments.

At a time prior to August 17, 1964, Aetna had acted as forwarder for the Coca-Cola Export Corporation (Coca-Cola) for a period of some 22 years, and during this time Aetna rendered satisfactory service. From time to time thereafter Coca-Cola advanced certain ocean freight moneys to Aetna for the express purpose of having Aetna transmit these moneys to the following steamship companies (in the amounts set opposite their names) for payment of ocean freight charges on Coca-Cola shipments:

Farrel Lines	$5, 951. 75
United States Lines	1, 503. 54
Columbus Line	934. 80
Funch, Edye & Co	73. 89
Hansa Lines	860. 05
Nedlloyd Lines	256. 60
American President Lines	710. 10
Moore-McCormack Lines	702. 54
Zim Israel Navigation Co	102. 12
Moller-Maersk Lines	1, 454. 69
Robin Line	43. 06
Black Star Line	94. 52
N.Y.K. Line	224. 49
Barber Steamship Lines	106.31
American Export Lines	107. 29
French Line	242. 25
	13, 368. 00
Insurance [5]	6, 814. 64
	20, 182. 64

[4] "The Principal [Aetna] or the Surety [New Hampshire] may at any time terminate this bond by written notice to the Federal Maritime Commission at its office in Washington, D.C. Such termination shall become effective thirty (30) days after receipt of said notice by the Commission."

[5] This item apparently represents the sum of insurance premiums paid by Coca-Cola to Aetna for the purpose of having Aetna transmit these moneys to the insurance broker, which was not done.

Aetna did not transmit the above ocean freight moneys to the steamship companies involved, but on the contrary, signed due bills covering the amounts shown above, which said due bills remain unpaid.

Between the period of August 17 and the end of August, 1964, United Forwarders Service, Inc. (United), a licensed forwarder and at present acting as Coca-Cola's forwarder, entered into an unwritten, so-called gentlemen's agreement with the above-named carriers (and with Coca-Cola's concurrence), whereby United assumed the responsibility of settling Aetna's accounts on the Coca-Cola shipments and whereby the carriers agreed not to look to Coca-Cola for payment. Pursuant to this understanding it would appear that settlement has been made with some of the carriers;[6] but not all.[7]

There is no gain saying the fact that it was Aetna's responsibility, indeed its prime duty, as a freight forwarder to pay over the moneys which it had received, to the carrier steamship companies. In several instances it did not do this.[8]

In addition it appears that Aetna did not transmit the insurance premiums heretofore mentioned to the insurance broker for whom they were intended, although United appears to have later settled the account to the satisfaction of the insurance broker.

General Foods Corporation (General Foods) advanced certain ocean freight moneys to Aetna for the purpose of having Aetna transmit these moneys to the steamship companies whose names appear below (in the amounts set opposite their names) for payment of ocean freight charges on certain General Foods shipments:

Grace Line	$1,045.03
Moore-McCormack Lines	115.10
Norton, Lilly & Co	10,665.54
Black Diamond Line	103.31
Nedlloyd Lines	2,201.81
Gran-Colombiana	90.68
Funch, Edye & Co	788.77
F. W. Hartmann and Co	3,327.45
Amerind Shipping Corp	654.80
Booth American Line	348.52
States Marine-Isthmian	1,212.83
Chilean Line	746.16

[6] Nedlloyd has accepted from United approximately $200 in full discharge of its claim for $256.60.

French Line has accepted from United one-half (½) of its $242.25 claim in full discharge thereof.

[7] There is testimony that United has not settled with Farrel Lines, Funch, Edye & Co. and Mediterranean Agencies (Zim Israel Navigation Co.).

[8] Subsection F of section 510.23, General Order No. 4, a Commission rule covering freight forwarders provides in part that "Each licensee shall promptly pay over to the ocean going common carrier * * * when due, all sums advanced * * * in connection with the forwarding transaction and shall promptly account to his principal for funds received in behalf of the principal * * *."

United Fruit Company	709.81
Mediterranean Agencies	62.07
Garcia & Diaz	149.11
Farrell Lines	1,325.32
American Hemisphere Marine Ag	316.68
Atlantic Lines (Chester Blackburn & Roder, Inc.)	387.99
Constellation Navigation Inc	566.94
	24,817.92

Aetna did not transmit the ocean freight moneys to the steamship companies above referred to, but on the contrary, signed due bills covering the amounts shown, which due bills it has not paid.

Trans-World Shipping Corporation (Trans-World), a licensed foreign freight forwarder and custom house broker since 1945, and Aetna have entered into a written agreement whereby Trans-World has agreed to pay to the steamship companies involved the full amount of Aetna's unpaid due bills incurred on the General Foods shipments. This agreement was thereafter submitted to the Commission for approval however, the Commission advised Trans-World by letter on September 21, 1964, that:

This agreement does not appear to be one subject to Section 15 of the Shipping Act, 1916. However, it appears to be the type of agreement contemplated by Section 510.25, Special Contracts, of Federal Maritime Commission General Order 4, Amendment 1.[9]

While the written agreement, as such, is not a part of the present record certain testimony relating thereto adduced at the hearing infers that Trans-World would not become liable for the unpaid ocean freight charges but on the contrary, Trans-World would agree to pay $300–$400 per month on Aetna's obligations with the option of accelerating payments; that Trans-World was willing to extend the agreement to cover Aetna's unpaid due bills on accounts of shippers other than General Foods; that in the past, Aetna and Trans-World each handled approximately 45 percent of General Foods' shipments; and that Trans-World was willing to pay Aetna's due bills in order to ingratiate itself with General Foods (and other shippers), i.e., to secure a larger percentage of their business.

In addition, the record further shows that Aetna collected ocean freight moneys from certain other shippers i.e., Clover Chemical Company, Callery Chemical Company, and Mine Safety Appliance Com-

[9] "[Section 510.25] (a) Every licensee shall retain in its files a true copy, or if oral, a true and complete memorandum of every special arrangement or contract with its principal ['Section 510.21(e). The term "principal" means the shipper, consignee, seller, purchaser who employs the services of a licensee.'] or modification or cancellation thereof, to which it may be a party or conform in whole or in part. Authorized Commission personnel and bona fide shippers shall have access to such contracts upon reasonable request."

pany for the purpose of transmitting these sums to steamship companies for ocean freight charges on shipments by these companies, but did not do so.

Although Aetna ceased handling shipments on August 17, 1964, yet, as of November 13, 1964, a number of steamship companies had filed claims with New Hampshire aggregating some $28,000 against Aetna's $10,000 bond.

DISCUSSION

On September 19, 1961, Congress enacted Public Law 87-254 (75 Stat. 522), "An Act to amend the Shipping Act, 1916, to provide for licensing independent ocean freight forwarders, and for other purposes." One such other purpose was to insure "* * * financial responsibility and proper performance of the [forwarding] services concerned."[10]

In order to accomplish that purpose, Congress, by section 44(b), made licensing dependent upon a finding by the Commission that an applicant freight forwarder "* * * is, or will be, an independent ocean freight forwarder * * * and is *fit*, *willing*, and *able* [emphasis supplied] properly to carry on the business of forwarding and to conform to the provisions of this act and the requirements, rules, and regulations of the Commission issued thereunder * * *." Under section 44(c) of the act Congress further conditioned both initial licensing and the continued effectiveness of licenses by requiring forwarders to obtain and maintain bonds in order to insure adequate financial responsibility.

As previously shown, on the accounts of Coca-Cola and General Foods alone, Aetna has misused some $40,000 by accepting freight moneys from Coca-Cola and General Foods for the express purpose of paying ocean freight charges on their shipments, which was not done. Furthermore, it executed written promises (due bills) with steamship companies to pay the ocean freight charges for which Coca-Cola and General Foods advanced the money. These due bills were not honored. Aetna similarly misused certain other moneys advanced to it by three other shippers namely, Mine Safety Appliance Company ($437.86), Callery Chemical Company ($196.46), and Clover Chemical Company in an undetermined amount.

The legislative history of Public Law 87-254 shows that Congress sought, among other things, to protect the shipping public against certain abuses then prevalent in the forwarding business, such as financial irresponsibility inconsistent with the "fiduciary relationship

[10] Senate Report No. 691; 87th Congress, 1st Session, p. 2 (1961). This Report accompanied S. 1368, which became P.L. 87-254.

which such business necessitates." I therefore construe the phrase "fit, willing, and able properly to carry on the business of forwarding" appearing in section 44(b) of Public Law 87–254, concerning initial licensing, to mean that a forwarder is unfit and unable to perform his duties when he misuses funds entrusted to him for purposes not otherwise intended and he thereafter fails to pay bills incurred in connection with his freight forwarding activities.

During the course of the hearing Respondent introduced some evidence to show that two other freight forwarders had undertaken to pay or compromise its unpaid due bills with carriers, in the apparent belief perhaps that such evidence might mitigate the need for any revocation of the license. While concern for the payment of past debts, such as we have in the present case, may be praiseworthy, nevertheless the acts complained of herein are by no means cured by such an attempt for the undertakings of other forwarders to pay or compromise Aetna's due bills are only remotely relevant to the crucial issues of licensing involved in our present case.

The unpaid due bills are neither the obligations of United nor Trans-World who have offered to pay. In fact, Trans-World has disclaimed, by the terms of its agreement, the assumption of liability for certain of the unpaid ocean freight charges involved herein. Actually, Aetna has received, and kept some $40,000 paid to it as hereinbefore shown without disbursing the moneys for the purposes intended.

In consequence, I find that Aetna is not shown to be financially responsible and is therefore unfit, within the meaning of the statute, to carry on the business of freight forwarding.

As a prime requirement for the granting of a license section 44(c) of Public Law 87–254 [11] requires as a further condition that a forwarder furnish a bond or other security in such form and amount as the Commission may require in order to secure adequate financial responsibility on the part of the forwarder in performing his duties thereunder.

It is of further significance to note that in addition to the mandatory character of section 44(c) there is a further requirement that no "* * * license shall * * * remain in force unless such forwarder shall have furnished a bond or other security approved by the Commission

[11] Section 44(c) reads:

"The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders and no such license shall be issued or remain in force unless such forwarder shall have furnished a bond or other security approved by the Commission in such form and amount as in the opinion of the Commission will insure financial responsibility and the supply of the services in accordance with contracts, agreements, or arrangements therefor."

* * *." Aetna had a bond written by the New Hampshire Insurance Company which became effective on December 18, 1963, but it was cancelled on December 12, 1964. There was no record showing that Aetna had replaced the bond or furnished any other satisfactory security which would meet the aforesaid requirements of section 44(c).

In consequence, I therefore find that Aetna has not met the continuing requirement of the Statute and has failed to provide a bond or other security approved by the Commission.

Of paramount importance under the Shipping Act, 1961 (75 Stat. 522), is the provision that ocean freight forwarders shall be independent, and in order to assure such purpose, Congress, by section 44(b) made licensing dependent upon a finding by the Commission that any applicant freight forwarder is, or will be, independent. This section in part states:

> A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be, an independent ocean freight forwarder as defined in this act * * * otherwise such application shall be denied.

Section 1 of the act defines an independent ocean freight forwarder as:

> * * * a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

In other words, an independent ocean freight forwarder must not be shipper controlled and in addition this section further requires that the forwarded must "carry on the business of forwarding." I therefore find that Aetna has not dispatched shipments since August 17, 1964, and in consequence Aetna is not carrying on the business of forwarding. Aetna therefore no longer qualifies within the meaning of the statute as an independent ocean freight forwarder.

CONCLUSION

As a result of the aforesaid findings, I therefore conclude that Aetna is deficient on three separate grounds, namely, Respondent is not financially fit; has failed to furnish the requested bond; and is no longer qualified as an independent ocean freight forwarder. Accordingly, Aetna's license must be and is revoked.

An appropriate Order will be issued.

(Signed) EDWARD C. JOHNSON,
Presiding Examiner.

June 30, 1965.

FEDERAL MARITIME COMMISSION

No. 872

JOINT AGREEMENT BETWEEN MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

Decided July 28, 1965

Supplementary agreements affecting overland rates, concurrence procedures, and the placement of items on the initiative list held to constitute unapproved agreements which are required to be filed with the Commission for approval, pursuant to Section 15 of the Shipping Act, 1916.

Doctrine of administrative estoppel held to be inapplicable in this case, as regards "tacit approval" of the supplementary agreements.

Right of independent action held preserved by Agreement No. 8200 and neither respondent found to have surrendered such right by means of a secret agreement.

Past conduct by respondents in regard to their treatment of Carnation Company held to violate Section 16, Shipping Act, 1916.

Evidence in the record of this proceeding held insufficient to warrant disapproval of Agreement No. 8200.

Respondents ordered to cease and desist from carrying out their supplementary agreements until filed with and approved by the Commission.

Elkan Turk, Jr., for the Far East Conference.

Allan E. Charles, for the Pacific Westbound Conference.

Mark P. Schlefer, for Alabama State Docks, Port of Galveston, and Port of Houston.

James M. Henderson, for Port of New York Authority and North Atlantic Ports Association.

A. P. Davis, for Carnation Company.

Louis A. Schwartz, for New Orleans Traffic and Transportation Bureau.

Richard S. Harsh, Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett and James V. Day, *Commissioners*) :[1]

[1] Commissioner George H. Hearn did not participate.

This matter is before us on exceptions to the Initial Decision of Chief Examiner Gus O. Basham.

The Federal Maritime Board, our predecessor, instituted this investigation on its own motion on October 26, 1959, in order to determine whether Agreement No. 8200 between the member lines of the Far East Conference and the member lines of the Pacific Westbound Conference is a true and complete agreement between the parties; whether Agreement No. 8200 is being carried out in a manner which makes the agreement unjustly discriminatory or unfair as between carriers, shippers, exporters or ports, or between exporters from the United States and their foreign competitors; and whether the Agreement operates to the detriment to the commerce of the United States or violates the Shipping Act, 1916.

Agreement No. 8200 was signed on November 5, 1952, and was approved by the Federal Maritime Board pursuant to section 15 of the Shipping Act, 1916, on December 29, 1952. By the terms of the agreement, the parties thereto agree to establish from time to time "rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates," excepting rates on 12 specified commodities. The agreement further stipulates the procedures for subsequent meetings or interconference interchanges of information to accomplish the objectives of the agreement.

Previous to the signing of the agreement, a meeting was held on January 16, 1952, attended by the Chairman of the Far East Conference, the Secretary-Manager of the Pacific Westbound Conference, a member of the Federal Maritime Board and two staff employees of the Board. At this meeting the Board member told the group "that he was very much interested in seeing the two Conferences form a joint agreement and that he hoped it could be finalized without delay." One of the staff members said he "and at least one member of the Board would like to see a joint agreement put into effect. . . ."

A draft agreement was prepared and personally delivered on September 4, 1952, by Far East's Chairman to the Board's staff, with a request "for an informal review of the agreement and opinion as to whether it would be recommended" by the Regulations Office for approval. The Regulations Office on September 18, 1952, sent Far East written informal comments on the draft. Another revised draft was prepared and made final by execution by the parties on November 5, 1952. On the same date a copy of the executed agreement was transmitted to the Board with a request for approval under section 15 of the Act, and approval followed on December 29, 1952.

The first two articles of the agreement provide for an "initial meeting" and for "independent action" on rate charges, as follows:

First: As promptly as possible after the approval of this agreement by the Federal Maritime Board, the parties shall hold a meeting which is hereinafter 'eferred to as the "initial meeting." The initial meeting shall be held at a time ınd place to be mutually agreed upon by the parties hereto. If, however, prior .o the 30th day after such approval the parties hereto shall not so have mutually ıgreed upon the time and place for the holding of the initial meeting, said initial neeting shall be held on the 40th day after such approval at the Fairmont Hotel in the city of San Francisco, Calif.; and if such 40th day shall fall on a Saturday, Sunday or legal holiday, said meeting shall be held on the second business day thereafter, at the same place. Such meeting shall be attended by representatives of the PACIFIC LINES and of the ATLANTIC/GULF LINES. All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the PACIFIC LINES, acting as a group, ınd of the ATLANTIC/GULF LINES, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect .o the establishment or change of rates. The initial meeting shall make rules, ıot inconsistent with the provisions of this agreement, for the conduct of all neetings to be held hereunder, and for the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the nitial meeting or at any subsequent meeting.

Second: Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram or 72 hours after the giving of such notice if given by airmail, and a summary of the facts which justify the changes on said short notice. Forty-eight hours, or 72 hours, after the giving of such notice, dependent upon the medium by which such notice shall have been given, the notifying group may make such changes as stated in said notice and the other group may, at the end of 48 hours, or at the end of 72 hours, as the case may be, after the giving of such notice, make such changes in its tariffs as it may see it and the action of the groups so taken shall not constitute a breach or violation of this agreement. The parties shall, however, promptly give to the governmental agency charged with the administration of section 15 of the Shipping Act, 1916, as amended, copies of any notices and information with respect to any changes n tariffs given or made as provided for in this *Article Second.*

The remaining six out of eight articles deal with (1) filing copies of proceedings with the Board, (2) admission of new parties to and termination of membership in conferences, (3) method of giving notices, (4) the effective date of the agreement, (5) expenses of representation, and (6) termination of the agreement.

The members of the respondent Conferences have met and adopted resolutions or have collectively agreed to a common course of action at meetings held at least annually since 1953, as evidenced by written minutes which were furnished to the Board and the Commission.

At a meeting in May 1956, the following action was taken: "At the

close of each joint meeting the spokesmen for the two Conferences shall agree upon that portion of the minutes of that meeting which shall become a part of the memorandum of decisions." These memoranda are exhibits in the record of this proceeding.

I. THE SUPPLEMENTARY AGREEMENTS

We now come to the first issue set out in the Order of Investigation, which is: Is Agreement No. 8200 a true and complete agreement between the parties? The Examiner held that the agreement was not a true and complete agreement between the parties, and that the conferences should file various "supplementary agreements" [2] with the Commission for approval before reapproval of Agreement No. 8200 is given by the Commission. The respondent conferences have excepted to this finding, arguing that these supplemental agreements are within the contemplation of the joint agreement, because the first paragraph of the joint agreement provides:

The initial meeting shall make rules * * * for the transaction of such * * * business as the parties may be permitted to conduct by virtue hereof including the provision of the machinery for the change of rates * * *.

The conferences further argue that, even if the supplementary agreements are not encompassed within the scope of the joint agreement, they have received the blessing of the Commission's predecessor, and the Commission is prevented by reason of the principle of "administrative estoppel" from finding a violation of the Shipping Act, 1916. We disagree with respondents as to both of their arguments, for the reasons hereinafter stated.

The threshold question as we see it is whether or not the supplementary agreements are within the purview of section 15, which reads in pertinent part, as follows:

SEC. 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 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 "agree-

[2] These supplementary agreements which deal with placement of items on the initiative list, overland rates, and concurrence procedures are described more fully, *infra*.

ment" in this section includes understandings, conferences, and other arrangements.

As early as 1927, the United States Shipping Board, one of our predecessor agencies, limited the language of section 15:

As contended by conference representatives in this proceeding, a too literal interpretation of the word "every" to include routine actions between the carriers under conference agreements would result in delays and inconvenience to both carriers and shippers. *Ex Parte 4, Section 15 Inquiry*, 1 U.S.S.B. 121, at 125 (1927).

Subsequent cases have elaborated on the aspect of "routine actions" so as to confine the same to day-to-day interstitial workings under the agreement. Thus, in *Mitsui Steamship Company* v. *Anglo-Canadian Shipping Co.*, 5 F.M.B. 72 (1956), the Federal Maritime Board held that a "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, * * * " 5 F.M.B. at 91–92. And, in 1957, the Board held that an agreement between Matson Navigation Co. and Encinal Terminals was not a true and complete agreement:

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. *Associated-Banning Co. et al.* v. *Matson Navigation Co. et al.*, 5 F.M.B. 336, at 341 (1957).

More recently, we have elaborated on the definition of "routine" in *Pacific Coast Port Equalization Rule*, 7 F.M.C. 623 (1963). In that case we determined that a rule providing for port equalization did "not constitute conventional or routine rate-making among carriers. It is a new arrangement for the regulation and control of competition. Moreover, it affects third party interests such as ports and facilities from which traffic is drawn and it obviously is not 'a pure regulation of intra-conference competition.' " 7 F.M.C. 623, at 630. In affirming the Commission, the U.S. Court of Appeals for the Ninth Circuit stated:

We are unable to agree with petitioners that Rule 29 is within the scope of their approved Conference Agreement. Such agreement contains no provision expressly authorizing port equalization, nor do we find any implicit authority contained therein. *American Export & Isbrandtsen Lines, et al.* v. *Federal Maritime Commission, et al.*, 334 F. 2d 185, 198 (1964).

We think that the holdings in the Commission decisions cited above clearly militate in favor of the position that the "supplementary agreements" were not within the purview of Agreement No. 8200 and were not routine, day-to-day arrangements which are exempt from the filing

requirements of section 15. The *Associated Banning* case is particularly in point. It appears to us that Agreement No. 8200 is nothing more than evidence of a general intention of the parties to enter into concerted rate-making. It sets out no details, no procedures, with the exception of the procedures to be taken at the initial meeting, nor does it inform any interested person as to how the agreement is to work.

Although not articulated in past cases, we are of the opinion that the applicable test here is whether or not the agreement as filed with the Commission and as approved sets out in adequate detail the procedures and arrangements under which the concerted activity permitted by the agreement is to take place. Any interested party should be able, by a reading of the agreement, to ascertain how the agreement is to work, without resort to inquiries of the parties or an investigation by the Commission. This is not to say that we are limiting the scope of "routine actions" which need not be the subject of section 15 filings; we are merely giving purpose to the requirements of the section. We can see no reason for the filing of agreements if they do not inform the Commission and the public in more than the barest outline as to how the agreement is to be carried out. No one reading Agreement No. 8200 could reasonably have been informed as to the procedures under which the respondent conferences were carrying out the agreement nor as to the nature of the supplementary agreements which respondents claim are within the contemplation of Agreement No. 8200. Thus, we hold that the supplementary agreements relating to rate-making initiative, overland rates, rate differentials, and the concurrence procedures (encompassing all instances of the operation of the concurrence machinery except for the placement of items on the agenda of the initial meeting)[3] are without sanction in the basic Agreement No. 8200, were therefore required by section 15 of the Shipping Act, 1916, to be filed with the Commission for approval, and, not having been so filed, were and are being carried out in violation of the said section 15.

As stated above, respondents have advanced the argument that the Commission is bound by the doctrine of administrative estoppel because the supplementary agreements received the tacit approval of officials of the Federal Maritime Board. We find that doctrine inapplicable here.

Respondents have continually been on notice as to the proper means to effectuate filing of section 15 agreements. See *Regulations for Filing Copies of Agreements Under Section 15, Shipping Act, 1916*, 46 CFR Part 522 (formerly Part 222, Sections 222.11 to 222.16). These regulations set out in detail that a letter of transmittal is re-

[3] See our discussion of the concurrence procedures, *infra*.

quired, the nature of agreements to be filed, that approval of the Commissioin is necessary, and that such approval may not be assumed until formal action is taken by the Commission.

The only agreement filed by respondents in accordance with the Commission's rules regulating the manner of filing agreements was Agreement No. 8200. The actions at the various meetings produced oral agreements which were reduced to memoranda thereof in the form of minutes. The minutes were further abstracted and put into a "Memorandum of Decisions." These were clearly not filed pursuant to the Commission's rules accompanied by a letter of transmittal "stating that they are offered for file in compliance with section 15 of the Shipping Act, 1916, * * *" 46 CFR § 522.1.

We think that the Examiner was correct when he stated:

> Respondents' contention that these agreements come within the "tacit approval" doctrine of the *Cotton* cases because of the filing of minutes and the Memorandum of Decisions, and the awareness of FMC officials of the details of the agreements just prior to and after approval, must fail because of the rejection of that doctrine on January 10, 1963, by the United States Court of Appeals (D.C.) in *H. Kempner* v. *Federal Maritime Commission*, No. 16,658 [313 F. 2d 586]. The Court held that the dual-rate agreements there involved "were not approved by the regulatory agency merely because it was silent concerning them, and the rates (established pursuant to such unapproved agreement) were therefore illegal." Initial Decision, p. 20.

II. The Concurrence Procedures

The Examiner found in his Initial Decision that the supplementary agreement requiring both respondent conferences to concur in matters voted on is sanctioned by the joint agreement, but is in violation of Public Law 87–346. We think that a brief discussion of the concurrence procedures as we understand them is in order.

First, all matters coming before the initial meeting held pursuant to the agreement were subject to concurrence before being placed on the agenda of the initial meeting. Agreement No. 8200 specifically provides that "All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the PACIFIC LINES acting as a group, and of the ATLANTIC/GULF LINES, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates." The above-quoted provision is the only specific reference in Agreement 8200 to the concurrence procedure. However, the initial meeting and procedure adopted subsequent thereto extended the concurrence procedure in the following additional cirmumstances:

(1) The assignment of items to the initiative list is subject to concurrence, although there is a prior requirement that 70 percent of the total annual movement of cargo of a particular item must be handled by the conference obtaining that item on its list. The Examiner found (Initial Decision, pp. 4–5) that "At the initial meeting * * * respondents established the basic principles * * * (4) the manner of voting on the assignment to a conference of rate-making power or 'initiative' on certain items, and the manner of voting of individual rate applications on other items * * *."

(2) Rate changes on competitive items are subject to concurrence, as found by the Examiner (Initial Decision, p. 5) that the parties set up machinery governing "the manner of voting on individual rate appliactions on other items, i.e. a requirement that both conferences must concur in all such actions." This is admitted by one of the respondents, Pacific Westbound Conference, in its Exceptions to the Initial Decision:

Moreover, the ultimate treatment of shippers whose commodities are on the initiative list and of those whose commodities are not on the list is exactly the same * * *. The procedure is no different for initiative commodities. Exceptions, p. 21.

(3) Rate changes on initiative items are subject to concurrence where the conference requesting a particular change does not have the initiative (i.e., such as the request for change in rate on evaporated milk when PWC did not have the initiative). This fact is borne out by the record developed in this case, and, more particularly, by the facts pertaining to the charge of discrimination made by Carnation Company (which will be discussed, *infra.*) These added instances of the operation of the concurrence procedure appear to us to go far beyond an agreement to concur in matters voted on. Were we confined to the latter, we could agree with the Examiner that the basic agreement sanctions the concurrence procedure. However, the concurrence procedures touch other matters than the content of the agenda of the initial meeting. Respondents will therefore be required to cease and desist from carrying out the concurrence procedures until the same be filed with and approved by the Commission.

The respondent conferences have excepted to the Examiner's finding that the concurrence procedure does not meet the tests of the "independent action" provisions of P.L. 87–346. The conferences point out that *Article Second* of Agreement No. 8200 "clearly reserves the right of each conference to act independently of the procedures adopted in and pursuant to the agreement." The Examiner decided "as a matter of law that the concurrence provision is illegal, regardless

of any testimony in support thereof." He relied on the provision of section 15 which directs the Commission not to approve any agreement between conferences and carriers serving different trades that would otherwise be competitive unless each conference retains the right of independent action. The Examiner has held that the statutory requirement is not met if, under certain circumstances, the parties do not exercise the right of independent action. The Examiner has therefore translated the mere existence of the right to a requirement that it be exercised. We think that the Examiner has applied the statute too strictly, and we therefore sustain the conferences' exception.

Section 15 provides a standard for approval of agreements based on the contents of the agreements. In the instant case, the agreement creates a "right" of independent action after certain preliminary notices to the other party. The Examiner, however, considered that the facts of the operation of the agreement are controlling, rather than the bare provisions of the agreement, relying on selected excerpts from House Report 498, 87th Cong., 1st sess., pp. 9–10 which in turn refer to how a joint agreement "has operated." We believe that Congress was only restricting the authority to approve agreements when it enacted P.L. 87–346, and was not establishing standards by which to judge the operations of agreements. Upon an initial examination of an agreement between conferences, we are confined to a determination as to whether or not the agreement provides for the right of independent action. That is all the statute requires. And, Agreement No. 8200 meets the statutory requirement in specific terms. This is not to say, however, that in the future we would be confined to "the four corners" of an agreement in a subsequent proceeding to determine whether an agreement should be reapproved, modified, or disapproved. It could well be that actual operations under an agreement, subsequent to our initial approval, might show that the agreement was being carried out in a manner as to make it detrimental to the commerce of the United States or contrary to the public interest. Then, disapproval would be in order.

In conclusion, the statute provides adequate means for disapproval should the same be required. We do not, however, find that such disapproval is warranted by the evidence of record in this case. We are unable to find any evidence of a secret agreement between Pacific Westbound and Far East that Pacific Westbound would give up its right of independent action. Such an agreement, we hold, has never existed. The right was created in Agreement 8200 in conformance with the statutory requirement, and it was never given up.

III. The Initiative List

The Examiner found that the manner of determining whether or not commodities are placed on the rate-making initiative is violative of section 16 of the Shipping Act, 1916, in that the procedure subjects shippers to undue prejudice and disadvantage. The conferences have excepted to this finding, and the Far East Conference has taken further exception to the Examiner's finding that it unjustly discriminated against Carnation Company by refusing to concur in Pacific Westbound's requests for the initiative on evaported milk until May of 1961.

The initiative procedure provides a method whereby certain commodities are classified in two categories in such a way as to locate the power to change rates with or without agreement or concurrence. The conferences first agreed that the so-called "local initiative" rate-making authority would be established with respect to an agreed list of commodities if 70 percent of the total annual movement originated in either conference's local territory. Later, in 1956, the method of agreeing on the commodities to be listed was changed to require concurrence by the other conference before establishing "rate-making initiative on commodities, pursuant to the formula." An agreed list was then prepared.

The commodity evaporated milk in 1953 was not classified and placed on the list of Pacific Westbound and remained off the list until 1961, after this proceeding was instituted, even though in 1960–61 90 percent or more of the evaporated milk was moving from the West Coast to the Philippines. The record shows that before 1961 Far East had refused to concur in such placement in spite of the formula commitment the conferences made to each other regarding the 70 percent test.

A right to concur was established in May 1956, when it was agreed "authority to establish rate-making initiative on commodities pursuant to the formula defined in the preceding paragraph [the 70-percent formula] may only be granted * * * after concurrence by the other Conference."

Carnation, a shipper of evaporated milk, was affected before and after the right to concur was established. Before May 1956, evaporated milk remained off the initiative list of Pacific Westbound for no apparent reason, and after May 1956 because Far East would not concur. Apparently, no request should have been needed in either period to classify evaporated milk as an "initiative" commodity. Carnation's first record request for a rate change by Pacific West-

bound was on November 11, 1957, after the addition of the concurrence procedure. Carnation was unsuccessful because Far East would not concur, although at this time Carnation did not know why because the the initiative list and concurrence procedure were still secret [4] as far as Carnation was concerned. Carnation persisted in its efforts and Pacific Westbound persisted in trying to obtain concurrence (December 1957 through May 1958—13 exchanges between Far East and Pacific Westbound), but without success for 3 years, even though Far East was handling 10 percent or less of the volume of evaporated milk shipped to the Philippines.

Both before and after the concurrence procedure was added, Carnation and the public had every reason to believe that Pacific Westbound was making its own decisions on rates based on the economics of shipment from the West Coast. It was developed in the record that this was far from the case and not only was the concurrence procedure interfering with Pacific Westbound's initiative decisions, but that Far East had conflicting interests in that it had to protect the movement of powdered milk from the East Coast. A shipper of powdered milk had demanded the same reduction as evaporated milk so a change in the evaporated milk rate would affect the revenues of Far East members.

This conduct on the part of Far East and acquiescence therein by Pacific Westbound in the exercise of their respective powers shows that the 70-percent rule for giving the rate-making initiative, whether or not affected by the concurrence restriction, became a sham. The agreed-upon condition called for the exercise of independent action by Pacific Westbound, but it failed to act independently as it had a right to do under *Article Second* of Agreement No. 8200. Both Far East and Pacific Westbound, we hold, subjected Carnation, as a shipper; West Coast ports, as localities; and the commodity evaporated milk to unreasonable disadvantage in violation of section 16 of the Shipping Act, 1916. In our opinion the respondents' failure to abide by commitments when it suited the interests of the parties, without satisfactory reason, made the disadvantage "unreasonable."

In our view, Pacific Westbound violated section 16 of the Shipping Act, 1916, by not taking independent action when it clearly had the right so to do. This is not to say that the right had been surrendered, or that the circumstances of this case warrant a disapproval of Agreement No. 8200 under section 15 of the Shipping Act. We rest our charge against Pacific Westbound solely on section 16 of the Act.

[4] The minutes of the first meeting state that the "proceedings of minutes are confidential" and that "unauthorized disclosure to shippers of information regarding rate changes" and positions "regarding rate requests is contrary to the spirit of the Joint Agreement."

Likewise, Far East violated section 16 of the Act, but here the violation results not from a failure to carry out the terms of an approved agreement (as in the case of Pacific Westbound) but in Far East's failure to implement fully the terms of the supplemental agreements as we understand them. We have no difficulty, however, in finding this conduct on the part of Far East to be a violation of the Shipping Act. Section 16 does not specify that "any undue or unreasonable prejudice or disadvantage" shall flow from a failure to adhere to *approved* agreements.

We think that it would be a most unrealistic view to hold that Far East's conduct is without the scope of the Shipping Act, merely because it consisted of a failure to adhere to unfiled and unapproved agreements. Likewise absurd would be a holding that because the agreements were unfiled and unapproved, no violation of the act could result from Far East's conduct. From whatever sources the violation arose, the conduct constituted "undue or unreasonable prejudice or disadvantage" and was in violation of the act.[5]

IV. Overland Rates

The second supplementary agreement which we have found, *supra*, not to have been filed for approval concerns the maintenance of rate differentials for commodities from the overland territory. Briefly stated, the agreement provides that the conferences would continue to establish rates for commodities from the overland territory without any change in previously established differentials. The previously established differentials appear to have been fixed as far back as 1925.

Respondent Pacific Westbound follows the procedure of reducing its rates on commodities originating in overland territory below its rates on commodities originating in local territory to an amount equal to the rates shippers would pay, after adding their inland railroad rates, if they used Far East Conference's members from either Atlantic or Gulf of Mexico coast ports.

This supplementary unfiled agreement, intended originally to be temporary, has been carried out for over a period of 10 years. Under the agreement, the competitive relationship between the two Conferences, through their power to fix rates independently of each other, has been regulated so as to produce an automatic reduction in the local rates of the members of the Far East Conference. There is also a restraint on Far East in reducing the differential between the local

[5] We note that Carnation has not filed a timely complaint for reparations under section 22 of the Shipping Act, 1916, and that such a complaint would now be barred by the 2-year Statute of Limitations in that section.

rates of Far East and the overland rates of Pacific Westbound. The overland rate differentials which are in "status quo" thus have a restraining effect on competition, regardless of the provisions of the basic agreement (8200), because of the knowledge that a change by one will be offset by a change by the other.

The Examiner found that Agreement No. 8200 should be amended to incorporate the overland agreement, and "as amended Agreement No. 8200 should be reapproved." Such action implies approval of the overland agreement.

We find ourselves in disagreement with the Examiner, not on the merits of approvability of the overland agreement, but rather on the issue of whether or not we are able on the basis of the record in this case to make a finding as to approvability. The approvability of the overland agreement is not at issue in this proceeding, and this fact was recognized by the Examiner in his statement that "the question of the lawfulness of the overland rate structure *per se* was ruled out as a direct issue in this proceeding * * *." No one has challenged any rate structure in this proceeding; the issues revolve around competitive relationships. We have nothing before us to indicate what respondents' complete overland agreement might be, so approval would be premature. For this reason we sustain the exceptions of the Port of New York Authority and the North Atlantic Ports Association that the overland rate agreements should be dealt with separately. We cannot, however, agree with the intervenors that the evidence of record compels a finding that the agreements are unlawful and cannot be approved. Respondents will be required to file their overland rate agreements subsequent to the issuance of this report, and the lawfulness of the agreements can then be determined separately from this proceeding.

V. PROPOSED MODIFICATIONS OF AGREEMENT NO. 8200

The Examiner held that Agreement No. 8200 should be reapproved and should be modified by amendment to incorporate "the complete agreement found herein to be outside the scope of said agreement." The words "complete agreement" refer to the supplementary agreements (1) creating ratemaking initiative powers, (2) establishing procedures for the operation of the concurrence machinery, and (3) the overland rate agreement.

On the basis of the record before us, we find insufficient evidence to disapprove Agreement No. 8200. The evidence as to conflicts of interest in voting was not developed to the point of proving detriment to the commerce of the United States or that the agreement was contrary

to the public interest. While we have in fact sustained the charge of discrimination against Carnation, this of itself does not constitute enough evidence on which to base disapproval of Agreement No. 8200 at this time. One instance of discrimination is not sufficient to prove competitive detriment to the Pacific Coast of such magnitude to warrant disapproval of the agreement. In this respect we overrule the exception of Hearing Counsel.

[The Examiner refers to the supplementary agreements as though they might be approved in their present form. However, their present form is far from definite. The supplementary agreements which we have found to have been unfiled and to have been required to be filed consist of oral agreements reduced to memoranda, in the form of abstracts or summaries of minutes of meetings. If it has been assumed that these are now before the Commission for approval, the assumption is misplaced. They are only before us in the form of exhibits in this record and cannot be treated as filed agreements. Filing pursuant to the regulations of the Commission is an essential prerequisite to an adjudication as to approvability. We find that on the basis of this record it is impossible to determine the scope of the unfiled supplementary agreements, the precise subjects covered by the agreements, the objectives to be achieved, and whether or not the agreements can be approved pursuant to the standards set forth in section 15 of the Shipping Act, 1916.] We therefore reverse the Examiner to the extent that he found that Agreement No. 8200 should be reapproved after the amendments are filed. Should the parties to Agreement No. 8200 decide to file these supplementary agreements, they would then be in a form suitable for action by the Commission pursuant to section 15.

CONCLUSION

In summary, we conclude:

(1) That the various supplementary agreements affecting overland rates, the concurrence procedures, and the placement of items on the initiative list, constitute unapproved agreements which should have been filed with us for action pursuant to section 15; and not having been so filed and approved the parties to Agreement No. 8200 are hereby ordered to cease and desist from carrying them out;

(2) The doctrine of administrative estoppel is inapplicable as regards so-called "tacit approval" by various members of the staff of our predecessor agency of these supplementary agreements;

(3) The right of independent action is preserved by Agreement No. 8200, as required by section 15 of the Shipping Act, 1916, and neither

party is found to have surrendered the right by means of a secret agreement;

(4) Past conduct by respondents in regard to their treatment of Carnation Co. has been in violation of section 16 of the Shipping Act, 1916;

(5) The Commission cannot at this time guarantee reapproval of Agreement No. 8200 if the various supplementary agreements are filed for approval, as the scope, contents, and procedures carried out under these agreements are uncertain; and

(6) There is insufficient evidence in the record before us on which to base disapproval at this time of Agreement No. 8200.

Respondents will be ordered to cease and desist from carrying out their supplementary agreements until filed with and approved by the Commission. An appropriate order will be entered.

A separate opinion concurring and dissenting with the majority report will be issued on or about August 2, 1965, by Commissioner John S. Patterson.

Commissioner John S. Patterson, concurring and dissenting:

I. Proceedings

The Federal Maritime Board (Board), now the Federal Maritime Commission (Commission), upon its own motion as authorized by Sec. 22 of the Shipping Act, 1916, as amended (Act), on October 26, 1959, entered into an investigation and hearing to determine whether (1) an agreement between the common carriers by water in foreign commerce, members of Far East Conference (Far East), and the common carriers by water in foreign commerce, members of Pacific Westbound Conference (Pacific Westbound), (Agreement No. 8200) approved December 29, 1952, pursuant to section 15 of the Act, was the true and complete agreement between the parties, and whether (2) Agreement No. 8200 (a) was being carried out in a manner which makes the agreement unjustly discriminatory or unfair as between carriers, shippers, exporters or ports, or between exporters from the United States and their foreign competitors, or, (b) operates to the detriment of the commerce of the United States, or (c) violates the Act.

A separate concurring and dissenting report has been prepared in the belief that the majority has failed to deal with the facts and exceptions consistently with what I consider to be our responsibilities under the Administrative Procedure Act and that the Commission is not authorized to issue a "cease and desist" order on this record. A summary follows of (A) my reasons for these three subject objections, (B) the Examiner's findings and conclusions, (C) the exceptions of

the participants in this proceeding, (D) my proposed rulings on the exceptions, and (E) my proposed conclusions resulting from the discussion of the issues.

(A) Objections.

1. The facts. A separate statement of the facts as I find them from the record to exist and to control my reasoning has been prepared, instead of using those "found" by the Examiner, or as they "appear" or are only "apparently" so. The details of the supplementary agreements are not assumed to be defined somewhere, but are described as to how they came into being and as to what they do.

2. The exceptions. The record must show the ruling upon each exception presented by the parties. Far East properly presented five itemized exceptions, and Pacific Westbound also properly presented nine itemized exceptions, as they are both given the opportunity and are required to do. Each exception was explicit, clearly understandable, and capable of being ruled upon. The majority refers to the respondents excepting to the finding "that the agreement was not true and complete * * * and that the conferences should file 'various supplementary agreements'." I have been unable to locate such an exception by both conferences except under a most liberal interpretation of the parties' statements. In other respects the majority discusses some but not all of the exceptions, and does not expressly show the ruling upon all the exceptions I consider to have been presented. By this method the parties are denied their right to a ruling backed up by reasoning showing why they are right or wrong and to a final decision on where they stand on each of their objections as to what the Examiner has decided about their rights. To meet this objection, the exceptions have been summarized to avoid repetition and some have been lumped together where they were believed to be of a similar nature, itemized by topics, and a ruling has been proposed for each.

3. The "cease and desist" order. The majority has committed the Commission to issuing an order requiring respondents to cease and desist from carrying out the concurrence procedures. The concurrence procedures have been used for many years and, apart from any question of whether the procedures are also subjects of an agreement, the actions required are believed by respondents to be lawful. Whatever the actions may be, there has been no adjudication of their unlawfulness, and until there is we have no authority to tell them to stop. The fact that the actions are taken pursuant to an agreement which has not been filed does not make the action unlawful. Failure to file an agreement is a separate offense with penalties prescribed in section 15. If respondents want to stop because the acts depend on an unfiled

agreement with penalties for each day's failure to file, no order will be necessary.

(B) Examiner's Findings and Conclusions.

1. Far East did not breach Agreement No. 8200 by failure to take independent action when it was unable to make Pacific Westbound change its method of billing freight for the transportation of flour from a net weight to a gross weight basis. The Port of Galveston, which made the claim of breach, did not except to the Examiner's conclusion.

2. Respondents' agreements with respect to (a) the rate-making initiative, (b) overland rates, and (c) rate differentials should have been, but were not, filed with the Commission for approval in violation of section 15 of the Act; the agreements have not been approved by the Commission; and the agreements have been carried out in violation of section 15 of the Act.

3. The concurrence provision consisting of a requirement that both conferences concur in matters voted on by the conferences is authorized by the approved basic agreement and therefore has in effect been filed and is not in violation of the filing requirement of section 15 of the Act.

4. The concurrence provision in Agreement No. 8200 is illegal and must be stricken from the agreement, as a violation of the "independent action" clause of section 15 of the Act.

5. It has not been shown that there has generally resulted any substantial delays in the processing of requests for concurrence.

6. The record does not sustain the allegations (a) that the concurrence agreement failed to afford equal protection to the conferences; or (b) that it deprived the Pacific Coast of its natural competitive advantages; or (c) that it operated to the competitive disadvantage of the Pacific Coast, its shippers, exporters, ports, and carriers.

7. Any charge of domination of one conference by the other has not been sustained.

8. The filing of voting records should not be required in this proceeding.

9. The matter of classification of commodities as between initiative and noninitiative cargo subjects shippers to undue prejudice and disadvantage in violation of section 16 of the Act.

10. The rate-making initiative agreement is not otherwise unlawful.

11. Agreement No. 8200 has not operated to the detriment of the commerce of the United States or otherwise contravened section 15 of the Act.

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12. Agreement No. 8200 should be amended to incorporate the complete agreements found to be outside the scope of said agreement, with such changes as will comport with the Examiner's findings.

13. As amended, Agreement No. 8200 should be reapproved.

The Examiner's conclusions in items 2, 9, and 11 are sustained; those in items 3, 4, 12, and 13 are reversed; item 6 is not ruled on as premature on this record; and those in items 1, 5, 7, 8, and 10 are not expressly dealt with as being outside the scope of the order notifying parties of the issues.

(C) Exceptions.

The exceptions by the respondents are that the Examiner made the following errors:

1. In concluding that the obligation in Agreement No. 8200 that each party must concur in certain rate actions by the other party is prohibited by law.

2. In concluding that existing procedures by which commodities are classified as giving one party or the other the initiative in making rate adjustments without asking for the concurrence of the other party violates section 16 of the Act.

3. In concluding that Far East unjustly discriminated against intervenor Carnation Co. (Carnation) by refusing to concur in Pacific Westbound's requests for rate-making initiative on evaporated milk until May 1961.

4. In concluding that the following actions by respondents created agreements which were not filed with and not approved by the Commission.

a. Mutually consenting to establish a classification of local cargo as "local competitive" and "local initiative."

b. Mutually consenting to establish conditions under which certain overland rates might be established.

c. Mutually consenting that certain minimum rate differentials resulting from the overland rate structure would be maintained in "status quo."

5. In failing to rule on 21 findings of fact as demanded by respondent Far East.

6. In making certain statements that (a) *Article Second* of Agreement No. 8200 is honored more in the breach than in the observance, (b) the respondents do not consider the right of independent action an instrument of practical employment, and (c) "there was considerable trading" in the granting of the local initiative to change rates.

The exceptions by the intervenors are that the Examiner made the following errors:

1. The Port of New York Authority (Port Authority) takes issue with the Examiner's apparent approval of the agreements relating to overland rates.

2. The San Diego Unified Port District (Port District) states the facts do not not support the Examiner's conclusions that the concurrence agreement does not deprive the Pacific Coast of natural competitive advantages or operate "to the competitive disadvantage of the Pacific Coast, its shippers, exporters, ports and carriers."

The exceptions by Hearing Counsel are that the Examiner made the following errors:

1. In concluding that the rate-making initiative agreement should be approved as modified.

2. In concluding that Agreement No. 8200 has not operated to the detriment of the commerce of the United States.

3. In concluding that the concurrence procedure and rate-making initiative agreement and Agreement No. 8200 do not operate to the detriment of the West Coast.

No exception was taken to the Examiner's conclusion in (A)1.

(D) Rulings on Exceptions.

The following rulings on the exceptions are based on the conclusions, findings, discussion, and facts which follow.

1. Respondents' exception in 1 is sustained and the Examiner is reversed for the reasons in the discussion establishing that Congress did not, as a matter of law, make past operations under the right of independent action clause in item (1), second paragraph of section 15, the test of approvability of an agreement reserving the right, but made the existence of an obligation to recognize the right the test. It was found that *Article Second* of Agreement No. 8200 created the right.

2. Respondents' exception in 2 is not supported and the Examiner is sustained insofar as the Examiner concludes that section 16 has been violated. The existing procedures, where shown to be a sham and as established by past practices, did not conform with agreements regulating each respondent's rights to initiate rate changes on evaporated milk. Respondents subjected a person and localities to undue and unreasonable disadvantage by not fixing rates on evaporated milk in conformity with commitments as to how such rates were to be changed and by not establishing rights based on dominant economic interests concerning the power to make rate revisions.

3. Respondents' exception in 3 is not supported and the Examiner is sustained. It was proven that respondents unreasonably refused to place commodities on an "initiative" classification list because Far

East unreasonably refused concurrence to the classification of commodities in accordance with their agreed procedures, and Pacific Westbound unreasonably refused to take independent action to establish its own rate in response to Carnation's requests.

4. Respondents' exception in 4 is not supported and the Examiner is sustained. It was proven that respondents failed to file any of their agreements, described in section 15 of the Act, made at meetings over a period of many years, and that with the exception of the procedure for changing rates without concurrence on short notice, none were sanctioned by Agreement No. 8200. The Examiner, however, was in error in reviewing the agreements as though they were filed. Unfiled agreements may not be approved or disapproved. The form in which they appear in this record does not constitute filing, and no conclusions or findings can be made on unfiled agreements.

5. Respondents' exception in 5 refers to 21 unused proposed findings of fact dealing with the history of actions and agreements antecedent to Agreement No. 8200, with lack of secrecy, claimed benefits, arguments, evaluations, and descriptions of how meetings and other procedures operate. None of these factors constitute relevant bases for any different conclusions. All are matters of extenuation or excuse having no basis in the statute. The exception is rejected and the Examiner sustained.

6. Respondents' exception in 6 to certain statements by the Examiner does not change any conclusion and no ruling sustaining or reversing is made.

7. Intervenors' exceptions in 1 and 2 to the apparent approval of the overland rate agreement is sustained and the Examiner is reversed. The question of final approval of the agreement to concur on certain rate-change decisions is premature on this record.

8. Hearing Counsel's exception in 1 relates to approval of the initiative agreement, which I consider is premature because it has not been filed. Exceptions 2 and 3 refer to the continued approval of Agreement No. 8200 because it operates to the competitive detriment of the West Coast and to the detriment of the commerce of the United States. This issue is likewise premature because the record was not developed. Accordingly, Hearing Counsel's exceptions are rejected.

The facts forming the basis of the discussion, findings, and conclusions herein are stated separately at the end of this report.

(E) Proposed Conclusions.

1. It is concluded as follows:

a. Agreement No. 8200 should not be disapproved (based on findings 1, 2).

b. The respondents have entered into agreements fixing and regulating transportation rates, controlling and regulating competition, regulating the character of freight traffic to be carried, and providing for cooperative working arrangements as a result of decisions made and agreements entered into at their meetings (based on finding 3).

c. The minutes of meetings evidencing decisions are memorandums of oral understandings, agreements, or other arrangements and are agreements as defined in section 15 of the Act (based on finding 3).

d. The aforesaid agreements were not filed immediately with the Commission (based on finding 4).

e. Agreement No. 8200 does not include or sanction any of the aforesaid agreements; therefore, approval of Agreement No. 8200 does not include approval of the unfiled agreements (based on findings 5, 6, 7).

f. The respondents have carried out in whole and in part, directly, agreements subject to filing and approval under section 15 (based on finding 8).

g. The provisions of *Article Second* of Agreement No. 8200 conform to the requirements of item (1), second paragraph of section 15 of the Act (based on finding 9).

h. The unfiled agreements between respondents have been carried out in a manner which is in violation of the second paragraph, item (1) of section 16 of the Act, by subjecting Carnation as a particular person and evaporated milk as a description of traffic to undue and unreasonable disadvantage (based on findings 10, 11).

2. The ultimate conclusions derived from the foregoing are that respondent common carriers by water, members of Far East Conference and of Pacific Westbound Conference:

a. Violated section 15 of the Shipping Act, 1916, as amended, (1) by failing to file immediately and (2) by carrying out before approval, in whole and in part, directly, agreements as defined in section 15.

b. Violated section 16 of the Shipping Act, 1916, as amended, by subjecting a particular person and description of traffic to undue and unreasonable disadvantage.

II. FINDINGS

The foregoing conclusions are based on the following findings, derived from the facts and discussion herein:

1. The agreement between Far East Conference and Pacific Westbound Conference made the 5th day of November, 1952, was filed with and approved by the Federal Maritime Board as of December 29, 1952, and designated Agreement No. 8200 (facts 1, 2, 3).

2. Agreement No. 8200 is the true and complete agreement covering

procedures for immediate changes in tariffs and the rates therein by either party, subject to prescribed notices being given (facts 4, 5).

3. The respondents, after November 5, 1952, made additional agreements, not a part of Agreement No. 8200, on the following subjects, as of the dates noted (facts 6, 7):

a. A conference shall have the right to classify and add to a list of commodities over which such conference shall have the power to initiate rate changes without the concurrence of the other if 70 percent of the total annual movement of a commodity is through the ports a conference serves, but shall obtain concurrence before a commodity is placed on the list. An initial list was agreed to (January 30, 1953) (fact 11a).

b. A conference shall have no right to change a rate without the approval of the other on commodities originating in a defined local territory if it is not on the list of commodities as to which it has the power to initiate rate changes without prior approval (January 30, 1953) (fact 13).

c. The local ocean rate basis used for comparative purposes between Atlantic, Gulf, and Pacific shall comprise the total ocean freight plus handling charges, tolls, or wharfage paid by the cargo through either Atlantic, Gulf, or Pacific ports (January 30, 1953) (fact 11b).

d. Existing (i.e., historically established) overland rate spreads (differentials) shall remain unchanged (status quo) until a study has been made of overland rates (January 30, 1953, and May 5, 1955) (fact 13).

e. Rate-making initiative power shall be limited to a decision as to the rate, effective and expiration dates, quotation period, and beginning or ending contract rates, and the conference having the initiative may not make other changes without concurrence by the other (May 5, 1955) (fact 13).

f. The authority to establish rate-making initiative on commodities pursuant to the agreement in a above may only be exercised after concurrence by the other conference (May 10, 1956) (fact 13).

g. Agreement on other subjects such as the right to interpret additional items to initiative status (May 10, 1956), the right to extend expiration dates on open-rated commodities after concurrence has been given (March 10, 1960), the duty not to divulge information in regard to changes in rates (January 30, 1953), the duty to use uniform minimum bill-of-lading charges (September 25, 1953), the obligation not to change the weight or measurement basis of rates without prior agreement (January 30, 1953), as shown in the record (exhibits 3 and 3A) (facts 11, 12, 13).

4. The published rules of the Commission require the agreements described in section 15 of the Act to be accompanied by a letter of transmittal stating they are offered for file and specifically requesting approval before they will be considered as filed under section 15. Such letter did not accompany any agreement submitted by respondents after November 5, 1952 (fact 10).

5. The memorandums of oral agreements were not shown to have been filed with the Commission or with any of its predecessor agencies, as required by Commission rules (fact 8).

6. The meetings between officials and employees of the Board and representatives of Far East or Pacific Westbound did not result in any revision or waiver of the rules requiring filing in accordance with prescribed procedures, nor in any approval of later agreements (facts 2, 3, 9).

7. The memorandums of oral argreements were not approved by the Commission or by any of its predecessor agencies (fact 8).

8. The respondents have carried out before approval by the Commission, in whole or in part and directly, the agreements made pursuant to decisions embodied in the minutes of their meetings.

9. (a) The agreement by each respondent qualified by the rights conferred by the *Article Second* of Agreement No. 8200 gives each respondent a right to change rates subject only to prescribed notification and constitutes the reservation of a right of independent action (facts 4, 5).

(b) Far East and Pacific Westbound are conferences of carriers serving different trades because of the differences in the ports of origin they serve, and are naturally competitive with respect to many commodities shipped from inland points in the United States, because the destination ports they serve are substantially the same (fact 15).

10. The respondents failed to live up to their commitments regarding the formulation of a list of commodities classified as subject to the power of each conference to change rates without concurrence of the other (fact 14).

11. Respondents subjected the particular person Carnation Co. and the description of traffic evaporated milk to undue and unreasonable disadvantage when Far East made Carnation pay unduly high transportation rates by refusing to concur, without reason, and Pacific Westbound failed to enforce, either before or after May 1956, its power to initiate rate changes on evaporated milk in response to requests by Carnation (fact 14).

12. Evidence or proposed findings (21 in number) by respondents dealing with the history of actions and agreements antecedent to

Agreement No. 8200; the lack of secrecy in making arrangements; claims of benefits in agreements; arguments; and evaluations and descriptions of how meetings and other procedures operate are rejected because they are without relevance to the existence or nonexistence of agreements.

III. Discussion

A. True and complete agreement issues.

1. Additional agreements were made.

The first issue propounded by the order of investigation was whether Agreement No. 8200 was the "true and complete" agreement between respondents. This statement is taken to mean we should determine whether there existed additional agreements which were not filed and thereafter approved.

Section 15 of the Act requires every common carrier by water, such as the respondents herein, members of the two conferences, to file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier fixing or regulating transportation rates, giving or receiving special rates, controlling, regulating, or preventing competition, limiting or regulating in any way the volume or character of freight traffic to be carried, or in any manner providing for a cooperative working arrangement. The term "agreement" includes understandings and other arrangements. The Commission's published rules state the method of accomplishing the required filing in the Code of Federal Regulations, Title 46 (CFR).

The only agreement filed by respondents in accordance with the Commission's rules regulating the manner of filing agreements was Agreement No. 8200. The facts showed that actions at the various meetings produced additional oral agreements which were reduced to memorandums thereof in the form of minutes, which were abstracted and put into a memorandum of decisions. The parties agreed that the memorandum constitutes a correct statement of their decisions.

The decisions defining rights and stating what was to happen resulted in four types of understandings and arrangements:

a. Local and overland territories were defined (docket subject No. 4, meeting No. 1).

b. Cargo commodities were classified into (1) local initiative, (2) local competitive, and (3) overland (docket subject No. 5, meeting No. 1).

c. Differentials in freight rates were established with regard to commodities, allowing Pacific Westbound to maintain certain mini-

mum differences. Where a conference having the initiative changes a rate, the other has the privilege of meeting the rate with Pacific Westbound having the right to maintain such difference, and when Far East adjusts Pacific Westbound makes the same dollar adjustment in its local and overland rates (docket subject No. 4, meeting No. 3).

d. Procedures were established requiring concurrence of each conference in certain rate changes (docket subject No. 13, item 7, meeting No. 1).

The effect of the foregoing is to change competitive relationships and to fix or revise freight rates consistently with the agreed competitive relationship.

The purpose of these decisions was shown to be to allocate authority between the two conferences in such a way as (a) to designate which conference makes the final decision on what the rates of both should be and to indicate whether the decision was to be made with or without the concurrence of the other, and (b) to limit the authority of both conferences to change certain established relationships between rates no matter how the rate-fixing decision is made by either. Item (a) was accomplished by a procedure to consult and obtain approval, called a concurrence, and item (b) was accomplished by mutual obligations to maintain, unchanged, certain rate relationships ("spreads") until a study was completed. The obligation to obtain concurrence before deciding on a rate was qualified by specifying (1) which conference might initiate decisions and what details the initiator may decide, (2) the decisions where no concurrence obligation existed, and (3) the procedures to be followed in communicating decisions and obtaining approvals.

It is concluded that these actions established new and continuing mutual obligations and are agreements. The circumstances occurring before and after agreements made at meetings referred to in the 21 findings of fact are not relevant because such facts do not change, and ought not be used to confuse, what occurred at the moment of each agreement, nor do they alter any agreements once established.

The next question is whether the agreements are agreements as described in section 15 of the Act.

Certain preexisting rate spreads covered by the local overland territorial divisions were continued unchanged ("remain status quo") at the first joint meeting in January 1953 (item No. 4, joint memorandum of decisions), and the rate-making initiative authority was made subject to concurrence by the noninitiating conference at the Joint Meeting in May 1955 (item No. 3, joint memorandum of decisions).

The territorial divisions served as the basis for classifying commodi-

ties whose shipment originated in the local territories as "local initiative" and "local competitive" commodities, and for classifying the commodities originating in between as subject to rules regulating overland rates. The decisions as to initiative and competitive classifications were that certain commodities would be subject to the authority of the members of one conference to initiate rate changes and these commodities are said to be in a "local initiative" commodity category. If one conference has been authorized to initiate a rate change, it may adjust the rate, its effective date, its expiration date, the period of quotation or forward bookings, or the establishment or termination of contract rates. In order to qualify for a local-initiative classification, 70 percent of the total annual movement of any one commodity in an agreed list of commodities would establish the initiative for exercising rate-making authority. After May 1955, concurrence was required before the conference having rate-making initiative could change the rate basis, terms and conditions, or open or close rates. Other changes requiring concurrence were also decided upon. All commodities not classified as local initiative were local competitive. With regard to the latter commodities, the decision was that changes in rates by either conference had to be concurred in by the other conference. In other words, the two conferences had to agree before a changed rate could be charged, and a large part of the time taken up at annual conferences, as shown by the minutes, was spent in reviewing and agreeing on rate changes for individual commodities. Special procedures were provided for reaching agreement expeditiously where concurrence was required between annual meetings.

Far East and Pacific Westbound agreed that a minimum difference between the rates from the coasts served by each should exist "measured by the accessorial charges assessed the cargo by Pacific and that on those items which presently carry a lesser difference Atlantic [Far East] may adjust upward to the above measure or Pacific may adjust downward and where present difference is greater than the amount of accessorial charge, same will be maintained, unless otherwise mutually agreed."

Overland commodities are those which move under the terms of the Pacific Westbound overland tariff. The tariff applies roughly to all commodities originating east of the Rocky Mountains and received by Pacific Westbound carriers under through rail-ocean bills of lading. As to the freight rates on overland commodities, the two conferences agreed that the "present Overland rate spreads remain status quo, pending outcome of the Overland Rate Study by the two Conferences."

The decisions at meetings were oral and recorded in minutes which are considered as memorandums of oral agreements.

It is concluded that the additional agreements having the effect and purpose described are agreements described in the first paragraph of section 15 of the Act because they:

(a) Give special privileges and advantages and regulate the character of freight traffic to be carried when they establish the list of commodities subject to initiative power to change rates and make a commodity eligible for the initiative list if 70 percent of total annual movement of a commodity is shipped from an area.

(b) Fix and regulate transportation rates and give special advantages when they specify rates for separate commodities, define the commodities and territories for the purpose of giving differing powers to change rates with or without concurrence, or when they establish a principle of parity or prescribe differentials in certain rates.

(c) Give and receive special privileges and advantages and regulate competition when they establish local and overland territories.

All of the agreements further involve the control or regulation of competition and cooperative working arrangements. Agreements such as these go well beyond the authorization to make rules for the transaction of business, including machinery for the change of rates. Court decisions substantiate the conclusion noted.

The subjects of the agreements evidenced by the minutes are neither changes in the dollar amounts of rates which do not have to be filed (Ex Parte, *Section 15 Inquiry*, 1 USSB 121, 125 (1927)), nor rules and regulations governing the application of the rates (*Empire State Highway Transportation Ass'n* v. *FMB*, 291 F. 2d 336 (D.C. Cir.), *Cert. denied* 368 U.S. 931 (1961) and the *Mitsui* case cited by the majority).

An agreement among carriers to establish an exclusive patronage contract system with dual rate levels on the other hand "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." (*Isbrandtsen Co. Inc.* v. *U.S. et al.*, 211 F. 2d 51 at p. 56 (U.S. App. D.C.), *Cert. denied* 347 U.S. 990 (1954)). The foregoing was stated in response to the Board's claim that it might allow the agreement to go into effect in advance of formal approval because the basic conference agreement authorizes dual rate system agreement. In the present record the agreements defining local and overland territories, classifying cargo as local initiative, local competitive, and overland, and establishing rate differentials or parity of rates are equally not the "routine arrangements" described in CFR § 222.16, nor interstitial adjustments for

carrying out the approved Agreement No. 8200, but are new agreements. Generally I agree with the majority's reasoning that the practical effect of agreements such as these also puts them well beyond any authorizations to make procedure or "carrying out" arrangements, because they significantly alter the power of the parties to establish rates without interference from each other. Before the agreements, each had power to fix rates from the coast each serves free of interference from the other. After the agreements became effective, each gave up part of its power to fix rates by promises each to the other that they would consult and concur before taking action and by promises regarding the limited conditions under which each had power to decide without consultation. After the agreements, each conference also acquired an expanded authority to influence the rates on the opposite coast, an authority which did not exist before. This is "an entirely new scheme of rate combination." Agreement No. 8200 did not create this alteration of power positions, but only established procedures in Article "FIRST" for bringing it about. Such relinquishment of some power over rates and expansion of power over other rates does not involve rules for the conduct of meetings nor machinery for changing rates and was accomplished by agreements not sanctioned by Agreement No. 8200. The alteration of obligations was created by the subsequent additional new agreements which should have been filed for approval.

I agree further with the majority's reasoning in regard to the concurrence procedure as being covered by Agreement No. 8200 with respect to the initial meeting only, and not to subsequent rate-making decisions. Section 15 of the Act requires that the agreements described be filed immediately.

2. The additional agreements were not filed.

The next question is whether the agreements, not sanctioned by Agreement No. 8200 nor otherwise incorporated therein and therefore subject to being filed immediately, were actually filed, or whether they were filed as a result of the activities of a member of the Commission and the staff in arranging for filing the minutes for information purposes

The Commission's rules in CFR § 222.11 require that the agreements to be filed should be accompanied by a letter "stating that they are offered for file in compliance with section 15 of the Shipping Act, 1916." These rules were not followed. Neither the record herein nor the Commission's files, of which official notice is taken, show any such letter, statement, or offer.

The conferences between officials of Far East and Pacific West-

bound and a member of the Board and the staff do not establish such filing. The subject of filing was never raised, according to the record, and minutes were mailed for many years without any letter of transmittal, nor any request for one. As a conference official testified: "At no time prior to the issuance of the order of investigation in the instant proceedings did the FEC receive any communication from the Commission or predecessors charging that any action of the parties to Agreement No. 8200 was illegal or in any respect improper, or even questioning the legality or propriety thereof." The lack of any communication or question on the subject, absent a requirement on the part of anyone to do so, did not relieve respondents from their responsibility; it is incumbent on respondents to follow the law and to comply with officially published implementing regulations. It is concluded that failure to file as required by the first paragraph of section 15 of the Act has been proven.

3. The additional agreements were not approved.

Approval of the agreements embodied in minutes and required to be filed has not been obtained as required by the second paragraph of section 15 of the Act. Unless filed, there can be no approval of agreements. This issue is likewise covered by the rules in CFR § 222.15 as well as by court decision. The rule stated, as of the time the acts herein occurred: "the practice of assuming approval of the Commission of copies of minutes of meetings * * * before the Commission has formally ruled thereon is no longer sanctioned; * * *."

A court has stated, in response to an argument that since the Board had not disapproved a dual rate system it had in effect approved dual rates, that the agreements "were not approved by the regulatory agency merely because it was silent concerning them and the rates[1] were therefore illegal." *Kempner* v. *Federal Maritime Comm's*, 313 F. 2d 586 (D.C. Cir. 1963), *Cert. denied* Oct. 14, 1963.

A similar situation was before the courts in connection with the approval of a dual rate contract system as a result of furnishing a written statement to the Board comparable to the furnishing of minutes here, bearing the Board's "received" stamp, as shown in the facts. The Court said: "The statement filed * * * which has appended form contracts with shippers is significantly marked 'received' and not 'approved' as are the basic agreement and its amendments in the Board's file." It was held that since plaintiff's exclusive patronage dual rate system had not been approved, the contract with defendant would not

[1] The reference to "rates" is believed to be erroneous and should be to "agreements". No rates were in evidence in the record, the Commission's report was silent concerning rates, rates were not in issue and were a non-existent factor in the case. What was referred to was probably the agreements creating the dual rates system.

support a claim based thereon, and defendant's motion for a summary judgment was granted. *River Plate and Brazil Conference et al.* v. *Pressed Steel Car Co. Inc.*, 124 F. 2d 88, 91–92; affirmed 227 F. 2d 60 (1955).

Illegality in such case, as in this proceeding, is based on the provision of section 15 of the Act that "any agreement * * * not approved, * * * by the Commission shall be unlawful and agreements * * * shall be lawful only when and as long as approved by the Commission." The agreements evidenced by the minutes have been neither filed nor approved and have been both unlawful from the dates of the meetings at which the actions took place and, with the exception of the concurrence procedure agreement, are not excepted from the provisions of the Act approved July 2, 1890, 26 Stat. 209, 15 U.S.C. 1–7, nor from the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, 28 Stat. 570, 15 U.S.C. 8–11.

The preceding discussion has shown, first, what the respondents actually did pursuant to their approved agreement to establish "machinery," which is herein limited to procedures at meetings and, second, what was done was without sanction in respondents' approved Agreement No. 8200 and therefore was of such a character as to require filing with the Commission of a new agreement labeled as such and accompanied by a request for approval, as suggested for our inquiry by the Court in *Carnation Co.* v. *Pacific Westbound Conference et al.*, 336 F. 2d 650 at pp. 666–667, rehearing denied Id. p. 667, July 30, 1964.

In response to that part of the initiating order of October 26, 1959, requiring a Commission determination "whether said Agreement No. 8200 is a true and complete agreement of the parties within the meaning of said section 15", it is concluded that Agreement No. 8200 is a true and complete agreement with respect to certain procedures and notifications, but the agreements evidenced by the minutes of their meetings are additional agreements of the type described in section 15 of the Act which were not filed. I do not agree with the majority that they are "supplemental."

4. The additional agreements may not be approved at this time.

The agreements found herein to have been unfiled and unapproved consist of oral agreements reduced to memorandums in the form of abstracts or summaries of minutes of meetings. I agree with the majority's reasoning that the agreements are not before us in a form permitting approval. Preferably, the Commission should review precise agreements that it has down in writing before it and bearing signatures of those bound thereby. Until agreements are filed, representing a true and complete statement of what is to be done by the parties,

the Commission cannot know what it is reviewing. In view of these practical difficulties, it is not desirable to attempt to prejudge whether any true and complete agreement that might be formulated and filed should be disapproved.

5. The overland agreement may not be approved at this time.

The Examiner decided the so-called overland agreement was in violation of section 15 of the Act because it was not a part of Agreement No. 8200, but should be incorporated in Agreement No. 8200 and Agreement No. 8200 as amended should be approved.

One of the conferences' agreements was to continue to establish rates for commodities from the overland territory without any change in previously established differentials ("present overland rate spreads remain status quo * * *") (exhibits 3 and 3A, p. 5). The rate differentials which I believe establish competitive relationships existed in 1925 or before.

Pacific Westbound reduces its rates on commodities originating in overland territory below its rates on commodities originating in local territory to an amount making shippers from overland territory pay, after adding their inland railroad rates, the same amount as they would pay if the shippers used Far East carriers after paying inland railroad charges to ports plus Far East rates from either Atlantic or Gulf of Mexico coast ports.

Under the agreement the competitive relationship between the two conferences, through their power to fix rates independently of each other, has been regulated so as to produce an automatic reduction in overland rates following a reduction in the Far East local rates, in order to preserve existing differentials (Tr. 232, 360).

I agree with the majority's reasoning as to the restraining effect, but cannot on this record determine the effect of operations under the agreement. As with the other additional agreements, the respondents will have to file at some future time their complete agreements affecting overland territories and rates for approval in a proceeding where its lawfulness can be determined under the Act.

6. The unapproved agreements were carried out.

The record shows without denial that all of the decisions taken at meetings were acted on, and there was continuous performance of everything decided to be done at the annual interconference meetings. The actions constituting performance were accomplished directly by the principals through their employees or agents and were accomplished in whole or in part as the circumstances required. Such activity constitutes a carrying out of what has herein found to be agreements that have not been approved by the Commission.

B. Agreement No. 8200 issues.

The Board ordered an investigation to determine whether Agreement No. 8200: (a) was being carried out in a manner which made it contrary to certain standards of section 15 of the Act or (b) operated to the detriment of the commerce, or (c) was in violation of the Act.

The Examiner addressed himself to the issues of the public interest in a hearing to determine whether Agreement No. 8200 should be "granted continued approval," modified, or disapproved.

1. Agreement No. 8200 is not being carried out contrary to section 15.

The issue of whether Agreement No. 8200 was being carried out in a manner which makes is contrary to certain standards of section 15 was decided by the Examiner in the context of the concurrence provision obligations being contrary to the provision in item (1) in the second paragraph of section 15 of the Act, directing the Commission not to approve or continue approval of any agrement between conferences serving different and competitive trades unless each conference maintains the right of independent action.

In this context the Examiner decided the concurrence provision is illegal. Agreement No. 8200, however, provides: "Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of lines should determine that conditions affecting its operations require an immediate change in its tariffs * * *" it may notify the other group. Thereafter, changes may be made "and the action * * * shall not constitute a breach or violation of this Agreement" (*Article SECOND*). I agree with the majority's reasoning in reversing the Examiner. The Examiner's reasoning requires that the "right" (the statutory word) be converted into an obligation or duty to act independently later, after the right is created, in conference operations. This is incorrect. Other parts of the legislative history fully support the inference that Congress was only restricting the authority to approve agreements, and not establishing standards by which to judge operations as the majority states. In this case the operations were also shown to have occurred long before October 3, 1961, when the statute was enacted. If the past operations were unlawful, they must be punished by other means than by declaring illegal an agreement that creates a future right of independent action consistently with the law's command. When the agreed right is created by appropriate provisions, the law is complied with. Respondents' provision complies with the law.

2. Agreement No. 8200 does not operate to the detriment of commerce.

With regard to the remainder of Agreement No. 8200 after excision of the concurrence provision, the Examiner decided that Agreement No. 8200 should be reapproved and should be modified by amendment to incorporate "the complete agreement found herein to be outside the scope of said agreement."

The reapproval of Agreement No. 8200 was not ordered in our initiating order, although disapproval might result from findings under item (2) of our order as described in I above. This result is precluded by our decision that Agreement No. 8200 alone is not being carried out unjustly or unfairly, nor is a detriment to commerce, nor is in violation of the Act; rather, certain other actions and agreements not a part thereof have these results. There are no proofs herein relative to discrimination or detriments to commerce or law violation relative to the performance of the express terms of Agreement No. 8200. The terms of the additional agreements are not to be implied as part of Agreement No. 8200 nor as a performance thereof.

Carnation raised an issue questioning the "need or desirability" of Agreement No. 8200 because of certain conflicts of interest in voting decisions thereunder by the many lines which are members of both Far East and Pacific Westbound. The factors of need and desirability are not standards for approval of agreements. Rather, the Act prescribes that if certain conditions are shown agreements shall be disapproved and the Commission "shall approve all other agreements, modifications or cancellations." The evidence as to conflicts of interest in voting was not developed to the point of proving detriments to commerce, or contrariety with public interest or conflict with the remaining tests. The mere existence of the same members in both conferences was thought to speak for itself, but this is not the case and facts showing how commerce and public interest are adversely affected must be shown as well.

Approval of Agreement No. 8200 was opposed primarily on the assumption that the unfiled agreements are a part thereof, and, because some are unlawful, Agreement No. 8200 must be disapproved. This is not the case; the agreements are separate agreements going beyond procedures, and it will take more than an examination of the defects of present operations, particularly in relation to the overland rate structure, to pass on the questions of approvability.

Possibly this issue was provoked by the wording of the Board's order regarding "true and complete" agreements. If Agreement No. 8200 is not true and complete in the sense of having been supplemented, the majority would have to disapprove it and could not state, "we find insufficient evidence to disapprove Agreement No. 8200," because

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the evidence of supplemental agreements is all that is needed. In my view, the other agreements are new and additional, having no direct relation to Agreement No. 8200.

There is no justification on this record for reversing the existing approval of Agreement No. 8200 based on detriments to commerce.

3. Agreement No. 8200 does not violate the Act.

The issue of whether Agreement No. 8200 was in violation of the Act was decided by the Examiner in the context of the use of the initiative and concurrence rights consistently with their additional agreements. These agreements are also separate from Agreement No. 8200. He decided that the "manner" of using the initiative resulted in respondents violating section 16 of the Act, and I agree we should sustain the Examiner in this respect, but such finding is not related to disapproval of Agreement No. 8200. The law is being violated apart from Agreement No. 8200.

C. Exercise of rights as a violation of section 16 of the Act.

I agree with the reasoning of the majority in regard to the use of the rate-making initiative procedures with regard to evaporated milk and that the interconference commitments were a sham as far as the treatment of Carnation was concerned.

As a result of the failure of the conferences to abide by their commitments to not interfere in the other's rate-making rights, respondents, in violation of section 16 of the Act, subjected Carnation as a person, West Coast ports as localities, and the commodity evaporated milk to undue and unreasonable disadvantage. Not getting an otherwise available reduction made the disadvantage "undue." The failure to abide by commitments and the failure to exercise rights when it suited the interests of the parties shown by the failure without satisfactory reason to treat evaporated milk the same as other "70 percent" commodities, made the disadvantage "unreasonable." The agreement was carried out, by the refusal to put evaporated milk on the initiative list in spite of eligibility, in a manner which made it unfair as between east and west coast carriers, shippers, and ports, and in a manner discriminatory to Carnation.

IV. Facts

1. Far East and Pacific Westbound, each on behalf of its members as common carriers by water in foreign commerce, are parties to an agreement made November 5, 1952, by which they agree to establish from time to time "rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates," excepting rates on 12 specified commodities. The agree-

ment stipulates the procedures for subsequent meetings or interconference interchanges of information to accomplish the rate-regulating objectives and to reach decisions.

2. Before the agreement was signed, there had been a discussion of the subject at a meeting on January 16, 1952, between the Chairman of the Far East Conference; the Secretary-Manager of Pacific Westbound; a member of the Board, our predecessor agency; and two employees on the staff of the Board (exhibit 8, par. 16, pp. 9–10). At this meeting the Board member told the group, "that he was very much interested in seeing the two Conferences form a joint agreement and that he hoped it could be finalized without delay." One of the staff members said he "and at least one member of the Board would like to see a joint agreement put into effect * * *" (exhibit 8, par. 16–17, pp. 9–10).

3. A draft agreement was prepared and personally delivered on September 4, 1952, by Far East's Chairman to the Board's staff, with a request "for an informal review of the agreement and opinion as to whether it would be recommended" by the regulations office for approval (Id, par. 21, p. 11). The regulations office on September 18, 1952, sent Far East written informal comments on the draft (Id, par. 22, p. 12). Another revised draft was prepared and made final by execution by the parties on November 5, 1952 (Id, par. 25, p. 12). On the same date a copy of the executed agreement was transmitted to the Board with a request for approval under section 15 of the Act, and approval followed as evidenced by a notation on the copy in the record, "Approved by Order of FMB dated December 29, 1952" (exhibit 13).

4. Obligations relative to performance of later actions under Agreement No. 8200 are as follows:

First: As promptly as possible after the approval of this agreement by the Federal Maritime Board, the parties shall hold a meeting which is hereinafter referred to as the "initial meeting." The initial meeting shall be held at a time and place to be mutually agreed upon by the parties hereto. If, however, prior to the 30th day after such approval the parties hereto shall not so have mutually agreed upon the time and place for the holding of the initial meeting, said initial meeting shall be held on the 40th day after such approval at the Fairmont Hotel in the city of San Francisco, Calif.; and if such 40th day shall fall on a Saturday, Sunday or legal holiday, said meeting shall be held on the second business day thereafter, at the same place. Such meeting shall be attended by representatives of the PACIFIC LINES and of the ATLANTIC/GULF LINES. All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the PACIFIC LINES, acting as a group, and of the ATLANTIC/GULF LINES, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates. The initial

meeting shall make rules, not inconsistent with the provisions of this agreement, for the conduct of all meetings to be held hereunder, and for the the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the initial meeting or at any subsequent meeting.

Second: Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram or 72 hours after the giving of such notice if given by air mail, and a summary of the facts which justify the changes on said short notice. Forty-eight hours, or 72 hours, after the giving of such notice, dependent upon the medium by which such notice shall have been given, the notifying group may make such changes as stated in said notice and the other group may, at the end of 48 hours, or at the end of 72 hours, as the case may be, after the giving of such notice, make such changes in its tariffs as it may see fit and the action of the groups so taken shall not constitute a breach or violation of this agreement. The parties shall, however, promptly give to the governmental agency charged with the administration of section 15 of the Shipping Act, 1916, as amended, copies of any notices and information with respect to any changes in tariffs given or made as provided for in this *Article Second.*

5. The remaining six out of eight articles deal with (a) filing copies of proceedings with the Board, (b) admission of new parties to and termination of membership in conferences, (c) method of giving notices, (d) the effective date of the agreement, (e) expenses of representation, and (f) termination of the agreement.

6. Since the agreement was signed, the parties have held 13 meetings.

7. Insofar as rates and the subjects of this proceeding are concerned, the members of respondent conferences met and adopted resolutions or collectively agreed to a common course of action at meetings held at least annually since 1953, as evidenced by written minutes which were furnished to the Board and the Commission and are now in the Commission's files, as follows:

January 26–30, 1953. Minutes stamped "Received 11:15 a.m., February 24, 1953. Regulations Office, FMB."

September 22–25, 1953. Minutes stamped "Received 12:30 p.m., October 12, 1953, Regulations Office, FMB."

September 10–14, 1954. Minutes stamped "Received 12:05 p.m., October 4, 1954. Regulations Office, FMB."

April 30 to May 5, 1955. Minutes stamped "Received 1:30 p.m., May 31, 1955. Regulations Office, FMB."

May 7–10, 1956. Minutes stamped "Received 2:15 p.m., May 28, 1956. Regulations Office, FMB."

May 6–9, 1957. Minutes stamped "Received 9:45 a.m., June 6, 1957. Regulations Office, FMB."

May 5–18, 1958. Minutes stamped "Received 1:30 p.m., June 16, 1958. Regulations Office, FMB."

May 4–7, 1959. Minutes stamped "Received 10:45 a.m., June 23, 1959. Regulations Office, FMB."

March 7–10, 1960. Minutes stamped "Received 2:30 p.m., April 15, 1960. Regulations Office, FMB."

May 8–11, 1961. Minutes stamped "Received 1:05 p.m., June 26, 1961. Office of Regulations, FMB."

May 2–4, 1962. Minutes stamped "Received 11:30 a.m., June 7, 1962. Bureau of Foreign Regulation, FMC."

(*Note:* As of the time of hearings in May 1962, only the foregoing meetings had occurred.)

May 15–17, 1963. Minutes stamped "Received 9:45 a.m., June 17, 1963. Bureau of Foreign Regulation, FMC."

April 13–17, 1964. Minutes stamped "Received 10:05 a.m., May 25, 1964. Bureau of Foreign Regulation, FMC." (See exhibit 3, 3A for compendium issued July 15, 1956.)

At joint meeting No. 5 in May 1956, the following action was taken: "At the close of each joint meeting the spokesmen for the two conferences shall agree upon that portion of the minutes of that meeting which shall become a part of the memorandum of decisions". The memorandums of decisions are exhibits in this record. (See exhibits 3 and 3A, p. 7, item 8.)

8. The record does not show that the minutes furnished during the years involved in this proceeding, 1953–1959, or the "memorandums of decisions" were accompanied by any letter of transmittal, nor do the Commission's files, of which I take official notice, show any such letter, or any statement that the minutes or abstracts were offered for file in compliance with section 15 of the Act, or any request for Commission approval thereof. The Commission's records show no referral to it for approval nor was any express approval of the minutes given. (See exhibit 8, p. 13, par. 27, and p. 14, par. 32, for testimony re informational nature of submission.)

9. Evidence of the Board's knowledge about the conferences' actions is contained in a letter from the Chairman of the Board to the Director of the Freight Traffic Department of the California Manufacturers Association, dated March 16, 1953, stating:

> * * * Information now before us shows that while no agreement with respect to particular rates was reached at the initial meeting, such meeting did result in mutual understandings on certain basic policies, operational patterns and procedural mechanics and that committees were named to work out details to accom-

plish the matters on which there was agreement by the members and to study and report on particular subjects to be given consideration at future meetings. Both conferences have now agreed that when comparing East Coast and West Coast rates, the handling charges, tolls and wharfage paid by the cargo will be included. In other words the total freight rate to be compared will be computed on the basis of the ocean freight rate as per the tariff plus any handling charges, tolls or wharfage which are for account of the cargo.

As was expected there was a wide divergence of views with respect to the matter of rates as between the two conferences on cargo classed as "local competitive." Further study is to be made of this problem and committees have been designated by the two conferences for this purpose. They are to meet in Chicago the early part of April. It is worthy of note that in agreeing to this, the Pacific Westbound Conference announced that it reaffirmed its views that the principle of a basic spread be recognized between Atlantic/Gulf and Pacific rates in favor of the Pacific and that it initends to continue discussion of this subject for final joint determination. (Exhibit 8, item 5, p. 1.)

10. At all times from December 31, 1948, to the present, the Code of Federal Regulations contained rules regarding filing of agreements. (See 1949 Edition—Code of Federal Regulations, containing a codification of documents of general applicability and future effect as of December 13, 1948. Title 46—Shipping. Ch. II—United States Maritime Commission. Part 222—Statements and Agreements Required to be Filed. See also Cumulative Pocket Supplement for Use during 1953; continued in the 1953 revision containing such codification of documents as of Dec. 31, 1953, under the same code sections and the Cumulative Pocket Supplement Revised as of Jan. 1, 1957; and continued in the current revision as of Jan. 1, 1958, including the Pocket Supplement as of Jan 1, 1964.)

11. A typical format of minutes and proof of the action taken on territorial division and initiative authority on rate making is as follows:

a. Minutes of Joint Meeting No. 1; Pacific Westbound Conference—Far East Conference; Held at the Santa Barbara Biltmore, Santa Barbara, California

January 26–29th, 1953.

Mr. Winston J. Jones, Joint Chairman, called the meeting to order at 2:30 p.m. and extended a warn welcome to both conferences and expressed the hope that the meeting would be productive in finalizing the details regarding the joint agreement.

* * * * * * *

DOCKET SUBJECT NO. 4—DEFINITION OF TERRITORIES; LOCAL AND OVERLAND

It was agreed that local and overland territories shall be as follows:

Local Territories

Atlantic/Gulf:

Maine	Pennsylvania	Florida
New Hampshire	Delaware	Alabama
Vermont	Maryland	Mississippi
Massachusetts	Virginia	Louisiana
Rhode Island	West Virginia	Texas
Connecticut	North Carolina	District of Columbia
New York	South Carolina	
New Jersey	Georgia	

Pacific:

Washington	Idaho	Nevada
Oregon	Utah	British Columbia
California	Arizona	Alberta
Wyoming	Montana	Saskatchewan

Overland Territory

That territory lying between the two local zones.

DOCKET SUBJECT NO. 5—CLASSIFICATION OF CARGO

(a) *Local Initiative:* It was agreed that 70 percent of the total annual movement of any one commodity of an agreed list of commodities would establish the initiative rate-making authority.

(b) *Local Competitive:* It was agreed that all cargo originating in local territories, except for open rate items, that have not been classified as initiative, is local competitive.

(c) *Overland Cargo:* It was agreed that overland cargo is that cargo originating in agreed overland territories.

* * * * * * *

DOCKET SUBJECT NO. 13—MECHANICS OF THE AGREEMENT (CONTINUED)

7. CONCURRENCES

(a): Where a concurrence is required and where a request for concurrence for adjustment in a rate is made by either conference, it is agreed that such concurrence shall be sent and replied to by telegraph. In the event no reply is received by the conference applying for such concurrence within 5 days after the original application is dispatched, Sundays and holidays excluded, it is agreed that concurrence shall be considered automatically granted.

(b): Requests for concurrence shall contain full data regarding the commodity in question, as follows:

1. Nature of commodity and use.
2. Export packing.
3. Weight and measurement per package and cubic feet per 2,000 lbs.

4. Invoice value at shipping point.
5. Point of origin.
6. Rail rates—both coasts.
7. Estimated annual tonnage.
8. Period of movement.
9. Necessity for rate and reasons and any other data that will be of assistance in concluding the subject under discussion.

(c): Whenever after full and reasonable consideration of any rate subject in which concurrence is requested, one or the other conference finally declines such concurrence, renewal of requests can only be made after satisfactory information is supplied. It is distinctly understood that the conference refusing concurrence shall in their refusal clearly explain the reason for so refusing and explain in detail the further information required to give the matter further consideration.

* * * * * * *

(Meeting No. 1, supra.)

Received 11:30 a.m.
Oct. 4, 1954.
Regulation Office.
Federal Maritime Board.

b. MINUTES OF JOINT MEETING NO. 3; PACIFIC WESTBOUND CONFERENCE AND FAR EAST CONFERENCE; HELD AT BANFF SPRINGS HOTEL, BANFF, ALBERTA, CANADA

September 10–14, 1954.

Mr. K. H. Finnesey, Joint Chairman, called the meeting to order at 11:00 a.m., September 10, 1954, and extended a cordial welcome to the members of both conferences.

DOCKET SUBJECT NO. 1—ROLL CALL

The secretary called the roll and reported all members of Pacific Westbound Conference present except Knutsen Line and Pacific Far East Line, Inc., and all members of Far East Conference represented except Intercontinental Marine Lines, Inc., Kawasaki Kisen Kaisha, Ltd., Kokusai Line, Shinnihon Steamship Co., Ltd., States Marine Corporation, and Waterman Steamship Corporation.

* * * * * * *

DOCKET SUBJECT NO. 4—LOCAL COMPETITIVE CARGO

1. Spread in Rates—Definition of Local Competitive Rate Basis

* * * * * * *

Far East Conference Position: That the principle of parity in establishing the level of local competitive rates is fundamental.

Position of Both Conferences: Both conferences agree that the Ocean Rate Basis used for comparative purposes between the Atlantic/Gulf and Pacific shall comprise the total ocean freight, plus handling charges, tolls or wharfage paid by the cargo through either Atlantic, Gulf or Pacific ports.

Both conferences agree to continue their efforts to reconcile differences in their fundamental positions as stated above.

12. Other actions taken at meetings cover the definition of the "local ocean rate basis" and specifying 17 commodities subject to rate-making initiative by Far East and 20 commodities by Pacific Westbound, stating differentials in rates between the two coasts, procedures for changing rates, agreeing not to divulge information in regard to changes in rates, creating a duty to use uniform minimum bill of lading charges, and a variety of agreements on rate changes and classifications (exhibits 3, 3A).

13. Rate-making initiative was defined as follows:

JOINT MEMORANDUM OF DECISIONS

1st Rev., page 5.
Issued May 9, 1960

ITEM NO. 3—DEFINITION OF LOCAL OCEAN RATE BASIS (CONTINUED)

(c) *Rate-Making Initiative.*

(Joint Mtg. No. 4—May 1955.)

The term "rate-making initiative" as expressed herein, when delegated to either conference shall be limited to:

1. Measure of the rate.
2. Effective date.
3. Expiry date.
4. Period of quotation or forward booking.
5. Establishment or termination of contract rates.

The conference having the rate-making initiative on a commodity may not change the rate basis, terms and conditions, or open or close the rate of that commodity without concurrence from the other conference.

(Joint Mtg. No. 5—May 1956.)

Rate-making initiative shall be confined to the commodity named and does not include the right to interpret additional items to the initiative commodity without concurrence by the other conference.

(Joint Mtg. No. 9—March 1960.)

Once concurrence has been given for the opening of a rate, the conference having the rate-making initiative may extend the expiration date of the open rate authorization without the further concurrence of the other conference.

4—DEFINITION OF OVERLAND RATE BASIS

(Joint Mtg. No. 1—January 1953.)

Present overland rate spreads remain status quo, pending outcome of the overland rate study by the two conferences. (For stated positions of the conferences on question of overland rates, see minutes of joint meeting No. 1, docket subject 5(c).)

14. As a result of decisions made pursuant to the conferences' undertaking evidenced by the actions at interconference meetings, the following events have occurred:

a. Intervenor Carnation Co. had before Pacific Westbound in a letter dated November 11, 1957, a proposal to restore the lower rates on evaporated milk in effect before May 1, covering transportation from West Coast ports to the Philippines (exhibit 19, p. 1).

b. In 1957, 90 percent or more of the total annual movement of evaporated milk was from the Pacific Coast (Tr. 210, 306), but Carnation did not know that Pacific Westbound was entitled to have the ratemaking initiative on this item. Conference meetings in 1957 and 1958 show shippers' requests for "a reduction in the rate for evaporated milk." Pacific Westbound expressed willingness to reduce rates for transportaton of evaporated milk to the Philippines (exhibit 19, p. 4, item (d); 5; 12).

c. Far East refused to concur or agree to giving Pacific Westbound rate-making initiative on evaporated milk (exhibit 19, p. 12), and the last refusal to adjust was communicated to Carnation on May 12, 1958 (exhibit 19, pp. 14–15) (Tr. p. 255).

d. Pacific Westbound at joint meeting No. 7 in May 1958 agreed to withdraw its request for concurrence to reduce local and overland rates on item 1350—evaporated milk (exhibit 19, p. 13).

15. Far East and Pacific Westbound establish freight rates for the transportation of commodities in foreign commerce from U.S. Atlantic, Gulf of Mexico, in the case of Far East, and Pacific Coast ports, in the case of Pacific Westbound, to ports in Japan, Korea, Taiwan, Siberia, Manchuria, China, Hong Kong, the Philippine Islands, Vietnam, and Cambodia (exhibit 8, p. 1, item 2). Pacific Westbound also serves Thailand (exhibit 12, p. 1).

FEDERAL MARITIME COMMISSION

No. 872

JOINT AGREEMENT BETWEEN MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

ORDER

Full investgation in this proceeding having been had, and the Commission on this day 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, and having found that the supplementary agreements affecting overland rates, concurrence procedures, and the placement of items on the initiative list constitute unapproved agreements which are required to be filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916,

Therefore, It is ordered, That the respondents, Far East Conference and Pacific Westbound Conference, cease and desist from carrying out such supplementary agreements until filed with and approved by the Commission.

By the Commission.

(Signed) THOMAS LISI,
Secretary.