DECISIONS OF THE

FEDERAL MARITIME COMMISSION

VOLUME 8

MARCH 1964 TO APRIL 1965

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1966

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C., 20402 - Price $3.50

FEDERAL MARITIME COMMISSION

JOHN HARLLEE, *Chairman*
JOHN S. PATTERSON, *Vice Chairman*
ASHTON C. BARRETT, *Member*
JAMES V. DAY, *Member*
GEORGE H. HEARN, *Member*
THOMAS LISI, *Secretary*

CONTENTS

	Page
Table of cases reported	v
Docket numbers of cases reported	xi
Table of cases cited	xix
Decisions of the Federal Maritime Commission	1
Table of commodities	729
Index digest	731

TABLE OF CASES REPORTED

	Page
Aetna Forwarding Co., Inc.—Revocation of Freight Forwarder License	545
Agreement No. 134–21, Gulf/Mediterranean Ports Conference	459, 703
Agreement No. 8545 Between Lloyd Brasileiro (Patrimonio Nacional) and Moore-McCormack Lines, Inc	476
Agreement No. 8650—Calcutta, East Coast of India and East Pakistan/ U.S.A. Conference—Dual Rate Contract	16, 267
Agreement No. 8660—Latin America/Pacific Coast Steamship Conference & Dual Rate Contract	16, 267
Agreement No. 8900—Rate Agreement United States/Persian Gulf Trade	712
Agreement No. 9205: Middle Atlantic Ports Dockage Agreement	381
Agreement No. 9218—North Atlantic Continental Freight Conference & Continental North Atlantic W/B Freight Conference	170
Agreement No. T–4: Terminal Lease Agreement at Long Beach, California	521
Agreement No. T–5: Terminal Lease Agreement at Oakland, California	521
Alaska Lower Yukon River Area Increased Freight Rates	467
Alaskan Rates and Charges, General Increases in	314
Alaskan Seasonal Rate Increases (1962)	1
Alaska Steamship Co.—Seasonal Rate Increases	1
American & Australian Steamship Line *v.* Blue Star Line, Ltd	433
American Export Lines, Inc., Bernard Bowman Corp. *v*	155
American Export Lines, Inc., Government of Israel Supply Mission *v*	14
American Export Lines, Inc., L'Aluminium Francais *v*	83
American Export Lines, Inc., United States, by GSA *v*	280
Applebaum, Louis—Freight Forwarding License Application	306
Associated Steamship Lines (Manila)—Dual Rate Contract	16, 267
Association of West Coast Steamship Companies (Coffee, Colombia/ United States Atlantic-Gulf)—Dual Rate Contract	16, 267
Association of West Coast Steamship Companies (Cocoa, Coffee, Ivory, Nuts, Ecuador/United States Atlantic-Gulf)—Dual Rate Contract	16, 267
Atlantic & Gulf American-Flag Berth Operators, Pacific Seafarers, Inc. *v*	461
Atlantic and Gulf-Indonesia Conference—Dual Rate Contract	16, 267
Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference—Dual Rate Contract	16, 267
Atlantic and Gulf, Singapore, Malaya and Thailand Conference—Dual Rate Contract	16, 267
Atlantic/Gulf Puerto Rico Trade—Increased Rates	94
Atlantic and Gulf/West Coast of Central America and Mexico Conference—Dual Rate Contract	16, 267
Atlantic and Gulf/West Coast of South America Conference—Dual Rate Contract	16, 267
Atlantic Lines, Ltd., Barr Shipping Co., Inc. *v*	638
Austrian Trade Delegate *v.* Universal Terminal & Stevedoring Corp	278

	Page
Barr Shipping Co., Inc. *v.* Atlantic Lines, Ltd	638
Bernard Bowman Corp. *v.* American Export Lines, Inc	155
Blue Star Line, Ltd., American & Australian Steamship Line *v*	433
Blue Star Shipping Corp., Bulkley Dunton Overseas, S. A. *v*	137
Bulkley Dunton Overseas, S. A. *v.* Blue Star Shipping Corp	137
Bunge Corp. and Southern Stevedoring Co., Inc., New Orleans Steamship Assn. *v*	687
Cabezas, Carlos H.—Freight Forwarding License Application	130
Cady, Wm. V.—Freight Forwarding License Application	352
Calcutta/U.S.A. Conference—Dual Rate Contract	16, 267
California Packing Corp. *v.* Hawaii/Orient Rate Agreement	78
California Stevedore & Ballast Co. *v.* Stockton Elevators, Inc	97
Camexco Freight Conference—Dual Rate Contract	16, 267
Canal, Central America Northbound Conference—Dual Rate Contract	16, 267
Capca Freight Conference—Dual Rate Contract	16, 267
Certain Practices of Stockton Elevators	181
Ceylon/U.S.A. Conference (Agreement 8050)—Dual Rate Contract	16, 267
Colpac Freight Conference—Dual Rate Contract	16, 267
Concordia Line, Mahlab, E. *v*	133
Continental North Atlantic W/B Freight Conference & North Atlantic Continental Freight Conference Agreement 9218	170
D. B. Turkish Cargo Line—Dual Rate Contract	16, 267
Deli-New York Rate Agreement—Dual Rate Contract	16, 267
Deli-Pacific Rate Agreement—Dual Rate Contract	16, 267
Del Mar Shipping Corp.—Freight Forwarding License Application	493
Department of State, AID *v.* Lykes Bros. S. S. Co., Inc	153
Dixie Forwarding Co., Inc.—Frieght Forwarding License Application	109, 167
Dual Rate Cases	16, 267
East Coast Columbia Conference—Dual Rate Contract	16, 267
Fall River Line Pier, Inc., International Trading Corp. of Va., Inc. *v*	145, 150
Far East Conference—Dual Rate Contract	16, 267
Flota Mercante Grancolombiana, Jordan International Co. *v*	537
F. W. Hartmann & Co., Inc., Midwest Export & Import Co. *v*	87
Galveston Cotton Co. *v.* Lykes Bros. S.S. Co., Inc	209
General Increases in Alaskan Rates and Charges	314
General Increases in Rates Pacific-Atlantic/Guam Trade	498
Government of Israel Supply Mission *v.* American Export Lines, Inc	14
Graves—Freight Forwarding License Application	109, 167
Great Lakes/Japan Trade Practices—Iino Kaiun Kaisha, Ltd., and Mitsui Steamship Co., Inc	270
Gulf/French Atlantic Hamburg Range Conference—Dual Rate Contract	16, 267
Gulf/Mediterranean Ports Conference Agreement No. 134–21	459, 703
Gulf/Mediterranean Ports Conference—Dual Rate Contract	16, 267
Gulf and South Atlantic Havana Steamship Conference—Dual Rate Contract	16, 267
Hasman & Baxt, Inc.—Misclassification of Goods in Containerized Vans	453
Havana Northbound Rate Agreement—Dual Rate Contract	16, 267
Havana Steamship Conference—Dual Rate Contract	16, 267
Hawaii/Orient Rate Agreement, California Packing Corp. *v*	78
Hellenic Lines, Ltd., Peter Bratti Associates, Inc	375
Increased Freight Rates—Alaska Lower Yukon River Area	467
Increased Rates in the Atlantic/Gulf Puerto Rico Trade	94

Page
India, Pakistan, Ceylon & Burma Outward Freight Conference—Dual Rate Contract 16, 267
International Trading Corp. of Va., Inc. *v.* Fall River Line Pier, Inc 145, 150
Ipar Transport, Limited—Dual Rate Contract 16, 267
Japan Atlantic and Gulf Freight Conference—Dual Rate Contract 337
Japan, Korea, Okinawa Trade Unapproved Section 15 Agreements 503
Java-New York Rate Agreement—Dual Rate Contract 16, 267
Java-Pacific Rate Agreement—Dual Rate Contract 16, 267
Joint Agreement Between Member Lines of the Far East and Pacific Westbound Conferences 553
Jordan International Co. *v.* Flota Mercante Grancolombiana 537
Kempner, H. *v.* Lykes Bros. S.S. Co., Inc 126, 209
L'Aluminium Francais *v.* American Export Lines, Inc 83
Leeward and Windward Islands & Guianas Conference—Dual Rate Contract 16, 267
Lloyd Brasileiro (Patrimonio Nacional), River Plate and Brazil Conference *v.* 476
Ludwig Mueller Co., Inc. *v.* Peralta Shipping Corp 361
Lykes Bros. S.S. Co., Inc., Department of State, AID *v.* 153
Lykes Bros. S.S. Co., Inc., Galveston Cotton Co. *v.* 209
Lykes Bros. S.S. Co., Inc., Kempner, H. *v.* 126, 209
Lykes Bros. S.S. Co., Inc.—Refund of Freight Charges 361
Lykes Bros. S.S. Co., Inc., Texas Cotton Industries *v.* 209
Mahlab, E. *v.* Concordia Line 133
Matson Navigation Co., Orleans Materials and Equipment Co., Inc. *v.* 160
Middle Atlantic Ports Dockage Agreement No. 9205 381
Midwest Export & Import Co. and Green Textile Export and Import Co., Inc. *v.* F. W. Hartmann & Co., Inc 87
Misclassification of Goods—Hasman & Baxt, Inc 453
Moore-McCormack Lines, Inc., Nopal Line *v.* 213
Morse Shipping Co.—Freight Forwarding License Application 472
New Orleans Steamship Assn. *v.* Bunge Corp. and Southern Stevedoring Co., Inc 687
New York Freight Bureau (Hong Kong)—Dual Rate Contract 16, 267
Nopal Line *v.* Moore-McCormack Lines, Inc 213
North Atlantic Baltic Freight Conference—Dual Rate Contract 16, 267
North Atlantic Continental Freight Conf. & Continental North Atlantic W/B Freight Conference Agreement 9218 170
North Atlantic French Atlantic Freight Conference—Dual Rate Contract 16, 267
North Atlantic Mediterranean Freight Conference—Dual Rate Contract 16, 267
North Atlantic United Kingdom Freight Conference—Dual Rate Contract 16, 267
North Atlantic Westbound Freight Association—Dual Rate Contract 16, 267, 387
North Atlantic Westbound Freight Association (Wines & Spirits Contract)—Dual Rate Contract 16, 267
Northern Commercial Co. River Lines—Seasonal Rate Increases 1
Northern Pan-America Line, A/S (Nopal Line) *v.* Moore-McCormack Lines, Inc 213
Orleans Materials and Equipment Co., Inc. *v.* Matson Navigation Co 160
Overseas Freight and Terminal Corp. (All Cargo Line)—Extra Charges Due to Delay in Unloading Caused by Longshoremen Strike 435

Page
Pacific-Atlantic/Guam Trade—General Increases in Rates 498
Pacific Coast/Caribbean Sea Ports Conference—Dual Rate Contract 16, 267
Pacific Coast European Conference—Dual Rate Contract 16, 267
Pacific Coast European Conference Procedures for Hearing and Considering Shippers' Requests and Complaints 372
Pacific Coast-Hawaii—Reduction in Rates 258
Pacific Coast/Mexico Freight Conference—Dual Rate Contract 16, 267
Pacific Coast/Panama Canal Freight Conference—Dual Rate Contract 16, 267
Pacific Coast River Plate Brazil Conference—Dual Rate Contract 16, 267
Pacific Indonesian Conference—Dual Rate Contract 16, 267
Pacific Seafarers, Inc. *v.* Atlantic & Gulf American-Flag Berth Operators 461
Pacific/Straits Conference—Dual Rate Contract 16, 267
Pacific Westbound Conference—Dual Rate Contract 16, 267
Pacific/West Coast of South America Conference—Dual Rate Contract 16, 267
Peralta Shipping Corp., Ludwig Mueller Co., Inc. *v* 361
Persian Gulf Outward Freight Conference—Dual Rate Contract 293
Peter Bratti Associates, Inc. *v.* Hellenic Lines, Ltd 375
Peter Bratti Associates, Inc. *v.* Prudential Lines, Inc 375
Practices in the Great Lakes/Japan Trade—Iino Kaiun Kaisha, Ltd., and Mitsui Steamship Co., Inc 270
Prudential Lines, Inc., Peter Bratti Associates, Inc. *v* 375
Ramirez, Chave *v.* South Atlantic & Caribbean Line, Inc 203
Rates, Charges and Practices of Carriers Engaged in the Trade Between United States and Spain/Portugal 596
Reduced Rates on Automobiles—Atlantic Coast Ports to Puerto Rico 404
Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico 404
Reduction in Rates—Pacific Coast-Hawaii 258
River Plate and Brazil Conference *v.* Lloyd Brasileiro (Patrimonio Nacional) 476
River Plate and Brazil Conferences—Dual Rate Contract 16, 267
River Plate/United States-Canada Freight Conference—Dual Rate Contract 16, 267
Santiago de Cuba Conference—Dual Rate Contract 16, 267
Sea-Land Service, Inc.—Application to Waive Undercharges 641
Sea-Land Service, Inc., Puerto Rican Div., Thatcher Glass Mfg. Co., Inc. *v* 645
Seatrain Lines, Inc.—Application of Rates on Shipments in Railroad Cars 516
South Atlantic & Caribbean Line, Inc., Chave Ramirez *v* 203
South Atlantic Steamship Conference—Dual Rate Contract 16, 267
Spanish/Portuguese Trade Unapproved Section 15 Agreements 596
Stockton Elevators, Certain Practices of 181
Stockton Elevators, Inc., California Stevedore & Ballast Co. *v* 97
Straits/New York Conference—Dual Rate Contract 16, 267
Straits/Pacific Conference—Dual Rate Contract 16, 267
Surcharge on Cargo to Manila 395
Swedish American Line—Refund of Freight Charges 142
Terminal Lease Agreements at Long Beach and Oakland, California 521
Texas Cotton Industries *v.* Lykes Bros. S.S. Co., Inc 209
Thatcher Glass Mfg. Co., Inc. *v.* Sea-Land Service, Inc., Puerto Rican Div 645
Trans-Pacific Freight Conference (Hong Kong)—Dual Rate Contract 16, 267
Trans-Pacific Freight Conference of Japan—Dual Rate Contract 337

Page
Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade 503
Unapproved Section 15 Agreements—Spanish/Portuguese Trade 596
Universal Terminal & Stevedoring Corp., Austrian Trade Delegate *v.* 278
United States Atlantic & Gulf/Australia New Zealand Conference—Dual Rate Contract 16, 267
United States Atlantic and Gulf-Haiti Conference—Dual Rate Contract .. 16, 267
United States Atlantic & Gulf-Venezuela & Netherlands Antilles Conference—Dual Rate Contract 16, 267
United States, by GSA *v.* American Export Lines, Inc 280
United States/Persian Gulf Trade Rate Agreement No. 8900 712
U.S. Atlantic and Gulf Ports-Jamaica Steamship Conference—Dual Rate Contract 16, 267
West Coast of India and Pakistan/U.S.A. Conference—Dual Rate Contract 16, 267
West Coast of Italy, Sicilian & Adriatic Ports/North Atlantic Range Conference 16, 267
Wharfage Charges on Bulk Grain at Pacific Coast Ports 653

DOCKET NUMBERS OF CASES REPORTED

		Page
267	Government of Israel Supply Mission *v.* American Export Lines, Inc	14
268	Chave Ramirez *v.* South Atlantic & Caribbean Line, Inc	187, 203
364	L'Aluminium Francais *v.* American Export Lines, Inc	83
365	The Austrian Trade Delegate *v.* Universal Terminal & Stevedoring Corp	278
366	Midwest Export & Import Co. and Green Textile Export and Import Co., Inc. *v.* F. W. Hartmann & Co., Inc., Agents for Hansa Line	87
367	California Packing Corp. *v.* Hawaii/Orient Rate Agreement	78
369	E. Mahlab, d/b/a Overseas Leather Importing Co. *v.* Concordia Line (Joint Service of Dampskibsaktieselskabet Alaska, Aktieselskabet Atlas, Dampskibsaktieselskabet Idaho, Skipsaksjeselskabet Hilda Knudsen, and Skipsaksjeselskabet Samuel Bakke)	133
371	Swedish American Line—Application to Refund in Part Freight Charges Collected on Shipment Via MS "Vasaholm" from New Orleans, La., to Oslo, Norway	142
372	Bernard Bowman Corp. *v.* American Export Lines, Inc	155
374	Department of State, Agency for International Development, U.S. Aid Mission to Dominican Republic *v.* Lykes Bros. S.S. Co., Inc	153
377	Ludwig Mueller Co., Inc. *v.* Peralta Shipping Corp., Agents for Torm Lines	361
378	Lykes Bros. Steamship Co., Inc., Application to Refund Part Freight Charges Collected on Shipment Via SS "Nancy Lykes" from Le Harve, France, to Galveston, Tex	361
396	Sea-Land Service, Inc.—Application to Waive Undercharges	641
397	Barr Shipping Co., Inc. *v.* Atlantic Lines, Ltd	638
732	H. Kempner *v.* Lykes Bros. Steamship Co., Inc	126, 209
733	H. Kempner *v.* Lykes Bros. Steamship Co., Inc	209
734	Galveston Cotton Co. *v.* Lykes Bros. Steamship Co., Inc	209
735	Texas Cotton Industries *v.* Lykes Bros. Steamship Co., Inc	209
872	Joint Agreement Between Member Lines of the Far East Conference and Member Lines of the Pacific Westbound Conference	553
881	General Increases in Alaskan Rates and Charges	314
884	Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade	503
890	In the Matter of Unapproved Section 15 Agreements—Spanish/Portuguese Trade	596
891	In the Matter of Rates, Charges and Practices of Carriers Engaged in the Trade Between United States and Spain/Portugal	596
901	General Increases in Rates Pacific-Atlantic/Guam Trade	498
921	River Plate and Brazil Conference *v.* Lloyd Brasileiro (Patrimonio Nacional) and Moore-McCormack Lines, Inc	476

		Page
928	Agreement No. 8545 Between Lloyd Brasileiro (Patrimonio Nacional) and Moore-McCormack Lines, Inc	476
947	International Trading Corp. of Va., Inc. and International Trading Corp. of New England, Inc. *v.* Fall River Line Pier, Inc	145, 150
966	Reduction in Rates—Pacific Coast-Hawaii-Oliver J. Olson & Co., C. R. Nickerson, Agent	258
969	Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska	1
971	New Orleans Steamship Association *v.* Bunge Corp. and Southern Stevedoring Co., Inc	687
1000	California Stevedore & Ballast Co. *v.* Stockton Elevators, Inc	97
1001	Gulf/Mediterranean Ports Conference—Dual Rate Contract	16, 267
1002	Pacific Westbound Conference—Dual Rate Contract	16, 267
1003	Capca Freight Conference—Dual Rate Contract	16, 267
1005	Associated Steamship Lines (Manila)—Dual Rate Contract	16, 267
1006	Gulf/French Atlantic Hamburg Range Conference—Dual Rate Contract	16, 267
1007	Pacific Coast European Conference—Dual Rate Contract	16, 267
1009	Colpac Freight Conference—Dual Rate Contract	16, 267
1010	Canal, Central America Northbound Conference—Dual Rate Contract	16, 267
1011	Camexco Freight Conference—Dual Rate Contract	16, 267
1012	Calcutta/U.S.A. Conference—Dual Rate Contract	16, 267
1013	Atlantic and Gulf/West Coast of South America Conference—Dual Rate Contract	16, 267
1014	Atlantic and Gulf/West Coast of Central America and Mexico Conference—Dual Rate Contract	16, 267
1015	Atlantic and Gulf, Singapore, Malaya and Thailand Conference—Dual Rate Contract	16, 267
1016	Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference—Dual Rate Contract	16, 267
1017	Atlantic and Gulf-Indonesia Conference—Dual Rate Contract	16, 267
1018	Association of West Coast Steamship Companies—Dual Rate Contract	16, 267
1018 (Sub. No. 1)	Association of West Coast Steamship Companies (Cocoa, Coffee, Ivory Nuts, Ecuador/United States Atlantic-Gulf)—Dual Rate Contract	16, 267
1018 (Sub. No. 2)	Association of West Coast Steamship Companies (Coffee, Columbia/United States Atlantic-Gulf)—Dual Rate Contract	16, 267
1019	Leeward and Windward Islands & Guianas Conference—Dual Rate Contract	16, 267
1020	The India, Pakistan, Ceylon & Burma Outward Freight Conference—Dual Rate Contract	16, 267
1021	Havana Steamship Conference—Dual Rate Contract	16, 267
1022	Gulf and South Atlantic Havana Steamship Conference—Dual Rate Contract	16, 267
1023	Far East Conference—Dual Rate Contract	16, 267
1025	East Coast Columbia Conference—Dual Rate Contract	16, 267
1026	Java-New York Rate Agreement—Dual Rate Contract	16, 267
1027	Java-Pacific Rate Agreement—Dual Rate Contract	19, 267
1028	Deli-Pacific Rate Agreement—Dual Rate Contract	16, 267

		Page
1029	Deli-New York Rate Agreement—Dual Rate Contract	16, 267
1030	Havana Northbound Rate Agreement—Dual Rate Contract	16, 267
1031	New York Freight Bureau (Hong Kong)—Dual Rate Contract	16, 267
1033	North Atlantic French Atlantic Freight Conference—Dual Rate Contract	16, 267
1034	North Atlantic Mediterranean Freight Conference—Dual Rate Contract	16, 267
1035	Pacific Coast/Caribbean Sea Ports Conference—Dual Rate Contract	16, 267
1037	North Atlantic Baltic Freight Conference—Dual Rate Contract	16, 267
1039	North Atlantic United Kingdom Freight Conference—Dual Rate Contract	16, 267
1040	Pacific Coast/Mexico Freight Conference—Dual Rate Contract	16, 267
1041	Pacific Coast/Panama Canal Freight Conference—Dual Rate Contract	16, 267
1042	River Plate/United States-Canada Freight Conference—Dual Rate Contract	16, 267
1043	River Plate and Brazil Conferences—Dual Rate Contract	16, 267
1044	Pacific/West Coast of South America Conference—Dual Rate Contract	16, 267
1045	United States Atlantic and Gulf-Haiti Conference—Dual Rate Contract	16, 267
1046	West Coast of Italy, Sicilian & Adriatic Ports/North Atlantic Range Conference	16, 267
1047	United States Atlantic & Gulf-Venezuela & Netherlands Antilles Conference—Dual Rate Contract	16, 267
1048	U.S. Atlantic and Gulf Ports-Jamaica Steamship Conference—Dual Rate Contract	16, 267
1049	United States Atlantic & Gulf/Australia New Zealand Conference—Dual Rate Contract	16, 267
1050	Trans-Pacific Freight Conference (Hong Kong)—Dual Rate Contract	16, 267
1051	Straits/Pacific Conference—Dual Rate Contract	16, 267
1052	Straits/New York Conference—Dual Rate Contract	16, 267
1053	South Atlantic Steamship Conference—Dual Rate Contract	16, 267
1054	Santiago de Cuba Conference—Dual Rate Contract	16, 267
1055	Pacific/Straits Conference—Dual Rate Contract	16, 267
1056	Pacific Indonesian Conference—Dual Rate Contract	16, 267
1057	Pacific Coast River Plate Brazil Conference—Dual Rate Contract	16, 267
1058	North Atlantic Westbound Freight Association (Wines & Spirits Contract)—Dual Rate Contract	16, 267
1059	North Atlantic Westbound Freight Association—Dual Rate Contract	16, 267, 387
1061	Bulkley Dunton Overseas, S.A. *v.* Blue Star Shipping Corp	137
1067	Northern Commercial Co. River Lines—General Increase in Rates in the Yukon River Area of Alaska	1
1072	Investigation of Certain Practices of Stockton Elevators	181
1077	Investigation of Increased Rates in the Atlantic/Gulf Puerto Rico Trade—Outward Freight Tariff No. 1 FMC–F No. 1, J. L. Marty, Agent	94
1078	Japan-Atlantic and Gulf Freight Conference Exclusive Patronage (Dual Rate) Contract	337

		Page
1079	The Persian Gulf Outward Freight Conference Exclusive Patronage (Dual Rate) Contract	293
1080	Trans-Pacific Freight Conference of Japan Exclusive Patronage (Dual Rate) Contract	337
1081	West Coast of India and Pakistan/U.S.A. Conference—Dual Rate Contract	16, 267
1082	Thatcher Glass Manufacturing Co., Inc. *v.* Sea-Land Service, Inc., Puerto Rican Division	645
1084	Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports	653
1088	Jordan International Co. *v.* Flota Mercante Grancolombiana	537
1091	Orleans Materials and Equipment Co., Inc. *v.* Matson Navigation Co	160
1092	In the Matter of Agreement No. 8660—Latin America/Pacific Coast Steamship Conference & Dual Rate Contract	16, 267
1096	The Northern Pan America Line, A/S (Nopal Line) *v.* Moore-McCormack Lines, Inc	213
1100 (Sub. 1)	Agreement No. 9218 Between the Member Lines of the North Atlantic Continental Freight Conference and the Continental North Atlantic Westbound Freight Conference	170
1101	The Ceylon/U.S.A. Conference (Agreement 8050)—Dual Rate Contract	16, 267
1103	Agreement No. 9205; Middle Atlantic Ports Dockage Agreement	381
1104	Pacific Seafarers, Inc. *v.* Atlantic & Gulf American-Flag Berth Operators	461
1105 (Sub. 1)	Agreement No. 8900—Rate Agreement United States/Persian Gulf Trade	712
1106	In the Matter of Agreement No. 8650— Calcutta, East Coast of India and East Pakistan/U.S.A. Conference—Dual Rate Contract	16, 267
1109	Ipar Transport, Limited—Dual Rate Contract	16, 267
1110	D.B. Turkish Cargo Line—Dual Rate Contract	16, 267
1111	Dual-Rate Contracts, 1963—Adjudication of Major Issues—Dual Rate Contract	16, 267
1115	Application for Freight Forwarding License— Dixie Forwarding Co., Inc	109, 167
1116	Application for Freight Forwarding License—Mr. L. H. Graves, d/b/a Patrick & Graves	109, 167
1117	Pacific Coast European Conference Procedures for Hearing and Considering Shippers' Requests and Complaints	372
1127	Overseas Freight and Terminal Corp. (All Cargo Line)—Extra Charges Due to Delay in Unloading Caused by Longshoremen Strike.	435
1128	Agreement No. T-4: Terminal Lease Agreement at Long Beach, California	521
1129	Agreement No. T-5: Terminal Lease Agreement at Oakland, California	521
1134	Investigation of Practices in the Great Lakes/Japan Trade—Iino Kaiun Kaisha, Ltd., and Mitsui Steamship Co., Inc	270

		Page
1145	Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico	404
1150	Hasman & Baxt, Inc., Valencia Baxt Express, Inc.—Misclassification of Goods in Containerized Trailer Vans in the United States/Puerto Rico Trade	453
1155	Imposition of Surcharge on Cargo to Manila, Republic of the Philippines	395
1157	United States of America, by General Services Administration *v.* American Export Lines, Inc., American Export and Isbrandtsen Lines, Central Gulf Lines, Inc., States Marine Lines, Inc., Concordia Line, Crescent Line, Ltd., Fern-Ville Lines, French Line, Fresco Line, Hansa Lines, Hellenic Lines, Hoegh Lines, Isthmian Lines, Inc., Italia-Societa Per Azione Di Navigazione of Genoa, Levant Lines, Malaya Indonesia Line, National Hellenic American Line, S. A., Orient Mid-East Lines, Stevenson Lines, Torm Lines, Zim Israel Navigation Co., Ltd	280
1158	In the Matter of Agreement No. 134–21—Gulf/Mediterranean Ports Conference	459, 703
1165	Application for Freight Forwarding License—Carlos H. Cabezas, 97 73d St., Brooklyn, New York	130
1167	Reduced Rates on Automobiles—Atlantic Coast Ports to Puerto Rico	404
1168	Application for Freight Forwarding License—Louis Applebaum, 8–10 Bridge St., New York, N.Y	306
1172	Peter Bratti Associates, Inc. *v.* Prudential Lines, Inc. and West Coast of Italy Sicilian and Adriatic Ports/North Atlantic Range Conference (W.I.N.A.C.)	375
1173	Peter Bratti Associates, Inc. *v.* Hellenic Lines, Ltd. and West Coast of Italy Sicilian and Adriatic Ports/North Atlantic Range Conference (W.I.N.A.C.)	375
1188	Increased Freight Rates—Alaska Lower Yukon River Area	467
1192	Application for Freight Forwarding License—Wm. V. Cady, 17 Battery Place, New York, 4, New York	352
1196	Application for Freight Forwarding License—Del Mar Shipping Corp., 354 South Spring St., Los Angeles, California	493
1201	Application for Freight Forwarding License—Morse Shipping Co. (Rebecca Ruth Morse, d/b/a) 149 Madison Ave., New York N.Y	472
1207	Seatrain Lines, Inc.—Application of Rates on Shipments in Railroad Cars	516
1211	Independent Ocean Freight Forwarder License No. 542—Aetna Forwarding Co., Inc. Revocation of License	545
65–2	American & Australian Steamship Line, and Port & Associated Lines *v.* Blue Star Line, Ltd., Hamburg Sud-Amerikanische Dampfshiffahrts-Gesellschaft, Eggert & Amsinck (Columbus Line), United States Lines Co., and M. E. Rough	433

TABLE OF CASES CITED

	Page
Absorption or Equalization on Explosives, 6 FMB 138	708
Adair *v.* Reorganization Investment Co., 125 F. 2d 901	290
Addison *v.* Holly Hill Fruit Products, 322 U.S. 607	200
Agreements 6210, Etc., 2 USMC 166	707
Agreement No. 6870, 3 FMB 227	154
Agreements 8225 and 8225-1, Greater Baton Rouge Port Commission and Cargill, Inc., 5 FMB 648	656, 694
Agreement 8492—T. F. Kollmar, Inc. & Wagner Tug Boat Co., 7 FMC 511	460, 708
Agreement No. 8765, Gulf Mediterranean Trade, 7 FMC 495	722
Agreement 8905, Seattle-Alaska Steamship Co., 7 FMC 792	530, 532
Agreements and Practices Re Brokerage, 3 USMC 170	117
Aichmann & Huber *v.* Bloomfield Steamship Co., 7 FMC 811	159, 368
Air Transport Associates, Inc.—Enf. Proc., 1 Ad. L. (2d) 537	310
Alaskan Rates, 2 USMC 558	445–447
Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 8 FMC 1	470, 499
Alcoa Steamship Co., Inc. *v.* CAVN, 7 FMC 345	254, 256, 492, 722
Alcoa Steamship Co., Inc. *v.* FMC, 321 F. 2d 756	120
American Export & Isbrandtsen Lines *v.* FMC 334 F. 2d 185	557
American Peanut Corp. *v.* M. & M.T. Co., 1 USSB 78	400
American President Lines, Ltd. *v.* FMB, 317 F. 2d 887	278, 279
American Red Ball, 82 MCC 391	112, 122
American Steel Foundries Co. *v.* Tri-City Council, 257 U.S. 184	359
Archer *v.* SEC, 133 F. 2d 795	131
Arizona Grocery *v.* Atchison Ry., 284 U.S. 370	320
Associated-Banning Co., *v.* Matson Navigation Co., 5 FMB 336	540, 557, 558
Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 7 FMC 87	3, 4, 5, 7
Atlantic & Gulf/West Coast Conference *v.* United States, 90 F. Supp 554, 94 F. Supp 138	117
Atlas Waste Mfg. Co. *v.* N.Y. P.R. S.S. Co., 1 USSB 195	289
Auburn Mills *v.* Chicago & A.R. Co., 221 ICC 475	644
Baltimore, Md.-Virginia Ports Wine Rates, 2 USMC 282	263
Baltimore & Ohio R.R. Co. *v.* United States, 277 U.S. 291	201
Baltimore & Ohio R.R. Co. *v.* United States, 345 U.S. 146	408
Banana Distributors, Inc. *v.* Grace Line Inc., 5 FMB 615	200
Barr Shipping Co. *v.* Royal Netherlands S.S. Co., 7 FMC 786	158
Becker, 7 Ad. L. (2d) 151	310
Black Diamond S.S. Corp. *v.* Cie. Maritime Belge, 2 USMC 755	172
Blanton Co., 6 Ad. L. (2d) 736	310
Bluefield Co. *v.* Public Service Commission, 262 U.S. 679	10
Board of Trustees *v.* United States, 289 U.S. 48	287

Page
Bonnell Elec. Mfg. Co. *v.* Pacific Steamship Co., 1 USSB 143 — 289
Boston Terminal Co., 103 ICC 707 — 501
Boston Wool Trade Association *v.* M. & M. & T. Co., 1 USSB 24 — 400
Byer, 4 Ad. L. (2d) 729 — 310
Cady, Wm. V.—Freight Forwarding License Application, 8 FMC 336 — 497
California Stevedore & Ballast Co. *v.* Stockton Port District, 7 FMC 75 — 98, 656, 694
Carey *v.* Corporation Commission, 33 P. 2d 788 — 319
Cargo to Adriatic, Black Sea and Levant Ports, 2 USMC 342 — 263
Carloader Corp. Freight Forwarder Application, 260 ICC 123 — 119, 124
Carnation Co. *v.* Pacific Westbound Conference, 336 F. 2d 650 — 582
CAVN *v.* A. J. Perez Export Co., 303 F. 2d 692 — 116
Cement Mfgrs. Assn. *v.* United States, 268 U.S. 588 — 150
Chesapeake & O. Ry. Co. *v.* Burton, 62 F. 2d 110 — 369
Chicago Express, Inc., 75 MCC 531 — 112, 122
Cie. Generale Transatlantique *v.* American Tobacco Co., 31 F. 2d 663, 280 U.S. 555 — 106
Cities Service Gas Co., Federal Power Commission, Dkt. No. G–18799 (July 15, 1963) — 6, 7
Cleveland & Akron *v.* Hope Natural Gas Co., 44 P.U.R. (N.S.) 1, 29 — 319
Colgate-Palmolive Peet Co. *v.* District of Columbia, 110 F. 2d 264 — 199
Colonialgrossisternes Forening *v.* Moore-McCormack Lines, Inc., 178 F. 2d 288 — 451
Commercial Molasses Corp. *v.* New York Barge Corp., 314 U.S. 104 — 290
Common Carrier Freight Rates and Practices in the Florida/Puerto Rico Trade, 7 FMC 686 — 412
Consolo *v.* Flota Mercante Grancolombiana, 5 FMB 633 — 200
Consolo *v.* Grace Line, Inc., 4 FMB 293 — 200
Continental Can Co. *v.* United States, 272 F. 2d 312 — 456
Contract Rates—North Atlantic Continental Freight Conference, 4 FMB 353 — 753
Contract Rates—Port of Redwood City, 2 USMC 727 — 106
Contract Rates—Trans-Pacific Freight Conference of Japan, 4 FMB 744 — 338
C. & P. Telephone Co. of Maryland *v.* Maryland Public Service Commission, 187 A. 2d 475 — 319
Crowe *v.* Southern S. S. Co., 1 USSB 145 — 140
Crude Petroleum from Mississippi to Illinois, 255 ICC 763 — 644
Department of State, AID *v.* Lykes Bros. S. S. Co., Inc., 8 FMC 153 — 286
Dixie Forwarding Co., Inc.—Freight Forwarding License Application, 109, sion, 167 — 357
D. J. Roach, Inc. *v.* Albany Port District, 5 FMB 333 — 104, 656, 694
Dipson Theatres *v.* Buffalo Theatres, 86 F. Supp. 716 — 290
Dual Rate Cases, 8 FMC 16 — 267, 293–297, 339, 340, 342, 387, 389, 390, 393, 394
Duluth Chamber of Commerce *v.* C., St. P., M. & O. Ry. Co., 122 ICC 739 — 709
Eastbound Intercoastal Lumber, 1 USMC 608 — 650
Eden Mining Co. *v.* Bluefields Fruit & S. S. Co., 1 USSB 41 — 22, 23, 148, 149
Empire State Highway Transp. Assn. *v.* FMB, 291 F. 2d 336 — 384, 386, 579
Ensminger *v.* People, 95 Am. Dec. 494 (Ill. 1868) — 657
Evans Cooperage Co., Inc. *v.* Board of Commissioners of Port of New Orleans, 6 FMB 415 — 656, 666
Ex Parte 4, Section 15 Inquiry, 1 USSB 121 — 557, 579
Far East Conference *v.* FMC, 337 F. 2d 146 — 373

Page
Far East Conference v. United States, 342 U.S. 570 23
Florida East Coast Ry., 84 ICC 25 501
Flota Mercante Grancolombiana v. FMC and United States, 302 F. 2d 887 708
FMB v. Isbrandtsen Co., 356 U.S. 481 23, 338, 504, 506
FMC v. Anglo-Canadian Shipping Co., 335 F. 2d 255 373
FMC v. Atlantic & Gulf Panama Canal Zone, Colon and Panama City Conference, 65 Civil 1033 (S.D. N.Y., Apr. 27, 1965) 627
FPC v. Hope Gas Co., 320 U.S. 591 10
Francesconi & Co. v. Baltimore & Ohio Ry. Co., 274 Fed. 687 201
Gannet Co., Inc. v. B. & O. R.R. Co., 219 ICC 617 644
Gelfand Mfg. Co. v. Bull Steamship Line, Inc., 1 USSB 169 379, 380
General Increases in Alaskan Rates and Charges, 5 FMB 486 320
General Increases in Alaskan Rates and Charges, 7 FMC 563 3, 5, 7, 9, 11, 315–319, 328
General Increases in Rates—Pacific/Atlantic-Guam Trade, 7 FMC 423 408
Grace Line Inc. v. FMB, 280 F. 2d 790 695, 708
Grays Harbor Pulp & Paper Co. v. A. F. Klaveness & Co., A/S, 2 USMC 366 402
Greater Baton Rouge Port Commission v. United States, 287 F. 2d 86 104, 694
Great Western Distributors, Inc., 1 Ad. L. (2d) 592 310
Gregg Cartage Co. v. United States, 316 U.S. 75 311
Guam v. FMC, 329 F. 2d 251 8, 408
Gulf Westbound Intercoastal Soya Bean Oil Meal Rates, 1 USSBB 554 644, 650
Harrison v. Mayor of N.Y., 92 U.S. 259 287
Hazel Atlas Glass Co.—Misclassification of Glass Tumblers, 5 FMB 515 456
Hellenic Lines, Ltd. v. FMB, 295 F. 2d 138 600
Hellenic Lines, Ltd.—Violation of Sections 16 (First) and 17, 7 FMC 673 609
H. Kramer & Co. v. Inland Waterways Corp., 1 USMC 630 644
Holly Sugar Corp. v. Alton R.R. Co., 216 ICC 85 644
Holy Trinity Church v. United States, 143 U.S. 457 369
Huber Mfg. Co. v. Stoomvaart Maatschapij "Nederland," 4 FMB 343 291
Increased Freight Rates, 1958, 304 ICC 289 386
Increased Rates on Sugar, 1962, 7 FMC 404 408
Interchange of Freight at Boston, 2 USMC 671 656, 682
Intercoastal Investigation, 1935, 1 USSBB 400 201
Intercoastal Lumber Rate Changes, 1 USMC 656 448
Intercoastal Rate Structure, 2 USMC 285 263, 408
International Trading Corp. of Va. v. Fall River Pier Line, 7 FMC 219 146, 200
Interstate Circuit Inc. v. United States, 306 U.S. 208 514
Isbrandtsen Co., Inc. v. United States, 211 F. 2d 51 338, 579, 504
Isbrandtsen Co., Inc. v. United States, 239 F. 2d 933 64, 200, 338, 504
Isbrandtsen Co., Inc. v. States Marine Corp. of Delaware, 6 FMB 422 64, 126, 149, 209
Japan-Atlantic and Gulf Freight Conference—Contract Rates, 4 FMB 706 64
Japan-Atlantic and Gulf Freight Conference—Dual Rate Contract, 8 FMC 321 389
Johnson Machine Works, Inc. v. Chicago, B. & Q. R. Co., 297 F. 2d 793 369
Johnson Picket Rope Co. v. Dollar S.S. Lines, 1 USSBB 585 291
Joint Committee v. Pacific Westbound Conference, 4 FMB 166 117
Kempner v. FMC, 313 F. 2d 586 126, 559, 581
Kerr Steamship Co. v. United States, 284 F. 2d 61 600

Page

Lifshultz Fast Freight Extension—Wisconsin, 285 ICC 659 .... 112, 122
Lopez Trucking Inc. *v.* Wiggin Terminals, Inc., 5 FMB 3 105
Louisville & N.R.R. Co. *v.* Maxwell, 237 U.S. 94 .... 365, 369
Louisville & W. R. Co., 103 ICC 252 501
Ludwig Mueller Co., Inc. *v.* Peralta Shipping Corp., 8 FMC 361 644
Lykes Bros. S.S. Co., Inc.—Refund of Freight Charges, 7 FMC 602 .... 92, 143, 364, 368
Lykes-Harrison Pooling Agreement, 4 FMB 511 200
Maple Island Farm, Inc. *v.* Chicago, B. & O. Ry. Co., 280 ICC 353 287
Markt & Hammacher Co.—Misclassification of Glassware, 5 FMB 509 379
Martini & Rossi *v.* Lykes Bros. S.S. Co., Inc., 7 FMC 453 .... 15, 81, 85, 135, 158, 204, 364, 368, 370
Midwest Export & Import Co. *v.* F. W. Hartman & Co., Inc., 8 FMC 87 368
Millar *v.* N.Y. Central & H.R.R. Co., 19 ICC 78 644
Misclassification and Misbilling of Glass Articles, 6 FMB 155 456
Mitsui Steamship Co., Ltd.—Alleged Rebates to A. Graf & Co., 7 FMC 248 229
Mitsui Steamship Co. *v.* Anglo-Canadian Shipping Co., 5 FMB 72 .... 557, 579
Montship Lines, Ltd. *v.* FMB, 295 F. 2d 147 600
Moog Industries, Inc., 5 Ad. L. (2d) 138 310
National Cable and Metal Co. *v.* American-Hawaiian Steamship Co., 2 USMC 470 380
NLRB *v.* Service Wood Heel Co., 124 F. 2d 470 511
N.Y. *v.* United States, 331 U.S. 284 290
Nydia Foods Corp. *v.* Java Pacific Line, 7 FMC 808 .... 158, 368
Ocheltree Grain Co. *v.* St. Louis & S. F. R. Co., 13 ICC 46 644
Oranje Line *v.* Anchor Line, Ltd., 5 FMB 714 .... 466, 713, 723, 725, 726, 727
Ouachita Packet Co. *v.* Aiken, 121 U.S. 444 657
Oxenberg Bros. Inc. *v.* United States, 3 FMB 583 .... 367, 644
Pacific Coast European Conference, 3 USMC 11 179
Pacific Coast European Conference, 7 FMC 27 231
Pacific Coast European Conference—Rates and Practices, 2 USMC 58 724
Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 7 FMC 260 .... 4, 5, 7, 500
Pacific Coast Port Equalization Rule, 7 FMC 623 557
Pacific Coastwise Carrier Investigation, 2 USMC 191 263
Pacific Seafarers, Inc. *v.* Atlantic & Gulf American-Flag Berth Operators, 8 FMC 445 286
Pacific Westbound Conference *v.* FMC 373
Panitz *v.* District of Columbia, 112 F. 2d 39 310
People Gas Light & Coke Co., 19 P.U.R. (n.s.) 177, 274 319
Persian Gulf Outward Freight Conference Dual Rate Contract, 8 FMC 277 340
Port of Philadelphia Ocean Traffic Bureau *v.* Export Steamship Corp., 1 USSBB 538 .... 400, 541, 649
Practices, Etc. of Ocean Freight Forwarders, 6 FMB 327 117
Practices, Etc. of San Francisco Bay Area Terminals, 2 USMC 588 .... 525, 657
Public Service Co. of New Hampshire *v.* State, 153 A. 2d 801 319
Puerto Rican Rates, 2 USMC 117 .... 288, 445–447
Ramirez *v.* South Atlantic & Caribbean Line, Inc., 8 FMC 203 643
Rates of Inter-Island Steam Navigation Co., Ltd., 2 USMC 253 288
Rawleigh *v.* Stoomvart, 1 USSB 285 23
Republic Carloading and Distributing Co., Inc., Freight Forwarder Application, 250 ICC 670 311

Page
River Plate and Brazil Conference v. Pressed Steel Car Co., Inc., 124 F. 2d 88 582
Royal Netherlands v. FMC, 304 F. 2d 938 456
Rubber Development Corp., v. Booth Steamship Co., 2 USMC 747 379
San Diego Harbor Comm. v. Matson Navigation Co., 7 FMC 394 274, 275, 648
S. H. Kress & Co. v. Baltimore Mail Steamship, 2 USMC 450 644
Silent Sioux Corp. v. Chicago & N.W. Ry. Co., 262 F. 2d 474 158, 365, 369
Southern Pacific Co. v. Darnell-Taenzer Co., 245 U.S. 531 366
States Marine Lines, Inc. v. Trans-Pacific Freight Conference of Japan, 7 FMC 204 465, 707
States Marine Lines, Inc. v. Trans-Pacific Freight Conference of Japan, 7 FMC 257 603
States Marine Lines, Inc. v. FMC, 313 F. 2d 906 149
Sugar from Virgin Islands to United States, 1 USMC 695 644
Swedish American Line—Refund of Freight Charges, 8 FMC 142 363, 364, 368
Swift & Co. v. FMC, 306 F. 2d 277 44, 231, 268
Terminal Rate Increases—Puget Sound Ports, 3 USMC 21 185, 656, 664, 682
Terminal Rate Structure—California Ports, 3 USMC 57 525, 657, 677, 678, 679
Terminal Rate Structure—Pacific Northwest Ports, 5 FMB 53 657
Texas & Pacific Ry. v. ICC, 162 U.S. 197 709, 710
Theatre Enterprises Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 514
Trans-Pacific Freight Conference of Japan v. FMC, 314 F. 2d 277 466
Transportation by Mendez & Co. Between U.S. and Puerto Rico, 2 USMC 717 707, 708
Transportation of Lumber through the Panama Canal, 2 USMC 143 445–447
Uddo & Taormina Corp. v. Concordia Line, 7 FMC 473 364, 368
Unapproved Section 15 Agreements—Gulf/United Kingdom Conference, 7 FMC 536 513
Unapproved Section 15 Agrements—South African Trade, 7 FMC 159 112, 514, 515, 608, 612, 614, 629
United States v. American Union Transport, 327 U.S. 437 117
United States v. Anchor Line, Ltd., 232 F. Supp 379 466, 600
United States v. Holliday, 70 U.S. 407 287
United States v. Illinois Central R.R., 263 U.S. 104 290, 291
United States v. Kirby, 74 U.S. 482 369
United States v. Turner, 246 F. 2d 228 199
United States v. Wabash R. Co., 321 U.S. 403 512, 513
Universal Camera Corp. v. NLRB, 340 U.S. 474 121
U.S. Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 22, 365, 369
Waterman v. Stockholms Rederiaktiebolag Svea, 3 FMB 248 367
Wells Lamont Corp. v. Bowles, 149 F. 2d 364 201
West-Bound Alcoholic Liquor Carload Rates, 2 USMC 198 263
West-Bound Carload and Less-Than-Carload Rates, 2 USMC 180 263
West Indies Fruit Co. v. Flota Mercante Grancolombiana, 7 FMC 66 291, 367, 400, 402
Wharfage Charges and Practices at Boston, Mass., 2 USMC 245 666
Whitman v. Chicago, R.I. & P. Ry. Co., 66 F. Supp 1014 201
Wilson, 5 Ad. L. (2d) 247 310
Yankee Network v. FCC, 107 F. 2d 212 369
Y. Higa Enterprises, Ltd. v. Pacific Far East Line, Inc., 7 FMC 62 81, 85, 364, 366, 368, 644
Yick Wo. v. Hopkins, 118 U.S. 356 512

FEDERAL MARITIME COMMISSION

No. 969

Alaska Steamship Company—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska

No. 1067

Northern Commercial Co. River Lines—General Increase in Rates in the Yukon River Area of Alaska

Decided March 5, 1964

Rates and charges of Alaska Steamship Company and Northern Commercial Co. River Lines found to be unjust and unreasonable to the extent that they provide Alaska Steamship Company with a rate of return in its seasonal service in excess of ten (10) percent.

Stanley B. Long and *Ira L. Ewers* for respondents.
George N. Hayes and *Richard S. Sasaki* for State of Alaska, intervener.
Leonard Shinn for General Services Administration, intervener.
Harold L. Witsaman, Hearing Counsel.
Alton L. Jordan, Hearing Examiner.

Report

By the Commission (John Harllee, *Chairman;* Thos. E. Stakem, *Vice-Chairman;* Ashton C. Barrett, James V. Day, and John S. Patterson, *Commissioners*)

On December 18, 1961, the Alaska Steamship Company (hereinafter Alaska Steam) filed certain rates and charges with the Commission to become effective on January 18, 1962. On January 15, 1962, the Commission suspended the effective date of these rates and charges for four months and instituted this investigation to determine whether the rates and charges were just and reasonable. By stipulation, the parties agreed that the decision in Docket 969 would govern the increased rates in Docket 1067, which rates had been filed

Hearings were held before Examiner A. L. Jordan in Seattle from December 4 to 15, 1962, and Examiner Jordan issued his initial decision on June 3, 1963. In his initial decision, Examiner Jordan found, *inter alia*, that the rates and charges of Alaska Steam were unjust and unreasonable to the extent that they produced a rate of return exceeding twelve percent. Alaska Steam and Northern Commercial Company, the respondents, and General Services Administration (hereinafter "GSA") the State of Alaska (hereinafter "State") and the Commission's Hearing Counsel filed exceptions to the initial decision of the Examiner. Oral argument on exceptions was heard.

The increased rates under consideration are a 10-percent increase on general cargo to the seasonal areas of Alaska, Bristol Bay, Nome, Kotzebue, and the general Bering Sea areas; a 20-percent increase on cannery cargo—cans, cartons, and salt, which are used in the salmon canning process; and a 10-percent increase on southbound canned salmon products from all areas of Alaska. Thus, the increases affect the so-called "seasonal trade," as opposed to the "scheduled trade." The seasonal trade exists only during the summer months and is primarily concerned with the movement of cannery supplies and canned salmon, while the scheduled trade operates year-round to the Southeastern and Southwestern areas of Alaska.

Rate Base

In testing the reasonableness of the rate increases, the Examiner constructed a partial rate base for the seasonal service and applied a rate of return with respect to the partial rate base, to which Alaska Steam took exception.

We are in agreement with the Examiner that the rates under investigation should be tested by the results of operation in the "seasonal trade" and not by the over-all operations of Alaska Steam. The increases filed by Alaska Steam apply to commodities moving principally in the "seasonal trade." In this trade Alaska Steam enjoys a virtual monopoly, while in its "scheduled trade" it faces keen competition. The record shows that Alaska Steam has reduced its rates in the scheduled trade. Alaska Steam has put forth no convincing rationale as to why we should measure the increases here by the results of the carrier's over-all operations. To do so would, in our opinion, allow the carrier to offset losses in the competitive trades with profits from the trade in which it presently enjoys a virtual monopoly. Shippers in the seasonal trade are dependent upon Alaska Steam's service. We think it would be unfair to saddle such captive shippers with the burden of the carrier's losses resulting from operations in the scheduled trade. The separation of services and construction of a partial rate base, while perhaps subject to some infirmities regarding exactitude of allocations, is the fairest method of testing these increases. And, while Alaska Steam objects to this procedure, the evidence presented by it during the course of the hearing was sufficient to enable the construction of the partial rate base. All figures necessary for such a computation were presented in the exhibits and testimony of the carrier. We therefore reject the contentions of GSA and State that Alaska Steam failed to meet its burden of proof. The carrier was entitled to urge on the Examiner its theory of rate-making, as it did, but the fact that it did not present a computation of a partial rate base cannot be equated with a failure to meet its burden of proof. Alaska Steam presented all the information required for a separation of the seasonal and scheduled services, and the Examiner in making his decision constructed the partial rate base from this information.

Alaska Steam excepted to certain allocations made by the Examiner in his computation of the partial rate base. The Examiner did not include the entire net book value of all vessels used in the seasonal service in the partial rate base, for the reason that the seasonal ships are used in the scheduled service when the need arises. Although the ships are used primarily in the seasonal service, they also generate revenue for the scheduled service, and we think that the Examiner's allocation was a proper one.

The Examiner utilized net book value in valuation of the ships of Alaska Steam. Alaska Steam contends that the Commission should value ships on the basis of market value, but we are unconvinced that we should depart from the use of net book value, utilized in several previous rate cases. See *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges*, 7 F.M.C. 87, 106 (1962) and *General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563, 581–582 (1963) where the use of net book value as opposed to market value is fully discussed.

Alaska Steam took exception to the Examiner's non-inclusion in the partial rate base of the investment in deferred charges and expenses and his failure to include a specific amount for working capital of related companies. The Examiner allowed as working capital an amount approximately equal to one round average voyage expense for each ship in the service. Thus provision has been made not only for current operating expenses of Alaska Steam, including the costs of services performed for Alaska Steam by related companies, but also for deferred charges and expenses. Alaska Steam's exceptions are rejected.

Alaska Steam contends that the Examiner should have included in the partial rate base the fair value of property used in the trade but not owned. We reject this contention. In *Atlantic & Gulf-Puerto*

Rico General Increase in Rates and Charges, 7 F.M.C. 87 (1962), we said:

In the earlier decision in this case (6 F.M.B. 14), the Board determined, correctly we think, that the value of terminal facilities used but not owned by the carriers should not be included in the rate base. The carriers are not devoting their capital to the public use insofar as such property is concerned.

It is proper to include as expenses the rentals paid and other expenses of the carriers which arise by reason of the use of the facilities. However, to include the value of non-owned property in the rate base and owners' expenses, instead of rentals as expenses results in a windfall to the carriers at the expense of the shipping public. 7 F.M.C. 87, 110.

The fact that the non-owned property that Alaska Steam would have us include in the rate base consists of chartered vessels, which are claimed to be indispensable to the seasonal operation, does not alter the principle that such property is not included in the rate base. The rate of return is essentially a return on invested capital, and non-owned property does not represent an investment of the owners' capital.

Allocation of Income and Expenses

The Examiner allocated administrative and general expense according to the proportion that total vessel operating expense in each service bears to the total vessel operating expense. In so doing, the Examiner followed earlier precedent set by us. See *General Increases in Rates (1961)*, 7 F.M.C. 260, at 288 (1962). Alaska Steam excepted to this allocation, and it contends that the allocation should be according to "vessel days" computed pursuant to Maritime Administration General Order 60. Alaska Steam's contention that M.A. General Order 60 should be used is premised on the proposition that since it has considerable pre-season and post-season activity in regard to its seasonal operations, the use of the formula under the M.A. General Order is more fair.

First, while Alaska Steam may comply with M.A. General Order 60 in its accountings to the Maritime Administration, there is nothing to prevent us from prescribing another allocation procedure different from that of M.A. General Order 60. M.A. General Order 60 involves a complex formula relating to excess charter hire, and we are not convinced that its use is justified in this case.

Second, since administrative and general expenses are a mixture of salaries and expenses that pertain to the over-all management and operation of Alaska Steam, logical reasoning dictates that their allocation should follow those expenses (i.e., vessel operating expenses) that management must control to profitably operate the business. Under the circumstances, we believe that the Examiner's allocation was fair and equitable. The very fact that these expenses are being allocated means that exactitude is impossible, and Alaska Steam has not shown on the record that the Examiner's allocation is inequitable or unfair.

The Examiner included in the income account of Alaska Steam the profits of Alaska Terminal and Stevedoring Company. Alaska Steam excepted to this inclusion and stated that by so doing the Examiner had disallowed a portion of its stevedoring expense. We agree with the Examiner. In *General Increases in Rates (1961)*, 7 F.M.C. 260 (1962), we held that "the shipping public is entitled to protection from the siphoning-off of revenues by affiliates of the regulated carrier." 7 F.M.C. 260, at 282. This holding followed earlier precedent established in the *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges* case, *supra*, and reiterated in *General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563, at 579–580 (1963).

The Examiner allocated depreciation, inactive expenses, vessel values, and working capital attributable to each trade assuming that the asset was available for use in the regulated trade for 365 days, so that in allocating the value of an asset, the numerator would be days in service, and the denominator would be 365. To this method of allocation, Hearing Counsel objects. We are persuaded that in this allocation the Hearing Examiner was correct. The asset was available for use in the regulated trade for 365 days each year, and this fact should be accorded weight in the allocation of inactive expenses, vessel values, depreciation, and working capital.

Taxes

The Examiner applied as taxes the actual taxes incurred by Alaska Steamship Company on all operations for 1962. Rates and charges under consideration in this proceeding were tested by the results of 1962 operations. In its "Notice of Request to Submit Exhibits" received by the Commission on November 5, 1962, Alaska Steam stated: "The facts showing the actual operations and results of operations for the full calendar year 1962 are the best evidence regarding the reasonableness of Respondent's revenues and income from all operations including increased freight rates which are the subject of these proceedings." And, during the course of the hearing before the Examiner, the attorney for Alaska Steam stated: "We judge the rates as of 1962, 1960, 1961, 1959 are not relevant." In 1962 Alaska Steam made money on its seasonal service but lost money on its scheduled service. Its actual tax liability for all operations in 1962 was less than a hypothetical liability of 52 percent on its seasonal service profits. Alaska Steam contends that the Commission should allow as taxes a figure of 52 percent of the profits of the seasonal service (plus an additional percentage for State of Alaska income taxes), notwithstanding the fact that a lesser amount was incurred by the company on its over-all operations. Hearing Counsel supports the Examiner's allowance for taxes.

We are not unmindful that rate-making is essentially prospective, and that it should not be assumed that one service will always lose money while another service will always be profitable. However, the increases under consideration are being tested by the actual results of 1962 operations, and during 1962 the scheduled service lost money, so that Alaska Steam's tax liability was reduced. To disregard this fact, it seems to us, would be to allow Alaska Steam to subsidize the scheduled service at the expense of the seasonal rate payers. It would, in effect, allow Alaska Steam a return over and above that which is shown to be just and reasonable in the seasonal service.

The Federal Power Commission has recently had to deal with the issue of tax allocations, although in a somewhat different context. The Power Commission decision, *Cities Service Gas Company*, Docket No. G–18799, issued July 15, 1963, involved a consolidated tax return [1] filed by the Cities Service Company and its subsidiaries. Since some of the subsidiaries had losses, and some had profits, a saving was achieved by filing the consolidated return, and the Gas Company argued that the saving should accrue only to the unregulated companies, and that the Commission should allow, for rate-making purposes, a tax factor of 52 percent against the profits of the Gas Company, despite the fact that its portion of the actual tax liability paid under the consolidated return was much less. The Power Commission rejected Gas Company's contention and applied as income taxes a portion of the net total consolidated tax liability of the regulated and unregulated groups over a representative period of time. The Power Commission's rationale was:

> To accept Cities Service's position would be to approve fixing jurisdictional rates on the basis of converting a hypothetical tax payment into a prudent operating expense. In effect, Cities Service argues that Gas Company should make Cities Service stockholders whole for the tax losses of nonregulated enterprises even though this means an allowance for taxes paid over and beyond that which the consolidated system as a whole actually paid. We reject this view as neither just nor reasonable. Tax allowances in a cost of service are for the purpose of permitting the regulated entity to secure a rate which, after taxes, will provide a reasonable return on jurisdictional investment, not to insure that other components of a complex corporate system are enabled to

[1] Internal Revenue Code, §§ 1501–1504.

"cash-in" on their tax losses. Docket No. G–18799, Federal Power Commission, page 4.[2]

We are not concerned here with a consolidated return or two separate corporate entities, one regulated and another not regulated. Alaska Steam is one corporation, with two different services which have been separated solely for the purposes of this proceeding. But the rationale of the Power Commission in the *Cities Service* case is applicable and with a greater force in the instant proceeding, because Alaska Steam is one company that is entirely regulated by this Commission and there can be no claim that the Commission is exercising improper jurisdiction.

Evidence was presented at the hearing before the Examiner that Alaska Steam has a virtual monopoly in its seasonal service, whereas in the scheduled service it is subject to competition. We are unwilling to speculate as to what management decisions regarding rates might be prompted by such a situation, but we are convinced that it is our duty to protect the rate payers of both services. This is one reason behind our support for the Examiner's separation of services in setting up a rate base, and we are of the opinion that it equally supports the Examiner's allowance of taxes. On the basis of the record, we hold that the equities are best served by allowing as tax against the income of the seasonal service only that amount of Federal income taxes which Alaska Steam incurred in 1962 on its over-all operations.

Working Capital Computation

The Examiner allowed as working capital an amount approximately equal to one round average voyage expense for each ship in the service. The Examiner's allowance is in accord with that which we have allowed in past rate proceedings. See *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges*, 7 F.M.C. 87, at 109 (1962); *General Increases in Rates (1961)*, 7 F.M.C. 260, at 289 (1962), and *General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563, at 582 (1963).

Alaska Steam excepted to the Examiner's allowance. Through the testimony of its witnesses, Alaska Steam contended that it needed an allowance for working capital in its over-all operations of $2,800,000. Alaska Steam's request was based on the difference between current assets and liabilities on its balance sheet at a given time plus an additional sum for contingencies. The amount allocated on the basis of Alaska Steam's request to the seasonal service would be $661,920.

[2] Our citation of this decision should not be taken to mean that we endorse the cost of service principle for rate-making in the instant proceeding. As stated *infra*, we are adhering to the prudent investment standard.

The most generally accepted definition of working capital is that of Barnes:

> Working capital, in the technical sense in which it is here employed, does not include the total liquid funds with which the business is conducted. It is not the property which the business *has:* that is, it is not the excess of current assets over current liabilities. Working capital, rather, is an allowance for the sum which the company *needs to supply from its own funds* for the purpose of enabling it to meet its current obligations as they arise and to operate economically and efficiently.[3]

This definition was used with approval by the Court in the recent case of *Government of Guam* v. *Federal Maritime Commission*, 329 F. 2d 251 (D.C. Cir., 1964), which case involved this very issue of working capital. In remanding the case to the Commission for further findings the Court said:

> The nub of the point here is that working capital is not a doctrinaire entry in the rate base; it is a realistic allowance—realistic in need and realistic in amount. Its inclusion in a rate base must bear a real relationship to the realities of the situation. 329 F. 2d at 257.

Alaska Steam's request for working capital is unrealistic. It bears no relationship to the needs of the carrier. In past rate proceedings the allowance of one round average voyage expense for each ship in the service has, in our opinion, provided amply for a carrier's needs in meeting any lag between expenses incurred and revenues received. There is no showing that such an allowance in this case will not be ample for Alaska Steam.

In examining Alaska Steam's operations, it is readily apparent that the seasonal service requires working capital. Alaska Steam engages in substantial pre-season planning and in a certain amount of post-season wind-up of operations, finding it necessary to maintain a year-round staff to insure that the seasonal operations go smoothly. Alaska Steam has considerable inactive vessel expenses attributable to the seasonal service, and part of its administrative and general expenses attributable to the seasonal service must be met throughout the lay-up months and the slack months when little cargo is being carried. The record shows that Alaska Steam's carryings in the seasonal service for 1962 went from a low of 5,000 revenue tons in May to a high of 42,000 revenue tons in August.

In 1962, inactive vessel expenses allocated to the seasonal service were $250,013. Administrative and general expense allocated to the seasonal service was $384,229. Alaska Steam needs working capital to cover its inactive vessel expense, and the allowance for working capital should include provision for part of the $384,229 of administrative and general expense which will be incurred in off-months. The allowance for working capital must also take into account cash requirements during other periods when revenues do not cover costs such as costs resulting from periods of vessel lay-up due to accidents, periods of increased vessel operating costs prior to the effective date of increased rates, and periods of strike.

Judged in the light of the above considerations, we are of the opinion that the Examiner's allowance of $453,090 is a realistic one and is fully justified.

Hearing Counsel excepted to the Examiner's allowance on the basis that only seven-twelfths of the Examiner's allowance should be included in the seasonal rate base since Alaska Steam's operations in its seasonal service cover only 7 months of the year. As we have found that the Examiner's allowance is a fair and a realistic one, a reduction of this allowance by five-twelfths would be unwarranted and might impede the seasonal operations. Hearing Counsel's exception is rejected.

Test Period

The Examiner used 1962 as the test period for the rate increases under consideration, to which only the State of Alaska excepted. State contends that the Examiner should have used a period of 3 to 4 years, to take into account the red salmon run cycle. While State's contention may have merit, the Examiner found 1962 to be a representational year, and we conclude, on the basis of the record, that this finding was correct. The record does not contain adequate information on seasonal operations over a 3- to 4-year period to support the use of such a period as the test period.

Operating Ratio Test

Alaska Steam urges that the Commission adopt the operating ratio test for the purposes of testing the rate increases under consideration. Alaska Steam has previously urged the operating ratio test on the Commission, and it has been rejected. *General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563, at 584 (1963). Here, as in that case, the same facts hold true. The carrier has a substantial investment in property used and useful in providing service, and even though it charters vessels to round out its seasonal fleet, we are not persuaded that the owned equipment used in the service is so unsubstantial as to cause us to depart from the prudent investment standard.

Rate of Return

The Examiner, in his initial decision, found that the rates and charges under consideration were unjust and unreasonable to the extent that they provided the carrier with a rate of return in excess of twelve (12) percent. He further found that "a reasonable maximum rate of return for Alaska Steam in its seasonal service is 12 percent." (Initial Decision, page 29.)

In its testimony and exhibits, Alaska Steam repeatedly emphasized the uncertainty of its operation and the hazards which it encounters. It is true that the success or failure of the seasonal operations is largely dependent on the salmon run, and that the carrier must be prepared to move cannery supplies and salmon at given locations on short notice. In this respect, we accept the carrier's evidence that its operation is not comparable with a regular liner operation that has a steady flow of cargo and can expect to pick up and discharge, within certain limits, the same amount of cargo each time at a given port. The cannery operations, as the evidence shows, are dependent upon the carrier being able to supply cans, boxes, and salt and at the same time moving the already canned salmon out so that the canning operation can be continued. For these reasons, the seasonal operations of Alaska Steam have perhaps a higher degree of risk than other steamship operations.

On the other hand, we are unconvinced that physical hazards are any greater or should be given more weight than they are in any other trade. Even though lighter operations must be utilized to move cargo in and out of ports because of insufficient dockage facilities or shallow harbors, we are of the opinion that these are the operational facts of life of any carrier which chooses to call at many small ports. Furthermore, Alaska Steam's evidence that the shoreside operations are conducted by several men shows efficiency of operation which would ordinarily be expected of most carriers. Also, the risk to capital is reduced by Alaska Steam's monopolistic position in the trade. Alaska Steam is well aware that it will carry any available cargo, and the absence of competition minimizes the risks attendant in Alaska Steam's seasonal operations.

The criteria to be employed in a determination of a rate of return are well settled. In *Bluefield Co.* v. *Public Service Commission*, 262 U.S. 679, at 693 (1923), the Court said: "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." And in *Power Commission* v. *Hope Gas Company*, 320 U.S. 591, at 603, the Court stated: "The rate-making process under the Act, i.e. the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests * * * From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of business. These include service on the debt and dividends on the stock." The testimony of the principal witness of Alaska Steam, an economist, was that the carrier needed a rate of return of 20 to 25 percent to prevent attrition of capital. While this witness testified at length, we have come to the conclusion that his testimony does not support Alaska Steam's contention. His analysis of Alaska Steam's operations was based on an earlier study made for Alaska Steam which had been updated for the purposes of the hearing, and he did not, in our opinion, take into consideration the realities of the situation. Here, as in the argument regarding working capital, Alaska Steam is relying on speculation. Alaska Steam is a Seattle-based corporation, it is a closely held corporation, and does not go to the public for capital. It does not have to go into the Alaskan capital market for funds, nor was any evidence introduced that it ever has. We can find no basis for allowing Alaska Steam a rate of return in the neighborhood of 20 to 25 percent—such a return would be allowed only on a showing of the most exceptional circumstances, which circumstances have not been shown here.

As to our conclusions, first we do not agree with the Examiner's finding that a maximum rate of return should be set in this proceeding. As stated above, the Examiner found that "a reasonable *maximum* rate of return * * * is 12 percent." (Italic supplied.) No purpose can be served by binding ourselves to setting a maximum rate of return in this proceeding, and such a finding is unnecessary. In this respect, the Examiner's finding is reversed. As to the actual rate of return to be allowed, we find that the increases here under consideration are unjust and unreasonable to the extent that they allow Alaska Steam a rate of return in its seasonal service in excess of ten (10) percent. In *General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563 (1963), we allowed the carrier a rate of return on its over-all operations of 9.07 percent. And, though the testimony of Alaska Steam's expert witness on the subject of rate of return is in our view an incorrect appraisal of Alaska Steam's needs, we find that the nature of the seasonal operations of Alaska Steam is such that a ten percent rate of return is justified. We conclude that a ten percent rate of return in the seasonal service is fair to stockholders and rate payers alike.

Computations

The following computations are based on the evidence of record and the principles expressed *supra*, and are in accord with the Examiner's computation with the exception of the Federal income tax computation.[4]

---

[4] This computation differs from that of the Examiner in that he failed to take into account the fact that the additional 22 percent surtax is applicable only to profits in excess of $25,000.

Rate base (seasonal service):	
Vessels, at cost	$1,699,468
Less reserve	738,129
Net	961,339
Other property	138,387
Working capital	453,090
Total	1,552,816
Income account (seasonal service):	
Revenue	4,529,725
Expense	3,425,067
Inactive vessel exp.	250,013
Vessel depreciation	108,933
Administrative & General	384,228
Alaska Income Tax	976
Total	4,169,217
Gross Profit	360,508
Federal Income Tax	*77,226
	283,282
Profits of related companies	23,461
Net Profit	306,743
Rate Base	1,552,816
Rate of Return (percent)	19.75

*Computation of Federal Income Tax:	
Over-all Operations	[5] $160,064
Alaska Tax	976
Total	159,088
Federal Tax (30 percent on all profits; 22 percent additional on all profits in excess of $25,000)	77,226

[5] Per Alaska Steam's exhibit, using 20 year vessel life for Federal Income Tax Computation.

CONCLUSION

An appropriate order will be issued to the effect that all rates and charges producing a rate of return in excess of 10 percent in the seasonal service of Alaska Steamship Company are unjust and unreasonable, and Alaska Steamship Company and Northern Commercial Company River Lines will be required to submit to the Commission within thirty (30) days following the date of this decision amended tariff schedules in accord with our decision.

By the Commission, March 5, 1964.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 969

ALASKA STEAMSHIP COMPANY—GENERAL INCREASE IN RATES IN THE PENINSULA AND BERING SEA AREAS OF ALASKA

No. 1067

NORTHERN COMMERCIAL CO. RIVER LINES—GENERAL INCREASE IN RATES IN THE YUKON RIVER AREA OF ALASKA

ORDER

Full investigation 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 increased rates and charges of Alaska Steamship Company and Northern Commercial Company River Lines are unjust and unreasonable to the extent that they provide Alaska Steamship Company with a rate of return in its seasonal service in excess of ten (10) percent,

Therefore, it is ordered, That respondents Alaska Steamship Company and Northern Commercial Company River Lines file with the Commission within thirty (30) days from the date of this decision revised schedules of rates and charges in accord with our findings and conclusions herein.

By the Commission, March 5, 1964.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 267

GOVERNMENT OF ISRAEL SUPPLY MISSION

v.

AMERICAN EXPORT LINES, INC.

Application of American Export Lines, Inc., to waive collection of a portion of the applicable charges on two shipments of dry milk powder from the port of New York to Haifa, Israel, granted.

A. T. De Smedt for applicant.

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

This is an application filed May 14, 1963, by American Export Lines, Inc. (AEL), pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure for permission to waive collection of a portion of the applicable tariff charges on two shipments in March 1963, of nonfat dry milk powder, spray process, in bags, from Hoboken, New Jersey, Port of New York, to Haifa, Israel. Pending the outcome of this application AEL has not attempted collection of the freight charges on these shipments.

The first of these two shipments of dry milk powder consisted of 4,591 bags, amounting to 465,987 pounds, or a fraction over 208 long tons. The second shipment consisted of 3,889 bags, amounting to 394,734 pounds, or a fraction over 176 long tons. They were loaded respectively, on the SS EXPORT AIDE, voyage No. 12, and on the SS EXPORTER, voyage No. 99. The consignor of the shipments, which concurs in this application, was the Government of Israel Supply Mission, and the consignee was the Foreign Loans Department, Ministry of Finance, Jerusalem, Israel.

From June 6, 1962, through December 31, 1962, a special rate of $45.00 a long ton of 2,240 pounds had been in effect on milk powder from the Port of New York to Israel, but the ordinary tariff rate of

[1] This decision became the decision of the Commission on July 16, 1963, and an order was entered granting the application.

$50.50 again became effective on January 1, 1963, upon the automatic expiration of the above special rate. Approximately 4,450 long tons of milk powder had moved at the special rate.

Toward the end of 1962, the Government of Israel experienced difficulties in obtaining delivery of bagged milk powder to AEL vessels for shipment, because of the longshoremen's strike situation and other technical problems with suppliers. At that time, the Government of Israel requested that the special rate of $45.00 be applied to about 400 long tons of milk powder which could not be loaded prior to the end of 1962. AEL concurred inasmuch as the problems were clearly beyond the control of the shipper. AEL also experienced the interruption of some of its normal clerical procedures when its office employees honored the longshoremen's picket lines at AEL's office premises. As a result, AEL was not aware that the $45.00 special rate had been terminated, and no steps were undertaken to extend it into 1963. On the other hand, under normal circumstances, AEL would have anticipated no difficulty in continuing the special rate in effect.

This application seeks to adjust the charges from the basis of the applicable rates of $50.50 per long ton to the basis of the special rate of $45.00 per long ton. While any shipper would be well advised to check the applicable tariffs carefully to be sure that a quoted rate is in fact the effective tariff rate, in the present circumstances, AEL's failure to extend the special rate was an oversight and the result of events of which the shipper was innocent. The granting of the relief sought will not result in any discrimination between shippers. *Martini & Rossi et al.* v. *Lykes Bros. S.S. Co.*, 7 F.M.C. 453 (1962).

American Export Lines, Inc., will be authorized to waive collection of that portion of the charges on each of these two shipments, which is the difference between the charges based on the tariff rate of $50.50 and the special rate of $45.00 per long ton. Since no charges have been collected by AEL, stating this waiver in other words, AEL will be authorized to collect at the special rate, charges of $9,361.35 on the first shipment and charges of $7,929.92 on the second shipment. An appropriate order will be entered.

CHARLES E. MORGAN,
Presiding Examiner.

JUNE 21, 1963.

FEDERAL MARITIME COMMISSION

THE DUAL RATE CASES [1]

Proposed dual rate contracts approved as modified herein.

Decided March 27, 1964

Appearances:

For respondent conferences and carriers: Edward S. Bagley and Walter Carroll, Nos. 1001, 1006, 1053; Ronald A. Capone, and Robert Henri Binder, Nos. 1058, 1059; Robert L. Harmon and F. Conger Fawcett, Nos. 1055, 1056; Leonard G. James, No. 1007; Leonard G. James, Robert L. Harmon and F. Conger Fawcett, Nos. 1003, 1009, 1010, 1011, 1018, 1035, 1040, 1041, 1044, 1057, 1092; Seymour H. Kligler, Michael L. Goldstein, and Herman Goldman, Nos. 1026, 1027, 1028, 1029, 1051, 1052; Elmer C. Maddy, Nos. 1012, 1020, 1049, 1101, 1106; Elmer C. Maddy and Paul F. McGuire, No. 1081; John R. Mahoney, Nos. 1013, 1014, 1016, 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1054, 1018 (Sub. No. 1), 1018 (Sub. No. 2); Paul F. McGuire, Nos. 1042, 1043; David Orlin, Nos. 1015, 1017; Edward D. Ransom, Lillick, Geary, Wheat, Adams & Charles, No. 1002; Elkan Turk, Elkan Turk, Jr., Sol D. Bromberg, Nos. 1005, 1023, 1031, 1050; Burton H. White and Elliott B. Nixon, Nos. 1033, 1034, 1037, 1039, 1046.

For interveners: Raymond V. Wolf, Ford Motor Company, Nos. 1033, 1034, 1037, 1039; Don A Boyd, E. I. du Pont de Nemours & Co., and du Pont de Nemours Internationl, S.A., Nos. 1012, 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1020, 1021, 1022, 1025, 1030, 1033, 1034, 1037, 1039, 1045, 1047, 1048, 1054, 1101, 1106; Donald Caldera, American Export Lines, No. 1081; Edward P. Cotter, D.B. Turkish Cargo Lines and Ipar Transport, Ltd., Nos. 1109, 1110; Paul Daniel, Brown & Williamson Tobacco Corp., Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1033, 1034, 1037, 1039, 1045, 1047, 1048, 1054; James H. Davis,

---

[1] The cases included in this report are set forth below.

Sun Oil Company, Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1033, 1034, 1037, 1039, 1045, 1047, 1048, 1054; Maurice W. Fillius National Association of Alcoholic Beverage Importers, Inc., Nos. 1058, 1059; Jerome H. Heckman, Dow Chemical Co., and Dow International, S.A., Nos. 1012, 1013, 1014, 1016, 1019, 1020, 1021, 1022, 1025, 1030, 1042, 1043, 1045, 1047, 1048, 1054, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1101, 1106; Jerome H. Heckman and Charles M. Meehan, Dow Chemical Co., and Dow Chemical International, S.A., Nos. 1033, 1034, 1037, 1039; Lawrence D. Hollman, Paul Daniel and James N. Ravlin, Brown & Williamson Tobacco Co., Nos. 1012, 1020, 1101, 1106; James A. Kenney, Government of Pakistan, Nos. 1012, 1020, 1101, 1106; Richard E. Keresey, Esso International Inc., Nos. 1033, 1034, 1037, 1039; Dickson R. Loos, National Industrial Traffic League, Nos. 1012, 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1020, 1021, 1022, 1025, 1026, 1027, 1028, 1029, 1030, 1045, 1047, 1048, 1054, 1101, 1106; Robert P. Nash, Esso International Inc., Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1054, 1101, 1106; James E. O'Boyle, Ford Motor Co., Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1026, 1027, 1028, 1029, 1030, 1045, 1047, 1048, 1054, 1101, 1106; T. R. Stetson, United States Borax & Chemical Corp., Nos. 1002, 1003, 1007, 1009, 1010, 1011, 1018, 1035, 1041, 1044, 1055, 1056, 1057, 1092; J. Richard Townsend, Pacific Coast Coffee Association and Pacific Coast Customs and Freight Brokers Association, Nos. 1003, 1009, 1010, 1011, 1018, 1035, 1040, 1041, 1044, 1057, 1092; R. S. Trigg, Armstrong Cork Co., Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019 1021, 1022, 1025, 1030, 1033, 1034, 1037, 1039, 1045, 1047, 1048, 1054, 1101, 1106; Burton H. White, North Atlantic Mediterranean Freight Conference Nos. 1109, 1110; John C. White, American Cotton Shippers Association, and Anderson, Clayton & Co., Nos. 1001, 1006, 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1053, 1054, 1101, 1106.

As Hearing Counsel: Frank Gormley and Robert J. Blackwell, Nos. 1033, 1034, 1037, 1039; Norman D. Kline and Robert J. Blackwell, Nos. 1051, 1052; Howard A. Levy and Robert J. Blackwell, Nos. 1005, 1007, 1023, 1026, 1027, 1028, 1029, 1031, 1050; Thomas R. Matias and Robert J. Blackwell, Nos. 1012, 1020, 1058, 1059, 1101, 1106; Thomas R. Matias, Howard A. Levy, and Robert J. Blackwell, No. 1081; Roger A. McShea, III, and Robert J. Blackwell, Nos. 1015, 1017, 1109, 1110; H. B. Mutter, Howard A. Levy, and Robert J. Blackwell, Nos. 1003, 1009, 1010, 1011, 1018, 1035, 1040, 1041, 1044, 1057, 1092; J. Scot Provan and Robert J. Blackwell, Nos. 1042, 1043, 1049, 1055, 1056;

J. Scot Provan, William Jarrel Smith, Jr., and Robert J. Blackwell, No. 1046; William Jarrel Smith, Jr., and Robert J. Blackwell, 1002; Harold Witsaman and Robert J. Blackwell, Nos. 1001, 1006, 1013, 1014, 1016, 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1053, 1054, 1018 (Sub. No. 1), 1018 (Sub. No. 2).

Hearing Examiners:

Herbert K. Greer, in Docket Nos. 1001, 1006, and 1053.

Edward C. Johnson, in Docket Nos. 1003, 1009, 1010, 1011, 1018, 1035, 1040, 1041, 1044, 1057, 1092, 1058, and 1059.

John Marshall, in Docket Nos. 1015, 1017, 1042, 1043, and 1111.

Charles E. Morgan, in Docket Nos. 1026, 1027, 1028, 1029, 1046, and 1111.

Paul D. Page, Jr., in Docket Nos. 1012, 1020, 1101, 1106, 1051, 1052, and 1111.

C. W. Robinson, in Docket Nos. 1013, 1016, 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1054, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1049, and Chairman of the Panel of Examiners in Docket No. 1111.

E. Robert Seaver, in Docket Nos. 1033, 1034, 1037, 1039, 1055, 1056, 1081, and 1111.

Walter T. Southworth, in Docket Nos. 1002, 1005, 1023, 1031, 1050, and 1007.

Benjamin A. Theeman, in Docket Nos. 1109 and 1110.

THIS REPORT INCLUDES THE EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACTS IN THE FOLLOWING DOCKETS:

No. 1001—Gulf/Mediterranean Ports Conference.
No. 1006—Gulf/French Atlantic Hamburg Range Conference
No. 1053—South Atlantic Steamship Conference
No. 1002—Pacific Westbound Conference
No. 1003—Capca Freight Conference
No. 1009—Colpac Freight Conference
No. 1010—Canal, Central America Northbound Conference
No. 1011—Camexco Freight Conference
No. 1018—Association of West Coast Steamship Companies
No. 1035—Pacific Coast/Caribbean Sea Ports Conference
No. 1040—Pacific Coast/Mexico Freight Conference
No. 1041—Pacific Coast/Panama Canal Freight Conference
No. 1044—Pacific/West Coast of South America Conference
No. 1057—Pacific Coast River Plate Brazil Conference
No. 1092—In the Matter of Agreement No. 8660—Latin America/ Pacific Coast Steamship Conference
No. 1005—Associated Steamship Lines (Manila)

No. 1023—Far East Conference
No. 1031—New York Freight Bureau (Hong Kong)
No. 1050—Trans-Pacific Freight Conference (Hong Kong)
No. 1007—Pacific Coast European Conference
No. 1012—Calcutta/U.S.A. Conference
No. 1020—The India, Pakistan, Ceylon & Burma Outward Freight Conference
No. 1101—The Ceylon/U.S.A. Conference (Agreement 8050)
No. 1106—In the Matter of Agreement No. 8650—Calcutta, East Coast of India and East Pakistan/U.S.A. Conference
No. 1013—Atlantic and Gulf/West Coast of South America Conference
No. 1014—Atlantic and Gulf/West Coast of Central America and Mexico Conference
No. 1016—Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference
No. 1019—Leeward and Windward Islands & Guianas Conference
No. 1021—Havana Steamship Conference
No. 1022—Gulf and South Atlantic Havana Steamship Conference
No. 1025—East Coast Columbia Conference
No. 1030—Havana Northbound Rate Agreement
No. 1045—United States Atlantic and Gulf-Haiti Conference
No. 1047—United States Atlantic & Gulf-Venezuela & Netherlands Antilles Conference
No. 1048—U.S. Atlantic and Gulf Ports-Jamaica Steamship Conference
No. 1054—Santiago de Cuba Conference
No. 1018 (Sub. No. 1)—Association of West Coast Steamship Companies (Cocoa, Coffee, Ivory Nuts, Ecuador/United States Atlantic-Gulf)
No. 1018 (Sub. No. 2)— Association of West Coast Steamship Companies (Coffee, Columbia/United States Atlantic-Gulf)
No. 1015—Atlantic and Gulf, Singapore, Malaya and Thailand Conference
No. 1017—Atlantic and Gulf-Indonesia Conference
No. 1026—Java-New York Rate Agreement
No. 1027—Java-Pacific Rate Agreement
No. 1028—Deli-Pacific Rate Agreement
No. 1029—Deli-New York Rate Agreement
No. 1033—North Atlantic French Atlantic Freight Conference
No. 1034—North Atlantic Mediterranean Freight Conference
No. 1037—North Atlantic Baltic Freight Conference
No. 1039—North Atlantic United Kingdom Freight Conference

No. 1042—River Plate/United States-Canada Freight Conference
No. 1043—River Plate and Brazil Conferences
No. 1046—West Coast of Italy, Sicilian & Adriatic Ports/North Atlantic Range Conference
No. 1049—United States Atlantic & Gulf/Australia New Zealand Conference
No. 1051—Straits/Pacific Conference
No. 1052—Straits/New York Conference
No. 1055—Pacific/Straits Conference
No. 1056—Pacific Indonesian Conference
No. 1058—North Atlantic Westbound Freight Association (Wines & Spirits Contract)
No. 1059—North Atlantic Westbound Freight Association
No. 1081—West Coast of India and Pakistan/U.S.A. Conference
No. 1109—Ipar Transport, Limited
No. 1110—D. B. Turkish Cargo Line
No. 1111—Dual-Rate Contracts, 1963—Adjudication of Major Issues

REPORT

BY THE COMMISSION (JOHN HARLLEE, *Chairman;* THOS. E. STAKEM, *Vice Chairman;* ASHTON C. BARRETT and JAMES V. DAY, *Commissioners*)

INTRODUCTION

These are proceedings under section 14b of the Shipping Act, 1916 (75 Stat. 762; 46 U.S.C. 813a), for the approval of so-called dual rate contracts used by common carriers by water and conferences of such carriers in the foreign commerce of the United States.[2] Most of the proceedings involve the approval of contracts which were in use at the time Public Law 87–346 was enacted. Under the terms of section 3 of Public Law 87–346, as amended, these contracts are not lawful beyond April 3, 1964.

In this report we have combined the aforesaid contracts for discussion and decision. The full terms of the contracts as approved by us are set forth in the orders appended hereto. The Initial Decisions of the Examiners which preceded this report dealt in most instances with the contracts of several conferences in related trade areas. Certain common issues were severed from some of the proceedings in-

[2] One proceeding, Docket No. 1092, also involves the approval of a new organic conference agreement under section 15 of the Shipping Act, whereby several presently existing conferences in the Pacific Coast/Latin American trades seek approval of an agreement which would combine the several conferences under a single agreement. The approval of this new conference agreement and such separate discussion of the use of dual rate contracts by this conference as is necessary are set forth at the end of this report.

volving specific contracts and were joined for hearing in Docket No. 1111 before a panel of five Examiners.[3]

Our determination to deal with all the contracts in a single report was prompted by several considerations. In its report on the bill which ultimately became Public Law 87–346, the Committee on the Merchant Marine and Fisheries of the House of Representatives made it clear that insofar as was possible dual rate contracts should be standard or uniform. The Committee said:

It is the expectation of the committee that a standard form of contract to be utilized by all conferences will be approved by the Board with such riders as may be required to suit the needs of a particular trade. This will greatly simplify the problems of shippers, who of necessity must be members of a number of conferences, with respect to interpretation and application of differing provisions. (H. Rpt. No. 498, 87th Cong., 1st Sess., p. 9 (1961)).

This sentiment was further expressed by the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives in its Report on the Ocean Freight Industry published several months following the enactment of Public Law 87–346.[4] The Anti-

[3] Docket No. 1111 treated the following issues:

Definition of Contract Shipper

(a) Whether the Commission should approve, disapprove or require modification of contract provisions requiring inclusion in the contract of affiliates of the contract shipper or of other connected companies.

Contract Shipper Commitment

(b) To what degree, if any, may or should contracts exclude a portion of shipments, commodities, or shipments on owned or chartered vessels?

Legal Right to Select the Carrier

(c) Whether the provision required by section 14b(3) in all contracts, to limit the coverage of the contracts to "those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier" requires special language in the contracts in order to avoid uncertainty and potential disputes as to the obligations of the merchant, or whether the language of section 14b(3) should be incorporated verbatim, in the contracts.

Notice, Disclosure and Burden of Proof

(d) Whether the Commission should approve, disapprove or require modification of contract provisions imposing notice and disclosure requirements upon the contract shipper in the event of non-conference shipments or of suspected or alleged breach of contract, and provisions relating to the burden of proof as to whether he has violated the contract.

Termination for Breach

(e) Whether the contracts should permit carriers or conferences to terminate individual contracts for breach or alleged breach of contract by the merchant.

The foregoing issues were severed in the following dockets: Nos. 1001 through 1007, inclusive; Nos. 1012 through 1023, inclusive; Nos. 1025 through 1031, inclusive; No. 1042; No. 1043; Nos. 1045 through 1057, inclusive; No. 1059; and No. 1101.

[4] For the part that the Antitrust Subcommittee played in the enactment of P.L. 87–346 see H.R. Rpt. No. 498, 87th Cong., 1st Sess., p. 6 and Sen. Rpt. No. 860, 87th Cong., 1st Sess., p. 10.

NOTE: There are no footnotes numbered 5 or 6, nor is there a page numbered 6.

trust Subcommittee in its recommendations related to Public Law 87–346 said:

3. The Federal Maritime Commission should establish minimal standards for dual-rate contracts beyond those set forth in Public Law 87–346 and should devise and publish a basic form contract to be used by all conferences. Any deviation from the form should be carefully studied by the Commission to insure that there is no discrimination against individuals or groups or shippers. (Report of the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives Pursuant to H. Res. 56, 87th Cong., 2d Sess., p. 390 (1962)).

A further consideration in the combining of all contracts for a single decision was the fact that the contract provisions which should be permitted in each instance depend for the most part upon construction of the statute rather than upon the peculiar facts of a particular trade. In these circumstances, both consistency and efficiency promoted a single discussion. The fact that a number of individual hearings were held and that there have been a number of initial decisions by several Examiners has furnished us with perhaps a broader background for this decision than would have been the case if but a single hearing had been held.

In reaching our conclusions we have considered the arguments presented in all the cases included herein. We discuss herein those arguments which appear to be of substance. Arguments and exceptions to the Initial Decisions not discussed herein were considered by us and found to be not justified.

BACKGROUND TO PUBLIC LAW 87–346

Public Law 87–346 is the latest event in the long and controversial history of dual rate contracts in the water-borne commerce of the United States. The lawfulness of dual rate contracts was challenged as early as 1922 when our predecessor, the United States Shipping Board, found that the use of such a contract by an individual carrier was unlawful under sections 16 and 17 of the Shipping Act (46 U.S.C. 815, 816). *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922).

A few years later an individual carrier sought, under the antitrust laws, to enjoin the use of a dual rate system by a conference of carriers. The charge was made that the system had not been approved by the Shipping Board under section 15 of the Shipping Act (46 U.S.C. 814) and therefore was open to challenge under the antitrust laws. The Supreme Court found that the matters complained of lay primarily within the jurisdiction of the Shipping Board under the Shipping Act and affirmed the dismissal of the bill of complaint. *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932). In

Cunard the Court made it plain that it was not passing upon the lawfulness of dual rate systems under the Shipping Act. Thus, in answer to an assertion that the dual rate contract there in issue could not lawfully be approved, the Court replied that this was "by no means clear." 284 U.S. at 487.

The following year the Shipping Board again had the occasion to speak on the lawfulness of dual rate contracts. In *Rawleigh* v. *Stoomvaart, et al.* 1 U.S.S.B. 285 (1933), the Shipping Board found that a dual contract used by a conference of carriers, as distinguished from the single carrier agreement in *Eden Mining*, *supra*, was not unlawful. The Shipping Board distinguished *Eden Mining* upon the ground, among others, that the conference contract offered the shipper the use of several carriers and therefore, in the judgment of the Shipping Board, was not subject to the same objections as a single carrier system.

The next major controversy over such agreements came when the Department of Justice sought an injunction under the antitrust statutes against a conference dual rate system which had not been approved by the United States Maritime Commission. Again, the Supreme Court held that the matters complained of were within the exclusive primary jurisdiction of the Maritime Commission under the Shipping Act and did not rule upon the lawfulness of the system. *Far East Conference* v. *United States*, 342 U.S. 570 (1952).

Finally, the lawfulness of such agreements under the Shipping Act was directly presented to the Supreme Court in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958), where a dual rate system which had been expressly approved by the Board was challenged. The Court set aside the Board's approval of the contract system on the ground that it was a "resort to other discriminating or unfair methods to stifle outside competition in violation of section 14 Third" of the Shipping Act, 1916 (46 U.S.C. 812), 356 U.S. at 493.

The Isbrandtsen decision cast serious doubt upon the lawfulness of all dual rate systems; and shortly following this decision Congress enacted legislation to permit, temporarily, the continued use of dual rate systems by conferences organized pursuant to agreements approved by the then Federal Maritime Board.[7] Immediately upon the enactment of this interim legislation the Committee on Merchant Marine and Fisheries of the House of Representatives commenced a study of conferences and dual rate systems. Concurrently, the Antitrust Subcommittee of the Committee on the Judiciary of

[7] Public Law 85-626 (72 Stat. 574).

the House of Representatives commenced a connected study of certain antitrust practices in the ocean freight industry.

Public Law 87–346 resulted from these studies. It permits the use of dual rate contracts but only if the Commission finds that certain safeguards have been met. In adopting this course Congress, in a sense, reaffirmed the earlier philosophy of section 15 of the Shipping Act which, by authorizing supervised competition-restricting agreements among carriers, recognizes that there is some justification in the water-borne foreign commerce for making exception to our normal antitrust policies.

We will now discuss the specific requirements of the statute, with frequent reference to primary documents of the legislative history of Public Law 87–346.[8] While section 14b authorizes the use of dual rate contracts by both common carriers and conferences of such carriers, we, for convenience, have generally used the term "conference" as including the one individual carrier whose dual rate contract is before us. Further, since section 14b also authorizes dual rate contracts with both shippers and consignees, our use of the term "merchant" generally includes both shippers and consignees.

THE STATUTORY REQUIREMENTS

Before considering the numbered provisions of section 14b which relate to the required express provisions of all contracts there are two general requirements of the section which demand brief preliminary discussion. In generally describing the nature of the contracts to be permitted, section 14b states that the Commission shall permit contracts which are "available to all shippers and consignees on equal terms and conditions" and which provide lower rates to a shipper or consignee "who agrees to give all or any fixed portion of his patronage" to the carrier or conference offering the dual rate contract.

Under the first of these provisions there is the question of whether the Commission can permit a contract which is offered only to shippers or only to consignees. The phrase "shippers and consignees" appears to have been used in the statute to eliminate any doubt regarding whether so-called consignee contracts could be continued

[8] Shortened citations to these documents are used as follows:

"House Hearings" refers to Hearings before Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, House of Representatives, on H.R. 4299, 87th Congress, 1st Session (1961).

"House Report" refers to House Report No. 498, 87th Congress, 1st Session (1961).

"Senate Hearings" refers to Hearings before Merchant Marine and Fisheries Subcommittee of the Committee on Commerce, U.S. Senate, on Steamship Conference/Dual Rate Bill, H.R. 6775, 87th Congress, 1st Session (1961).

"Senate Report" refers to Senate Report No. 860, 87th Congress, 1st Session (1961).

under the statute rather than for the purpose of requiring that all contracts be offered on both sides of the ocean.

As originally introduced, H.R. 4299 (the direct predecessor to H.R. 6775 which was ultimately enacted as Public Law 87–346) stated that the then Federal Maritime Board could permit contracts "available to all shippers in the trade on equal terms and conditions." In commenting on this provision of H.R. 4299, the Under Secretary of Commerce, speaking for the Maritime Board, suggested that the bill be amended by defining the word "shipper" as used therein to include consignors and consignees. In explaining the motive for this amendment, the Under Secretary said, "many of the exclusive patronage contracts currently in effect are between consignors as well as consignees and carriers. The recommended language would make it clear that such arrangements may be continued and shall be governed by the safeguards erected in the proposed section." (House Hearings, p. 6; House Report, p. 17.) Presumably in response to this suggestion by the Under Secretary, Draft Revision No. 2 of H.R. 4299 permitted contracts "available to all shippers and consignees on equal terms and conditions." (House Hearings pp. 535–536.)

Elsewhere in the hearings on H.R. 4299 there is expressed concern on the part of carriers and conferences that the bill as originally introduced might not permit the continuation of consignee contracts then in existence. (See House Hearings pp. 177, 357, and 511.) Shippers were likewise concerned that the bill as originally introduced might not permit the continuation of their consignee contracts or might not require that the safeguards of the bill be included in consignee contracts. (See House Hearings pp. 388–389, 411.)

From all this it would appear that the intent of the statute is to permit the continuation of so-called consignee contracts rather than to demand that if a contract is used it must be offered both to the exporter in one country and to the importer in the other country. The decision of whether to solicit contract signatories on both sides of the ocean, like the decision of whether to use a dual rate system at all, will therefore be left to the conference.

Under the second of the above provisions there is the question of whether the merchant must have the option of excluding a portion of his shipments from the obligation of the contract. The proposed contracts fall into two basic categories: (1) those which require the merchant to use the conference vessels for *all* of his shipments (except for commodities expressly exempted by the eighth numbered provision of section 14b) and (2) those which obligate the merchant to exclusive patronage only for specific commodities. The first type is generally used in the export trades; the second is generally used in the import trades. In this regard the proposed contracts generally are unchanged from those which were in effect at the time Public Law 87–346 was enacted.

The legislative history of the "all or any fixed portion" phrase of the statute is scant but nevertheless enlightening. As originally introduced, H.R. 4299 dealt only with arrangements whereby a merchant would be given a lower rate if he promised his "exclusive patronage." (See House Hearings, p. 1.) In testifying on this provision of H.R. 4299, Mr. Edward Bransten of the Pacific Coffee Association criticized the "exclusive patronage" wording because, in his opinion, the statute so worded would not have outlawed 80% or 90% patronage contracts and would not have required that such contracts contain the statutory safeguards. (House Hearings, p. 389.) (In this connection it should be remembered that H.R. 4299 first expressly outlawed "exclusive patronage" contracts and then by a proviso permitted the use of such contracts if they contained certain provisions and were approved by the then Federal Maritime Board.) Mr. J. Richard Townsend, appearing as counsel for the Pacific Coast Coffee Association, also explained to the House Committee that, in his opinion, the bill as it then stood would not prohibit conferences from offering contract rates for 80% or 90% of a merchant's patronage but not including any of the safeguards imposed by the bill for exclusive patronage dual rate contracts. (House Hearings, pp. 397–398.) Mr. Bransten and Mr. Townsend testified before the Committee on April 10, 1961. Draft Revision No. 2 of H.R. 4299, published on April 13, 1961, changed "his exclusive patronage" to "all or any part of his patronage." (House Hearings, p. 536.) This language ultimately became "all or any fixed portion of his patronage" in the Senate subcommittee print of August 8, 1961. (Senate Hearings, pp. 603–604.)

From all this it is evident that the intent underlying the phrase "all or any fixed portion" was not to require that under all dual rate contracts lower rates had to be offered for a fixed percentage of the merchant's cargo. The phrase was intended rather to make it clear that if such fixed portion contracts were offered they would be subject to the same safeguards as "exclusive patronage" contracts. We therefore will not require that conferences permit shippers the option of offering only a fixed portion of their shipments to the conference in exchange for lower rates.

Prompt Release

The first numbered provision of section 14b requires that every contract contain a provision which expressly:

(1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contract carrier or con-

ference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice.

Most of the conferences have recognized the benefits both to themselves and to the contract shippers of defining what is meant by "prompt release." The contracts of these conferences require that the merchant notify the conference that he needs space for a particular shipment. The conference is then allowed a specific period of time by which it must notify the merchant that space will be available within a fixed number of days from the sailing date requested by the merchant.

A few of the contracts presented in these proceedings contain but the bare words of the statutory provision and merely state that the merchant will be "promptly" released from the contract where the conference cannot provide space for his shipment. Some of these conferences have argued that the fixing of specific times under this provision of the statute is unnecessary because in the past they have always been reasonable in their treatment of merchants. If this be true then there should be no objection to a contract provision which informs each merchant of his rights and fixes with some certainty the obligations of the parties.

In the interest of avoiding future controversies over what, in fact, constitutes prompt release of the merchant, we are requiring that all contracts, by their terms, fix the time period by which the conference must respond to a request for space and the time by which the conference must furnish space. We have permitted some variation in these times among the various trades depending upon what appeared to be the reasonable commercial needs in the particular trade.

Rate Increases

Under the second numbered provision of section 14b all contracts must contain a provision which expressly:

(2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days:

Read most literally, this provision of the statute would simply require that rates not be increased more often than once every 90 days. However, numerous witnesses, both shippers and carriers, who testified before the Senate and House Committees during the consideration of H.R. 4299 and H.R. 6775 viewed this provision as requiring 90 days' *notice* of rate increases rather than the bare assurance that rates would not be increased more often than once every 90 days.[9] It was recog-

[9] See, for instance House Hearings pp. 270, 325, and 352–353; Senate Hearings pp. 249, 519, 533, 675, 712, and 719.

nized by these witnesses that merchants offering goods for sale in our foreign commerce must know the ocean freight rate well in advance of shipment. A contract which merely assures the merchant that a rate which was increased today will not be again increased sooner than 90 days from today does not meet this need. With the passage of each day under such a contract the merchant has one day less for the planning of future sales and after the running of the initial 90 days the merchant is assured nothing. It appears therefore the overriding intent of the statute and the reasonable requirements of our foreign commerce demand that merchants be given a minimum of 90 days' advance notice of increases in rates. This would seem a reasonable *quid pro quo* on the part of the conference for the merchant's exclusive patronage.

In recognition of this practical need of our commerce, a great number of the conferences have included a 90 days' notice provision in their proposed contracts.

Many of these contracts also contain provisions which permit the merchant to give notice of cancellation of his contract effective with a proposed rate increase and, in turn, permit the conference a period of time during which it may reach a decision whether to withdraw its proposed rate increase rather than suffer numerous merchant cancellations. Such provisions have the salutary effect of discouraging rate increases which might be completely unacceptable to merchants and would make it unnecessary that the merchant unqualifiedly cancel his contract upon notice of a rate increase which he found unacceptable. Such provisions would not, of course, interfere with the merchant's statutory right to cancel his contract without cause upon 90 days' notice.

A contract provision which permits merchants 30 days after notice of a rate increase in which to decide whether they will continue under the contract and, in turn, permits the carriers 30 days in which to decide whether the proposed increase should be withdrawn would appear to be fair to both merchants and carriers. In keeping with the legislative intent that the Commission should, insofar as possible, standardize dual rate contracts, we are requiring that all contracts include a uniform clause relating to provision (2) of section 14b. This clause, which is set out below, requires 90 days' notice of rate increases and includes the conditional cancellation provision just discussed. Rate increases necessitated by emergency conditions outside the control of the carriers are permitted under a separate contract provision which will be discussed below.

In order to dispel any doubt regarding the applicability of section 18(b) of the Act to rate changes under dual rate contracts, we are requiring that all rate changes must conform with section 18(b)(2).

The further requirement of section 18(b) that carriers must offer subscriptions to their tariffs is also to be explicitly stated in the required standard clause.

In order to clear up the question of notice to merchants who sign a contract during a time that an outstanding notice of increase is running, the standard clause also states that both rates and notice of proposed rate increases shall be considered to have become effective on their original dates rather than to have become effective with the signing of the individual contract. In order to eliminate the possibility of different notice dates to different merchants, notice is accomplished by tariff publication.

The following clause will be included in all contracts:

(a) The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results in an increase or decrease in cost to the Merchant, except as provided by section 18(b)(2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however*, the rates of freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance of the increases by publishing them ninety (90) calendar days in advance in the ------------------ ------------ Conference Tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the Merchant, the Merchant may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid, of the proposed increase: *Further provided, however*, that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the Merchant in writing that they elect to continue this Agreement under the existing effective rates and, in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the Merchant's notice of termination had never been given.

(b) The Conference shall offer to the Merchant a subscription to its tariffs at a reasonably compensatory price, however, the Merchant shall be bound by all notices accomplished as aforesaid without regard to whether it subscribes to the Conference tariff. Tariffs shall be open to the Merchant's inspection at the Conference offices and at each of the offices of the Carriers during regular business hours.

(c) The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date through filing with the Federal Maritime Commission rather than to have become effective with the signing of this Agreement and notices of proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this Agreement.

Legal Right to Select the Carrier

Under the third numbered provision of section 14b all contracts must contain a provision which expressly:

> (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however*, That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract:

There are two questions which arise under this provision of the statute. Historically, both have been troublesome; neither is easy of resolution. First is the question of the circumstances under which the merchant is restricted to the use of conference vessels for the transportation of goods which he purchases or sells. The second question, which arises indirectly, is the extent to which companies affiliated with the signatory to the contract should be bound by the single merchant's signature. Both of these issues were segregated from most of the cases and were given separate treatment in Docket No. 1111.

The major controversy over contract clauses dealing with the first question concerns the presumptions, if any, which may be drawn by the carriers where the signatory merchant has participated in some fashion in the arrangements for ocean transportation or where the shipping documents list the merchant as either shipper or consignee. Many of the proposed contracts contain language which would raise a conclusive presumption that the signatory merchant had the legal right to select the carrier if his name appeared on certain shipping documents or if he otherwise participated in the ocean routing or the selection of the ocean carrier. While we agree that these circumstances may suggest that the merchant had the legal right to select the carrier, the statute does not appear to permit such circumstances, and nothing more, to prove conclusively legal right to select the carrier. In short, the statute does not appear to permit a presumption here which would preclude the proof of the true situation.[10]

On the other hand, some recognition of the practical problems which a conference must face in proving that a merchant had the legal right to select the carrier seems desirable. The merchant himself will

[10] As was brought out in many of these proceedings, letter of credit financing generally requires that bills of lading be taken out in the name of the selling merchant without regard to whether the purchaser may have in fact directed the ocean routing or chosen the carrier. Even absent such testimony, however, we have discovered nothing in the records of these proceedings which would warrant a conclusion that mere participation in the arrangements for ocean transportation or the mere appearance of a name on a bill of lading or other shipping document would themselves prove conclusively that the merchant had the right to select the ocean carrier.

ordinarily be in sole possession of all the facts which would prove or disprove his legal right to select the carrier. We are therefore approving a contract provision which will raise a rebuttable presumption, as it were, that the merchant possessed the legal right at the time of shipment to select the ocean carrier if he participated in the arrangement for ocean transportation or if his name appears on a bill of lading or export declaration as shipper or consignee. This provision is optional with carriers. Those who desire some provision relating to presumptions may use it. Those carriers that desire no language in the contract relating to presumptions need not include it.

In accordance with the House Committee Report we are also requiring that all contracts expressly state that nothing therein shall require the merchant to forego a sale unless the shipment is made on a conference vessel.[11]

Paragraphs numbered 1, 2, 3, and 5 of the following provision will be required in all contracts. Paragraph number 4 may be used by those conferences which desire a provision which raises a presumption where the signatory merchant is named in the bill of lading or export declaration or participates in the ocean routing.

1. If the Merchant has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Merchant shall select one or more of the Carriers.
2. If Merchant's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Merchant to select the carrier, Merchant shall be deemed to have the legal right to select the carrier.
3. It shall be deemed a breach of this Agreement, if before the time of shipment, the Merchant, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.
4. For the purposes of this Article, the Merchant shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment.
   (a) with respect to which the Merchant arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or
   (b) with respect to which the Merchant's name appears on the bill of lading or export declaration as shipper or consignee.[12]

---

[11] House Report, p. 9.

[12] Because of special circumstances shown to exist in the Hong Kong trades involved in Docket Nos. 1031 and 1050 the following additional language will be permitted in those contracts:

"With respect to which merchant participated in the arrangement for ocean shipment beyond the delivery to the ocean carrier's terminal or alongside the carrier's vessel and without in any way exhausting what may constitute subterfuge or evasion within the meaning of Article ______ hereof, the merchant shall be deemed prima facie to have the

5. Nothing contained in this Agreement shall require the Merchant to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

Turning to the second problem presented under provision (3) of section 14b, the legislative history of the section makes it clear that Congress left it to the Commission to specify the circumstances under which affiliated companies would be bound under the contract by a single merchant's signature. Many of the proposed contracts would include all affiliates without regard to the signatory merchant's control over the affiliate. A few contracts bind only the signatory merchant. Others would bind only those affiliates which the signatory merchant has the power to control.

The desire of some conferences to bind all the affiliates of the contract signatory to a single contract would seem prompted primarily by two objectives: (1) To ease the solicitation or sales efforts of the conferences by tying an entire corporate complex by a single contract and (2) To make it less easy for a signatory merchant to evade his obligations under the contract through the subterfuge of using an affiliated company for nonconference shipments. Neither of these interests is, in our view, sufficient to permit a clause which would bind all of the signatory merchant's affiliated companies without regard to the merchant's control over the affiliated company. In the words of the Senate Committee, "no single answer which would include or exclude all shipments made by all such related companies could suffice." [13]

An appropriate contract provision dealing with this question should take into account that section 14b was designed in some measure as a device for strengthening conferences by assuring them a nucleus of cargo and should recognize the problems of contract evasion which arise if only the signatory merchant is bound to the contract. We agree with the findings on this problem by the panel of Examiners in Docket No. 1111, especially since their reasoning was grounded upon

---

legal right to select the carrier for any shipment made in fact by such merchant in respect of which the name of any firm or person, being associated with the local agents of a nonconference line appears as the shipper on the relevant bill of lading and any merchant using this subterfuge shall be deemed prima facie to have violated his contract with the carriers."

[13] In speaking of the problems left to the Commission for resolution, the Senate Report said, at page 14:

"One such matter involves another 'coverage of the contract' question, somewhat like the f.o.b./f.a.s. problem. To what extent should dual rate contracts cover goods shipped by a company which is a subsidiary, affiliate or associate of the contract shipper? Obviously, no simple answer which would include or exclude all shipments made by all such related companies could suffice. The 'good faith of the contract shipper' issue is present in large proportions. If the answer were left entirely to contract shippers, it is quite conceivable that some would have subsidiaries for the express purpose of using the conference carrier only when it suited them. But if it were left entirely to the contract carrier or conference, it might well be that no matter how legitimate and autonomous the subsidiary, affiliate or associate company, the claim of 'all-or-nothing' might be made against the contract shipper."

an interpretation of the broad legislative intent of section 14b rather than upon any facts peculiar to an individual case.

The Examiners found that if a conference did not desire to bind a merchant's affiliates by a single contract, then it need not. However, those conferences which desire to bind affiliates should use a uniform clause which binds only those affiliated companies over which the signatory merchant regularly exercises working control in relation to shipping matters. As the Examiners pointed out, the legislative history of this provision of the statute indicates that Congress recognized that some, but not necessarily all, of a merchant's affiliates might properly be bound to a single contract. By imposing the test of regular control over shipping matters, the clause which we are approving prevents the merchant from avoiding his obligations under the contract by merely routing particular shipments in the name of an affiliated company. The further requirement in this clause that all companies over which merchant exercises this control be listed in the contract serves two additional purposes. It gives the conference a complete list of the companies entitled to contract rates, and it places a compulsion on the merchant to fully inform the conference of the names of all companies obligated under the contract. As the Examiners observed, however, no purpose under the contract would be served by requiring the merchant to also list related companies not controlled by the merchant.

It has been argued that the ease of forming subsidiaries or affiliates in some countries requires that the contract include all affiliates. If the contract binds all affiliates whose shipping matters are controlled by the signatory merchant, however, the ease of forming or extinguishing affiliates will not make such affiliates any less bound under the contract. Instances may occur where a signatory merchant breaches his contract through the use of a controlled affiliate. But no words in any agreement can assure that the parties will not breach their contract. In an attempt to make it clear that the contract requires the good faith of the parties the clause which we are approving includes a specific provision regarding various subterfuges.

The following clause will be uniformly required in all contracts with the exception that those conferences who do not desire an affiliates clause may omit the second paragraph.

The Merchant undertakes to ship or cause to be shipped all of its ocean shipments moving in the trade on vessels of the Carriers unless otherwise provided in this agreement.

The term "Merchant" shall include the party signing this contract as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this contract and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Merchant", any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Merchant" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this contract on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its (their) shipments to the vessels of the Carriers the Merchant promises and declares that it is his (their) intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Merchant.

The Carriers agree that they will not provide contract rates to anyone not bound by a shipper's rate agreement with the Carriers. The Merchant agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this contract, by making shipments under this contract on behalf of any such person.

Natural Routing

The fourth numbered provision of section 14b requires that all contracts include a provision which expressly:

(4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available.

The mere absence of a contract provision requiring diversion from natural routings is insufficient to meet this requirement in that the statute directs that all contracts *expressly* not require diversion. As was the case with "Prompt Release," discussed above, definition of "Natural Routing" in the contract will, in the words of the House Committee, "greatly simplify the problems of shippers, who of necessity must be members of a number conferences, with respect to interpretation and application of differing provisions."[14] We are therefore requiring that all contracts contain a uniform or standard clause on this subject as set out below.

We have included in this clause a requirement that where a merchant intends to exercise his right under this clause to use a non-conference carrier he must first notify the conference of his desire or need for service on the direct route and afford the conference an opportunity to provide such service. The approved clause also resolves what might be considered an ambiguity under this provision of the statute by requiring the merchant to use conference vessels if the conference provides service on a natural routing for the particular shipment. Thus, the contract requires shipment on conference ves-

[14] House Report, p. 9.

sels unless this constitutes *unnatural* or *indirect* routing. It has been suggested that the statute does not permit this construction. We disagree. The overall philosophy of the statute reaffirms an earlier Congressional conclusion that steamship conferences, if properly regulated, can be beneficial to our commerce and that exclusive patronage contracts under fair terms and conditions should be permitted as a means of assuring conferences a nucleus of cargo. There is no justifiable need served by relieving the merchant of his obligation to use conference vessels merely because a nonconference carrier is calling at one of the several ports through which a particular shipment could "naturally" move, and the conference calls at another port of equal natural routing but not the port served by the nonconference line. To permit the merchant to avoid his contract in these circumstance would amount to little more than obligating the merchant to use conference vessels when there was no satisfactory nonconference service available.

As we have construed the "natural routing" provision of section 14b the merchant will be free under his contract to use nonconference vessels if in fact the use of conference vessels would require him to divert his cargo to unnatural routes. The merchant will not be permitted to escape his contract obligations, however, when the nonconference service is no more natural, as it were, than that of the conference.

The following clause will be required in all contracts

This agreement does not require the Merchant to divert shipments of goods from natural transportation routes not served by conference vessels where direct carriage is available: *Provided, however*, That where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Merchant shall be obligated to select the Carriers' service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Merchant intends to assert his rights under this article to use a carrier who is not a party hereto, and the port through which Merchant intends to ship or receive his goods is within the scope of this agreement, Merchant shall first so notify the conference in accordance with the provisions of Article [prompt release] hereof.

Damages for Breach

The fifth numbered provision of section 14b requires that all contracts contain a provision which expressly:

(5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however*, That the contract may specify that in the case of a

breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling.

There is only one aspect of this provision which presented any serious controversy in these proceedings. All of the proposed contracts contain provisions which substantially paraphrase this provision, including its proviso.[15] However, some of the proposed contracts contain provisions which would permit the carriers to suspend or terminate the merchant's right to contract rates prior to any adjudication that the merchant has breached his contract and would keep the merchant bound to exclusive patronage at the higher, noncontract rates during the pendency of arbitration or adjudication of an alleged breach. Generally, where these latter provisions have appeared, the conferences have agreed or have provided in their contracts that if the adjudication or arbitration is ultimately in the merchant's favor then the conference would refund to the merchant the difference between the contract rate and the noncontract rate which he had paid during the pendency of the litigation or arbitration.

The Senate Committee was clear in its statement that punitive suspensions or terminations by the conferences of merchants' contracts are not permitted under the statute. The Committee said:

Most of the dual rate contracts now used by the conferences serving U.S. ports provide for liquidated damages in the amount of dead freight, without deducting anything for cost of handling. In addition, many of them provide that if of a shipper who has breached does not promptly pay the liquidated damages due, or if he breaches twice in a year, his contract shall be cancelled and he shall thereafter pay the noncontract rate. The bill would allow no such penalties. (Senate Report, p. 213.)

This statement makes it plain that the limits of the merchant's punishment for violation of his contract are the damages provided by the statute and nothing more. We therefore will not permit clauses which suspend a merchant's rights but continue his obligations as an additional penalty for breach of his contract.

However, provisions which would suspend both the merchant's obligations and his rights under the contract if he does not promptly dispute or deny claims made by the conference that he has breached his contract or suspend his obligations and rights during a period that he fails to pay damages adjudged due would not appear to be contrary to the statute. Such a suspension of the merchant's contract, running only for so long as the merchant fails to pay damages ad-

[15] Some proposed contracts also provide that the cost of handling will be assumed to be a fixed percentage of the contract rate with either party having the option to challenge this cost in the particular case. Such provisions appear reasonable and therefore will be permitted.

judged due, is hardly punitive. It simply terminates the contract for that period of time during which one party refuses to fulfill his obligations. It does not impose punishment over and above damages. If the adjudged damages are promptly paid the contract is never suspended.

Some of the conferences have argued that if, under such circumstances, both the merchant's rights and obligations are suspended, unscrupulous merchants will intentionally breach their contracts by a small shipment via a nonconference vessel in order to work a cancellation of their agreements on less than the required 90 days' notice. We do not believe, however, that this poses any serious problem. Under the approved clause which is set out below, the soonest that a merchant's contract could be suspended would be 30 days following the discovery by the conference of facts which would raise a suspicion of a breach. Presumably, some period would transpire between the merchant's shipment and the conference's discovery of that fact, and a further period of time would be consumed by the conference in informally verifying its suspicions. Thus, it is likely that it would be well in excess of 30 days following a shipment in violation of the contract before the contract could be suspended. Furthermore, for the merchant to reap any appreciable benefits from such a subterfuge his shipment would have to be relatively insignificant because if he breaches his contract he remains liable for damages without regard to whether his later failure to dispute his liability works a suspension of his contract.

We are not requiring that any contract contain an express provision giving the conference the right to suspend a merchant's rights and obligations under the contract for failure to pay adjudged damages. However, those conferences which have indicated by their proposed contracts that they desire coverage of this subject, will use the following provision which would, of course, be in addition to the mandatory provision of the statute fixing the measure of damages:

(1) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within 30 days after receipt of notice by registered mail from the Conference that they are due and payable the Conference shall suspend the Merchant's rights and obligations under the contract until he pays such damages.

(2) If, within 30 days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within 30 days thereafter proceed in accordance with Article to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within 30 days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages.

(3) No suspension shall abrogate any cause of action which shall have arisen prior to the suspension.

(4) Payment of damages shall automatically terminate suspension.

(5) The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within 10 days after the event.

To avoid later controversy regarding what might be meant in the contract by "cost of handling," we are requiring that where a liquidated damage provision is used in a contract the deduction from the contract rate shall be the "cost of loading and unloading." This is in perfect agreement with the Senate Committee's statement that "the cost of handling is understood to mean the cost of loading the cargo onto the vessel and discharging the cargo from the vessels." (Senate Report, p. 13.)

Shipper Cancellation

The next numbered provision of section 14b requires that all contracts contain a provision which expressly:

(6) Permits the contract shipper to terminate at any time without penalty upon ninety days' notice.

All of the proposed contracts contain, as they must, clauses which conform with this provision of the statute. Therefore, no discussion is here necessary.[16]

Spread Between Contract and Noncontract Rates

The next numbered provision of section 14b requires that each contract contain a provision which expressly:

(7) Provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates.

Most of the proposed contracts expressly provide for the maximum 15 percent spread. A few provide for ordinary rates 15 percent higher than the contract rates which results in a spread of approximately 13 percent of the higher, ordinary rates. In none of these proceedings was there any shipper objection to the spreads as proposed by the conferences nor did any independent or nonconference carrier appear in opposition to the spreads as proposed. In these proceedings as in the Senate and House Hearings, there was, as the Senate Committee said, "general satisfaction with the 15 percent spread." (Senate Report, p. 14.)

[16] A few of the contracts contain clauses which state, in substance, that either party may cancel the contract on 90 days' notice. In the case of termination by the conference, cancellation would, of course, have to be in accordance with the third-from-last sentence of section 14b.

In discussing this provision of the statute the House Committee said:

> The provision authorizing the maximum spread between the rate charged the casual shipper and the exclusive patronage contract signer of 15 percent appeared to the Committee, in the light of its experience, as reasonable. The problem was to find a figure that would not act as a penalty upon the shipper who did not choose to limit his shipments to conferences and at the same time would provide sufficient inducement to others to execute agreements. As stated, it is the belief of the Committee, which was shared by carrier and shipper witnesses alike, that the dual rate conference system provides definite advantages in assuring a nucleus of cargo to established carriers, thus enabling them to provide the equipment and service required by the majority of shippers. The contract/noncontract spread is the best practical device to assure these aims and the 15 percent difference in rates is, in the judgment of the Committee, fair and reasonable to achieve this end without imposing a penalty or discriminating against the nonsigner. (House Report, p. 8.)

In these circumstances we find that the 15 percent spread as provided for in the majority of the proposed contracts is reasonable. It follows, of course, that the 13 percent spread of some of the proposed contracts is also reasonable. A number of the contracts also provide for the statement of rates in the highest multiple of 5 cents, or 25 cents, which does not result in a spread greater than 15 percent. This appears to be a reasonable provision and will therefore be permitted.

Cargoes Excluded from the Contract

The next numbered provision of section 14b requires that each contract contain a provision which expressly:

> (8) Excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however*, That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception.

All of the proposed contracts include provisions generally following this language. Many of the contracts as approved by the Examiners both in Docket No. 1111 and in other cases which were not consolidated for hearing in Docket No. 1111, also provide for the exclusion of liquid petroleum in less-than-full shipload lots.

We are requiring that all contracts exclude liquid bulk petroleum in less-than-full shipload lots.

As originally proposed, this provision would have excluded all bulk cargo, without exception, from the coverage of all contracts.[17]

---

[17] As reported by the Senate Committee the provision read:

"(7) excludes cargo of the contract shipper which is loaded in bulk without mark or count." (Senate Report, p. 39.)

No similar provision appeared in H.R. 6775, as it passed the House. (107 Cong. Rec. 9369–9372.)

It was amended during the Senate debate to read substantially as finally enacted. The only explanation of the amendment to remove liquid bulk, except liquid chemicals, was that the provision as reported by the Senate Committee was broader than was necessary. (107 Cong. Rec. 18250.) The most detailed information and argument presented in the Senate Hearings relative to the bulk exemption were from Dow Chemical Co., who explained at some length the requirements of their particular business which made it necessary that bulk cargoes be excluded from contract coverage. Dow's contentions were, in part, that their chemicals should be permitted the exclusions which had in the past been generally accorded liquid petroleum. (Senate Hearings, pp. 506–509.)

It is not clear whether Congress thought the phrase "liquid chemicals" included liquid petroleum, but certainly the same factors which prompted the exclusion of liquid chemicals would serve also to exclude liquid petroleum. This conclusion is further reinforced by the obvious practical difficulties in many instances of determining with any assurance whether a particular liquid should properly be called "petroleum" and not "chemical."

Other Contract Provisions

The ninth and last numbered clause of section 14b states that dual rate contracts shall contain such other provisions "not inconsistent herewith as the Commission shall require or permit." There are a number of matters which have arisen in these proceedings which must be dealt with under this portion of section 14b.

a. *Notice of shipment via nonconference vessel.* The issue of what notice, if any, should be given by the merchant of the movement of goods via nonconference vessels was severed from a number of the individual proceedings and treated in Docket No. 1111. A variety of provisions have been suggested. Their purpose, of course, is to aid the conference in policing its contracts. The basic merchant objections to these provisions are that the statute does not require notice and that a notice requirement would impose an administrative burden upon them and would possibly lead to interference with purchases or sales or to improper disclosure of the details of their business transactions.

In Docket No. 1111 the panel of Examiners found that a reasonable notice requirement should be permitted. We agree. Some recognition of the practical problems of enforcement of dual rate contracts would seem permissible, if not desirable. Both the Senate and House Committees acknowledged that the good faith of the signatory merchant is important to the survival of any contract system.[18] A reasonable

[18] Senate Report, p. 13, House Report, p. 9.

notice provision would help assure this good faith. The provision approved by the Examiners in Docket No. 1111 appears reasonable and we will therefore permit its use in all contracts. This clause limits notice to shipments which have already moved via a nonconference vessel and thus avoids conference interference in a pending sale. Only the bare essentials of the transaction need to included in the notice and hence the burden on the merchant should be slight. The following clause will be permitted:

> Within ten (10) days after the event in any transaction in which the Merchant is a party and the legal right to select the carrier is vested in a person other than the Merchant, and if he has knowledge that the shipment has been made via a nonconference carrier, the Merchant shall notify the Conference in writing of this fact, giving the names of the Merchant and his customer (or vendor), the commodity involved and the quantity thereof, and the name of the nonconference carrier: *Provided, however,* That where the activities of the Merchant are so extensive in area or the nature or volume of his sales or purchases makes it impracticable to give notice within ten (10) days, the Merchant shall give notice as promptly as possible after the event.

b. *Disclosure by merchant of facts relative to the routing of a particular shipment.* The issue of what rules of discovery against merchant should be permitted in the contracts was also given special treatment in Docket No. 1111. It was treated individually in other proceedings. Here again, a reasonable disclosure provision would appear to be proper in recognition of the problems which the conference must face in policing its contracts. The basic facts concerning a merchant's shipments will in many instances be available only from the merchant's files. Merchant objection to disclosure provisions was based more on the possible abuse by the conferences of such a provision than upon disagreement with the principle of disclosure itself. The clause approved by the panel of Examiners in Docket No. 1111 strikes a fair balance between carrier and merchant interests and therefore is approved for inclusion in those contracts where the conference has expressed a desire for language covering the subject of disclosure. This clause is as follows:

> In order that the conference may investigate the facts as to any shipment of the Merchant that has moved, or that the Merchant or the conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Merchant, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Merchant where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the Merchant, and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended.

Many conferences objected to the portion of this provision which permits the merchant the option to require examination at the merchant's office which may be some distance from the conference office. As noted, however, the provision seeks to strike a fair balance between conference and merchant interests. It should discourage conference harassment of merchants by intemperate use of discovery but at the same time it does not impose an unreasonable burden on the conference. Moreover, we would assume that in most instances merchants will wish to furnish copies to the conference rather than to permit an outsider to look through their files in their own office.

c. *Burden of proof.* Many of the proposed contracts would place upon the merchant the burden of proving that he did not violate his contract in various circumstances. This was also one of the issues treated in Docket No. 1111. The arguments in support of placing the burden of proof upon the merchant have generally been arguments of convenience. The conferences contend that because in many instances the proof of a breach will depend upon the merchant's intent, he should have the burden of proving his intent. The language of the panel of Examiners in Docket No. 1111 is generally appropriate here:

> The general rule that he who claims a breach must prove the breach is so strongly entrenched in American jurisprudence that there must be some compelling reason not to follow it in the case of dual-rate contracts. Nothing has been shown to this Panel which would justify the finding that dual-rate contracts are so sacrosanct or so important as to require treatment different from that accorded most other contracts. We are not unaware, of course, that Congress, by enacting section 14b, has recognized the desirability of the dual-rate system, but it also has hedged the system with various restrictions in order to protect shippers.

As was discussed above under provision (3) of section 14b (Legal Right to Select the Carrier), we have approved a contract provision which makes the appearance of a merchant's name upon certain documents or his participation in the ocean routing of the cargo prima facie proof that he had the legal right to select the carrier. This places some burden of going forward on the merchant. More is not needed. We therefore will not approve any clause which places the burden of proof, as such, on the merchant.

d. *Merchant's right to use owned or chartered vessels.* This issue was also treated by the panel of Examiners in Docket No. 1111. Their conclusion was that contract provisions which at present permit merchants to use their owned or chartered vessels should be continued but that conferences who have not permitted such exclusions in the past should not now be required to do so under the new law.

Exclusion from contract coverage of a merchant's goods moving on the merchant's owned or chartered vessels would primarily benefit larger shippers. However, neither the economic philosophy of the United States nor section 14b of the Shipping Act requires that a merchant be deprived of all normal economies which go along with large-ness. An important purpose of the Shipping Act is to facilitate the flow of commerce, and while it recognizes that a proper conference system can contribute to this end, it does not undertake to give the conference prior claim on all cargoes nor afford the conferences protection from all possible competition. We therefore are requiring that all contracts, whether or not they previously did so, shall permit merchants to transport cargoes on their owned vessels, or on vessels chartered by the merchant provided the term of the charter is 6 months or more. By limiting this to charters for periods of some duration, the conferences are accorded reasonable protection from spot raiding of cargoes and merchants accorded the right to engage in bona fide proprietary carriage under reasonable conditions.

e. *Geographic scope of the contract.* Two questions have arisen in these proceedings relative to the geographic areas to be covered by the contracts. The first is the inclusion in contracts of commerce over which we have no direct jurisdiction. Some of the contracts require, for example, that the merchant promise exclusive patronage from or to ports on one of the United States coasts and contiguous ports in Canada and/or Mexico. The argument has been made that because the Commission has no direct regulation over non-United States commerce, Canada and Mexico should not be included in the contracts presented to the Commission for approval.

The purpose of the inclusion of these areas in a single contract is to obligate merchants who desire dual rate contracts from or to the United States to also obligate themselves to exclusive patronage from or to ports contiguous to the United States. This is a natural result of the fact that the conference offers service to all such ports. If merchants were permitted to obtain lower rates by promising their exclusive patronage only from or to United States ports, they could easily use nonconference vessels from or to nearby Canadian or Mexican ports and honor the contract only when it met their convenience. We, therefore, are permitting contracts to include Canada and/or Mexico where these areas are included in the service offered by the conference.

The second question here concerns the inclusion in the contract of foreign areas not presently served by the conference vessels. This question has arisen in connection with foreign areas which are presently not being served because of political reasons. Examples of such areas are Communist China and Cuba. The conferences have generally argued that they should be permitted to include these areas in their contracts in order to facilitate their resumption of service when political conditions permit. We find no harm in permitting such areas to be included. This inclusion will constitute no more than so-called stand-by authority to reinstitute dual rate contracts at such time as service is resumed.

One of these cases presents an additional, related problem. The proposed contract of the River Plate Brazil Conferences (Docket No. 1043) would include Great Lakes ports in addition to United States Atlantic and Gulf ports when only one conference member serves Great Lakes ports and then with only one sailing per month during that part of the year that the Lakes are open to navigation. Under these circumstances a single carrier would be permitted the benefit of the full economic force behind the conference contract with the conference, as such, offering no service to the Great Lakes. Or, as the Examiner stated in his Initial Decision:

The proposed contract is unjustly discriminatory because shippers must subscribe to inadequate conference service out of the Great Lakes in order to get needed contract rates from Atlantic and Gulf ports.

We, therfore, will not permit the contract of the River Plate and Brazil Conferences to include the Great Lakes. Of course, at such time as the conference extends fuller service to the Great Lakes it may apply for permission to extend the scope of its contract system.[19]

f. *Arbitration.* Most of the proposed contracts contain clauses which require or permit arbitration of disputes arising thereunder. Some of the initial decisions have required that these clauses be qualified so as to permit arbitration only of those matters falling outside the jurisdiction of the Commission. This qualification is said to be necessary in order to avoid conflict with section 22 of the Shipping Act which provides "That any person may file with the Commission sworn complaint setting forth any violation of the Act. . . ." While we agree that the contract should not, nor cannot, oust the Commission from its jurisdiction and duties under the Shipping Act, limiting arbitration only to matters outside the jurisdiction of the Commission may be more restrictive than is necessary.[20] Arbitration has developed as an efficient means of settling disputes under commercial contracts generally and would appear to be an appropriate means of disposing of routine disputes which arise under dual rate contracts. We therefore have no objection to clauses which call for the arbitration of disputes provided they contain the following statement: "nothing herein shall deprive the Federal Maritime Commission of its jurisdiction."

g. *Contract amendments and applicability of the Shipping Act.* Many of the proposed contracts contain clauses which acknowledge

---

[19] The Examiner would also withhold approval of the dual rate system as to Atlantic and Gulf ports unless the organic conference agreement were modified to eliminate the Great Lakes. It would appear that this modification of the conference agreement is better treated outside this proceeding. We are therefore not here requiring the modification of the conference agreement but rather will study the matter further with a view to possible future action.

[20] See *Swift & Co.* v. *Federal Maritime Commission,* 306 F. 2d 277 (D.C. Cir., 1962).

that any amendments thereto are subject to the approval of the Commission. Some conferences argue that such provisions are unnecessary as they merely state a requirement of law. In order to avoid any misunderstanding on the part of shippers who may in many instances be unaware of the status of such agreements, we are requiring that all contracts contain a provision specifically stating that all modifications are subject to the Commission's approval. For similar reasons we are also requiring that the contracts include a provision acknowledging that interpretations thereof must be made in the light of the Shipping Act and the rules and regulatons of the Commission.

h. *Contracts of carriage.* Many of the proposed contracts contain provisions which state that contracts of carriage must be made with the individual conference carrier and that the other conference members have no liability under such contracts of carriage. These provisions were generally approved by the Examiners. They appear to be included merely to avoid any misunderstanding of the part of the merchant regarding the fact that the merchant must make arrangements with the individual conference members for the carriage of the specific cargoes and that the conference as a whole does not assume the normal carrier liabilities of the member line under whose bill of lading the cargo moves. As such they seem proper and will be permitted.

i. *Open rates.* The conferences have generally sought in these proceedings a means whereby they could open rates on particular commodities to meet temporary and abnormal competitive conditions without being considered to have terminated their contracts as to such commodities. Merchants generally favored permitting conferences this flexibility. In an interpretative ruling published March 2, 1962 (27 F.R. 2046, 46 C.F.R. § 530.1) we expressed the opinion that section 14b appeared to preclude such flexibility. In retrospect, and having had the benefit of the views of all parties as well as the Examiners in these proceedings, we think that flexibility in the opening of rates, under proper safeguards, is permissible under the statute.

In Docket No. 1111 and in the other cases where the matter was at issue the Examiners generally found that there was a justifiable need on the part of the conferences for some flexibility in opening rates to meet abnormal competitive conditions. It was said that for the opening of rates to be of any benefit to the conference, it must be able to do so swiftly since one of the objectives thereof is to enable the individual conference members to move promptly in reducing rates to meet the competition. In a rapidly declining rate situation the conference machinery is often too unwieldy to keep up with the day-to-day fluctuations. While we do not suggest that the opening of rates is an altruistic move, it must be recognized that in many instances rates are opened in response to the demands of contract shippers. If the disparity between the conference contract rates and the rates of the carriers outside the conference becomes too great shippers will soon abandon the conference service. To keep up with the rate fluctuations in some instances requires that rate fixing initiative be returned to the individual conference members.

Under the clause which we are approving and which was approved by the examiners in Docket No. 1111, the conference will be permitted to open rates without advance notice but the individual carrier members would not be permitted to charge rates in excess of the last published conference contract rate for a period of 90 days after the rate has been opened. Also, the conference would have to give 90 days' notice of the return of the rate to the conference dual rate system. This clause was generally agreeable to the conferences, their only objection being that the limit on rate increases should be 30, rather than 90, days.[21] The 90-day requirement is necessary however to assure that the opening of rates will not be used to accomplish a rate increase on less than the required notice. Under the approved clause, when a rate is opened the contract shippers are released from their contract with regard to the particular commodity. In these circumstances the conference carriers individually possess the initiative in meeting the rates of the carriers outside the conference and must compete individually for the open rated cargo. The approved clause further recognizes that merchants need advance notice that a rate will be returned to the conference contract system and requires 90 days' notice of this event. Tariff filings while rates are open would, of course, be subject to section 18(b).

The following clause is approved for use by those conferences who desire to provide in their contracts for the opening of rates. Our interpretative ruling of March 2, 1962, will be withdrawn.

The Merchant and the Carriers recognize that mutual benefits are derived from freedom on the part of the Carriers to open rates, where conditions in the Trade require such action, without thereby terminating the dual rate system as applicable to the commodity involved; therefore, it is agreed that the Conference, to meet the demands of the Merchants and of the Trade may suspend the application of the contract as to any commodity through the opening of the rate on such commodity (including opening subject to maximum or minimum rates) provided that none of the Carriers during a period of ninety days after the date when the opening of such rate becomes effective shall quote a rate in excess of the Conference contract rate applicable to such commodity on the effective date of the opening of the rate and provided further that the rate shall not thereafter be closed and the commodity returned to the application

[21] A few conferences initially sought approval of clauses which provided for so-called open dual rates. This innovation appears to have been offered as one means of avoiding our March 2, 1962, ruling. These conferences have indicated that a clause similar to that which we are approving would also be agreeable to them. Under these circumstances it is necessary that we discuss the merits and vices of such clauses.

of the contract system on less than ninety days' notice by the Carriers through the filing of contract-non-contract rates in their tariff.

j. *Conditions beyond the control of the carriers.* The proposed contracts generally contain provisions which would permit the suspension of service or rate increases on short notice where abnormal conditions beyond the control of the carriers are present. Both the words of the statute and its legislative history indicate that the carriers were to be permitted some flexibility under the contracts in extraordinary circumstances.

Provision (2) of section 14b specifically acknowledges that under some circumstances the carriers would be permitted to increase rates on less than normal notice. As originally passed by the Senate, this provision of the section expressly provided that the limit on rate increases was not to apply in cases of "war or other force majeure." (107 Cong. Rec. 17946 et seq.) This phrase was deleted by the House-Senate conferees. (107 Cong. Rec. 19289.) Although the Conference Report did not specifically discuss this deletion, Senator Engle, one of the conferees, explained on the floor of the Senate that the Senate conferees agreed to the deletion "because it was redundant." Senator Engle explained that "Such occurrences are always beyond the control of the contracting parties and therefore may not impose upon them obligations which they did not intend to assume when they made their contract." (107 Cong. Rec. 19782.)

In recognition of this legislative history we are permitting contract clauses which provide for exceptions to the routine of the contract system in extraordinary circumstances.

First, we are approving a contract provision which authorizes the complete suspension of the contract system under circumstances where war or other governmental action interferes with the service of the carriers. This provision merely requires that the carriers notify the merchants of the suspension of the system and give 15 days' notice of the resumption of the system. Those conferences or carriers which desire to provide for this contingency in their contracts shall use the following clause:

In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the Carriers in the trade covered by this Agreement, the Carrier or Carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the Merchant of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by any Carrier or Carriers, said Carrier or Carriers shall forthwith reassume its or their rights and obligations hereunder and notify the Merchant on fifteen (15) days' written notice that its suspension is terminated.

Further, in order that the conference may, if it so desires, continue its contract system notwithstanding war or other governmental action which adversely affects carrier service and in recognition that the costs and risks of service increase precipitously in such circumstances, we are approving a clause which permits rate increases on 15 days' notice in such circumstances. The approved clause would also permit the continuation of the contract system at higher rates imposed in compliance with section 18(b) of the Shipping Act in other extraordinary circumstances which unduly impede or delay the carriers service. Where rates are increased in either of these situations the merchant is also given the right to suspend his obligations under the contract for the duration of such increases. Those conferences or carriers which desire to provide for rate increases in such circumstances shall use the following clause:

In the event of any of the conditions enumerated in Article * * * [the clause set out above] the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than 15 days' written notice to the merchant, who may notify the carrier or carriers in writing not less than 10 days' before increases are to become effective of its intention to suspend this Agreement insofar as such increase or increases is or are concerned, and in such event the Agreement shall be suspended as of the effective date of such increase or increases, unless the carrier or carriers shall give written notice that such increase or increases have been rescinded and cancelled.

In the event of any extraordinary conditions not enumerated in Article * * * [the clause set out above] which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions; provided, however, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The merchant may, not less than 10 days before increases are to become effective, notify the carrier or carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the carrier or carriers shall give notice that such increase or increases have been rescinded and cancelled.

DOCKET NOS. 1109 AND 1110

Some special comment is necessary regarding the contract systems of Ipar Transport, Limited (No. 1109) and D. B. Turkish Cargo Line (No. 1110) which are the only single carrier contract systems included in these proceedings.[22] The only objection to these individual carrier rate systems came from the North American Mediterranean Freight Conference which, to some extent, parallels the service of Ipar and Turkish Cargo. The Conference has also applied for permission to use a dual rate contract. The conference argues in the main that two

[22] Ipar has given notice of cancellation of its dual rate system. However, this cancellation does not become effective until April 6, 1964, and therefore its contract is included herein.

dual rate contracts in the same trade can only produce instability and chaos and therefore should not be permitted. The conference also challenges the lawfulness of individual carrier dual rate systems.

There would appear to be no doubt that Public Law 87–346 allows individual carriers to use dual rate contracts under the same requirements as conferences. Both in the preamble to Public Law 87–346 and throughout section 14b the separate terms "carrier" and "conference" are used. To say that a single carrier is nevertheless to be denied a dual rate system where it is in competition with a conference is to read the word "carrier" out of the statute. At least since 1914 it has been recognized that conferences (or rate-fixing combinations by some other name) are the all but universal rule in foreign waterborne commerce.[23] Thus it must be concluded that Congress in repeatedly using the word "carrier" intended to differentiate and to sanction the same treatment for an individual line as for a conference in the matter of dual rate contracts. We are therefore permitting the dual rate contract of these lines as modified to conform with our findings as to all contracts.

DOCKET NO. 1092

As mentioned above, one of these proceedings also involves the approval of a new conference agreement which would combine under a single agreement several conferences in the Pacific Coast/Latin American Trade. This new agreement (Agreement No. 8660) provides for the fixing of rates and practices in the trade between Pacific Coast ports in the United States and Canada on the one hand and ports in the Caribbean, Central America, and South America (excluding ports in Brazil, Uruguay, and Argentina) on the other. The new conference would replace 10 currently existing conferences which embrace this trade area.

The primary objection to Agreement No. 8660 is that it would concentrate too much power in one conference. It should be noted, however, that the purpose of the agreement is to increase generally the efficiency of conference administration. The agreement is divided into five trade areas (three outbound from the United States and two inbound), and only those carriers who provide service in the particular trade area may vote on rates and practices which apply to that area. Thus, while the new agreement takes the place of 10 currently existing agreements, it creates what amounts to 5 new conferences under a single administrative office.

---

[23] See Report on Steamship Agreements & Affiliations in the American Foreign & Domestic Trade of the House of Representatives Committee on the Merchant Marine and Fisheries, 63rd Cong., Vol. 4, p. 415 (1914). (Generally known as the "Alexander Report.")

We recognize that while the new agreement may promote administrative efficiency, it also to some extent provides greater control over competition in these trades. However, this particular consolidation of several conferences serving contiguous areas does not of itself appear to be unlawful. We perceive no undue increase in competitive strength by reason of the arrangement. We will therefore approve Agreement No. 8660. We will also observe closely the future operation under the agreement so as to insure that the standards of section 15 of the Shipping Act are met.

The use of a dual rate contract by the new conference presents a special problem, however. As discussed above, the conference members themselves have recognized that five separate trade areas are involved and that a carrier who does not serve a particular trade should not be permitted to control the rates and practices in that trade. Yet, if the conference is permitted to offer a single dual rate contract which includes all five of the trade areas, merchants will be forced to obligate themselves to exclusive conference patronage in trade areas not desired in order to obtain contract rates in a trade area where they feel the dual rate contract meets their needs. This seems to us neither necessary nor fair.

We have approved the new agreement on the ground that it is largely concerned with providing a means of central administration for a number of conferences. In keeping with this, we are approving the use of a dual rate contract in each of these five trade areas and merchants must be offered the privilege of executing a contract for any or all of the trade areas, as they desire. We find that it would be both contrary to the public interest and detrimental to commerce for the conference to require that a merchant obligate himself to exclusive patronage in all of these trade areas in order to obtain contract rates in a single trade. Any such requirement would, of necessity, bring into serious question the new conference arrangement itself.

What we have said above in our general discussion of the express requirements of section 14b applies to the contract form proposed by this new conference and its proposed contract will be modified accordingly.

One intervener in Docket No. 1092 argues that there is no "need" for the extension of the dual rate system to areas included in the new conference agreement which are not now covered by existing dual rate systems of the individual conferences. Section 14b does not require that the conference demonstrate a positive need for the system as a prerequisite for approval. Rather it authorizes the use of dual rate contracts if they meet certain safeguards. Moreover, it appears that the requirements which we have here generally imposed on all contracts satisfy most of this intervener's objections.

One other matter regarding the contract system of the new conference requires some discussion. The tariffs of the conferences who are combining under the new agreement split their total charges for ocean freight into two parts. One is a so-called freight rate which is in payment for service from ship's tackle at port of origin to ship's tackle at the destination port. The other is a so-called handling charge which is in payment for movement of the cargo from ship's tackle to place of rest on the dock. The conferences acknowledge that "the handling charge is a component part of the overall freight paid for transportation." While there would appear to be nothing in section 14b which would require that two levels of "handling charges" be stated by conferences using dual rate systems, it would make folly of the section to permit conferences to avoid the rate stability or guarantee which the section assures contract shippers through the simple device of segregating into separate elements the prices charged for the total carrier services. While we will not require the conferences to state two levels of "handling charges" in their tariffs, they should be aware that they will not be permitted to increase their handling charges on less than the 90 days' notice required of carriers using dual rate systems.

We recognize that it may take some time to accomplish the details involved in the dissolution of the 10 separate conferences and in formally organizing the new conference and that the dual rate contracts of the 8 of the 10 conferences which currently use contracts, expire by the terms of section 3 of Public Law 87-346 on April 4, 1964. The individual conferences will therefore be allowed to use the dual rate contract proposed by the new conference, as modified herein, until such time as the new conference can be formally organized.

CONCLUSION

The contracts submitted in these proceedings, modified as set out in the orders attached hereto, are found to comply with the requirements of section 14b of the Shipping Act, 1916. Provisions which have been found herein to be permissible, but not mandatory, may be added or deleted from the contracts as set out in the attached orders [22] before said contracts are tendered to merchants for signing.

Commissioner Patterson concurring and dissenting:

The following report covers what would be my response to applications filed pursuant to section 14b of the Shipping Act, 1916 (Act), by 57 conferences of carriers and one carrier in the foreign commerce of the United States for permission to use 24 types of contract forms to

[22] Attachments omitted here due to length.

be tendered merchant shippers. The proposed contract forms provide lower rates to a shipper or consignee who agrees to give all or a fixed portion of his patronage to such conferences or carriers and generally contain provisions which the applicants claim conform to the description of such contracts in section 14b. The contracts are referred to generally hereafter as the "contracts."

Each application and its annexed contract forms has been made the subject of a docketed proceeding to determine whether the Commission should permit the use of these standard form contracts so drafted to make them available to all shippers and consignees on equal terms and conditions. We are required to give permission to use "unless the Commission finds that the contract, amendment or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors" and if the contract, amendment or modification "expressly" contains eight specific types of obligations. In performing this function we have been authorized by section 14b(9) to approve a contract containing "such other provisions not inconsistent herewith as the Commission shall require or permit"; and by section 3 of Public Law 87–346 to "approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act" (Public Law 87–346).

The purpose of these proceedings is to comply with this mandate and with the congressional directive to the Commission in section 3 that it shall approve, disapprove, cancel or modify contracts within the period ending April 3, 1964.

Acting pursuant to these mandates the majority of the members of the Commission have required that each of the applicants' contracts must be modified to achieve conformity with section 14b by the use of certain required provisions and no others and has in effect declared invalid the applicants' provisions on the same subjects.

The majority's newly prescribed and required provisions are not found in any application for permission to use a contract submitted by respondents, nor have they been proposed by the examiners and accepted by respondents, but have been conceived and adopted by the majority for compulsory use. None of the required provisions has been subjected to review, hearing, or comment. By this process the initiative for submitting a contract which we will permit to be used is taken away from the applicants and is assumed by the majority even though there is no finding that the provisions they are to replace have any of the prohibited effects referred to in the first sentence of section 14b which were quoted above.

The congressional intent of section 14b, as I see it, is to place the initiative for preparing a contract on the applicant carriers or their conferences acting according to their own commercial needs, and to place the burden of not permitting (i.e., forbidding) the use of a contract on us after we show the prohibited effects exist in any case, or nonconformity with any of the eight conditions in section 14b.

It is from this base that I embarked on the task of reviewing and considering whether or not to permit the use of contracts.

Dissent is based on the failure of the majority (1) to conform to the requirements of section 14b, and of section 3 of Public Law 87–346, (a) by denying notice and hearing on future nonconforming proposals and (b) by failing to meet the burden of showing how applicants do not conform before refusing to permit use of contracts; (2) to conform to the requirements of section 4 of the Administrative Procedure Act, and (3) to follow congressional policy in its treatment of proposed contracts.

(1)(a) The ignored statutory compulsions of section 14b are that carrier-applied-for contracts should not be prejudged but should be permitted after notice and hearing (i.e., adjudication) unless the Commission finds a particular contract will be detrimental to commerce or contrary to the other standards listed, or fails to cover expressly the enumerated subjects. If we say that each future contract, no matter what it contains, is not to be permitted without the prescribed clauses, we are making our order, not after notice and hearing on each contract, but before a hearing thereon. Notice and hearing with respect to future proposals has been denied because of the presently announced rule that only the required clauses will be permitted hereafter. Section 14b is being disregarded when the right of notice and hearing is foreclosed.

(1)(b) The requirements of section 14b in a proceeding to permit the use of a contract or to forbid the use of a contract is to review each applicant's contract on its own merits, one by one. The purpose of these proceedings is not to prescribe the use of the Commission's contract by any particular applicant, nor is it to perfect or rewrite contracts, but only to measure each applicant's contract by statutory tests and to forbid use after an adjudication if the measure is not met. If the contract fails, the Commission's order may require other provisions as authorized in (9) of section 14b or the Commission may modify by its order in accordance with section 3 of Public Law 87–346. Before modifying or requiring something else, however, the Commission must show how the applicant's contract has failed to meet the measure. The Commission has a statutory obligation or "burden" to do at least this much. The use of item (9), providing that a contract may contain such other conditions as the Commission may require or permit, or of section 3, directing the Commission within a year to approve, disapprove or modify agreements, is simply a useful way of expediting an order giving permission to use a contract instead of just forbidding various provisions and wasting time with repeated re-applications until a permissible contract is achieved.

The majority justifies as consistent with the law or as reasonable the contract provisions it has required as substitutes for those applied for in contracts. It does not follow that because a government-required reasonable provision is consistent with the law, all other provisions are automatically contrary to the requirements of section 14b. The burden to show failure of other provisions to conform rests on the Commission *before* it may exercise its own judgment. The majority has overlooked this essential procedural step.

(2) Section 4 of the Administrative Procedure Act provides that general notice of proposed rules shall be published and interested persons shall be afforded the opportunity to participate in the formulation of rules through the submission of views or comments before rules are adopted. The majority, by prescribing for the first time in its report the only contract provisions that must be embodied in all future contracts before it will permit the use of a contract, has thereby made a statement of general applicability and future effect. The presently prescribed provisions are for the guidance of the public if any applicant wants to get permission to use a contract.

The panel of five examiners in Docket No. 1111 understood what they were doing in this respect when they prescribed similar provisions: " . . . the present proceeding . . . is rulemaking in nature" although adjudicatory in form, they said (p. 62). In spite of their understanding, they refused to alter their procedure, however. The Commission makes no comparable acknowledgment, but its deeds are consistent with such an understanding that it is making rules.

There has been no general notice published that the prescribed provisions were being considered and that interested persons were being given an opportunity to participate in their formulation through the submission of views. The only effort in this direction was in Docket No. 983, giving notice on March 21, 1963, of a rule-making proceeding to consider adoption of rules governing contract rate systems and including a standard form of dual-rate exclusive patronage contract. Comments were due on May 25, 1963. These rules are still awaiting adoption, and they are not part of this proceeding. The deficiency in notice is not supplied by the "Orders of Investigation and Hearing" in the dockets herein, because the only purpose of such orders was to initiate an adjudication of whether the particular contract met the requirements of section 14b, and no proposed rule was ever published in any of these notices. The decision to require prescribed provisions was made later, but with no change in the orders of investigation, nor publication of any notice of proposed rulemaking.

Except for interrogation in oral argument, applicants have had no indication, much less has the rest of the public had notice, that the prescribed provisions would be required. Neither have other interested persons not respondents or intervenors herein had any opportunity to participate in the formulation of these particular rule-made provisions.

It is not considered that the provisions of section 14b(9) or section 3 of Public Law 87–346, authorizing requirements and modifications in contracts, supersede the mandate of section 4 of the Administrative Procedure Act in regard to a need for notice of proposed rulemaking as to the newly prescribed provisions having general applicability and future effect. Item (9) is to authorize changes having particular applicability and present effect on specific contracts being considered for a grant of permission to use them.

There is no doubt that Congress intended that we should establish standards for dual-rate contracts and that we would be expected to provide a standard form of contract which all conferences might utilize, as the majority says. I am confident that it was equally expected that we would observe existing laws governing procedures to be followed in achieving the intended results. The assertion of an expectation by a Congressional Committee does not justify abandonment of existing prescriptions of law. Congressional expectations are not enough to repeal section 4 of the Administrative Procedure Act in regard to these contracts. The Committee's expectation was to be accomplished in our rulemaking Docket No. 983, which is still awaiting action by the Commission.

The desirability of uniform results is assigned as a reason for compulsory rule-made provisions. Desirability, however, is no substitute for statutory compulsion. The majority has committed a fatal error in not complying with the Administrative Procedure Act.

(3) Lastly, there is a fundamental policy error in the majority's base of approach. Its base point assumption is that there is something absolute, final, or superior about what the Government prescribes when it administers a law, at least until the Government decides to make a change. This should not be so. The commercial trading context in which these contracts are used cannot function with such rigidity when there is any new development such as section 14b. In the commercial world, the ability to change obligations in response to experienced needs after mutual consent within the guides put up by section 14b is an essential factor of existence. Congress has carefully

avoided imposing an inflexible revision of historically developed trading conditions, but has only altered some of the conditions. Why should we do what Congress has avoided? A period of adjustment, within the guidelines of section 14b, will be required in traditional contracting practices in world-wide trades. Our job is to review and pass on the diverse forms of adjustment. This adjustment should be allowed if possible, and should not be immediately shut off and solidified into new rule-imposed rigidities emanating from a Government agency at only one end of the trading route, no matter how high-minded and superior the adjustments may seem to us at the moment.

As a part of our program to review applications for permission to use contracts pursuant to section 14b, it was decided that there were five issues common to all application proceedings; consequently, their severance from existing application proceedings was ordered. The issues were stated in the order initiating Docket No. 1111 as follows:

Definition of Contract Shipper

(a) Whether the Commission should approve, disapprove or require modification of contract provisions requiring inclusion in the contract of affiliates of the contract shipper or of other connected companies.

Contract Shipper Commitment

(b) To what degree, if any, may or should contracts exclude a portion of shipments, commodities, or shipments on owned or chartered vessels?

Legal Right to Select the Carrier

(c) Whether the provision required by section 14(b)(3) in all contracts, to limit the coverage of the contracts to "those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier" requires special language in the contracts in order to avoid uncertainty and potential disputes as to the obligations of the merchant, or whether the language of section 14(b)(3) should be incorporated, verbatim, in the contracts.

Notice, Disclosure and Burden of Proof

(d) Whether the Commission should approve, disapprove or require modification of contract provisions imposing notice and disclosure requirements upon the contract shipper in the event of non-conference shipments or of suspected or alleged breach of contract, and provisions relating to the burden of proof as to whether he has violated the contract.

Termination for Breach

(e) Whether the contracts should permit carriers or conferences to terminate individual contracts for breach or alleged breach of contract by the merchant.

A separate proceeding was docketed to consider the above issues, and a panel of five examiners has served an initial decision giving its answers to the five questions.

The issues described in (a) and (c) are discussed together in the majority's report under the heading "Legal Right to Select the

Carrier." For convenience the discussion herein is re-separated into two parts called the "legal rights" issue and the "affiliates" issue. Dissent is to the majority's conclusions on both these issues.

1. The "legal rights" issue.

After the contract shipper has been determined, section 14b(3) requires that the contract cover only those goods of such shipper "as to the shipment of which he has the legal right at the time of shipment to select the carrier." The legal right to select defines the goods subject to the contract obligation. The right to select must be determined later at the time of shipment by external evidence in a specific transaction. The external evidence relates to arrangements the contract shipper, or merchant as he is called in many of the contracts, makes later on with the persons to whom the goods are sold or with the persons financing the sale of the goods subject to shipment.

The majority has resolved the problems connected with the necessities of such later determination on evidence, by the apparently simple expedient of drafting a five-paragraph section of which four paragraphs "will be required in all contracts" and a fifth containing two subparagraphs that "may be used by those conferences which desire a provision which raises a presumption where the signatory merchant is named in the bill of lading or export declaration or participates in the ocean routing."

After reading these prescribed paragraphs the parties to a contract will still have the practical problem of locating the legal right to select the carrier. The majority has prescribed four paragraphs using the statutory terms "legal right," the very terms needing definition, and then has made optional the use of the fifth paragraph defining how the legal right might be determined. At the moment of providing a useful guide, it backs away from the last step with only an optional provision.

The reasons for a dissent from all compulsory requirements have already been stated, but I further dissent from the decision to permit the optional paragraph only and no other as a solution to this problem. In reality, a very restricted choice is given by the option because variations of the option are not permitted. Many applicants submitted what should be permissible variations.

The optional paragraphs resolved the evidence problem by providing "the Merchant shall be deemed prima facie to have the legal right . . ." if he "arranged" the ocean shipment or if his name appears on the bill of lading or export declaration as shipper. There is no objection to the use of his name on the bill of lading or export declaration as evidence, nor in participation in arrangements. There is objection to the "prima facie" test which restricts the parties to an illusory and unworkable guide.

What is "prima facie" is at best indefinite, but some lack of clarity in the mandated paragraph is dispelled by the majority's disclosure of what it has in mind when it uses the term: "We are therefore approving a contract provision which will raise a rebuttable presumption, as it were, that the merchant possessed the legal right at the time of shipment to select the ocean carrier . . . Those who desire some provision relating to presumptions may use it . . ." A "rebuttable presumption" is the true basis of the optional provision, and is a true revelation of what is meant by "prima facie." Applicants who do not desire such a provision relating to presumption, but desire instead some other objective way of fixing the evidence, have no other choice. Many such provisions were applied for. The choice has been denied them with no finding that other alternatives have any of the effects prohibited by the first sentence of section 14b. All the majority does is announce its results without providing any consecutively thought out linkage to the statute.

It is entirely consistent with section 14b(3), on the contrary, to find that there is a compelling public interest and advantage to commerce in letting the bill of lading point to the true selector of the carrier, by means of contract provisions which deem the merchant to have the legal right to select if his name appears on the carrier's bill of lading as shipper.

The statute makes it necessary to determine the fact of who has the legal right to select the carrier. This simply means that there must be a finding of fact based on evidence, not that anyone has to establish final truth. The latter is rarely known. The evidence need only show what, as a practical matter, can be determined as to the identity of the shipper in any particular shipment. As a practical matter, taking the evidence of what carrier's bill of lading form has been chosen, what the merchant himself intends and has written on the bill of lading, and what is accepted by the master of the ship as shown by his signature simply provides a clear, definite standard by which to measure performance. What is more, the proposed provision is known ahead of time and will guide the parties' action so that their business conduct may be based on a known test. Both merchant and carrier know ahead of time that if a person is called a shipper on the bill of lading then he will be one under the contract. The need for presuming later can be avoided. The test is consistent with reality.

Implicit, but not stated in the prescribed provision, if used, is an assumption that it is wrong to deem the shipper on the bill of lading to be the shipper under the contract if this is a conclusive presumption. So the majority has set about reversing this presumption and substituting a rebuttable one, with the words "deemed prima facie." It is assumed that the right to select the carrier is an abstraction which somehow becomes reality and truth after presumption and rebuttal.

This seems to assume further that you can take the "legal right" to make a choice, or to select, and consider the act of choosing apart from other manifestations of power and conduct in the business world by rebutting and counter-rebutting your way to the truth. Many conference provisions examined avoid this by making conduct the guide.

The many respondents in these proceedings who made conduct the guide did so by applying for permission to use contracts which make it a breach of contract if the merchant ships on noncontract ships and his name shows up on a bill of lading as the shipper. These contract provisions are frozen out without any finding that they are detrimental to the commerce or contrary to any other prohibition of section 14b.

All the applicants have done is to say that if merchants have used their power and then have done certain things in a business transaction dealing with the sale of goods, and if as a result someone's name gets shown as a shipper on the bill of lading, then these actions constitute substantial evidence in that particular transaction that the person named really is the shipper who selected the carrier. When it is provided that the name typed in on a bill of lading form opposite the word "shipper" (which has been on all bill of lading forms I have seen) shall also mean that person had the legal right, it means the evidence is so substantial that it will overcome any other evidence as to who is the shipper with a legal right to select a carrier.

The advantage to commerce in such provisions is first that they recognize that the basic problem is one of proof where nothing is said ahead of time about the right to select the carrier and they fill in the gap, and, second, that they will bring added certainty to an area of past misunderstanding between carriers and merchants.

To understand how the gap in proof is supplied and how it can provide advance warning to merchants, we may start with the premise that the term "shipper" means the person who ships, who sends goods on their journey by having them placed on board a ship. My understanding is shared by the witness who testified in Docket No. 1111 as to financing as follows:

Q. * * * You have referred a number of times to shipper testimony and I am wondering if you can tell us what you mean when you say shipper?

A. When I refer to a shipper I was referring to a cotton merchant, merchandiser of cotton who is in the exporting business and he would be the shipper.

Q. Is it correct to say you mean the exporter as opposed to the foreign consignee?

A. Definitely. A shipper will be the merchant himself.

Q. Is that your understanding that that is the usual usage of the term in the trade?

A. I would say yes, the shipper would be the man that exports the cotton and presumably would be the man who sold the cotton.

(Transcript, p. 2467, line 25, and p. 2468, lines 1–13.) The understandings reflected above derive support from the ordinary dictionary definition which ought to do here as confirmation of our respective understanding: "one who ships goods; broadly, one who sends goods by any form of conveyance."

In ocean transportation such person, customarily and absent a special agreement, selects the conveyance, in this case a ship, by making arrangements commonly called "booking" with the carrier which provides the required ocean transportation.

If a blank line for the insertion of a name on a bill of lading after the word "shipper" is filled in by the insertion of a person or company's name, absent any other qualification, and taking such writing at face value, one would conclude that the person who made out the form and called himself a shipper was the one who selected the conveying carrier. As one of the attorneys being examined in Docket No. 1111 said, "The appearance of his name as shipper on the bill of lading necessarily means that he is asserting and exercising control over the movement of those goods . . . if it's an authorized assertion of control over the goods he has the right to select the carrier and has exercised it by booking the cargo . . ." (Vol. 3, Transcript, p. 30). Such a person usually arranges or participates in the arrangements for the ocean shipment, in other words.

Before a merchant prepares a bill of lading, he must decide which carrier's bill of lading form is to be used. After he decides he must give instructions that a bill of lading form with the selected carrier's name printed at the top be used and that the "leading marks necessary for identification of the goods" or other identifying symbols on the packages containing the property he has sold be written on the face of the form along with his name opposite the word shipper, to the extent required by the Carriage of Goods by Sea Act.[1] By this conduct, and

[1] April 16, 1936, c. 229, § 3, 49 Stat. 1208, 46 U.S.C. § 1303. Section (3) provides:

"(1) * * *

"(2) * * *

Contents of bill

"(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

* * *"

The law does not require the shipper to "furnish in writing" the name of the vessel, dates, ports or the shipper's or consignor's or the consignee's names and addresses, but by custom this information is written in at the same time as the cargo information is furnished.

by this exercise of power, the merchant makes a choice whether he does so as agent or principal. When the merchant instructs that his name be used as shipper in the carrier's bill of lading and his property be described therein, he has at that moment participated in the arrangement for ocean shipment and has asserted a right to choose a carrier. It is to avoid the consequences of this choice that contract shippers who have divested themselves of the right to select try to subtract from the implications of the proof supplied by the shipper designation of a bill of lading, so that it will no longer supply proof that they exercised any right to select. To justify the subtraction, it is pointed out that many other business practices depend upon the presence of the merchant's name as shipper in the bill of lading, even though he may no longer exercise the right to select.

The normal or prima facie conclusion about what the shipper designation proves may be distorted by these other business practices. Such practices as having a special agreement covering the conditions of sale, pricing, and financing security arrangements influence the location of the power to select the carrier. The power to select may be removed from the person whose name appears on the goods as shipper. Nevertheless, the customary practice in banking is "that the beneficiary should appear as shipper" in a bill of lading (Docket No. 1111, Exhibit 41, and Transcript, p. 2462, Testimony of Richards, and p. 2463, lines 5–10, 2466, lines 1–15, and 2478, lines 7–13). The beneficiary is the person who gets the money for the sale price. In banking transactions, the letter of credit may control the choice of the carrier, but what goes in the bill of lading may be less adjustable because of the requirements of the Carriage of Goods by Sea Act. The terms of the letter of credit, however, are subject to negotiation on these subjects. (Transcript, p. 2478, lines 14–25, 2479, lines 1–18, and 2481, lines 17–24.) Government programs are also influential. The Government's Commodity Credit Corporation requirements, for another example, create distortions by making the exporter "produce an on-board bill of lading in his name in order to receive the payment-in-kind certificates or to satisfy the bonded obligation to export the cotton under the cotton export sales program." A witness also stated, "It is a matter of virtual necessity therefore that the U.S. shipper's name appear on an on-board bill of lading regardless of whether he has any control, or right to control, the shipment." (Docket No. 1111, Exhibit 45, pp. 2 and 3, Statement of Eric A. Catmur, American Cotton Shippers Association. Supporting references were also made to U.S. Department of Agriculture, Commodity Credit Corporation Announcement CN–EX–18, section II–D–3, paragraph 6, signed by Raymond A. Iones, Administrator, FAS, and to: "United States Department of Agriculture, Agricultural Stabilization and Conservation Service Payment-in-Kind Regulations," Article 7, chapter XIV, Commodity Credit Corporation, subchapter C—Export Programs, Part 1482—Cotton, section 1482.610, par. (c), signed and dated June 19, 1963, by H. D. Godfrey, Exec. Vice Pres., CCC.) This testimony and these regulations prove, if anything, that either the reported practices have nothing to do with carrier selection, or, to the extent they do have an influence, they require distortion of traditional understandings based on the usual attributes of power in the shipper status. Section 14b recognizes this aspect of power when it refers to a contract shipper who "permits himself to be divested of the legal right to select the carrier." Implicit here is recognition of a need to divest the usual power to choose. If the divesting occurs the evidence should show that when the fact of choice changes, the appearance of choice should also change, rather than remain deceptively the same simply to accommodate to the lack of adaptability of letters of credit and governmental regulations.

In effect, there is a commercially accepted practice, at least where a beneficiary or exporter does not select the carrier, of distorting the proof about the usual powers of the shipper named in the bill of lading. This may be done to carry out the terms of a letter of credit or to accommodate governmental regulations, but it is at variance with the normally understood facts as the bill of lading terms show them.

The foregoing considerations to the contrary, there are good reasons why a common understanding of the term "shipper" should not be distorted by allowing a contract shipper, who divests himself of the right to select, to remain a shipper on a bill of lading.

When we deal with the information on the face of a bill of lading, we are not dealing with legal subtleties, but with general understandings of people in shipping departments of exporters who make out the documents, of people on the docks who read the bill of lading. The shipper is not helpless and has full control over this information under the Carriage of Goods by Sea Act as well as by his own conduct. If he has changed his rights or status, he is the one to know about it and tell the carrier. He can do this since, by law, the shipper or exporter must prepare the bill of lading, and should underwrite the accuracy of the information. Accordingly, it is important that the Commission impose on shippers a high degree of care and establish commonly accepted understandings to serve as proofs useful in administering contracts affecting the commerce of the United States.

If the bill of lading is to be a reliable shipping document I see no reason why the Commission should allow the plain meaning of the bill of lading to be distorted simply to facilitate financing or to accommodate governmental regulations, particularly where an element of deception may occur. On the contrary, the integrity of the bill of lading should be preserved, and other commercial practices should be adapted by revisions in letters of credit or in regulations. The bill of lading, if it is an accurate shipping document, should provide valid proof for the purpose of determining whether or not there has been performance of the merchant's contract. These two documents, as well as what is marked on the cargo packages, should be all consistent with each other. This can be accomplished by exporting merchants keeping their names off the bill of lading when they are not carrier-selecting shippers. If merchants are not accurate about their shipper status in the bill of lading, then they must either take the consequences of the factual representations for the purpose of performing the merchant's contract or prove beyond a doubt that a mistake was made.

One witness said difficulty arises "when another carrier is specified by the buyer and a conference attempts to apply a rule at variance with the terms of sale, which gives the buyer control of the carrier." The difficulty vanishes, however, if the merchant-seller does not agree to assume obligations at variance with the terms of his exclusive patronage contract. It is not the conference's attempt to apply a rule at variance with the terms of sale that creates the difficulty, but the seller's choosing terms of sale wherein he acts as buyer's agent in selecting the carrier contrary to his obligation as a merchant and the seller's activity in preparing the bill of lading. The buyer, consistently with section 14b, may reserve the right to select the carrier and the merchant may relinquish the right, but the buyer must do so independently and may not involve the merchant in the selection, and the merchant must stay out of the activity surrounding the choice of the carrier. There is no interference here with sales contracts, but only a requirement that the merchant make his actions and his papers consistent with his choice not to assume the shipper's right to select the carrier. If a merchant wants to retain control of the goods as against the buyer for security purposes, then he may not give up to the buyer one of the chief attributes of ownership, the power to control the choice of a carrier, and may not disguise the relinquishment by continuing to call himself a shipper to avoid obligations under the merchant's contract.

The majority refers to the "House Committee Report" and also requires that nothing in a contract "shall require the merchant to forego a sale unless the shipment is made by a conference vessel." Reference is made to page 9 of the House Report on section 14b before enactment. What the Report said was that its provision "prohibits a conference or carrier from requiring a contract signatory to forego a sale unless shipment is made via conference vessels." The contracts reviewed do not require forgoing a sale, so the prohibition is satisfied. Merchants are still free to make any type of sale they want. All they have to do is prepare a precise bill of lading and stay out of the arrangements for ocean shipment.

Provisions along the lines discussed are also consistent with past decisions of this agency and conform to the congressional intent of section 14b.

The proposed shipper test is consistent with at least two decisions of the Commission or its predecessors wherein resort was had to the bill of lading to prove who was the shipper. The former Board said: "We deem it highly desirable that simple tests and standards be applicable [in determining when a given shipment is or is not covered by the shipper's agreement]. To this end we consider that the contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper." *In The Matter of The Statement of Japan-Atlantic & Gulf Freight Conference Filed Under General Order 76* (1955), 4 F.M.B. 706, 740, reversed *Isbrandtsen Company* v. *United States* (U.S. App. D.C. 1956) 239 F. 2d 933, aff'd 356 U.S. 481. (The above statement was not involved in the reversal.) The Board also had the following to say: "Respondents claim that Isbrandtsen is not a shipper and therefore can not claim that he has been discriminated against as a shipper. Isbrandtsen's name appears as a shipper on the bills of lading in evidence . . ." *Isbrandtsen Co., Inc., et al.* v. *States Marine et al.* 6 FMC 422 at 447 (1961), aff'd 313 F. 2d 906, *certiorari denied*, 374 U.S. 831 (1963).

The proposed solution, consistent with these past decisions, contributes a practical solution of the difficult problem of deciding, among opposing positions, who selects the carrier in any given case. Reconciliation of competing claims was described as follows in the Report of the Committee on Merchant Marine and Fisheries to accompany H.R. 6775, which later became section 14b:

> Some shippers complained that a few conferences were extreme in their demands on contract shipments requiring shippers to use conference vessels even if the shipper had no legal right to choose the carrier. On the other hand, steamship companies also complained that unscrupulous shippers would use conference vessels at the contract rates when it suited them or ship by nonconference lines without loss of contract rights merely by changing the terms of sale. It was extremely difficult to reconcile the two opposing requirements of this basic feature of the shipping contract. 87th Cong., 1st Sess., Report No. 498, p. 9; *Index to Legislative History of the Steamship Conference/Dual Rate Law*, p. 120, 87th Cong., 2nd Sess., Senate Doc. No. 100.

These comments reflect a long-standing controversy over whether certain shipments, notably those consisting of goods sold on freight-on-board or freight-at-side of ship terms, were covered by exclusive patronage contracts. It was hoped the proposed language of section 14b(3) would help resolve these disputes. Still the problem of proof of the right to select the carrier remained. The bill-of-lading shipper test appeared to offer a way out on the ground that the bill of lading correctly points to the true shipper who selects the carrier.

A frequent argument we heard was that the record amply demonstrates that the question of who has the legal right to select has nothing to do with whose name appears on the bill of lading or who arranges the shipment. This is undoubtedly true, but it does not preclude action by us which makes the act of selection have something to do with whose name gets on the bill of lading. Another point to make is that the merchant does have something to do with the selection and his name is there because of his activities, and because he wants benefits inconsistent with such activities. The merchant does have a choice as to whether he will act as agent for someone who is not a party to the contract. If the agency requires the merchant to deliver goods to a nonconference vessel and the securing of a bill of lading naming the merchant as "shipper" the agency is inconsistent with the contractual obligations to the conference and should not be accepted by him.

It was hoped that the Commission would provide some help in reconciling the two opposing requirements referred to by the Committee, but it is feared the majority has left us just as far from a solution as ever, because its "prima facie" provision actually will be productive of delays, arguments, and controversies. The provision is too indefinite for practical purposes.

Ideally, a contract should be drafted so that the actions constituting performance can be tested by objective standards. It should be written in terms of future acts. It should require people to do specific things at certain times and in a prescribed manner. A contract which is not specific and certain as to the actions required may fail for want of definiteness or impossibility of ascertainment of the required performance. Making legal rules of evidence, such as "prima facie" and legal conclusions such as "legal right," the subject of a contract obligation does not meet the conditions of objectivity and definiteness. They only postpone ascertainment of the facts which should be speedily ascertainable in the commercial world. A contract which makes the ascertainment of performance depend on a presumption subject to rebuttal or on a legal right simply converts the test of performance into claims and counter-claims. A right of rebuttal invites denial that one had a "legal right," itself an intangible concept, and leads to further rebuttal as to the contrary of the contrary, etc. The proofs of carrier selection will have to consist of a miscellany of cables, shipping papers, half-remembered telephone conversations, oral testimony, correspondence, both available and unavailable, and a host of who-struck-John arguments by merchants about who was to select the carrier and when and how he was to do it. I would reject this program of shifting rebuttals in favor of a practical objective standard.

The substitute language, by giving the appearance of proof when it refers to the shipper test, and by taking the test away with the rebuttal right, leaves us just where we were before Congress acted—in the middle of an argument over the merchant's shifting status. We are, furthermore, right back where we started with no practical, objective means of precluding what hearing counsel described as "the even more odious practice of having the merchant make a nonconference shipment for the nonsignatory and claim it was not his shipment even though he is named as 'shipper' because by the terms of sale, he did not have the 'legal right' to select the carrier." The prima facie provision gives such a "claim" a dignity it would not otherwise have.

The need for an objective standard is so compelling that the bill-of-lading shipper test might well be applied as a conclusive test.

For these reasons, I think the proposed requirement is contrary to the public interest and detrimental to the commerce of the United States.

2. The "affiliates" issue.

In an effort to define the persons to be obligated as "all shippers and consignees" (the terms used in the first sentence of section 14b) and to become "the contract shipper" (under item (3) of section 14b), some contracts proposed to cover "the Merchant, its agents and its subsidiary, associated or parent companies." This was called for convenience the "all affiliates" clause. Other contracts proposed to cover only the shipper named at the end of the contract above the space for the signature (the contract referred to, it is to be noted, also contained an unclear, undefined reference to evasion by subsidiaries). Between these extremes were various provisions attempting to define the extent of corporate control which would cause the contract's obligations to apply to a merchant. Each should be potentially permissible, without prejudgment. In the inbound trading contracts, the provision should take into consideration the laws and customs of the foreign areas where the signatory merchants would be located. In the outbound trading contracts, the provision should accommodate itself to contemporary corporate organization and control in this country and of each signatory's peculiar situation. The majority does not permit such flexibility.

There is no difficulty in saying that the all-affiliate clause in contracts with U.S. merchants is contrary to the public interest because

(1) it is uncertain as to its applicability and therefore productive of disputes, delaying expeditious closing of transactions; (2) it is oppressive in its operation by binding companies having little commercial identity of interest with the signatory company; and (3) it will not accomplish its professed objective of preventing fraud and evasion by merchants. If anything, the broad clause will invite fraud by its extreme demands. Evasion, like bad morality, is not stopped by private contract any more than by laws. Short of an "all affiliates" clause, any affiliate provision should be permitted which confines the corporate affiliates to be bound to those over which the signatory merchant exercises effective working control over management decisions affecting ocean transportation (to be ascertained by tests to be negotiated), or such companies (decided upon through negotiation before the contract is signed) as are named in the contract at the end under the signatures or elsewhere. The latter will assure certainty as to the meeting of the minds of the parties as to just what entities are to be obligated. Under either guide, there is no impediment to the conference seeking a separate contract with those affiliates which the merchant excludes from the listing on his contract. These standards have been applied in the review of the contracts further on in this report.

The issues described in (b) of the order initiating Docket No. 1111 are discussed in the majority's report under the heading "Merchant's right to use owned or chartered vessels." I concur with the majority's conclusion that contracts should allow carriage on owned or chartered vessels of merchants and that there should be a six months or more charter requirement.

The issues described in (d) of the order initiating Docket No. 1111 are discussed in the majority's report under the two headings "Disclosure by merchant of facts relative to the routing of a particular shipment" and "Burden of proof." I concur generally with the majority's conclusion that we should not permit use of any provision which requires the merchant to sustain the burden of proof of innocence of carrier claims of breach of contract. The merchant may be required to make relevant papers, such as bills of lading, available and to disprove established evidence of breach of contract, but no more. What should be permitted or forbidden in any case should depend on the applicant's contract proposals.

The issues described in (e) of the order initiating Docket No. 1111 are discussed in the majority's report under the heading "Damages for Breach." Authority to "not permit clauses which suspend a merchant's rights but continue his obligations as an additional penalty for breach of his contract" is asserted, based on derivation from a statement in a Senate Committee report. Such a statement is not law and, insofar as the portion quoted by the majority says the bill that became section 14b "would allow no such penalties," it is in error. Dissent is to the majority's decision to forbid any reasonable termination or penalty provision to enforce damages for breach provisions.

A reasonable termination provision is one which gives the conferences a right to terminate after an arbitration followed by a finding that a breach of contract is proven and a refusal to pay assessed damages. A provision that if the merchant who has breached his contract, or who has refused to adjudicate a claimed breach, and does not pay promptly the liquidated damages due, or if he breaches his contract twice in a year, his contract shall be terminated and thereafter be required to pay the noncontract rate, is also reasonable and should be permissible if some means of establishing the breach besides a mere assertion by the carrier is provided. Provisions which penalize by keeping the merchant obligated, assessing damages, and suspending his rights to reduced rates might be permissible if suspension is limited until damages are paid or the dispute adjudicated, and if there is provision for a refund with interest if the adjudication goes against the conference. I would permit, but the majority would not permit, these provisions or variations thereof which on examination and analysis were shown not to involve the prohibited effects of section 14b. The majority makes none of the necessary findings as to prohibited effects and justifies its conclusion solely on an interpretation of section 14b(5), apparently supported by legislative intent as an aid to statutory construction.

It is impossible for me to equate the statutory limitation on damages in item (5) recoverable for breach with a provision concerning what happens when a merchant breaches his contract or refuses to pay damages assessed, and concurrently refuses to adjudicate the dispute. We should distinguish between damages and penalties. Refusal to allow such penalties, which have nothing to do with the measurement of damages, would have to be expressly enacted into law to be binding on the Commission. The added prohibition was not put in the law and may not be put there where the legislative intent is so clearly absent. The majority's use of statements showing legislative intent as an aid to statutory construction is applicable only where there is an ambiguity about the words of the enacted law. There is no such ambiguity here. The damage limitation is clear and may not be stretched to disallow additional penalties for refusal to pay damages or to adjudicate disputes. Therefore, this statement provides no basis for denying an applicant permission to use other types of penalty provisions for refusal to adjudicate or to pay. The Senate Committee's opinion that the bill "would allow no such penalties" never found its way into the law, and we should not put the prohibition in the law if Congress didn't.

The majority also discusses, as generalized issues, several additional issues to the five referred to the panel of examiners in Docket No. 1111. These issues relate to (1) prompt release of shippers from exclusive patronage contract obligations if the conference cannot furnish transportation when needed; (2) a prohibition against rate increases before at least 90 days after a rate becomes effective; (3) a prohibition against requiring shippers to divert shipments from a "natural routing" to give patronage; (4) a limitation on the amount of damages chargeable for breach of contract; (5) the right of the shipper to cancel his contract on 90 days' notice; (6) the amount of the differential between contract and noncontract rates; and (7) exclusion of certain bulk cargoes from exclusive patronage contract obligations.

Without agreeing with the reasoning, concurrence with the majority's conclusions in regard to items (1), (3), (5), and (6) is possible, except, of course, to the majority's requirement for the use of standard provisions on the above subjects.

With regard to item (2), it is impossible to read-in any "overriding intent of the statute" that a prohibition against an increase "before a reasonable period, but in no case less than 90 days" is translatable into a 90-day notice requirement for rates subject to contracts. The statutory notice provisions of section 18(b)(2) speak for themselves and are all the law requires. No contract provision is needed covering such provisions. The required 90-day notice clause requires more than what the Commission may permit applicants to use.

With regard to item (4) there is a discussion below indicating the belief that suspensions of rights while continuing a merchant's obligations and similar penalties for breaches of contract, which are distinguishable from damages, are normal and permissible methods for enforcing contract obligations. Penalty provisions may be permitted as long as they do not automatically invoke the penalty and require the merchant to sustain the burden of proof of innocence simply on the basis of a carrier's claim of breach of contract.

Lastly, with respect to item (7), we have no authority to make a general exclusion of liquid bulk petroleum products in less-than-full shipload lots. The statute says the exclusion of commodities must be allowed by the Commission "upon a finding that economic factors so warrant." Economic factors in any given trade covered by a contract must be looked into and a specific finding made, instead of the proposed across-the-board exclusion. The need for findings cannot be avoided by statutory interpretation involving speculation as to what Congress intended.

The following conclusions as to whether or not the Commission should permit the use of specific contracts are subject to the foregoing reservations as to the interpretation of section 14b, even though not expressly referred to in the text that follows.

In the third part of this dissent, each of the 24 types of contract forms is reviewed and conclusions made as to whether we should permit its use. Such procedure is required as a consequence of the belief that under section 14b the Commission's duty to each applicant is to give individual consideration to its contract and that the majority has not discharged this duty properly.

The contracts are taken up in the order of dates on which the examiner served his opinion on the contracts.

The contracts subjected to this review are the contracts initially submitted by the applicants, plus the modifications made as of the close of the hearing with an applicant's consent, and plus the modifications made after the examiner's decision with the applicant's consent as evidenced by a failure to except to the modifications.

The following opinions as to the permissibility of these contracts are qualified by the preceding observations on the generalized issues applicable to contracts.

Docket Nos. 1033, 1034, 1037, 1039:

Four conferences applied for permission to use one contract form for trading from North Atlantic ports to French ports, Mediterranean ports, Baltic ports, and United Kingdom ports in Europe.

The applicants' contract in Article 1(a), as I understand it, requires the parties to negotiate and agree to the affiliates to be obligated and to name them in an "Appendix A" *before* the contract is signed. Disagreement later over the exclusion of an affiliate may not be made the subject of a breach of contract action, if the contract is to be permissible.

Additionally, Article 1(a)(iii) makes the merchant list in Appendix "B" all other affiliates not to be obligated. The latter requirement according to the record is to assist the conference in solicitation for cargo. Such purpose is so remote from the purposes of section 14b and so burdensome on merchants, particularly the large corporate complexes, that it is considered a detriment to commerce and should not be permitted.

Article 1(c) conforms generally to section 14b(8) and excludes liquid bulk cargoes, but also includes petroleum products in less than shipload lots. The examiner, in response to an intervenor's presentation, found that economic factors warranted the exclusion of petroleum products as authorized by item (8). Technical factors differentiating the loading, handling, transporting, and unloading of petroleum products from other types of packaged commodities were proven.

Technical factors are not "economic factors;" nevertheless, the technical factors shown have an economic effect on the costs of loading, storing, and berthing of ships and on their handling and storage facilities to accommodate the needs of petroleum shippers sufficiently to sustain the examiner's finding that economic factors warranted a revision of this contract. The examiner's revision is sustainable on the facts of these dockets.

Article 5 requires a merchant to apply to "all" carriers for space, but the examiner changed this to require application to "one or more" carriers. The "all" is excessively burdensome to a merchant, thus a detriment to commerce, and we should not permit the "all" carrier application for space.

Article 8 makes the merchant prove, simply on the basis of a question arising, that he did not divest himself of the right to select a carrier. The conference under Article 7 obligates the merchant to make records available, and the addition of a burden of disproof in response to a question alone, contrary to the normal rule that the person making the charge has the burden of proof, is oppressive to the point of being against the public interest. The examiner's refusal to permit Article 8 should be sustained.

Except as noted with respect to Articles 1, 5, and 8, we should permit the use of the contract in the above dockets.

Docket Nos. 1055, 1056:

Two conferences applied for permission to use one contract form for trading from Pacific coast ports to ports in the Republic of the United States of Indonesia. The contract available for review did not show any signature page, but if the all-affiliate clause is not used and each party to be obligated is named, we should permit the use of the contract in the above dockets. (It is noted this contract was extensively revised by the examiner, but no exceptions thereto were taken.)

Docket No. 1002:

One conference applied for permission to use a contract form for trading from ports on the Pacific coast to ports in Japan, Korea, Taiwan, Siberia, Manchuria, China, Hong Kong, Vietnam, South Vietnam, Cambodia, Republic of the Philippines, and Thailand.

We should permit the use of the subject contract in the above docket.

Docket Nos. 1012, 1020, 1101, 1106:

Four conferences applied for permission to use two contract forms, one for outbound trade and one for inbound trade between India, Pakistan, Ceylon, and Burma area ports and U.S. Atlantic and Gulf of Mexico ports.

Article 6, fifth paragraph of the outward contract, obligates the merchant to bear the burden of proof if he has to defend himself against a charge he did not have the right to select the carrier. The fourth paragraph requires the merchant to furnish documents. For the reasons noted in the discussion of the contract subject of Docket Nos. 1033, 1034, 1037, and 1039, the use of this provision should not be permitted.

Except as noted with respect to Article 6 above, we should permit the use of these two contracts.

Docket Nos. 1005, 1023, 1031, and 1050:

Four conferences applied for permission to use four contract forms (three conferences use the Far East Conference Merchant's Rate Agreement with minor modifications) in trading between the U.S. Pacific, Gulf of Mexico, and Atlantic coasts to the Republic of the Philippines; from the U.S. Atlantic and Gulf of Mexico to the Far East (Japan, Korea, Taiwan, Siberia, Manchuria, China, Hong Kong, Vietnam, Cambodia, and the Republic of the Philippines); from Hong Kong, Amoy, Foochow, and south, Formosa, and Vietnam (excluding Saigon) to U.S. Atlantic and Gulf coast; and from the same areas to U.S. and Canada Pacific coast and Hawaii.

We should permit the use of this contract, but because it is the first contract to require, for practical purposes, a conclusive presumption test to determine the right to select a carrier, some added comments are offered.

Article 1(c) makes the bill of lading "shipper" the one who has the legal right to select the carrier, provided there is no such presumption if "the Merchant proves" that his name on the bill is for reasons not related (1) to retention of a security interest and (2) to the transaction between the merchant and his vendor or vendee or the carrier. The proviso to the conclusive presumption in effect contains two exceptions which, for practical purposes, all but cancel out the proviso and leave the conclusive presumption intact. One may complain that this is an overly-clever technique, but the result is still permissible. It has been indicated in the discussion hereinabove that a conclusive presumption might be permitted and the present proposal comes about as close to a conclusive presumption as possible. The use of presumptions as a basis of contract obligations has been criticized above. Possibly the use is inevitable because Congress has injected "intent" as one of the elements of a breach of contract ("with intent to avoid his obligation").

Normally, intent is used as an element of the violation of criminal laws and is not material in commercial transactions. To make the contract commercially effective, some method of proving speedily this elusive concept is imperative. A contract obligation concerning the proofs to be used to establish a right may be inevitable, for all its shortcomings, but the majority's effort to confine the use of the evidence to shifting rebuttals prevents any effective execution of section 14b(3). It is a detriment to commerce to provoke commercial disputation by means of a provision that cannot be effectively enforced by anyone.

I dissent from the majority's action in not permitting the use of this applicant's Article 1(c) which can actually be enforced. We should permit the use of this contract.

Docket Nos. 1001, 1006, 1053:

Three conferences apply for permission to use one contract form in trading between the Gulf of Mexico and the Mediterranean and French Atlantic ports and between South Atlantic and United Kingdom and Eire and Continental European ports. The liquidated-damages provision attempts to conform with section 14b(5) by its Article 9(a) in which it "is hereby stipulated and agreed that 'the cost of handling' shall be equal . . . to 33⅓% of such freight charges, except that either party, at its option, may elect to prove the actual cost of handling . . ." This should not be permissible because the law refers to "cost," not to arbitrarily chosen amounts even if based on "the experience of the carriers or on estimates." Cost means what would have been actual cost, which is determinable from schedules of charges, and nothing else will do. The merchant is entitled to this deduction from freight otherwise applicable, and it is unfair to ask him to gamble on what he can prove in an expensive arbitration proceeding where the burden of proving the cost may be on the merchant even though he has no easy way of getting the handling cost evidence he will need. The terminal and stevedoring charges are usually billed to the carriers, and the rate schedules are most easily available to the carriers. The use of the third sentence of Article 9(a) should not be permitted. It is contrary to section 14b(5) to use an arbitrarily fixed amount instead of a reasonable estimate of handling costs.

Except as noted with respect to Article 9, we should permit the use of the contract in the above dockets.

Docket Nos. 1051, 1052:

Two conferences applied for permission to use one contract form in trading from Straits of Malay areas to Pacific coast ports and New York (inbound).

The Commission should permit the use of the contract in the above dockets.

Docket No. 1007:

One conference applied for permission to use a contract form in trading between the Pacific coast ports of the United States and the

United Kingdom, Ireland, the Scandinavian Peninsula, and Continental Europe.

The applicant failed to include a provision covering natural routing. Section 14b(4) requires the Commission to find, before it may permit use of a contract, that the contract "expressly . . . does not require" diversion of cargoes "from natural routings." Since there is no express provision along these lines in this contract, I would not permit use of this contract unless the provision is included. There is a great deal of logic and plausibility to the applicant's argument that the mandate of item (4) is in negative terms so an absence of any provision requiring diversion is permissible. Unfortunately, the statute, by requiring us to find the contract expressly covers the subject, precludes a disregard of the mandate for reasons of logic.

In other respects we should permit the use of the contract in the above docket.

Docket No. 1046:

One conference applied for permission to use one contract form in trading between the west coast of Italy, Sicily, and Adriatic ports and the U.S. North Atlantic range of ports. We should permit the use of the contract in the above docket.

Docket Nos. 1058 and 1059:

One conference applied for permission to use a contract form covering wine and spirits commodities and another contract covering general commodities in trading westbound in the North Atlantic between the United Kingdom and Eire and the U.S. Atlantic coast ports.

We should permit the use of the contract in Docket No. 1058, subject to the revision made by the examiner in Clause 9 which, it is understood, applicants "do not disagree with."

We should also permit the use of the contract in Docket No. 1059, subject (1) to the revision of Clause 8 suggested by the applicants and adopted by the examiner, and (2) to the addition of the arbitration clause proposed by applicants in their motion of February 20, 1964.

Docket Nos. 1015 and 1017:

Two conferences applied for permission to use one contract form in trading from Atlantic and Gulf of Mexico coast ports to ports in the State of Singapore, Federation of Malaya, Thailand, Colony of Sarawak, Colony of British North Borneo, and the British Protected State of Brunei.

Each applicant proposes a provision giving it the right to increase rates or impose a surcharge on certain contingencies on less notice than authorized by section 18(b). The examiner correctly refused to permit such provisions. Whatever may be allowed by section 18(b) is allowed by statute regardless of this contract, but inconsistent contract obligations should be taken out. As the examiner notes, the requirements of section 18(b) need not be repeated in the contract.

We should permit the use of this contract in the above docket, modified by the examiner.

Docket Nos. 1026, 1027, 1028, and 1029:

Four conferences apply for permission to use one contract form in trading from ports in Indonesia (except the east coast of Sumatra between Langsa and Indragi) to ports on the Atlantic coast and on the west coast of North America. The Deli-New York agreement also includes Gulf of Mexico ports.

We should permit the use of the contract in the above dockets.

Dockets Nos. 1042, 1043:

Two conferences apply for permission to use one contract in trading between ports in Argentina, Paraguay, and Uruguay in South America and ports in the U.S. Atlantic coast and the Gulf of Mexico.

The contract in Docket No. 1043 covers shippers from the Great Lakes area. The facts showed that at the time of the hearings only one member of the conference actually served the Great Lakes area, providing service only once each month during the 8-month navigation season. The conference operates on a two-thirds voting rule. Rate questions would be decided by 13 of the 14 conference members. This means that carriers not serving the Great Lakes area would fix the rates and might even fix rates at a level at which the member carrier could not attract business. The lack of interest in Great Lakes trade by such a substantial number of carriers dictates that the conference not be allowed to tie up shippers to an exclusive patronage contract until it can show a larger commercial interest.

Other evidence showed that one shipper located in the Great Lakes area shipped from Gulf, Atlantic, and Great Lakes ports and if it should be tied in to the conference on the Great Lakes to get service elsewhere, it would be tied in with inadequate service. The possibility of inadequacy was reinforced by a showing that the conference carrier in the area had imposed a limitation of the amount of the shipper's cargo it would accept, preventing the shipper from making a sale for a larger amount of cargo, for lack of other available carrier space.

The proposed restraint on shippers and control over rates by parties without a more serious interest in the trade and a better ability to handle shipments would be a detriment to commerce.

We should not permit the use of the contract in Docket No. 1043 unless its scope is changed to omit any requirement that Great Lakes area shippers must sign up. In other respects we should permit the use of this contract in these dockets.

Dockets Nos. 1013, 1014, 1016, 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1054, 1018:

Thirteen conferences applied for permission to use one contract in trading between Atlantic and Gulf of Mexico coast ports and ports in Central America and the Caribbean area and Venezuela and the north coast of Colombia ports and another contract in trading between Atlantic and Gulf of Mexico ports and the west coast of Colombia, Ecuador, Peru, and Chile.

We should permit the use of the contract in the subject dockets.

Docket No. 1049:

One conference applied for permission to use a contract in trading from ports on the U.S. Atlantic and Gulf of Mexico to ports in Australia and New Zealand.

This contract, as it is now before us, covers Great Lakes ports even though the conference agreement of association does not authorize rate-fixing agreements covering such ports. The contract subject of the initial application did not include such coverage. Until the conference agreement is expanded and the Commission thereafter permits the use of this contract in Great Lakes trading based on the facts shown to exist at the time of a further application for permission to use a contract tieing shippers in the Great Lakes area, permission should not be given to use the contract. There is not enough record evidence for a decision on Great Lakes coverage at this time.

Subject to the exclusion of an obligation to ship via conference carriers from the Great Lakes area, we should permit the use of the contract in this docket.

Dockets Nos. 1003, 1009, 1010. 1011, 1018, 1035, 1040, 1041, 1044, and 1057:

Ten conferences apply for permission to use one contract form in trading between Pacific coast ports and ports in Latin America, other than ports on the east coast of South America.

Each applicant's Articles 1 and 3 require the merchant to "give all his patronage to the carriers." This language is not equivalent to the requirements of section 14b that the contract "expressly" cover "only those goods of the contract shipper" of which he has "the legal right at the time of shipment to select the carrier." This contract is either silent on the subject of coverage, as delineated by the "legal right" to select provision, or is so uncertain as to be meaningless. The reference to "patronage" in each applicant's Article 1 has no clear or necessary relation to "those goods" or to legal rights therein which Item (3) prescribes to describe the necessary obligations of the parties. Under section 14b(3) the parties must examine evidence as to the merchant's other agreements with respect to the goods to find out whether the contract obligation to select a conference carrier applies or not, and may not be compelled to define anything so vague as "patronage," before the obligation to select can be established. Each applicant's provision does not comply with section 14b(3) and may not be permitted.

Article 6 provides that if no carrier "is able to furnish reasonably prompt space for specific shipments when requested by the shipper" the latter will be free to use nonconference ships. Section 14b(1) requires the contract to permit "prompt release of the contract shipper" under the same circumstances. In most cases an exact conformity with statutory language would be unimpeachable, but in this case it is believed Congress meant that applicants should do a little more than embody a source of dispute over what is "prompt" in the contract by establishing an ascertainable period of time, and that the Commission should review the proposed time limit in the context of the particular circumstances. A provision which specifies only "prompt" and does not specify a time should not be permitted because it does not comply with section 14b(1).

Except as noted with respect to Articles 1 and 6 above, we should permit the use of the contract in these dockets.

Docket Nos. 1109, 1110:

Two carriers applied for permission to use a contract form in trading between U.S. ports and Turkish ports. During the proceedings the Ipar Transport tariff and application to use a contract was withdrawn, leaving the only respondent-applicant D. B. Turkish Cargo Line. The latter's contract is the only one subject to this report.

We should permit the use of the contract only as modified by the examiner in this docket.

Docket No. 1081:

(This docket was the first in the order of dates in which the examiner served his opinion.)

One conference applied for permission to use a contract form for trading from the west coast of India and Pakistan to U.S. Atlantic and Gulf of Mexico ports.

Subject to the comments herein, the Commission should permit the use of the contract in the above docket.

This report is confined to a discussion of exclusive patronage contracts and not to conference agreements under section 15 of the Act.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET NO. 367

CALIFORNIA PACKING CORPORATION, ET AL.

v.

HAWAII/ORIENT RATE AGREEMENT

REPORT

(Thomas E. Stakem, *Vice Chairman;* Ashton C. Barrett, *Commissioner;* James V. Day, *Commissioner*) *:*

No exceptions having been filed to the initial decision of the Examiner in this proceeding, and the Commission having determined not to review same, notice is hereby given, in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the decision became the decision of the Commission on March 19, 1964.

It is ordered, That the application of Hawaii/Orient Rate agreement to waive collection of certain undercharges be and is hereby granted.

John Harllee, *Chairman* and John S. Patterson, *Commissioner*, *dissenting:*

The Commission has ordered that the application of the conference called Hawaii/Orient Rate Agreement, filed on behalf of States Steamship Company, American President Lines, Ltd., and United States Lines Company, to repay to shippers certain overcharges should be granted. The Commission has determined not to review the Examiner's decision that the applicant need not collect from shippers amounts in excess of $28 per 2,000 pounds for the transportation of canned pineapple and canned pineapple juice from Honolulu, Hawaii, to Yokohama and Kobe, Japan, during the period January 1, 1963, to March 31, 1963, inclusive. The reason assigned is that the shippers were not required to pay freight on the basis of the rates and charges specified in each carrier's tariffs on file with the Commission and published and in effect at the time because a rate established by the carriers in a tariff page which "the conference's secretary, through oversight, failed to file * * * with the Commission" was justifiably charged instead.

The facts are quite clear that the rate the shippers are required to pay is not based on the duly published and effective tariffs, but on an unfiled and unpublished tariff.

Section 18(b)(3) of the Shipping Act, 1916, enacted by Congress in Public Law 87–346, approved October 3, 1961, provides as follows:

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

Whatever rights Rule 6(b) of the Commission's "Rules of Practice and Procedure," effective July 31, 1953, may give, the rule may not sanction disregard of the clear terms of the above Congressional enactment.

It is our opinion that the facts in this case show beyond any doubt that the carriers are collecting and receiving a less compensation for the transportation of property than the charges specified in their tariffs on file with the Commission and duly published and in effect at the time. For these reasons we dissent from the determination of the majority of the Commission to not review and reverse the decision of the Examiner in this docket.

By the Commission, March 19, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 367

HAWAII/ORIENT RATE AGREEMENT

v.

CALIFORNIA PACKING CORPORATION, ET AL.

Application of Hawaii/Orient Rate Agreement on behalf of member lines States Steamship Company, American President Lines, Ltd., and United States Lines Company, pursuant to rule 6(b) of the Commission's Rules of Practice and Procedure, to waive collection of undercharges, granted.

E. N. Bowen for Hawaii/Orient Rate Agreement.

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

Hawaii/Orient Rate Agreement (the conference) is an approved steamship conference (Agreement No. 8290), the member lines of which carry freight from Hawaii to Yokohama and Kobe, Japan, and other ports. On behalf of three of its member lines, who have concurred in the application, States Steamship Company, American President Lines, Ltd., and United States Lines Company, it here applies for permission to waive collection from all shippers for whom its member lines carried canned pineapple and canned pineapple juice from Honolulu, Hawaii to Yokohama and Kobe, Japan, during the period January 1, 1963 to March 31, 1963, inclusive, of amounts in excess of $28 per 2,000 pounds (the rate at which freight was collected) for such carriage. These shippers are named, and have all concurred in the application.

This is what happened. The regular conference tariff rate (established by Freight Tariff No. 1, First Revised Page 20, effective June 10, 1957) for canned pineapple and canned pineapple juice, Honolulu to Yokohama and Kobe is $49.25 per 2,000 pounds. By Second Revised Page No. 20–A of Freight Tariff No. 1, the conference tem-

[1] This decision became the decision of the Commission of March 19, 1964.

porarily superseded this rate with a special rate of $28 per 2,000 pounds. This rate became effective May 21, 1962, and according to the tariff terms, expired on December 31, 1962, when the regular $49.25 rate automatically became effective again.

Prior to December 31, 1962, however, the conference printed and distributed a tariff page correction (No. 178) which, had it been filed with the Commission, would have prevented the $49.25 rate from becoming effective on January 1, 1963, by extending the special $28 rate to March 31, 1963.

The conference's secretary, through oversight, failed to file this corrected page with the Commission. During the period January 1, 1963, to March 31, 1963, canned pineapple and canned pineapple juice, Honolulu to Yokohama and Kobe was booked at the $28 special rate which the carriers, their agents, and the shippers believed had been filed and was the effective rate, and the carriers collected from shippers at the $28 rate.

In the latter part of March, 1963, the Conference discovered that it had not filed the $28 rate, and attempted to do so retroactively so as to prevent the applicability of the $49.25 rate from midnight of December 31, 1962. The Bureau of Foreign Regulation during the last week of March 1963, correctly rejected a page naming the $28 rate period May 21, 1962 (the initial effective date of the $28 special rate) to March 31, 1963, *because it was retroactive*, and hence its filing would contravene section 18(b) of the Shipping Act, 1916.

The *bona fides* of the conference and its member lines with respect to their intention of continuing the special $28 rate beyond December 31, 1962, is shown by the fact that on April 1, 1963, the conference filed Ninth Revised Page No. 20, "issued in lieu of Eighth Revised Page No. 20 rejected by the Federal Maritime Commission." This revised page named the $28 rate for the period April 1, 1963, to December 31, 1963. It was accepted, and (having subsequently been extended) is now effective until June 30, 1964. The facts, as above set out, are substantially the same as those considered by the Commission in *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line, Inc.*, 7 F.M.C. 62, (January 23, 1962) and *Martini & Rossi S.p.A., et al.* v. *Lykes Bros. Steamship Co., Inc.*, 7 F.M.C. 453 (November 16, 1962), and decision here is ruled by the Commission's decisions in those cases.

In *Martini & Rossi*, the Commission summarized the facts as follows:

> During the month of January 1962, the carrier * * * had on file with the Commission its Special Rate Circular No. 2 containing rates for commodities such as those here involved. This Circular had an expiration date of January 31, 1962, after which the higher rates published in Lykes' Westbound Freight Tariff No. 1, also on file with the Commission, would apply absent an extension of the

Circular. Lykes intended to extend the lower rates but * * * failed to make the necessary filing with the Commission.

Lykes' employees continued to solicit cargo on the basis of the lower rates, apparently in ignorance of the fact that Circular No. 2 had expired. On discovering the situation Lykes filed Special Rate Circular No. 3, effective February 20, 1962, reinstating the lower rates, but in the interim the shipments here in question had been booked, transported and paid for on the basis of the lower rates. These were not the rates legally applicable to the shipments, since Lykes' Westbound Mediterranean Freight Tariff went into effect, albeit inadvertently, on February 1, 1962, and was in force until February 20, 1962. Having received less than the lawful rates, Lykes is in violation of the * * * statutory requirement (that only the charges computed at the rate on file be collected). It is also obligated to collect the undercharges from the shippers concerned.

* * * * * * *

The carrier's failure to continue in effect the rates it had been charging and which it actually quoted during the relevant period, was the result of oversight * * *. The record contains no hint that the parties concerned were not acting in complete good faith.

* * * * * * *

The paramount question in cases of this type is whether granting the requested relief will result in discrimination. This is because the primary purpose of the * * * tariff filing provisions of the Shipping Act, 1916 * * * is to prevent discrimination. If this purpose will not be defeated we think we are unquestionably clothed with discretion to permit corrective action under the rule. We have the responsibility for administering that Act, * * * and are empowered among other things to see that equity and justice are done in the matter of reparations.

* * * * * * *

The record in this case shows that granting the relief sought will not result in discrimination and that such grant, as in the *Higa* case, *supra*, will relieve innocent shippers from the consequences of the carrier's failure to effectuate an intended tariff filing.

This record shows that granting the relief sought will not result in discrimination, and will relieve innocent shippers who relied upon the unfiled $28 rate, from the consequences of the carriers' failure to effectuate the intended tariff filing.

The application therefore is granted.

(Signed) Paul D. Page, Jr.,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 364

L'ALUMINIUM FRANCAIS

v.

AMERICAN EXPORT LINES, INC.

Application of American Export Lines, Inc. for an order authorizing the payment of the sum of $1,285.23, as reparation in connection with a shipment of aluminum from Marseilles to Chicago, denied.

A. T. De Smedt for American Export Lines, Inc.
H. Chabot for L'Aluminium Francais.

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

American Export Lines, Inc. (Export) here applies for an order authorizing it to pay to L'Aluminium Francais (Francais) the sum of $1,285.23. This sum represents the difference between $2,923.26 actually collected by Export from Francais for a shipment (the only shipment carried at this approximate time by member lines of the conference involved) of aluminum wire from Marseilles, France to Chicago, Ill. in April 1963 at $58, the legally applicable rate, and $1,638.03, the charge which would have been made at the $32.50 rate Export here seeks to retroactively apply.

These are the record facts, stated in chronological order:

(1) About the first of March 1963 Francais orally protested to the "Marseilles Committee" of the Mediterranean/U.S.A. Great Lakes Westbound Freight Conference (the conference) the conference $58 rate on aluminum wire in rolls from Marseilles to Chicago. Export was a member of the conference, and as such, charged shippers conference rates.[2]

[1] This decision became the decision of the Commission on April 7, 1964, and an order was entered denying the application.

[2] In a letter to the conference secretary dated February 3, 1964, Sté Pechiney (an affiliate of Francais, which acted for Francais in this matter) states that this was done "at the beginning of the month of March * * * as soon as the tariff rates were known." The accuracy of the last phrase may be debatable, because the $58 rate became effective on November 30, 1961, and had been "known" since that date. It is possible that in Marseilles it is customary to issue advices of "change or no change" in rates from Marseilles to the Great Lakes about the first of each March, shortly before the Lakes open, but in any event *the reason why* the protest was made *at that time* is immaterial here.

(2) Francais was then told by the head of the Marseilles Committee that its request seemed well grounded, and that "a favorable decision" could be expected, but that "any modification of the tariff would have to be decided at the meeting which was to be held in Paris in April" 1963.

(3) On April 3, 1963, Sté Pechiney put its request in a letter to the conference.[3] In pertinent part, this letter envisioned shipments of aluminum wire in rolls from Marseilles to Chicago during 1963, but indicated that shipments would not be made at any rate higher than $32.50 per ton, and requested that such a rate should be put into effect to cover shipments made during the Lake's 1963 open season.

(4) On April 5, 1963, Francais loaded the cargo in question on Export's *Extavia*, and prepaid freight at the $58 rate. *Extavia* sailed from Marseilles April 6, and arrived at Chicago on April 26, 1964.[4]

(5) Some time between April 3, 1963, and April 10, 1963, the April 3, 1963 Sté Pechiney letter was communicated to the conference secretary at Nice. On April 10, 1963, by Circular No. 13, the conference secretary advised all conference members of the Sté Pechiney letter (without indicating its date) and at the Paris meeting which was held April 19, 1963, the conference reduced the rate to $47.[5]

(6) Francais requested reconsideration, and subsequent to May 2, 1963, when the secretary advised members of Francais' request, a rate of $32.50 on aluminum wire in cases, drums, and in rolls, was authorized. The conference forwarded to the Commission a Third Revised Page 79, which, if it had been accepted, would have made the $32.50 rate effective on May 20, 1963. It was, however, received by the Commission on June 4, 1963, and rejected on the same day because it was retroactive according to its terms.

(7) The conference then filed a Fourth Revised Page 79, stating the same rate as the rejected page to become prospectively effective June 12, 1963, which it did.

---

[3] This letter was addressed to "Monsieur Moscovitz" as president of the conference. In the letter referred to in footnote 2, Sté Pechiney says that "Mr. M. Moscovitz" was on April 3, 1963, "president of the local (Marseilles) committee of the conference." It is immaterial here if there was one Moscovitz or two Moscovitz's, or what offices were held. Both the March oral representations, and the written April representations of Francais were made by Francais to a conference representative who had no power to modify the tariff under discussion.

[4] In this, and certain other matters of detail, this opinion relies upon government records, and any party, on timely request will be afforded an opportunity to show the contrary (rule 13g, 46 C.F.R. 502.227).

[5] The Commission's files indicate that this was a reduction of a $62.50 rate on aluminum wire *in drums* not rolls, although the application states that "the rate was reduced from the then current $58 weight basis." Which it was does not affect decision here. (See the conference's Tariff 4, Second Revised Page 79, which became effective May 1, 1963.)

(8) The $32.50 rate, however, remained in effect less than three weeks, for by Tariff 5, Original Page 79, the conference raised it to $35.75, effective July 1, 1963.

DISCUSSION AND CONCLUSIONS

The foregoing specific findings of fact support and compel the conclusion that while granting the relief sought herein would not result in discrimination, it would not relieve an innocent shipper from the consequences of the carrier's failure to effectuate an intended tariff filing, but would, on the other hand, give a shipper the benefit of a rate which the conference at no time intended to apply to the shipper's cargo moving on the *Extavia* in April 1963, and which the shipper knew did not apply, when he shipped the cargo. This case therefore, is one which the decisions in *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line, Inc.*, 7 F.M.C. 62 (January 23, 1962), *Martini & Rossi S.p.A., et al.* v. *Lykes Bros. Steamship Co., Inc.* 7 F.M.C. 453 (November 16, 1962) and similar cases do not control.

The facts of this case make it unique. They support and compel the conclusion that when Francais loaded on *Extavia*, April 5, 1963, Francais knew (or at the very least was charged with knowledge) that the $58 rate was the only rate the carrier could legally charge, and that the carrier was (as it still is) expressly prohibited by law from rebating, refunding, or remitting any part of the freight money paid by Francais, in any manner or by any device. See section 18(b)(3), Shipping Act, 1916 which section had been effective for fifteen months before Francais made the shipment here involved.

Undoubtedly, when Francais, about the first of March, orally initiated its attempt to get the rate reduced to $32.50 it hoped to have the $32.50 rate made effective on the first ship it utilized to send aluminum wire in rolls from Marseilles to Chicago in 1963. (The *Extavia* was the first ship Francais utilized, and may well have been the first Marseilles-to-Chicago sailing in that year. The Lakes opened April 15, and *Extavia* reached Chicago April 26, 1963.)

On April 3, 1963, when Francais made its written protest, Francais could not reasonably have expected that the reduced rate would be made applicable to the shipment it intended to make a day or two later. *Extavia*, as Francais undoubtedly knew, sailed from Rijeka for Marseilles the day before the letter was written. Francais had been told by the conference's Marseilles Committee that the rate matter would have to be decided in Paris, some time in April. There is not a scintilla of evidence to support a finding that when Francais loaded aboard *Extavia* on April 5, and paid at the $58 rate, it believed or had reason to believe that the Paris meeting would be held, the rate reduced and filed by cable so as to become effective before *Extavia* sailed from

Marseilles the next day, April 6.[6] And most certainly neither conference nor carrier did anything to cause Francais to believe that.

It could be argued that Francais believed that at its meeting in Paris, later in April, the conference would reduce the rate to $32.50 retroactively so that the $32.50 rate would apply to cargo loaded on *Extavia* for her April 6 sailing from Marseilles. First, there is no evidence that Francais so believed, and second, it appears that when, subsequent to May 2, 1963, the conference undertook to reduce the rate to $32.50, it did not attempt to make the effective date one which would bring *Extavia*'s April 6 sailing within the scope of the reduction, and did not then feel (as it still does not feel) that Francais had requested such action by the conference. In a letter to the Commission dated September 12, 1964, urging approval of the application in this case (and attached to the application) the secretary says in part:

> Member lines of this Conference further fully agree that the rate which came into application on "Aluminum Wire," on May 20th, could be made retroactive for the above shipment, as *should such a rate reduction had been requested at the time*, member lines would have been in favor of same. [Emphasis supplied.] [7]

Finally, and most importantly, as heretofore pointed out, the conference could not make the rate effective retroactively, and Francais knew or at least was charged with knowledge of that fact. No principle of equity or justice authorizes this Commission to base an award to any party upon that party's prospective reliance upon the performance of an unlawful act by another.

Inasmuch as no Commission decision supports granting this application, and no sound reasoning can be said to support it, the application is hereby denied.

(Signed) Paul D. Page, Jr.,
Presiding Examiner.

---

[6] Decreasing rates by cabled filing was practical in April 1963. Compare Special Docket Nos. 245–257 inc., 7 F.M.C. 473, where it was not practical to do this—although the carrier tried.

[7] The statement that the rate "came into application * * * on May 20" is erroneous. It did not become effective until June 12, 1963. See Finding 6, *supra*.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 366

MIDWEST EXPORT & IMPORT CO. AND
GREEN TEXTILE EXPORT AND IMPORT CO., INC.

v.

F. W. HARTMANN & CO., INC., AGENTS FOR HANSA LINE

REPORT

BY THE COMMISSION (Thomas E. Stakem, *Vice Chairman* Ashton C. BARRETT, *Commissioner;* James V. Day, *Commissioner*):

No exceptions having been filed to the initial decision of the Examiner in this proceeding, and the Commission having determined not to review same, notice is hereby given, in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the decision became the decision of the Commission on April 21, 1964.

It is ordered, That the application of F. W. Hartmann & Co., Inc., as agents for Hansa Line, to refund a portion of certain freight charges as specified in the Examiner's decision to complainants be and it is hereby granted.

John Harllee, *Chairman*, and John S. Patterson, *Commissioner*, dissenting:

The Commission has ordered that the application of F. W. Hartmann & Co., Inc., as agents for Hansa Line, to refund to two shipper-consignees a portion of the freight charges collected should be granted. The Commission has determined not to review the Examiner's decision that the Hansa Line may refund the amount of $1,608.21 to Midwest Export & Import Co., Inc., and $2,062.57 to Green Textile Import & Export Co., Inc., because the importers were required to pay freight on the basis of the rates and charges specified in the carrier's tariffs on file with the Commission and published and in effect at the time instead of a rate established by the carrier which was not in the tariff nor published nor on file.

Various excuses are assigned for the deficiency, but the facts show clearly that Hansa Line by its agents transported some baled jute rags from Suez to New York and Philadelphia at a time when the legally filed and effective tariffs of the Red Sea & Gulf of Aden/U.S. Atlantic & Gulf Tariff No. 1 observed by Hansa Line did not include a rate for such a classification of commodities. Accordingly, Hansa Line charged the rate for commodities not classified, commonly known as "not otherwise specified" or the "N.O.S." rate. There is no question and no party contends that any other applicable rate than the N.O.S. rate was specified in the tariffs governing the Hansa Line service and that such tariff was on file with the Commission and duly published and in effect at the time.

Section 18(b)(3) of the Shipping Act, 1916, enacted by Congress in Public Law 87–346, approved October 3, 1961, provides as follows:

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

Whatever rights Rule 6(b) of the Commissions "Rules of Practice and Procedure," effective July 31, 1953, may give, the rule may not sanction disregard of the clear terms of the above Congressional enactment.

It is our opinion that the facts before us in this case, as disclosed by the Examiner's decision, show beyond any doubt that the carrier is refunding and remitting a portion of the rates or charges specified in its tariffs on file with the Commission and duly published and in effect at the time. The carrier is also collecting and receiving a less and different compensation for the transportation of property than the aforesaid filed tariffs.

There is another reason for our dissent. Rule 6(b) is entitled "Voluntary payment of reparation." The only authorization for the granting of reparation is contained in Section 22 of the Shipping Act, 1916, which relates only to injury caused by "any violation of this Act." We think it clear, therefore, that Rule 6(b) authorizes only the voluntary payment of reparation for violation of the Act. In fact all applications filed pursuant to Rule 6(b) require a statement that "The undersigned carrier(s) hereby admits that when exacted the freight charges collected were unlawful in violation of sections(s) * * * of the Shipping Act, 1916, as amended." No such statement was included in the application here under consideration and no violation of the Act is apparent.

For these reasons we dissent from the determination of the majority of the Commisson to not review and reverse the decison of the Examiner in this Docket.

(Signed) THOMAS LISI,
Secretary.

APRIL 21, 1964.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 366

MIDWEST EXPORT & IMPORT CO. AND GREEN TEXTILE IMPORT & EXPORT CO., INC.

v.

F. W. HARTMAN & CO., INC., AGENTS FOR HANSA LINE

Application under Rule 6(b) for permission to refund a portion of freight charges collected is granted.

INITIAL DECISION OF WALTER T. SOUTHWORTH, EXAMINER [1]

F. W. Hartmann & Company, Inc., as agent for Hansa Line ("Hansa"), applies for permission under Rule 6(b) of the Commission's Rules of Practice and Procedure to refund to two shipper-consignees a portion of the freight charges collected on certain shipments of baled jute rags which had originated in Bombay and were carried by Hansa from Suez to New York and Philadelphia under the following circumstances:

The jute rags had been shipped from Bombay, for discharge in New York and Philadelphia, on the *Suzanne* of Kulukundis Lines, Ltd. When the *Suzanne* arrived at Suez, in or about February 1963, she was arrested under legal process issued by a court of the United Arab Republic, in a proceeding arising out of the financial difficulties of the Kulukundis interests. The ship lay idle at Suez with her cargo aboard from February until August 1963. The cargo included a large number of shipments of hides, whose consignees took action through the Tanners Council of America to obtain a release thereof through the court. Apparently the court of the U.A.R. would not recognize a claim for the release of less than all the cargo; at any rate, the Tanners Council communicated with the consignees of all the cargo (including the nominal complainants herein) and obtained authority to arrange for the release, with expenses to be prorated among all receivers and ocean freight charges from Suez to be "collect."

[1] This decision became the decision of the Commission on April 21, 1964, and an order was issued granting the application.

The Tanners Council then made arrangements with Hansa pursuant to which the cargo ex the *Suzanne* was shipped from Suez consigned to the order of "Messrs. Tanners Consul of America" in Hansa's m/s *Greiffenfels*.

A month earlier Hansa had carried from Aden, in its m/s *Kandelfels*, several hundred tons of cargo which had been removed from the Kulukundis ship *Ines* at Aden under similar circumstances. In that case Hansa had been advised what commodities were aboard the ship and, since such commodities never moved from the Red Sea area and therefore were not specifically provided for in the applicable tariff under the Red Sea & Gulf of Aden/U.S. Atlantic & Gulf Rate Agreement, Hansa had agreed to amend such tariff to include rates for the specific items involved, including wool, gum karaya and goat skins, identical with those in Tariff No. 5 of the West Coast of India and Pakistan/U.S.A. conference, of which Hansa was also a member. However, in making arrangements with Hansa for the cargo from the *Suzanne*, the Tanners Council of America did not reveal that that cargo included baled jute rags. Since this commodity was not specifically provided for in the applicable tariff (Red Sea & Gulf of Aden/U.S. Atlantic & Gulf Tariff No. 1), Hansa charged the complainants herein, and collected, freight at the General Cargo N.O.S. ("not otherwise specified") rate of $59 per cubic meter. This N.O.S. rate from Suez is almost three times the specific commodity rate for jute rags of $21.25 per cubic meter from Bombay, under the West Coast of India and Pakistan/U.S.A. tariff.

Hansa's position, briefly, is that it was not aware, before the *Greiffenfels* sailed from Suez, that jute rags were going to be shipped, and that therefore the rate was not discussed; that if it had known, it would have amended the applicable tariff to provide the same rate as from Bombay (as it had previously done in the case of other commodities not normally shipped from the Red Sea area); and that it is willing, and desires, to make an equivalent adjustment through the refund herein proposed.

This application arises out of an unusual situation, not likely to recur. There was unquestionably misunderstanding, error and inadvertence. Had the carrier known what commodities it was agreeing to carry, it would have filed the $21.25 rate which already existed under its tariff for carriage from Bombay—a much greater distance than from Suez, which is on the route from Bombay. Inadvertently, the carrier was not fully advised as to the consist of the goods to be transshipped; whether this was primarily the fault of the carrier in failing to inquire, or of the Tanners Council in misstating the consist or failing to describe it completely, does not appear from the record. Probably it was a mutual mistake. The carrier, since it was dealing with the Tanners Council, would naturally assume that it was concerned only with hides unless advised to the contrary. The Tanners Council, being principally concerned with its members' affairs, presumably did not consider the incidental shipments of jute to have any great significance. The actual consignee-shippers, who had bought the jute on the basis of a freight rate of $21.25 per cubic meter from Bombay, assumed that the freight for the same shipment from the wayport of Suez would not exceed the rate for the whole distance. As the Commission stated in *Lykes Bros. Steamship Co., Inc. Application to Refund*, etc., 7 F.M.C. 602, at p. 603: "Whether or not this was a justified assumption, the shipper had no reason to expect freight to be charged at a rate more than 130 percent greater than it had recently paid to move the same item." The rate charged in the present case was actually more than 175 percent greater than the rate to move the same goods all the way from Bombay.

Upon the record, the rate of $59 appears *prima facie* to have been unjust and unreasonable. As stated in *Lykes Bros.*, however, it is not necessary that the rate be shown to be unjust, unreasonable or otherwise unlawful; it is sufficient that the relief sought "will relieve an innocent shipper of the consequences of the carrier's failure to file a proper rate." Here there was certainly a failure of the carrier to file a proper rate for the commodity in question; and the basic reason for its failure was the same as in *Lykes Bros.* There the carrier had an outward rate for "fosfatefeeders," but did not file any inward rate because movements of such items were "rare" in the inward trade. Here the carrier had filed a rate for baled jute rags from Bombay, but no rate from the intermediate Red Sea area, because such commodities "never" moved in that trade.

Since the carrier's application has been amended to cover all the jute shipments of the *Suzanne*, and since the commodity does not move normally in the Red Sea/U.S.A. trade, there can be no discrimination by reason of the granting of this application; on the contrary the disadvantage to the consignees which resulted from their unfortunate involvement in the Kulukundis affair would be considerably magnified if the application were denied. The carrier will be permitted to refund the difference between the freight paid at the rate of $59 per cubic meter, and the amount at the rate of $21.25 which would have been charged had the carrier ascertained all the facts when the transaction was negotiated.

In the case of complainant Midwest Import & Export Co., Inc., P.O. Box 5425, Detroit 11, Mich., freight on a shipment of 42.6017 cubic meters was collected at the N.O.S. rate of $59 per cubic meter, in the amount of $2,513.50. At the rate of $21.25 per cubic meter the freight would be $905.29. An order will be entered granting the application for permission to refund the difference of $1,608.21 to said complainant.

In the case of complainant Green Textile Import & Export Co., Inc., 241 Church St., New York 13, N.Y., freight on a shipment of 26.531 cubic meters was collected at the rate of $59 per cubic meter, in the amount of $1,565.33. On another shipment of 29.6538 cubic meters, the carrier purported to collect freight at the rate of $59 per cubic meter; however, through arithmetical error the amount actually collected on this shipment was $1,691.16, instead of $1,749.57. The amount actually collected on the two shipments, therefore, was $3,256.49. At the rate of $21.25 per cubic meter, the freight would have been $563.78 on one of the shipments and $630.14 on the other, a total of $1,193.92. An order will be entered granting the application to the extent of permitting a refund of the difference of $2,062.57 to said complainant.

(Signed) WALTER T. SOUTHWORTH,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

No. 1077

INVESTIGATION OF INCREASED RATES IN THE ATLANTIC/GULF PUERTO RICO TRADE—OUTWARD FREIGHT TARIFF No. 1 FMC–F No. 1, J. L. MARTY, AGENT

Decided March 19, 1964

Increased rates on dried beans, feed and feedstuffs, slacked lime, soda ash, and certain other commodities of respondents from U.S. Gulf ports to Puerto Rico found just and reasonable. Proceeding discontinued.

Carl H. Wheeler for respondent Waterman Steamship Corporation of Puerto Rico.

Mark P. Schlefer for respondent Lykes Brothers Steamship Co., Inc.

John T. Rigby for intervener the Commonwealth of Puerto Rico.

Norman D. Kline and *Frank Gormley* as Hearing Counsel.

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

This is an investigation to determine the lawfulness under the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, of certain increased rates of the respondents, Waterman Steamship Corporation of Puerto Rico (Waterman), and Lykes Brothers Steamship Co., Inc. (Lykes), from United States Gulf ports to Puerto Rico.

By original order served December 4, 1962, there were placed in issue Waterman's rates contained in 18 pages of the U.S. Atlantic and Gulf-Puerto Rico Tariff FMC–F No. 1. By supplemental orders served on January 9 and 31, 1963, the investigation was broadened to include Lykes' rates contained in 17 pages of the above tariff, and the additional rates of Waterman on coal in bags and citrus pulp. The increased rate on coal in bags was suspended until May 27, 1963, and became effective on May 28, 1963. None of the other rates were suspended. All of the increases came into effect, although at least one rate since voluntarily has been cancelled.

---

[1] This decision became the decision of the Commission on March 19, 1964. See Rules 13(d), and 13(h), Rules of Practice and Procedure, 46 C.F.R. 502.224 and 502.228.

In lieu of an oral hearing, a procedure was agreed on whereby joint statements of fact were filed on December 9, 1963, as Exhibit Nos. 1 and 2. Hearing Counsel and the respondents had cooperated in the preparation and the submittal of these facts, and in that connection Hearing Counsel had visited the office of respondents to verify certain financial data. The Commonwealth of Puerto Rico intervened but has not taken a position in opposition to the proposed increased rates.

An opening brief was filed by Hearing Counsel, and the respondents waived the filing of reply briefs. No shipper nor other party opposes the increased rates, and Hearing Counsel concludes that the increased rates should be approved.

Waterman operates a regular weekly service between the ports of Mobile and New Orleans, on the one hand, and, on the other, the Puerto Rican ports of San Juan, Ponce, and Mayaguez.

Until about June 1, 1961, Waterman was a member of the United States Atlantic and Gulf-Puerto Rican Conference and a party to tariffs published by that Conference. Upon the termination of the Conference in 1961, Waterman adopted the former Conference tariffs as its own. The former Conference tariffs applied between both United States Atlantic and Gulf ports, on the one hand, and on the other, Puerto Rico. Said tariffs named commodity rates governing the movement of some articles, which because of their geographical origin, moved only through Atlantic Coast ports while other articles moved only through Gulf ports.

There are 29 Waterman rates under investigation. But of the 29 commodities covered by these rates, Waterman in 1962 transported only 16 commodities. Some of the principal heavier moving of these are feed and feed-stuffs, dried beans, slacked lime, corn meal, box shooks, citrus pulp, and beet pulp.

Cost figures submitted herein show that Waterman's revenues in 1962 were less than its fully distributed costs on 14 of the above 16 commodities. The net losses, per 40 cubic feet, ranged from $0.83 on dried beans to $7.53 on soap flakes, chips, or granules. On slacked lime the net loss was $7.28. The only two commodities showing a profit were $0.18 on wall or insulating board, and $6.23 on cotton or felt waste. The total transportation costs on these two commodities respectively were $13.82 and $21.77 per 40 cubic feet. The increased rate on waste has been cancelled voluntarily by Waterman and it did not carry a single shipment of waste while the increased rate was in effect. Effective December 2, 1963, Waterman changed the rate on waste from $4 per 100 pounds to $0.40 per cubic foot. The former rate had been predicated upon an average density of the waste of 170 cubic feet per ton of 2,000 pounds, but this density has been increased because of improved methods of machine compressing of bales. This factor and the competitive rate of Alcoa Steamship Company, Inc. of $0.40 per cubic foot caused Waterman to change its rate. Pursuant to this new rate, Waterman will derive revenues of only $16 per measurement ton as against total transportation costs of $21.77 per measurement ton of cotton or felt waste. The above costs do not reflect any increases for 1963.

Lykes provides a fortnightly service from west Gulf of Mexico ports of the United States to Puerto Rico. It regularly calls at Lake Charles, Houston, and Galveston, and from time to time depending upon cargo offerings also calls at Beaumont, Port Arthur, Orange, and Corpus Christi. Discharge is regularly made at San Juan, Mayaguez, and Ponce.

There are 31 rates of Lykes under investigation. But of the 31 commodities covered by these rates, Lykes in 1962 transported only 13 low-rate commodities. Some of the principal heavier moving of these are soda ash, dried beans, slacked lime, feed and feedstuffs, and common laundry soap. Cost figures herein show that Lykes' revenues in 1962 were less than its fully distributed costs on 12 of the above 13 commodities. These net losses, per 40 cubic feet, ranged from $0.82 on soya bean meal to $9.75 on common laundry soap. The only commodity showing a profit is cotton waste with $2.90 per measurement ton before taxes, and $1.39 after corporate income taxes of 52 percent. This profit is about five percent of the gross revenue of $25.60 per measurement ton on cotton waste. Lykes also believes that the stowage factor of 70 cubic feet per ton used by it to compute the costs of transporting cotton waste may be understated. In that event its cost would be understated and its profit overstated.

The rates herein under investigation appear well within the zone of maximum reasonableness. It is concluded and found that the increased rates of the respondents herein are just and reasonable. An order will be entered discontinuing the proceeding.

(Signed) Charles E. Morgan,
Presiding Examiner.

March 19, 1964.

FEDERAL MARITIME COMMISSION

No. 1000

California Stevedore & Ballast Co. et al.

v.

Stockton Elevators, Inc.

Decided April 21, 1964

Respondent, a public grain terminal also engaged in stevedoring at its facilities, found to have violated section 17 of the Shipping Act, 1916, by engaging in the following unreasonable practices:

1. Passing on to the ship its established rental charge, for the use of loading equipment, in the form of a lump-sum markup which also includes its profit on stevedoring.
2. Failing to publish the charge specifically to apply against the ship, or the cargo, or against all stevedores alike.
3. Failing to assess the charge against its subcontractor which performs respondent's stevedoring under an exclusive contract.
4. Assessing such charge exclusively against complainants who are competing stevedores.

Richard W. Kurrus and *James N. Jacobi* for complainants.
H. Stanton Orser for respondent.
Gus O. Basham, Chief Examiner.

Report

BY THE COMMISSION (John Harllee, *Chairman*, Thos. E. Stakem, *Vice Chairman*, James V. Day, Ashton C. Barrett *Commissioners*):

Proceedings

Complainants are six stevedoring firms [1] seeking to enjoin respondent, Stockton Elevators, Inc., a grain terminal, from carrying on certain activities alleged to be "unreasonable practices relating to or connected with the receiving, handling, storing or delivering of prop-

[1] California Stevedore and Ballast Co., Marine Terminals Corporation, San Francisco Stevedoring Co., Schirmer Stevedoring Co., Ltd., Seaboard Stevedoring Corporation and Yerba Buena Corporation.

erty" in violation of section 17 of the Shipping Act, 1916. The activities are said to be designed to create and perpetuate a monopoly in the stevedoring of bulk cargoes loaded into vessels at respondent's public terminal facilities. After hearing and briefs, the Examiner, in his initial decision, found that respondent's practices (1) of passing on to the ship its established rental charge for the use of loading equipment, in the form of a lump-sum markup which also included its profit on stevedoring; (2) of failing to publish the charge specifically to apply against the ship, or the cargo or against all stevedores alike; (3) of failing to assess the charge against its subcontractor which performs respondent's stevedoring work under an exclusive contract; and (4) of assessing charges exclusively against complainants who are competing stevedores were unreasonable within the meaning of section 17. The case is before us upon exceptions by respondent.

In Docket 898, *California Stevedore & Ballast Co., et al.* v. *Stockton Port District and Stockton Elevators*, 7 F.M.C. 75 (1962), these same six complainants obtained an order from the Commission requiring Stockton Elevators, Inc. and Stockton Port District to cease and desist from carrying out certain agreements whereby Stockton Elevators, granted to Stockton Port District the exclusive contractual right to stevedore all vessels loading or unloading bulk grains or rice at respondent's elevator. The Commission found this to be an unreasonable practice within the meaning of section 17 of the Shipping Act, 1916, which practice operated to the detriment of the commerce of the United States.

On October 10, 1961, shortly after the Examiner issued his initial decision in Docket 898, also finding the practice unlawful, respondent amended its tariff by publishing an equipment rental charge of 15 cents per ton, effective October 15, 1961, on equipment to be used in loading and trimming bulk cargoes.[2]

In addition to operating as a public grain terminal, respondent also contracts with vessels for stevedoring in competition with complainants. It employs Jones Stevedoring Company (Jones), as its subcontractor to perform its stevedoring exclusively. Respondent does not assess the equipment rental charge against Jones but would levy it against complainants and other outside stevedores using its loading equipment.

---

[2] *EQUIPMENT RENTAL:* Equipment, and maintenance thereof is available from Stockton Elevators for use in the loading and trimming of bulk cargoes.

Rental: 15¢ per short ton loaded*.

* Rental on above equipment and services when used in connection with such edible commodities as rice to be charged at 24½ cents per short ton loaded and to include complete clean-up and fumigation of all equipment prior to use.

Said rental to cover use of: Tarps, pans, spouts, flexes, and power telescopes as well as maintenance thereof. And to include power for trimmers and other electrical equipment; also spot maintenance on trimmers by elevators mechanics.

Complainants allege that this rental charge renders them noncompetitive at respondent's facilities, that its imposition on them exclusively constitutes an unreasonable practice in violation of section 17, and that it is but another device to exclude complainants and other stevedores from the terminal in defiance of the Commission's decision in docket 898.

Respondent maintains that when it performs stevedoring it includes the 15 cent rental charge in its bill to the vessel for stevedoring services; that as a public grain terminal, its obligation to deliver grain under its delivery charge does not extend beyond the spout fixed to its elevator; and that it is entitled to a rental charge for its equipment when such is used by complainants or other outside stevedoring firms to convey the grain from the elevator's fixed loading spout to the inside of the vessel hold.

The Examiner made the following findings of evidentiary facts which, with one minor exception discussed later, we adopt as our own.[3]

Complainant Seaboard Stevedoring Corporation (Seaboard) asserts that it cannot compete with respondent. One of Seaboard's principals asked it to bid on a vessel at respondent's terminal, but the offer was turned down because of the 15-cent charge. It informed Seaboard it could get service cheaper from respondent if Seaboard charged the 15-cent rental charge. In addition to the equipment rental charge, respondent imposes on the cargo a wharfage charge of 50 cents per ton, and a delivery charge to the end of spout of 60 cents per ton, and against the vessel a service charge of 25 cents per ton. Seaboard is not aware of any other instances where a terminal assesses an equipment rental charge of this type. Grain terminals, including the Port of Stockton Grain Terminal, commonly assess a charge against the cargo for delivery at end of spout.

Seaboard's definition of "end of spout" is the end of the property of the elevator in the compartment of the ship in which the grain is blown. This includes the attachments that are put on at the end of the belt. Such attachments are used at other terminals in the San Francisco Bay area, but are not furnished by the stevedore.

Complainant Yerba Buena Corporation stevedored four vessels at respondent's terminal during March and April 1962.[4] In each instance the connection to the spout had been removed and had to be rerigged, which entailed quite a bit of time. Respondent imposed the rental charges,[5] amounting to $934.20, which have not been paid.

---

[3] Quotation marks have been omitted for the sake of convenience.

[4] Complainant San Francisco Stevedoring Company also stevedored a ship at respondent's elevator on January 26, 1962, and used the equipment in question.

[5] The equipment used by complainant consisted of flex buckets, telescopic pipe, flex pipe, save-alls, goosenecks, power winch, and electrical power.

The person who solicited this bid for Yerba Buena testified that "with the 15 cents [rental charge] it did not leave us anything." This complainant, which also stevedores grain at Port of Stockton Grain Terminal, had had no difficulty there concerning the dismantling of telescopic spouts and flexes, which are furnished without charge. The only equipment furnished by complainants are trimmers, and the necessary equipment to operate them. The charge for delivering grain there, of 60 cents per ton, includes delivery through the telescopes. The grain elevators in the Bay area, including the Port of Stockton Grain Terminal, make the same delivery, wharfage and service charges as respondent, but do not assess any charge for rental of somewhat similar equipment used for conveying grain from spout to vessel.

Yerba Buena has clients, three of whom were identified, who want to use its services at respondent's elevator, but its solicitor has been told by them that its rates, with the inclusion of the 15-cent charge, are not competitive with those of respondent. This complainant competes successfully at the Port of Stockton Grain Terminal with Jones, which is a private contract stevedore like Yerba Buena, both hiring the same labor and paying the same wage scale. Yerba Buena states that it could also compete with Jones at respondent's terminal were it not for the rental charge, which as stated, is not assessed against Jones.

Respondent relies upon the following facts to prove that it is entitled to a reasonable charge for use of the equipment in question. They are offered to support its argument that under its tariff, its obligation to the ship (a) is to deliver only to the end of the spout ("ex-spout") to a point over ship where the grain can fall free, but (b) does not include conveyance beyond spout by equipment for use or convenience of the stevedore in stowing or trimming the vessel.

Respondent's definition of "end of spout" is the bare end of the cylindrical tube fixed to the tower of the elevator. It telescopes to position the end of spout outboard or inboard over ship's hold, and is controlled by an elevator employee. A ship could be loaded from such spout (without the loading equipment in question), but not very efficiently.

The spout has shackles for the affixing of additional equipment used by the stevedore to convey the grain into various compartments and holds of the ship. This equipment, the use and rental of which is in issue here, is described as telescopic pipes, flexes, thrower, adapter, trimmers and by such singular names as "horsehead" and "elephant trunk." The horsehead is an adapter, attached to the spout, by which the flow of grain is controlled. To the horsehead it attached the elephant trunk, which is a group of flex buckets linked by a chain. They give mobility and feed into the telescopic pipes. These pipes are telescoped up and down by a motor attached to the horsehead. They feed into the trimmer, suspended from ship's tackle, which throws the grain into the hold. Respondent has three sets of such equipment (one a spare) which it developed at considerable costs,[6] and acquired after October, 1961.

In loading a ship, the gear must be hauled up and replaced three to five times per hatch. Before the above-described equipment was developed such operation was performed by block and tackle by the stevedore, taking as much as one-half hour for a move. The new equipment has increased production by 20 percent.

The practice of large grain elevators in the Pacific Northwest and in Southern California, comparable in size to that of respondent, is for the stevedore to supply equipment similar to that in question, and for the terminal to make a charge of 15 to 25 cents per ton for equipment supplied for *unloading* vessels, such as fork lifts, cranes, etc.

At the smaller terminals in the San Francisco Bay area, there are available manually operated extensions of the spout which are furnished by the elevators to stevedores without charge. According to respondent, these elevators do not have or need improved equipment since their capacities cannot utilize the increased loading rates possible. Respondent, which handles 80 percent of bulk agricultural commodities shipped from California and whose maximum loading rate is 800 tons per hour, does not consider such elevators representative of Northern California. The comparable loading rate at the Port of Stockton Grain Terminal is 300 tons per hour.

In respondent's opinion, the assessment of the 15 cent charge against the cargo would run counter to the practices in the grain trade since long-established buying and selling practices are to deliver, to sell and be responsible for charges on export shipments to end of spout.

The charge is made, according to respondent, to amortize the cost of past and continuing development and to return a profit on respondent's investment, and it was fixed on what respondent believes to be sound business principles.

Respondent maintains that it competes with complainants for stevedoring at its terminal and has bid for stevedoring work since July 1961. It quotes a flat maximum rate per ton, enters into a contract with the ship and guarantees the rate it quotes. Although its witness testified it never reduces a bid to get business, he added that on occasion there may be an "invoice reduction" if the loading is particularly good.

---

[6] A complete set of this equipment would cost between 15 and 25 thousand dollars. None of complainants own such equipment.

Complainants have free access to the dock and ships it may be stevedoring there, and can use their own equipment, if it is reasonably capable of doing the job.

Respondent loaded 156 vessels between October 1961 and February 1963, without complaint and with success. It did not increase its rates for stevedoring following the recent 10 percent increase in longshoremen's wages. Respondent attributes its success in competition with complainants to its claimed ability to achieve better production, faster turnaround and lower overall cost to the ship.

To demonstrate that complainants are not excluded from stevedoring there, respondent points to the fact that one of the complainants (Yerba Buena) stevedored four ships at its terminal. There was no interference or harassment by respondent. This complainant understood the 15-cent charge, used the equipment in question, and was given spot maintenance on its machines. In one instance both of complainant's trimmers broke down and respondent loaned one of its trimmers to finish the job.

Respondent states that if complainants had the necessary equipment, they could use it at respondent's elevator, and the 15-cent charge would not be assessed. Respondent does not put out bids for its exclusive stevedoring arrangement, but if it did, it would "still reserve the right to * * * give consideration to other factors than the economic ones, such as the type of equipment available, the caliber of the personnel who would do the supervisory work, and things of that sort * * *."

After finding the foregoing, the Examiner stated the controlling question in the proceeding as "whether the 15-cent rental charge is used by respondent as a device to exclude complainants from conducting their business on its docks," and from there went on to review in some detail the testimony concerning the basis of the charge and the manner in which it is applied. His review of the testimony is as follows:

The manager and vice president-treasurer of respondent testified that in fixing the charge of 15 cents they took into consideration the increased efficiency of the loading operation and the resulting decreased costs of the loading, the investment in the equipment, and primarily, rental charges of 15 to 25 cents made at other elevators on the West Coast for equipment used in discharging vessels, such as fork lifts, cranes, etc.

This witness also testified that the quotations by respondent to the ship for stevedoring include the equipment rental charge, which is not separately stated as such; that Jones bills respondent for its cost plus profit; that in billing the ship for stevedoring, respondent adds a lump-sum markup to Jones' charges to include (a) at least 15 cents per ton to cover the equipment rental charge, plus (b) an amount for respondent's profit on the stevedoring; and that the bill to the ship shows a flat charge per ton, without identifying any amount as the rental charge.[7]

Respondent's accountant testified that the billings to the steamship companies for stevedoring performed by respondent on the 156 ships it loaded exceeded the amount charged to respondent by Jones for stevedoring by at least 15 cents per short ton, except in one instance where it was 12 cents, and that the charges were paid by the ship in every instance. Such billings were not broken down to show the rental charge separately. Neither witness presented any cost figures to show that 15 cents is a proper charge to use in amortizing the equipment in question.

* * * * * * *

Respondent filed exceptions to the Initial Decision in which it reasserted its position that the equipment rental charge, is fair, reasonable and nondiscriminatory, and that complainants are able to compete at Stockton Elevators. The only new matters brought out in the exceptions are respondent's contentions that contrary to the Examiner's finding Jones' contract with respondent was not a so-called "cost plus profit contract" and did not guarantee any certain margin of profit to Jones.[8] Respondent further asserts that since the Examiner found that respondent did not use the rental charge as a device to exclude competing stevedores, we should "decline to issue an order on the ground that there has been no evidence of wrongdoing."

Respondent misapprehends our responsibilities under section 17. It is our duty under that section to remove all unlawful discriminations whether there is an intent to so discriminate or not. The same harm flows from an unintended discrimination as from one fully intended. It is the consequence of not the motive behind the discrimination which produces the harm. Thus, for the reasons set forth below, most of which constitute a restatement of those found in the Initial Decision, we agree with the result reached by the Examiner.

We agree with respondent that the employment of one stevedoring subcontractor in preference to another or even to the exclusion of another does not necessarily constitute an unreasonable regulation or practice under section 17, see *D. J. Roach Inc.* v. *Albany Port District*

---

[7] He testified that: "We have to charge it [rental charge] to the vessel whether we do the stevedoring or California Stevedoring and Ballast or Yerba Buena does the stevedoring. It is charged in all cases."

[8] At page 8 of the Initial Decision the Examiner in reviewing the testimony of respondent's own witness found that "Jones bills respondent for its cost plus profit." Respondent admits that the error was caused by its own witness but contends that the invoices in the record demonstrate that the statement should be that Jones billed respondent for costs plus profit if any.

et al. 5 FMB 333 (1957). But that is not the question here. The issue here does not concern who is to be respondent's subcontractor, rather it is the difference in treatment accorded by respondent to Jones, and to itself as a stevedore, on the one hand, as compared with the treatment of complainants on the other. This difference in treatment results from the imposition of the rental charge upon complainants, but not upon Jones. Moreover, it is not imposed *by* respondent acting as owner and operator of the terminal, *upon* respondent acting in the capacity of a stevedore, in the same manner as it is imposed upon complainants.

A ship has the right to contract for stevedoring with a qualified stevedore [9] of its choice, and the chosen stevedore has the right to perform such stevedoring work at a public grain terminal. *Baton Rouge Port Commission* v. *United States and Federal Maritime Board*, 287 F.2d 86 (1961).

Granting that a public terminal elevator may make a fair and nondiscriminatory charge for the use of any of its facilities; and that the terminal is entitled to a fair return on its investment, the question remains: Is the charge fair, reasonable and nondiscriminatory?

At the outset it is important to note that the tariff item naming the rental charge is ambiguous in not stating who is to pay the charge. Therefore, respondent conceivably could place the charge against the stevedore, the vessel or the cargo. Also, it can make the charge against some stevedores and not others as in the situation presented here. For there is a vast difference between having to pay a rental charge as complainants do which they then must pass on to the ship or absorb out of profit; and the situation which respondent (as a stevedore) enjoys of being able to bury the charge in a lump-sum "markup" which also includes its profit. To say the least, this is an unreasonable practice which may be a source of potential discrimination.

While Jones is a subcontractor, it is also in fact a private stevedoring firm in competition with complainants for the stevedoring business at Stockton. Yet it is not charged the rental fee assessed against complainants, and the result is that it has enjoyed all of the business, except on the five ships *ante*. The record is persuasive that if this charge were made against Jones also, or that it was published specifically to apply against the ship or against the cargo, complainants would have no trouble in getting a share of the business. It is well enough to say, as respondent does, that in passing the charge on to the vessel by means of a markup, respondent is putting itself and Jones on a competitive parity with complainants and other outside stevedoring firms. But, there is no compulsion on respondent to include all or any part of the

[9] Respondent's manager conceded that complainants are reputable firms.

rental charge in the markup. It may reduce the rental charge in the markup below the 15-cent charge, as it did in one instance. If this is done there is no means of knowing what the markup actually is or whether it includes all, or even any part of the rental charge except by auditing respondent's accounts, and perhaps making a cost study. Moreover, the record provides no cost figures from which a rental fee could be determined which would fairly amortize the investment. Assume for instance that 5 cents per ton is a proper amount to include; this would give respondent an advantage of 10 cents per ton in bidding for the business. Thus, viewing the arrangement from a regulatory standpoint, its flaw lies in the fact that the so-called rental markup is interwoven with profit markup and short of an audit of respondent's books no one but respondent knows which is which.

Without in any way impugning the motives of respondent, it must be concluded that in burying the rental charge in a lump-sum markup which also includes profit, it has opened the door for discrimination of a most invidious nature. Because it is impossible to tell where the charge will fall the tariff provision is potentially discriminatory. Moreover, its generality affords an unwarranted degree of possible variance between what respondent says the provision means and the actual practice thereunder. Not only potential discrimination in unequal application of a tariff, but the mere possibility of a variance between regulation and practice render both regulation and practice unreasonable, *Lopez Trucking Inc.* v. *Wiggin Terminals Inc.* 5 FMB 3, 15 (1956).

Respondent has suggested that a separate rental charge against the vessel would make the terminal noncompetitive with other grain terminals. Yet respondent's manager testified that it had to assess the rental charge against the vessel, and does so assess it. Then why should respondent not state in its tariff that it will do so? It would appear that repondent's reluctance to publicly provide for assessment of the charge against the ship is based upon one of two assumptions. Either the full charge is not now being paid by the vessel via the markup, or the carrier and the trade are unaware that the vessel pays the fee, in which case they will learn about it from this proceeding. If it should be considered that the end of spout is the place from which the grain falls into the ship or the trimmer, the fee could be incorporated in the delivery charge against the cargo, which as respondent's manager admitted, pays all the charges in the final analysis. As a last resort, it could be placed unequivocally against all stevedores, including Jones. Any of these measures would remove any taint of discrimination or unreasonableness.

As stated before, respondent is free to employ any stevedore as a subcontractor. But where such arrangement becomes an integral part of an unreasonable practice which operates to the detriment of a class of persons, as revealed here, the niceties of the legal relationship must be ignored, if necessary, to correct the situation.[10] The siutation, to all intents and purposes, is the same as that condemned in Docket 898, *supra*, namely, that Jones has an exclusive contract and complainants are still unable to break the monopoly. Much is said of the efficiency of respondent as the operator of the elevator and as the stevedore. Respondent does the soliciting and the billing, but Jones performs the stevedoring, and there is no evidence that Jones is more proficient than complainants. We assume that respondent, as a matter of self interest, would maintain the same level of efficiency of its elevator operations regardless of whether Jones or complainants or any other qualified stevedore performed the stevedoring.

Thus, we conclude as did the Examiner that respondent's practices (1) of passing on to the ship its established rental charge, for the use of loading equipment, in the form of a lump-sum markup which also includes its profit on stevedoring; (2) of failing to publish the charge specifically to apply against the ship, or the cargo, or against all stevedores alike; (3) of failing to assess the charge against its subcontractor which performs respondents stevedoring under an exclusive contract; and (4) of assessing such charge exclusively against complainants, who are competing stevedores—are unreasonable in violation of section 17 of the 1916 Act. Respondent may as suggested above by tariff rule assess the charge against the ship, against the cargo, or against all stevedores, including Jones. An appropriate order will be entered.

SEPARATE REPORT OF COMMISSIONER PATTERSON:

The majority report is almost word for word the conclusions and reasoning made in the Examiner's Initial Decision, with which I fully agree. However, the majority adds a reason resulting in a basic departure from the Examiner's Decision with which I disagree.

I do not agree that our responsibilities under the second paragraph of section 17 are "to remove all unlawful discriminations whether there is an intent to so discriminate or not." The second paragraph of section 17 reads as follows:

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

---

[10] Any restrictions of the 1916 Act are by legal implication imported into the contract. *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F. 2d 663, 280 U.S. 555; *Contract Rates-Port of Redwood City*, 2 U.S.M.C. 727, 736 (1945).

There is nothing in the above language which relates to discriminations by other persons such as terminals as defined in the first section of the Shipping Act, 1916. Discriminations by other persons are referred to in sections 15 and 16 of the Act.

The terminal practices described herein have been found to be unjust or unreasonable, and this is all that is necessary. There is no need on the facts of this case to decide whether the practices are discriminations, nor whether we have a duty to remove them.

The Examiner's reasoning was quite adequate for the result herein and he was correct in confining himself to a finding and conclusion "that respondent's practices * * * are unreasonable in violation of section 17 of the 1916 Act."

FEDERAL MARITIME COMMISSION

No. 1000

CALIFORNIA STEVEDORE & BALLAST CO. ET AL.

v.

STOCKTON ELEVATORS, INC.

Full investigation of the matters and things involved in this proceeding having been had, and the Commission on April 21, 1964, 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 respondent Stockton Elevators has violated section 17, Shipping Act, 1916 (46 U.S.C. 816, 39 Stat. 734), by engaging in the following unreasonable practices:

1. Passing on to the ship its established rental charge, for the use of loading equipment, in the form of a lump-sum markup which also includes its profit on stevedoring.
2. Failing to publish the charge specifically to apply against the ship, or the cargo, or against all stevedores alike.
3. Failing to assess the charge against its subcontractor which performs respondent's stevedoring under an exclusive contract.
4. Assessing such charge exclusively against complainants who are competing stevedores.

It is ordered, That respondent cease and desist from engaging in the above enumerated unreasonable practices; and

It is further ordered, That within 15 days of the service of this order respondent Stockton Elevators modify its tariff clearly to show the amount of the rental charge and against whom it is to be assessed, and conform its conduct in reference to the collection of the charge to the tariff as so modified.

By the Commission, April 21, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1115

APPLICATION FOR FREIGHT FORWARDING LICENSE
DIXIE FORWARDING CO., INC.

No. 1116

APPLICATION FOR FREIGHT FORWARDING LICENSE
MR. L. H. GRAVES D/B/A PATRICK & GRAVES

Decided April 21, 1964

Applicants because of (1) operations in violation of section 44; (2) submission of false financial statements to the Commission; (3) false certifications to carriers in order to collect brokerage unlawfully; (4) lax financial practices found not fit to properly carry on the business of forwarding and their applications for licenses as independent ocean freight forwarders denied.*

Milton Schwartz for respondents.

Robert J. Blackwell, Wm. Jarrel Smith, Jr., and *J. Scot Provan,* Hearing Counsel.

Paul D, Page, Jr., Hearing Examiner.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* Ashton C. Barrett and John S. Patterson, *Commisisoners*):

This proceeding is before us upon the exceptions of Hearing Counsel to the Initial Decision of the Examiner in which he concluded that Patrick & Graves and Dixie Forwarding Co., Inc., should each be granted licenses as independent ocean freight forwarders under section 44 of the Shipping Act, 1916 (46 U.S.C. 841(b)).

*See Report on Reconsideration of June 26, 1964, setting aside this decision and granting the applications.

Under section 44 a person desiring to engage in the carrying on of the business of forwarding must first secure a license from the Commission and the Commission must issue the license if the applicant is "fit, willing, and able to carry on the business of forwarding and to conform to the provisions of [(the Shipping)] Act and the rules and regulations of the Commission issued thereunder." The section also requires that the Commission consider whether "the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936." Operation without a license constitues a violation of section 44.

Section 44 became effective on September 19, 1961, and Congress granted so-called "grandfather rights" to those independent ocean freight forwarders who, on the effective date of the Act were "carrying on the business of forwarding under a registration number issued by the Commission." Such forwarders were allowed to continue in business for a period of one hundred and twenty days after the effective date of section 44 without a license, and if the forwarder applied for a license within the one hundred and twenty days, he could continue to operate until otherwise ordered by the Commission.

While these proceedings are concerned with two applications, for all practical purposes an individual, Mr. L. H. Graves (Graves) is the applicant. Graves wholly owns Patrick & Graves and substantially owns Dixie Forwarding Co., Inc. (Dixie), a corporation of which he is president.

Patrick & Graves and Dixie first applied for licenses by applications dated May 18, 1962. The one hundred and twenty days for the preservation of "grandfather rights" expired January 17, 1962.

On March 22, 1963, the Commission by letters advised applicants of its intent to deny licenses to both Patrick & Graves and Dixie and further advised both that section 44 prohibited them "from engaging in the business unless and until a license is issued." Despite this and a previous warning from an investigator of the Commission, Patrick & Graves and Dixie continued without a license, to carry on the business of forwarding subsequent to the effective date of section 44, and were still doing so as of the close of hearings in July, 1963. Shortly after filing their applications, Dixie and Patrick & Graves each provided bond in the amount of $10,000.

Over a period of not more than 6 months, extending from late 1961 to early 1962, Graves wrote at least 250 "insufficient funds" checks, and as a result Graves was asked by one bank to close out the Patrick & Graves and Dixie accounts. Dixie and Patrick & Graves changed banks in the early fall of 1962. Graves testified that the reason for the "insufficient funds" checks was that they were written on customers' checks that either "bounced" or were slow in being paid. The new bank handles customers' checks deposited by Graves "for collection" rather than as deposits. Neither Patrick & Graves nor Dixie may draw on these checks until they are notified by the bank that they have been paid.

As a result of their consistent failure to pay current accounts on time, most, if not all, steamship lines and the Customs House have placed Patrick & Graves and Dixie on a "cash basis." There is no evidence in the record of what effect, if any, that this will have on their operations.

Section 44 requires that before a freight forwarder may collect brokerage from a carrier he must be licensed by the Commission under that section. Since some time in late 1961 or early 1962, Dixie has been falsely certifying to steamship companies that it was licensed by the Federal Maritime Commission as an independent ocean freight forwarder. This certification was accomplished by rubber-stamping invoices to the carrier and was done for the purpose of collecting brokerage.

Dixie, by exchange of letters and informal understandings for cooperative working arrangements, has entered into agreements with other forwarders and at least some of these letters have not been filed with the Commission.

During the field investigation in October 1962, an investigator of the Commission requested that Graves submit financial statements for Patrick & Graves and Dixie. Graves submitted balance sheets dated October 31, 1961. When asked by the investigator for an up-to-date balance sheet, Graves submitted the same balance sheets, but the date now appeared as March 30, 1962, and the name of a firm of certified public accountants had been placed thereon.

The foregoing constitutes the facts over which there is no genuine dispute and all which were, in substantially the same form, found by the Examiner in his Initial Decision. There have been omitted, however, certain mitigating circumstances found by the Examiner to constitute facts but which to some extent at least constitute conclusions. Hearing Counsel excepted to most if not all of these, and they are dealt with below.

Hearing Counsel excepts to the conclusion of the Examiner that Patrick & Graves and Dixie are qualified for licensing as independent ocean freight forwarders. It is Hearing Counsel's position that the applicants are disqualified because of a series of previous illegal and irresponsible business transactions which render them unfit for licensing within the meaning of section 44. In their replies to the exceptions of Hearing Counsel, applicants appear to take the position that past illegal conduct has no bearing on the issuance of a license to do business in the future. Applicants further appear to urge that the

Commission in reviewing an initial decision of the Examiner is under the same restrictions as a court in its review of a final decision of the Commission. The latter contention misconceives the role of the Commission in this proceeding. While entitled to weight any recommended or initial decision which comes before us on review remains only a recommendation. In reviewing an initial decision the Commission exercises all the powers we would have in making the initial decision itself. *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159 (1962). We agree with Hearing Counsel, and on the basis of the record before us, we are compelled to overrule the Examiner.

After reviewing certain decisions of the Interstate Commerce Commission, the Examiner concluded (1) that licensing statutes should be liberally construed and (2) that past violations of law do not constitute an absolute bar to approval under a licensing statute. We do not disagree with the conclusions nor with the Examiner's interpretation of the cases relied upon.[1] But it is stated with equal clarity in those cases that violations of law can and should be taken into consideration in determining the fitness of an applicant. The fitness of the applicants is the issue here. The Examiner puts the points to be weighed against licensing applicants as (1) violation of law, (2) lax financial practices, and (3) false representations.

It is beyond dispute that applicants have operated without a license in violation of section 44 since January 17, 1962, the deadline for filing applications to preserve "grandfather rights." The Examiner further concluded that Graves had heard that forwarders required licenses sometime prior to January 17, 1962, but that "the information probably went in one ear and out the other." From this and from the fact that the simple act of filing the application would have rendered the operation lawful, the Examiner concludes "that the failure to file was sheer negligence rather than a calculated act."

The record demonstrates that a then employee of Dixie on at least several occasions, both before and after the critical date, spoke to Graves concerning the requirement of a license, and on one occasion tried to give Graves the necessary application forms but was told by Graves that he (Graves) already had them. The only evidence to the contrary is Graves's self-serving testimony to the effect that he did not recall any such conversations nor did he believe they had taken place. The only conclusion to be drawn is that Graves was told of the licensing requirement. The Examiner also came to this conclusion but apparently excused this violation of law on the ground that the operations were "neither the crafty and 'concealed' operations of a sneak * * * or the planned and deliberate defiance of one who

---

[1] These cases are: *Lifshultz Fast Freight Extension—Wisconsin*, 285 ICC 659 (1955); *American Red Ball*, etc., 82 MCC 391 (1961); *Chicago Express, Inc.*, 75 MCC 531 (1958).

refuses to comply with licensing requirements." It is difficult to understand just how Graves could have concealed his operations if he had thought this necessary and that his operations were deliberate is beyond doubt. Moreover, it must be kept in mind that Graves was faced with the "dilemma" of operating without a license or closing down his business solely by reason of his own "sheer negligence." The record in this proceeding clearly shows that the attitude of negligent indifference characterized virtually every facet of Graves's forwarding operations.

The Examiner dismisses misrepresentations contained in the so-called "up-dated" balance sheet on the ground that it harmed nobody and that there was no evidence "that Graves intended anything more than to get through with what he probably considered an unreasonable interruption of his business, as promptly and inexpensively as possible." We disagree, and this supposition does not seem to comport with the conclusion of the Examiner that "Graves promptly undertook to comply with the law when he really appreciated what the law said and that it meant what it said." It cannot be denied that Graves knew he needed a license or that he was at the time undergoing an investigation to determine his qualifications for that license. Yet when asked to submit a current balance sheet by the very agency charged with licensing him, he simply directs a secretary to change the date on one previously submitted and further he caused to be placed thereon the name of a firm of certified public accountants. He then personally signed and submitted the balance sheets. Such conduct is inexcusable on any grounds let alone those of time and expense. The record clearly establishes that the false balance sheets were submitted in a deliberate attempt to mislead the Commission and must be considered as another indication of the contempt, or at the very least, the complete indifference of Graves to the duties and responsibilities of a member of a regulated industry.[2]

The Examiner found and concluded that Dixie misrepresented that it was a licensed forwarder in order to collect brokerage from carriers. But again the Examiner dismisses this representation on the ground "that it is unlikely that it deceived anybody: it injured nobody: and making it was the only practical way in which Dixie could collect money it fairly earned." If we understand the reasoning correctly we cannot agree with it.

If the record demonstrates anything it shows that the misrepresentation was meant to deceive and did so. It certainly injured those carriers which paid brokerage when not required to do so. But more importantly, practicability affords no excuse for violation of the law.

[2] Additionally Graves did not comply with a further request made after submission of the false balance sheet for a correct and current one for the fiscal year ending Oct. 31, 1962.

The Examiner refers to testimony of Graves that when he began to use the stamp he thought that "Commission" meant "Board." The Examiner points out that when Graves was apprised of the difference by an investigator of the Commission "he (Graves) had the certificate form amended to include Dixie's Board registration number as 'FMB-1424' and felt that by doing so he had corrected anything wrong." This is not precisely correct. The certification itself was not amended. Rather, separate and apart from the certification an additional stamp was placed in the lower left hand corner of the invoice. This stamp included "FMB-1424" and a statement that brokerage was paid on the strict understanding that no part of the brokerage would revert to the shipper or consignee in compliance with section 16 of the Shipping Act, 1916. The certification remained precisely the same and represented Dixie as licensed by the Commission. This action hardly comports with a desire to obey the law. The only reasonable action to correct the misrepresentation was the removal of the certification and this Graves did not do. This failure represents at best a shocking indifference to the requirements of the law and a total lack of any desire on the part of Graves to expend any effort in informing himself of his duties and responsibilities under the law.

After a careful analysis of the Initial Decision it would appear that the Examiner concluded that Graves's misrepresentations and operations in violation of the law did not render him unfit because they were not "fraudulent" or "crafty and concealed" or "sinister" or that there was little likelihood that they deceived or actually caused harm to anyone. We disagree with this conclusion and to the extent that we have already commented on it nothing more need be said. It is important, however, to keep in mind that there exists between the shipper and forwarder a *fiduciary relationship* which will be discussed in some detail after a consideration of the applicant's financial responsibility.

We cannot agree with the Examiner that Graves's assurances of future financial responsibility on the witness stand warrant belief. The Examiner gives them credence because of Graves's demeanor, the sale of some stock for approximately $57,000 and an estimate by Graves that Dixie's net balance would be $150,000 made again on the stand at the hearing. One difficulty with these assurances is the failure to submit the last requested balance sheet. The Examiner points to the fact that no additional request was made subsequent to October 1962. This of course has no bearing on the fact that the best possible way to establish the financial worth of the applicants is the submission of a current balance sheet. To accept Graves's assurances is to continue the clear pattern that characterized all his activities, that of failing to meet even the minimum requirements of sound operational integrity.

One client of Graves, whom the Examiner characterized as vague and elderly, though the testimony itself is not at all vague, testified that he had suffered harm and had transferred his account because of the failure of Graves to pay the carrier on time.

After careful consideration of all the testimony and exhibits in this proceeding, we find that the record clearly establishes (1) that the applicants knew sometime before January 17, 1962, that a license was required, but in spite of that knowledge failed to file a timely application and operated in violation of section 44; (2) that Graves knowingly filed a falsely dated balance sheet with the name of a firm of certified public accountants improperly placed thereon in an effort to mislead the Commission; (3) that Dixie falsely certified with intent to deceive that it was licensed by the Commission as an independent ocean freight forwarder in order to collect brokerage from carriers in violation of section 44 and when specifically apprised of the falseness of the certification failed to cause its removal from the invoices; and (4) has demonstrated a lack of that kind of financial responsibility compatible with the duties and responsibilities of an independent ocean freight forwarder. The fact that Graves always ultimately made his bad checks good in our view again demonstrates that Graves does that which his very presence in business requires only when he is placed under pressure to do so.

The record in this proceeding reveals that forwarders frequently have in their possession large amounts of their clients' funds. They also frequently hold negotiable documents for others. Moreover, forwarders have access to confidential business secrets. Anyone acting in such a fiduciary capacity should of his own initiative, seek to attain the highest degree of business responsibility and integrity. This initiative is totally lacking in Graves, and his actions as spread across this record establish an attitude of at best complete indifference and at worst willful negligence regarding the duties and responsibilities imposed upon him by the law. His protestations of past ignorance of these duties and responsibilities and his assurance of future good behavior have a decidedly hollow ring when tested against the other evidence of record and his own past conduct. The Examiner places great stress upon the demeanor of Graves on the witness stand and upon the "unconscious fervor" with which Graves gave the Examiner himself the assurance of future behavior in full compliance with the law.

Demeanor is, of course, a valid consideration in weighing testimony, but where as here, belief based on demeanor contradicts the substantial evidence of record, the demeanor may characterize nothing more than a consummate poise on the part of the witness. Regarding the "unconscious fervor" with which Graves assured the Examiner that his future operations would be in complete conformity with the law, it is difficult to conceive a different answer to the Examiner's question.[3] Secondly, even if it may be assumed that Graves meant what he said, the record of Graves's operations demonstrates above all else, that Graves's assurance regarding even the most serious of matters were of little weight and any "unconscious fervor" would in all probability prove a fleeting thing when confronted with the practical necessities of operating a profitable forwarding business. Such fervor would undoubtedly vanish along with the assurance if in Graves's opinion some deviation from the law as dictated by practical necessity.

The freight forwarder occupies a position of enormous competitive and economic power as to carriers and enjoys a fiduciary relationship with shippers. He is in a position to do grave economic harm to both. A good example of this appears in *Compania Anonima Venezolana De Navegacion* v. *A. J. Perez Export Company*, 303 F. 2d 692 (CA 5, 1962), *cert. den.*, 371 U.S. 942 (1962), where a carrier's agent brought suit for unpaid freight monies which the shipper had paid to the forwarder but which the forwarder had not paid to the carrier. The Court had the following to say at p. 698:

> Under the due bills the Freight Forwarder promised to pay the freight or return the bills of lading within three days. Thus, within four days of the release of the bills of lading, the Agent knew that the Freight Forwarder was not honoring its promise to pay or return. Nothing, absolutely nothing, was done by the Agent except some unidentifiable weak-kneed requests made of the Freight Forwarder to do as it had promised. Not a word was breathed to the Shipper until May 9, 1955—more than five months after the one recent shipment in November 1954 and practically ten months as to all other. * * * The explanation for this action—which the trial Judge characterized as incredible—was not hard to find. The Agent did not really try very hard, nor, by the nature of things, could he either press too strongly for payment by the Freight Forwarder, or take the extraordinary step for notifying the Shipper that the Freight Forwarder had defaulted on his trust. This was because competitive forces in the shipping business are so severe in the solicitation and booking of outbound export traffic, that the Agent, dependent upon its generated traffic for its compensation * * * did not wish to incur the ill will of the Freight Forwarder as a source of added business from other shippers in the future. And where excessive pressure on the Freight Forwarder to pay its obligations might be thought untactful, it was completely out of the question, so the Agent made clear, for it to embarrass this potential source of future business by exposing his infidelity, incompetence, or down-right dishonesty to the principal (the Shipper). To collect the freight from the Freight Forwarder was important. But one

[3] This assurance was given in the following colloquy between the Examiner and Graves.:

EXAMINER. "If Dixie and Patrick & Graves should be licensed by the Commission, will you and these companies conform to this Act, and to the requirements, rules and regulations of the Commission issued thereunder?"

GRAVES. "You can bet that I will."

cannot read this record without the uncomfortable conviction that what was more important was preserving the good will of the Freight Forwarder lest traffic suffer tomorrow.

In a footnote, which we have omitted from the above quotation, the Court cites the decision in Docket Nos. 765 and 831, *Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders*, 6 FMB 327 (1961).[4]

In that decision the Federal Maritime Board, the Commission's predecessor, found that "brokerage" payments to freight forwarders by ocean common carriers had resulted in widespread malpractices including illegal rebates to shippers, resulting in discriminations as between shippers, and that such payments should be prohibited, and that various other practices in the forwarding industry were violative of the Shipping Act, 1916. These findings were the products of an extensive investigation by the Board. The Board issued proposed regulations prohibiting brokerage and otherwise regulating the industry. For several years, also, Congressional Committees had been probing into freight forwarding practices in the ocean foreign commerce, and there had been numerous prior agency and court cases involving forwarder practices and compensation.[5]

Faced with what they described as a substantial loss of revenue because of the Board's proposed ban on brokerage payments by common carriers, the forwarders appealed to Congress for the enactment of legislation which would permit such payments under appropriate safeguards. In response to this appeal, P.L. 87–254, *supra*, was enacted authorizing carriers to compensate forwarders if duly licensed by the Commission and if certain other prescribed conditions were met. These provisions were incorporated into a new section 44 of the Shipping Act, 1916. In passing this legislation Congress took cognizance of the malpractices which had led to the Board's action and explicitly authorized and directed the Commission to administer the program for licensing enacted therein to prescribe rules and regula-

[4] In this footnote 14 at page 699. the Court noted that the decision set forth in detail "the abuses thought to result from freight brokers having such a competitive death grip on generated traffic with a resulting practical inability to ocean carriers to do anything which might incur the ill will of freight forwarders."

[5] See for example *House and Senate Reports:* 84th Cong., H. Rept No. 2939. 7/26/56; 85th Cong., H. Rept. No. 2333, 7/31/58; 86th Cong.. H. Rept. No. 798. 8/6/59; 87th Cong., H. Rept. No. 1096, H.R. 2488, 8/31/61; 87th Cong.. S. Rept. No. 691, S. 1368, 8/9/61.

United States v. *American Union Transport,* 327 U.S. 437 (1946); Docket No. 657, *Agreements and Practices Pertaining to Brokerage, and Related Matters,* 3 U.S.M.C. 170, aff'd; *Atlantic & Gulf/West Coast Conference* v. *United States,* 90 F. Supp. 554. 94 F. Supp. 138 (SD NY, 1950); *Joint Committee* v. *Pacific Westbound Conference,* 4 F.M.B. 166, 172 (1953); *Agreements and Practices re Brokerage,* 3 U.S.M.C. 170, 177 (1949); Dockets 765/831, *Investigation of Practices and Agreements of Common Carriers by Water in Connection with Payment of Brokerage or other Fees to Ocean Freight Forwarders and Freight Brokers,* which was consolidated with Docket No. 765, *supra.*

tions governing the industry's conduct. As we said in Senate Report 691, 87th Congress, accompanying the bill that became P.L. 87–254:

> We recognize that malpractices have been widespread in the past, but we are confident that the regulatory authority given the Board in this bill will prevent such practices in the future, and we therefore have no hesitancy in recommending that the bill as amended be approved.

The business integrity of one who occupies the position of freight forwarder should be above reproach, and he should clearly demonstrate a complete awareness of and a willingness to accept the responsibilities that the preferred position imposes. Graves has shown an almost total lack of both. As the House Committee on Merchant Marine and Fisheries pointed out: "The intention of the * * * licensing provision [section 44] is to have every person, firm or corporation who holds himself out as a forwarder to be fully competent and qualified to act in the fiduciary relationship which such business necessitates." Thus the philosophy of section 44 is such that the shipping public should be entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder. The record here, however, demonstrates that members of the shipping public who do busines with Graves do so at their own risk. We cannot conscientiously license such an applicant and thereby suggest to the shipping community that we have probed his conduct and found him "fully competent and qualified" to act in a fiduciary capacity.

On the record before us we find and conclude that applicants, Patrick & Graves and Dixie Forwarding Co., Inc., are not fit properly to carry on the business of forwarding within the meaning of section 44 of the Shipping Act, 1916, and their applications for licenses as independent ocean freight forwarders under that section are hereby denied.

Vice Chairman THOS. E. STAKEM dissenting.

What the majority decision does is to put out of business freight forwarders who, as Hearing Counsel stated on the record that the Examiner found, are sufficiently experienced and efficient in the mechanics of forwarding to enable them to properly carry on the business of ocean freight forwarding. The opinion calls certain conduct of the applicants "shocking." The majority opinion shocks me.

Reviewing the whole record leads to the inescapable conclusion that it contains no substantial evidentiary basis for the majority decision of the Commission that, contrary to the examiner's findings, applicants "are not fit properly to carry on the business of forwarding." It is upon this very narrow ground that the majority elects to sweep away applicants' livelihood, earned for many years in a business which, as the record establishes, the examiner finds, and the majority does not deny, applicants are *willing* and *able* properly to carry on.

Notwithstanding the lip service of the majority to the liberal construction of the statutory language which has been given over a period of years by the Interstate Commerce Commission, the majority converts the statute into an economic death sentence to be imposed without giving the victim a chance to save his livelihood. The majority says that it does not disagree with the examiner's conclusions that licensing statutes should be liberally construed, and that past violations of law do not constitute an absolute bar to approval under a licensing statute. Thereafter it construes the licensing statute here involved as requiring an applicant to be one whose business integrity is "above reproach" and that he "clearly demonstrates a complete awareness of and a willingness to accept the responsibilities" of the freight forwarding business. This is not a liberal but an extraordinarily strict construction of the statute, and it constitutes the unsound basis upon which the majority opinion rests. It is fortunate for many wholly competent freight forwarders we have licensed that they were called upon to meet no such stern test. The majority decision turns primarily therefore upon a point of statutory construction rather than administrative expertise.

The majority theory is that we shall license only those sterling characters we know to be trustworthy and know this so well that we are willing to give the public our assurance of it. Frankly, I see no evidence to indicate that this would be practical and much common sense as well as sound statutory guides point to another and well charted course. When Congress selected the language "fit, willing and able," it did not do so in the dark. It knew how the Interstate Commerce Commission had administered licensing under substantially the same formula. Had Congress intended the Commission to take the diametrically opposite course taken here, Congress surely would have said so.

There is if course, a basic and important reason why Congress would not wish to set up as a requisite for an initial license the super-standard of requiring that an applicant demonstrate that its business integrity is "above reproach" and requiring that the applicant demonstrate that it is "seeking to obtain *the highest degree* of business responsibility." So to do comes perilously close to *ex post facto* criminal legislation.

The Commission would do well to recognize and apply as sound what the Interstate Commerce Commission said in *Carloader Corp. Freight Forwarder Application*, 260, I.C.C. 123, 127 (1944):

> The statute prescribes specific penalties for violations thereof and we deem it unnecessary to deny this application because of the unauthorized operation in the past.

What the majority opinion sets up as a test is something which might well be imposed as a guide to future conduct. All licensed forwarders would then be on notice that only by living up to that standard can they retain their licenses. It is plainly otherwise, however, with respect to securing an initial license by an established operator. Where a man has put years of effort and many dollars into building up a business which did not have to be licensed, only to see it swept away by the decision of the Commission based on applicants' blameworthy conduct while not licensed, amounts to a penalty which Congress with informed judgment, obviously considered too cruel to impose.

The majority, of course, believes that Graves is a very bad man, and is not backward about saying so. In my opinion this is inconsistent with the fact that his businesses are going concerns and that only *one* dissatisfied customer turns up in the record of the public hearing and he under subpoena.

The majority makes much of the "fiduciary relationship" of forwarders with shippers, and says in effect that Graves cannot meet the requirements for such a relationship. How in the world then, has he succeeded in occupying it so long?

The heart of the majority decision is in the express over-ruling of the examiner's conclusion that Graves was sincere in his testimony that if licensed by the Commission he "will conform to the Act, and to the requirements, rules and regulations of the Commission issued thereunder," and the majority's feeling that Graves will not live up to that assurance. Conceding that the examiner's conclusion was based upon the demeanor of the witness, the majority takes the position that this is a case wherein the "belief based on demeanor contradicts the substantial evidence of record." It is not such a case. The fact that Graves's conduct in the past, when he had no license to lose was not good, is certainly not substantial evidence that if Graves gets a license he will throw it away by the same sort of conduct, which the examiner's decision, the majority opinion, and this dissenting decision unanimously condemn. I respectfully say to my colleagues, that their reasoning upon this point is logically unsound, and their rejection of the examiner's conclusion on the crediblity of the witness is contrary to applicable law. It must be conceded that if Graves will do what he says he will do, by complying with the law and our regulations, he will be a good forwarder, and should be licensed.

I do not consider applicable here the sound rule in *Alcoa Steamship Company, Inc.* v. *Commission*, 321 F 2d. 756, 758 (D.C. Cir., 1963), that although an examiner's decision is entitled to great weight, the Commission's view of the evidence is what counts. Neither does it appear the court would consider the rule applicable, for the court was careful to point out that "the credibility of witnesses was not involved." Here it is directly and importantly involved, as *the witness is testifying about his own intentions*, and if he intends to protect himself in the future he is telling the truth. I consider it legally arbitrary and capricious action to decide a case by the finding of three men that a witness they didn't hear testify wasn't telling the truth. Mr. Justice Frankfurter's quotation in the well known *Universal Camera* case seems in point. It reads:

In general, the relationship upon appeal between the hearing commissioner and the agency to a considerable extent ought to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.

No really serious consideration appears to have been given by the majority to either the examiner's suggestion that the business of these applicants be closely supervised by our staff (by doing which we would follow sound I.C.C. precedent) or applicants' petition for reopening, in which they tender complete cooperation in procedures the Commission may prescribe to protect the public interest. It is questionable if applicants have not been here denied due process of law without such consideration, and a showing (to my mind impossible on this record) that the only way to protect the public is to put applicants out of business.

Finally, I believe that the examiner's initial opinion was and this dissenting opinion is a dispassionate consideration of the facts, and weighing of the public and the private interest. Both conclude that it is possible to protect the public without sacrificing the private interest. My fellow Commissioners who take the contrary view, are unquestionably sincere in castigating Graves. The examiner did not, and I do not point to Graves as a paragon of virtue. I simply do not consider him so bad and dangerous that he cannot be given even the chance to reform, and must be summarily denied a license.

The matter of past violations of law by the applicants can be handled in this case like all other similar violations that come to the Commissioner's attention.

Commissioner James V. Day dissenting:

The majority has gone contrary to established precedent in so restrictively defining what constitutes a "fit" applicant for a forwarder license. By such action, the majority has destroyed two enterprises which possess an expertise in forwarding acquired over a number of years prior to when the industry was under regulatory requirements and has thus removed a source of valuable service to the public of years' standing, not to mention the resultant losses to applicants' employees and ownership.

220-178 O - 66 - 10

In defining a "fit" forwarder, the majority maintains that "the business integrity of one who occupies the position of freight forwarder should be *above reproach*" and that "anyone acting in such a fiduciary capacity should of his own initiative seek to attain the *highest degree* of business responsibility and integrity." [Italics added.]

Our licensing statute simply states, *inter alia*, that applicants qualify for licenses if the Commission finds that they are "fit, willing and able properly to carry on the business of forwarding." This language is indeed similar to the licensing statute administered by the ICC and Congress was well aware in adopting such language for our statute of the interpretation given to the ICC law. As the Examiner says, from the beginning it has been held that such licensing statutes should be liberally construed, particularly in the early stages of regulation—as here. (Citing *Lifschultz Fast Freight Extension—Wisconsin*, 285 I.C.C. 659, 665 (1955)). He further states that neither unauthorized operations, nor violation of Commission regulations, nor lax financial practices will necessarily constitute a bar to licensing (Citing *American Red Ball*, etc., 82 M.C.C. 391, 398 (1961) wherein application approved). He also refers to another ICC case holding that "* * * there is no inflexible formula which must be followed in making the determination, and each case must be decided on the facts presented, consideration being given to such factors as the nature and extent of past violations, the effect thereof upon regulation, mitigating circumstances, and whether the carriers' past conduct represents a flagrant and persistent disregard of the provisions of the act." (*Chicago Express, Inc.*, 75 M.C.C. 531 (1958)—license granted under circumstances similar to the case here). Yet the majority, while stating that it does not disagree with the Examiner's conclusions (that licensing statutes should be liberally construed and that past violations of law do not constitute an absolute bar) nor with the Examiner's interpretations of the above cases, nevertheless defines "fitness" as "above reproach" and does indeed absolutely bar applicants from being licensed.

The majority and the Examiner agree that the decisive facts to be here weighed are of three types—(1) violation of law, (2) lax financial practices, and (3) false representations.

As to (1) violation of law—in that applicants have operated without a license—the Examiner held that Graves's action in *applying for a license*, admittedly late but immediately upon recognizing the serious import of the law, and *continuing to operate* after applying, at the risk of a fine and opposition to his license so as to save his business, did not constitute "the planned and deliberate *defiance* of one who refuses to comply with licensing requirements." [Italics added.]

Nor does the majority, in noting the operations were deliberate, characterize them as a defiant refusal to comply. The majority merely would define them as resulting from negligent indifference.

As to (2) lax financial practices—as evidenced by issuance of bad checks—the Examiner noted that there is no proof that any check was known to be worthless when it was drawn, that applicants' accounts were weakened by worthless checks deposited, and that applicants made good all their checks immediately and that corrective action has been taken. The majority's position is obviously strained when it says the fact that Graves "ultimately" made his bad checks good only demonstrates that Graves does that which he must only when placed under pressure.

The majority refers to one client of Graves as testifying he had suffered harm and had transferred his account because of a failure of Graves to pay the carrier on time. The Examiner notes that this witness also testified that none of his shipments had been delayed and that the record does not support any inference that Dixie's customers are handicapped in any way by anything for which Dixie is responsible.

As to (3) misrepresentation—in that Graves supplied an updated balance sheet to the Commission investigator and used an invoice stamp indicating Dixie was a licensed forwarder. The Examiner held that these misrepresentations were not fatal to the license application because of certain mitigating circumstances.

The Examiner found that Graves updated the balance sheet without any appreciation of the gravity of his action and there was "no evidence that Graves intended anything more than to get through with what he probably considered an unreasonable interruption of his business as promptly and inexpensively as possible." The majority recognize that Graves's action may be considered as in indication of "complete indifference * * * to the duties and responsibilities of a member of a regulated industry." (Applicants have since filed per their petition quite current balance sheets-for Dixie as of 2/28/64 and for Patrick & Graves as of 12/31/63—with the Commission).

The Examiner found with respect to the invoice stamp that "Graves' testimony indicates that at least at first, he confused a Maritime Board registration number with a Commission license. Further, that when the point came up, he had the certificate form amended—and felt that by so doing he had corrected anything wrong." [1] Further, the Examiner noted that the use of the certificate did not frustrate the intention of Congress which was to prevent the payment of brokerage to "dummy forwarders" and safeguard payment only to forwarders per-

[1] More precisely, Graves began using an additional stamp.

forming services which Dixie actually performed. Further, Graves indicated on the witness stand that he would discontinue use of the false certificate. The majority, without referring to this indication and dismissing Graves's prior effort to correct the situtation, describes Graves's failure to remove the certification as representing a shocking indifference to the requirements of law and a total lack of any desire to expend any effort in informing himself of his duties and responsibilities under the law.

The record in this proceeding shows that forwarders frequently hold large amounts of their clients' funds, negotiable documents belonging to others, and have access to confidential business secrets. Any person exhibiting a proclivity to dispense such funds, documents and secrets improperly would not appear to be a fit applicant for licensing. The applicants here, however, are not accused essentially of such fault. Applicant's unlicensed operations, and misrepresentations may be said to indicate an attitude of indifference and reluctance to comply with a new statutory requirement.[2] But indifference and reluctance is not quite flagrant disregard or calculated defiance of a new regulatory authority. The Examiner attaches considerable weight to Graves's chastened attitude. The Examiner observed his demeanor. Graves's past actions following upon the enactment of new licensing legislation are not of such a nature as to bar our recognition of a sincere and firm intent to conduct operations in the future conforming to new statutory and Commission requirements.

Both the Examiner and even Graves in his petition would contemplate a periodic Commission review or audit of his future actions to see that he conforms to the law. This is worthy of consideration. Past actions noted, of course, are not to be condoned and any violation of law should be referred to the proper authorities for appropriate action. (See *Carloader Corp. Freight Forwarder Application*, 260 ICC 123, 127 (1944)).

On balance, the applicants' past actions do not make them unfit nor have they been found unwilling or unable to continue in business and serve the public. It would not be a departure from past precedent to award them a license and such action would be in keeping with our past actions in licensing forwarders who, upon our weighing their applications both pro and con, have been found to have met the test of the statute.

An appropriate order will be entered.

---

[2] With respect to Graves's issuing checks which initially were not supported by funds, his immediate correction of the situation and his assurances and demeanor on the witness stand can support a finding that such practices should not bar him from a license. (See Examiner's decision at page 12 and Appendix thereto at page IV.)

FEDERAL MARITIME COMMISSION

No. 1115

APPLICATION FOR FREIGHT FORWARDING LICENSE
DIXIE FORWARDING CO., INC.

No. 1116

APPLICATION FOR FREIGHT FORWARDING LICENSE
MR. L. H. GRAVES, D/B/A PATRICK & GRAVES

The Commission having fully considered the above matters and having this date made and entered of record a Report containing its conclusions and decision thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That the applications for licenses of Dixie Forwarding Co., Inc. and L. H. Graves, d/b/a Patrick & Graves, are hereby denied pursuant to section 44(b), Shipping Act, 1916, and Rule 510.8 of General Order 4.

By order of the Commission, April 21, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 732

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

Decided April 30, 1964

Complaint against certain respondents dismissed with prejudice as result of settlement between complainant and said respondents of claim for reparation on shipments of cotton from U.S. Gulf ports to ports in the Mediterranean.

Delmar W. Holloman for complainant.

Edward S. Bagley for respondents except States Marine Corporation of Delaware (which is not a party to settlement).

THIRD DECISION ON REMAND OF GUS O. BASHAM, CHIEF EXAMINER,[1]

DETERMINING REPARATION DUE COMPLAINANT

The decision of the Federal Maritime Board in *Isbrandtsen Co., Inc., et al.* v. *States Marine et al.* 6 F.M.B. 422 (1961) dismissing the complaint herein was reversed by the United States Court of Appeals (D.C.) on January 10, 1963. The Court remanded the proceeding to the Commission (successor to the Board) for the assessment of reparation, if any, due to complainant.[2] In turn, the Commission by order of November 21, 1963, remanded the proceeding to the Examiner for that purpose.

Complainant, on March 16, 1964, submitted the following Stipulation and Agreement between it and respondents[3] executed on March

[1] In the absence of exceptions thereto by the parties, and upon notice by the Commission, the initial decision of the Examiner became the decision of the Commission on the date shown (section 8(a) of the Administrative Procedure Act and the Rules 13(d) and 13(h) of the Commission's Rules of Practice and Procedure).

[2] The Court said: "The discriminatory (dual) rates here involved were not approved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal."

[3] Respondents herein are all of the lines named in the original complaint except States Marine Corporation of Delaware, and Lykes Bros. Steamship Co., Inc., the latter having previously settled with complainant. (See First Report on Remand in Docket 732 etc.)

16, 1964, and requested the dismissal with prejudice of the complaint against them:

This Stipulation and Agreement is entered into between H. Kempner, a Massachusetts trust, on the one hand, and Kerr Steamship Company, Societa Italiana di Armamento "SIDARMA", Compania Maritime del Nervion, Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line), and the Gulf/Mediterranean Ports Conference, and Waterman Steamship Corporation, Alexandria Navigation Company, S.A.E., Bloomfield Steamship Company, Blue Funnel Line-Java New York Line, Compagnie de Navigation Cyprien Fabre (Fabre Line), Compagnie Generale Transatlantique (French Line), Concordia Line, Ellerman & Bucknall Associated Lines, Fern-Ville Mediterranean Lines-Fearnley & Eger and A. F. Klaveness & Company A/S, Hellenic Lines, Ltd., Leif Hoegh & Company A/S (Hoegh Lines), Isthmian Steamship Company, Prudential Steamship Corporation, Larrinaga Steamship Company, Ltd. (Larrinaga Line), Richard Meyer Company of Texas, Strachan Shipping Company (Strachan Line), Thos. & Jas. Harrison (Harrison Line), and Israeli Judges Line Shipping & Navigation Co., Ltd., all of which are more fully described in the complaint and answer in Docket No. 732 before the Federal Maritime Commission, on the other.

Whereas, the aforesaid H. Kempner is the complainant in the proceeding in Docket No. 732 before the Federal Maritime Commission (which term, where appropriate, shall include the Federal Maritime Board), seeking to recover reparations against Kerr Steamship Company [Kerr], Societa Italiana di Armamento "SIDARMA" [Sidarma], Compania Maritima de Nervion [Nervion], and Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line) [Creole], among others, and which proceeding further names the other parties hereinabove set forth as respondents, all as will more fully appear from the complaint and answer in the said proceeding; and

Whereas, in addition to the reparations claimed against Kerr Steamship Company, Societa Italiana di Armamento "SIDARMA", Compania Maritima del Nervion, and Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line) for the period through December 31, 1952, by the aforesaid H. Kempner as set forth in the complaint in the said proceeding, and said H. Kempner shipped at non-contract rates consignments of cotton via the vessels of Kerr Steamship Company, Societa Italiana di Armamento "SIDARMA", Compania Maritima del Nervion, and Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line) and/or the other respondents named herein from January 1, 1953, to the date of the interim legislation enacted by Congress which made lawful the dual-rate contract systems of the aforesaid Conference insofar as it might be applied subsequent to the date of the enactment of that legislation, August 12, 1958; and

Whereas, the United States Court of Appeals for the District of Columbia Circuit by decision dated January 10, 1963, reversed the decision of the Federal Maritime Commission in the aforesaid proceedings and ordered the proceedings remanded to the Commission for the assessment of reparations due to the complainants thereunder; and

Whereas, the Conference and its members, including the parties named hereinabove, deny that they are liable to the aforesaid H. Kempner for any alleged reparations and/or damages; and

Whereas, the parties are desirous of settling, satisfying and compromising their differences to avoid the necessity for further proceedings and the expense, inconvenience, and delays which would be occasioned thereby;

Now, therefore, for and in consideration of the mutual undertakings of the parties hereto, it is hereby stipulated and agreed by and between the said parties that:

1. H. Kempner hereby releases any and all claims which it may have had against Kerr Steamship Company, Societa Italiana di Armamento "SIDARMA", Compagnia Maritima del Nervion, Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line), and the Gulf/Mediterranean Ports Conference, and Waterman Steamship Corporation, Alexandria Navigation Company, S.A.E., Bloomfield Steamship Company, Blue Funnel Line-Java New York Line, Compagnie de Navigation Cyprien Fabre (Fabre Line), Compagnie Generale Transatlantique (French Line), Concordia Line, Ellerman & Bucknall Associated Lines, Fern-Ville Mediterranean Lines-Fearnley & Eger and A. F. Klaveness & Company A/S, Hellenic Lines, Ltd., Leif Hoegh & Company A/S (Hoegh Lines), Isthmian Steamship Company, Prudential Steamship Corporation, Larrinaga Steamship Company, Ltd. (Larrinaga Line), Richard Meyer Company of Texas, Strachan Shipping Company (Strachan Line), Thos. & Jas. Harrison (Harrison Line), and Israeli Judges Line Shipping & Navigation Co., Ltd. in connection with the matters alleged in the complaint in Docket No. 732 before the Federal Maritime Commission, including all claims for damages and/or reparations arising out of the payment by H. Kempner of non-contract rates under the dual-rate system involved, including those covering shipments which were effected during the period subsequent to December 31, 1952.

2. Upon the execution of this Agreement the parties hereto shall advise the Federal Maritime Commission that the controversy which is the subject of the complaint in Docket No. 732 before the Federal Maritime Commission has been settled insofar as it applies to the respondents named in Paragraph No. 1 hereinabove and that H. Kempner has withdrawn its complaint, as amended, insofar as it pertains to the said respondents, and request an order by the Commission dismissing the said complaint, with prejudice, insofar as it pertains to the said respondents.

3. Upon the dismissal of the complaint, as hereinabove set forth, the Kerr Steamship Company, Societa Italiana di Armamento "SIDARMA", Compania Maritima del Nervion, and Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line) shall pay to H. Kempner, including principal, interest thereon, costs, and any other amounts which may be due, the following sums:

Compania Maritima del Nervion and Kerr Steamship Company, agents	$5,000.00
Societa Italiana di Armamento "SIDARMA"	$2,713.06
Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line)	$3,000.00

4. This Agreement is entered into by and between the parties for the purpose of settling, satisfying, and compromising the differences set forth hereinabove and for the avoidance of the expense, inconvenience, and delays which would be involved in any further litigation between them. Neither this Agreement nor any payment hereunder shall be construed as an admission that H. Kempner is entitled to recover damages and/or reparations against the respondents named hereinabove in any amount whatsoever.

This document was served upon the attorneys for all other respondents herein, who have filed no objection to the proposed settlement.

The complaint herein was filed timely, therefore none of the shipments are time barred. The amount of reparation claimed therein

($3,339.54 from Kerr/Nervion, $1,779.06 from Sidarma and $2,436.78 from Creole, all with interest), was calculated on basis of the difference between the noncontract rate paid and the contract rate sought, applied to the weight of the shipments involved.

The amounts agreed upon in settlement of the claims ($5,000 from Kerr/Nervion, $2,713.06 from Sidarma and $3,000 from Cerole) is equivalent to the reparation originally sought plus a nominal amount of interest.

Premises considered, an order will be entered dismissing the complaint, with prejudice, as to respondents named in the Stipulation and Agreement only. This action should not be construed as an approval of any particular amount of interest on the claims involved; and is without prejudice to any findings which may be made with reference to the remaining claim for reparation against the remaining respondent.

(Signed) GUS O. BASHAM,
Presiding Examiner.

APRIL 15, 1964.

FEDERAL MARITIME COMMISSION

No. 1165

APPLICATION FOR FREIGHT FORWARDING LICENSE

CARLOS H. CABEZAS, 97 73D STREET, BROOKLYN, NEW YORK

Decided June 2, 1964

Application of Carlos H. Cabezas for freight forwarding license denied because of lack of financial capability compatible with the duties and responsibilities of a freight forwarder, and unwillingness to conform to the requirements, rules and regulations of the Commission.

Michael Patestides for Applicant.
J. Scot Provan, Hearing Counsel.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER[1]

Carlos H. Cabezas of Brooklyn, New York (applicant) filed his application for a license to operate as an independent ocean freight forwarder with the Federal Maritime Commission (Commission). The Commission, after considering the application, notified the applicant of its intent to deny his application because he was not financially qualified and further, because he had failed to respond properly to lawful inquiries of the Commission. The applicant requested the opportunity to show at a hearing that denial of his application was unwarranted and this proceeding was instituted to afford him that opportunity.

THE FACTS

The record discloses the following facts:

1. Applicant resides at 97 73d Street, Brooklyn, N.Y., and presently conducts his business at that address.

2. He has been engaged in the business of forwarding for about 12 years, except for a period when the volume of business did not warrant continuing the occupation.

3. Freight forwarding is an integral part of applicant's livelihood.

4. His business involves the forwarding of general merchandise, machinery, luggage and "any sort of shipments" primarily to South American ports.

[1] This decision became the decision of the Commission on June 2, 1964 and an order was issued denying the application. See Rules 13(d) and 13(h), Rules of Practice and Procedure (46 CFR 502.224, 502.228).

5. Applicant holds Captain's papers issued by the Chilean Government and has had extensive experience at sea.

6. Applicant was charged with aiding and abetting one Amiano in operating as a freight forwarder in violation of the Shipping Act and appeared before a Federal Court on January 9, 1964, without counsel; at the direction of the Judge of the Federal Court, applicant tendered a certified copy of his 1962 individual income tax return and after examining the return, the Court found that applicant had a marginal income and appointed a lawyer to defend him.

7. An investigator for the Commission was charged with the responsibility of investigating applicant's qualification for a forwarding license; the investigation was not completed due to failure of applicant to keep appointments made with the investigator.

8. Applicant did not comply with the request of the investigator to produce books and records for the reason that such documents were in storage in a warehouse and applicant considered them unavailable.

Discussion

Public Law 87–254, amended the Shipping Act, 1916 (the Act) by providing in the first section thereof a definition of "carrying on the business of forwarding" and by adding section 44 which requires the licensing of forwarders. In pertinent part, the statute provides:

> Section 44. (a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business: * * *
>
> (b) 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 and is fit, willing, and able 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, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied.

The statute places upon the Commission the duty of determining that an applicant for a license is fit, willing and able to properly carry on a forwarding business, and further, that he is willing and able to conform to the Act and the Commission's requirements, rules and regulations. The determination of the fitness, willingness, and ability of the applicant must be by application of the Commission's sound discretion. It is well recognized that discretion may not be exercised in an arbitrary or capricious manner and in licensing or refusal to license, consideration must be given to constitutional and lawful safeguards of individuals and their right to make a living. *Archer* v. *SEC*, 133 Fed. 2d 795, cert. denied 319 U.S. 767.

The record discloses that applicant did not respond to the Commission's proper inquiries. This fact raises reasonable doubt that he is willing or able to conform to the requirements, rules and regulations of the Commission and forecloses an affirmative finding that he is so willing and able to conform. Applicant offered no evidence of his financial qualifications at the hearing. His request to present documentary evidence of his financial ability pursuant to Rule 10(w) of the Commission's Rules of Practice and Procedure was granted with concurrence of Hearing Counsel. Applicant failed to furnish the documentary evidence within the two week period allowed by the Examiner at the hearing or within more than a month subsequent to the expiration of that period. Through his counsel, he has elected to rely on the evidence presented at the hearing.

His failure to present documentary evidence of his financial status and waiver of the opportunity to do so, permits only the conclusions that favorable evidence is not available to him. Evidence of lack of financial ability was presented by Hearing Counsel. Within recent months, a Federal Court determined that applicant's financial status was marginal and found it necessary to appoint an attorney to defend applicant in a matter involving violation of the Shipping Act, 1916, as amended.

Section 44(b) of the Act provides that a license shall be issued *if it is found* that an applicant is fit, willing, and able to properly carry on the business of forwarding and to conform to the provisions of the Act as well as the requirements, rules and regulations of the Commission. In view of the attitude and behavior of the applicant in regard to the Commission's lawful inquiries and his questionable financial status, the findings prerequisite to issuing a license cannot be made. Applicant has not complained, nor could he complain in view of the facts and circumstances here presented, that refusal of his license would be an arbitrary or capricious exercise of discretion. In the absence of the findings required by the statute, denial of the license is mandatory.

Conclusions

Applicant does not possess that kind of financial responsibility compatible with the duties and responsibilities of a freight forwarder. It cannot be found that he is willing and able to conform to the provisions of the Act or the Commission's requirements, rules and regulations.

The application for a freight forwarding license is denied. An appropriate order will be entered.

(Signed) Herbert K. Greer,
Presiding Examiner.

May 8, 1964.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 369

E. MAHLAB D/B/A OVERSEAS LEATHER IMPORTING CO.

COMPLAINANT

v.

CONCORDIA LINE (JOINT SERVICE OF DAMPSKIBSAKTIESELSKABET ALASKA, AKTIESELSKABET ATLAS, DAMPSKIBSAKTIESELSKABET IDAHO, SKIPSAKSJESELSKAPET HILDA KNUDSEN, AND SKIPSAKSJESELSKAPET SAMUEL BAKKE)

RESPONDENT

Application of Concordia Line for authority to refund to E. Mahlab d/b/a Overseas Leather Importing Co. the sum of $367.20 in connection with a shipment from Beirut, Lebanon to New York, denied.

Thomas K. Roche, Esq. and *Sanford C. Miller, Esq.* for applicant.

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

Concordia Line (Joint Service of Dampskibsaktieselskabet Alaska, Aktieselskabet Atlas, Dampskibsaktieselskabet Idaho, Skipsaksjeselskapet Hilda Knudsen, and Skipsaksjeselskapet Samuel Bakke) (Concordia), respondent and applicant filed an application pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure,[2] for permission to make a partial repayment of freight on a shipment of goatskins in bundles shipped from Beirut, Lebanon, via way ports to New York on or about April 24, 1963 on its vessel *Concordia Star.* This shipment was on a "freight collect" basis, the freight being for the account of the United States receiver.

[1] This decision became the decision of the Commission on April 30, 1964 and an order was issued denying the application. See Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224 and 502.228.

[2] Rule 6(b) provides: "Carriers or other persons subject to the shipping acts may file applications for the voluntary payment of reparation or for permission to waive collection of undercharges, even though no complaint has been filed pursuant to rule 5(b). All such applications shall be made in accordance with the form prescribed in Appendix II(5) herein, shall describe in detail the transaction out of which the claim for reparation arose, and shall be filed within the 2-year statutory period referred to in rule 5(c). Such applications will be considered the equivalent of a complaint and answer thereto admitting the facts complained of. If allowed, an order for payment will be issued by the Commission."

The shipment's aggregate weight or measurement was 28.80 cubic meters or 9,600 kilograms. The consignor is one Hashim A. Rahman Mohammad, in Beirut and the consignee is complainant (by endorsement) in New York City. The aggregate freight charges collected on this shipment on March 29, 1963, by Concordia amounted to $1,101.60, the said amount being paid by the complainant herein. The basis on which the freight charges were collected was predicated upon $38.25 per cubic meter in accordance with the Concordia Line Eastern Mediterranean/U.S. Atlantic Westbound Freight Tariff F.M.C. Number 1, Revised Page No. 14. The rate sought to be applied was $76.50 per weight ton (1,000 kilos) and the aggregate freight charges at the rate sought to be applied would be $734.40. The refund request is for the difference namely $367.20.

Concordia asks for authority to cure a hardship which has been imposed upon complainant, a small American importer, by reason of an inadvertent oversight with respect to its tariff rates applicable to goatskins. This shipment in question was made on a "freight collect" basis, the freight being for the account of the United States receiver and upon the issuance of the bill of lading on or about April 24, 1963, the shipper called to the attention of Concordia's agent that Concordia's tariff was very much higher than the rate being charged by American Export Lines (Export), Concordia's competitor. On April 26, Concordia's Beirut agent thereupon cabled its head office in Norway and asked permission to make the necessary adjustment. The vessel, however, had sailed on April 25, the day before the agent brought the matter to the owner's attention and the head office in Norway replied to the Beirut agent that the adjustment requested could not then be made. Thereafter when the goods arrived in New York in late May, the receiver called to the attention of Concordia's general agent that the freight rate was far higher than the rate charged for similar shipments by Export which serves the same trade. Concordia states that it has been its policy to set rates at competitive levels and when it learned that the American Export freight rate on this item was $76.50 per weight ton, which would have resulted in total freight on the shipment of $734.40, Concordia's traffic officials agreed that the rate should have been at the same level. The rate, however, in Concordia's tariff was as above shown which resulted in the amount of $1,101.60. Thereafter Concordia after investigating the matter further learned that this older freight rate had been carried over inadvertently from an older tariff and that the unduly high rate had not been detected because no shipments of the commodity had been offered to Concordia, and that if this disparity had been known to Concordia in time to permit the filing of the necessary tariff amendment, Concordia would have filed the appropriate tariff amendment reducing the rate (this has since been done). However, as noted, the vessel had already sailed from Lebanon when its Beirut agent first raised the question with Concordia's head office, and by the time the receiver of the goatskins in New York called the error to Concordia's attention the only step then available was for Concordia to seek permission from the Federal Maritime Commission (Commission) to rectify the inadvertent error.

It would appear that the facts in the present case do not fall within the category of cases in which relief has been granted by the Commission. Although it is alleged by Concordia that there was a misunderstanding or at least an inadvertent mistake in not filing its newer tariff in relation to the charges involved in the shipment of goatskins, nevertheless it would appear that those engaged in the export and import trade would know or make it their business to determine the costs of shipping services they intend to use. Shipping costs are an integral part of the costs of commodities that are to be sold and it would be basic to inquire about or to know these costs inasmuch as they enter into the price which an importer will have to pay for his merchandise. Although competitive rates on the shipment of goatskins from Beirut, Lebanon, to New York were then at different levels it must be assumed that the consignor in Beirut as well as the New York consignee knew what the shipping charges would be when the cargo was booked for shipment to New York. It cannot be said that the shipper and the consignee were misled for there was no error or inadvertence as to the tariff rate then on file at the time of the shipment.[3] The facts in the present case do not fit within the scope of the *Martini & Rossi* decision, Special Docket No. 244, F.M.C. 453 (1962), which holds that innocent shippers should not be made to bear the consequences of a carrier's neglect in filing a tariff rate that the parties, acting in good faith, had agreed would apply. Actually the shipper in this case knew or should have known or could have readily ascertained what the tariff was since it was then on file even though the carrier apparently was without knowledge at that time that its rate was higher than that of its competitor, Export, serving the same trade. To be sure the carrier in the present instance will receive a substantial windfall at the expense of the shipper. However, the carrier is getting exactly the amount which its tariff provided for—nothing more, nothing less—even though the shipper could have used a competitive line (Export) and gotten a much lower rate.

There was no misunderstanding as to the rate to be applied. The carrier's agent may have agreed that his principal's rate was high but he did not accept the shipment with any concurrent promise that a

[3] (Concordia Line Eastern Mediterranean/U.S. Atlantic Westbound Freight Tariff F.M.C. No. 1 Revised page 14.)

lower rate would be applied. The shipper was not treated unfairly. He shipped with his eyes open as to the charges and the consignee was not an innocent party herein. The fact that the consignee was required to pay a rate which, subsequent to his shipment, was lowered to meet the rate of a competing carrier is no basis for permitting the lower rate to become retroactively effective. Under approved and lawful practices, a carrier may lower his rates to meet competition. It is, however, the retroactive application of rates that is forbidden. To permit such a practice would be to make a farce of the statute requiring the filing of rates and the charging of the rates as filed.

It is precisely this set of facts that distinguishes this case from the cases in which the Commission has heretofore granted relief. The carrier simply charged the rate which its tariff provided and the shipper or consignee paid that rate even though it apparently discovered shortly after the shipment had moved out of Beirut that the tariff charges were noticeably higher than Export's, its competitor, was charging.

The application is denied. An appropriate order will be entered.

(Signed) EDWARD C. JOHNSON,
Presiding Examiner,

APRIL 2, 1964.

FEDERAL MARITIME COMMISSION

No. 1061

BULKLEY DUNTON OVERSEAS, S.A.

v.

BLUE STAR SHIPPING CORPORATION

Handling charges of respondent terminal not found to constitute unjust or unreasonable practice in violation of section 17 of the Shipping Act, 1916.

Harold Mitherz, Esq. and *Howard A. Pratt, Esq.*, Tanzer, Mullaney, Mitherz & Pratt for Bulkley Dunton Overseas, S.A.

James J. Bierbower, Esq. for Blue Star Shipping Corporation.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER [1]

During the period 1959–61 complainant Bulkley Dunton Overseas, S.A., a New York City based corporation organized under the laws of Panama, was engaged in the export of wood pulp supplied by the St. Marys Kraft Mills, a paper manufacturing company located at St. Marys, Georgia.[2] The complaint is against respondent Blue Star Shipping Corporation as lessee and operator of the Kings Bay Marine Terminal, Kings Bay Station (St. Marys), Georgia (the "Terminal"). As amended, it alleges unjust and unreasonable rules, regulations and practices (i.e. handling charges) by respondent in violation of the second paragraph of section 17 of the Shipping Act, 1916 (the "Act"), and seeks reparation therefor.

The second paragraph of section 17 provides:

> Every [common carrier by water in foreign commerce] and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the [Commission] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

[1] This decision became the decision of the Commission on June 9, 1964. See Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224, 502.228.

[2] Since July 1961 wood pulp has not been available from this source for export as Kraft has required the entire supply for its own paper production.

The facts are that between on or about March 21, 1959, and July 19, 1961, complainant shipped for export over the Terminal an aggregate of 23,836 tons of wood pulp by 31 separate shipments (see Appendix). However, only the last 16 shipments, which totaled 13,404.25 tons and which occurred on and after May 17, 1960,[3] are here concerned. Complainant admits that the 15 earlier shipments are time-barred by the 2-year limitation prescribed by section 22 of the Act.

Although these shipments, as delivered in railroad freight cars, were in stacks ranging from three to seven bales high, respondent usually handled them in stacks of five bales. This handling was done either by respondent's employees or by arrangement with stevedores for which respondent paid. Each bale weighed approximately 500 pounds and, even when stacked, they were not bound together. It is understandable that the stacking involved considerable effort and that the tendency of the top bale to fall off posed safety problems. Two workmen suffered broken arms and one a broken leg. The pertinent provisions of the Terminal's tariff provided as follows:

Item 18 *Definition of the term "handling."*

The term "handling" as used in this tariff means the physical handling or movement of cargo between shipside and cars, shipside and motor vehicles, shipside and storage or between storage and cars or trucks; and one handling charge is assessed for each movement of cargo except that when the Terminal is required to load cargo on pallets furnished by the Shipper or Consignee at time of handling out, the handling out charge will be fifty percent (50%) higher than the regular handling charges published in this tariff. Handling charges are assessed against the cargo.

Item A–55 *Handling—Cargo moving direct between cars and ships.*

On all cargo moving direct between rail cars, trucks, trailers and/or vehicles and ships, the stevedore and/or stevedoring companies will handle and receive 33⅓ percent of the applicable tariff rate.[4]

Item 269 *Charges for wharfage and handling* (in cents per ton of 2,000 pounds).

	Wharfage	*Handling*
Wood Pulp, in bales 1,000 pounds and over	30	69
In units under 1,000 pounds	30	95

Respondent charged, and complainant paid, handling charges of 95 cents per ton of 2,000 pounds for the said 16 shipments, or a total sum of $12,734.06. In a few but undetermined number of instances, two of the participating stevedoring companies [5] waived, and respondent therefore did not pay, the one third share specified by Item A–55.

[3] This assumes a valid filing of the complaint not more than 2 years thereafter, although required copies and exhibits thereto were not received until June 4 and 11, 1962, respectively.

[4] The complete tariff of record herein (Ex. 1) contains an amendment of uncertain date excluding this clause. However, both parties contend that the exclusion did not occur until near the end or even after the period in question. The original tariff was filed with the Federal Maritime Board October 17, 1958, but the amendment was not.

[5] Strachan Shipping Company and Southern Shipping Company.

The president of the Terminal, in referring to one of the stevedoring companies, testified that "They said we couldn't make it up here at the Terminal no matter what we were charging and they said they had theirs from stevedoring costs and we could have it * * * just keep it."

It is complainant's position that respondent engaged in unjust and unreasonable practices, in violation of section 17, (a) by issuing a tariff that was ambiguous to complainant's detriment, and (b) by collecting a handling charge on the basis that it was to be divided with the stevedores, not so dividing it, keeping the matter secret, and not refunding the unpaid amount.[6]

In developing the issue of ambiguity, complainant argues (Brief p. 4) that tariff Item 269 contains two conflicting descriptions, the first referring to wood pulp in *bales* of 1,000 pounds and over, and the other to *units* under 1,000 pounds; that this necessitates specific recognition of the *handling charge* provision set forth in Item 18 as applying to *each movement;* that each movement consisted of five bales, weighing approximately 2,500 pounds in total, and was therefore subject to the over 1,000 pound handling charge of 69 cents rather than the 95-cent rate; that wood pulp is typically moved in bales of 400 to 600 pounds, not heavier; and that, in any event, where rates conflict due to ambiguity, the lowest is applicable. Abruptly stated, the contention is that the units moved were the *stacks* rather than the individual bales. The difference of 26 cents between the two rates, which totals $3,485.11, is claimed as a "rate overcharge." Further hearing is proposed to determine the amount of the handling charge due but not paid to stevedores and therefore said to constitute additional overcharges refundable to complainant.

On brief, complainant, although contending that respondent's tariff was ambiguous and confusing, states that it was not supplied with a copy of the tariff until July 28, 1961, more than a week after the last shipment was invoiced; that prior to commencement of the shipments, the handling rate and charge had been explained orally only; and that it did not question or protest the 95-cent rate until the last shipment. There was no written correspondence between the parties until August 30, 1961, more than a month after the last shipment.

Respondent takes the position that its tariff was not ambiguous; that the imposition of the 95-cent handling charge was just and reasonable because the shipments involved individual bales weighing less than 1,000 pounds each; and that the stevedores waived payment of their one-third share of the handling charges because of the amount of

[6] By its complaint, and at the outset of the hearing, complainant also contended that the assessment of a handling charge was unjust and unreasonable because "the wharfage and handling assessments are duplicative * * *." However, judging from its brief, including proposed findings and conclusions, it appears that this contention has been abandoned. In any case, the record shows that the two assessments were not duplicative.

handling actually performed by respondent. In short, respondent argues that the 95-cent handling charge was proper, that it was properly assessed, that all shippers were treated alike, and that the record herein requires that the complaint be dismissed.

Discussion

With regard to the ambiguity of respondent's tariff, the ingenuity of complainant's argument exceeds its merit. Bales and units are indeed different words. One could add such words as bundles, bags, boxes, packages, rolls, or any other term indicating a separate, self-contained, composite accumulation of wood pulp and the meaning would be adequately clear. Unless a number were bound or otherwise joined together in such manner as to facilitate movement as a single unit, the individual weight of each would govern under this tariff. Called by whatever name, the number of such units that might be stacked on a fork lift truck or other conveyance is irrelevant and may not be seized upon to sustain a claim of tariff ambiguity or confusion. In truth, the evidence and argument advanced in this case by complainant leaves some doubt as to whether there really was ambiguity or lack of understanding. Complainant was not new to the wood pulp exporting business and this particular handling charge item was not novel. In fact, it was virtually copied from the then effective Terminal Tariff of the nearby "Municipal Docks and Terminals of the City of Jacksonville, Florida." (Ex. 5), which provided as follows:

Woodpulp, in bales:	*Wharfage*	*Handling*
In units under 1,000 pounds	30	95
In units 1,000 pounds or over	30	69

There is no question but that such tariffs must be construed strictly and that wherever they are ambiguous the doubt should be resolved against the Terminal. Nevertheless, fair and reasonable construction must be given. The terms must be construed in the sense in which they are generally understood and accepted, and shippers cannot be permitted to avail themselves of strained or unnatural construction. *Thomas G. Crowe* et al. v. *Southern S.S.* et al., 1 U.S.S.B. 145, 147.

It seems clear that complainant was here seeking to exploit an apparent opportunity to eliminate the handling charge or at least get it reduced. Had respondent agreed to either, it would have been in violation of its tariff.

Complainant's contention that it paid the handling charge on the premise that a one-third portion would be paid to the stevedores (Brief p. 7) is also questionable. The last shipment was invoiced July 19, 1961. The complaint filed in May 1962 makes no reference to payments to stevedores. In fact the record indicates that complainant first became aware that this provision had been in the tariff when it was disclosed, during the course of the hearing on March 5, 1963, that the copy of the tariff supplied complainant on July 28, 1961, contained a subsequent amendment which omitted this reference entirely. Of even more direct significance is the fact that, under the circumstances, complainant was not a party in interest with regard to that provision of the tariff. The provision need not have been in the tariff at all, and as contained was strictly a matter between the stevedores and respondent. They were at liberty to waive payments, in whole or in part, and without reference to shippers.

Ultimate Conclusions

The record in this case does not disclose nor will it support a finding that regulations and practices established and observed by respondent in the assessment of handling charges for wood pulp were ambiguous, unjust, unreasonable, or otherwise violative of section 17 of the Act.

An order dismissing the complaint should be entered.

(Signed) John Marshall,
Presiding Examiner.

March 19, 1964.

Appendix

Bulkley Dunton Overseas S.A., 295 Madison Avenue, New York

Shipments of Wood-Pulp Over Kings Bay Marine Terminal

Invoice No.	Date	Vessel	Short tons
37	3/21/59	Southland	1, 362. 00
43-A	4/24/59	Mimi Horn	386. 25
47-A	5/23/59	Elizabeth Lykes	611. 00
46-A	5/25/59	Casa Blanca	505. 00
59-A	8/25/59	Fernwave	303. 00
63-A	9/23/59	Tana	1, 208. 00
66-B	10/13/59	Ferngrove	606. 75
76-2	12/4/59	Stanwear	527. 50
75-2	12/7/59	Frank Lykes	303. 00
75-3	12/7/59	Frank Lykes	303. 75
75-1	12/7/59	Frank Lykes	425. 25
91-1	2/15/60	Barbara	362. 00
92-A	2/24/60	Corneville	1, 221. 00
97-1	3/22/60	Crestville	1, 214. 25
97-1	3/4/60	Consul Arlt	1, 093. 00
81-1	5/17/60	Sonderburg	1. 174. 50
81-1	5/27/60	Fernplant	1, 030. 75
84-1	6/14/60	Barbara	1, 031. 75
95-1	7/11/60	Libreville	597. 00
85-1	7/11/60	Fernbank	733. 00
97-2	7/26/60	Fernstate	1, 057. 50
103-1	8/25/60	Syllum	789. 50
106-1	9/20/60	Lieberville	848. 25
104-1	9/30/60	Hasselburg	999. 50
119-1	12/7/60	Sue Lykes	1, 202. 75
146-F-1	3/20/61	Barbara	670. 25
127-F-1	2/3/61	Teklatorm	424. 00
146-F-1	3/20/61	Barbara	670. 25
166-1	6/23/61	Edmund Hugo Stinnes	692. 50
161-1	5/17/61	Bovec	609. 00
169-1	7/19/61	Almeria Lykes	873. 75
		Total short tons	23, 836. 00

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 371

SWEDISH AMERICAN LINE—APPLICATION TO REFUND IN PART FREIGHT CHARGES COLLECTED ON SHIPMENT VIA MS VASAHOLM FROM NEW ORLEANS, LOUISIANA, TO OSLO, NORWAY

Decided June 11, 1964

Application of Swedish American Line to refund certain overcharges pursuant to Rule 6(b) granted.

Edward S. Bagley for Swedish American Line.

REPORT

BY THE COMMISSION (Thos. E. Stakem, *Vice Chairman;* Ashton C. Barrett, James V. Day, *Commissioners*):

Swedish American Line (the carrier) filed an application pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure for permission to make a refund of $593.94 on a shipment of binder twine which moved via carrier's vessel *Vasaholm* on February 19, 1964, from New Orleans, La., to Oslo, Norway.

Carrier is a member of the Gulf Scandinavian and Baltic Sea Ports Conference (the Conference), and charges conference rates. In Tariff No. 8, page 115, effective November 23, 1962, the Conference named a rate on binder twine, New Orleans to Oslo, of $1.95 per 100 pounds. But in filing Tariff No. 9, which took effect on January 15, 1964, the Conference failed to include a rate on binder twine.

Bemis Bros. Bag Company (Bemis) has been shipping twine via Conference vessels for years. On February 19, 1964, Bemis shipped 76 cartons of binder twine on the *Vasaholm* from New Orleans to Oslo. Since the Conference had no rate for twine on file at that time, carrier necessarily charged and Bemis prepaid freight computed at the N.O.S. rate of $80 per 2,240 lbs./40 cu. ft.

Almost immediately thereafter, the Conference noticed its oversight and failure to carry forward in Tariff No. 9, the rate on binder twine. Therefore, it filed, effective February 26, 1964, a rate on twine of $43.75

of $1.95 per 100 pounds). No other shipment of binder twine moved during this period so that there is no possibility of discriminatory treatment should Bemis be refunded the difference between the N.O.S. rate and the rate on binder twine.

In an initial decision served March 20, 1964, the examiner concluded that there was no indication that the parties had agreed in good faith that the lower rate which had been in effect prior to the shipment in question in Tariff No. 8 and which subsequent to the shipment was introduced in Tariff No. 9 would apply to the contract of affreightment. He therefore denied the application.

The carrier has since filed exceptions clarifying this point and indicating that it was the intent and understanding of the parties that the rate of $43.75 per 2,240 pounds would apply to this shipment as had been the case in the past. On the basis of this further clarification we will grant the application for the partial refund. In the past we have granted such applications where a shipper through previous shipments has come to rely on a given rate only to discover that subsequently, the rate was inadvertently omitted from a new tariff and therefore theoretically inoperative, *Lykes Bros. Steamship Co. Refund of Freight Charges* 7 F.M.C. 602 (June 4, 1963). As in that case, the relief granted here will relieve an innocent shipper of the carrier's failure to file a proper rate.

An appropriate order will be entered.

John Harllee, *Chairman*, and John S. Patterson, *Commissioner*, dissenting:

The Commission has ordered that the application of Swedish American Line to refund to a shipper a portion of the freight charges collected should be granted. The Commission has reversed an Examiner's decision denying the Swedish American Line's application for an order authorizing it to refund the amount of $593.94 to Bemis Bros. Bag Company because the shipper was required to pay freight on the basis of the rates and charges specified in the carrier's tariffs on file with the Commission and published and in effect at the time instead of on the basis of a rate established by the carrier which, by mistake, was omitted from the tariff, not published, and not on file at the time of the shipment.

Facts show that Swedish American Line transported 76 cartons of binder twine from New Orleans to Oslo, Norway, at a time when the legally filed and effective tariffs of the Gulf/Scandinavian and Baltic Sea Ports Conference Tariff No. 9 observed by Swedish American Line did not include a rate for such a classification of commodities. Accordingly, Swedish American Line charged the rate for commodities not classified, commonly known as "not otherwise specified" or the "N.O.S." rate. There is no question and no party contends that any other applicable rate than the N.O.S. rate was specified in the tariffs governing the Swedish American Line service and that such tariff was on file with the Commission and duly published and in effect at the time.

Section 18(b)(3) of the Shipping Act, 1916, enacted by Congress in Public Law 87–346, approved October 3, 1961, provides as follows:

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

Whatever rights Rule 6(b) of the Commission's "Rules of Practice and Procedure," effective July 31, 1953, may give, the rule may not sanction disregard of the clear terms of the above congressional enactment. Moreover, Rule 6(b) authorizes reparation for injury caused by a violation of the Act to the extent indicated in section 22. No statement admitting any violation of the Act was included in the application here under consideration, and no violation exists.

The Commission's reversal was made on the basis of exceptions indicating an intent that the subsequently filed rates should apply, but section 18(b)(3) makes no exception for intentions, or for mistakes. The Examiner's decision reached the correct result.

FEDERAL MARITIME COMMISSION

Special Docket No. 371

Bemis Bros. Bag Company v. Swedish American Line Application To Refund in Part Freight Charges Collected on Shipment * * * From New Orleans, La., to Oslo, Norway, Granted

The Commission has this day made and entered a report stating its findings and conclusion herein which report is made a part hereof by reference. Accordingly,

It is Ordered, That the application of Swedish American Line to refund to Bemis Bros. Bag Company the sum of $593.94 is hereby granted.

By the Commission, June 11, 1964.

(Signed) Thomas Lisi,
Secretary,

FEDERAL MARITIME COMMISSION

No. 947

INTERNATIONAL TRADING CORPORATION OF VIRGINIA, INC. AND INTERNATIONAL TRADING CORPORATION OF NEW ENGLAND, INC.

v.

FALL RIVER LINE PIER, INC.

Decided June 11, 1964

Upon further proceedings to determine the amount of reparations due complainants as a result of respondent's violation of sections 16 and 17, Shipping Act, 1916, reparation equalling the unlawful excess charged to complainants over the lawful rates charged to similarly situated shipper is awarded to complainants.

W. B. Ewers, for complainants.
Frank L. Orfanello and *John F. Dargin, Jr.*, for respondent.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* Thos. E. Stakem, *Vice Chairman;* James V. Day, and John S. Patterson, *Commissioners*)

FACTS

International Trading Corporation of Virginia (ITC Virginia), the original complainant in this proceeding, is a Virginia corporation, with its principal place of business in Norfolk, Virginia. Complainant is engaged in the importation of cement in bags from northern Europe and Sweden for its own account and subsequent resale in the New England market area served by a municipal marine terminal located at Fall River, Massachusetts, and operated by respondent Fall River Line Pier, Inc. Foreston Coal Company (Foreston), not a party to this proceeding, also conducts a cement importing business. Complainants and Foreston are the only regular users of respondent's terminal with respect to ocean borne cargoes. In its complaint filed June 8, 1961, and subsequently amended on June 30, 1961, complainant alleged that respondent had violated sections 16 First and 17 of the

Shipping Act, 1916:[1] (1) giving undue and unreasonable preference and advantage to Foreston in the allocation of berthing space and pier storage space at respondent's terminal during 1959, 1960, and 1961; (2) by charging complainant storage rates greater than those charged Foreston for the same type of cargo; and (3) by subjecting complainant to undue and unreasonable payment of terminal charges. Complainant, ITC, Virginia, further alleged that it had been damaged in the amount of $14,265.50 by the respondent's unlawful acts, and sought reparation in that amount. Complainant also sought an order directing respondent to cease and desist its alleged unlawful activities.

In its prior Report in this proceeding, 7 FMC 219 (1962), the Commission found that the billing practice of respondent with regard to the matter of storage charges and free time allowances was unjustly discriminatory against complainant in comparison with Foreston but that complainant had not established any undue or unjust discrimination by respondent in the matters of storage space allocation and berthing arrangements. However, from the record the Commission was unable to determine the extent of the injury and whether ITC Virginia or its wholly-owned subsidiary, International Trading Corporation of New England, Inc. (ITC New England), was the injured party. It had developed during the course of the hearing that the charges as billed were paid by ITC Virginia or by ITC New England, but ITC New England had not been made a complainant in the proceeding and no evidence had been offered to show how much was paid by either. The Commission therefore remanded the case to the Examiner to authorize an amendment to the complaint to include ITC New England and thereafter to determine the amount of reparation due under the complaint as amended.

In the hearing on remand held November 8, 1962, the Examiner permitted the amendment of the complaint to join ITC New England as a party complainant and received evidence bearing on the amount of reparation due under the complaint as amended. The Examiner concluded in the Initial Decision on Remand, dated May 10, 1963, that both complainants paid and bore the charges on the storage of cement; that they were damaged thereby to the extent of the differences between the storage charges and free time allowances unlawfully assessed

[1] The pertinent provisions of these sections are:

"Sec. 16 * * * That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly: First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Sec. 17 * * * every * * * person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or concerned with the receiving, handling, storing, or delivery of property."

against them in comparison with those assessed Foreston; and that they were entitled to reparation in the total sum of $11,778.99.[2]

During the hearing on remand, respondents offered a written motion to dismiss. The Examiner declined to consider the motion, relying on Rule 5(o) of the Commission's Rules of Practice and Procedure, (46 CFR § 502.74) which requires that all motions to dismiss must be addressed to the Commission. Respondent subsequently presented the motion to the Commission during the oral argument on exceptions to the Examiner's decision on remand. It was thereafter denied by the Commission in an order served October 10, 1963 (copy of which appears as an appendix to this Report).

Discussion and Conclusions

Respondent in excepting to the Initial Decision on Remand alleges that the Examiner erred:

1. In refusing to entertain respondent's motion to dismiss.
2. In permitting ITC of New England to be joined as a party complainant without opportunity for respondent to reply to new issues said to be raised by ITC New England being so joined.
3. In receiving in evidence a stock certificate, allegedly representing ten shares of stock in ITC New England owned by ITC Virginia, without requiring further proof of genuineness; and
4. In basing his findings with respect to damages on an unsupported assumption that complainants and Foreston Coal Company conducted a competitive cement importing business; and in awarding reparations without an adequate basis on the record.

We need not treat respondent's first exception here, as it has already been treated in our denial of respondent's motion to dismiss (see Appendix).

Respondent's second exception asserts that the amended complaint was really a new complaint, introducing new issues, and that respondent was not given an opportunity to reply to these issues. The violations alleged against respondent in the amended complaint were identical to those set forth in the original complaint and were provable by the same evidence. Whether ITC New England was made a

[2] The Examiner found that there was insufficient evidence to justify part of complainant's claim in the amount of $1,606.35, that $877.51 was paid by ITC New England more than 2 years prior to ITC New England's joinder as a party complainant, and that $2.65 was paid by check drawn on the account of International Trading Corporation of Florida, which is not a party to this proceeding. The Examiner accordingly reduced complainants' reparation by $2,486.51, leaving a remainder of $11,778.99.

party to the proceeding by an amended complaint or a new complaint makes no difference. Neither procedure raised new issues of which respondent was not apprised. By prior Report and Order of the Commission, respondent was given ample notice that the proceeding was remanded to the Examiner so that the complaint could be amended to include ITC New England 7 FMC 219 (1962).

In its third exception respondent asserts that adequate proof of the ownership of ITC New England by ITC Virginia was not offered. This contention is without merit. While the original complaint was brought by ITC Virginia for damages sustained by itself and by its agent ITC New England, ITC New England has now been joined as a party complainant, seeking reparation from respondent in its own right, and its ownership is therefore immaterial. Even if that were not so, ITC Virginia offered evidence at the original hearing to show its ownership of ITC New England and this evidence is sufficient to establish that all the outstanding stock of ITC New England is owned by ITC Virginia.

Respondents fourth exception questions the sufficiency of the record to find that ITC and Foreston were in competition with each other, that the commodities for which storage charges were assessed or the services rendered to ITC and Foreston were the same or similar, and that ITC has suffered any actual damage by respondent. The record leaves no doubt that the commodity upon which storage charges were assessed is bagged cement, and that the services in question are those normally connected with the day-to-day operation of a terminal (*e.g.* unloading and storage). The commodities and services involved are identical.

Respondents also contend that the Examiner erred in failing to find that complainants had failed to prove their damages and thus were not entitled to reparation. We think the Examiner properly disposed of this contention in his initial decision.

Respondents rely upon *Eden Mining Co.* v. *Bluefield Fruit & SS. Co., et al.* 1 U.S.S.B. 41 (1922). In that case, two Philadelphia shippers were engaged in the business of mining and furnishing power and transportation in Nicaragua, Central America. They claimed reparation on the basis of unjust discrimination. The Board found that respondent carriers, by entering into certain exclusive patronage contracts with other shippers on shipments out of New Orleans to Nicaragua, had unjustly discriminated against complainants in violation of sections 16 and 17 of the Act. The Board, however, denied reparation because no evidence was introduced "relative to any expense incurred, loss of profits or damage of any sort suffered as a result of the wrong of respondent. * * *"

In the *Eden* case, unlike here, there was no contention that the business of complainants were competitive with those of the contract shippers, or for that matter any one else, or that they were otherwise of a nature that would raise a presumption of damage as the normal and probable consequence of the assessment of discriminatory rates.[3]

More in point in this proceeding is *Isbrandtsen Co. Inc.* v. *States Marine Lines, Inc. et al*, 6 FMC 422 (1961). In that case complainant Isbrandtsen entered into a fixed price contract with a shipper to transport raw cotton from United States Gulf ports to Japan. Isbrandtsen had intended to charter a nonconference vessel for this transportation but when shipment was to be made no such vessels were available. Isbrandtsen then arranged shipment on two conference lines and in order to obtain the lower contract rate offered to sign a conference dual rate contract. Isbrandtsen's offer was refused by respondent. Isbrandtsen paid the higher contract rates and filed a complaint with the Board alleging unjust discrimination in violation of section 17. The Board sustained the claim and awarded reparation in the amount of the difference between the contract and noncontract rates. On appeal, *States Marine Lines, Inc.* v. *Federal Maritime Commission, et al*, 313 F. 2d 906 (CADC, 1963) the Court of Appeals for the District of Columbia Circuit had the following to say in upholding the decision of the Board:

> Assuming that [the Eden] case sets forth the correct measure of damages on the facts there involved, reliance upon it here is misplaced. That case merely holds that proof of the differential does not "*as a matter of course*" establish the damages. It does not hold that the differential can never be the measure of damages. [Italics supplied.]

By footnote the Court observed that, "There has been no judicial determination of the correct measure of damages under the Shipping Act. Supreme Court decisions in similar situations have not been consistent." We think the principle of the *Isbrandtsen* case is equally applicable here.

Complainants and Foreston both import the same commodity through the same terminal, at the same time for sale in the same gen-

[3] Indeed the Board's report in the *Eden* case does not even disclose the type of cargo, or its ultimate disposition, e.g. for use by shipper in its mining operations or for resale in Nicaraguan market. The complainants there simply insisted that under the statute mere proof of the discriminatory rates and the amount of the differential ipso facto proved injury and the amount of damage. Thus the question before the Board in Eden was a limited one, and it was in answer to this limited issue that the Board stated:
"the fact of injury and the exact amount of pecuniary damage must be shown by further and other proof before the board may extend relief. We think it is clear that proof of unlawful discrimination within the meaning of the act, by showing the charging of different rates from shippers receiving the same service, does not, *as a matter of course*, establish the fact of injury and the amount of damage to which the complainants may be entitled by way of reparation." Id. at 47–48. [Italics supplied.]

eral market area. This commodity, cement, is a thoroughly standardized product and in a normal market the price will undoubtedly approach uniformity. *Cement Manufacturers Assn.* v. *U.S.*, 268 U.S. 588, 591, 506 (1925). Thus, complainants could not, without fear of loss of customers, increase prices to compensate for respondent's prejudicial charges.

The Shipping Act is designed to place similarly situated shippers and importers on equal footing when using the facilities of our ocean-borne foreign commerce. There is no place in this design for undue preference or unjust discrimination in the form of differing rates and charges to like users of those facilities. Respondent has in no way justified the unduly prejudicial charges imposed and has subsequently discontinued the practice of charging complainants more than Foreston Coal Company for the use of the same facilities. Until respondent changed its policies, complainants were directly damaged by paying the excess charges. We therefore affirm the conclusions of the Examiner: that complainants received the shipments as described, paid and bore the charges thereon, were damaged thereby to the extent of the difference between storage charges and free time allowance unlawfully assessed against them over and above those charges assessed Foreston, and that they are entitled to reparation in the total sum of $11,778.99. Based upon evidence introduced as to which of the complainants bore each of the unlawful charges, it is found that complainant ITC Virginia is entitled to reparation in the sum of $8,678.38; and complainant ITC New England is entitled to reparation in the sum of $3,100.61.

An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

DOCKET NO. 947

INTERNATIONAL TRADING CORPORATION OF VIRGINIA AND INTERNATIONAL TRADING CORPORATION OF NEW ENGLAND

v.

FALL RIVER LINE PIER, INC.

DENIAL OF MOTION TO DISMISS

By an order dated April 16, 1962, the Commission remanded this proceeding to the Examiner to authorize an amendment to the complaint to include International Trading Corporation (I.T.C.) of New England as a party complainant. I.T.C. Virginia, the initial complainant, had sought unsuccessfully to make this amendment during the original hearing before the Examiner. At the hearing on remand, held on November 8, 1962, the Examiner permitted the amendment adding I.T.C. New England as a party complainant. At the same hearing, respondent offered a motion to dismiss which the Examiner refused to entertain since such a motion must be addressed to the Commission under its Rules of Practice.

Respondent did not then submit its motion to the Commission. Instead, respondent presented its motion to us on August 14, 1963, in the course of oral argument on exceptions to the Examiner's decision on remand, determining the reparations due complainants. Without in any way countenancing such dilatory procedure, we agreed to consider this motion provided it was properly filed and served and complainants were afforded an opportunity to reply. This was done and the motion and the reply are now before us.

In its motion, respondent contends I.T.C. New England is not properly a party because a formal motion to amend the complaint should have been filed instead of the amended complaint which was offered and accepted at the hearing on remand. But, as above noted, such a motion to amend was made and denied at the original hearing. I.T.C. Virginia excepted to the Examiner's action in this respect, respondent replied arguing that the Examiner was right, and we ruled with complainant and directed that the amendment be allowed. Respondent therefore had the opportunity and in fact did argue this issue to the Commission, but the final ruling went against it. No basis existed for requiring the filing of a second such motion at the hearing on remand.

The purpose of including I.T.C. New England as a party complainant was to enable the Examiner to award this company reparations if he found that it, rather than its parent, I.T.C. Virginia, was the party actually damaged by the acts of respondent. The illegal acts alleged against respondent in the amended complaint were identical to those set forth in the original complaint and were provable by the same evidence. No new issues were raised of which respondent was not apprised. Moreover, the Commission's order of April 16, 1962, remanding the case was ample notice to respondent that I.T.C. New England would be included as a party complainant. The lack of a second formal motion for this purpose could not have prejudiced respondent.

Respondent also argues that I.T.C. New England is suing it in a Massachusetts State court and has thus elected to waive any rights before the Commission and seek relief elsewhere. Nothing appears in the record of our proceeding as to the existence of this suit. We were first told of it by respondent on August 14, 1963, during the oral argument on remand. Even so, the existence of such a suit would not bar I.T.C. New England from bringing a complaint before the Commission. As we pointed out in our report of April 16, 1962, respondent, by virtue of its carrying on the business of "furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" is an "other person" subject to the Shipping Act, 1916, and hence is subject to our jurisdiction with respect to violations of the Act. Pendency of a State court suit cannot defeat our jurisdiction and this would be so even if the suit and the complaint before us were predicated on the identical matter.

In consideration of the foregoing, respondent's motion to dismiss is hereby denied.

By the Commission, October 8, 1963.

FEDERAL MARITIME COMMISSION

No. 947

INTERNATIONAL TRADING CORPORATION OF VIRGINIA, INC., AND INTERNATIONAL TRADING CORPORATION OF NEW ENGLAND, INC.

v.

FALL RIVER LINE PIER, INC.

The Commission has this day made and entered a report stating its findings and conclusions herein, which report is made a part hereof by reference,

It is ordered, That the complainants in this proceeding are entitled to reparation as stated below; and

It is ordered, That respondent, Fall River Line Pier, Inc., shall pay:

to International Trading Corporation of Virginia, Inc., the sum of $8,678.38 and

to International Trading Corporation of New England, Inc., the sum of $3,100.61.

By the Commission, June 11, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 374

DEPARTMENT OF STATE, AGENCY FOR INTERNATIONAL DEVELOPMENT, U.S. AID MISSION TO DOMINICAN REPUBLIC

v.

LYKES BROS. STEAMSHIP CO., INC.

Application to waive collection of a portion of charges assessed on a used automobile shipped from San Juan, P.R., to Santo Domingo, Dominican Republic, granted.

J. D. Kearns for applicant.

INITIAL DECISION OF C. W. ROBINSON, PRESIDING EXAMINER[1]

Under bill of lading dated March 12, 1963, Lykes Bros. Steamship Co., Inc. (Lykes), transported on its *Reuben Tipton* from San Juan, P.R., to Santo Domingo, Dominican Republic, one unboxed used automobile shipped by and consigned to Rafael Pol Mendez, care of American Embassy. The bill of lading was stamped with the words "Government B/L #A-0911904," and the application shows "Department of State, Agency for International Development, United States Aid Mission," as complainant.

The shipment was at the rate of $40 per measurement ton, applicable to cargo n.o.s., as published in Lykes's Puerto Rico/Dominican Republic and Haiti Freight Tariff No. 1 (FMC No. 3), and the basic freight charges amounted to $537. In addition, there were assessed a wharfage charge of 1 cent per cubic foot ($5.37), an arrimo charge of $4 per 1,000 kilos ($5.44), and an emergency surcharge of $3 per short ton ($4.50). Total charges of $552.31 have not been collected although the bill of lading is stamped "FREIGHT PREPAID."

The n.o.s. rate of $40 was assessed in the absence of a commodity rate on automobiles. Effective March 16, 1964, Lykes published a commodity rate on automobiles of $17 per [40] cubic feet. On such basis, the total charges for the automobile in question would be $243.54,

[1] This decision became the decision of the Commission on June 16, 1964 (rules 13(d) and 13(h), rules of practice and procedure, 46 CFR 502.224, 502.228).

and Lykes seeks authority to assess and collect this amount rather than the original amount of $552.31 (this represents a reduction of $308.77).

By letter of August 5, 1963, complainant's administrative officer (presumably at San Juan) refused to honor Lykes's bill for the charges originally assessed, for the following reason:

> It is beyond the realm of our comprehension that the freight from San Juan, P.R., to Santo Domingo could be in excess of the freight from east coast ports; and we cannot find the Federal Maritime Commission ruling, which authorizes your charge of $40 per measurement ton.

The reason assigned by Lykes for the reduction from $40 to $17 is that "such rating ($40, n.o.s.) is unwarranted in the trade, most unreasonably high, detrimental to the commerce of the United States, and was definitely applied through the above oversight." The application states that "this is a singular shipment of this commodity."

Section 18(b)(3) of the Shipping Act, 1916, as amended (Public Law 87–346), forbids any common carrier in foreign commerce to "charge or demand or collect or receive a greater or less or different compensation for the transportation of property * * * than the rates and charges which are specified in its tariff on file with the Commission and duly published and in effect at that time * * *." Section 18(b)(5) provides that the "Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States * * * which, after hearing, it finds to be so unreasonably high * * * as to be detrimental to the commerce of the United States."

As previously pointed out, the shipment consisted of one used automobile, apparently connected in some way with an agency of the Government. It, therefore, does not come within the purview of the statute as it was not that type of "commerce of the United States" which could be detrimentally affected by the level of the rate; in other words, it was not a *commercial* movement. In *Agreement No. 6870*, 3 F.M.B. 227, appendix page IV (1950), it was stated: "To be a detriment to the commerce of the United States there must be at least a plausible possibility that the action complained of will affect commerce adversely."

No mistake was made by Lykes in assessing the $40 n.o.s. rate; indeed, it was required to do so in the absence of a commodity rate. Nor is there any indication that complainant was misled. On the other hand, as the shipment moved on a Government bill of lading and it does not appear that the $17 rate is unduly preferential or discriminatory, the application is granted.

C. W. ROBINSON,
Presiding Examiner.

MAY 26, 1964.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 372

BERNARD BOWMAN CORP.

v.

AMERICAN EXPORT LINES, INC.

Application of American Export Lines for authority to refund a portion of freight charges in connection with a shipment from New York to Izmir, Turkey, denied.

Applying contract rates to a shipment made prior to the effective date of a dual-rate contract by the device of granting retroactive effect to such contract, is in violation of section 18(b)(3) of the Shipping Act, 1916, as amended.

Elliott B. Nixon for applicant.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER [1]

American Export Lines, Inc., has filed an application pursuant to rule 6(b) of the Commission's rules of practice and procedure, designating Bernard Bowman Corp. as the nominal complainant, and requesting authority to pay to Eris Insaat ve Ticaret, Ltd., of Izmir, Turkey,[2] the equivalent in Turkish currency of $441.05 as a refund in connection with two shipments of machinery parts from New York to Izmir.

The application discloses the following facts:

1. American Export Lines, Inc. (applicant), at all material times was a member of the North Atlantic Mediterranean Freight Conference (conference), which conference had filed with the Federal Maritime Commission (Commission) its tariff No. 8, establishing rates for machinery parts as follows:

	Contract rate	*Non-Contract rate*
Boxed, per measurement ton	$46.50	$53.50
Unboxed, per measurement ton	54.25	62.50

[1] This decision became the decision of the Commission on June 16, 1964, (rules 13(d) and 13(h), rules of practice and procedure, 46 CFR 502.224, 502.228).

[2] Eris Insaat ve Ticaret, Ltd., is not named party complainant although it is the party to whom payment is sought to be made. The application includes the certificate of complainant that the charges referred to in the application were paid and borne by Eris Insaat ve Ticaret, Ltd., and no other. Bowman is named complainant, according to applicant, because it is responsible to its customer for the amount of freight difference. The person to receive reparation is a proper party complainant, however, the principles stated in this decision would be applicable whether payment was sought to be made through Bowman to Eris Insaat ve Ticaret, Ltd., or direct to such firm.

2. On December 20, 1963, applicant received from Bernard Bowman Corp. (shipper) two shipments of machinery parts to be carried from New York to Izmir, and issued bills of lading No. 6 and No. 7, on both of which Bowman was designated as the shipper, the shipment consigned to order of Yapi ve Kredi Bankasi A.S., notice of arrival to be addressed to Eris Insaat ve Ticaret, Ltd., (actual consignee).[3]

3. Bill of lading No. 6 covered boxed machinery parts and specified the noncontract rate of $53.50 for a total charge of $1,108.79 (plus heavy lift charges not here involved), which sum was paid by the actual consignee.

4. Bill of lading No. 7 covered unboxed machinery parts and specified the noncontract rate of $62.50 for a total charge of $2,242.19 (plus heavy lift charges not here involved), which sum was paid by the actual consignee.

5. The total charge for both shipments would have been $441.05 less than the actual charge had the contract rates been applied.

6. On December 20, 1963, the date of the shipments, the shipper was not party to a conference dual-rate contract covering the trade between New York and Turkey; the actual consignee was not at any material time party to a dual-rate contract covering such trade.

7. On December 27, 1963, the shipper executed a merchant's freight contract (dual-rate contract) and mailed it to the conference with the request that the contract rates be applied retroactively to the two shipments made on December 20, 1963. The conference replied, regretting its inability to apply the contract rate to the two shipments.

8. On January 6, 1964, the shipper requested authorization from the Commission to date the dual-rate contract as of December 20, 1963; on January 21, 1963, the Commission's Division of Informal Complaints replied, suggesting the filing of an application under rule 6(b).

9. In its letter to the Commission of January 6, 1964, the shipper supported its request for predating the contract, and has similarly supported this application, on the following basis:

> We have been shipping regularly, practically on every vessel, goods to Israel since 1948, and always paid freight on the contract rate. It was somehow never brought to our attention that shipments to Israel were eliminated from the contract rate system of the Conference, and we thus took it for granted that shipments to Izmir, Turkey, were also within the same category and within the same rules as those to Israel. It is quite obvious that we acted in good faith and we feel that we should not be penalized by paying ocean freight of $441.06 higher than would normally apply.

---

[3] The person to be notified of arrival of shipment under the terms of an order bill of lading is considered as the "actual" consignee. *McDowell and Gibbs, Ocean Transportation,* 1954 edition, p. 135.

10. The dual-rate contract signed by the shipper on December 27, 1963, provided that the effective date would be the date specified in the contract. The application does not specify the effective date but the contract was not signed by the conference until after December 27, 1963, the date it was mailed to the conference by the shipper.

11. Applicant, shipper, and the actual consignee have consented to a refund of $441.05 in connection with the two shipments of machinery parts.

12. The shipper holds itself responsible to its customer, the actual consignee, for the amount of the rate differential.

13. No other shipments of similar commodities moved via applicant's vessels during the approximate period of time here concerned.

DISCUSSION

In support of the application, applicant points out the importance of expanding the ability of American shippers to sell their goods abroad. It takes the position:

> * * * that if this end is to be achieved, it calls for a broad minded interpretation of the recent amendments to the Shipping Act, not a narrow and hypertechnical one. Plainly no carrier or Conference should itself have the discretion to grant contract rates on a retroactive basis; the possibilities of improper discrimination and prejudice would be too great. However, we submit that the Commission can and should permit such a freight adjustment where, as here, the facts have been put before it and formal permission requested. Otherwise, any misunderstanding by a shipper of the complicated procedures and laws governing our foreign trade would be irremediable. We cannot believe that this is the proper meaning or intent of the recent amendments to the Shipping Act or that any such interpretation would serve to encourage the smaller American exporters to expand their activities into previously unfamiliar trade areas.

Recent amendments to the Act include section 18(b)(3), which provides:

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

The basic issue is the Commission's authority to grant retroactive effect to a dual-rate contract as a means of authorizing a refund, regardless of the prohibitions of section 18(b)(3) against refunds *in any manner or by any device*. Applicant argues that under a "broad minded" interpretation, it may be determined that the proper meaning and effect of that section does not prevent authorization for a refund under the circumstances here disclosed. To support its contentions, applicant attributes to the Commission the authority to remedy "any shipper misunderstanding of the complicated procedures and laws governing our foreign commerce." Applicant does not cite precedent for its contention or relate this broad authority to a specific statutory provision but, apparently, proposes that this power may be implied from the Commission's responsibility to foster foreign commerce. In *Martini & Rossi* v. *Lykes Brothers Steamship Company*, 7 F.M.C. 453 (1962), the Commission implied from its responsibility to administer the Act the authority "to see that equity and justice are done in the matter of reparations." Further, that in a case involving a bona fide rate mistake or inadvertence "it seems clear that we may exercise our discretion to remedy the situation." However, an examination of that decision and other similar decisions makes clear that the Commission did not assert the authority to remedy every type of rate mistake, but only where the mistake was related to a carrier's error or omission in filing a rate it intended, in good faith, to apply to a shipment. *Barr Shipping Company* v. *Royal Netherlands Steamship Company*, special docket No. 282, supplemental decision, March 17, 1964. Although not so specifically stated in prior decisions, the Commission has permitted relief only when a carrier, or conference has failed to file the new rate in accordance with section 18(b)(2) of the Act, although the shipper had been led to believe such rate would become the lawful rate.

The application fails to present grounds for the relief requested not only because it fails to relate a rate mistake to the carrier's omission to file a rate it intended to apply to the shipments, but for the further reason that the circumstances do not warrant application of the principles of equity and justice. It was held in *Nydia Foods Corporation* v. *Java Pacific Line*, special docket No. 313, January 8, 1964, that business men engaged in the import and export trade are not innocent, but negligent when they make no effort to determine the cost of a shipping service they intend to utilize. Here, the shipper "took it for granted" that a rate it had been paying on shipments to Israel would apply to shipments to Turkey. Although there may have been some basis for the assumption, the carrier did not mislead the shipper. Unilateral assumptions by shippers, unrelated to a misleading act of a carrier, will not support equitable relief. A shipper is charged with knowledge of the correct rate and the only lawful rate is the one on file with the Commission. *Silent Sioux Corporation* v. *Chicago & N. W. Ry. Co.*, 262 F. 2d 474 (1959).

Precedent does not support applicant's concept that the Commission is possessed of authority to correct "any" shipper misunderstanding of law or regulation by permitting freight adjustments. It would seem that applicant and its conference may have attributed such wide regulatory authority to the Commission for the exclusive purpose of permitting a freight adjustment by means of a refund. It was established in *Aichmann & Huber* v. *Bloomfield Steamship Company*, special docket No. 290, March 3, 1964, that rule 6(b) does not provide a panacea for every wrong or misunderstanding arising from the business relations between carriers and shippers. It was further made clear in that proceeding that rule 6(b) does not provide a loophole for escape from the prohibitions of section 18(b)(3) of the Act.

Stripped of nonessentials, the application is designed to effect a refund by the device of granting retroactive effect to a dual-rate contract, although the carrier has not violated the Act or employed a practice which offends the principles of fair dealing. Granting the application would be in direct contradiction to the prohibitions found in section 1(b)(3) of the Act.

CONCLUSION

Under the circumstances here disclosed, the Commission is without authority to grant retroactive effect to a dual-rate contract for the purpose of permitting a refund of a portion of freight charges imposed in accordance with the carrier's tariff on file with the Commission.

The application is denied. An appropriate order will be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

MAY 19, 1964.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1091

ORLEANS MATERIALS AND EQUIPMENT CO., INC.

v.

MATSON NAVIGATION COMPANY

Charges assessed and collected by respondent on shipments of structural steel from New Orleans, La., to Honolulu, Hawaii, found applicable and not unreasonable.
Complaint dismissed.

John B. Gooch, Jr., for complainant.
Edward S. Bagley for respondent.

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

By complaint originally received on August 6, 1962, and refiled on February 6, 1963, complainant alleges that the charges assessed and collected by respondent on certain shipments of structural steel from New Orleans, La., to Honolulu, Hawaii, were in excess of the applicable charges; also that they were unreasonable in violation of section 18 of the Shipping Act, 1916. Reparation is sought.

Complainant stated that it filed the papers received on August 6, 1962, in order "to have these claims of record with the Commission within the (2-year) statutory period provided in section 22 of the 1916 Act, in the event the court in New Orleans should rule that the Commission has exclusive primary jurisdiction." The filing consisted of a copy of a petition filed in court by complainant in a suit to recover the alleged overcharges, together with an affidavit of an employee of complainant verifying the facts stated in the petition.

Nothwithstanding the fact that complainant's attorney was advised by the Secretary of the Commission that this filing was not in accordance with the Commission's rules of practice and procedure, and that

[1] This decision became the decision of the Commission on June 24, 1964 (rules 13(d) and 13(h), rules of practice and procedure, 46 CFR 502.224, 502.228).

there was a possibility, therefore, that it would not stop the running of the statute of limitations, nothing further was filed with the Commission until the revised complaint was received on February 6, 1963.

In view of the findings and conclusions herein, and the fact that the U.S. District Court for the Eastern District of Louisiana, before which the suit [2] is now pending, has stayed the proceeding pending the decision of the Commission, the question whether the claims are time barred [3] here will not be considered further.

Neither party called witnesses, and the matter was submitted on the following stipulated facts.

1. Complainant is a Louisiana corporation engaged in the manufacture and sale of structural steel.

2. Respondent is a common carrier by water, engaged in ocean transportation between New Orleans, Louisiana, and Honolulu, Hawaii, and in connection with these proceedings is subject to the provisions of the Intercoastal Shipping Act and the Shipping Act, 1916.

3. During the period beginning in May 1960 and ending in January 1961, complainant shipped via respondent's line consignments of structural steel for carriage to the port of Honolulu.

4. The freight rate to be applied to complainant's shipments was $29.96 per ton of 2,000 pounds or $29.96 40 cubic feet, whichever produced the greater revenue.

5. Freight tariff number 13 (F.M.B. 20) of the Atlantic and Gulf/Hawaii Freight Conference was the tariff applicable to the shipments referred to above.

6. The freight on said shipments was determined by respondent as follows: The above-mentioned shipments were received on the wharf by the carrier's clerks, who thereupon measured each of the pieces or packages as received from the shipper, taking their depth, width and length in feet and inches in such a manner that the cubage of a piece of cargo was determined by the carrier's agents through the ascertainment of the smallest rectangular container (which container is conceived geometrically without wall thickness) into which the piece or package would fit. As an example, if pieces of steel were fabricated to resemble a carpenter's square measuring 20 feet on its length (along one side of the square) by 10 feet in width (along the other side of the square) by 1 foot in depth or thickness, the cubage for freighting purposes would be 200 cubic feet, the product obtained through Tweed's Accurate Cubic Tables by multiplying the length by the width by the depth. Once these dimensions were so determined, they were then furnished to the rate clerks in the office of States Marine-

[2] CA—11935—A.

[3] The freight charges were paid on June 8, 1960, Aug. 25, 1960, Oct. 5, 1960, Nov. 17, 1960, Dec. 21, 1960, and Feb. 8, 1961.

Isthmian Agency, Inc., where the cubic measurement of each individual piece or package was obtained from Tweed's Accurate Cubic Tables, as referred to in the tariff, which provide as follows:

HOW TO USE THE TABLES TO FIND CUBIC DISPLACEMENT

After measuring depth, width and length in feet and inches; take the smallest dimension and find that particular page by using the index on the right-hand side of the book. Then find the next largest dimension at the top of the page (listing is in feet and inches). The largest dimension will be found in a vertical line on the extreme left-hand side of this page. At the angle of the meeting of the last two dimensions will be the corresponding cubic for one such package listed in feet and thousandths of a foot.

To get the total cubic for more than one package of the same size; multiply this listed cubic by the total number of packages and point off.

After the cubic measurement had been obtained from the Tables, the freight applicable to the shipment was computed from the rates contained in the Conference tariff on both a weight and a measurement basis. The method producing the greater revenue prevailed and in the case of cubic measurement, the measurement, the tariff rate and the freight derived therefrom were entered on the bill of lading.

7. The weight or measurement tonnage basis and the freight, minus wharfage and insurance, as ascertained by respondent were as follows: Measurement of cargo, 46,362 cubic feet; and freight charged, $40,581. The freight herein charged by respondent on each of the shipments referred to above was paid by complainant to respondent's agents, States Marine-Isthmian Agency, Inc.

8. The freight on said shipments determined solely on a weight tonnage basis (without consideration of the alternative weight or measurement tonnage basis) would have been $21,710.12.

9. In order to conserve space in the vessel compartments, individual pieces and packages, in some instances and where practicable, were stowed in a manner resulting in their stowage in the form sometimes referred to as "nesting," that is, by other cargo or other pieces or packages occupying a part of the "rectangularized" cubic measurement volume of such individual piece or package as referred to in paragraph 6 hereinabove. In addition to the space occupied by the individual pieces or packages, whether "nested" or not, stowage of cargo of this nature results in what is sometimes referred to as "broken stowage," that is, unoccupied space in, about or over the shipment required for blocking, lashing, tomming, chocking, and otherwise securing the shipment, as well as space which is not suitable for the stowage of any other available cargo. The cubic measurement occupied by the shipments was not measured after they were stowed and secured in the vessel compartments, and while stowage was arranged to conserve space to the extent practicable, the difference, if any, between the

space occupied in the vessel by the shipments and their cubic measurement for freighting purposes is unknown.

Rule 14(a) of the carrier's applicable tariff provided that:

"Weight or measurement shall be assessed on accurate measurement calculated when cargo is delivered to carrier;" (and that) "When measurement has been obtained in accordance with the above (method of disposing of fractions), cubic measurement of the shipment must be obtained from, and ocean freight charges billed in accordance with Tweed's Accurate Cubic Tables."

Rule 17(a) of the tariff provided that:

rates are per ton of 2,000 lbs. or 40 cubic feet, whichever creates the greater revenue. Gross weights and outside measurement shall govern.

Rates applying to weight or measurement of cargo, whichever produces the greater revenue, are customary in the ocean trades of the United States; and in measuring irregular packages, the three greatest dimensions are used to determine cubic. See *Modern Ship Stowage*, page 12, U.S. Department of Commerce, 1942, appendix A.[4]

As to a piece or package with six rectangular sides, the ascertainment of cubage presents no difficulty. In the case of other articles, packed or not packed, the cubage for freighting is generally taken to be that of the smallest rectangular container—conceived geometrically without thickness—into which the package or other object, as it stands, would fit. See *Grossman on Ocean Freight Rates*, pages 5–7, 1956. Professor Grossman states that: "This standard appears to be reasonable because such an imaginary container would ordinarily represent the space needed for the accommodation of the object and made unavailable for other cargo".[4]

Structural steel is susceptible to damage by being bent during handling and requires extensive shoring and dunnaging, is limited for stowage purposes as to cargoes which can be safely stowed about it, and represents a dangerous cargo for the personnel engaged in loading it. See *Handling and Stowage of Cargo*, Ford and Webster, 3d Ed. (1952), pages 284–285.[4]

The record is not clear as to the size, shape and weight[5] of the articles shipped, but it is clear that the pieces were assembled, and that a typical shipment was in the shape of a carpenter's square, used as an example in paragraph 6 of the stipulation.

Tweed's Accurate Cubic Tables is one of two standard references utilized in our ocean trades for the determination of cubage for freighting purposes. (See footnote 4.) Its purpose is to provide

[4] Official notice is taken of these facts under rule 13(g) of the Commission's rules of practice and procedure. These authorities were mentioned in respondent's brief and were not challenged by complainant in its reply brief.

[5] Official notice is taken of the fact that steel displaces 1 cubic foot for every 490 pounds of weight, which was asserted in respondent's brief and not challenged in complainant's reply brief.

steamship clerks with a fast and efficient method for ascertaining cubic area without the necessity of making actual arithmetic computations, much like the function of a sliderule as used by engineers and others who deal with many figures. As a preface to the directions for using the tables (par. 6 *ante*), is the following statement: "Listing Corresponding Cubic in Feet and Thousandanths for Three Given Dimensions in Feet and Inches * * *."

DISCUSSION AND CONCLUSIONS

The use as a example of an L-shaped carpenter's square measuring 20 feet in length (along one side of the square) by 10 feet in width (along the other side of the square) by 1 foot in depth or thickness, clearly illustrates the difference between the contentions of the parties as to how a shipment so shaped should be measured for the purpose of freighting. Respondent calculates the measurement as 200 cubic feet; i.e., 20 x 10 x 1. Complainant, on the other hand, would measure the square as if it were disassembled into two parts—one being 20 feet in length and the other 9 feet in length. Then, the freight cubage would be 20 x 1 x 1 plus 9 x 1 x 1, equaling 29 cubic feet.

Respondent assumes that the carpenter's square would occupy 200 cubic feet of space as if it were shipped in a rectangular container measuring 10 feet by 20 feet by 1 foot, conceived geometrically without wall thickness. It contends that the applicable tariff in connection with Tweed's Tables provides for "rectangularizing" the shipments.

Complainant contends that this method of computing the cubage is arbitrary, illegal and unreasonable, since the shipments are "nested" insofar as practicable, that is, much of the rectangular space for which it is charged is used for other cargo, resulting in respondent's receiving "double freight" for the same cargo space. Therefore, complainant maintains that it should have to pay only for the actual displacement of the carpenter's square or 29 cubic feet. Moreover, complainant argues that Tweed's Tables merely provide a quick method for calculating cubage for "three given dimensions" as noted in the preface to such tables; that they do not provide for "rectangularizing" the shipment, or any other manner in which the three dimensions are to be ascertained; and that they apply only *after* the dimensions of width, length and depth are obtained.

Put in another way, respondent contends that the shipment should be weighed and measured as a rectangle (the smallest into which it would fit) as it comes to the dock before being loaded, and the alternative weight or measurement basis applied according to which yields the greater freight charge. On this basis the charges on the measurement basis would be higher and therefore applicable under the tariff.

Complainant, on the other hand, contends that respondent's method of "rectangularizing" the shipment produces a fiction; that the space actually used in the ship should govern; that if such space is used in the calculation, the charges on the weight basis would yield the greater revenue, and therefore would be applicable under the tariff. As noted in the stipulation, if the rate had been applied to weight instead of measurement the charges would have been $21,710.12 instead of $40,481, or a difference of $18,870.88, which complainant seeks as reparation.

Complainant's contentions, though ingenious and plausible, cannot be sustained on this record.

In the first place, a carrier's tariff must provide a certain and unvarying method of weighing and measuring cargo and of calculating the proper freight charges thereon. This can be accomplished only by taking the weight and measurement of the cargo as it is received on the dock by the carrier. The applicability and reasonableness of the charges cannot be determined after the shipments are loaded in the vessel; or by determining how much the shipment would measure or how it would stow—on the assumption that it was disassembled into its component parts.

Complainant's argument that refund should be made on the unused part of the rectangular space, because other cargo is "nested" therein, is untenable. The record shows that "nesting" is done in *some instances* and *where practicable*, resulting in other cargo occupying a *part* of the rectangular space; that stowage of this cargo results in "broken stowage" or unoccupied space required for blocking, lashing, etc., and otherwise securing the shipment, as well as space which is not suitable for other available cargo; that the cubic measurement occupied by the shipments was not measured after being stowed and secured; and that the difference, if any, between the space occupied in the vessel by the shipments and their cubic measurement for freighting purposes is unknown. From this evidence, it would be highly speculative to say how much of the alleged 191 cubic feet (200-9) of unused space in the "rectangularized" carpenter's square, for instance, was occupied by "nested" cargo, and how much was actually occupied by the shipment together with the timber and other material required to secure it safely.

As stated, respondent's tariff provided that accurate measurement was to be calculated when the cargo was delivered to carrier, on each package, and that *outside measurement would govern.* Respondent took the measurements in the above manner which, according to *Modern Ship Stowage, ante*, is in accordance with the usual practices pertaining to cargo freighted on a measurement or alternative weight-or-measurement basis. Note that this authority states specifically that in measuring irregular packages, the three greatest dimensions are to be used to determine cubic.

Another authority[6] relied upon by respondent recognizes that respondent's method of "rectangularizing" the shipment is generally followed in our ocean trades; and states that such method is reasonable because such imaginary container would ordinarily represent the space needed for the accommodation of the shipment and made unavailable for other cargo.

Upon the foregoing facts, and contentions made in connection therewith, it is found and concluded that the charges assessed by respondent on the shipments in question were calculated in accordance with the applicable tariff; and that such charges have not been shown to be unreasonable or otherwise unlawful, as alleged.

The complaint will be dismissed.

(Signed) GUS O. BASHAM,
Presiding Examiner.

JUNE 3, 1964.

[6] *Grossman on Ocean Freight Rates, ante.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 1115

APPLICATION FOR FREIGHT FORWARDING LICENSE
DIXIE FORWARDING CO., INC.

DOCKET NO. 1116

APPLICATION FOR FREIGHT FORWARDING LICENSE
MR. L. H. GRAVES, d.b.a PATRICK & GRAVES

Decided June 26, 1964

On reconsideration, order served April 22, 1964, is withdrawn and applications for licenses as independent ocean freight forwarders are granted subject to certain conditions.

Cunningham, *Yznaga*, and *Duncan* for respondents.

Robert J. Blackwell, *Wm. Jarrell Smith*, *Jr.*, and *J. Scot Provan*, Hearing Counsel.

Paul D. Page, *Jr.*, Hearing Examiner.

REPORT ON RECONSIDERATION

BY THE COMMISSION (Thos. E. Stakem, *Vice Chairman;* Ashton C. Barrett and James V. Day, *Commissioners*):

By applications filed May 18, 1962, Dixie Forwarding Co., Inc. (Dixie), and Mr. L. H. Graves, d.b.a. Patrick & Graves (Patrick & Graves), applied for licenses as independent ocean freight forwarders pursuant to section 44, Shipping Act, 1916 (46 U.S.C. 841(b)).

In the prior report herein, served April 22, 1964, the Commission denied the applications. On May 21, 1964, applicants petitioned for reconsideration of that decision. The material facts are set forth in the prior opinions and need not be restated here.

The applicants in their petition emphasize that their continued business activity depends almost entirely on their being licensed to engage in freight forwarding, and that the denial of such licenses would destroy a well-established business built up over a number of years. The question before us is whether applicants' past history of lax practices (as detailed in the prior report) requires a denial of the applications. This is a close question upon which the Commission, on further consideration, has concluded that the applications should be granted with certain conditions attached, as hereinafter noted.

Applicants' lax practices began prior to the passage of Public Law 87–254 (75 Stat. 522), which established new requirements and safeguards applicable to the operations of independent ocean freight forwarders. In light of the statute and the possible loss of their forwarding business, applicants have committed themselves to cooperate fully with the Commission and adhere scrupulously to the requirements of the law and the conditions which the Commission is imposing. We believe this provides a proper basis under which these applicants may be given the opportunity, under close supervision, to continue to offer their otherwise qualified services to the shipping public.[1]

Accordingly, the applications for licenses as independent ocean freight forwarders are granted subject to the following conditions:

(1) That Dixie Forwarding Co., Inc., and L. H. Graves, d.b.a. Patrick & Graves, submit to this Commission every 6 months an independently certified audit of their financial status; and

(2) That the above requirement shall remain in effect for the period of two (2) years from the date of this order.

Chairman Harllee and Commissioner Patterson dissenting:

For the reasons set forth in the original report served April 22, 1964, we dissent from the decision herein to grant the licenses of these applicants. There is nothing new contained in the petition for reconsideration or the above majority decision which would warrant a reversal of our prior decision.

---

[1] The matter of past violations of law by the applicants can be handled in this case like all other similar violations that come to the Commission's attention.

FEDERAL MARITIME COMMISSION

DOCKET No. 1115

APPLICATION FOR FREIGHT FORWARDING LICENSE
DIXIE FORWARDING CO., INC.

DOCKET No. 1116

APPLICATION FOR FREIGHT FORWARDING LICENSE
MR. L. H. GRAVES, d.b.a. PATRICK & GRAVES

ORDER ON RECONSIDERATION

On April 22, 1964, the Commission served a report and order in the above-entitled proceedings, denying the applications. Upon petition for reconsideration filed by applicants, and for good cause shown, these proceedings were reopened for reconsideration on the present record. Reconsideration of the matters involved having been had, and the Commission on the date hereof having made and filed its report on reconsideration, which report is made a part hereof:

It is ordered, That the order served April 22, 1964, is hereby vacated and set aside;

It is further ordered, That the applications for licenses of Dixie Forwarding Co, Inc., and L. H. Graves, d.b.a. Patrick & Graves, are hereby granted pursuant to section 44(b), Shipping Act, 1916, and rule 510.8 of General Order 4, subject to the following conditions:

(1) That Dixie Forwarding Co., Inc., and L. H. Graves, d.b.a. Patrick & Graves, submit to this Commission every 6 months an independently certified audit of their financial status; and

(2) That the above requirement shall remain in effect for the period of two (2) years from the date of this order.

(Signed) FRANCIS C. HURNEY,
Special Assistant to the Secretary.

FEDERAL MARITIME COMMISSION

No. 1100 (Sub. 1)

IN THE MATTER OF AGREEMENT NO. 9218 BETWEEN THE MEMBER LINES OF THE NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE AND THE CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE

Decided June 30, 1964

Agreement No. 9218, providing that in all instances where a member line of either of the respondent conferences operates within the scope or range of the other conference, it must be a member of both conferences, approved pursuant to section 15, Shipping Act, 1916.

Burton H. White and *Elliott B. Nixon* for respondents.
Robert J. Blackwell and *H. B. Mutter* as Hearing Counsel.

REPORT

BY THE COMMISSION (Thos. E. Stakem, *Vice Chairman;* James V. Day, John S. Patterson, *Commissioners*) :

This proceeding is before us upon exceptions to the initial decision. The North Atlantic Continental Freight Conference (Eastbound Conference) and the Continental North Atlantic Westbound Freight Conference (Westbound Conference) filed an agreement (F.M.C. No. 9218) with the Federal Maritime Commission which provides that in all instances where a member line of either conference operates any vessel within the scope or range of the other conference, it must be a member of both conferences. This proceeding was instituted for a determination of whether the agreement, if approved, would deny conference membership on reasonable and equal terms and conditions, or would otherwise contravene the standards of section 15 of the Shipping Act of 1916, and whether the agreement should be approved, disapproved, or modified in any respect pursuant to section 15. The agreement provides:

It is hereby agreed by and between the undersigned conferences that they will impose as a condition of admission to, or for continuance of membership in, their Conferences the requirement that any line offering services within the jurisdiction of both Conferences and seeking admission, or desiring continuance of membership in one, be a member of the other Conference.

The undersigned Conferences further agree to take all steps necessary or appropriate to effectuate this agreement.

The Westbound Conference lines operate from ports of Germany, Holland, and Belgium to U.S. ports in the Portland, Maine/Hampton Road range. The Eastbound Conference lines operate from U.S. ports in the same range to ports in Germany, Holland, and Belgium. A combination of the routes constitutes a round voyage. The importance of the trade covered by each conference to the commerce of the United States is established. Both conferences have active competition from nonconference carriers and the trade is overtonnaged in both directions. Membership in the conference is common with the exception of the French Line which does not operate westbound, and Isbrandtsen, which joined the Eastbound Conference in July of 1963 and has signed the joint agreement demonstrating its consent to the provisions of agreement No. 9218. Finn Line was formerly a member of the Eastbound Conference and operated westbound as a nonconference carrier. On March 31, 1963, Finn Line resigned from the Eastbound Conference because of its disapproval of the proposed dual membership requirement and for the further reason of "business economics."

In an initial decision, the Examiner recommended disapproval of the agreement because it failed to provide reasonable and equal terms and conditions for membership in the respective conferences as required by section 15. Respondents excepted to the Examiner's decision.[1] Pointing out that the conferences had chosen to maintain their separate existence, the Examiner concluded that it was unreasonable to condition membership in one upon membership in the other. Respondents, however, contend that the Examiner misinterpreted the applicable law, and that neither section 15 nor any other section of the Act requires that we disapprove the agreement. For the reasons set forth below we agree with respondents.

Prior to the enactment of Public Law 87–346 (75 Stat. 762), the Shipping Act did not include specific reference to conference membership requirements and all proposed conditions on conference membership were considered under the general provision of section 15 which precludes approval of any agreement or portion thereof found to be:

* * * unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their

[1] A portion of respondents objections go to the alleged failure of the Examiner to make the findings required by sec. 8(b) of the Administrative Procedure Act and certain other alleged deficiencies in the initial decision. In view of our decision herein we find it unnecessary to deal with these exceptions.

foreign competitors, or to operate to the detriment of the United States, or to be in violation of this Act.

The Commission and its predecessors consistently interpreted this statutory language to preclude approval of agreements excluding from conference membership any common carrier who was regularly engaged in the trade covered by the agreement, or who furnished evidence of ability and intention in good faith to institute and maintain a regular service between ports within the scope of the conference agreement. *Black Diamond S.S. Corp* v. *Cie M'T'ME Belge*, 2 U.S.M.C. 755 (1946). However the past policy in this respect was never intended to prevent approval of reasonable membership requirements, whose existence was justified, and whose provisions were not unjustly discriminatory, or detrimental to the commerce of the United States.

By Public Law 87–346 the so-called steamship conference dual-rate law, Congress included in section 15 of the Act an amendment dealing expressly with the problem of open membership, requiring the Commission to disapprove after notice and hearing, any agreement which fails to provide:

* * * reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade * * *.[2]

Thus, any provision in a conference agreement, establishing criteria for conference membership, must now meet two statutory tests: (1) The terms of membership must be reasonable and equal; and (2) they must not be unjustly discriminatory, contrary to the public interest, detrimental to the commerce of the United States or otherwise in violation of the Act. The similarity of these two statements of congressional policy regarding conference membership is evident. It would be difficult to conceive of a membership provision which could be called "reasonable" if it were contrary to the public interest or detrimental to the commerce of the United States; or "equal" if it were unjustly discriminatory.

The "reasonable and equal" provision of section 15, constitutes legislative recognition of the prior administrative policy of "open" conference membership. But the statute permits "reasonable and equal" conditions to be imposed; thus, it necessarily does not envision a situation where the mere fact of application will guarantee a carrier admission to the conference. Some conditions may be imposed so long as they are "reasonable and equal." The determination that a particular condition of membership is reasonable or unreasonable is necessarily a factual one, and on the record before us, we find that agreement No. 9218 should be approved.

---

[2] This specific requirement was in some measure due to congressional sanction of the dual-rate system with the resultant preservation of the economic power inherent therein.

It has been demonstrated by the respondents that although they have chosen, for administrative reasons, to exist as separate conferences, the trades of each are so interrelated and interdependent, they must be considered, for reasons of practicality, as a single trade. Membership in the conferences is common (with the exceptions indicated above); the trades covered by each of the conferences constitutes a round voyage, the vessel owners operating in each of the trades are identical; the same vessels are used both eastbound and westbound; accounts are kept on a round voyage basis, and the rates charged both eastbound and westbound are based on profit and loss figures computed on the basis of a round voyage.

With such compelling circumstances as these, it would be excessive deference to formality to say that what is acceptable conduct for a single two-way conference (i.e. a single conference covering both the inbound and outbound trade),[3] becomes unreasonable, and detrimental to the commerce of the United States, when practiced by two conferences under the circumstances and conditions existing in this trade. In our view the resolution of such questions as the existence of detriment to the commerce of the United States must be based upon more substantial distinctions than these.

An important reason for the existence of the conference system is the elimination of rate competition between member lines. Thus, whatever competition might exist between conference members as to service, frequency of sailings or other factors which could lead a shipper to prefer one conference line over another, all conference members must offer prospective shippers the same rate.[4] However, as respondents point out a one-way conference member in the subject trade would be in the unique position of being able to lure the cargo of a shipper who conducts both an import and an export business. Thus, were a line operating conference outbound but as an independent inbound, that line could by offering reduced rates inbound induce the exporter-importer to ship with it both ways. Thus, while those carriers operating conference both ways would be bound to charge the higher conference rate both ways, the dual capacity carrier gains the advantage of the conference rate outbound but is not committed to charge conference rates inbound. We do not think it unreasonable for the conferences to protect themselves from this possibility through an agreement providing for joint membership. Nor do we consider it unreasonable for them to protect themselves from a one-way in-

---

[3] There are fifteen two-way conferences listed in the Commission's list of "Approved Steamship Conference and Related Agreements" (1962); see also Marx, "International Shipping Cartels" p. 138 (1953) where eleven such two-way conferences are listed.

[4] Admittedly, there is the exception to the principle of no rate competition when a rate or rates are declared "open" and the individual member is then free to charge rates which may differ from those charged by the other members.

dependent having a voice and a vote in conference decisions which affect both the eastbound and the westbound trades. We think it would be unrealistic to accept Hearing Counsel's contention that conference members in two such closely related trades, can completely ignore eastbound factors when discussing westbound policies, and vice versa. The one-way conference member is in the fortunate position of having a voice in setting policies which, in turn, have a strong influence on the trade in the opposite direction, where he competes as an independent with the same conference members whose policies he helps determine.

We consider the existence of strong nonconference competition in the trades involved an important factor in this decision. The agreement in question is not likely to drive nonconference competition from the trade, since nonconference lines have always been a strong factor in these trades. This agreement is not likely to deprive the shipping public of its opportunity to ship on nonconference lines. Moreover, the trade is overtonnaged, and there does not appear to be any likelihood that this agreement will restrict the movement of goods.

A reasonable term and condition of admission may be one which facilitates the elimination of differentials in rates for transporting the same goods over the same routes but in a different direction as well as one which promotes rate stability in each direction. The Commission has been concerned with the existence of such differentials, particularly as a result of facts brought out in the hearings before the Joint Economic Committee (*Discriminatory Ocean Freight Rates and the Balance of Payments* hearings pursuant to section 5(a) of Public Law 304). Official notice is taken of the contents of the reports of these hearings printed for the use of the Joint Economic Committee.

The committee has suggested that one of the reasons for the decline in steel sales abroad "may well be the transportation advantage enjoyed by foreign steel producers due to ocean freight rate differentials." It was shown "that ocean freight rates established by the conferences which control most United States shipping are much higher from a given port in the United States to a Western European port" than are rates "on identical products shipped inbound from the same ports to a given American port" (hearings, pt. 1, p. 2). Both of the conferences' parties to agreement No. 9218 transport commodities between ports in the United States and Western European ports.

One of the causes for this condition is the fact that rates in each direction are established by separate conferences in each direction. This will still be the case, but now membership will be identical where any line offers services within the jurisdiction of both conferences. Without such an identity of interests between the two conferences, it would be impossible to take any rate action reflecting the common interests. The members of a westbound conference will have different economic problems and different national loyalties affecting their decisions on the rates to charge than members of an eastbound conference. The diversity of interests resulting from a diversity of membership inhibits the establishment of rates which reflect a common interest. If the members of the conferences in each direction are substantially identical, they will approach rate problems on the basis of the round voyage economics of all the members rather than on the basis of competition with carriers operating independently in the opposite direction.

Studies and investigations are not going to make owners change their rates to eliminate differentials as long as we have decisions made by private property owners in a free enterprise system and, it is to their diverse interests to charge different rates in each direction. To the extent the world economy is free and competitive, it will be promoted by rates made in this manner even though disparities may result. The advantages of a free economy rest on the enlightened self-seeking of sellers and buyers of transportation service. Disparities are the result of this self-seeking at present. The government may provide incentives and legal means for accomplishing the result of eliminating differentials by private decision, if it is in the public interest to have such differentials removed, by actions which promote elimination of incentives to continue disparities. The proposed agreement is a very limited step in this direction by facilitating discussion of ways and means to eliminate differentials and still maintain rates at levels that will produce a reasonable profit on a round voyage basis.

There is a need for discussion based on common interests. The committee hearings refer to an acknowledgment of the need by an owner's representative who said there have been some differences in rates which make "little sense at all" and "we in the steamship business agree that any disparities between inbound and outbound rates must be based on sound causes or adjusted" (pt. 3, p. 593). If this is true, the mutual membership agreement will promote the ascertainment of sound causes or adjustments which will be in the public interest of a free competitive economy rather than a government-controlled one.

We find, therefore, that the agreement is a *reasonable* one, according to the terms of the statute.

The question of whether it is *equal*-as well as reasonable, is less difficult of determination. The statutory mandate that provisions governing membership be "equal" is satisfied if an outsider is granted membership on the same terms as those already in the conference, and on the same terms as other applicants. No contention was made that the agreement is not "equal" in this sense, and we find that this requirement of the statute is satisfied.

We have examined the proposed agreement, and find nothing which warrants its disapproval under section 15. We conclude that agreement No. 9218 is a reasonable and equal condition of conference membership, and is not discriminatory as between carriers, detrimental to the commerce of the United States, contrary to the public interest, or otherwise violative of the Act. It should be approved under section 15 of the Act. An appropriate order will be issued.

Chairman Harllee and Commissioner Barrett dissent from the majority opinion and their views thereon will be subsequently expressed.

FEDERAL MARITIME COMMISSION

No. 1100 (Sub. 1)

IN THE MATTER OF AGREEMENT NO. 9218 BETWEEN THE MEMBER LINES OF THE NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE AND THE CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE

This proceeding having been instituted upon our own motion and having been duly heard and full investigation of the matters and things having been had, and the Commission, on the date hereof, having made and entered of record a report on further hearing stating its conclusion and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That agreement No. 9218 is hereby approved.

By the Commission.

FEDERAL MARITIME COMMISSION

No. 1100 (Sub. 1)

IN THE MATTER OF AGREEMENT NO. 9218 BETWEEN THE MEMBER LINES OF THE NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE AND THE CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE

Chairman Harllee and Commissioner Barrett dissenting:

While the majority purports to agree with the "open door" policy regarding admission to conference membership, it has proceeded to place obstacles in that doorway never intended by Congress.

The Antitrust Subcommittee of the Committee on the Judiciary, has observed that:

> Since 1940, the Commission or its predecessors have committed themselves to an affirmative policy of assuring relatively easy access to conference membership for newcomers. Support for this position can be found, at least indirectly, in the Shipping Act itself. It is safe to generalize by saying that today, *as a matter of law*, a line must be admitted to any steamship conference provided it has the ability to maintain, and has the good faith intention of instituting, a regular service in the trade included *within the ambit of the conference agreement*. [Emphasis ours.] [1]

By approving agreement No. 9218, however, the Commission is now sanctioning an agreement which would allow each conference to impose upon applicants a condition for membership affecting their participation in a trade not included "within the ambit of the conference agreement." Thus, the Westbound Conference may now prevent its members and prospective members from operating as independent carriers in the eastbound trade from the United States to Continental Europe, in our view a different trade entirely. In a similar manner, the Eastbound Conference may influence the participation of its members in the westbound trade.

Apropos of such a condition, the House Antitrust Subcommittee's investigation showed that:

> Various reasons have been offered, over the course of years, for excluding applicants from conferences. Since it is now recognized by conferences that few, if any, of these alleged justifications would be considered valid today in view of the Board's "open door" policy with respect to membership, current efforts to exclude new members from steamship conferences have had to assume more subtle guises. These have taken the form of efforts to persuade applicants to remain outside the trade because of the thinness of traffic, delay and procrastination in the processing of applications for admission, or exacting as conditions of membership agreement with respect to rate practices *in areas beyond the scope of the conference*. Unless vigorously enforced, therefore, the Board's "open door" policy may prove largely hortative in light of the many devious means which conferences continue to employ to gainsay admittance to outside lines. [Emphasis ours.] [2]

The concern expressed by the subcommittee over the very type of agreement now approved by the majority is not, in the language of its opinion, "an excessive deference to formality." It is an expression of concern over what could be a highly anticompetitive device, disadvantageous to many carriers in the trades served by the conferences. As pointed out by the Examiner, the respondents have chosen to maintain their separate existence notwithstanding *their* contention that

---

[1] Report of the Antitrust Subcommittee of the House Committee on the Judiciary, H. Rept. No. 1419, 87th Cong., 2d sess., p. 97 (1962).

[2] Report of the Antitrust Subcommittee of the House Committee on the Judiciary, H. Rept. No. 1419, 87th Cong., 2d sess., p. 98 (1962).

the two trades are in reality but one. The only reasons proffered for the retention of their separate existence are some rather vague references to "administrative reasons." [3]

Respondents point to the "unique" competitive position of the one-way operator as justification for the imposition of the membership condition here at issue. Yet the record contains not one scrap of evidence that such competition has ever been faced by the conference in the absence of the proposed condition.[4] The entire testimony on this count is prospective only and is continually characterized by such prefatory phrases as "It is conceivable . . .," "It may well be . . ." or "It is possible . . ." Such conjecture is a thin thread by which to suspend a condition to membership particularly in the face of the announced policies of the Congress, this Commission and its predecessors.[5] When the conjectures of respondents are weighed against the experience of Finn Line which for economic reasons resigned from the Eastbound Conference rather than join the Westbound Conference, we find it difficult to understand either the majority's reasoning or its conclusions.

The record shows that the ability to operate as an independent is a substantial factor in allowing a new carrier to break into a trade. As one witness, the agent for Finn Line in this country, testified:

A. . . . obviously, being new in a trade, and coming into the Westbound Conference as a new line, certainly this would apply to any trade, it would be very difficult to succeed, quoting the same rate, as against lines who had been in that trade for years.

* * *

Q. Then, it is your opinion that to go conference would require a considerable amount of effort to establish a different contact?

A. We would have naturally lost all of our customers that we had developed as a nonconference line and then going into the conference, we just would have to start afresh and develop new customers.

A line's status as an independent has been a valuable opening wedge in the trades served by the two conferences. When, in the exercise

---

[3] Respondents point to the fact that different representatives attend the meetings of the respective conferences. We fail to see the efficacy of the point, particularly in view of virtually identical membership in both conferences. Indeed the testimony on this point seems to indicate merely that the two conferences are not "prepared to consider (forming a single conference) at the moment."

[4] Finn Line was formerly a member of the Eastbound Conference and operated westbound as an independent, but the record nowhere discloses any injurious effect on the Eastbound Conference's operations by virtue of Finn Lines' "unique" position.

[5] There are no exhibits or testimony in the record which provide any basis for a reasonable determination as to the number of dual capacity shippers (i.e., the person who both exports and imports in these trades) or the amount of cargo they ship. Thus, there is no way of determining the degree of probability that the fears of the respondents would be realized without the proposed condition.

of a line's business judgment, it felt that it was sufficiently established in the trade to be able to get the advantage of conference membership and still hold its customers, it would apply for conference membership. The record further shows, that while some goods moved in both directions, this was generally not the case. It is only natural, therefore, that a carrier's fortunes eastbound and westbound did not develop at precisely the same rate, and there might be a considerable period of time when his business judgment would dictate that he operate conference in one direction, and nonconference in the other. Thus, under the subject agreement, in order to share the advantages of conference membership in one direction, a carrier might be forced to assume a disastrous loss of business in the other.

The views of the majority to the effect that rate disparities can be better eliminated through this agreement is pure speculation and, in any event, irrelevant. The membership of the two conferences is practically identical now, and it is difficult to see just how the requirement of common membership can possibly contribute to a solution of the problem of inbound/outbound rate differentials.[6] If the problem were that simple, the Commission would, we are sure, seek legislation which would authorize only two-way conferences. The approval of this anticompetitive, exclusionary device contravenes not only section 15 of the Act, but runs contrary to the majority's desire for "a free competitive economy" in that trade.

While it is true that "reasonable" conditions have been approved, they have been routine in nature, designed mainly to meet conference expenses, and insure the financial integrity and operational readiness of the applicant. Many conferences have admission fees, which range from \$100 to \$2,500. One conference exacts a readmission fee for lines seeking to rejoin the conference within 3 years after resignation. A bond or security deposit in lieu of an entry fee is required by a number of other conferences. Several conferences impose both an admission fee and an indemnity bond. However, even an admission fee high enough to deter some smaller carriers from entering the conference has been disapproved as detrimental to the commerce of the United States. *Pacific Coast European Conference*, 3 U.S.M.C. 11 (1948). In our view any further inroads on the "open door" membership policy, beyond the requirement that the applicant be operating or show intent or ability to operate in the trade (and such other routine conditions as described above) are contrary to the essential

[6] In this connection, the majority would appear to accept statements made before the Joint Economic Committee as "facts" proven here and which are entitled to weight in reaching our decision in this proceeding. Until the parties to this proceeding have been afforded an opportunity to test the validity of such statements they cannot be used as a basis for our decision here.

and well-defined administrative policy governing conference membership, and are unreasonable, unjustly discriminatory as between carriers, contrary to the public interest, and detrimental to the commerce of the United States. We would uphold the Examiner and disapprove the agreement as imposing an unreasonable condition on membership in contravention of section 15.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1072

INVESTIGATION OF CERTAIN PRACTICES OF STOCKTON ELEVATORS

Decided June 30, 1964

The record does not show and will not support a finding that either respondent participated in any act which was unjust, unfair or unreasonable. Accordingly, neither the initial paragraph of section 16 nor the last paragraph of section 17 of the Shipping Act, 1916, are shown to have been violated.

H. Stanton Orser for respondent, Stockton Elevators.
Alexander D. Calhoun, Jr., for respondent, Mitsui & Co., Ltd.
Frank Gormley and *Robert J. Blackwell*, Hearing Counsel.

REPORT

BY THE COMMISSION (Thos. E. Stakem, *Vice Chairman;* Ashton C. Barrett, James V. Day, *Commissioners*) :

This is an investigation on our own motion into (1) the practices of Stockton Elevators in connection with terminal charges assessed the Department of Agriculture and other owners, shippers, or exporters of grain during 1961 and 1962 to determine whether the Elevator may have violated sections 16 First and 17 of the Shipping Act, 1916, and (2) into the transactions between the Elevator and Mitsui & Co., Ltd., to determine whether Mitsui violated section 16 of the Act. The Examiner concluded that neither the Elevator nor Mitsui had participated in any act which was unfair, unjust or unreasonable within the meaning of sections 16 and 17 and that the proceeding should be discontinued. Hearing Counsel filed exceptions to the initial decision.

The exceptions are in the nature of general conclusions that Stockton Elevators, in granting "allowances or commissions" to Mitsui engaged in a practice which was unjust and unreasonable in violation of section 17 of the Act; and Stockton Elevators in arranging for Mitsui to pay wharfage at a reduced rate, engaged in an unjust and unreasonable practice in violation of section 17. Hearing Counsel agrees that there is no "meaningful disagreement as to the facts" and in essence the exceptions are nothing more than a disagreement with the Examiner's evaluation of the evidence. A careful consideration of the record leads us to the conclusions that the exceptions are without merit and that findings and conclusions in the initial decision are well founded and proper. Accordingly we adopt the attached examiner's initial decision as our own and make it a part hereof.

Commissioner Patterson dissenting:

Stockton Elevators (Elevators) is an "other person" defined in the first section of the Shipping Act, 1916 (Act), as a person "carrying on the business of furnishing wharfage * * * or other terminal facilities in connection with a common carrier by water" and is a respondent herein subject to our jurisdiction. There is no dispute as to Elevators' status nor as to the facts which show respondent required Mitsui & Co., Ltd. (Mitsui), a consignor, to pay wharfage in amounts from ½ to 1 cent a bushel less than the applicable tariff rates in 1961 and 1962 and less than other shippers were required according to the tariffs to pay during the same period for identical services.

The Examiner found that the Director of the Port of Stockton agreed to charge Mitsui wharfage "at one cent per bushel for not more than ten thousand tons, rather than one and one-half cents per bushel as provided by the Port's then effective tariff." Elevators' manager and vice president, Mr. Harley, acknowledged a similar agreement. The manager agreed that in response to requests by Mitsui if Elevators felt a need for business and "we could afford a one-half cent per bushel or 20 cents a ton, or whatever it might be" to make a trade possible, he would "authorize them (Mitsui) to try to make the trade."

A July 14, 1961, debit memo from Mitsui to Elevators refers to ½ cent per bu., $658.28 "above arrangement made through Mr. Harley/Mr. Lyons" (Mr. Lyons was an agent of Mitsui). Mr. Harley wrote Lyons, "I don't deny the agreement; I don't remember it. Will you refresh my memory?" Mr. Harley replied on August 3, 1961, referring to May 26 notes showing "we agreed on a one-half cents (½¢) per bushel discount in order to realize this business."

Other notations, references, and conduct of the parties substantiate the existence of a continuing agreement to allow Mitsui less than the tariff wharfage by means of lower charges, refunds, or direct payments to Mitsui.

The tariffs in effect during the period covered by the transactions in evidence were the Port of Stockton's tariff No. 3, superseded by tariff No. 5, which provided up to June 30, 1961:

Rates provided in this item are in cents per 2,000 pounds or 40 cubic feet.
Column A—Rates apply for Inland Waterway Trade.
Column B—Rates apply for Coastwise Trade.
Column C—Rates apply for Offshore Trade.

	A	B	C
Merchandise n.o.s. in bulk, direct between vessel and car, truck, barge, or terminal; or direct to or from another vessel	21	35	50

The wheat in question was transported to Japan, Formosa, Korea, and elsewhere, so column "C" applied.

Elevators' regulations provided "wharfage is applicable to all grain moving to and from vessels over our dock at rates published in Port of Stockton tariff No. 3."

Before June 30, 1961, the Port of Stockton billed Elevators for wharfage and Elevators passed the charge on in its own billing for wharfage pursuant to the Elevators' tariff regulations.

After June 30, 1961, pursuant to Federal Maritime Board agreement No. 8695, approved January 3, 1962, "Franchise To Operate Shipside Grain Terminal Elevator," Elevators charged wharfage directly under its own tariffs. Elevators' tariff No. 1, original page No. 9, section "B," "Wharfage," effective July 1, 1961, provided for wharfage in identical terms as the Port's tariff, and no longer used the Port's tariff by reference. During both periods the effect on Mitsui was the same and Mitsui did not pay the tariff wharfage, at the same time that Government agencies were required to pay the full 1½ cents per bu.

It was established that 50¢ per 2,000 lbs, or 40 cu. ft. is equal to 1½ cents per bushel.

Pursuant to the agreement and before June 30, 1961, the following typical transactions involving lower charges were proven:

1. Elevators by invoice dated April 7, 1961 (No. A10665), billed Mitsui "wharfage on wheat loaded on *SS Oregon Bear* 3,161,620 lbs. or 52,693.67 bu." at the rate of $0.01 per bu. and total charges of $526.94.

2. Elevators by invoice dated April 27, 1961 (No. A10737), billed Mitsui "wharfage on purchase of wheat ex CCC for loading on *Oregon Bear* 3,306,900 lbs. or 55,115 bu." at the rate of $0.01 per bu. and total charges of $551.15.

These two transactions were pursuant to the agreement between the Port of Stockton and Mitsui and to the arrangement whereby Elevators passed on the Port's charges which were 1 cent per bu. instead of 1½ cents as they should have been under both tariffs.

Pursuant to the agreement and after July 1, 1961, when Elevators obtained the franchise, the method of dealing with Mitsui changed.

Mitsui was no longer charged wharfage, but billed Elevators and was paid directly as follows:

1. Mitsui by "debit memo" dated July 14, 1961, on a *China Bear* total shipment of 7,899,520 lbs., 131,658.66 bushels of soft white and dark hard winter wheat billed Elevators "½¢ per bu., $658.29," with the notation "Above arrangements made through Mr. Harley/Mr. Lyons." The "arrangements" related to wharfage payments.

2. Mitsui by "debit memo" dated February 7, 1962, for "wheat allowance" billed Elevators as follows:

Oregon Bear	31,884.92 bu. @ 1¢ bu. (your invoice No. B2070)	$318.05
	6,869.036 lbs. @ 20¢ S/T	686.90
Fairport	78,630.33 bu. @ 1¢ bu. (your invoice B2070)	786.30
California Bear	55,118.12 bu. @ 1¢ bu	551.18
Washington Bear	63,568.55 bu. @ 1¢ bu	1635.69
	25,766 bu. @ 1¢ bu	257.66
Anna C	4,300 S/T @ 33¢ S/T	1,419.00
Lancelot overcharge per your invoice B2274		882.00
Total		5,536.78

3. Elevators by invoice No. B2746 dated March 19, 1962, to Mitsui stated, "we credit your account" for "wheat allowances" on 3 ships listed a total of $1,873.77 at rates of 20 cents per ton and 1 cent per bushel.

Elevators paid directly the foregoing billings, or gave Mitsui credit.

The purchases of the wheat were proven as well as the movement through Elevators' facilities. Evidence of charges of full 1½ cents per bu. wharfage to Commodity Credit Corporation, Agriculture Stabilization & Conservation Service, E. D. Wilkinson Gr., Balfour Guthrie, and Port of Stockton was in the record.

On the shipments covered by Item 1, the record showed Elevators billed Commodity Credit Corporation and the latter paid July 11, 1961, charges amounting to $1,974.88 for "Wharfage as per Port of Stockton Invoices SS *China Bear*." The allowances to Mitsui are no longer expressly stated as being related to wharfage, but follow the original arrangement in being measured as ½ and 1 cent per bushel. The transactions in Items 2 and 3 followed the same course. The payments were posted in Elevators' records as "Conditioning Wheat," although no conditioning service was performed by Mitsui.

Other record evidence showed that Mitsui was the addressee of letters of credit covering the financing of the wheat and confirmed the various sales to purchasers in the Far East. The letters of credit required Mitsui to provide documents including "full set of at least two clean on board ocean bills of lading marked freight prepaid," in order to receive payment from the buyer's credit established in

Mitsui's favor. Mitsui was thus shown to be the owner or party controlling the shipment of the wheat through Elevators' terminal facilities and over the Port's dock facilities into the transporting ships, in accordance with instructions from buyers who were also the shippers (sales were made f.o.b.).

From the foregoing facts it is found that:

1. Elevators arranged and participated in transactions whereby Mitsui was allowed to obtain wharfage at less than Elevators' tariff regulations applicable to and paid by others.

2. Elevators made payments to Mitsui called "allowances" not made to any other customers and permitted Mitsui to obtain wharfage services without charge although under the same circumstances other customers would be liable for wharfage pursuant to the terms of Elevators' tariffs.

The variance between what Elevators' records stated payments to Mitsui covered (i.e., performance of a service) and what actually happened (i.e., no service was performed) conceals a continuation of a practice of giving Mitsui an allowance in the form of a rebate of part of the wharfage actually due by means of the lower wharfage billing, by a shifting of the obligation to pay wharfage to a government agency and thereafter giving Mitsui an allowance payment measured in the same manner as before. Normally wharfage is paid by the person who owns or controls the cargo. In this case such control or ownership is found to be in Mitsui (*Terminal Rate Increases—Puget Sound Ports*, 3 USMC 21, at p. 24). Mitsui was relieved of this obligation and got 1 cent a bushel in addition, but no other customer was similarly treated.

From these findings it must be concluded that in arranging a reduction in wharfage chargeable to Mitsui and in making allowances and repayments to Mitsui on account of wharfage and not to other customers contrary to its published tariffs applicable to the public, Elevators has not observed a just practice relating to or connected with the handling, or delivering, of property consisting of wheat, in violation of the second paragraph of section 17 of the Act. The Examiner should be reversed on this issue.

It is further considered that the Examiner was correct in holding that neither Mitsui nor Elevators as an other person subject to the Act violated the first paragraph of section 16 as charged, because the prohibition applies only to obtaining transportation by the proscribed means. Wharfage is not transportation.

Section 17 does not apply to consignors; therefore, Mitsui has not violated section 17.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1072

INVESTIGATION OF CERTAIN PRACTICES OF STOCKTON ELEVATORS

This proceeding having been instituted on our own motion and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission this day having made and entered of record a report containing the conclusion and decision thereon, adopting the initial decision of the Examiner, which report and decision are hereby referred to and made part hereof;

It is ordered, That this proceeding is hereby discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1072

INVESTIGATION OF CERTAIN PRACTICES OF STOCKTON ELEVATORS

The record does not show and will not support a finding that either respondent participated in any act which was unjust, unfair, or unreasonable. Accordingly, neither the initial paragraph of section 16 nor the last paragraph of section 17 of the 1916 Act are shown to have been violated.

H. Stanton Orser for respondent Stockton Elevators.
Alexander D. Calhoun, Jr. for respondent Mitsui & Co., Ltd.
Frank Gormley and *Robert J. Blackwell* Hearing Counsel.

INITIAL DECISION OF JOHN MARSHALL, EXAMINER

On October 1, 1962, the Commission, pursuant to section 22 of the Shiping Act, 1916, as amended (the Act), instituted on its own motion an investigation (1) into the practices of Stockton Elevators (the Elevator) in connection with terminal charges assessed the Department of Agriculture and other owners, shippers, or exporters of grain during 1961 and 1962 to determine whether the Elevator may have violated sections 16 First and 17 of the Act, and (2) into the transactions between the Elevator and Mitsui & Co., Ltd. (Mitsui), to determine whether Mitsui violated section 16 of the Act. The order of investigation names the Elevator and Mitsui as respondents.

Hearings were held October 18, 1962 and November 27, 1962 at San Francisco, Calif. Following the close thereof, Hearing Counsel filed proposed findings of fact and conclusions of law. Thereafter the Elevator, Mitsui, and Hearing Counsel filed briefs. Mitsui's brief was accompanied by a motion to dismiss as to itself. By reply, Hearing Counsel requested that the Commission deny the motion. The Elevator did not file a reply but in its aforesaid brief urged that Mitsui be dismissed from the proceeding. On March 5, 1963, the Commission ruled that the motion presented issues which could not properly be resolved at the then existing stage of the proceeding and that it would therefore be held in abeyance pending the Examiner's initial decision and the submission of the entire case for final decision.

THE FACTS

Identity of respondents

The Elevator is a private corporation which owns and operates, as a public utility, grain elevators and terminal facilities at the Port of Stockton, Calif. It also maintains additional grain storage facilities in warehouses located from ½ to 3 miles from the terminal. The primary area served consists of "the entire Great Central Valley from Red Bluff down to Bakersfield." A secondary area includes Nevada, Utah, and southern Idaho. As the hereinafter referred to Oriental market for hard red winter wheat develops, the Elevator will also serve the Midwestern States, especially Kansas, Colorado, and Nebraska. Over the past it has handled or processed commodities for virtually every grain farm of any size on the west coast. In order of magnitude, its main customers are the local farmers; local grain dealers and merchants; international grain traders, exporters, and importers; and the U.S. Commodity Credit Corporation (CCC). Normally, it does not own any of the grain that it handles.

Mitsui (not connected with the steamship line of the same name) is a grain trading company with offices in Portland, Oreg. It does not own or operate any elevators on the west coast and its business is in no way competitive with that of the CCC. During 1960 and 1961 Mitsui stored quantities of its own grain at the Elevator, bought grain from CCC, both "f.o.b. vessel" and "in store" at the Elevator and, in some instances, shipped its own grain from the Elevator.

Warehouse tariffs and wharfage tariffs

At least since June 1955 the Elevator has operated under Warehouseman License No. 3–4088, granted by the Production and Marketing Administration, Department of Agriculture, pursuant to the United States Warehouse Act, 7 U.S.C.A. 241 *et seq.* Its *warehouse tariff* for storing and handling grain in bulk, effective June 15, 1955 and filed with the Department of Agriculture June 20, 1955, provided that "Wharfage is applicable to all grain moving to and from vessels over our dock at rates published in Port of Stockton tariff No. 3." [1] There was no indication in the Elevator's tariff of the specific rates or rules applied by the Port of Stockton (the Port) in determining its wharfage charges. These charges were assessed by the Port which, in most instances, submitted its invoices directly to, and received payment directly from, the user.

In July 1961 the Elevator entered into an agreement with the Port [2] under which the Elevator was granted a franchise to operate a shipside

---

[1] This was eventually superseded by Port of Stockton tariff No. 5.

[2] This agreement was executed by Stockton Port District on June 23, 1961, and by Stockton Elevators, Inc., on July 5, 1961.

grain terminal elevator. This was duly approved January 3, 1962, by the Federal Maritime Commission as agreement No. 8695. As anticipated by the terms of the agreement, the Elevator issued on July 1, 1961, effective the same date, its terminal "Tariff No. 1 Naming Rates, Rules and Regulations Applying at Facilities of Stockton Elevators." Section "B" thereof prescribed a *wharfage rate* applicable to wheat shipments in bulk in the offshore trade of 50 cents per 2,000 pounds[3] or 40 cubic feet. This rate was the same as that contained in the Port's tariff. The agreement, in providing for payment by the Elevator to the Port of certain sums based upon the tonnage movements of specified cargoes and the wharfage and service charges earned by the Elevator, expressly contemplated the reduction of wharfage and other charges on grain originating, as did the grain in this case, outside of California.

By cancellation supplement No. 1, effective July 1, 1961, the Port canceled its counterpart tariff and served notice that future rates, rules, and regulations would be as published in the Elevator's tariff No. 1. Thereafter, the Elevator issued and filed with the Department of Agriculture a revised *warehouse tariff*, effective July 10, 1961. This provided that "wharfage is applicable to all grain moving to and from vessels over our dock under Wharfinger Tariff published July 1, 1961." Although not required by law or regulation, copies of all of the above tariffs were voluntarily submitted to the Commission, or its predecessor, for information.

Demands in excess of Elevator capacity

The Elevator's problems, as a terminal operator, are more complicated than others throughout the country because it serves an extensive and important producing area and consequently a considerable part of its business comes directly from the harvesters. The volume of grain[4] to be received following a given spring or fall harvest cannot be forecast with certainty. Nor can the capacity that the Elevator will have open or available at any future time. On occasion there have been two to three hundred trucks as well as a number of railcars awaiting discharge. The trucks must be returned to the fields as promptly as possible in order to pick up additional loads and the holding of the railcars results in congestion on sidings and the accrual of demurrage charges. While most of the non-Government commodities, or so-called "free stocks," are moved to the Elevator under schedules providing at least approximate times for export shipment, the CCC

[3] Future references to quantities of wheat are mainly in terms of bushels. For conversion purposes, 60 pounds equals 1 bushel, 33⅓ bushels equals 1 short ton, and 50 cents per short ton equals 1½ cents per bushel.

[4] The record shows that the principal commodities handled by the Elevator are wheat rice, corn, barley, and milo.

stocks are ordinarily deposited for an indefinite period pending a buyer * * * an unknown buyer, who may come forward within a short time or not for a prolonged time. The CCC does not, as a general practice, ship grain on its own account. Moreover, the Elevator does not and, for corporate organizational reasons not clearly disclosed by the record, cannot engage in the grain merchandising business.

The Elevator, as a public utility and as a commercial enterprise, is obligated to exert every reasonable effort to provide the handling, processing, and storage services required by its customers, especially those in the local area. When it becomes inadvertently overbooked, or grain awaiting receipt exceeds capacity, there are three possible solutions.

(a) Leave railcars on demurrage until space opens up. This is expensive and can only provide limited additional capacity for limited times.

(b) Rehandle the grain and truck it to warehouses away from the terminal elevator and then back for shipping. This costs at least $1.50 a ton (4.5 cents per bushel) and outside warehouse space is not always available.

(c) Arrange for immediate shipment of some commodity thereby freeing space. Since the CCC sells only to those who come to buy, and the Elevator cannot engage in grain merchandising, this involves solicitation of the cooperative efforts of grain traders to expedite export sales.

Program to develop Oriental grain market

Hard red winter wheat from the Great Plains area (a high-protein wheat used for bread flour) constitutes the predominant grain surplus in the United States. Historically exports have been almost entirely through gulf, Great Lakes, and Atlantic ports to European and Near East markets. During the late 1950's the Department of Agriculture (through its Commodity Stabilization Service), working with a number of Midwest farm groups represented by the Great Plains Wheat Market Development Association, port authorities up and down the west coast, grain traders and rail carriers, initiated a concerted effort to develop a market for this wheat in the Orient * * * Japan, Korea, and Formosa. The Elevator and Mitsui were in the forefront of this activitiy. John Harley, the manager and a vice president of the Elevator, over a period of more than 3 years contributed "thousands" of hours to this program. It was recognized that this market offered the only sizable growth potential for wheat consumption and could provide an export outlet for as much as 50 million bushels a year. This would not only result in the Government's recovering the funds invested in surplus stocks of this grain, and avoid continuing storage expenses, but would also beneficially affect this country's critical balance of payment's deficit. Japan, recently referred to by Secretary of Agriculture Freeman as "Our number one agricultural customer" is a major dollar market.

The Department of Agriculture and other interested groups used demonstration teams in Japan to encourage the people to change their dietary habits and eat bread and toast rather than rice and noodles. These teaching efforts were successful but the desired increase in U.S. exports did not occur. It was found that the Japanese were buying their wheat from Canada. This was due to the fact that rail freight rates from the Midwest had always been based on the previously noted distribution of this wheat to the east through gulf, Great Lakes, and east coast ports and the rates for westbound movements had remained too high to permit a price competitive with Canadian wheat. In other words, the Canadians could place wheat stocks at Vancouver appreciably cheaper than Midwest wheat could be placed at U.S. west coast ports. The significance of this problem, and the concern of the Department of Agriculture, were indicated by the following letter, written in February 1960 by Clarence D. Palmby, associate administrator, Commodity Stabilization Service, to the president, Great Plains Wheat Market Development Association: [5]

Dear Mr. Hope:

Thank you very much for your kind letter of January 30, 1960, acknowledging receipt of my report on the wheat team trip to Japan last December. I was particularly pleased to read in your letter that grain exporters are showing interest in ways and means to cooperate with the wheat market development program.

You inquired as to what we have been able to work out in Commodity Credit Corporation with reference to possibilities for exporting hard red winter wheat from the west coast. Before commenting on this, I want to differentiate between two separate aspects of this question. The first is the big, challenging problem of the increasing potential in Japan for hard winter wheat and the fact that U.S. exportable supplies do not lie adjacent to the west coast, which is the advantageous coast, freightwise, for Far East shipping. The second aspect concerns what action CCC might be able to take in some small way to ease the situation temporarily. Presently, our CSS commodity office at Portland has authority to maintain an inventory in California of 500,000 bushels of hard red winter wheat, the wheat to be supplied by our Kansas City office for movement to California without freight penalty. This, as I have inferred, is not the longtime answer or even a very significant contribution to the temporary situation. CCC just does not have freedom to move any substantial volume of high protein hard winter to the west coast because of the freight penalties that would need to be absorbed.

You may be sure that importance of the potential for hard wheat business in the Japanese market will be kept in the foreground until some means is found for the United States to offer such wheat competitively.

---

[5] John Harley testified "In effect, Palmby had direct responsibility for the development of these particular merchandizing programs. He was extremely interested in the development of the Orient as a market for surplus winter wheat which the Government had running out of its ears. * * * I have this letter because it was I who prepared the exhibits for the Great Plains people and for the U.S. Department of Agriculture, and all the rest, in an effort to induce the railroads to lower these rates and to permit the wheat to move."

With continued appreciation for the work that you and your association are doing, I am,

Sincerely yours, /s/ CLARENCE D. PALMBY.
Clarence D. Palmby,
Associated Administrator."

In November 1960 the railroads reduced the grain freight rate from the Midwest to the west coast from 90 cents per hundred pounds (cwt.) to 82 cents per cwt. This, however, was insufficient to overcome the advantage held by the Canadians and efforts were continued to obtain still lower rates. Under date of January 16, 1961, the Secretary of Agriculture addressed a memorandum to the Under Secretary and Assistant Secretaries of the Department which, in pertinent part, stated:

Subject: Expanded Agricultural Export Activities

I approve and endorse the recommendations from the Committee on Agricultural Exports on ways and means of expanding U.S. agricultural exports. These recommendations, listed below, are the result of studies made as directed in memorandum No. 1441, May 31, 1960, and take into account the past several years of highly successful market development activities by the Department and cooperating farm and trade organizations.

In order to give American farmers the best possible opportunities for expanded markets and to give the free world fullest advantage of our agricultural abundance, you are requested to take appropriate steps to put these recommendations into operation as rapidly as possible.

1. EXPORT POLICY

1. Develop export policy to improve the competitive position of U.S. hard red winter wheat in Far Eastern markets.

Throughout 1960 and 1961 the movement of hard red winter wheat through west coast ports to the Orient continued to be of a promotional nature. Finally, in May 1962, the rail freight rate was further reduced to 70 cents per cwt. which rendered the Midwest wheat competitive with the Canadian wheat. Reference to subsequent developments is noted by the following item contained in a Department of Agriculture release dated December 5, 1962, covering trade problems discussed by Secretary Freeman and Japanese Minister of Agriculture and Forestry Shigemasa:

"The discussions also ranged over Japan's growing interest in imports of high quality hard winter wheat from the United States and of its continuing interest in imports of western white wheat. Secretary Freeman pointed to the steps taken by the United States to obtain necessary freight rate adjustments and to make stocks of wheat available at west coast locations in order to facilitate Japan's purchase of winter wheat.

Transactions in issue in this investigation.[6]

Immediately following the first rail rate reduction, in November 1960, the various interests that were working on the program decided

[6] Details regarding individual shipments are contained in the appendix hereto which is incorporated in these findings of fact.

that "despite the fact that the (rail rate) gap had not been closed, they should make every effort to get grain out from the Midwest, through the Elevator, and into the Orient, in order to maintain the interest of the oriental buyers, and in order to show good faith in the (rail) carriers." Everyone agreed "that it was the necessary thing to do, that once you start a promotion you just can't stop it because the fellow hasn't been able to bend quite as far as you wanted." The original plan was to solicit orders from buyers in the Orient and then purchase the amount of wheat required from free stocks in the Midwest. This would get the wheat moving and demonstrate the potential to the railroads and to the oriental buyers.

Mitsui, while realizing that movement of the wheat at the then effective 82-cent rail rate would be very difficult, volunteered to attempt it. Mr. Harley, although not requested by Mitsui to do so, went to Elmo Ferrari, director of the Port, and told him that, even though the rail rate deemed necessary had not been obtained, an attempt would be made to move some wheat out of the Midwest into oriental markets, but that sacrifices would have to be made by everyone. Mr. Ferrari agreed that the Port would help by charging wharfage at 1 cent per bushel for not more than 10,000 tons, rather than the 1½ cents per bushel provided by the Port's then effective tariff. However, after purchasing 52,694 bushels from free stocks held by farmers and dealers in Kansas, Colorado, and Nebraska, and shipment to the Elevator, it became apparent that the loss to Mitsui would be excessive. Accordingly, an additonal 55,115 bushels, the balance required to make up the total needed to satisfy sales which had already been arranged, were purchased from CCC stocks in the Elevator. The terms of this purchase were "in store" rather than "f.o.b. vessel" as the CCC wheat had to be blended with the free stocks in order to provide the desired protein content. The only way this blending could be accomplished was to buy in-store.

This shipment, totaling 107,809 bushels, was lifted to the Oregon Bear on or about April 27, 1961, for export to the Orient. The Port contrary to its usual though not entirely consistent practice of billing wharfage charges directly to the user, addressed its invoices to the Elevator. These were for $551.15 and $526.94, or a total of $1,078.09 representing the agreed upon wharfage charge at 1 cent per bushel. The Elevator merely attached the Port's invoices to its own cover invoices in the same amount and forwarded them on to Mitsui. Mitsui made payment of the full amount to the Elevator and the Elevator issued its check in the same amount to the Port. This was a "wash" transaction in which the Elevator was nothing more than a conduit. Its accountant, acting on his own initiative, posted the amounts in the ordinary books of account under "Prepaid Wharfage" and immediately charged them out by invoice to Mitsui.

In addition to the foregoing shipment through the Elevator to the Orient, there are five other shipments in issue in this proceeding. All involved the purchase by Mitsui, on "f.o.b. vessel" terms, of CCC wheat stored in the Elevator. Wharfage charges at the rate of 50 cents per ton (1½ cents per bushel) prescribed by the tariff were paid by CCC. The Elevator, at least once by check and otherwise by account credit, paid to Mitsui so called "allowances" [7] which varied from ½ cent per bushel, to 1 cent per bushel, to 20 cents per ton. This wheat, totaling 475,265 bushels, had been sold by Mitsui to buyers in the Oriental market but, as Mr. Harley freely testified, this fact was not the consideration for the Elevator's payment to Mitsui of these allowances, amounting to $3,636.41.

The Elevator's purpose involved two separate and distinct operating problems. The first concerned temporary but acute space shortages experienced during the 1961 spring and fall harvests. Its facilities were overtaxed on a number of occasions. At times, necessary additional space at or within reasonable distance of the terminal was unobtainable even on a temporary basis. Mr. Harley, in keeping with his usual practice, increased his efforts to get various grain traders and others engaged in the grain exporting business to expedite sales of CCC wheat for early export. Numerous such sales were arranged and consummated under the usual terms and conditions common to this trade but the volume moved was not always sufficient to remove the congestion problem. William A. L. Lyons, a grain trader representing Mitsui as resident agent in its Portland, Oreg. office, was particularly cooperative in these circumstances. In most instances the sales which he was able to arrange were on at least a break-even basis and no allowances were paid. There were several times, however, when he found that the price he would have to pay CCC for wheat was higher than competitive world markets and that these particular sales could only be made at a loss. He reported these findings to Mr. Harley, indicating the potential volume of wheat and financial loss concerned in terms of so much per bushel or per ton. After considering the dollar amount required to make up the loss, the exigencies of the Elevator's space problems, and the availability of alternative solutions, Mr. Harley would decide which of these possible sales he should tell Mr. Lyons to forgo and which he should ask him to try to make, it being understood that the Elevator would assume the loss.

In those cases, identified in the appendix hereto as shipments No. 2, 3, part of 5, and 6, Mr. Lyons, at the request of Mr. Harley, sold 364,830 bushels of wheat to buyers in the Orient and received allowances from the Elevator totaling $2,432.06. These allowances were computed to offset the losses that would otherwise have been sustained

[7] While the record contains interchangeable characterizations of these transactions as

by Mitsui and contained no element of profit to Mitsui. They were proposed by the Elevator (Mr. Harley) and not Mitsui, were for the benefit of the Elevator, and Mitsui understood that they were not to serve as a basis for its seeking or anticipating other allowances in the future. The Elevator's ordinary books of account show the exact amounts, under "Conditioning Wheat" which is a catchall account for miscellaneous, nontariff services in connection with grain handling. In addition, its working files contain invoices and memoranda which clearly publish the fact that these payments were in the nature of allowances, the methods by which they were computed, and the particular shipments to which they applied.

The other operating problem here concerned had to do with a sale of 11 percent protein CCC wheat made by Mitsui to a buyer in Formosa in September 1961. The following month when this wheat was scheduled to be lifted for export, the Elevator found that its fall drying operations were blocked by the placement of a quantity of 12 percent protein CCC wheat held in storage. The Elevator superintendent asked Mr. Harley to try to get Mitsui to take the 12 percent in lieu of the 11 percent wheat as otherwise drying operations would have to be limited or the 12 percent wheat would have to be trucked to an outlying warehouse. At his time the price of 12 percent CCC wheat was 1 cent per bushel more than 11 percent wheat. Mr. Lyons advised that he would buy the 12 percent wheat to "free up" the Elevator's bins but that the Elevator would have to pay the differences because the Formosans, having bought 11 percent wheat, would not pay more if a higher grade was delivered. Mr. Harley concluded that this was the least difficult and most economical solution to the problem and asked Mr. Lyons to proceed accordingly. This transaction, identified in the appendix hereto as shipment No. 4 and part of No. 5, involved a total of 110,435 bushels on which the Elevator paid Mitsui an allowance of 1 cent per bushel or $1,104.35. This was duly recorded in the Elevator's books under "Storage Wheat" as it involved a wheat storage problem. It was further detailed by invoices and memoranda contained in the Elevator's files.

Without exception the CCC wheat sold to Mitsui was bought and sold to foreign purchasers by Mitsui before shipment was effected. In each instance the sale was pursuant to Public Law 480, under which program Mitsui was a "supplier" and by regulation could not affect foreign shipment. The purchasers effeeted shipment and freight payments were by purchaser's letters of credit payable to the carriers.

All of the allowances involved wheat purchased from CCC during the spring and fall of 1961. There were no allowances granted during the nonharvest seasons. The allowances and the wharfage reduction of $539.05 totaled $4,175.46, or less than ½ of 1 percent of the Elevator's handling charges during the 18-month period under investigation.

In August 1962 a Department of Agriculture auditor, Mr. Olen Lane, undertook an audit of the Elevator's books covering the period January 1, 1961, to July 1, 1962. Mr. Harley suggested that, if it would be of assistance to him in the preparation of his report to his superiors, he (Mr. Harley) would be willing to prepare a memorandum regarding the wharfage reduction and the allowances that had been granted. Mr. Lane agreed and on August 24, 1962, Mr. Harley gave him a memorandum containing frank and specific references to these transactions.

The Position of Parties

There is no really meaningful disagreement between the parties as to the facts here concerned. Differences go only to the conclusions to be drawn therefrom and the interpretations of law applicable thereto.

Hearing Counsel urge that in granting allowances to Mitsui, the Elevator engaged in a practice which was unjust and unreasonable in violation of section 17; that in arranging for Mitsui to pay wharfage at a reduced rate it similarly engaged in an unjust and unreasonable practice in violation of section 17; and that in accepting wharfage at less than the applicable tariff rate, Mitsui violated the introductory paragraph of section 16 of the Act.[8] It is the proposal of Hearing Counsel that the Commission should accordingly (1) by rule prescribe that the Elevator cease and desist from paying allowances to users of its facilities in connection with the movement of Government-owned grain, and (2) direct the Elevator to recover from Mitsui (a) the difference between the applicable *rate for wharfage* and that actually paid, and (b) the *allowances* granted in connection with the Government-owned grain.

The Elevator and Mitsui urge that the investigation has failed to show that either has violated any section of the Act.

The applicable paragraphs of sections 16 and 17 provide:

SEC. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

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

---

[8] By amended proposed findings and on brief Hearing Counsel noted that they would not argue that the record establishes a violation of section 16 First by the Elevator.

As recited by the foregoing facts, this case concerns one shipment involving a *reduction in wharfage* and five shipments involving *allowances*. With regard to the *allowances*, Hearing Counsel contend that payments to a user of terminal facilities or services are akin to rebates and constitute a practice which ends to frustrate the fairness and equality of treatment which the Act requires be accorded all similarly situated users; that although there was no existing competition relationship between CCC and Mitsui, they were similarly situated users; that the grant of anything of value to one user, to the exclusion of others, is condemned by the Act; and that in these instances the practice was secret and surreptitious.

Hearing Counsel further contend that the Elevator arranged for and permitted a *wharfage reduction* which Mitsui, knowingly and willfully, by an unjust device or means, received; that the wharfage reduction was in connection with the transporation of goods by water; that it resulted in payment, by Mitsui, of a wharfage charge at less than the applicable rate therefore; and that whether Mitsui was a "shipper" or merely a "supplier" within the context of section 16 is a distinction without a difference. Extensive reference is given to the legislative history of the introductory paragraph of section 16 [9] to validate the position that the phrase "transportation by water" encompasses terminal services and is not restricted to actual water carriage.

The Elevator, on the other hand, urges that in most instances where Mitsui bought and sold Government grain from the Elevator at the Elevator's request in order to free up space, no allowances were made; that the five *allowances* here concerned were isolated actions out of hundreds of trades; that they were open and above board without concealment or falsity, made in the regular course of business and fully accounted for; that Mr. Harley voluntarily prepared a complete memorandum disclosing the facts; that the Elevator usually absorbed the costs of moving grain to other warehouses, as well as rail demurrage accumulated during the interim but that in these instances there was no outside warehousing space. Further, that the allowances merely equaled the difference between the world market and the CCC price and consequently provided no profit to Mitsui; that they were paid as good consideration for the results achieved, "freeing-up the elevator," and in each case constituted a much less expensive solution of the problem than available alternatives, if any; that it was never the *practice* of the Elevator to grant allowances as its management knows that such a practice, open or hidden, will destroy its business; and that Mitsui at no time solicited any allowance or reduction or realized any profit therefrom, did not know when if ever it might

[9] Hearings on S. 3467, Apr. 28, 1936, before the House Merchant Marine and Fisheries Committee, 74th Congress.

again be called upon to help, and did not expect future allowances of any kind.

Finally, the Elevator contends that the *wharfage reduction* was given as a contribution or sacrifice by *the Port* [10] in support of the program to promote the sale of surplus Midwest wheat in the Orient, a program sponsored directly and actively by the U.S. Government; that its purpose was to assist in offsetting the then existing rail freight differential; and that the Government, among its contributions to the program, moved several parcels of wheat from the Midwest to the west coast and absorbed the rail freight penalty. In summary, the Elevator argues that none of these transactions were unjust, unfair or unreasonable and that no one was prejudiced thereby in any way. On the contrary, it concludes that they were beneficial to the Government's program to promote the development of the oriental market, provided the farmers with elevator capacity for their current harvests, and improved this Nation's trade balance.

Mitsui, by exceptionally well-prepared motion to dismiss, memorandum in support thereof, and brief, all simultaneously submitted and incorporated each within the other by reference, takes little exception to Hearing Counsels' proposed findings of fact but urges the conclusion that no violation of any section of the Act has been shown. The entire proceeding, argues Mitsui, was ill-conceived and no case has been made against it "for the simple reason that there has at no time been any case to be made." A detailed analysis of the law and the facts is offered in support of the proposition that a showing of violation of the introductory paragraph of section 16 must be founded upon affirmative findings with regard to five elements. These elements and the basis of Mitsui's denial may be summarized as follows: (1) The alleged violator must be a "shipper, consignor, consignee, forwarder, broker, or other person * * *," within the terms of the paragraph, but that Mitsui, in all pertinent transactions, was none of these; (2) there must be use of some unjust or unfair device, or some falsity, but that there was none; (3) the alleged violator must have been in a position to effect transportation by water, but that Mitsui was not; (4) there must be a showing that other rates than those actually received were the only lawful ones, but that there has been no such showing; and (5) the action of the alleged violator must have been knowing and willful, but that this was not shown.

It is unnecessary to burden this decision with detailed discussion of every legal point raised by the parties. The issues are simple and direct: (1) Did Mitsui violate the above-quoted paragraph of section 16 by accepting wharfage at less than the applicable rate, and (2) did the Elevator violate the above-quoted paragraph of section 17 by (a)

[10] The Port is not a party to this proceeding.

granting the specified allowances to Mitsui [11] and (b) by arranging for Mitsui to pay wharfage at less than the applicable rate?

In urging that the word "receipt" and in turn "accepting" should be read into section 16 as being synonyms for "obtain," Hearing Counsel reasons that to hold otherwise would be to permit "an insulated avenue for the manipulation of preferences and discriminations which could readily wreck the congressionally intended regulatory scheme that requires similarly situated persons to be treated alike." Be that as it may, the terms are not synonymous [12] and the amendment of the statute, by interpretation or otherwise, is beyond the power of the Commission. There is no ambiguity in the word "obtain" and therefore there is no necessity to look elsewhere to determine its meaning in this statute. *U.S.* v. *Turner*, 246 F. 2d 228; *Colgate Palmolive Peet Co.* v. *D.C.*, 110 F. 2d 264. The law as enacted is clear. If it proves inadequate it may be amended, but only by the Congress.

In any event, these provisions of the statute do not provide flat and unqualified prohibitions. Section 16 prohibits only unjust or unfair devices or means to avoid payment of the applicable rate. Section 17 prohibits only "unjust or unreasonable" practices. Thus, even if Hearing Counsel's contention that accepting wharfage at less than the applicable rate could be designated as a "device or means," a violation has not occurred unless the record supports an additional finding of unjustness or unfairness. Similarly, even should it be found that granting allowances in five instances constituted a "practice," there is no violation in the absence of a finding that the practice was unjust or unreasonable. The same must hold true with regard to the single instance of "arranging" for reduced wharfage.

The Shipping Act was not drawn to bring about absolute equality of treatment of all persons subject to the Act by all other persons subject to the Act. This is evident from the language used by Congress in considering amendments recently enacted as Public Law 87–346 (75 Stat. 762).

> This section would amend section 14 Third, Shipping Act, 1916, to insert the word "unjustly" before the word "discriminating." This will conform that section to all other portions of the Shipping Act, 1916, where not all "discriminatory" conduct is forbidden but only that which is "unjust." Senate Document No. 100, 87th Congress, 2d session, at page 210.

There has been no showing that any party suffered a disadvantage by reason of the allowances or reduced wharfage. No party has appeared to claim disadvantage or loss of competitive posture or any-

---

[11] The allowances were not related to tariff charges. The wharfage charge was, but it was assessed by the Port, as a deviation from the Port's tariff, before the Elevator had a terminal tariff.

[12] According to Webster's New Collegiate Dictionary (1961) obtain is held to mean "1. To get hold of by effort; gain possession of; procure." This clearly involves more than passive receipt or acceptance.

thing else. Insofar as Mitsui's competitors may be involved, Hearing Counsels' proposed finding that allowances made by the Elevator to Mitsui were not solicited by Mitsui but were made in order to free-up space for the benefit of the Elevator, and represented nothing more than the difference between the price paid by the ultimate purchaser and the cost to Mitsui to obtain the grain from Government stocks stored with the Elevator, negates a finding that Mitsui benefitted. If Mitsui did not benefit, it is difficult to determine how its competitors could have suffered. The mere fact that Mitsui accepted a reduced wharfage rate does not, in the absence of proof to the contrary, imply that it was dishonest or used a device or means which was unjust or unfair. The record does not show and will not support a finding of this nature.

In adopting such broad and undefined terms as unfair and unjust and unreasonable, Congress granted the Commission wide discretion in determining whether the circumstances in any given case violated the statutes. *Lykes-Harrison Pooling Agreement*, 4 FMB 511, 527; *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 616, rehearing denied, 323 U.S. 809; *Isbrandtsen* v. *U.S.*, 239 F. 2d 933, 937, aff'd 356 U.S. 481, 495. Hearing Counsel offer the phrase "elemental fairness and equality of treatment" as the standard by which the conduct of the parties should be judged and cite the "banana" cases as authority.[13] There can be no quarrel with this as a general statement. However, as above pointed out, the term "equality" cannot be used in its copy-book sense. There may be inequality if it is not unjust, unreasonable, or unfair. The banana cases were decided on the basis of unjust discrimination and equality of treatment was an incidental consideration. In *Consolo* v. *Grace Line*, *supra*, the Commission concerned itself with justification for the different treatment of shippers. All of the banana cases were based on "unjust" discrimination and did not condemn discrimination or inequality of treatment which was justified. Moreover, those decisions turned upon the specific statutory provisions of sections 14 Fourth and 16 First, neither of which are here concerned. In *International Trading Corp. of Virginia* v. *Fall River Line Pier*, 7 FMC 219, also relied upon by Hearing Counsel, there was reference to certain "practices" but the true issue was undue or unjust discrimination between competitors and the injury resulting therefrom. In the instant case the absence of competition and of injury is admitted.

It cannot be found that the Elevator engaged in a "practice" within the meaning of section 17. The essence of a practice is uniformity. It is something habitually performed and it implies continuity * * * the

[13] *Consolo* v. *Grace Line Inc.*, 4 FMB 293; *Banana Distributors, Inc.* v. *Grace Line Inc.*, 5 FMB 615, aff'd 280 Fed. 2d 790; *Consolo* v. *Flota Mercante Grancolombiana*, 5 FMB 633.

usual course of conduct. It is not an occasional transaction such as here shown. *Intercoastal Investigation*, 1935, 1 U.S.S.B.B. 400, 432; *B & O Ry. Co.* v. *U.S.*, 277 U.S. 291, 300; *Francesconi & Co.* v. *B & O Ry. Co.*, 274 Fed. 687, 690; *Whitman* v. *Chicago R.I. & P. Ry. Co.*, 66 Fed. Supp. 1014; *Wells Lamont Corp* v. *Bowles*, 149 Fed. 2d 364. In this case, Hearing Counsel specifically propose the finding that "In most instances where Mitsui bought and sold Government grain from the Elevator at the Elevator's request in order to free up space, no concessions or allowances were made by the Elevator to Mitsui." However, even if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be found to be unjust or unreasonable. The commerce of the United States was not deterred. To the contrary, the public interest was served by (1) the opening of the oriental market as an outlet for surplus wheat and (2) the favorable contribution to efforts to right the U.S. balance of payments deficit. The benefit to the Elevator was, by virtue of the incidental opening of space for the accommodation of new crops, a benefit to farmers in the vicinity who were dependent on the Elevator. Although the method employed by the Elevator in saving Mitsui from loss by reason of assisting in making space available may be arguable by lawyers and accountants on various procedural grounds, in relation to other customers, Government agencies, and the public in general, it was not unjust or unreasonable. No one was denied anything, prejudiced, disadvantaged or discriminated against in any way. Mitsui obtained no advantage. The allowances were to save Mitsui from loss by reason of accommdating the Elevator. They were in no way related to tariff rates or charges and cannot be considered as involving rebating in any fashion. There is no suggestion of injury or loss to anyone. While the transactions between the parties were not advertised, they were in no sense hidden or tainted with falsification. All arrangements were knowingly and wilfully entered into but there was no intent, purpose, or effect which can possibly be related to an evil scheme or device which the Act was designed to prevent. Any such finding would be unsupported and unwarranted.

Ultimate Conclusion

Regardless of other legal points raised, there has been no showing that either respondent participated in any act which was unjust, unfair, or unreasonable.

The proceeding should be discontinued.

(Signed) John Marshall,
Presiding Examiner.

220-178 O - 66 - 15

APPENDIX

Wheat Exports on Which Mitsui & Co., Ltd., Received Wharfage Reduction or Other Allowance During the Period Jan. 1, 1961–July 1, 1962

Ship. No.	Vessel	Lifted to— Date	Bushels	Type	Purchased by Mitsui From	Date	Terms	Reduction or allowance to Mitsui Rate	Amount	Nature	Elevator account No. and subject	Objective
1	Oregon Bear	Apr. 27, 1961	51,441	Dark hard water.	CCC	Mar. 28, 1961	In store	½ cent per bushel.		Wharfage	No. 237, prepaid wharfage.	To support program to create U.S. grain market in Orient.
		do	3,674	do	do[1]	Mar. 30, 1961	do	do		do		
		do	52,694	do	Dealers		do	do		do		
	Total		107,809						$539.05			
2	China Bear	June 10, 1961	35,467	Dark hard water.	CCC	May 3, 1961	F.o.b.	½ cent per bushel.		Allowance	No. 3A90-5, conditioning wheat.	To open up elevator capacity for current grain harvest.
		do	30,947	do	do	May 29, 1961	do	do		do		
		do	65,245	Soft white water.	do	June 1, 1961	do	do		do		
	Total		131,659						658.29			
3	California Bear	Oct. 16, 1961	55,118	Dark hard water.	do	Sept. 14, 1961	do	1 cent per bushel.	551.18	do		
4	Fairport	Oct. 22, 1961	78,630	Hard water	CCC	Sept. 22, 1961	F.o.b.	1 cent per bushel.	786.30	Allowance	No. 3-10-5, storage wheat.	To move grain blocking processing operation.
5	Oregon Bear	do	31,805	do	do	do	do	do	318.05	do		
		do	114,484	Hard water	CCC[2]	Sept. 29, 1961	F.o.b.	20 cents per ton.	686.90	Allowance	No. 3A90-5, conditioning wheat.	To open up elevator capacity for current grain harvest.
6	Washington Bear	Nov. 9, 1961	44,278	do	do	Oct. 20, 1961	do	1 cent per bushel.	442.78	do		
		do	19,291	do	do	Nov. 3, 1961	do	do	192.91	do		
	Total		583,074						4,175.46			

[1] Purchased by Mitsui from free stocks held by farmers and dealers in Kansas, Colorado, and Nebraska and moved by rail to Stockton.
[2] CCC invoice (exhibit 16) shows only 81,019 bushels. However, debit and credit memos exchanged between Mitsui and Elevator (exhibits 14 and 43) show 6,869,036 pounds (114,484 bushels) and an allowance of $686.90.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 268

CHAVE RAMIREZ

v.

SOUTH ATLANTIC & CARIBBEAN LINE, INC.

Decided June 30, 1964

Application of South Atlantic & Caribbean Line, Inc., to waive collection of undercharges on certain shipments of used automobiles from the ports of Jacksonville and Miami, Fla., and Savannah, Ga., to San Juan, P.R., denied.

John Mason, for applicant.

REPORT

BY THE COMMISSION (Thos. E. Stakem, *Vice Chairman*; Ashton C. Barrett, James V. Day, *Commissioners*) :

On June 19, 1963, South Atlantic & Caribbean Line, Inc., (SACL), made application pursuant to rule 6(b) of the Commission's rules of practice and procedure, for permission to waive collection of undercharges on a number of shipments of used automobiles from the ports of Jacksonville and Miami, Fla., and Savannah, Ga., to the port of San Juan, P.R. These autos were transported on vessels of SACL which arrived in San Juan mainly during the months of September, October, and November, and December 1962. In the initial decision, the Examiner denied the application.

Exceptions to the initial decision were filed by applicant SACL. In its exceptions applicant attempts to introduce certain new material into the record. Applicant did not attempt to introduce such material for the benefit of the Examiner, nor did the Examiner call for any additional information from applicant during the pendency of the application. The failure of applicant to submit the subsequently proffered material apparently stems from its misconception of the nature of a special docket application. Applicant states the application "is, after all, a pleading, it is not a statement of all evidentiary facts." The special docket proceeding is designed to relieve applicants of the time and expense of litigating formal proceedings. Under it no hearings are contemplated since all the relevant facts are admitted by both the carrier and the shipper. Thus, the application itself must set forth all the facts relevant and material to a decision on the merits of the application, for how else are these facts to be placed before the Examiner.[1] A special docket application is in the nature of a complaint alleging facts establishing a violation of the Shipping Act, for which reparations may be awarded and an answer admitting those facts. As the Examiner correctly noted in his inital decision the Commission's authority in an informal proceeding is no greater than its authority in a formal proceeding. The special docket proceeding is designed to reduce, insofar as possible, the time and expense of the parties, the Commission and its staff.

However, these aims cannot be achieved if applications filed under rule 6(b) are incomplete or improperly prepared. In this connection we call applicant's attention to form No. 5, appendix II, to the rules of practice and procedure. This form prescribes the manner in which all 6(b) applications must be made, and the information called for therein represents the minimum upon which a decision on the merits could be made. This is not to say, however, that some cases would not require that additional information be submitted to prevent discriminations or preferences in the granting of applications under rule 6(b). Applicants seeking relief should exercise the greatest of care to insure that all relevant facts are in the application. We shall, of course, expect the foregoing to serve as a guide to future applicants under rule 6(b). In order to avoid any unnecessary prejudice to the merits of the application, we have accepted the supplemental material and considered it in reaching our decision.

On June 2, 1962, one Chave Ramirez, president of the Used Car Importers Association of Puerto Rico, wrote to Eagle, Inc., then agents of SACL in Miami, Fla., inquiring as to the possibilities of contracting with SACL for the carriage of automobiles for the members of the Association, from Miami, Fla., and Savannah, Ga., to San Juan and Ponce, P.R. The Association estimated that it would ship

[1] Applicants point to our decision in special docket 244, *Martini & Rossi* v. *Lykes Bros., S.S. Co.*, 7 FMC 453 (1962) wherein we stated that the Examiners should freely utilize their authority to obtain any "additional information deemed necessary" to insure that approval of applications would not result in discrimination. From this the applicant excepts to all conclusions of the Examiner based upon lack of evidence or clarity in the application. The extent to which an Examiner will go in trying an applicant's or complainant's case for him is essentially within the discretion of the Examiner and after a review of the record, we certainly cannot say that he has abused that discretion.

approximately 200 units per month, with the "possibility that on some months this figure will be under or over the established amount." The rate then in effect on used cars was $0.32 per cu. ft., as published in SACL's freight tariff FMC–F No. 1.

In reply to this inquiry on June 13, 1962, R. H. Halsey, Jr., then vice president of SACL, stated that his company was most desirous of assisting the Association with its transportation problem and further stating, "we are willing to establish in our new tariff a freight rate covering unboxed automobiles not exceeding 400 cu. ft., each at the rate of $115 each. For automobiles exceeding 400 cu. ft. but not exceeding 550 cu. ft., we will establish a flat rate of $150 each. For all automobiles exceeding 550 cu. ft., a flat rate of $175 will apply." Halsey, however, added the following conditon to the establishment of the new rates:

In view of our establishing this particular rate, we will expect you to pay us dead freight at the rate of $150 each during any month in which you do not ship the agreed minimum of 200 units.

These three rates covering unboxed automobiles actually shipped but not the "dead freight" rate of $150 were included in Tariff FMC–F No. 2 filed by SACL on June 27, 1962.[2] This filing was rejected on July 6, 1962, for failure to comply with certain requirements of our Tariff Circular No. 3. Again the same rates were filed on August 13, 1962, in Tariff FMC–F No. 3 to become effective September 14, 1962. This tariff was subsequently withdrawn by SACL with the result that the original rate of $0.32 per cu. ft. remained in effect throughout the period during which the shipments in question were made. On the same day that Tariff FMC–F No. 3 was filed with the Commission, August 13, 1962, Halsey also wrote to SACL's agent at San Juan instructing that agent effective immediately to place members of the Association on an "open account" basis.

* * * with the understanding that each consignee is to pay you for cars forwarded on a collect basis not less than $156 per unit of which $150 is to apply to ocean freight, $5 to Miami wharfage and handling, and $1 to San Juan arrimo charge.

After SACL changed agents in San Juan, Halsey on September 7, 1962, directed the new agents to charge the Association members $150 for ocean carriage, $5 for Miami handling, and $1 Miami wharfage.

Submitted as a part of the additional material offered on exceptions is a bill of lading covering a freight-collect shipment of one unit made by Chave Ramirez aboard the SS *New Yorker* on October 16, 1962.

[2] We note that in Tariff FMC–F No. 2 the $150 rate was for automobiles not exceeding 560 cu. ft. instead of the 550 cu. ft. offered in Halsey's letter. For the purposes of discussion, we will assume that the limitation intended was 550 cu. ft.

The unit measured 531 cu. ft., and was rated at $0.32 per cu. ft. for ocean freight of $169.92. Miami wharfage and handling of $6 and Puerto Rico arrimo of $10.62 brought the total charges to $186.54. Upon receipt of the shipment, $156 was paid and SACL issued a due bill for the balance of $30.54.

From the foregoing, several crucial facts appear. Although it is argued that the Association understood that it had an agreement with SACL for the new rates as early as June of 1962, the Association was still being billed at the old rate, $0.32 per cu. ft., as late as October, 1962. Yet it does not appear from the record that the Association ever questioned the bills of lading as rated by SACL. Moreover, SACL issued due bills against the Association on the basis of the difference between the flat $156 rate and the published rate. Again the record does not show that the Association ever questioned the additional freight charges due under the due bill. Thus, applicant knew or should have known that the $0.32 per cu. ft. rate was still in effect. Moreover, there is nothing whatsoever in the record that supports any contention that the complainant was entitled to rely upon a flat across-the-board rate of $150 for all units shipped regardless of the actual measurement of the particular unit. The record contains only two instances in which the $150 rate was mentioned, and both are found in Halsey's letter of June 13, 1962, *supra.* In the letter Halsey offered a flat rate of $150 not on all automobiles shipped regardless of measurement but only on those exceeding 400 cu. ft. but not exceeding 550 cu. ft. Hence, for this to be applied to all of the shipments involved in this application each automobile must have measured somewhere between 400 and 550 cu. ft. There is nothing in the record to establish this fact and no such inference is warranted.

The only other mention of a charge of $150 is found in Halsey's condition to the new rates that should the Association fail to ship 200 units in any given month it would then have to pay "dead freight" of $150 for each unit short of the 200 unit commitment. We must assume that the term "dead freight" was meant to be understood in its general accepted sense. Under the accepted definition, "dead freight" is a claim exacted for nonfulfillment of a charter and it is levied on cargo space which is contracted for but not used.[3]

Thus, even were we to assume that all of the automobiles shipped by applicant measured between 400 and 550 cubic feet and further that because of Halsey's offer, the $150 rate was applicable then it also follows that pursuant to the same offer, applicant would expect to pay some amount of dead freight for the months in which it shipped less than 200 automobiles. There is no suggestion, however, that ap-

[3] DeKerchove, ***International Maritime Dictionary,*** **1956, New York.**

plicant ever agreed or is now willing to pay any dead freight, nor does it appear that applicant in fact ever paid any dead freight charge.[4]

The record in this proceeding is replete with inconsistencies. For instance in paragraph 6 of the application the following appears:

> 6. While * * * it appears that (Halsey) attempted to establish reduced rates on unboxed automobiles, including a rate of $150 per unit in certain categories, the fact remains that the ocean rate authorized to be collected (by Halsey's letters to SACL's agents) was never the rate lawfully applicable, *and in consequence of these unauthorized acts, SACL stands in technical violation of the applicable statute in that transportation was performed at rates not lawfully applicable.* [Emphasis ours.]

In his Initial Decision, the Examiner found that "the law was being violated insofar as the applicable tariff charges were not being collected on these shipments." Notwithstanding the above admission, applicant's second exception to the Examiner's decision is that, "The Examiner erroneously, gratuitously and prejudicially concludes that applicant has violated the law and engaged in unlawfully practice [sic]." Applicant, however, points to the terms of Halsey's instructions to the San Juan agents to collect "not less than" $156 on an "open account." Applicant points out that the words "open account" have clearly understood meaning and refer to "an account with a debtor or creditor having a balance due or payable."[5] They contend:

> It is clear then, that the payment of "not less than" $156 was not accepted as full payment, but that a balance would remain unpaid, to be paid in the future.

Applicant further stresses the already noted fact that the bills of lading were freighted at the lawful rate of $0.32 per cu. ft. and that due bills were issued for the balance due. All this according to applicant points to nothing more than an extension of credit which in no way is unlawful. This may be true, but how, if everything is so clear, can the applicant further contend that "the question here is not what the facts were, but what the used car dealers believed the facts to be and they believed the fact to be that the $156 charge was the full charge." It is difficult to understand how this belief could be held to despite the fact that the bills of lading were freighted at the old rate and due bills were issued for additional freight money due.

---

[4] According to attachments VI and VI A of applicant's request for permission to waive collection of undercharges only 75 automobiles were shipped during the month of September 1962. Then pursuant to the offer contained in Halsey's letter of June 13, 1962, the members of the Association are responsible for paying dead freight on 125 automobiles at $150 or a total of $18,750. For the month of January 1963, only 26 automobiles were shipped which means that the members of the Association would be charged dead freight on 174 automobiles totaling $26,100. According to these calculations the Association for these 2 months would owe SACL in dead freight more than $44,000, the sum closely approximating the undercharge which applicant seeks to waive.

[5] Applicant takes this definition from *Webster's Third New International Dictionary.*

From the foregoing it is readily apparent that applicant was never entitled to rely upon a flat $150 rate for all automobiles shipped with SACL, and that applicant knew or should have known that the lawful tariff rate of $0.32 per cu. ft. remained in effect and was the actual rate being applied to their shipments. Accordingly,

It is ordered, That the application of South Atlantic & Caribbean Line, Inc., be, and it is hereby, denied.

Commissioner Patterson concurring:

I concur with the majority's decision to deny the application of South Atlantic & Caribbean Line, Inc., to waive collection of claimed undercharges on certain shipments of used automobiles from the ports of Jacksonville and Miami, Fla., and Savannah, Ga., to San Juan, P.R., but for different reasons.

The Intercoastal Shipping Act, 1933, is applicable to common carriers by water in interstate commerce of the United States, and section 2 thereof, after requiring the filing of certain tariffs, provides that any common carrier by water in interstate commerce shall not:

> * * * charge or demand or collect or receive a greater or less or different compensation for the transportation of passengers or property or for any service in connection therewith than the rates, fares, and/or charges which are specified in its schedules filed with the board and duly posted and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such schedules.
>
> * * * * * * *
>
> Any violation of any provision of this section by a common carrier by water in intercoastal commerce shall be punished by a fine of not less than $1,000 nor more than $5,000 for each act of violation and/or for each day such violation continues, to be recovered by the United States in a civil action.

Based on the record before me, the facts showed that the original rate of 32 cents per cu. ft. for the transportation of the automobiles in question was contained in tariffs filed as aforesaid and remained in effect throughout the entire period during which the shipments in question were made. The record contains no evidence or claim that this rate was unreasonable or in any way invalid.

The shipper was billed for freight in accordance with the tariffs but did not pay the entire amounts due. The full tariff charges must be charged and collected.

In my opinion it is deemed unnecessary for the majority to consider any of the other alleged conditions and circumstances in denying the application. Therefore, I do not associate myself with any of the various expressions and comments contained in the majority's report.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 732

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 733

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 734

GALVESTON COTTON COMPANY

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 735

TEXAS COTTON INDUSTRIES

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

Complaints against certain respondents dismissed with prejudice as result of settlement between complainants and said respondents of claim for reparation on shipments of cotton from U.S. Gulf ports to ports in the Mediterranean and the Far East.

Delmar W. Holloman for complainants.
Herman Goldman for respondents.

FOURTH INITIAL DECISION ON REMAND OF GUS O. BASHAM, CHIEF EXAMINER, DETERMINING REPARATION DUE COMPLAINANTS [1]

The decision of the Federal Maritime Board in *Isbrandtsen Co., Inc., et al.*, v. *States Marine, et al.*, 6 F.M.B. 422 (1961) dismissing the com-

[1] This decision became the decision of the Commission on July 7, 1964 and an order was issued dismissing the complaints, with prejudice, as to respondents named in the Stipulation and Agreement only.

plaint herein was reversed by the United States Court of Appeals (D.C.) on January 10, 1963. The Court remanded the proceeding to the Commission (successor to the Board) for the assessment of reparation, if any, due to complainants.[2] In turn, the Commission by order of November 21, 1963, remanded the proceeding to the Examiner for that purpose.

Complainants, on June 4, 1964, submitted the following Stipulation and Agreement between them and respondents executed on June 1, 1964, and requested the dismissal with prejudice of the complaints against them:

This Stipulation and Agreement, entered into between H. Kempner, a Massachusetts trust, Galveston Cotton Company, a Texas corporation, and Texas Cotton Industries, a Texas corporation, ("shippers"), on the one hand, and Nippon Yusen Kaisha Limited, a Japanese corporation, Kawasaki Kisen Kaisha Limited, a Japanese corporation, the carrier or carriers constituting the Fern-Ville Far East Lines, Waterman Steamship Corporation, an Alabama corporation, and States Marine Corporation, a Delaware corporation, ("carriers"), on the other, all of which are more fully described in the complaints and answers in Docket Nos. 732, 733, 734 and 735 before the Federal Maritime Commission;

WHEREAS, the aforesaid shippers are the complainants in the proceedings in Docket Nos. 732, 733, 734 and 735 before the Federal Maritime Commission (which terms, where appropriate shall include the Federal Maritime Board), seeking to recover reparations against the above-named carriers, among others; and

WHEREAS, in addition to the reparations claimed against the above-named carriers for the period through December 31, 1952 by the aforesaid shippers as set forth in the complaints in the said proceedings, the said shippers shipped at noncontract rates consignments of cotton via vessels of said carriers from the date of January 1, 1953 to the date of the interim legislation enacted by Congress which made lawful the dual rate contract systems of the aforesaid Conference insofar as it might be applied subsequent to the date of the enactment of the legislation on August 12, 1958; and

WHEREAS, the United States Court of Appeals for the District of Columbia Circuit by decision dated January 10, 1963 reversed the decision of the Federal Maritime Commission in the aforesaid proceedings and ordered the proceedings remanded to the Commission for the assessment of reparations due the complainants thereunder; and

WHEREAS, the carriers named hereinabove deny that they are liable to the aforesaid shippers for any alleged reparations and/or damages; and

WHEREAS, the parties are desirous of settling, satisfying and compromising and avoiding the necessity for further proceedings and the expenses, inconvenience, and delays which may be occasioned thereby;

NOW, THEREFORE, for and in consideration of the mutual undertakings of the parties hereto, it is hereby stipulated and agreed by and between the said parties that:

---

[2] The Court said: "The discriminatory (dual) rates here involved were not approved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal."

NOTE.—On Sept. 17, 1964 the Commission issued an Order dismissing the complaints in their entirety and with prejudice as to all respondents named in said complaints.

1) H. Kempner, Galveston Cotton Company and Texas Cotton Industries, hereby release any and all claims which they may have had against Nippon Yusen Kaisha Limited, Kawasaki Kisen Kaisha Limited, the carrier or carriers constituting the Fern-Ville Far East Lines, Waterman Steamship Corporation, and States Marine Corporation, in connection with the matters alleged in the complaints in Docket Nos. 732, 733, 734, and 735 before the Federal Maritime Commission, including all claims for damages and/or reparations arising out of the shipments by the said H. Kempner, Galveston Cotton Company and Texas Cotton Industries, at noncontract rates under the dual rate systems involved, including those covering shipments which were effected during the period subsequent to December 31, 1952;

2) Upon the execution of this Agreement, the parties hereto shall advise the Federal Maritime Commission that the controversies which are the subject of the complaints in Docket Nos. 732, 733, 734, and 735 before the Federal Maritime Commission have been settled insofar as they apply to the respondent carriers named in paragraph #1 hereinabove and that the complainant shippers named in paragraph #1 hereinabove have withdrawn their complaints, as amended, insofar as they pertain to the said respondents and request an order by the Commission dismissing the said complaints, with prejudice, insofar as they pertain to the said respondents;

3) The respondent carriers will pay to the indicated complainant shippers sums which shall include principal, interest thereon, costs and any other amounts which may be due, as follows:

a) Waterman Steamship Corporation, a total of $16.95, to Galveston Cotton Company in Docket No. 734;

b) Kawasaki Kisen Kaisha Limited, a total of $158.55 to H. Kempner in Docket No. 733;

c) Nippon Yusen Kaisha Limited, a total of $15,335.54, by paying to H. Kempner, $7,180.08 in Docket No. 733, Galveston Cotton Company, $7,364.20 in Docket No. 734, and Texas Cotton Industries, $791.26 in Docket No. 735;

d) The carrier or carriers constituting the Fern-Ville Far East Lines, a total of $5,794.26, by paying to H. Kempner, $3,672.57 in Docket No. 733, Galveston Cotton Company, $1,646.78 in Docket No. 734, and Texas Cotton Industries, $474.91 in Docket No. 735;

e) States Marine Corporation, a total of $44,780.81, by paying to H. Kempner, $26,690.13 in Docket Nos. 732 and 733, Galveston Cotton Company, $17,511.83 in Docket No. 734, and Texas Cotton Industries, $578.85 in Docket No. 735.

4) This agreement is entered into by and between the parties for the purpose of settling, satisfying and compromising the cases set forth hereinabove, and for the avoidance of the expense, inconvenience, and delays which would be involved in any further litigation between them. Neither this agreement nor any payment hereunder shall be construed as an admission that H. Kempner, Galveston Cotton Company and Texas Cotton Industries are entitled to recover damages and/or reparations against the respondents named hereinabove in any amount whatsoever.

This document was served upon the attorneys for all other respondents herein, who have filed no objection to the proposed settlement.

The complaints herein were filed timely, therefore none of the shipments are time barred. The reparation claimed therein was calculated on basis of the difference between the noncontract rate paid and the contract rate sought, applied to the weight of the shipments involved.

The amounts agreed upon in settlement of the claims are equivalent to the reparation originally sought plus a nominal amount of interest.

Premises considered, an order will be entered dismissing the complaints, with prejudice, as to respondents named in the Stipulation and Agreement only. This action should not be construed as an approval of any particular amount of interest on the claims involved; and is without prejudice to any findings which may be made with reference to the remaining claims for reparation against any remaining respondent.

(Signed) GUS O. BASHAM
Presiding Examiner.

JUNE 19, 1964.

FEDERAL MARITIME COMMISSION

No. 1096

THE NORTHERN PAN-AMERICA LINE, A/S (NOPAL LINE)

v.

MOORE-MCCORMACK LINES, INC., ET AL.

Decided July 20, 1964

Nopal Line's share of the revenues from the carriage of coffee from Brazil to U.S. Gulf ports fixed under Agreement No. 9040 found to be unjustly discriminatory and unfair within the meaning of section 15.

Thomas K. Roche and *Sanford C. Miller* for complainant Nopal Line.

W. B. Ewers for respondent Moore-McCormack Lines.

Frank J. McConnell for respondent Lloyd Brasileiro.

Seymour H. Kligler for respondent Empresa Lineas Maritimas Argentinas (E.L.M.A.).

Donald Macleay, *Harold Mesirow*, and *Edward S. Bagley* for respondent Delta Line.

Edwin Longcope for respondent Brodin Line.

Donald D. Webster for respondents Columbus Line, Ivaran Lines, and Holland Pan-American Line.

Elmer C. Maddy for respondent Norton Line.

James N. Jacobi for respondent Montemar.

John R. Mahoney for Wilbur Van Emburg, Administrator, Brazil, United States Coffee Agreement (not a respondent).

Frank W. Gormley and *Robert J. Blackwell*, Hearing Counsel.

Benjamin A. Theeman, Hearing Examiner.

REPORT

By JOHN HARLLEE, *Chairman* and JAMES V. DAY, *Commissioner:*

This proceeding arises out of a complaint filed by Northern Pan-America Lines, A/S (Nopal), alleging primarily that the Brazil/United States Coffee Agreement (Agreement 9040) is unjustly discriminatory and unfair as between carriers in violation of sections 15 and 16 of the Shipping Act, 1916.[1]

The Examiner, in his initial decision, found that complainant had failed to show that Agreement 9040 violated sections 15 and 16 of the Act, and that the complaint should be dismissed. The proceeding is before us on exceptions to the initial decision.

Before proceeding to a resolution of the issues set forth in the complaint, some preliminary discussion of the parties to this proceeding and their participation herein is necessary. While Nopal's complaint is directed only to its percentage allocation or share in the Gulf pool, it nevertheless named as respondents to the complaint all signatories to Agreement 9040, including certain lines which were participants in the Atlantic pool but not the Gulf pool. The parties and their participation in the proceeding are as follows:

There are four lines participating in the Gulf pool: Nopal Line, the complainant; and three respondents in this proceeding, Delta Steamship Lines (Delta), Lloyd Brasileiro (Patrimonio Nacional) (Lloyd), and Empresa Lineas Maritimas Argentinas (E.L.M.A.).

Complainant, Nopal, is a Norwegian corporation operating Norwegian-flag vessels, some of which are owned and others chartered by A/S Sobral, which owns 97 percent of the stock of Nopal. The stock of A/S Sobral, a Norwegian corporation, is owned by members of the Lorentzen family. Its vessels generally proceed southbound from Gulf ports in the United States and Mexico to ports in Brazil, Uruguay, and Argentina, on the east coast of South America, and thereafter northbound from Argentina, Uruguay, and Brazil to Gulf of Mexico ports. Nopal entered the trade in 1949, at which time all of its coffee carryings were on chartered vessels. From that time through the end of 1962 (the last full year of operations covered by this record), its proportion of sailings on owned vessels has constantly increased in relation to its charter operations so that by 1962, 22 of its 28 sailings from Brazil to U.S. Gulf ports were with owned vessels. In 1962, revenues from the carriage of coffee accounted for 95 percent of Nopal's total revenue from all cargoes carried northbound from Brazil, and 63.5 percent of its northbound gross freight revenues from

---

[1] A copy of Agreement 9040 is attached as app. A hereto. The agreement is discussed in detail where pertinent; however, generally speaking, it provides for the pooling of revenues derived from the carriage of coffee from Brazil to U.S. Gulf and Atlantic ports. Since its inception the Brazil/United States coffee pool has been divided into two "money" pools: (1) The Gulf pool providing for pooling of revenues on coffee carried from Brazil to U.S. Gulf ports, and (2) The Atlantic pool providing for the pooling of revenues on coffee carried from Brazil to U.S. Atlantic ports. Under the agreement each signatory is required to maintain a minimum number of sailings and is assigned a percentage of the revenues realized from the total amount of coffee carried by all signatories. Failure to provide the required minimum service results in a proportionate reduction of the percentage allocation. Eligibility for participation in the pool is conditioned upon membership in the Brazil/United States-Canada Freight Conference and an applicant must be approved by three-quarters of the pool membership.

South America. It is the second largest carrier of coffee in the Gulf trade and generally maintains a fortnightly service.

Delta is a subsidized American-flag carrier and, like Nopal, is engaged in the trade between U.S. Gulf ports and ports in Brazil, Uruguay and Argentina on the east coast of South America. It has been engaged in the carriage of coffee from Brazil to U.S. Gulf ports since 1919, and is the largest carrier of coffee in that trade. It is the only Gulf carrier which transports coffee on passenger vessels as well as freighters. Since 1949 its utilization of chartered tonnage has been minimal. It operates about four sailings per month in the coffee trade from Brazil to U.S. Gulf ports. From 1959 to 1963, its coffee carryings constituted an average of 63.8 percent of its total revenue northbound and southbound combined.

Lloyd is owned and controlled by the Republic of Brazil. At its head is a director appointed by the President of Brazil, assisted by a commercial superintendent appointed by the Minister of Transportation. It operates in the name of the Brazilian Government and is required to carry out governmental policy, which dictates that Lloyd's vessels call at ports in Brazil to transport cargoes from which the earnings are poor. In order to further the growth of industry in Brazil, Lloyd must each year visit many of these ports which the other carriers in the trade do not visit because they are unprofitable. As a result of such lengthened itineraries, Lloyd's operations are subsidized by the Brazilian Government and the transit time of Lloyd's vessels in this trade has more than doubled from 1955 to 1963.

Lloyd is the oldest carrier in the trade. It is the only one of the Gulf carriers in this trade whose vessels do not call at ports in Uruguay or Argentina as part of their round-trip voyages. It offers an average of about two sailings per month in the trade with owned tonnage. For the period from 1959 through 1962, its total coffee carryings were the smallest of the four Gulf carriers.

E.L.M.A. is owned and controlled by the Republic of Argentina in a manner similar to that by which Lloyd is owned and controlled by Brazil. E.L.M.A. is an instrument of policy of Argentina and is required to further the development of that country's foreign commerce. Its transportation services are directed by its president who is appointed by the President of Argentina, subject to confirmation by the Argentine Senate. By a series of transactions it is the successor to Cia. Argentina de Navegacion Dodero, S.A., which commenced carriage of coffee in the trade in 1948. Dodero was purchased by the Government of Argentina in 1949 and in 1954 its name was changed to Flota Argentina de Navegacion de Ultramar (F.A.N.U.). In 1961, F.A.N.U. was merged with Flota Mercante del Estado and became E.L.M.A. E.L.M.A. had approximately 12 sailings per year in the trade from 1959 through 1962 and averaged the third largest carriage in the trade.

The other respondents to this proceeding are common carriers participating in the coffee trade from Brazil to U.S. Atlantic ports.

Brodin Line, flying the Swedish flag, entered in effect a general denial to the complaint. Generally, its position was in agreement with the Gulf respondents. Its participation in the proceedings was limited, and it presented no evidence.

Montemar is an entity of the Uruguayan Government. It became a member of the Atlantic pool in March 1963, when it signed Agreement No. 9040. Montemar's participation in the proceeding was limited to the filing of an answer which in effect set forth a general denial.

Moore-McCormack Lines, Inc. (Mormac) is a private U.S. corporation operating under the U.S. flag. Like Delta Line, it operates under a subsidy agreement with the U.S. Government. Mormac entered in effect a general denial to the complaint, and took part in the proceedings to show that Mormac, in its corporate capacity, did not participate in the Gulf pool negotiations but that any such participation was by Mormac representatives as individuals and not in their representative capacity when so doing. Mormac's position supported that of the gulf respondents.

Torm Lines, flying the Danish flag, took no part in the proceeding. Torm stated that since it does not serve the Gulf ports, it would refrain from comment because the dispute was confined to lines serving the Gulf ports, but in stating its position in a letter to the Examiner wrote: "In reply, please note that we fully understand and sympathize with Nopal's views in this matter."

Columbus Line, flying the West German flag, Ivaran Lines, flying the Norwegian flag, Holland Pan-American Line flying the Netherlands flag, and Norton Line, flying the Swedish flag appeared by attorneys. They filed no answer to the complaint and presented no evidence but participated actively in cross-examination and argument. The position of these respondents generally supported that of Nopal Line.

Carriers participating in the coffee trade were generally referred to by the conference as either "national flag" or "third flag" carriers. A carrier was considered "national flag" if it flew the flag of the country of origin or destination of the coffee (Brazil or the United States); or if the carrier was a government-owned line of a South American country within the conference trading limits; i.e., Brazil, Uruguay, or Argentina. Mr. Lorentzen of Nopal Line testified that in his opinion E.L.M.A. (Argentina) and Montemar (Uruguay) should not be considered as "national flag," but never expressed this view to the conference. E.L.M.A.'s agent claimed that E.L.M.A. was entitled to the "special consideration" accorded national flag lines, since it has "obligations to the development of the Argentine trade and traffic which restrict her commercial activities to a degree, and she performs essential traffic development service for * * * many branches of the Argentine Government * * *."

In the Gulf pool, Delta Line, Lloyd, and E.L.M.A. are considered and designated "national flag," and Nopal Line is the only third flag line. In the Atlantic pool, Mormac, Lloyd, E.L.M.A. and Montemar are considered "national flag," and Brodin Line, Columbus Line, Ivaran Lines, Holland Pan-American Line, Norton Line, and Torm Line are "third flag" lines.

The pooling agreement here in issue (Agreement 9040) was approved by the Commission on June 11, 1963, with the condition that it be modified by adding the following provision:

> "* * * provided that no monies shall be paid into the escrow fund established by the agreement, nor shall any monies be distributed from such fund or otherwise among the parties, until such time as the Commission issues its final decision in Docket No. 1096, and provided further that distribution at that time shall be made in accordance with such decision."

The parties to 9040 agreed to the said modification and 9040, as modified, became effective on August 22, 1963.

Nopal is not opposed to the principle of pooling embodied in Agreement 9040, but claims that the share of the trade allocated to it under the agreement is unreasonably low, considering its history of past coffee carryings. Nopal alleges that Agreement 9040 will deprive it of substantial revenue from the carriage of coffee, and that its share in the pool is discriminatory, detrimental to the commerce of the United States, and in violation of sections 15 and 16 of the Shipping Act, 1916, as amended. Its prayer for relief seeks a Commission order "modifying proposed Agreement No. 9040 so as to accord to Nopal Line a fair and nondiscriminatory share in the Gulf money pool, and approving said proposed Agreement No. 9040 as so modified; or, in the alternative, disapproving said agreement unless the proposed parties thereto so modify said agreement, together with such other and further relief as the Commission shall deem just and proper."

Following Nopal's complaint four respondents (Norton Line, Columbus, Ivaran, and Holland Pan-American Line) signatories of Agreement 9040 participating in the Atlantic pool petitioned the Commission for a declaratory order resolving the following questions:

"*Controversy No. 1*

"Whether, under Sec. 15, Shipping Act, 1916, the Commission can approve a pooling agreement among ocean common carriers when it is admitted by a number of members of the proposed pool that the shares therein have been allocated on a basis which is designed to and does accord (a) preferred status to certain carriers because their vessels fly the flags of either the importing or exporting nation (so-called 'national flag' lines), and (b) in relation to those carriers, prejudiced status to certain other carriers because their vessels fly the flags of other nations (so-called 'third flag' lines)?

Controversy No. 2

"Whether, when a pooling agreement approved by the Commission provides that the agreement shall be effective through a certain date and that thereafter, in negotiating an extension of the agreement, 'the percentages and minimum sailings shall be subject to review and adjustment taking into consideration the service and carryings during the past two (2) year period,' any members or group of members of the pool may 'refuse to consider' the services and carryings of another member or group of members during the past two year period?"

The Commission denied the petition for a declaratory order stating that the issues presented were capable of resolution in Docket 1096, the present proceeding. During the hearing, the Examiner excluded evidence pertaining to the allegedly discriminatory effect of the Atlantic pool, and confined the proceedings to the issues involved in the Gulf pool.

Brazil is the world's principal producer of coffee, and the United States is Brazil's chief customer, importing about 8 million bags per year. The conference rate for transportation of coffee has been stabilized at $2.50 per bag, but a tariff revision recently filed with the Commission has increased this rate to $3. Thus, prior to this recent increase, the yearly freight on the coffee to the United States was about $20 million. During 1962 the value of coffee imported to the United States was about $362,528,000. The United States is the only nation that permits the entry of coffee without import duty. The coffee trade provides about 70 percent of Brazil's foreign exchange, and Brazil considers this the mainstay of its exchange structure.

In the latter part of 1959 rumors, allegations, and complaints of malpractices spread in the trade, and the Chairman of the Green Coffee Association, a shipper group, complained to the conference about these practices. From this the conference members foresaw the breakup of the conference and a damaging rate war in the offing.[2]

In May 1960, a conference meeting was called for the purpose of discussing these problems and agreeing on appropriate remedies. Prior to this meeting, Captain Clark, president of Delta Lines, discussed the possibility of a pool with the conference chairman, and was told that "anything [Clark] could do to bring order out of chaos might be the salvation of the conference."

Prior to this meeting, a caucus of the national flag lines was held during which Captain Clark presented his proposal to the other lines in attendance. The representatives of Lloyd, the Brazilian line, and

[2] While the record clearly shows that malpractices were rumored, and complained of, nothing therein indicates whether or not any malpractices were in fact engaged in.

E.L.M.A. were initially hostile to the pool proposal, but subsequently agreed in principle to the establishment of a pool. An initial memorandum was then prepared by the national flag conferees for submission to the conference as a whole. The memorandum did not purport to be an agreement among national flag lines, nor were its terms necessarily agreeable to any of them. Rather, this initial proposal was designed to be presented to the conference as a point of departure for further discussion. The proposal provided for two pools of coffee carryings from Brazil to the United States, one for the Atlantic ports and one for the Gulf ports. The pool shares allotted for the Gulf were: Delta Line, 59 percent; Lloyd, 19 percent; F.A.N.U., 9 percent; Nopal Line, 13 percent.[3] The quotas were purportedly arrived at by striking an average for the 10 previous years, excluding 1959 [5] as a year which was considered by some to be atypical because of alleged malpractices, and considering among other factors each carrier's "past service, cubic capacity, frequency and number of sailings, pioneering effort, and over-all length of service."

It was during the discussions on this proposal, the Brazilian delegation first made known its position that Lloyd was entitled to an allocation of 50 percent because of its status as a national flag line and more particularly because Brazil was the exporting country. Lloyd subsequently retreated from this position but stood firm in its insistence that in no event would it accept a quota lower than a third flag carrier, which in practical terms meant that despite any differences that might exist in past carryings between Lloyd and Nopal, Lloyd would insist on a quota at least equal to Nopal's. Nopal maintained that considerably more weight be given to past carryings. According to statistics before the parties at the time of these discussions, Nopal had carried 29.4 percent of the coffee between April 1, 1959, and March 31, 1960. Nopal agreed to accept a quota of 26 percent, but a final offer of 19 percent made by the other Gulf carriers was refused by Nopal. In July 1960, as a result of Nopal's refusal to accept the 19 percent allocation, a coffee pool was formed by the other three Gulf carriers without Nopal (Agreement 8505).[5] Nopal continued to carry coffee outside the pool at conference rates (Nopal was still a conference member albeit not a pool participant).

Despite the remedial effect the pool was expected to have on the coffee trade, rumors of malpractice continued, and it was about this time that so-called "outsiders" began to appear on berth, i.e., nonconference nonpool carriers loading coffee.

---

[3] This initial memorandum also proposed pool shares for an Atlantic pool.

[4] Some conflict appears in the record as to whether the year 1959 or 1960 was excluded in computing the 10-year average. The distinction is not crucial to our decision herein.

[5] Agreement 8505 also had a separate pool for the Atlantic.

On October 13, 1960, the Brazilian Government's Superintendent of Money and Credit issued a decree known as SUMOC 202, which read in pertinent part as follows:

1. Brazilian export products with destination United States of America or Canada will be transported exclusively by shipping companies which are members of the Brazil/United States/Canada Freight Conference.

3. In the case of products which transportation is regulated by specific accords or agreements between member lines of the conference signed under the auspices of the above conference and not rejected by the Brazilian authorities, loading of these products will be effected exclusively on vessels of those shipping companies that are signatories of said accords or agreements.

SUMOC 202 had and still has the force of law in Brazil.

Put in its essential terms, SUMOC 202 prohibited the carrying of coffee by any carrier who was not a member of the pool. Despite Nopal's success in persuading shippers to request Brazilian authorities to allow Nopal's service to continue, and despite its attempts, without success, to persuade the conference to intervene on its behalf, the Brazilian Government refused to rescind or modify the decree and as of October 21, 1960, its effective date, Nopal could no longer load coffee at Brazilian ports.

Shortly after the promulgation of SUMOC 202, the coffee pool administrator at the request of Delta Line urged nonpool members to apply for membership in the coffee pool. On November 7, 1960, Nopal made its application and on November 11, 1960, a meeting of the Gulf carriers was held in Rio to consider that application. Prior to that meeting the President of Delta Line met with the Director of Lloyd and urged Nopal's prompt admission to the pool. At the November 11 meeting the Gulf lines were receptive to Nopal's admission, but there were no specific discussions of pool quotas.

During the next few days, however, the hard bargaining took place. Lloyd's position remained firm. While it continued to assert that it was entitled to 50 percent of the trade, Lloyd flatly refused to accept a lesser percentage than Nopal. F.A.N.U., the Argentine line, made an oral proposal to allot Delta 50 percent, Lloyd 25 percent, Nopal 15 percent and F.A.N.U. 10 percent.

Delta's proposal, while not making specific recommendation as to quotas, set forth what it considered to be appropriate factors in arriving at quotas. Its proposal stated in pertinent part:

* * * * * * *

D. Allocation of percentages should be based on:

(1) Previous experience over a representative number of years, with due weight to pioneering effort.

(2) National interest.

Previous Experience

As a first step, we suggest a review of previous experience, and we attach statistics covering carryings of coffee by Gulf Lines during the past 10 years * * *. We feel a good deal of weight should be given to the 10-year averages, and that little, if any, weight be given to the year 1960, due to the unusual circumstances, including malpractices prevailing during the past 10 months. It is imperative that agreement be reached on previous experience (the number of years) before proceeding to discusss future divisions. We believe a minimum period of five (5) years' experience should be offered as a basis for negotiations.

National Interests

It is our opinion that Lloyde Brasiliero, as an instrument of policy of the Brazilian Government, should receive special consideration on the basis of both national interest as well as its position as the oldest carrier in the trade * * *.[6]

Delta Line Proposal

We are agreeable to accept a substantial reduction in the last complete five (5) years' average carryings by Delta Line, in favor of the legitimate aims of Lloyde Brasiliero, provided Nopal Line will also agree to a similar reduction in favor of Lloyde Brasiliero.

Nopal countered with a proposal based on an estimate that 2,600,000 bags of coffee would move annually from Brazil to U.S. Gulf ports. Of the 2,600,000 bags, Lloyd would be guaranteed 375,000 bags, and F.A.N.U. 150,000 bags, based on 15 sailings per year for each of the above lines. Should Lloyd and F.A.N.U. fail to carry 375,000 bags and 150,000 bags, respectively, the deficit up to those amounts would be paid at $1.00 per bag, by Delta and Nopal, in proportion to their actual carryings. Under this proposal Nopal proposed to limit its sailings to 26 per year.

Nopal's proposal was strongly opposed by both Delta and Lloyd. Among the reasons given by Delta for its opposition was its belief that "the proposed limitation of service would probably be interpreted as an unwarranted restriction of trade, and therefore illegal."

Finally, on November 23, 1960, after considerable negotiation during the course of the previous week, agreement was reached, and an informal statement of agreement was executed by the parties, which became Agreement 8505–1. As finally executed the agreement provided for a percentage allocation of the revenue from the total coffee transported by the parties to the agreement. Excluded from the computations were the carryings on Delta Line's passenger vessels up to 23.5 percent of the total Gulf carryings.[7] The revenue from Delta's

---

[6] Delta's proposal under this *National Interests* heading went on to point out that the national interests of the United States and Argentina were also entitled to consideration in allocating quotas. Although not an exporter of coffee the national interest of Argentina was thought entitled to consideration because Argentina was within the scope of the conference trading area.

[7] Under the prior agreement (8505) Delta was allowed to exclude 800,000 bags from the pool carried on passenger vessels. This would normally be a greater exclusion than the 23.5% excluded under Agreement 8505–1. This represented a concession by Delta. In order to get full advantage from this exclusion, Delta actually had to carry 23.5% of the total movement to the Gulf on its passenger vessels. If it carried less, only the amount it actually carried would be excluded.

passenger vessel carryings beyond the 23.5 percent was placed in the general pool. The revenues thus pooled after a deduction by each line of $1.15 per bag for handling charges, were divided as follows:

	Percent
Delta Line	38.64
Lloyd Brasileiro	25.37
Nopal Line	25.37
F.A.N.U. (E.L.M.A.)	[8] 10.62

In order to qualify for the percentages specified above, the following minimum sailings, during each 6-month pool accounting period, were to be maintained:

Delta	13
Lloyd	12
Nopal	12
F.A.N.U. (E.L.M.A.)	6

If any line failed to provide its minimum sailings, the percentage allocated to it was to be reduced in direct proportion to its reduction in service and the surrendered portion was to be allocated to the other lines in ratio to their percentage quota allocations.

However, as a concession to Nopal, Delta accepted a 50 percent reduction in whatever compensation might accrue to them by reason of noncompliance by the other pool members with the specified minimum sailing requirements, and E.L.M.A. accepted a similar reduction of 33⅓ percent.

Nopal expressed dissatisfaction with its quota but was told that its record did not entitle it to more, that the national flag lines had "a certain right in the trade" which Nopal did not have, and that in any event Lloyd would not permit Nopal to have a higher quota than Lloyd.

A provision which was later to give rise to much controversy was embodied in Article 18 of Agreement 8505-1 and read in pertinent part:

> * * * This Agreement and percentages established herein shall be effective through August 29, 1962. Thereafter the percentages and minimum sailings shall be subject to review and adjustment taking into consideration the service and carryings during the past two (2) year period.[9]

As a condition of Nopal's acceptance of the agreement, Lloyd immediately advised Brazilian authorities that Nopal was now a pool

[8] These percentages total 100%. It is to be noted that this does not represent the total Gulf carryings. The latter include the carryings of Delta Line's passenger vessels. On the basis of total Gulf carryings these percentages become Delta Line, 53.06%; E.L.M.A., 8.12%; Lloyd, 19.41%; and Nopal Line, 19.41%. Figures and percentages hereinbefore and hereinafter referred to, unless otherwise specified, refer to and are based on total Gulf carryings.

[9] A 6-month extension to Agreement 8505-1, designated as Agreement 8505-2, was later approved by the Commission. Pursuant to the latter agreement, the Aug. 29, 1962, date found in art. 18 was changed to Feb. 28, 1963.

member, and therefore eligible to lift coffee. The ban was lifted and Nopal was back on the berth.

The combination of SUMOC 202 and the pool was apparently an effective one and during the period of 8505–1 rumors of malpractice disappeared from the trade as, of course, did all so-called "outsiders."

Since Agreement 8505–1 had an expiration date of August 29, 1962, a meeting of principals was scheduled for June 1962, in New York, to consider, among other things, the extension of the coffee pool.

In February/March 1962, Delta Line and Mormac arranged through their respective representatives in Brazil that an invitation be issued to Lloyd's representatives for a meeting in New York in advance of the scheduled meeting. As a result, Commandante Loris, Commercial Superintendent of Lloyd, and several other Lloyd officials met with Messrs. Clark of Delta Line, and Mattman, Vice President of Mormac, several times in May 1962, the main topic of discussion being the desire of Lloyd to transfer the seat of the Conference to Brazil in order to enhance the prestige of that country. Both Delta and Mormac agreed to support the move. Some discussion of pool quotas also took place between these national flag carriers, but apparently no conclusions were reached.

At the June 1962 principals' meeting Commandante Loris' proposal to transfer the seat of the Conference to Brazil was approved, and a further proposal was made by Lloyd to extend the pool for 6 months, so that Conference machinery could be set up in Rio, and the first meeting to be held in Rio would be the renegotiation of the pool. Nopal made no objection to transferring the base of the Conference, but did express its reluctance to agree to any extension. Nopal stated that since it considered its quota under Agreement 8505–1 to be inadequate, and had relied on Article 18 of the agreement to get an upward revision of its quota as of August 29, 1962 (the terminal date of Agreement 8505–1), any extension of that date would be "a very definite hardship." After expressing these views at the meeting, however, Nopal joined with the other principals in approving the extension of the pool to February 28, 1963.[10] Nopal was assured by Commandante Loris of Lloyd, that Article 18 would be fully discussed when the principals convened in Rio.

The principals met in January/February 1963 against a background of the following history of coffee carryings in the Gulf trade:[11]

1. Although Nopal's quota under Agreement 9040 was 19.41 percent, its carryings during the pool period (November 23, 1960–December 31, 1962) averaged

---

[10] This extension was approved by the Commission on Jan. 31, 1963, as Agreement 8505–2.

[11] A table setting forth the sailings and carryings of the Gulf carriers from Nov. 23, 1960 to Dec. 31, 1962, the latest figure available to the principals at the Rio meeting, is attached hereto as app. A. A table showing the financial results of Agreement 8505–1 through Dec. 31, 1962, is attached hereto as app. B.

25.5 percent. During this period its carryings consistently increased and ranged from a low of 19.90 percent for the period November 23, 1960–August 28, 1961, to a high of 31.99 percent for the 4 months from August 29, 1962 to December 31, 1962.

2. As a result of carryings considerably in excess of its quota, Nopal for the period November 23, 1960–December 31, 1962, was the principal contributor to the pool, and paid $449,920.74 [12] into the pool—as against payments by Delta and E.L.M.A. of $383,155.19 and $734.58, respectively. Under the agreement, Lloyd (who actually carried a lower percentage of the coffee during the pool period than any of the Gulf participants) received $833,810.51.

3. Nopal's contribution per bag carried during the above period was 34.4 cents, Delta's was 12.6 cents and E.L.M.A.'s 0.2 cents per bag. Lloyd, during the period in question, received $2.16 for each bag it carried.

4. Nopal entered the Brazil-United States Gulf coffee trade in 1949. Its annual carryings since that year were as follows: [13]

	Percent		Percent
1949	4.8	1956	18.4
1950	7.6	1957	19.9
1951	7.7	1958	21.9
1952	13	1959	27.3
1953	15.3	1960	24.9
1954	12.4	1961	24.8
1955	13.3	1962	27.7

As can be readily observed, these latter figures with some slight fluctuation show a consistent upward trend.

The January/February 1963 meeting of principals was the scene of many days of difficult negotiation. The negotiations took place both at plenary meetings of all coffee pool participants, both Atlantic and Gulf, and at caucuses at which Atlantic and Gulf lines met separately to negotiate quotas for their respective pools.

Disagreement between the national flag lines and the third flag lines with regard to the application and effect of Article 18 on the quotas for the new period occurred on the first day and continued throughout the conference.

Nopal Line pointed out that its carryings for the preceding few months averaged about 32 percent of the total Gulf carryings but that its average for the total pool period was about 25.5 percent. On this basis Nopal contended that Article 18 entitled it to a higher quota than its old one and stated it was willing to accept 25.5 percent of the total Gulf carryings. Nopal Line recognized the fact that the primary purpose for which the pool had been formed was being achieved, but took the position that Lloyd had "received a tremendous (money)

[12] This figure does not represent the amount actually paid by Nopal, but the amount payable. The record shows that as of July 23, 1963, the date testimony was given relating to Nopal's payments into the pool, Nopal had not yet made payment into the pool of $290,918.25, the amount due for the 6-months period ending Feb, 28, 1963.

[13] Comparative figures for the other Gulf carriers appear in app. C.

tribute from us and it is about time that we finish with this." Delta Line, Lloyd, and E.L.M.A. stated that, although each of them wanted a quota increase, each was willing to continue with the quotas as negotiated in Agreement No. 8505–1. Lloyd reasserted its position that it wanted 50 percent of the trade, but would not insist on that figure because its national obligations not only prevented it from carrying 50 percent but also prevented it from carrying even the 19.41 percent quota it had received under Agreement 8505–1. Lloyd maintained, however, that it had special rights and was entitled to special considerations as a national flag line to which Nopal was not entitled because of its position as a third flag line. It was apparently Lloyd's view that because Brazil was the exporting country, Lloyd was entitled to greater preferment than even the other national flag lines. Lloyd reiterated that in no event would it accept a quota less than Nopal Line's in the Gulf. Delta stated that it, too, was an over-carrier, and was seeking an increase in the quota of carryings for its passenger vessels to a little less than the 800,000 bag figure it had under Agreement No. 8505. E.L.M.A. adopted the flat position that it would take nothing less than the quota it already had, on the basis of its past service and carryings and its position as a national flag line.

These positions taken by the Gulf national flag lines were discussed and reached at two meetings at which no representative of Nopal Line was present. The first such meeting was held the night of the first day of the principals' meeting, and among the items discussed were the advisability of a new pool as distinguished from an extension of the old; the desire of each line for a greater quota; the fact that each was prepared to agree to the previous percentage; and the applicability of Article 18. At the second meeting of the national flag lines, about 5 days later, concern over the lack of progress at the principals' meeting was expressed and the three lines considered the possibility of forming a new pool without Nopal should it refuse to accept the offer of the national flag lines.

The discussion at the principals' meeting had made no headway. No party was willing to make any further concession, and faced with an apparent impasse, Captain Clark proposed that each line retain the same quota it held under Agreement 8505–1. In response to Nopal's protests, Captain Clark stated:

"I would like to remind Mr. Lorentzen of the sequence of events, which he has apparently not understood. Delta has made its position clear: We would be prepared to stay within our present quota with the understanding that the passenger ships must receive a fair allowance. E.L.M.A. has also made its statement. Lloyd said that, if Nopal asked for a percentual increase, they would have to follow this procedure too. We have told Mr. Lorentzen that he has reached a level beyond which he cannot go. Isn't that clear enough now?"

At a caucus of the Gulf lines held February 4, Nopal was informed that a new pool without Nopal would be formed if it would not accept its present quota by noon of the next day.

Captain Lorentzen protested at the plenary meeting that:

"* * * it was plainly explained to us what will happen if we did not join or maintain or accept the offer made to us * * * we understand the difficult position of Lloyd in this trade and we feel that, instead of working on quotas and insisting on the emphasis on quotas we should try to find some way of eliminating the incredible situation of when national lines do not get cargo. We are perfectly open and willing to explore any avenue we can find * * * because we believe * * * that the present percentage system, with large payments passing from one line to the other, is not healthy and is not in the best interests of the commerce of Brazil or the United States * * *. During that discussion this misunderstanding of our position came out, namely when we are insisting on consideration of Article 18 we do not expect or insist or hope for 100 percent consideration of our carryings in the adjustment to be made. We do expect some consideration * * *."

The following morning Captain Clark advised the meeting that the Gulf pool situation was settled as far as the national lines were concerned and that they were waiting only for Nopal Line's reply. Mr. Lorentzen restated his belief that Nopal's rights under Article 18 had been abrogated but accepted the quota offered, stating:

"* * * yesterday afternoon, in definite words, we were told that, if we don't accept the status-quo by noon today, a new pool will be organized without Nopal line. We must strongly protest against this kind of treatment, but, in view of the existence of regulations such as Sumoc 202, we have no alternative left to us. Nopal will sign only because refusal to do so will shut them off from the coffee trade.

The remainder of the next 2 days were spent in drafting Agreement No. 9040 and the issue arose as to whether the new agreement should take the form of an extension of Agreement 8505, or a completely new pool. Captain Lorentzen participated actively in the discussions dealing with, and the drafting of, the new agreement. At first Nopal Line objected to the new pool arrangement and favored an extension, but at Delta's insistence, Nopal subsequently withdrew its objection stating: "Of course we reserve all our rights under the old agreement, where we have them. We have no more objections against a new pool."

Agreement No. 9040 was drafted and distributed among the parties for signature. Nopal Line signed and returned its copy of the agreement to the coffee pool administrator, and in its covering letter dated February 25, 1963, Nopal stated:

"The signature of the Northern Pan-America Line, A/S, has been affixed under the circumstances which Mr. Per A. Lorentzen set forth in our behalf at length at the owner's meeting in Rio de Janeiro in January and February, 1963."

No copies of this letter were sent to the other parties either by Nopal Line, or by the Administrator, nor did Nopal Line request the Administrator to do so.

Thereafter, the agreement received the Commission's conditional approval as noted *supra*.

Discussion and Conclusions

Numerous exceptions to the Examiner's initial decision have been filed by Nopal, the complainant, by Hearing Counsel and by certain third flag lines who are members of the Atlantic pool.[14]

In substance, these exceptions urge that the Examiner erred:

(1) In failing to find that Agreement 9040 is unjustly discriminatory as between carriers, contrary to section 15 of the Act in that Nopal's share in the gulf pool is unreasonably low and was accepted under duress; and in failing to find that Agreement 9040 can be approved by the Commission only if modified to give Nopal a quota of 30 percent;

(2) In failing to find that Agreement 9040 is unjustly discriminatory between carriers in violation of section 15, in that national flag carriers were given preferred status in the gulf pool in relation to third flag carriers;

(3) In failing to find that the third flag carriers in the gulf pool refused to consider Nopal's carryings during the period Agreement 8505-1 was in effect, that this failure abrogated Nopal's rights under article 18 of that agreement, and was a departure from the terms of an approved section 15 agreement;

(4) In failing to find that Agreement 9040 is detrimental to the commerce of the United States and contrary to the public interest, in violation of section 15 of the Act;

(5) In failing to consider evidence pertaining to the Atlantic pool segment of Agreement 9040;

(6) In failing to find that Agreement 9040 should be disapproved because a substantial number of the parties thereto did not agree to its terms;

(7) In failing to find that the national flag carriers illegally combined to misuse the monopoly created by SUMOC 202 against the third flag lines by forcing them to accept unjust quotas or be excluded from the trade; and combined to discriminate against Nopal, in violation of section 16 of the Act; and

(8) In failing to impose upon the pool's proponents the burden of proving its necessity.[15]

Arguments and exceptions to the Initial Decision not discussed herein were considered by us and found not justified.

The main question presented here is whether the percentages allocated under the gulf portion of Agreement 9040 meet the standards of section 15 of the Act[16] which requires the Commission to dis-

[14] A single memorandum of exceptions was filed on behalf of Columbus Line, Ivaran Lines, and Holland Pan-American Line. A separate memorandum was filed on behalf of Norton Line.

[15] Not all of the parties take every exception stated above, and where necessary to our discussion we will identify the specific party excepting.

[16] Nopal's complaint also charges that the national flag lines unlawfully combined to unduly prejudice Nopal in violation of sec. 16 of the Act. In view of our conclusion of the sec. 15 issue we find it unnecessary to consider this allegation.

approve any agreement which is unjustly discriminatory and unfair.

The Examiner concluded that, "The quota allocated to Nopal Line in Agreement No. 9040 has not been shown to be unjustly discriminatory or unfair." For the reasons set forth herein we disagree with the Examiner.

The record in this proceeding is clear, and the fact undisputed, that since 1960, when SUMOC 202 compelled Nopal either to become a member of the coffee pool or cease to carry coffee in the trade, Nopal has been the largest contributor to that pool, both in terms of total dollar amount contributed and amount contributed per bag of coffee carried.[17]

In short, a situation existed under Agreement 8505–1 where Nopal's pool quota did not nearly reflect that share of the coffee which Nopal was able to carry and did in fact carry. But despite Nopal's history as a substantial contributor to this first coffee pool, its quota remained unchanged when Agreement 9040, the subject of this proceeding, was negotiated by the parties. Thus, unless drastic changes occur in the trade (a likelihood which this record does not support) Nopal, should we approve this Agreement, will once again be a substantial contributor to this pool.

While it may be true that the mere fact that a party's carryings under a pooling agreement result in its paying large sums to other pool members would not in and of itself render the agreement discriminatory and thus compel our disapproval, other factors must exist which justify the payments, and these factors must be consonant with the policies and purposes of the Shipping Act.

While the record is not clear as to all of the factors considered in reaching the precise percentages allocated under the agreement, three such factors appear to have played the dominant role in the eyes of the parties. They are: (1) The so-called national interest, (2) previous experience including "due weight" given to "pioneering efforts" in the trade and (3) actual carryings under the previous pooling agreement. We shall discuss them in that order.

I. *The so-called national interest factor*

Throughout the extensive negotiations culminating in Agreement 8505–1 as well as Agreement 9040, the "national flag lines," Delta, Lloyd, and E.L.M.A., impressed upon Nopal their position that as a

[17] According to coffee pool statistics already cited herein, for the period Nov. 23, 1960, to Dec. 31, 1962, Delta with a pool quota of 53.06 percent carried 3,042,598 bags of coffee (59.39 percent); Nopal with a quota of 19.41 percent, 1,306,495 bags (25.50 percent); ELMA with a quota of 8.12 percent, 388,338 bags (7.58 percent); and Lloyd with a quota equal to Nopal's, 385,755 bags (7.53 percent). The statistics further show pool payments by Delta of $383,155.19; by Nopal of $449,920.74; and by ELMA of $734.58; in contrast to contributions received from these lines by Lloyd, in the sum of $833,810.51.

"third flag carrier" Nopal did not occupy the same status or enjoy the same rights in the trade as a national flag line. This national interest was an admitted factor in reaching the percentage allocated Nopal. The Examiner concluded that the inclusion of that national interest factor was proper. We disagree.

Every maritime nation in the world is, of course, intensely and legitimately interested in the economic well-being of its merchant marine. Thus, national interest plays an important part in the overall policies of the maritime nations. But it is of overriding importance to properly distinguish between promotional policies and regulatory policies. The Commission, of course, is a regulatory agency charged by Congress with the administration of this country's regulatory policy as expressed in the Shipping Act, 1916. And, while as an arm of the U.S. Government we are of course interested in the growth and economic well-being of our own merchant marine, we are bound by the Shipping Act to scrupulously insure that all carriers regardless of flag are accorded equal treatment under the laws we administer. As we said in *Mitsui Steamship Co.—Alleged Rebates*, etc., 7 F.M.C. 248 (1962):

> * * * all carriers regardless of flag or nationality are placed on equal footing under our laws * * *. Foreign flag carriers, although charged with the responsibility imposed by our laws, are also the recipients of the benefits they confer.

Agreement 9040 by granting preferred status to the so-called national flag carriers solely on the basis of the flag flown is contrary to this expressly avowed policy. The Shipping Act, 1916, imposes no burden and grants no privilege on the basis of a carrier's nationality. To the contrary it seeks to insure that all carriers operating in our foreign commerce regardless of flag do so as equals. Thus, we are prohibited under the law from approving such an agreement just as we would be prohibited from using our regulatory powers to attempt to insure that U.S. flag carriers received a given percentage of this country's export trades. We think it clear that a pooling agreement which allocates percentages or any portions thereof on the basis of flag or national interest is discriminatory as between carriers within the meaning of section 15.

II. *Length of service and pioneering efforts*

Also asserted in justification of the gulf quotas were the factors of length of service in the trade, and the so-called "pioneering efforts" of the individual lines, and the record demonstrates that consideration and an indeterminate amount of weight was given to these factors.

Nopal is the newest carrier in the trade, but it has carried coffee from Brazil to U.S. Gulf ports for 14 years. During that period, Nopal has risen from a relatively small carrier to the second largest. It is firmly entrenched in second position, far ahead of Lloyd and E.L.M.A., but considerably behind Delta. Its service has been regular and dependable. The numerous requests received by the Government of Brazil requesting that Nopal be allowed to remain in the trade following the adoption of SUMOC 202, while solicited by Nopal, indicate a considerable amount of shipper support.

The pioneering efforts alluded to by the gulf respondents occurred in the distant past—Delta entered the trade about 1919, and Lloyd sometime prior to that time. E.L.M.A. entered the coffee trade in 1948 just a year ahead of Nopal. Pioneering effort, like national interest, is a factor to which it is extremely difficult to assign a value, particularly where as here the effort was made so long ago, and the record contains no indication of just what value was assigned to the pioneering efforts of Delta and Lloyd. After 14 years of dependable service we think it most unjust that Nopal be placed in the status of a junior member and penalized by some vague and undefined "pioneering efforts" expended several decades ago. Thus, in this instance we consider it improper to use so-called "pioneering efforts," as distinguished from carryings, as a factor in allocating percentages under the agreement.

III. *Actual carryings under the previous agreement*

While the contentions of the parties lead to some confusion as to whether or not actual consideration was given Nopal's carryings under Agreement 8505–1 and 8505–2, the record does clearly establish certain salient points.

All of the parties agree that previous carryings are a valid factor but they disagree as to the amount of consideration they should be given. The heart of the controversy is Article 18 of Agreement 8505–2 which provides:

> This agreement and percentages established herein shall be effective through February 28, 1963. Thereafter, percentages and minimum sailings shall be subject to review and adjustment taking into consideration the service and the carryings during the past two (2) year period.

Certain respondents, Columbus, Ivaran, and Holland Pan-American Lines contend in effect that in allocating percentages under Agreement 9040 the only factors to be considered were the carryings and service of the parties during the previous 2-year period.[18] This result they contend was dictated by Article 18. This position is supported by Hearing Counsel. We think the Examiner was correct in rejecting this contention. Neither the record of the negotiations nor the lan-

[18] The latest statistics available to the parties at the time Agreement 9040 was negotiated were for coffee carryings up to Dec. 31, 1962.

guage of Article 18 dictates such an interpretation. Nopal itself is not now contending that it expects "100 percent consideration of [its] carryings in the adjustment to be made." Nopal did expect and does contend that *some* consideration of its past carryings was and is required under Article 18. We agree.

The gulf respondents appear to imply that some such consideration was in fact given. However, there remains the undisputed fact that Nopal's percentage remained the same notwithstanding such consideration if in fact it was given. We think it clear that the continuation of the status quo was directly attributable to the consideration given the factors dealt with in I and II above. It is equally clear that some adjustment under Article 18 was contemplated. However, our determination that the percentages allocated were unjustly discriminatory and unfair as between carriers is not dependent upon the existence of Article 18. Rather it flows from the consideration of improper factors in making the allocations.

In concluding that the use of the "national flag" and "pioneering" factors is contrary to the provisions of section 15, we do not mean to imply that past carryings is the sole permissible standard for allocating pool quotas. Where factors other than past carryings are employed, however, they must be acceptable ones under the act; and as we have indicated, no such acceptable factors have been suggested to us by the parties to this proceeding.

In his initial decision, the examiner has suggested that for the Commission to set down guidelines as to the factors to be used in fixing quotas "would be trespassing not only upon the rights of the parties to the contract but their contractual rights as well." We, of course, as already indicated from the foregoing, disagree with this conclusion. A section 15 agreement is not a private contract, *Swift & Co.* v. *Federal Maritime Commission* 306 F. 2d 277 (CADC 1962) *In re Pacific Coast European Conference* 7 F.M.C. 27 (1961). The rights of the parties to such an agreement are restricted to those which this Commission authorizes when, guided by and subject to the requirements of section 15, it approves the agreement. Thus, if the agreement does not meet the standards of section 15, the parties have no rights to be abrogated.

While we have indicated that in reaching the quotas fixed under the agreement the parties gave consideration to factors which are contrary to the standards of section 15, we are not prepared on the record before us to fix specific quotas. We will, however, grant the parties an opportunity to make adjustments in the quotas in a manner not inconsistent with this decision.

There remain yet a few issues requiring resolution. It is alleged that the examiner erred in failing to consider evidence pertaining to the Atlantic pool segment of the agreement. We think this was proper under the terms of Nopal's complaint.[19] However, the record indicates that in fixing the quotas for the Atlantic pool, the parties may have given consideration and weight to factors which were herein found to be improper. If this be the case, we would expect the parties to re-examine in the light of our decision here all quotas fixed under the agreement.

Several respondents have asserted that if overcarriage under the agreement is to be rewarded by increased quotas the very same malpractices which prompted the establishment of the pool will again plague the trade and deprive shippers and carriers of the stability they both desire.

The thrust of this argument is that malpractices may only be curtailed by the absolute elimination of all competition between carriers in the trade.

The trade in question already has an approved conference in operation to which all the parties to the pool must belong. Agreement 9040 and SUMOC 202 combine to effect an absolute prohibition against any other carrier lifting any coffee and thus to grant a monopoly to the four gulf carriers. Now, it seems that the final incentive to free competition, i.e., any upward adjustment in a party's share of the trade, must be removed in order to preserve stability. Thus, under the contentions of these respondents once a carrier has been allotted a share of the trade it must forever be satisfied therewith. It seems plain that this theory which would forever freeze quotas because of potential rumors of possible malpractices, etc., would also preclude any hope of a return to even the limited competition allowed under a conference agreement.

We do not in any way intend to minimize the seriousness of malpractices or their effect on the desired stability in a trade. Congress itself recognized their seriousness when it amended section 15 to provide:

> The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, * * *

It would seem clear to us that an effective system of self-policing rather than complete elimination of all competition is the solution to rumored malpractices and alleged rebates.

For the reasons set forth above we find and conclude that the quota or share allotted Nopal under Agreement 9040 is unjustly discriminatory and unfair as between carriers within the meaning of section 15.

---

[19] This proceeding was instituted by the filing of a complaint by Nopal requesting a modification of its share of the gulf pool. The Atlantic lines, although free to file complaints on their own behalf, failed to do so, and the issues in the proceeding were therefore properly confined to Nopal's quota in the gulf pool. Since the issues raised by exceptions 6 and 8 go beyond the scope of the complaints herein, we decline to rule thereon.

If the quotas fixed under the agreement were renegotiated and the agreement were modified in a manner not inconsistent with this opinion, we would give further consideration to the matter of approval.

Commissioner Patterson, Concurring and Dissenting in Part:

Based on the record before me in this proceeding, my conclusions are as follows:

First. I join the conclusion of Commissioners Harllee and Day reversing the Examiner's approval of Agreement No. 9040, and on the following counts their decision has my concurrence:

(a) That a pooling agreement which allocates percentages or any portion thereof on the basis of flag or national interest is discriminatory as between carriers within the meaning of section 15;

(b) That Article 18 contemplated some adjustment of Nopal's quota based on its carryings under Agreements No. 8505–1 and No. 8505–2; and

(c) That there is discrimination in the quotas assigned to Nopal.

Second. I dissent from the conclusion reached by Commissioners Harllee and Day that a modification of the agreement changing the percentages allocated under the Gulf portion of Agreement No. 9040 may create an agreement that is in the public interest, not a detriment to commerce, and fair as between carriers.

Third. On the following counts I conclude that Agreement No. 9040 is in violation of section 15 of the Act and should be disapproved from the time it was entered into, namely February 27, 1963, irrespective of any modification:

(a) The pool quotas are unfair as between carriers.

(b) The failure to adjust quotas in accordance with the promises made in Article 18 of Agreement No. 8505 and the excessive payments for unperformed services are detrimental to the commerce of the United States.

(c) The method by which the agreement was entered into is against the public interest.

As regards my three conclusions as highlighted above, there are advanced on the following pages of this report cogent reasons and specific data related to them which support my concurrence and dissent.

The complainant in this case (Nopal) describes itself as "a corporation organized and existing under the laws of the Kingdom of Norway with its principal place of business at Smestad, Oslo, Norway." Complainant is a common carrier by water in the foreign commerce of the United States, as defined in the first section of the Act, having been engaged since 1947 in operating ships in regular service between the U.S. Gulf of Mexico ports and ports in Brazil in South America and since 1949 has been in the coffee trade.

There is no question as to complainant's status nor as to the Commission's jurisdiction.

The basic question is whether Agreement No. 9040 must be approved, modified, or disapproved pursuant to section 15 of the Act. The complainant does not ask for approval or disapproval, but prays that the Commission either order modification of its share "in the Gulf money pool" or disapprove Agreement No. 9040 "unless the proposed parties thereto modify said Agreement." Nevertheless, section 15 makes it the duty of the Commission to approve or disapprove under the conditions stated therein as follows:

"The Commission shall * * * disapprove * * * any agreement * * * that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act * * *."

The Commission must approve all other agreements.

Agreement No. 9040 was approved on June 11, 1963, subject to the condition that Article 8 be modified to add the following proviso:

"* * * no monies shall be paid into the escrow fund established by the agreement, nor shall any monies be distributed from such fund or otherwise among the parties, until such time as the Commission issues its final decision in Docket No. 1096, and provided further that distribution at that time shall be made in accordance with such decision."

Thereafter the parties agreed to the modification and notified the Commission so that its approval became effective August 22, 1963.

At that time no facts showing reasons for disapproval were present and approval was ordered as required under the mandate that unless the foregoing conditions are shown the Commission "shall approve all other agreements * * *." After such approval the record of facts in this docket was developed and made known to the Commission. The further mandate of section 15 now applicable is that agreements "whether or not previously approved" by the Commission shall by order be disapproved if any of the stated conditions exist.

A review of this record convinces me that the agreement must now be found (1) to be contrary to the public interest, (2) to be unfair as between carriers, and (3) to operate to the detriment of the commerce of the United States and that no modification of the agreement can remedy its defects. The defects are in the circumstances under which the agreement was entered into and is to be performed. Exceptions from the provisions of the Act to protect trade against unlawful restraints and monopolies, authorized under section 15 of the Act, ought not to be extended to agreements that have not themselves been arrived at under circumstances of genuine competition, as is the case here.

The proposed agreement has not been modified so as to accord Nopal a fair and nondiscriminatory share in the Gulf money pool, but the second alternative offered in Nopal's complaint of disapproving said agreement unless the parties modify the agreement has been taken.

It is on the issue of modification that I disagree, because it is not believed any modification is approvable and it is believed any further negotiations will be futile.

The foregoing conclusion is derived from the following facts and findings:

1. Complainants and respondents herein are signatories to an agreement establishing a conference of common carriers by water in the foreign commerce of the United States known as the Brazil/United States-Canada Freight Conference approved by the Commission pursuant to section 15 of the Act and identified as Agreement No. 5450 (Conference Agreement). The Conference covers trade inbound from Brazil.

2. Complainant Nopal and respondents Lloyd Brasileiro (Patrimonio Nacional) (Lloyd) and Mississippi Shipping Co., Inc. (Delta Line) (Delta) were also three signatory parties to Federal Maritime Board Agreement No. 8205 approved April 11, 1957, as amended by Agreement No. 8205–1 approved October 24, 1957 (exhibit 3).

This agreement was known as the Coffee Stabilization Agreement. It was terminated effective August 29, 1960.

After termination of the Coffee Stabilization Agreement, the respondents, including Empresa Lineas Maritimas Argentina (E.L.M.A.), were parties to a new agreement called the Brazil/United States Coffee Agreement No. 8505 (exhibit 4) approved August 29, 1960. The coffee agreement was amended by Agreement No. 8505–1 approved February 12, 1962, to include complainant Nopal as a participant effective "on and after November 23, 1960" and terminating August 29, 1962 (exhibit 5). The coffee agreement was further amended by Agreement No. 8505–2 approved January 31, 1962, to terminate February 28, 1963 (exhibit 6). The coffee agreement is what is generally referred to as the pooling agreement. The pooling agreement recited, insofar as relevant to the complaint herein, that the parties were engaged in the carriage of coffee from Brazil to U.S. Gulf of Mexico ports.

3. Respondent Lloyd is owned and operated by the Republic of the United States of Brazil. It cannot be divorced from the Brazil-

ian Government. Lloyd has as its head a director who is appointed by the President of the Republic and is directly subordinate to the Brazilian Ministry of Transportation and Public Works. The director is assisted by a commercial superintendent who carries out the policies of the Brazilian Government in the administration of his duties. Lloyd is also subordinate to other government agencies. (Tr., 1525–26.)

4. On October 21, 1960, "The Superintendence of Money and Credit [an agency of the Government of Brazil] upon the decision of the Council, at the meeting of October 13th, taking into consideration Article 3, Line H, and Article 6 of Decree Law 7293 of February 2, 1945 * * *" resolved:

> "1. Brazilian export products with destination United States of America or Canada will be transported exclusively by shipping companies which are members of the Brazil/United States/Canada Freight Conference * * *
>
> "3. In the case of products which transportation is regulated by specific accords or agreements between member lines of that conference signed under the auspices of the above conference and not rejected by the Brazilian authorities, loading of these products will be effected exclusively on vessels of those shipping companies that are signatories of said accords or agreements.
>
> "4. Item 3 referred to above does not apply to accords or agreements in which the Brazilian flag does not participate.
>
> "5. The issuance of loading permits by the Bank of Brazil Bank Fiscalization (FIBAN) will depend also on the observance of this instruction besides the other requirements presently in effect * * *."

The foregoing is titled "Transportation Regulations on Commodities Exported to the United States and Canada—Sumoc Instruction 202" and is herein referred to as "SUMOC 202." (exhibit 9).

5. After April 11, 1957, and before October 21, 1960, Nopal carried coffee pursuant to the Brazil/United States Coffee Stabilization Agreement (FMB No. 8205) (exhibit 3). During this period Nopal carried coffee as follows:

1960,[1] January–October, 618,280 bags, 27.44 percent (exhibit 67, sheet 8).
1960,[2] entire year, 636–551 bags, 24.9 percent (exhibit 53, p. 4).
1959,[2] entire year, 774,506 bags, 27.3 percent (exhibit 53, p. 4).
1958,[2] entire year, 414,221 bags, 21.9 percent (exhibit 53, p. 3).
1957,[2] entire year, 475,986 bags, 19.9 percent (exhibit 53, p. 3).

6. Between October 21, 1960, and November 23, 1960, by virtue of Sec. 3 of SUMOC 202, Nopal was barred by the Brazilian Government from carrying coffee as "export products with destination United States of America" from Brazil because transportation had to "be effected exclusively on vessels of those shipping companies that are signatories of said accords or agreements." (4 above.)

[1] Figures based on arrivals.
[2] Figures based on sailings.

The next two Nopal ships after October 21, 1960, that called at Brazilian coffee ports, the *Para* shown at Santos on November 4 and 5, and the *Nopal Express* shown at Santos on November 20–22, 1960, picked up no bags of coffee, and the *Nopal Trader*, on berth in Paranagua on October 21, 1960, loaded 1,250 bags already booked, and in Santos on October 22, 1960, loaded 1,000 bags and in Niteroi on October 23–24, 1960, loaded 1,000 bags, for a total of 3,250 bags already cleared for shipment in comparison with prior 1960 loadings varying from 5,950 bags to 53,400 bags (exhibit 25, p. 2, and Tr. 97, 103–104). The failure to carry coffee on these ships was caused by the operation of SUMOC 202.

7. Nopal became a pool participant "on and after November 23, 1960." (exhibit 5, p. 1, 1st par.) At this time it was "mutually agreed" Nopal's future participation obligations would be as follows:

"The carryings of Delta Line's passenger vessels *Del Norte, Del Sud* and *Del Mar* (in the event of a casualty to any of these passenger vessels, Delta Line shall have the right to substitute a freight vessel for any of these passenger vessels during the period of their layup), up to to a total of 23.5% of the total volume of coffee carried by the four participating lines in each accounting period, shall not be included in the following divisions nor counted in the minimum sailings. The revenue from any excess over 23.5% of the total volume of coffee carried by the four participating lines in each accounting period, transported on said vessels or their substitutes shall be divided among all lines including Delta Line after deducting $1.15 per 60 kilo bag on the percentage and minimum sailing basis hereinafter provided. The total carryings of all other Delta Line's vessels and of the vessels of the other lines listed below shall be included in the carryings on which the following percentage divisions shall apply.

Delta Line	38.64%
Lloyd Brasileiro	25.37%
Nopal Line	25.37%
F.A.N.U.[1]	10.62%

[1] Later, E.L.M.A.

(exhibit 5, p. 2.)

Agreement No. 8505, as amended, is one of the "specific accords or agreements between member lines of that conference [the Brazil/United States-Canada Freight Conference] signed under the auspices of the above conference and not rejected by the authorities, * * *" referred to in SUMOC 202 (4 above).

The agreement covering the above transportation in Article 18 was made "effective through August 29, 1962" and Article 18 further provided that "Thereafter the percentages and minimum sailings shall be subject to review and adjustment taking into consideration the service and carryings during the past two (2) year period." (exhibit 5, p. 5.) After Nopal signed the pooling agreement on November 23, 1960, the ban on its transportation of coffee was revoked, and it resumed carryings. (Tr. 212–213.)

8. Between November 23, 1960, and February 28, 1963, the service and carryings during the past 2-year period, referred to in Article 18 of the pooling agreement, was as follows:

	Nopal	Delta	Lloyd	E.L.M.A.
Pool quotas on total carryings	*Percent* 19.41	*Percent* 53.06	*Percent* 19.41	*Percent* 8.12
Actual carryings based on sailings (passenger and freight vessels combined):				
First period (Nov. 23, 1960–Aug. 28, 1961)	19.90	59.08	9.53	11.49
Second period (Aug. 29, 1961–Feb. 28, 1962)	26.73	54.67	10.26	8.34
Third period (Mar. 1, 1962–Aug. 29, 1962)	28.48	64.62	5.83	1.07
Fourth period (Aug. 30, 1962–Feb. 28, 1963)	[1] 35.59	57.77	0.70	5.94

[1] Somewhat high because of effect of dock strike in U.S. affecting other carriers.

The amounts paid thereunder were as follows:

EXHIBIT 16

Brazil/U.S. Gulf Coffee, Nov. 23, 1960–Feb. 28, 1963, amounts payable and receivable by lines

[Receivable shown in ( )]

	Nopal	Delta	Lloyd	E.L.M.A.
1st period (Nov. 23, 1960–Aug. 28, 1961)	$8,069.84	$147,617.83	($238,209.36)	$82,521.69
2d period (Aug. 29, 1961–Feb. 28, 1962)	139,869.45	30,668.50	(174,791.25)	4,253.30
3d period (Mar. 1, 1962–Aug. 29, 1962)	108,035.95	147,157.26	(195,580.40)	(59,612.81)
4th period (Aug. 30, 1962–Feb. 28, 1963)	[1] 290,918.25	86,567.40	(337,844.25)	(39,641.40)
Total, 4 periods	546,893.49	412,010.99	(946,425.26)	(12,479.22)

[1] Payments for 4th period not made, but subject to arbitration.

Based on freight vessel carrings.

9. Nopal refused to enter into a new pooling agreement after February 28, 1963, unless the promise made in Article 18 of the expiring agreement was honored by a change in its quota allocation to take into consideration the facts shown in 8 above. The other signatories refused, after Nopal was told, as a summarization of the positions of Delta, Lloyd, and E.L.M.A.:

"This traffic of coffee is a traffic that should belong actually to two flags: the American and the Brazilian flags, because this is business Brazil is making with the United States. Then the speaker makes mention of the fact that the USA are the only nation which does not charge a tariff, customs-duties, on coffee. And therefore I want to add: this is a business between Brazil and the U.S. Of course you have the right to compete in that market, but not trying to exclude from it what are the national lines of these two countries. They have a greater right than any of you may think that you have. I really don't want to talk to you in that manner, because this is not an assembly of Congress, but a meeting of businessmen—and you must understand this. My Government could very well (and I don't know exactly what they intend to do) demand that a quite greater percentage of this commerce remain between the U.S. and the Brazilian lines. This I want to say to Mr. Hamsig—this is a national line. But the policy of Brazil has never been, in this trade, of excluding anybody. Therefore, I cannot be accused for wanting something for my flag which is of the utmost importance to my very life. You have the obligation to understand that our situation is such a one that we cannot afford the luxury, as said Mr. Mattmann, to let this trade escape our hands, just because you have been giving a better service. I am willing even to recognize that my own service may be bad; but accusing Moore McCormack of bad service makes no sense—and yet Moore McCormack carries less coffee." (exhibit 23, pp. 143–144).

"Delta has made its position clear: we would be prepared to stay within our present quota with the understanding that the passenger-ships must receive a fair allowance. ELMA has also made its statement. Loide said that, if NOPAL asked for a percentual increase, they would have to follow this procedure too. We have told Mr. Lorentzen that he has reached a level beyond which he cannot go. Isn't this clear enough now?"

* * * * * * *

"Mr. Lorris stated he informed Mr. Norton this morning about Clause 18, that if we discuss it, we will never get anywhere. I have never refuted Clause 18 but this way we are going to end up in Court. If Clause 18 is getting in our way, let us make a new pool." (exhibit 23, pp. 229–230.)

* * * * * * *

Before the Examiner, Captain Lorris recalled:

"* * * that Mr. Lorentzen requested consideration of Article 18 using as his principle this agreement that talks of two years before * * *." (Tr. 1570.)

"Who knows, maybe some day I will be a company strictly commercial in essence.

"I could then have the same consideration that Mr. Lorentzen has regarding Article 18." (Tr. 1557–1558.)

At a meeting on February 4, 1963, Nopal was told:

"*Capt. Clark*. I would also like to report that, at the request of Mr. Lorentzen, of NOPAL, the Gulf lines caucusses at 2 p.m. and went over very carefully our position. [sic] We reached no conclusion, but did explore every possibility that was left. I think we have advised Mr. Lorentzen that a reasonable time has already passed and have stated that he should advise us by noon tomorrow about his view regarding our offer that he remain with his present quota. It is our intention that, if he does not accept this by noon tomorrow, we see no other alternative than to form a new pool without NOPAL and we have very honestly declared him our thought as to the division of the quotas.

"*Capt. Lorris*—refers again to NOPAL's desire to increase its quota and says—I should satisfy NOPAL, but I cannot possibly diminish my own quota in any way." (exhibit 23, p. 289; and see Tr., 258–9, 263.)

On February 5, 1963, Mr. Lorentzen indicated what this meant to Nopal:

"We are disappointed that our proposal has not been considered worthy of further exploration. Instead, yesterday afternoon, in definite words, we were told that, if we don't accept the status-quo by noon today, a new pool will be organized without NOPAL line. We must strongly protest against this kind of treament, but, in view of the existence of regulations such as SUMOC 202, we have no alternative left to us. NOPAL will sign only because refusal to do so will shut them off from the coffee trade." (exhibit 23, p. 303.)

10. Nopal signed the Brazil/United States Coffee Agreement as of February 27, 1963 (exhibits 18 and 19). The agreement provided the following quotas and sailings with regard to the Gulf of Mexico ports:

"The lines listed below operating to United States Gulf ports agree to the following percentage division of revenue from total coffee transported on their vessels on the following basis subject to the maintenance of minimum service specified.

"The carryings of Delta Line's passenger vessels *Del Norte, Del Sud* and *Del Mar* (in the event of a casualty to any of these passenger vessels, Delta Line shall have the right to substitute a freight vessel for any of these passenger vessels during the period of their layup) up to a total of 23.5% of the total volume of coffee carried by the four participating lines in each accounting period, shall not be included in the following divisions nor counted in the minimum sailings. The revenue from any excess over 23.5% of the total volume of coffee carried by the four participating lines in each accounting period, transported on said vessels or their substitutes shall be divided among all lines including Delta Line after deducting $1.25 per 60 kilo bag on freight vessels and after deducting $1.50 per 60 kilo on Delta Line's passenger vessels, on the percentage and minimum sailing basis hereinafter provided. The total carryings of all other Delta Line's vessels and of the vessels of the other lines listed below shall be included in the carryings on which the following percentage divisions shall apply:

"Delta Line	38.64%
Lloyd Brasileiro (Patrimonio Nacional)	25.37%
Nopal Line	25.37%
Empresa Lineas Maritimas Argentinas (E.L.M.A.)	10.62%

"To qualify for the above percentages and to offer adequate service to the trade, each line must maintain at least the following number of sailings during each six-month period. In determining the number of sailings during a period, the date on which a vessel reports at coffee loading port shall be considered a sailing during the period:

"Delta Line	11
Lloyd Brasileiro (Patrimonio Nacional)	10
Nopal Line	10
Empresa Lineas Maritimas Argentinas (E.L.M.A.)	5"

(exhibit 18, p. 2)

11. The aforesaid coffee agreement was designated Agreement No. 9040 and was approved by the Federal Maritime Commission as follows:

"* * * the approval herein ordered shall become effective at such time as the Commission receives notice that each of the parties to the agreement has agreed to the foregoing modification;"

The notice issued was as follows pursuant to a letter dated August 28, 1963, from the Commission's Division of Carrier Agreements:

"In view of the provision in the order that the approval of Agreement 9040 shall become effective at such time as the Commission receives notice that the parties have agreed to the modification and file a modification executed by each of the parties, as provided therein, you are advised that your letter and modification were received on August 22, 1963. Accordingly, approval of Agreement 9040 has been recorded effective as of said date."

12. The following amounts have been paid and received during the period from November 23, 1960, to December 31, 1962, pursuant to the pooling agreements as distribution for overcarryings:

Lines	Amount paid by lines	Amount received by lines
Delta	$383,155.19	
E.L.M.A.	734.58	
Lloyd		$833,810.51
Nopal	449,920.74	

Source: App. D, Examiner's initial decision.

These facts demonstrate, and because of them it is concluded that:

1. The complainant is an established participant in the foreign commerce of the United States as a common carrier by water in the coffee trade from ports in Brazil, South America, to ports on the Gulf of Mexico coast of the United States.

2. The Brazilian decree which denied loading permits to ships unless transportation of coffee was to be exclusively on ships of carriers having agreements with a Brazilian flag carrier prevented the conclusion of an agreement in response to free enterprise bargaining by giving the national flag carrier power to compel the results without regard to commercial market place necessities. The decree permitted a settlement dictated by carriers in agreement with the national flag carrier.

3. The promise made to complainant in Agreement No. 8505 to review and adjust quota percentages and carryings based on the prior 2 years' experience, when a new pooling agreement was concluded, was not kept.

4. The percentage of bags of coffee to be carried allocated as complainant's quota in Agreement No. 9040 deprives Nopal of an established position in the foreign commerce of the United States as the result of dictated contract conditions.

A purpose of this proceeding is to determine whether Agreement No. 9040 is still approvable or whether an agreement "previously approved" (sec. 15) by the Commission must be disapproved in view of the foregoing findings.

The facts showing that Nopal has been engaged in the Brazil to U.S. Gulf coffee trade since 1949 starting with 4.8 percent of the coffee bags carried and continuing without interruption to the present, reaching as high as 29.4 percent of the trade, establishes complainant's position. There was no proof on this record that this position was achieved by other than fair means consistently with the act or by other than consistent good service to shippers. There are no valid grounds for impugning Nopal's entitlement to what it has earned by its efforts. The respondent carriers have likewise achieved their relative positions in the market by comparable effort.

Notwithstanding these efforts we are asked to approve an agreement by which Nopal relinquishes its position by reducing future activity from its 1960 high point of 29.4 percent to 19.41 percent while another signatory is authorized to increase its activity from its 1960 6.6 percent level to the same 19.41 percent level. Nopal's actual 19.41 percent allowance in comparison with the 25.37 percent quota in Article 4 of Agreement No. 9040 results from the operation of the second paragraph thereof wherein Delta is given an allowance which is not included in the quota divisions for carryings on its passenger ships. (See report of Commission, footnote 8.) Lloyd's increased quota is authorized in spite of an acknowledged "bad" service on the grounds the trade cannot be allowed to escape because another carrier is giving better service, as item 9 of the facts shows.

Complainant is entitled, in fairness, to not have its position eroded by governmental compulsion. Such compulsion is the result of a governmental decree which has stripped Nopal of bargaining power and has placed complete power in the hands of Lloyd. The record shows there has been no change of schedules, no change of ships, no deterioration of service, and no change in rates or policies by Nopal. The only change has been the new bargaining power given Lloyd by its owner government. By SUMOC 202, Lloyd acquired control over the market represented by "Brazilian export products with destination United States" and thereby control over the entire bargaining power of the Brazilian export coffee market, enforceable by the issuance or nonissuance of loading permits by the Bank of Brazil Bank Fiscalization. Exclusion from market is the price of refusal to acknowledge the dictates of the market's spokesman. A demonstration of this factor is to be found in the testimony that if Nopal "does not accept this by noon tomorrow, we see no alternative than to form a new pool without Nopal * * *." The absence of commercial considerations was shown by the testimony that the national carrier was not a company strictly commercial having to consider things the same as Nopal. There was the further concession in oral argument before us by counsel that there is nothing to prevent the happening of further slashes in the quotas of third-flag lines (i.e., non-Brazilian and non-U.S. lines). Expression of this power is reflected in the statement, "We have told Mr. Lorentzen that he has reached a level beyond which he cannot go" (exhibit 23, p. 229). The statement was not that Nopal had reached a level beyond which the others were not willing to agree on, but had gotten all it was going to get or be excluded from the Brazilian coffee market.

The Brazilian coffee market is larger than the part shared by each carrier. Each must compete for a share. Lloyd's domination of access to the shares allows it to wrest more from the other carriers than would otherwise be possible. All of the parties to the agreement, including Delta, lost the protection of their own influence over the market represented by Brazilian coffee sellers, whether or not sellers are now satisfied with the service. Delta has as much to lose from approval of an agreement arrived at under these circumstances as anyone.

The issue as I see it is the way in which this agreement was arrived at, rather than the quotas or the terms of the agreement, although I agree that the quotas are discriminatory. It is contrary to our public interest to have our foreign commerce regulated by agreements arrived at as a result of noncommercial factors.

There is no objection to direct State action. The Brazilian Government may do anything it wants to do in relation to its commerce with the United States. All carriers are subject to action by the nations into whose jurisdiction they pass. The objection arises when Brazil converts what should be a freely negotiated agreement subject to our jurisdiction into one not freely negotiated.

In free enterprise negotiation, unity of interest occurs at the moment of contract and the Commission is usually only required to approve the result where the subject is covered by section 15. Concessions of interest before and after are submerged in the agreement and the final agreement obscures the fact that events before and after also affect public interest in our commerce. Here the facts shown remove the obscurity to disclose that the agreement happened as the result of concessions obtained by noncommercial considerations. Bargaining is only a formality under these circumstances. Brazil has obtained the results of direct State action without enacting any law directly controlling its commerce. Its action is disguised as bargaining and we are being asked to approve the resulting agreement giving its own line a preferred position in our commerce at the expense of the established position of a longtime participant in our commerce.

The deprivation of position does not result from a true agreement, but from an imposed settlement. An agreement subject to our jurisdiction which does not represent free enterprise bargaining is a sham and must be treated differently than other agreements processed under section 15.

To approve an agreement arrived at in the foregoing manner and achieving the results noted, if we are to be consistent later on, would project a need to approve an agreement achieving the same results by the same means against all carriers in the trade except the carrier chosen by the national carrier employing such means.

The end result of this process would be an end to multilateral trading in our ocean commerce. This too is contrary to our public interest.

Complainant in Agreement No. 8505 joined with the other parties in mutually promising each other that when the end of the term of the agreement arrived they would review and adjust the percentages and minimum sailings to take into consideration service and carryings during the past 2 years. One must assume that the obligations of Agreement No. 8505 were undertaken to acomplish practical objectives and to require some future change of position. It is not to be assumed the businessmen who negotiated and signed the agreement created an obligation to do nothing but contemplate and discuss the past. Rather, at the time, they meant to make significant new moves when the agreement was renegotiated based on their past ability to capture a share of the Brazilian coffee market.

The agreement provisions quoted in items 7 and 10 above show no change betwen No. 8505 and No. 9040.

If Article 18 requires no change in No. 9040 and only a mental exercise, it is simply a way of avoiding action. No written statement is necessary for such an obligation.

The evidence shows that Nopal had no such views of the obligation and took significant steps to increase its share of the market during the 2-year period with the promise of Article 18 clearly in mind. (exhibit 23, p. 140). To the losers Nopal's moves are, of course, distasteful, but this has never justified breaking promises. Nopal rightfully complains about the failure to perform the promise. Only the dominant influence of Lloyd over the bargaining process has made such action so easy to accomplish. In my opinion it is a detriment to our commerce to permit the products of broken promises to influence the shares of participants therein.

The effect of Lloyd's bargaining position and its ability to disregard promises to revise quotas showed up most clearly in the quota Nopal was required to accept which was far below its proven ability to carry and in the quota Lloyd received which was far above its proven ability to carry. Lloyd's quota represented not business consideration, but national policy as its counsel candidly recognized: Quota parity with Nopal "is a national policy of Brazil which Nopal as a private carrier for gain, has never apparently appreciated" (Lloyd brief, p. 59).

National policy may be enforced by legislation. Absent direct legislation, Lloyd should not obtain quota advantages associated with competition between private carriers for gain in the form of a diminution of a hard-won position by means of an agreement approved under section 15.

Assuming the promise may be disregarded without detriment to the commerce, it is further believed that there is detriment to the commerce in any agreement which results in one carrier paying to a competitor such a disproportionately large part of its earnings (Nopal, $546,893.49 over the period November 23, 1960, to February 28, 1963; Delta, $412,010.99 during the same period) when its competitor performs no service whatever for such payment. Coffee consumers eventually pay the rates used to supply the funds needed to pay Lloyd, whose only power to obtain money by this means is the Government-backed control over access to the Brazilian "export products" market (SUMOC 202, par. 1). As Nopal's representative said: "* * * large payments passing from one line to the other is not healthy and is not in the best interests of the commerce of Brazil or the United States" (exhibit 23).

The noncompetitively inflicted loss caused by being allowed revenues from 19.41 percent of the trade and by having to pay expenses of carrying up to 29 percent of the trade, as well as the large pool payments to Lloyd for performing no service whatever cannot be continued by Nopal. Its loss is a loss to our commerce. Its payments are an expense to our consumers. Moreover, all respondents are faced with the possibility of the same future quota attrition as the result of the power of Lloyd to make future agreements with carriers of its choosing containing still lower quotas as the condition of admission to the market.

An agreement is unfair as between carriers if it is a pooling agreement in which the quotas are arbitrarily established so as to diminish without effective commercial restraint the market shares of participants in the foreign commerce of the United States.

In my opinion Agreement No. 9040 should be disapproved from the time it was entered into on February 27, 1963, irrespective of any modification, on the ground that it:

(a) Arbitrarily establishes pool quotas that are unfair as between carriers;

(b) Embodies the results of unfulfilled promises and requires excessive payments for unperformed services that are detrimental to the commerce; and

(c) Reflects the results of governmental action rather than market competition which is against the public interest.

APPENDIX A

FEDERAL MARITIME COMMISSION

AGREEMENT NO. 9040

BRAZIL/UNITED STATES COFFEE AGREEMENT

MEMORANDUM of AGREEMENT entered into at New York, N.Y. on 27 February 1963.

Witnesseth

The parties to the Brazil/United States Coffee Agreement (Federal Maritime Commission Agreement No. 8505, and amendments thereto designated as F.M.C. Agreements Nos. 8505–1, 8505–2, and 8505–3) which terminates February 28, 1963, have agreed to the establishment of a new agreement providing for the participation of MONTEMAR, S.A. COMERCIAL Y MARITIMA on and after March 1, 1963.

1. For the common good of shippers and carriers, by providing just and economical cooperation between steamship lines operating on the coffee trade from Brazil to United States Atlantic and gulf ports, the parties hereto who are members of the Brazil/United States-Canada Freight Conference (U.S.M.C. Agreement No. 5450) hereby agree, as set forth hereinafter, to a division of the revenue derived from the total coffee transported on their vessels from ports within the scope of the above-named Conference (i.e., ports in Brazil south of and including Victoria) to United States Atlantic and gulf ports.

2. The lines listed below operating to United States Atlantic coast ports agree to the following percentage division of revenue after deducting $1.25 per 60 kilo bag from total coffee transported on their vessels, excluding Moore-McCormack Lines, Inc. passenger vessel SS *Argentina* and SS *Brasil*, to United States Atlantic ports on the following basis subject to the maintenance of minimum service specified. The revenue from any excess over 350,000 bags per annum carried by the SS *Argentina* and the SS *Brasil*, after deducting $1.50 per 60 kilo bag, shall be divided among all the lines including Moore-McCormack Lines, Inc. on the percentage and minimum sailing basis hereinafter provided:

	Percent
Moore-McCormack Lines, Inc	37.10
Lloyd Brasileiro (Patrimonio Nacional)	19.40
Empresa Lineas Maritimas Argentinas (E.L.M.A.)	9.05
Montemar S.A	1.00
Brodin Line	9.50
Columbus Line	6.00
Ivaran Line	6.00
Torm Line	6.00
Norton Line	4.80
Holland Pan-American Line	1.15

3. To qualify for the above percentages and offer adequate service to the trade, each line must maintain at least the following number of sailings during each 6-month period. In determining the number of sailings during a period, the date on which a vessel reports at a coffee loading port shall be considered a sailing during the period:

Moore-McCormack Lines, Inc	25
Lloyd Brasileiro (Patrimonio Nacional)	12

Empresa Lineas Maritimas Argentinas (E.L.M.A.)	14
Montemar S.A	2
Brodin Line	9
Columbus Line	6
Ivaran Line	6
Torm Line	6
Norton Line	6
Holland Pan-American Line	6

Should any line fail to provide the above stipulated minimum service to transport its quota, the percentage alloted to it shall be reduced in direct proportion to the reduction in service and the surrendered portion shall be allocated to all the other lines in ratio to the percentages allotted to them in article 2 above.

4. The lines listed below operating to United States gulf ports agree to the following percentage division of revenue from total coffee transported on their vessels on the following basis subject to the maintenance of minimum service specified.

The carryings of Delta Lines passenger vessels *Del Norte*, *Del Sud* and *Del Mar* (in the event of a casualty to any of these passenger vessels, Delta Line shall have the right to substitute a freight vessel for any of these passenger vessels during the period of their layup), up to a total of 23.5 percent of the total volume of coffee carried by the four participating lines in each accounting period, shall not be included in the following divisions nor counted in the minimum sailings. The revenue from any excess over 23.5 percent of the total volume of coffee carried by the four participating lines in each accounting period, transported on said vessels or their substitutes shall be divided among all lines including Delta Line after deducting $1.25 per 60 kilo bags on freight vessels and after deducting $1.50 per 60 kilo on Delta Line's passenger vessels, on the percentage and minimum sailing basis hereinafter provided. The total carryings of all other Delta Line's vessels and of the vessels of the other lines listed below shall be included in the carryings on which the following percentage divisions shall apply:

	Percent
Delta Line	38. 64
Lloyd Brasileiro (Patrimonio Nacional)	25. 37
Nopal Line	25. 37
Empresa Lineas Maritimas Argentinas (E.L.M.A.)	10. 62

To qualify for the above percentages and to offer adequate service to the trade, each line must maintain at least the following number of sailings during each six month period. In determining the number of sailings during a period, the date on which a vessel reports at coffee loading port shall be considered a sailing during the period:

Delta Line	11
Lloyd Brasileiro (Patrimonio Nacional)	10
Nopal Line	10
Empresa Lineas Maritimas Argentinas (E.L.M.A.)	5

5. In consideration of the privilege of vessel substitution afforded Delta Line under article 4 above, Delta Line accepts a 50 percent reduction in whatever compensation might accrue to Delta Line by reason of noncompliance on the part of other lines with specified minimum sailings (art. 4), the balance to be divided among the other participants in direct proportion as otherwise agreed.

In consideration of the average per ship afforded to E.L.M.A. under this agreement, E.L.M.A. accepts a 33.3 percent reduction in whatever compensation might accrue to E.L.M.A. by reason of noncompliance on the part of other lines which specified minimum sailings (art. 4), the balance to be divided among the other participants in direct proportion as otherwise agreed.

Should any line fail to provide the above stipulated minimum service to transport its quota, the percentage allotted to it shall be reduced in direct proportion to the reduction in service and the surrendered portion shall be allocated to the other lines in ratio to the percentages already allotted to them, except as otherwise provided in Article 5, irrespective of their actual number of sailings as provided by Article 4.

6. It is mutually understood and agreed that a voyage can only be counted as one sailing to either the gulf ports or Atlantic coast ports by a line party to both such divisions of the pool even though both ranges of ports may be served on a single voyage but all coffee carryings are to be included in the respective divisions of the pool. It is agreed that the final decision in which division of the pool such a sailing shall be counted, shall be made by the Administrator. However, should any line carry coffee in a division of the pool in which it does not have an allotted percentage, the revenue, after deduction as provided in Articles 2 and 4 shall be divided among the lines in such division of the pool on the basis provided for above.

7. In the event any of the parties to this agreement is unable to provide the minimum service set forth in Articles 3 and 4 because of reasons of force majeure or any other cause beyond the control of the carrier and a dispute arises as to whether a good and valid reason existed for failure to maintain minimum service, the decision as to whether an exemption should be granted from the reduction in allotted percentage as stipulated in Articles 3 and 4 shall be resolved by arbitration procedure as provided in Article 14.

8. At the end of each period of 6 calendar months an accounting shall be made. Lines carrying in excess of the allotted percentage of the total coffee transported as provided above shall pay, within 30 days after an accounting has been submitted, into an escrow account to be established the revenue derived from their excess carrying after the deduction as provided in Articles 2 and 4 to cover only direct cargo handling expenses. In the event of increased costs these deductions may be adjusted by consent of not less than three-quarters of the parties hereto entitled to vote as stipulated in Article 12. The monies paid into the escrow fund shall be distributed to the lines to which payments are due under this agreement.

9. All coffee shall be transported strictly in accordance with rates, rules, regulations and agreements established by the Brazil/United States-Canada Freight Conference and any infractions shall be subject to the penalties provided for in the agreement of the Conference.

10. New members, who are members of the Brazil/United States-Canada Freight Conference, may be admitted to this agreement on application and by approval of not less than three-quarters of the parties hereto entitled to vote as stipulated in Article 12. No such admission shall become effective until an appropriate modification of this agreement has been filed with and approved by the Federal Maritime Commission.

11. This Agreement shall be administered in New York, N.Y., United States of America, by an Administrator elected by the member lines parties to the agreement. The Administrator is authorized to make appropriate arrangements for the receipt and checking of reports on coffee carryings, the accounts provided therein, such banking arrangements as may be necessary and apportion any ex-

penses for the maintenance of this agreement between Atlantic and gulf lines on the basis of coffee carryings and between the respective lines of such groups on coffee carryings as allocated under the agreement.

12. Meetings of the parties to this agreement will be held at the call of the Administrator of the agreement or upon the request of any party to this agreement. All actions within the scope of this agreement, except allocation of percentages which shall be by unanimous vote, shall be taken only upon assent of not less than three-quarters of all the parties to the agreement except that should a party cease to be a member of the Brazil/United States-Canada Freight Conference, withdraw from the trade, or not have a sailing in the Brazil/United States trade for a period of 6 months, such party shall not be entitled to vote on any matter including amendments to the agreement, but shall be bound by the vote of the other parties to the agreement on such matters. A minute record of the proceedings of all meetings, including all votes on matters coming before such meetings, shall be kept and copies of all minutes of meetings and true and complete records of all affirmative or negative actions of the parties hereto, pursuant to or giving effect to this agreement, shall be furnished promptly to the governmental agency charged with the administration of section 15 of the Shipping Act, 1916, as amended.

13. Copies of accounting shall be furnished promptly to the governmental agency charged with the administration of section 15 of the Shipping Act of 1916, as amended.

14. Any and all differences and disputes of whatsoever nature arising out of this agreement, including circumstances referred to in Article 7, shall be put to arbitration in the city of New York pursuant to the laws relating to arbitration there in force before a board of three persons consisting of one arbitrator to be appointed by the parties to the agreement complaining or complained against, one by the other party or parties to the agreement complained against or complaining and the third to be selected by the two so chosen. All such arbitrators shall be appointed immediately when the occasion arises. The decision of any two of the three on any point or points shall be final. Judgment may be entered upon any award made hereunder in any court having jurisdiction in the premises.

It is mutually understood and agreed that the expenses incurred in any arbitration shall be borne by the parties directly involved in the question of such arbitration.

15. In the event of war or war-like operations affecting the Brazil/United States coffee trade, the agreement may be suspended for the period of such war or war-like operations.

16. This agreement shall become effective March 1, 1963 subject to approval by the Federal Maritime Commission and it is mutually understood that no accounting or payment shall be made as provided herein until such approval has been granted. This agreement and percentages established herein shall be effective through February 29, 1964. Thereafter the percentages and minimum sailings shall be subject to review and adjustment. No extension of this agreement shall be effective until filed with and approved by the Federal Maritime Commission.

17. It is mutually understood and agreed that this Agreement shall conform with the laws, rules and regulations of the United States of America and of the United States of Brazil.

18. This Agreement may be executed in several parts, and the said parts shall be read and be effectual as one instrument.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed by their respective officers or agents thereunto duly authorized.

REDERIAKTIEBOLAGET DISA REDERIAKTIEBOLAGET POSEIDON ANGFARTYGSAKTIEBOLAGET TIRFING (BRODIN LINE)
(as one member only),
By ERIK G. BRODIN
Title: ________________

HAMBURG - SUEDAMERIKANISCHE DAMPFSCHIFF - FAHRTS - GESELLSCHAFT EGGERT & AMSINCK (COLUMBUS LINE),
By COLUMBUS LINE, INC., *General Agents*,
By W. A. NIELSEN,
Title: *Executive Vice President.*

DELTA STEAMSHIP LINES, INC. (DELTA LINE),
By J. N. LALA,
Title: *Vice President.*

EMPRESA LINEAS MARITIMAS ARGENTINAS (E.L.M.A.),
By RENE CHARPENTIER,
Title: *O/Charge General Delegation.*

VAN NIEVELT, GOUDRIAAN & CO'S STOOMVAART MAATSCHAPPIJ N.V. (HOLLAND PAN-AMERICAN LINE),
By BLACK DIAMOND STEAMSHIP COMPANY, *General Agents*,
By FRANK R. JORDAN,
Title: *General Traffic Manager.*

A/S IVARANS REDERI (IVARAN LINES),
By STOCKARD SHIPPING COMPANY, INC., *General Agents*,
By RAYMOND HORGAN,
Title: *Executive Vice President.*

LLOYD BRASILEIRO (PATRIMONIO NACIONAL),
By HAROLD W. DILLON,
Title: *General Traffic Manager.*

MONTEMAR S.A. COMERCIAL Y MARITIMA,
By AMERIND SHIPPING CORP., *General Agents*,
By LEWIS C. PAINE, JR.,
Title: *President.*

MOORE-MCCORMACK LINES, INC.,
By CHARLES T. MATTMAN,
Title: *Executive Vice President.*

THE NORTHERN PAN-AMERICA LINE, A/S (NOPAL LINE),
By OIVIND LORENTZEN INC., *General Agents*,
By PER A. LORENTZEN,
Title: *President.*

STOCKHOLMS REDERIAKTIEBOLAGET SVEA REDERIAKTIEBOLAGET FREDRIKA (NORTON LINE)
(as one member only),
By NORTON, LILLY & COMPANY, INC. *General Agents*,
By JOSEPH F. LILLY,
Title: *President.*

DAMPSKIBSSELSKABET TORM (TORM LINES),
By TORM LINES AGENCY, INC. *General Agents*,
By K. SCHMOLZE,
Title: *Vice President.*

APPENDIX B

Brazil/United States Coffee Agreement—F.M.C. Agreement No. 8505-1 as amended, reconciliation of carryings for period Nov. 23, 1960–Dec. 31, 1962, lines operating to U.S. gulf ports passenger and freight vessels combined

Period	Total bags carried	Delta			E.L.M.A.			Lloyd			Nopal		
		Bags carried	Percentage allocated	Actual percentage carried	Bags carried	Percentage allocated	Percentage carried	Bags carried	Percentage allocated	Percentage carried	Bags carried	Percentage allocated	Percentage carried
Nov. 23, 1960, to Aug. 28, 1961	1,845,712	1,090,557	53.06	59.08	212,020	8.12	11.49	175,837	19.41	9.53	367,298	19.41	19.90
Aug. 29, 1961, to Feb. 28, 1962	1,414,886	773,450	53.06	54.67	118,100	8.12	8.34	145,127	19.41	10.26	378,209	19.41	26.73
Mar. 1, 1962, to Aug. 29, 1962	993,356	641,892	53.06	64.62	10,651	8.12	1.07	57,956	19.41	5.83	282,857	19.41	28.48
Aug. 29, 1962, to Dec. 31, 1962	869,232	536,699	53.06	61.75	47,567	8.12	5.47	6,835	19.41	.79	278,131	19.41	31.99
Total	5,123,186	3,042,598			388,338			385,755			1,306,495		
Average			53.06	59.39		8.12	7.58		19.41	7.53		19.41	25.50

Brazil/United States Coffee Agreement—F.M.C. Agreement No. 8505-1, as amended, sailings Nov. 23, 1962–Dec. 31, 1962 [1]

Period	Delta		E.L.M.A.		Lloyd		Nopal	
	Min. Req.	Actual	Min. Req.	Actual	Min. Req.	Actual	Min. Req.	Actual
Nov. 23, 1960, to Aug. 28, 1961	19.87	21	9.17	13	18.34	18	18.34	19
Aug. 29, 1961, to Feb. 28, 1962	13	13	6	8	12	12	12	13
Mar. 1, 1962, to Aug. 29, 1962	13	13	6	4	12	12	12	14
Aug. 29, 1962, to Dec. 31, 1962	8.67	7	4	6	9	5	9	10

[1] Minimum sailing requirements in Agreement 8505-1 were based on a 6-month period. The first pool period listed on this table, however, is a 9-month period. The minimum sailing figures, therefore, are theoretical ones, computed by multiplying each carrier's minimum sailing requirement by 1.5. Similarly, minimum sailings listed for period Aug. 29, 1962–Dec. 31, 1962, are theoretical figures based on 4 months of operation.

APPENDIX C

Brazil/United States Coffee Agreement—F.M.C. Agreement No. 8505-1 as amended, reconciliation of carryings and accounting for period Nov. 23, 1960–Dec. 31, 1962, lines operating to U.S. gulf ports, passenger and freight vessels combined

Period	Delta		E.L.M.A.		Lloyd		Nopal	
	Amount paid by lines	Amount received by lines	Amount paid by lines	Amount received by lines	Amount paid by lines	Amount received by lines	Amount paid by lines	Amount received by lines
Nov. 23, 1960, to Aug. 28, 1961	147,617.83		82,521.69			238,209.36	8,069.84	
Aug. 29, 1961, to Feb. 28, 1962	30,668.50		4,253.30			174,791.25	139,869.45	
Mar. 1, 1962, to Aug. 29, 1962	147,157.26			59,612.81		195,580.40	108,035.95	
Sept. 29, 1962, to Dec. 31, 1962	57,711.60			26,427.60		225,229.50	193,945.50	
Subtotals			86,774.99	86,040.41				
Totals	383,155.19		734.58			833,810.51	449,920.74	

EXHIBIT D

Yearly coffee carryings and sailings, Brazil/U.S. gulf, for Nopal, Lloyd, Delta and E.L.M.A. (F.A.N.U.) (1947–1962)

		Total	Nopal	Lloyd	Delta	E.L.M.A. (F.A.N.U.)
1947	Bags, number	2,986,711	0	286,121	2,700,590	0
	Bags, percent		0	9 6	90.4	0
	Sailings, number	74	0	9	65	0
	Sailings, percent		0	12.2	87.8	0
1948	Bags, number	4,111,081	0	731,141	3,278,317	106,623
	Bags, percent		0	17 8	79.7	2.5
	Sailings, number	89	0	19	61	9
	Sailings, percent		0	21.3	68.5	10 27
1949	Bags, number	4,340,261	208,197	953,104	3,103,100	75,860
	Bags, percent		4.8	22	71.5	1.7
	Sailings, number	94	9	23	52	10
	Sailings, percent		9.6	24.5	55.3	10 6
1950	Bags, number	3,022,979	230,886	469,075	2,261,598	61,420
	Bags, percent		7 6	15.5	74 9	2
	Sailings, number	90	11	18	51	10
	Sailings, percent		12.2	20	56.7	11.1
1951	Bags, number	3,541,304	271,863	437,104	2,651,450	180,887
	Bags, percent		7.7	12.3	74.9	5.1
	Sailings number	87	10	18	46	13
	Sailings, percent		11.5	20.7	52.9	14.9
1952	Bags, number	2,996,783	389,608	429,555	2,102,422	75,198
	Bags, percent		13	14.3	70.2	2.5
	Sailings, number	89	14	12	52	11
	Sailings, percent		15.7	13.5	58.4	12.4
1953	Bags, number	2,508,699	383,720	251,971	1,783,202	89,806
	Bags, percent		15.3	10	71 1	3.6
	Sailings, number	87	16	11	47	13
	Sailings, percent		18.4	12.6	54 7	15
1954	Bags, number	1,896,821	236,130	147,499	1,451,173	62,019
	Bags, percent		12.4	7 8	76 5	3.3
	Sailings, number	88	16	12	50	10
	Sailings, percent		18.2	13.6	56.8	11.4
1955	Bags, number	2,340,403	311,788	142,360	1,853,505	32,750
	Bags, percent		13.3	6.1	49.2	1.4
	Sailings, number	88	19	12	51	6
	Sailings, percent		21.6	13.6	58	6.8
1956	Bags, number	3,115,173	573,616	200,429	2,211,118	130,110
	Bags, percent		18.4	6.4	71	4.2
	Sailings, number	100	21	12	52	15
	Sailings, percent		21	12	52	15
1957	Bags, number	2,386,687	475,986	209,264	1,644,007	57,430
	Bags, percent		19 9	8.8	68.9	2.4
	Sailings, number	99	23	12	50	14
	Sailings, percent		23 2	12.1	50.5	14.2
1958	Bags, number	1,884,419	414,221	120,214	1,292,019	57,965
	Bags, percent		21.9	6.4	68.6	3.1
	Sailings, number	91	20	10	52	9
	Sailings, percent		22	11	57 1	9 9
1959	Bags, number	2,831,007	774,506	171,474	1,663,483	221,544
	Bags, percent		27.3	6.1	58.8	7 8
	Sailings, number	110	29	8	50	23
	Sailings, percent		26.4	7 3	45.5	20 9
1960	Bags, number	2,557,431	636,551	217,801	1,409,350	293,729
	Bags, percent		24.9	8.5	55 1	11.5
	Sailings, number	104	28	12	46	18
	Sailings, percent		26.9	11.5	44.3	17 3
1961	Bags, number	2,459,490	610,218	208,484	1,441,349	199,439
	Bags, percent		24.8	8.5	58.6	8.1
	Sailings, number	109	26	20	51	12
	Sailings, percent		23.9	18.3	46.8	11
1962	Bags, number	2,390,352	663,143	114,178	1,475,194	137,837
	Bags, percent		27.7	4.8	61.7	5 8
	Sailings, number	108	28	23	45	12
	Sailings, percent		26	21.3	41.7	11

FEDERAL MARITIME COMMISSION

No. 1096

THE NORTHERN PAN-AMERICAN LINE, A/S (NOPAL LINE)

v.

MOORE-MCCORMACK LINES, INC., ET AL.

ASHTON C. BARRETT, *Commissioner*, dissenting:

I respectfully dissent, and would approve Agreement No. 9040 as the examiner did. The opinion of Chairman Harllee and Commissioner Day (a majority of the majority) indicates that the attached order does not preclude further consideration by the Commission, but, on the other hand, assures such further consideration if Agreement No. 9040 is "modified in a manner not inconsistent with this opinion." The Harllee-Day opinion can be read to require one modification and only one—an adjustment upward of Nopal's share in the money pool. While in my opinion such adjustment should not, and legally cannot be made the price of approval, I am willing to join in such further consideration. I am indeed inclined to feel that absent further favorable consideration and eventual approval, we may expect a super SUMOC 202 and real chaos in the trade. Certainly to avoid such a situation which would substantially destroy operating efficiency and seriously endanger the continuation of first-class transportation service on the route should be a prime objective of this regulatory body. I hope, therefore, that the agreement, with some reasonable adjustment of Nopal's carryings, not diminished by reason of flag or length of service, will be returned to the Commission for further consideration in this proceeding.

There being no assurance that such further consideration will be requested, it is my unpleasant duty to indicate as briefly as possible, unsound reasoning and legal error in the decisions of my colleagues. I feel that the ultimate conclusions of both are unsupported by indispensable subordinate findings of fact and substantial evidence, and that the decision to disapprove Agreement 9040 is therefore arbitrary and capricious. I am convinced that both those opinions fly in the face of the policy unanimously stated in *Alcoa-C.A.V.N.*, 7 F.M.B.

345, 364, that in acting upon pooling agreements the Commission applies the standards set out in section 15 of the Shipping Act, 1916, and no others. This statement was approved by the United States Court of Appeals for the District of Columbia Circuit, and *certiorari* was not requested.

The standard upon which the Harllee-Day opinion is based is that a pooling agreement may not be approved if a combination of parties to the agreement who are nationals of the countries served, successfully insist upon a little better deal than this Commission thinks they should get. Section 15 sets out no such standard.

The Harllee-Day opinion falls into a well-laid snare by equating our duty to enforce our regulatory statutes without distinction between flags, with a non-existent prohibition [1] against approval of an agreement in negotiating which "national interest" played a "dominant role in the eyes of the parties." It also has been entrapped into feeling that an approval of such an agreement to which an American-flag line is a successful party would necessarily be a "promotional" act, which is an obvious *non sequitur*.

The Harllee-Day opinion also finds that the consideration and giving an indeterminate amount of weight to the pioneering efforts of Lloyd and Delta was "improper." Section 15 does not set up the use of any particular factors as a standard. It is concerned only with agreements, not the negotiations in which they are formulated, or factors taken into account by negotiators. Nothing in section 15 justifies an ultimate finding that "percentages" are and the contract containing them is unjustly discriminatory and unfair as between carriers because "it flows from the consideration (by the parties) of improper factors in making the allocations." It is to be noted that the Harllee-Day decision which absolutely rules out of consideration the pioneering of Lloyd and Delta, does not even find that these lines have recovered their pioneering costs, much less a reasonable profit on their investments. They were under no obligation to Nopal to make it possible for coffee growers to profit and grow more coffee for Nopal to carry. Nopal is profiting from the past efforts of the other lines. In my opinion the pioneers are fully entitled to special consideration, and Nopal is in no position to complain if it were accorded. The development of this particular trade into a stable and dependable service was highly desirable; the protection of the endeavors of these pioneering lines which have so served would be a legitimate objective of any pooling arrangement.

The Harllee-Day opinion does not find that Nopal's carryings were not considered in the negotiations; at most it seems to "suggest" a probability that they were not given *enough* consideration. To the

[1] See p. 22; "we are prohibited."

contrary, the record showing the minutes of the Rio meeting, points out the extensive negotiations made in discussing the issue involved and states the facts and arguments advanced by the various parties in support of their contentions.

Nowhere in this opinion as above discussed can I find subordinate findings of fact or reference to substantial evidence to support its ultimate conclusion of unjust discrimination. In view of the practical and economic side of the presented issue, the import of one factor must be constantly realized—coffee is Brazil's greatest economic asset. That Lloyd should benefit in a major way from its transportation to and from the United States is a normal and natural objective of Brazilian national policy. It seems to me far preferable that recognition be given to the legitimate objectives of that policy through agreement arrived at by negotiation among the lines, rather than by a Brazilian decree, which would naturally support the national interest.

Before briefly discussing Commissioner Patterson's opinion, I must say that I strongly believe that we should consider pooling agreements as they really are, and realize what our limitations in dealing with them are; and especially, that no decision of ours is going to turn a hard-boiled, intensively competitive business into an association of dedicated altruists. Even my brief experience here teaches me that the lines in the strongest bargaining position get a bigger cut in any pool than their weaker competitors, which bigger cut may well be justified where the greater strength of such lines stems not from predatory and discriminatory tactics, but is the result of pioneering efforts, heavy investments in the trade, and other factors. If we can keep this in bounds, I think we will do all that can be expected of us, and this I think we can do. As we indicated in *Alcoa-C.A.V.N.*, *supra*, if the result of a pooling agreement is so to impair the revenues of a valuable carrier as to lead it to abandon or seriously curtail its service, we will not hesitate to disapprove it. However, where, as here, the division of revenues appears to be within a zone of reasonableness, I think we should approve. I cannot read section 15 as imposing pinpointed equitable allocation of pool percentages as a condition to the approval of pooling agreements, and I doubt if any of the valuable pooling agreements now functioning with Commission approval could meet such a test. We certainly should not take seriously any suggestion by proponents or opponents of pools that revenue percentages are fixed by feeding "factors" into computers, and accepting the result, or indeed, upon any considerations other than those dictated by enlightened self-interest.

Commissioner Patterson's opinion makes no additional subordinate findings of fact and points to no additional evidence to support the findings of unjust discrimination in which he concurs. His decision that this agreement must be disapproved as contrary to the public interest is based upon his finding that it "reflects the results of governmental action rather than market competition." [2]

I cannot read section 15 as permitting the approval of contracts only if they reflect "market competition" or forbidding approval of a contract which "reflects the results of governmental action." I have thought and still thing that section 15 requires us to approve or disapprove an agreement upon its merits, not upon consideration of what it may "reflect."

I agree with decision of the Examiner that Agreement No. 9040 should be approved.

(Signed) THOMAS LISI,
Secretary.

---

[2] Although he approved the Grace-C.A.V.N. pooling agreement which certainly "reflected" the action of *two* Governments.

FEDERAL MARITIME COMMISSION

No. 966

REDUCTION IN RATES—PACIFIC COAST-HAWAII

OLIVER J. OLSON & CO., C. R. NICKERSON, AGENT

Decided July 20, 1964

Rates from, to, and between Pacific coast ports and ports in the Hawaiian Islands found to be lawful and just and reasonable. Order should be entered discontinuing the proceeding.

Russell S. Bernhard for respondent.

George D. Rives and *Robert N. Lowry* for Matson Navigation Co., intervener.

Shiro Kashiwa for State of Hawaii, intervener.

Richard S. Harsh and *Robert J. Blackwell*, Hearing Counsel.

A. L. Jordan, Hearing Examiner.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*; Ashton C. Barrett, James V. Day, John S. Patterson, *Commissioners*):

PROCEEDINGS

This is an investigation into the lawfulness of certain tariffs filed by Oliver J. Olson & Co. (Olson), covering transportation of cargo between the Pacific coast and Hawaii. The investigation is being conducted by the Commission on its own motion pursuant to section 18 of the Shipping Act, 1916 (Act), and section 3 of the Intercoastal Shipping Act, 1933 (Intercoastal Act).

The tariffs under investigation are those contained in Olson's revised pages to its local Freight Tariff No. 5, FMC–F No. 32, naming reductions in freight rates from, to, and between Pacific coast ports and ports in the Hawaiian Islands. The order of investigation, dated December 27, 1961, embraces those revisions in Olson's tariff to become effective December 28, 1961, and "all subsequent revisions of the said rates subsequently filed by respondent in this proceeding." The order suspended the rate on one item in the tariff, lumber, to and including April 27, 1962, but allowed the other items in respondent's tariff to remain in effect during the course of the investigation.

We discontinued the investigation insofar as the suspended lumber rate was concerned when it was canceled by Olson. Thereafter, Olson filed new rates on lumber which were placed under investigation.

Matson Navigation Co. (Matson) and the State of Hawaii intervened. The State of Hawaii did not submit any evidence or file any brief.

FACTS

A. *History of the rates under investigation:*

The initial tariff filed by Olson for the Pacific coast-Hawaii trade became effective on September 9, 1961. Generally, the rates set forth by this initial tariff were at the same level as those of intervener Matson.

By revised schedules, effective November 27, 1961, Olson made a general 5% reduction in its September 9, 1961 rates. This reduction was not protested by Matson.

Effective December 28, 1961, Olson made still further reductions on a selected list of commodities. Generally, these reductions were of an additional 5% below the November 27, 1961 level. However, the rate for lumber, previously a uniform rate of $37.62 per 1,000 board feet, was revised by Olson to range from $30.00 per 1,000 board feet for shipments in excess of 2,000,000 board feet to $37.62 for those under 500,000 board feet. These proposed reductions on 31 commodities were protested by Matson, the present investigation was ordered, and the new rate on lumber was suspended by the Commission.

The rate on lumber was restored to the November 27, 1961 rate of $37.62 per 1,000 board feet, effective January 25, 1962.

Olson then further revised its rate on lumber, effective February 5, 1962, setting a rate of $36.00 per 1,000 board feet for lumber stowed below deck and $32.50 when carried on deck.

The final tariff revision relevant to this proceeding became effective on August 20, 1962, when Olson revised its tariff and restored all but 8 of the 31 commodities whose rates were originally protested by Matson to a level set by Olson without protest by Matson.

In addition, a new rate structure was established for commodities for which rates were not otherwise specified in the tariff (N.O.S.). The September 9, 1961 rate for N.O.S. commodities was $28.34 per ton. The reduction of November 27, 1961, brought this rate down to $26.92, where it remained until August 20, 1962. Pursuant to the revision effective on that date, cargo which was unitized or palletized, so as to be suitable for forklifting, was carried at the $26.92 rate, while the rate for loose stow cargo was increased to $30.00 per ton. This rate differential was intended to reflect the greater suitability of unitized cargo for movement in a barge operation, such as the one run by Olson, and the relative ease of handling and lower stevedoring costs possible with a cargo of this type.

An analysis of Olson's August 20, 1962 rates reveals that where shipments are unitized or have similar transportation characteristics, Olson's present rates are below Matson's by amounts ranging from 7 to 19 percent. Where the commodities are such they they are not adapted to unitized shipment, Olson's $30.00 merchandise N.O.S. rate is applicable, resulting in differentials below Matson's corresponding rates, with unimportant exceptions of 3 to 4 percent. The purpose of the foregoing rate adjustments is to provide attractive rates for all palletized or unitized cargo and for cargo having similar transportation characteristics, and to subject any non-unitized cargo to the merchandise N.O.S. rate of $30.00.

The differentials of 3 to 4 percent on non-unitized cargo are less than those necessary to compensate shippers for the added cost of insurance when shipping by barge.

B. *Olson's operations in the Pacific coast-Hawaii trade:*

1. *The 1961 voyages.* Olson first entered the Pacific coast-Hawaiian trade in September 1961, when the west coast maritime strikes made it necessary for additional carriers to handle the backlog of goods. The first such strike extended from June 16, 1961 to July 3, 1961; the second extended from September 29, 1961 to October 12, 1961; and the third extended from March 16, 1962 to April 11, 1962.

Olson made five voyages during 1961, the first commencing on September 5. There were no exceptions to the finding of the Examiner that Olson suffered a loss of $53,262.72 on these voyages.

These 1961 voyages, the first undertaken by Olson in the Hawaiian trade, should not be regarded as typical; and the financial data collected for them is not a reasonable index of what Olson could expect from its Hawaiian operations in the future.

In the first place, Olson's 1961 voyages were made under rates which were in effect prior to those under investigation. The reduced rates, protested by Matson, did not become effective until December 28, 1961, except lumber which became effective February 5, 1962.

Secondly, the strikes produced abnormal conditions resulting in the immediate availability to Olson of large volumes of traffic that would normally not be present for a newly instituted service in an established trade. On the other hand, the strikes resulted in abnormally high costs of operation. Freight was delivered to the carrier without proper booking and was delivered to the carrier up to the time of sailing. All types of cargoes were received, including those which would not ordinarily move by barge, and which were not suitable for shipment via barge. Docks and warehouses were overcrowded, with the result that cargoes could not be loaded and unloaded quickly. Because of shortage of dock space and stevedoring gangs, loading and unloading had to continue around the clock, with necessary additional overtime compensation. To accommodate the extra stevedoring crews necessitated by the urgency for rapid unloading, extra cranes had to be rented. Moreover, vessels were not loaded selectively and some were loaded to 100 percent capacity with miscellaneous cargoes as they arrived at the dock, thereby producing inefficient utilization of space and excessive stevedoring time. Thus, the strikes resulted in the production of a large volume of traffic, but they also caused a high cost of performing service.

2. *The 1962 completed voyages.* Olson made six voyages in 1962 in its Pacific coast-Hawaiian operation. All of these voyages were made under the new rates effective December 28, 1961, and the new rates for lumber, effective February 5. The Examiner found that Olson suffered a loss of $63,082.21 on these voyages, and no exception was taken to his finding.

3. *Olson's 1962 projections.* Olson conducted two types of studies in an effort to predict revenues and expenses from its voyages in the Hawaii trade scheduled for the last 6 months of 1962.

The first of these sought to apply the August 1962 rates to what Olson contended was a typical cargo, based on what it had carried in the first 6 months of 1962. No separate cost analysis was made for this typical cargo. Rather, the average cost of the six 1962 voyages was adjusted to reflect the savings that Olson believed would be effected. The anticipated decline in expenses was attributed to the reduction in handling cost of pineapple, based on the new F.I.O. rate and the reduced cost of handling palletized cargo. Estimated revenue from the so-called typical future voyage was $174,476. Expenses were estimated at $147,174, leaving a profit of $27,302.

The Examiner found these estimates to be overly optimistic on the basis of the record and we find nothing in the record which leads us to differ with his conclusion. However, whether or not respondent is able to turn a $63,082 loss into a $27,302 profit per voyage in the short span of 6 months is not essential to deciding the issues before us. As respondent points out, "The future typical voyage, as portrayed on Exhibit 41, cannot be expected to materialize immediately. The new structure of rates is designed to attract palletized and unitized cargoes. This will require a change in the packing procedures of many shippers. Such changes take time and require selling."

In the second type of study, Olson sought to determine the effect of the lumber and paperboard rates by constructing exhibits (39 and 40) assuming a round trip voyage carrying an optimum load of the commodity westbound and coming back empty. With respect to lumber, a rate of $32.50 produced revenue of $97,500 which after expenses of $75,250 yielded a profit of $22,250. Regarding paperboard, a rate of $27.92 produced a profit of $21,072. The Examiner also found Olson's forecast for lumber to be too optimistic. We agree and further believe the record does not support Olson's projection of pulpboard profits. The record in this proceeding, however, is concerned with a new and experimental service. Experience under the new system is required before an accurate appraisal of its financial feasibility is possible.

DISCUSSION

The Examiner found that Olson had failed to establish that its rates were compensatory. He stated, however, "Merely because Olson's revenues do not meet fully distributed costs is no bar to a finding that the rates are lawful, just and reasonable. If Olson is permitted to continue operating at its present level of rates, its new barge service will be afforded a reasonable opportunity to realize its full potential. It should have this chance." He concluded Olson's rates were lawful, just and reasonable.

Exceptions by Matson to the Examiner's initial decision are that his decision errs:

(1) In concluding that the only alternative to approving the proposed rates was a return to prior rates which were noncompensatory;

(2) In concluding that the rates of Olson do not need to cover fully distributed costs in order to be found just and reasonable;

(3) In finding that there is no evidence that Olson has taken unfair advantage through the use of short-term competitive measures to capture cargoes from established operators in the trade;

(4) In concluding that the proposed rates are lawful, just and reasonable in the absence of probative evidence to support the conclusion;

(5) In failing to make specific findings with respect to the lawfulness of reduced rates on lumber and paperboard.

A. *Matson's first exception:*

By reading into the initial decision the finding that the only alternative to approving the proposed rates was a return to preinvestigation rates which were also noncompensatory, Matson misconstrues the Examiner's meaning.

Matson correctly cites the initial decision in its brief, when it calls attention to the following segment of the initial decision:

Since Olson's August 20 rates result generally in no reduction over the preinvestigation rates there may be no reason to adopt the compensatory test here, as the issue of compensatory rates may have become moot. For instance, if the Commission were to find new rates unlawful because noncompensatory, it would presumably mean a return to the rates in effect prior to those investigated. In this connection, the record shows that the preinvestigated rates were equally noncompensatory.

However, had Matson proceeded to the next three sentences in the initial decision, the full import of the Examiner's words would have become clear. The Examiner continues:

It is doubtful if any rate structure which Olson could adopt would be immediately compensatory. Olson's primary need is to attract a greater volume of cargo at rate levels sufficiently high to defray all expenses. Until this is done it is doubtful that Olson at any level rates could meet the compensatory test.

The Examiner's language makes clear that a return to the preinvestigation rate structure is not the only alternative. It is merely the alternative that will prevail, if the rates under investigation are rejected, and if no other alternative is offered, and adopted.

Since no rate had been considered which satisfied the Examiner as being compensatory for the amount of cargo Olson now carries or can be expected to carry in the near future, the Examiner could have rejected the present revisions, thereby adopting by default the preinvestigation rates; or could have allowed the revised rates to stand. He chose the latter course.

The Examiner's decision that Olson's revised rates should be allowed to stand at least until Olson has had the opportunity to experiment and discover the rates at which traffic will be attracted and provide a profit is reasonable. Olson does not have to charge compensatory rates during the preliminary period of its operations in this new service. The first exception is rejected.

B. *The second and third exceptions:*

Where the Commission has held a rate structure to be unlawful because it was noncompensatory it has been on a finding that rate reductions were adopted by the carriers in order to fight competition or take unfair advantage of other carriers in the trade through rate levels not based upon costs of operation. *Cargo to Adriatic, Black Sea and Levant Ports*, 2 U.S.M.C. 342 (1940); *Intercoastal Rate Structure*, 2 U.S.M.C. 285, 299–302 (1940); *Baltimore, Md.-Virginia Ports Wine Rates*, 2 U.S.M.C. 282, 284 (1940); *West-Bound Alcoholic Liquor Carload Rates*, 2 U.S.M.C. 198, 204–205 (1939); *Pacific Coastwise Carrier Investigation*, 2 U.S.M.C. 191, 196–197 (1939); *West-Bound Carload and Less-Than-Carload Rates*, 2 U.S.M.C. 180, 186–187 (1939). In addition, the disapproved rates were frequently intended as a short-term competitive measure. Thus, the conclusion follows that the compensatory test was designed primarily to test a carrier's good faith motives in establishing reduced rates.

There is nothing in the record to indicate that the rate under investigation herein was adopted in the furtherance of unfair competitive practices. Indeed, the evidence points to the fact that these very rates under investigation could one day be compensatory, if Olson is successful in attracting additional cargo to its new service.

The crux of the problem is not that the rates are inherently noncompensatory. The major question is whether or not Olson can attract sufficient cargo to its new service to make these rates compensatory. Had the Examiner found that no matter how much cargo was loaded, and no matter how efficiently it was carried, the proposed tariff could not possibly earn a fair return for Olson, the rates might have been properly rejected. However, when the Examiner decided that the rates under investigation were noncompensatory, he did so on the basis of the fact that the studies submitted by Olson in an effort to project this rate into its operations for the last 6 months of 1962, were "overly optimistic" regarding the amount of cargo which Olson could expect to carry. Whether one is a shipowner or a corner grocer, his prices will be noncompensatory if the customers don't come to the store.

The Examiner found that if these rates were allowed to remain in effect, there was a reasonable chance that Olson might attract sufficient cargo at some future time, to make a profit, and that Olson should be given that chance. It is evident that some period of operation is required in order to overcome the natural reluctance of the shipping public against trying this or any other new transportation form. If new transportation experiments are to be adequately tested, they must be given sufficient time to realize their inherent advantages. To compel them to fully compensate the owner from the first days of their operation would doom many promising services to the shipping public to an early death.

Exceptions 2 and 3 are rejected.

C. *The fourth exception:*

Matson's fourth exception charges that the Examiner's decision errs in concluding that the proposed rates are lawful, just and reasonable in the absence of probative evidence to support the conclusions.

Olson put in evidence a complete record of its operating revenue and expenses. Aside from the data respecting the 1961 voyages, it presented figures concerning its voyages in 1962, including the number of days of service, the miles covered and tonnage carried. Olson provided cost and depreciation figures for its barges, voyage statements showing the commodities carried and the freight money received and the expenses for each barge trip. Olson's balance sheets and profit and loss statements were in evidence with supporting detail. Olson made a complete statement of its plans and described the existing and proposed operations. Estimates of future operations were offered.

As previously indicated the Examiner found that given a reasonable chance to attract cargo Olson might realize a profit. New carriers in a trade should be afforded a reasonable opportunity to develop their services, and the fact that immediate operating results may not show a profit is not sufficient ground for declaring the rates unlawful.

The fourth exception is rejected.

D. *The fifth exception:*

In support of the fifth exception concerning rates for lumber and paperboard, it is argued that the rates have not been justified on the basis of competitive necessity or cost and the Examiner erred in not making specific findings in regard thereto.

The evidence on competition was conclusive. Olson showed that it was trying to meet competition with a noncommon carrier, Pacific Hawaiian Co. It was also shown that another potential competitor, States Steamship Co., had lower rates.

Respondent also presented evidence showing that at the published rates of $32.50 on deck and $36.00 under deck per 1,000 board feet for lumber and $27.92 per ton for paperboard, Olson could make a profit after fully distributed costs if it carried nothing but these commodities to Hawaii and returned the barges empty. Such loads are regularly carried to Hawaii by a competitor offering contract service.

Olson's rates are attacked as unlawful, because they are 16% to 17% below Matson's. But the evidence of this differential was not accompanied by any comparison of relative costs between shipments on the fast self-propelled ships Matson operates and the slower barge service of Olson. This is not sufficient to overcome Olson's estimates, and Olson's managerial judgment should be allowed a chance to prove itself. There is no rule of law which says Olson must here charge as much as the dominant carrier. The fifth exception is rejected.

In our opinion the record supports the Examiner's conclusions as to the justness, reasonableness and lawfulness of all the rates under review and the exceptions to his initial decision have not been supported.

The initial decision has properly found that all of Olson's tariffs subject to this investigation are just and reasonable under section 18 of the Act and are lawful under section 3 of the Intercoastal Act. An order will be entered dismissing the proceeding.

By the Commission.

FEDERAL MARITIME COMMISSION

No. 966

REDUCTION IN RATES—PACIFIC COAST-HAWAII

OLIVER J. OLSON & CO., C. R. NICKERSON, AGENT

Full investigation of the matters and things involved in this proceeding having been had, and the Commission on July 20, 1964, 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 proposed rates, charges, tariffs and regulations herein under investigation are just and reasonable and lawful;

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

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

THE DUAL RATE CASES

ORDER GRANTING THE DELETION OF CERTAIN CLAUSES

Decided July 31, 1964

Various respondents in these proceedings have petitioned the Commission to permit certain modifications in their dual-rate contracts as approved by the Commission in its report and orders in *The Dual Rate Cases*, dated March 27, 1964, and served March 30, 1964. Notices of these petitions were published at various times in the Federal Register and by notice dated June 17, 1964, published in the Federal Register on June 18, 1964, the Commission indicated that it was considering modifying the aforesaid report and orders so as to permit all respondents the option of deleting certain contract provisions relating to the applicability of the Shipping Act, 1916, and the Rules of the Commission.

Interested persons were invited to comment on these proposals and the only comments filed objected to permitting the deletion of:

(*a*) That part of the "Disclosure" clause approved by the Commission in its report at page 33 which reads: "and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended."; and

(*b*) The provision required to be included in all "Arbitration" clauses approved by the Commissiion in its report at page 37 of its report which reads: "nothing herein shall deprive the Federal Maritime Commission of its jurisdiction."

It was suggested that as to (*a*), above, the specific mention of section 20 of the Shipping Act, 1916, might be dropped from the contracts but that the contracts nevertheless prohibit the disclosure of information. Inasmuch as the purpose of the disclosure provision in the contracts is merely to make it possible for the conferences to investigate suspected breaches of the contracts, it is only proper that limits be placed upon the use of such information. We are therefore approving the optional deletion of the reference to section 20 of the Shipping Act provided the language set out below is used.

As to (*b*), above, it was argued that to drop the mention of the jurisdiction of the Commission would be to risk depriving contract shippers of their right to file complaints with the Commission under section 22 of the Shipping Act, 1916. It was suggested that the following language be permitted in lieu of the provision quoted above:

Nothing herein shall be construed as preventing either party hereto from resorting, either before arbitration has been initiated by the other party hereto or within 30 days after such initiation, to any other forum which would, but for this agreement to arbitrate, have jurisdiction to decide the dispute.

As was the case in *Swift & Co.* v. *Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir., 1962), arbitration may sometimes present the question of whether a particular construction of a dual-rate contract is lawful under the Shipping Act, 1916, a question which ordinarily would not be a proper matter for arbitration. And, as we stated in our Report of March 27, 1964, herein, the terms of dual-rate contracts should not, nor cannot, relieve us of our duties and responsibilities under the Shipping Act. None of this is to say, however, that disputes under dual-rate contracts could not be properly and finally resolved through arbitration where there is no substantial question of violation of the Shipping Act involved.

The problem presented by the proposed language is that it appears to be so broad as to effectively bar arbitration of *any* dispute except where both parties desire to arbitrate.

In view of the holding in the *Swift* case, *supra*, that the Commission may upset the decision of the arbitrators where their decision is not in conformity with the Shipping Act, notwithstanding the absence of any provision to that effect in the contract, it would appear that the deletion of the language in (*b*) above would not change in any fashion the exercise of jurisdiction by the Commission in the proper case. We are therefore authorizing the deletion of such language.

As no comment was received as to the deletion of other references to the Shipping Act and as it appears that the deletion of these references can have no effect upon the applicability of the Shipping Act, we are permitting certain deletions as set out below.

Now, therefore, it is ordered, That the aforesaid Report and Orders are amended by making the following contract provisions optional rather than mandatory.

1. That part of paragraph (a) of the "Rate Increases" clause approved by the Commission in its report at pages 15–17 which reads:

The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results in an increase or decrease in cost to the Merchant, except as provided by Section 18(b)(2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however,*

2. That part of paragraph (c) of the "Rate Increases" clause approved by the Commission in its report at pages 15–17 which reads:

through filing with the Federal Maritime Commission

3. That part of the "Disclosure" clause approved by the Commission in its report at page 33 which reads:

and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended.

Provided, however, That where this language is deleted the following language must be inserted:

and there shall be no disclosure of such information without the consent of the merchant except that nothing herein shall be construed to prevent the giving of such information (1) in response to any legal process issued under the authority of any court, or (2) to any officer or agent of any government in the exercise of his powers, or (3) to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or (4) to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers, or (5) to arbitrators appointed pursuant to this agreement.

4. The provision required to be included in all "Arbitration" clauses approved by the Commission in its report at page 37 of its report which reads:

nothing herein shall deprive the Federal Maritime Commission of its jurisdiction.

5. The "Amendments" and "Applicability of the Shipping Act" clauses discussed by the Commission in its report at pages 37–38.

Respondents desiring to make any or all of these changes in their contracts may do so without further permission from the Commission: *Provided, however,* That full copies of the contract form as so amended must be filed with the Commission within 30 days following such amendments.

It is further ordered, That requests for the deletion of contract provisions not herein granted are denied.

By order of the Federal Maritime Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1134

INVESTIGATION OF PRACTICES IN THE GREAT LAKES/JAPAN TRADE—IINO KAIUN KAISHA, LTD., AND MITSUI STEAMSHIP CO., INC.

Respondents, parties to F.M.C. Agreement 8670, who determined not to serve Duluth on inbound traffic, delivering cargo of Duluth shipper at Milwaukee even though the same vessels called at Duluth later to pick up outbound cargo, found not to have violated section 15 or 16 First.

Agreement 8670 found to be the complete agreement between the parties on this subject.

Charles F. Warren and *John P. Meade* for respondents.

Walter F. Mondale, Attorney General, State of Minnesota, *Jack L. Chestnut*, Special Assistant Attorney General, and *Gene W. Halverson* for the State of Minnesota and the Seaway Port Authority of Duluth.

Frank Gormley, *Donald J. Brunner*, and *H. B. Mutter*, Hearing Counsel.

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

The two respondents, Iino Kaiun Kaisha, Ltd. (Iino), and Mitsui Steamship Co., Ltd. (Mitsui), are common carriers by water in the foreign commerce of the United States and, in the conduct of the activities involved in this proceeding, are subject to the provisions of the Shipping Act, 1916 (46 U.S.C. 801, et seq.). The two carriers file tariffs jointly and are permitted to discuss and agree upon rates and tariffs in the inbound trade from Japan to ports on the Great Lakes under F.M.C. Agreement No. 8670 and in the outbound trade from Great Lakes ports to Japan under F.M.C. Agreement No. 8595. The Commission received information that respondents refuse to deliver inbound cargo to Duluth, Minn., but instead discharge cargo destined for Duluth at Milwaukee, Wis., even though they subsequently call at Duluth with the same vessels to load outbound cargo.

[1] This decision became the decision of the Commission on July 28, 1964. See Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224, 502.228.

The Commission ordered this investigation pursuant to sections 15 and 22 of the Shipping Act (46 U.S.C. 814 and 821) to determine (1) whether Mitsui and Iino have effectuated an agreement not to serve Duluth on inbound traffic in violation of section 15, (2) whether Agreement No. 8670 is the complete agreement of the parties thereto as required by section 15, (3) whether Agreement No. 8670 should be canceled pursuant to section 15 because Iino and Mitsui are effectuating that agreement in a manner which is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or which is detrimental to the commerce of the United States or contrary to the public interest, by not quoting rates inbound to Duluth and by not serving Duluth for inbound traffic, and (4) whether the refusal of Mitsui and Iino to serve Duluth on inbound traffic subjects any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in violation of section 16 First. The pertinent portions of sections 15 and 16 First are set out in the attached Appendix.

The State of Minnesota and the Seaway Port Authority intervened and took active parts in the proceeding. Other interveners, the International Association of Great Lakes Ports and The Niagara Frontier Port Authority, did not appear at the hearing nor file briefs. With the consent as well as the encouragement of the Presiding Examiner, the need for the taking of oral testimony was dispensed with by the parties who appeared at the hearing agreeing to a stipulation of the facts. The facts so stipulated are clear and quite adequate for the purpose of reaching a decision on the above issues. The agreed facts follow, including data taken from some of the exhibits attached to the stipulation of facts.

THE FACTS

1. Iino Kaiun Kaisha, Ltd. (Iino), and Mitsui Steamship Co., Ltd. (Mitsui), are authorized to discuss and agree upon rates and practices in commerce from Japan to the Great Lakes of the United States pursuant to the terms of F.M.C. Agreement No. 8670, as amended.[2]

2. Acting pursuant to the above Agreement, Iino and Mitsui have filed with the Commission a joint tariff entitled "Iino Kaiun Kaisha, Ltd./Mitsui Steamship Co., Ltd., Joint Tariff No. 1." The said Joint Tariff quotes rates from certain Japanese ports to certain Great Lakes ports, as more specifically named therein.

3. In the said joint tariff, no rates are published from Japanese ports to the port of Duluth, Minn. This is because these lines do not

[2] Respondents have advised the Commission that on Apr. 1, 1964, Mitsui Steamship Co., Ltd., became Mitsui O.S.K. Lines, Ltd., and Iino Kaiun Kaisha, Ltd., ceased common carrier operations when it was merged with Kawasaki Kisen Kaisha, Ltd.

offer a service from Japan to this port, although the matter of serving it has been a subject of discussion between them.

4. Iino and Mitsui are also authorized to discuss and agree upon rates and practices in commerce from the Great Lakes of the United States to Japan pursuant to the terms of F.M.C. Agreement No. 8595, as amended.

5. Acting pursuant to the above agreement, Iino and Mitsui have filed with the Commission a joint tariff entitled "Iino Kaiun Kaisha, Ltd./Mitsui Steamship Co., Ltd., Joint Tariff No. 1." The said joint tariff quotes rates from certain Great Lakes ports, including Duluth, to certain Japanese ports, as more specifically named therein.

6. During 1963, the American importer of machine tools and machine tool parts, Equipment Investors, Inc., 1309 Clover Drive, Minneapolis, Minn., complained to Mitsui over its failure to serve the port of Duluth, Minn., on direct shipments from Japan, and to publish a tariff covering same. Specifically, this company objected to Mitsui vessels discharging their cargo at Milwaukee though the same vessels may have called subsequently at Duluth for loading pursuant to the said joint tariff filed under authority of Agreement No. 8598. During 1963, Mitsui booked eighty-nine (89) tons of machine tool parts which Equipment Investors, Inc., had purchased from Japanese sources. The said eighty-nine (89) tons constitutes Equipment's total offerings to Mitsui during 1963. This cargo was booked and shipped from Japan to Milwaukee under bills of lading consigned to Norman G. Jensen and calling for discharge at Milwaukee.

In advance of the departure of their sailings from Japan, neither Iino nor Mitsui has actually known whether its vessels would be calling at Duluth for loading pursuant to Agreement No. 8595. Respondents begin their "Eastern Canada & Great Lakes Liner Service" at Hong Kong, load at Japanese ports, then proceed to eastern Canadian ports for beginning of discharge. Loading at Hong Kong and Japanese ports takes approximately 2 weeks, while the ocean voyage takes approximately 1 month. Discharging at eastern Canadian ports and Great Lake ports takes approximately 3 weeks. The entire eastbound leg of respondents' voyages takes approximately 60 days.

For their westbound leg, important base cargo is dried milk for use in the Japanese Government sponsored Lunch Program for Japanese school children. Duluth is one of the loading ports for this milk; however, specific designation of the loading port is not made until approximately 2 weeks prior to loading. Illustrative of this situation is the M.S. *Muneshima Maru* Voyage No. 14, which commenced loading at Hong Kong on March 24, loaded at various Japanese ports and departed Yokohama on April 10; commenced discharging at Halifax on May 5, and on May 9 a radiogram was dispatched to the Captain informing him of the required unscheduled loading of milk at Duluth. This illustration is typical of all eight voyages which called at Duluth.

7. During 1962 and 1963 the following inquiries were made regarding such a service:

A. In March of 1962, the Seaway Port Authority of Duluth inquired of Iino whether it was interested in the carriage of 1,000 tons of wire and pipe from Japan to Duluth. By letter dated March 21, 1962, Iino replied:

> * * * due to the tight scheduling of vessels and the time required for extension of service to Duluth and return is at this time prohibitive. Should the picture of Iino Lines change relative to direct call at this port, we will be pleased to advise you accordingly.

B. In December of 1962, the American firm, Rochester Iron & Metal Co. of Rochester, N.Y., requested Mitsui to advise it with respect to its first calling at Duluth, this firm having contracted to supply an undisclosed quantity of stainless steel sheets to that general locality. In January of 1963, Mitsui replied:

> * * * that present plans for 1963 do not include our vessels calling at the port of Duluth.

C. In June of 1963, the American firm, J. J. Fitzpatrick Lumber Co., Inc., of Madison, Wis., inquired whether Iino served Duluth in connection with the possibility of a purchase of Philippine mahogany from the Far East. Iino advised this firm that it did not offer a service to Duluth. However, inquiry was made as to the possible amount of tonnage that might be involved. No reply was received.

Except for the complaint of Equipment Investors, Inc., and the three inquiries set forth in this paragraph, no other American commercial interests are known to have inquired of either Iino or Mitsui about their respective managerial decisions not to serve this port under trading conditions existing at the times relevant to the inquiry herein.

8. Iino and Mitsui have not served Duluth from Japan because, in the managerial discretion of each, neither considers that this trade would be operationally practicable under trading conditions existing at the times relevant to the inquiry herein. However, in response to the requests described in paragraph 6 hereof, these companies have discussed the feasibility of inaugurating a service to this port. If and when such a service should prove practicable and economical in the opinion of each company, it is contemplated that an agreement will be reached to extend the scope of their joint tariff presently on file to include this port.

9. During 1962 Mitsui had seven (7) sailings from Japan to the Great Lakes pursuant to Agreement No. 8670, and seven (7) sailings

from the Great Lakes to Japan pursuant to Agreement No. 8595. None of its vessels, however, called at Duluth. Effective September 4, 1962, Iino and Mitsui amended their joint tariff filed pursuant to Agreement No. 8595 to include Duluth and several other Great Lakes ports.

During 1963 Mitsui also had seven (7) sailings from Japan to the Great Lakes and seven (7) sailings from the Great Lakes to Japan. Of the latter, five (5) vessels called at Duluth for loading pursuant to the joint tariff filed under Agreement No. 8595 and two (2) did not.

10. During 1962 Iino had ten (10) sailings from Japan to the Great Lakes pursuant to the joint tariff filed under Agreement No. 8670 and ten (10) sailings from the Great Lakes to Japan pursuant to the joint tariff filed under Agreement No. 8595. None of its vessels, however, called at Duluth during that season.

During 1963 Iino had ten (10) sailings from Japan to the Great Lakes and ten (10) sailings from the Great Lakes to Japan. Of the latter, three (3) vessels called at Duluth for loading pursuant to the joint tariff filed under Agreement No. 8595 and seven (7) did not.

11. In addition to their dried milk carryings during 1963, Iino vessels booked out of Duluth 265 L/Ts of soybean oil (which was shipped to Hong Kong), while Mitsui vessels booked 87 bales of woolen shirt cuttings and 435 bags of edible milk powder. Iino and Mitsui accepted all cargo tendered them in the case of each such calling.

DISCUSSION AND CONCLUSIONS

The question, essentially, is whether the Commission can or should apply sanctions against respondent carriers who are associated together under a section 15 agreement and whose vessels transport cargo outbound from a port but who refuse to serve the port inbound.

The Commission and its predecessor agencies have held, most recently in *Harbor Commission, City of San Diego* v. *Matson Navigation Company*, 7 F.M.C. 394 (1962), that the Commission does not possess the power to require that common carrier service to a port be inaugurated by a particular carrier, nor to prevent indefinitely a common carrier by water from abandoning service. In that case the Commission did not attempt to define the extent of its authority under section 16 First of the Shipping Act, 1916, to require common carrier service to a port in order to prevent undue or unreasonable prejudice to that port or preference to another port. It found that the estimated volume of cargo in the trade between San Diego and Hawaii was quite small as compared to the volume of cargo offered at the competing port of Los Angeles. The Commission therefore found no reason to interfere with Matson's managerial decision not to serve San Diego based upon Matson's judgment of the economics of serving the port.

The State of Minnesota and the Seaway Port Authority of Duluth, interveners, and Hearing Counsel concede that Iino and Mitsui have not violated the Shipping Act by their decision not to serve Duluth inbound from Japanese ports. They cite the *Matson* case as the fundamental basis for their conclusions. The Examiner has concluded, first, that the decision of respondents not to serve Duluth inbound should not be condemned under section 16 First. In view of the relatively small amount of inbound cargo offered and the fact that these carriers were not even aware that their vessels would call at Duluth until long after their inbound itineraries were fixed and the vessels had sailed, it can not be concluded that this decision resulted in undue or unreasonable prejudice to the port within the meaning of that section. The fact is that the decision, like the carrier's decision not to serve San Diego in the *Matson* case, reflected the business judgment of the respondents that the service in question would be operationally impractical. There is no suggestion of a design to prefer Milwaukee or prejudice Duluth.

The rule of the *Matson* case does not necessarily govern the issues raised by section 15, of course, because only one carrier was involved there. The decision in the instant case not to include inbound calls to Duluth in their joint tariff was made after discussions between the two respondents under the protection of F.M.C. Agreement No. 8670. Thus an additional element is presented here because the existence of such an approved agreement, which permits cooperative tariff arrangements between the two members, would eliminate to some degree normal competitive consideration that might otherwise lead one or both of the carriers to render the desired service to Duluth, particularly if the cargo offerings were to increase substantially in the future. While interveners discuss this aspect of the case and conclude that the Commission could and would withdraw its approval of the Agreement if it were found to contribute to such a result, they concede that in the existing circumstances the respondents have not violated the standards of section 15.

As far as this record shows, each of the carriers would have taken the same action, independently, as they took jointly if no Agreement had been in existence. Therefore it can not be concluded that the Commission-approved Agreement was in whole or in part the basis for the carriers' action or that the carriers' effectuated an agreement not to serve Duluth on inbound traffic in violation of section 15. The record would not support a conclusion that Agreement No. 8670 should be canceled because it is being effectuated in a manner that violates the standards of that section.

On the remaining issue—whether Agreement 8670 is the complete agreement of the parties on the subject matter involved here—Hearing Counsel assert that there is no evidence that it is not the complete agreement and intervener concurs in this view. The record contains no evidence to the contrary. It is found and concluded that Agreement 8670 is the complete agreement between respondents.

For the foregoing reasons the four issues are decided in favor of respondents. An order will be entered discontinuing the proceeding.

(Signed) E. ROBERT SEAVER,
Presiding Examiner.

JUNE 30, 1964.

APPENDIX

Pertinent portions of the Shipping Act, 1916:

Section 16. * * *

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 15.

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. * * *

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 365

THE AUSTRIAN TRADE DELEGATE

v.

UNIVERSAL TERMINAL & STEVEDORING CORP.

Decided August 13, 1964

REPORT

BY: (John Harllee, *Chairman*; James V. Day, *Vice Chairman*; Ashton C. Barrett, *Commissioner*)

This is an application by Universal Terminal & Stevedoring Corp. (Universal) to collect the sum of $3,000.00 as full payment for accrued pier demurrage charges amounting to $8,807.13 from the Austrian Trade Delegate (Austrade).

In September, 1963, the Austrian Government through Austrade, shipped certain material to New York to be used in the construction of the Austrian Pavilion at the New York World's Fair. When the cargo arrived, the work at the Austrian Pavilion had not progressed to the point where the cargo could be utilized in the construction. Furthermore, there was no space available on the fair grounds where the material could be stored. As a result, the cargo remained on the pier and accumulated pier demurrage charges, as set out in the carrier's tariff, Meyer Line Westbound Tariff No. 2, F.M.C.: No. 1, original page 16. The demurrage charges aggregated $8,807.13.

Application of "first period" rates to this cargo for the period of time it remained on the pier after the expiration of the "free time" period would result in demurrage charges of $3,042.04. Universal requests under the circumstances to pay $3,000.00, an approximate equivalent to a "first period" rate.

In an Initial Decision issued May 18, 1964, the Examiner granted this application relying heavily on a new and different interpretation of both the Commission's demurrage rule, United States Maritime Commission order issued October 19, 1948 and *American President Lines, Ltd.* v. *Federal Maritime Board*, SRR 20,269, 317 F.2d 887, (CADC 1962). The Commission is of the opinion that the rule should not be expanded so as to encompass the situation present in this case. Nor does *American President Lines*, *supra*, compel any such expansion.

However, the cargo upon which the charges have been levied was destined for the New York World's Fair, an essentially noncommercial endeavor from the standpoint of foreign governments. The cargo in question is owned by the Government of Austria. Moreover, it does not appear that other consignees were prejudiced in the matter of storage space because of the delay of Austrade in picking up its cargo. We hereby grant applicant's request to accept from the Austrian Trade Delegate the sum of $3,000.00 as full payment of accrued pier demurrage in the amount of $8,807.13.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1157

UNITED STATES OF AMERICA, BY GENERAL SERVICES ADMINISTRATION

v.

AMERICAN EXPORT LINES, INC., AMERICAN EXPORT AND ISBRANDTSEN LINES, CENTRAL GULF LINES, INC., STATES MARINE LINES, INC., CONCORDIA LINE, CRESCENT LINE, LTD., FERN-VILLE LINES, FRENCH LINE, FRESCO LINE, HANSA LINES, HELLENIC LINES, HOEGH LINES, ISTHMIAN LINES, INC., ITALIA-SOCIETA PER AZIONI DI NAVIGAZIONE OF GENOA, LEVANT LINES, MALAYA INDONESIA LINE, NATIONAL HELLENCI AMERICAN LINE, S.A., ORIENT MID-EAST LINES, STEVENSON LINES, TORM LINES, ZIM ISRAEL NAVIGATION CO., LTD.

Sale and shipment by General Services Administration to Turkish and Moroccan importers pursuant to program for disposal of stockpiled crude natural rubber declared excess to the Nation's needs is commerce of the United States although the proceeds of sale were used in furtherance of the activities of the Agency for International Development.

Complainant not having shown that respondents' rate on crude natural rubber in bales from New York to Turkey and Morocco is so unreasonably high as to be detrimental to the commerce of the United States, unjustly discriminatory or unduly prejudicial is not entitled to reparation and a cease and desist order is not required. Complaint dismissed.

J. E. Moody, General Counsel, *Morris Levinson*, Assistant General Counsel, *William R. Pierce*, Chief Counsel, and *Paul J. Fitzpatrick*, Attorney, for complainant.

Burton H. White and *Elliott B. Nixon*, for respondents.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER [1]

The United States, by General Services Administration (complainant) seeks reparation from respondents American Export Lines, Inc., Central Gulf Steamship Company, Prudential Lines, Inc., and States-Marine Isthmian Agency, Inc., all members of the North Atlantic Mediterranean Freight Conference (Conference), in connection with shipments of natural rubber from New York to Turkey and Morocco.

[1] This decision became the decision of the Commission on Aug. 31, 1964. See rules

Complainant alleges that the rates charged and collected were unduly or unreasonably preferential, prejudicial or disadvantageous in violation of Section 16, Shipping Act, 1916 (the Act), unjustly discriminatory or preferential in violation of section 17 of the Act, unjust and unreasonable in violation of section 18(a) of the Act, and detrimental to the commerce of the United States in violation of section 18(b)(5) of the Act. Reparation in the amount of $87,583.11 is claimed on shipments carried prior to August 3, 1963, together with such amount as may be determined to be due on shipments made subsequent to that date. Complainant further seeks an order requiring all respondents, members of the conference, to cease and desist from their alleged violations of the Act and that they be required to establish, put in force, and apply in the future, such rates as the Commission may determine to be lawful.

The Facts

1. The United States, pursuant to the Strategic and Critical Materials Stock Piling Act, accumulated stores of natural rubber. That Act authorized the disposal of material which deteriorates or becomes obsolescent, and prior to the shipments here involved Congress enlarged the disposal authority to include natural rubber which is in excess to the Government's needs although not deteriorated or obsolescent.

2. A program was established which involved several agencies of the United States, the general purpose of which was to dispose of excess natural rubber in such a manner as to minimize dollar expenditures and gold outflow incidental to the activities of the Agency for International Development (AID). Under the procedure established:

> "The actual rubber purchases will be made by private importers under licenses issued by the host country. In this case, however, instead of paying the supplier for the rubber, the importer pays his government therefor in local currency. The currency is set up as counter-part funds by the host country, for use in carrying out local assistance programs, as approved by the Mission. AID will reimburse GSA for the rubber upon completion of the shipment * * *"

3. The sale price for natural rubber was established by agreement between AID and General Services Administration (GSA) at the world market price (Singapore Price) laid down at the foreign port of import.

4. The rate for shipment of natural rubber from New York to Mediterranean ports was the subject of negotiations between complainant and the conference prior to the first shipment to Istanbul and Morocco. At the beginning of the negotiations, the conference rate on crude rubber in bales was $69.50 W/M, the same rate applicable on general cargo, and the rate on synthetic was $24.00 per long ton (LT). Com-

plainant invited the conference's attention to a letter addressed to all contract shippers proposing a rate on natural rubber of $28.50 per 50 cubic feet, and requested that such rate be established. The conference agreed to submit the proposal to its members and at a meeting held September 13, 1962 in which conference members familiar with shipment of natural rubber participated, the rate was reduced from $69.50 W/M to $36.00 W/M (long ton or 40 cubic feet), effective only from September 18 through December 31, 1962.

5. Although complainant shipped natural rubber in bales to Turkey and Morocco at the $36.00 rate, increased October 14, 1963 to $39.19 W/M (long ton or 40 cubic feet), it continued negotiating with the Conference, contending that the shipping characteristics of natural and synthetic rubber were identical and that the rate of $24.00 per 2,240 pounds applicable to synthetic rubber in bales should be made applicable to natural rubber in bales.

6. In establishing the $24.00 rate on synthetic rubber, the conference considered the argument of rubber companies in the New York area that competition with Canadian producers was keen and that something should be done about the then established rate if the American shipper was to compete in foreign markets. The gulf rate had been established at $24.00 per weight ton. The conference adopted that rate to keep producers in the U.S. North Atlantic area competitive with other United States and Canadian producers.

7. In establishing the $36.00 W/M rate on natural rubber, the conference investigated the rates in other trades and found that the rate from Malaya to the U.S. Pacific coast and from the U.S. Pacific coast to Korea was $45.50 per ton; that the North Atlantic/Baltic Conference had an $80.00 per ton rate on natural rubber and a $28.00 per ton rate on synthetic; that the North Atlantic/United Kingdom Conference had a rate of $65.25 for natural rubber and a $25.25 rate on synthetic (ton), that the Canadian/Mediterranean Conference had a rate on natural rubber of $69.50 per ton as compared to a rate on synthetic which varied as to ports from $29.00 to $33.75; and that other conferences or shippers had not specified a rate on natural rubber but applied the general cargo rate.

8. Certain carriers from U.S. Pacific coast ports to ports in the southern Asia area do not distinguish between natural and synthetic rubber, applying the same rate to both, the rates varying from $43.50 to $62.50 per short ton (2,000 pounds); certain carriers from U.S. Atlantic and gulf ports to ports in the southern Asia area apply the same rate to natural and synthetic rubber, the rates varying from $62.75 to $64.75 per short ton; certain carriers from U.S. ports to Mexico, nearby islands, and South American ports apply the same rate to natural and synthetic rubber, the rates varying from $29.12 per long ton ($1.30 per

100 pounds) to Puerto Rico, to $45.00 per long ton to South American ports.

9. At the time the Conference established the $36.00 W/M (long ton or 40 cubic feet) rate on natural rubber, New York to Istanbul, the rate from Singapore to Istanbul was $28.50 per 50 cubic feet. Stevedoring costs in the New York/Istanbul trade exceed such costs in the Singapore/Istanbul trade by approximately $14.50 per ton.

10. Natural and synthetic rubber are similar in composition, use, and density.

11. In ocean shipping, the transportation characteristics of natural rubber differ from those of synthetic rubber. Synthetic rubber is received in bags of good quality and of a size which may be handled by one man while natural rubber is received in large bales of irregular shape; synthetic rubber may be palletized efficiently while natural rubber must be handled by means of a large rope net and a "cherry picker"; natural rubber requires more handling than synthetic which when palletized (40 bags per pallet) is moved by means of fork lift tractor to storage and the pallet stacked one on top of the other; natural rubber is stored in piles and on space which must be carefully cleaned as the bales are not wrapped, and the bales protected from dampness (or rain) by a tarp or dunnage paper; synthetic rubber is loaded on board vessels while still palletized and stowed in "brick wall" fashion while natural rubber requires additional handling, may not be as efficiently stowed, and requires more dunnage and the use of talc; synthetic rubber may be used for filler cargo; the stowage ratio is 60 cubic feet for synthetic as compared to 100 cubic feet for natural; because synthetic rubber is packaged, the claims average less than 1 percent of the freight cost while claims against natural rubber shipments have averaged 10 percent of the freight costs.

12. Complainant is the only exporter of natural rubber from the United States; several firms export synthetic rubber.

13. In authorizing the disposal of excess natural rubber, Congress considered that the program would be carried out with due regard to the protection of the United States against avoidable loss, and, the protection of producers, processors, and consumers against avoidable disruption of their usual markets, and consistent with the U.S. foreign policy. The economics of the disposal plan was viewed from the standpoint that the average cost per pound of natural rubber was somewhat lower than the current market price and the estimated sales price, that the cost of keeping the rubber (warehousing etc.) was $3.20 per ton per year, and that the United States would recover between $25 and $30 million by reason of the increased value of the natural rubber in the stockpile and also save $4 million a year in costs which

would otherwise be incurred by reason of the need for warehousing and rotation.

14. GSA, incidental to its assigned duties in the program, made 46 shipments of natural rubber during the period October 29, 1962, to January 6, 1964, via American-flag vessels, members of the Conference, summarized as follows:

	Bales	*Pounds*	*Cubic feet*	*Charges*
American Export Lines:				
(A)	10,840	2,639,507	61,851	$55,664.90
(B)	2,986	727,189	17,746	17,396.72
Subtotal	13,826	3,366,696	79,597	73,062.62
Central Gulf Steamship Corp.:				
(A)	5,267	1,298,567	35,316	31,784.40
(B)	0	0	0	0
Subtotal	5,267	1,298,567	35,316	31,784.40
Prudential Lines, Inc.:				
(A)	27,161	6,737,629	150,949	135,854.10
(B)	6,063	1,494,938	37,579	35,755.98
Subtotal	33,224	8,232,567	188,528	171,610.08
States Marine-Isthmian Agency, Inc.:				
(A)	1,057	264,031	4,952	4,456.80
(B)	0	0	0	0
Subtotal	1,057	264,031	4,952	4,456.80
Totals:				
(A)	44,325	10,939,734	253,068	227,761.20
(B)	9,049	2,222,127	55,325	53,152.70
Grand totals	53,374	13,161,861 (5876 long tons)	308,393 (7710 measurement tons)	280,913.90

Averages:

Weight per bale ... pounds	246.6
Cubic feet per bale	5.77
Bales per long ton	9.08
Bales per M/T	6.93
Cubic feet per L/T	52.39

(A) = At $36 rate W/M prior to Oct. 14, 1963.
(B) = At $39.19 rate W/M subsequent to Oct. 14, 1963.

Positions of the Parties

Complainant points out that the essence of the excess rubber disposal program is the furtherance and protection of the overall national interest and that the beneficiaries are the citizens in general, including respondent American-flag carriers. It reasons that as the United States is forced to pay an excessively high rate for ocean shipments, the interests of the Nation have suffered in that other activities in the national interest are deprived of the funds expended for the excess over a just and reasonable rate.

In discussing the background of the rate on natural rubber, complainant refers to a conference letter of April 17, 1961, addressed to contract shippers, wherein the shippers are informed that the Conference members are prepared to adopt a rate of $28 per 50 cubic feet through May 31, 1961, on a particular shipment of 2,000 tons of crude rubber in bales from U.S. North Atlantic ports to Istanbul, Turkey, the offer being conditioned on acceptance before May 1, 1961. Complainant notes that when, on August 30, 1962, it requested that the current rate on crude rubber from Singapore to Istanbul ($28.50 per 50 cubic feet) be activated on its shipments from New York to Istanbul, the Conference changed its attitude. This change is related to the fact that its request was made on behalf of the Government rather than a private shipper. The inescapable inference is that complainant contends the Conference established the $36 W/M rate with a view of overcharging the Government by not according it the same treatment it would have given private shippers.[2]

Aside from any inference of improper motive, complainant seeks to prove the unreasonable, unjust, disadvantageous, and discriminatory nature of the rate by comparison with rates and practices in other trades and with the rate for synthetic rubber in the New York/Istanbul trade. It computes the New York/Istanbul rate of $36 W/M (40 cubic feet or long ton) as the equivalent of $45 per 50 cubic feet and, as the rubber shipped averaged 52.39 cubic feet per long ton, the actual charge to complainant was equivalent to $47.09 per long ton. This figure is compared to the $24 per long ton rate on synthetic rubber in the same trade, a two-to-one disparity on commodities alleged to be so much alike in composition, purpose and use, value, density, as to be virtually identical. Complainant concedes there may be differences in packaging and handling the two commodities but that such factor alone cannot, in good and sound reason, justify the 2-to-1 ratio.

Further comparison is made between the $45 per cubic feet rate (computed as above) on natural rubber in the New York/Istanbul trade and the $28.50 per 50 cubic feet rate on the same commodity in the Singapore/Istanbul trade. Complainant contends that the meeting of a rate from another source of supply is a practice so well established that refusal by respondents to follow that practice requires justification which does not appear in this proceeding; further, that the two trades constitute like traffic and the comparison discloses a gross disparity which forces a serious disadvantage upon the Government in meeting world market competition.

To support its claim for reparation, complainant calls attention to the testimony that it incurred an overall loss of about 4½ cents per pound in selling to AID-recipient countries as compared to the price which it would have received from domestic sales.

Respondents consider the shipments of natural rubber under the disposal plan, which involves AID, as noncommercial and thus not commerce of the United States as that term is used in section 18(b)(5)

[2] See discussion of this practice, p. 280, H. Rept. 1419, 87th Cong. 2d sess.

of the Act. They contend that the difference in the rates on natural and synthetic rubber is justified because of different transportation characteristics and that the difference in domestic-to-foreign rates and foreign-to-foreign rates is due to the lesser costs involved in the latter. Respondents conclude that complainant has not been subjected to undue or unreasonable prejudice or disadvantage or unjust discrimination, and that no recoverable loss has been suffered. In the absence of a violation of the Act, no basis is seen for reparation under section 22, nor is there a basis for a cease and desist order.

Respondents attack complainant's comparison of rates on several grounds. They point out the record is devoid of testimony that the difference between the conference rates on natural and synthetic rubber gave synthetic rubber shippers an advantage in the trade with Turkey by enabling them to undersell the Government; further, had the natural rubber been offered by a private shipper on a purely commercial basis, it would not have moved because the price on natural rubber exceeds the price of synthetic by more than $45 per long ton. Moreover, the rate on synthetic was established to meet competitive conditions encountered by U.S. exporters and has no comparative value in relation to the natural rubber rate which was not sold on a purely commercial basis.

Respondents' contentions include that as the Commission had not declared the natural rubber rate unreasonably high prior to the shipments, there has been no violation of section 18(b)(5); that such section does not authorize the Commission to establish rates; and other points not necessary for discussion in this decision.

Discussion of the Issues

Commerce of the United States

Respondents relate complainant's shipments to aid and defense programs and argue that as the shipments are unrelated to any commercial program, they are not included in the term "commerce of the United States" as used in section 18(b)(5) of the Act. Two recent decisions are cited in support of this position: *Department of State, Agency for International Development, etc.* v. *Lykes Bros. Steamship Co., Inc.*, special docket 374, initial decision adopted by the Commission on June 16, 1964, and, *Pacific Seafarers, Inc.* v. *Atlantic & Gulf American-Flag Berth Operators, et al.*, docket 1104, initial decision served May 7, 1964. These cases are not conclusive of the problem here presented. Neither involved the shipment of cargo sold by the United States to a foreign customer. It was held in special docket 374 that the shipment of one used automobile apparently connected in some way with a Government agency, was not a commercial shipment. Docket 1104 was concerned with a trade which consisted exclusively of foreign interport shipments of local origin and found such shipments not to be commerce of the United States, not because they were financed by AID, but in spite of that fact.

Complainant contends that in the absence of a statutory definition. the common meaning of "commerce" must be applied to section 18(b)(5) and that as the shipments here involved related to sales which were a part of a national program in dealing with another nation, they were commercial.

The term "commerce of the United States" has been broadly defined by the Supreme Court and although the cases hereinafter cited do not bear on the precise question here presented, the judicial definitions furnish persuasive guidance.

"Buying and selling and exchanging commodities is the essence of all commerce." *U.S.* v. *Holliday*, 70 U.S. 407 (1865).

"Commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments. It means trade, and it means intercourse. It means commercial intercourse between nations, and parts of nations, in all its branches. It involves navigation as the principal means by which foreign intercourse is effected." *Harrison et al.* v. *Mayor of N.Y. et al.*, 92 U.S. 259 (1875).

"The words of the Constitution comprehend every species of commercial intercourse between the United States and foreign nations." *Board of Trustees* v. *U.S.*, 289 U.S. 48 (1932).

It is found that the United States sold crude natural rubber to foreign purchasers for a consideration and shipped the commodity sold from United States ports to foreign ports. It is concluded that regardless of whether the United States accepted payment in cash or diverted the proceeds of the sale to an aid program, the transactions were commercial in nature and within the category of foreign commerce of the United States.

Section 18(b)(5) and the rate on natural rubber

A finding that the shipments involve commerce of the United States leads to the question of whether respondents have violated section 18(b)(5) of the Act which provides:

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

Complainant rests its entire case on *Maple Island Farm, Inc.* v. *Chicago B.&O. Ry. Co.*, 280 I.C.C. 353, 356, which holds that the best test of reasonableness is a comparison with other rates in like traffic. Respondents' rate on crude natural rubber in bales is compared with rates and practices in other trades, and on a similar commodity, to support the allegation that it is unreasonable.

Like traffic, complainant argues, is the Singapore/Istanbul trade in natural rubber wherein the rate is $28.50 per 50 cubic feet as compared with a rate equivalent to $45 per 50 cubic feet over the shorter route from New York to Istanbul. Respondents consider the comparison of foreign-to-foreign rates with domestic-to-foreign rates as misleading in the absence of a showing that the traffic conditions in the compared trades, such as the methods, conditions, and costs of operation, and other conditions surrounding the traffic are similar. This principle has been established in *Rates of Inter-Island Steam Navigation Co., Ltd.*, 2 U.S.M.C. 253, 256 (1940). Although the burden is on complainant to show that the trades compared are similar, and in the absence of proof of similarity there is no burden on respondents to justify the rate disparity, respondents nevertheless went forward with evidence that stevedoring costs in the New York/Istanbul trade are approximately $14.50 per ton more than in the Singapore/Istanbul trade and that overhead costs are greater in New York than in Singapore. The additional costs account for a substantial portion of the rate differential and the comparison loses its effectiveness.

Complainant, further pursuing its concept of comparisons, presented evidence that in many trades, the carriers do not distinguish between natural and synthetic rubber, charging the same rate for both commodities. However, the record also discloses that certain carriers do make the distinction and charge a higher rate for carriage of natural rubber. The only conclusion to be drawn is that practices vary and, as above discussed, in the absence of a showing that traffic conditions and carrier costs of operation in the trades compared are similar, the comparisons are of little value in supporting complainant's contention that respondents' natural rubber rate is unreasonable because different from the rate on synthetic. (See also *Puerto Rican Rates*, 2 U.S.M.C. 117, 119.) It is noted that in the trades where no distinction is made, the rate applied to both commodities is either higher or compares favorably with respondents' rate on natural rubber, however, this fact is of little assistance in evaluating respondents' rate as comparative trade conditions and costs are not available.

Complainant also offers a comparison between the rates imposed by respondents on natural and synthetic rubber in the New York/Istanbul trade. While admitting differences in handling and packaging the two commodities, complainant finds no justification for the 2-to-1 disparity in the rates. Its witnesses support this contention, basing their opinion on the similarity of the commodities in composition, purpose and use, value, density, and other comparative factors. Although these witnesses are without doubt, experts in their field, their opinions lose persuasiveness because of their admitted unfamiliarity with ocean carrier costs and methods of operation and in arriving at an opinion, they did not consider the differences in handling and stowing the two commodities as presented by respondents' witnesses. Respondents did not rebut the testimony as to the similarity in composition and use of the two commodities and complainant did not, persuasively at least, rebut the testimony relating to the difference in ocean transportation characteristics. These differences appear in the findings of fact heretofore made and need not be repeated. They may not be lightly brushed aside although they would have lost their impact had complainant developed from respondents' witnesses, or otherwise, cost figures to show that the carriers' additional costs in handling natural rubber did not justify a more than $20 per 50 feet rate differential. The record does, however, disclose factors which indicate that the cost of handling and carrying natural rubber substantially exceeds those costs as applicable to synthetic. The natural claims factor is 10 percent of the freight as against 1 percent of the freight for synthetic. The stowage ratio for natural rubber is 100 as compared to 60 for synthetic.

To summarize, complainant having alleged that the rate on natural rubber is unreasonably high in violation of section 18(b)(5) of the Act, has the burden to prove unreasonableness. *Bonnell Elec. Mfg. Co.* v. *Pacific Steamship Co.*, 1 U.S.S.B. 143, 144 (1928); *Atlas Waste Mfg. Co.* v. *N.Y.P.R.S.S. Co. et al.*, 1 U.S.S.B. 195, 197 (1930). The evidence adduced to meet this burden is the similar composition and use characteristics of natural and synthetic rubber; that other carriers apply the same rates to both commodities; that a foreign-to-foreign rate on natural rubber is substantially lower than respondents' rate, as is its rate on synthetic rubber in the same trade. A 2-to-1 disparity in rates for similar commodities in comparable trades, if properly shown, would raise a rational inference of unreasonableness. Although there is a question as to the probative value of complainant's comparisons due to the manner in which they were presented, respondents went forward to produce evidence sufficient to persuade that the reasonableness of their rate was as probable as its unreasonableness. It was shown that costs in domestic-to-foreign commerce exceed like costs in foreign-to-foreign commerce and that there is a substantial difference in the shipping characteristics of natural and synthetic rubber in the New York/Istanbul trade. While of limited probative value, evidence adduced by both parties tends to show that respondents' rate on natural rubber compares favorably with the rates in other trades. Respondents have cast doubt on any inference which may have been raised by complainant's evidence and complainant did not produce evidence sufficient to erase that doubt. Any inference which might remain is, at best, founded on conjecture or speculation and is not sufficient to support complainant's allegations. The burden of proof remains with complainant throughout and it has not produced evidence sufficient to persuade that respondents' rate is unreasonable. *Dipson Theatres* v. *Buffalo Theatres*, 86 F. Supp. 716 (1949) cert. denied, 342 U.S. 926; *Adair* v. *Reorganization Inv. Co.*, 125 F. 2d 901, 905 (1942); *Commercial Molasses Corporation* v. *New York Barge Corporation*, 314 U.S. 104, 111 (1941); *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 524 (1924); *Wigmore on Evidence*, 2d Ed. 8 2485.

Section 18(b)(5) directs the Commission to disapprove a rate found to be so unreasonably high as to be detrimental to the commerce of the United States. As the rate has not been shown to be unreasonably high, there is no basis for disapproval and the question of detriment to U.S. commerce becomes moot. No violation of this section having been established, there is no basis for a cease and desist order or for reparation unless it may be found in a violation of another section of the Act.

Sections 16, 17, and 18(a) [3] *of the Act and the rate on natural rubber.*

Complainant alleged violations of these sections but may have abandoned its contentions in regard thereto as they are not discussed in its brief. However, as the allegations have not been withdrawn and are discussed at length in respondents' brief, they will not be overlooked. In view of the fact that complainant rests its case solely on comparisons which have been considered above, further discussion borders on the academic although there may be a recognizable distinction between detriment to the commerce of the United States as a general matter under section 18(b)(5) and detriment, prejudice, and disadvantage as between individual interests under sections 16 and 17.[4]

Section 16 First, of the Act declares it unlawful:

To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or, to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 17 provides:

That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States compared with their foreign competitors.

---

[3] Section 18(a) is concerned only with interstate commerce and does not apply to this proceeding.

[4] See *N.Y.* v. *U.S.*, 331 U.S. 284, 345 (1946) and *U.S.* v. *Illinois Central R.R. Co.*, supra, to the effect that two rates may be within the zone of reasonableness and yet result in discrimination.

If commodity rates are compared, to establish a violation of these sections, there must be a showing of the character and intensity of the competition; that the difference in rates has operated to shipper's disadvantage in marketing the commodity; the deferring of one person to another or the prefering of one person to another; and unequal treatment between competing shippers or ports. *Johnson Picket Rope Co.* v. *Dollar S.S. Lines et al.*, 1 U.S.S.B.B. 585, 587 (1936); *Huber Mfg. Co.* v. *Stoomvaart Maatschappij "Nederland"*, 4 F.M.B. 343, 347 (1953).

Complainant has failed to establish that it has been hindered in marketing natural rubber by reason of the rate. On the contrary, complainant's witnesses testified that no difficulty was experienced in finding customers. If any particular shipper obtained an advantage over complainant by reason of respondents' rate, that fact does not appear in the record. It is established that complainant pays a higher rate than U.S. exporters of synthetic rubber but that fact alone does not warrant a conclusion that respondents granted a preference or imposed a disadvantage within the prohibitions of section 16. A necessary requirement is for proof that an effective competitive relationship exists between complaintant and U.S. exporters of synthetic rubber. *West Indies Fruit Co., et al.* v. *Flota Mercante*, 7 F.M.C. 66, 69 (1962). The commodities may be competitive, however, Congress directed that the excess natural rubber program would be carried out with due regard to the protection of producers, processors, and consumers against avoidable disruption of their usual markets. *House Report 1260, 86th Congress, 2d Session.* Complainant can not enter into an effective competition as it has been limited in selling, and has sold, on the basis that "the quantities actually released from time to time may vary considerably in order to avoid undue disruption of markets."

A rate differential is not unreasonable and there is no unjust discrimination or undue preference in the absence of proof that the differential is not justified by the costs of the services rendered, by their values, or by other transportation conditions. *United States* v. *Illinois Central R.R. Co.*, supra.

Ultimate Findings and Conclusions

Complainant has failed to establish that respondents' rate on crude natural rubber in bales between New York and Turkey or Morocco is so unreasonably high as to be detrimental to the commerce of the United States in violation of section 18(b)(5) of the Act, that respondents' have subjected complainant to undue or unreasonable disadvantage or prejudice in violation of section 16 of the Act, or demanded, charged, or collected a rate which is unjustly discriminatory between shippers in violation of section 17 of the Act.

In the absence of a violation of the Act, there is no basis for reparation or a cease and desist order.

An order dismissing the complaint will be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

July 30, 1964

FEDERAL MARITIME COMMISSION

No. 1079

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

Decided August 31, 1964

Respondent conference permitted to use an exclusive patronage (dual rate) contract in the form appended to this Report.

Elmer C. Maddy, for respondent.

Dickson R. Loos and *George M. Baroody*, for Arabian American Oil Company.

Jerome H. Heckman, for Dow Chemical Company and Dow Chemical International, S.A.

J. Scot Provan, Hearing Counsel.

E. Robert Seaver, Hearing Examiner.

REPORT

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

This is a proceeding under section 14b of the Shipping Act, 1916 (75 Stat. 762; 46 U.S.C. 813a), for the approval of a dual rate contract to be used by the respondent conference. The hearing examiner issued a decision in which he approved the proposed contract form with certain modifications. The matter is before us on exceptions to that decision filed by all parties.

The entire subject of dual rate contracts was extensively treated in our recent report in *The Dual Rate Cases* (issued March 27, 1964). In that report we approved with modifications all dual rate contracts then in use under the terms of section 3 of Public Law 87–346 (75 Stat. 762). Respondents here have made no showing of circumstances peculiar to their trade which would make inapplicable our reasoning and conclusions in *The Dual Rate Cases*. We refer to that report and find it unnecessary to restate our previous findings and conclusions here. There are, however, several matters raised by the exceptions to the Examiner's decision which bear some reemphasis.

The principal exception to the Examiner's decision was advanced by both intervenors and by hearing counsel. Those parties argued that the Commission should modify the contract to permit less than full shipper commitment, because the exclusive patronage aspect of the contract was detrimental to the commerce of the United States and contrary to the public interest. Neither the intervenors nor hearing counsel, however, provided any rationale for such a finding, and the exception is overruled. Hearing counsel would have the Commission approve a fixed percentage, yet no suggestion was made as to what percentage would be appropriate. In the absence of proposed findings or a basis on which to construct such findings, we find the exception untenable. Here, as in *The Dual Rate Cases* we are approving a contract which requires the merchant to promise the conference *all* his patronage, subject, of course, to the conditions and exclusions required to be contained in all contracts.

The respondent conference excepted to the Examiner's approval of the legal right clause (clause *2*(*e*)) which raises only a *prima facie* presumption that the shipper has the legal right when his name appears on the bill of lading or when he participates in the arrangements for selection of a carrier. As we said in our previous opinion,

> Many of the proposed contracts contain language which would raise a conclusive presumption that the signatory merchant had the legal right to select the carrier if his name appeared on certain shipping documents or if he otherwise participated in the ocean routing or the selection of the ocean carrier. While we agree that these circumstances may suggest that the merchant has the legal right to select the carrier, the statute does not appear to permit such circumstances, and nothing more, to prove conclusively legal right to select the carrier. In short, the statute does not appear to permit a presumption here which would preclude the proof of the true situation. (*The Dual Rate Cases*, mimeo rept. p. 18)

The legal right clause which we have approved contains a *prima facie*, and not a conclusive, presumption.

Arabian American Oil Co., one of the intervenors, excepted to the Examiner's approval of two clauses involving reporting requirements and the furnishing of documents. These two clauses were articles 2(c) and 2(d) in the contract as approved by the examiner. We have approved substantially similar clauses, as articles 2(g) and 2(h). Article 2(g) allows the merchant the option of furnishing documents to the conference or allowing inspection of the documents on the premises of the merchant. This clause was approved by the panel of examiners in docket No. 1111 and was affirmed by us in our prior decision in *The Dual Rate Cases*. As we have previously said, the clause strikes a fair balance between carrier and merchant interests. We have likewise included as article 2(h) the "notice of shipment" clause formulated by the panel of examiners in our docket No. 1111 and which we approved for all other dual rate contracts.

The exceptions of both Dow Chemical and Arabian American Oil Co. on the issue of exclusions from contract coverage have been dealt with in article 3. This article excludes from contract coverage "shipments on vessels owned by the merchant or chartered solely by the merchant where the term of the charter is for 6 months or longer, and the chartered vessels are used exclusively for the carriage of the merchant's commodities." Our previous reasoning is again applicable here: "By limiting this [exclusion] to charters for periods of some duration, the conferences are accorded reasonable protection from spot raiding of cargoes and merchants accorded the right to engage in bona fide proprietary carriage under reasonable conditions." (*The Dual Rate Cases*, mimeo rept., p. 35.) In conformance with our Order on Reconsideration in North Atlantic Westbound Freight Association—Exclusive Patronage (Dual Rate) Contract, docket No. 1059 (served Aug. 3, 1964), the exclusion has been worded so as to make it clear that chartered vessels are limited to the carriage of the merchant's owned cargo.

Respondents excepted to the Examiner's change in the "prompt release" period of clause 4 from 15 to 10 days. In making this change the examiner stated:

> The shipper witnesses testified that the 15-day period would not permit shippers to fill the orders of customers in the time required by the customers on some occasions. Of greater importance is the fact that this conference is composed of only a minority of carriers in this trade and therefore the occasions upon which they will be unable to accommodate the contract shippers may arise more frequently than in other trades. While this is not certain to happen, the shippers should be protected from the possibility of it. In order to meet the shipper objections to joining a dual rate system offered by such a minority conference, the release clause must necessarily be more favorable to shippers in order to be reasonable within the meaning of the statute. (Initial decision, pp. 5–6)

We find the examiner's reasoning in this regard to be sound, and we affirm his modification of the 15-day period to one of 10 days.

We have approved a clause on open rates which is identical with the clause approved in *The Dual Rate Cases* and which was originally formulated by the Examiners in docket No. 1111. The clause as approved provides flexibility to the conference, which is particularly important in the instant case, and protects the merchants by requiring notice to the merchant of a return of a commodity to the contract rate system. The clause, in effect, strikes a balance between both interests.

As regards the conference's exception to the breach of contract clause approved by the examiner, we have affirmed the examiner's clause. This clause was formulated by the panel of examiners in docket No. 1111, and it is, as they said in their initial decision, just and equitable and "imposes no unfair burden on shipper or conference, and should be acceptable to both." (Initial decision, docket No. 1111, p. 88.)

Both respondent conference and hearing counsel excepted to the inclusion of the language "which does not lie within the jurisdiction of the Federal Maritime Commission" in the arbitration clause. We are not approving the examiner's clause and, instead, are approving for optional use by the conference the following statement to be added to the arbitration clause: "Nothing herein shall deprive the Federal Maritime Commission of its jurisdiction." In this connection and in consonance with our recent "Order Granting the Deletion of Certain Clauses" in *The Dual Rate Cases* (served July 31, 1964), we are also approving for optional use by the conference certain other language which has been bracketed in the appendix attached hereto. The affected articles are Nos. 2(g), 7(a), 7(c), 13, 14, and 16. If the option to delete the bracketed language in article 2(g) is exercised, the following substitute language will be required:

"and there shall be no disclosure of such information without the consent of the merchant except that nothing herein shall be construed to prevent the giving of such information (1) in response to any legal process issued under the authority of any court, or (2) to any officer or agent of any government in the exercise of his powers, or (3) to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or (4) to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers, or (5) to arbitrators appointed pursuant to this agreement."

In any event, if any or all of these options are exercised by the conference, full copies of the contract form as so amended must be filed with the Commission within 30 days following such amendments.

We have set out as an appendix hereto the full text of the contract as modified and approved.

COMMISSIONER PATTERSON, CONCURRING AND DISSENTING:

The application of the Persian Gulf Outward Freight Conference, a conference of common carriers in foreign commerce, for permission to use a "Merchant's Rate Agreement" has been adjudicated in accordance with the precedural requirements of section 14b of the Shipping Act, 1916, as amended.

Based on an examination of the proposed standard form of contract between the Conference and shippers for shipments on its members' vessels, and of the facts pertaining to the particular trade described in the record herein, it is found:

1. The Merchant's Rate Agreement will be available to all shippers and consignees on equal terms and conditions.

2. The Merchant's Rate Agreement provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to the conference.

3. The contract rate system proposed by the conference, including the form of contract, will not be detrimental to the commerce of the United States, nor contrary to the public interest, nor unjustly discriminatory or unfair as between shippers, exporters, importers or ports, or as between exporters from the United States and their foreign competitors.

4. The Merchant's Rate Agreement contains the express provisions prescribed by items (1) through (8) of section 14b.

5. The Merchant's Rate Agreement contains other provisions which are not inconsistent with the aforesaid prescribed provisions and which the Commission should require or permit.

Accordingly, I concur that we should permit the use of the Merchant's Rate Agreement to the extent indicated in my concurring and dissenting opinion in *The Dual Rate Cases*, dated March 30, 1964.

For the reasons stated in my opinion of March 30, 1964, I dissent from the majority's action in prescribing modifications in the Merchant's Rate Agreement.

It is the better policy and in line with congressional intent in enacting section 14b that we permit differences in circumstances prevailing in trading routes all over the world to be accommodated as far as possible in diverse contract provisions. There may be merit in striving to draft the best possible contract provisions and then to condition our permission on the use of our contract provisions; however, such an effort is not consistent with the statutory plan. The law does not require the Commission voluntarily to endeavor to conceive the best possible provisions nor to take up the burden of achieving an ideal solution to all contract drafting problems.

It is also beyond the duty or authority of the Commission to prescribe modifications without finding the applicant's particular provisions do not meet the requirements of section 14b. The mandate of section 14b is that the Commission shall permit the use of a contract if the contract is found to comply with the first three conditions noted above and to contain the eight express provisions and such other provisions as do not conflict with section 14b. The applicant's Merchant's Rate Agreement has been compared with the law and found to conform. An order should be issued granting the conference permission to use the proposed dual rate system and contract as proposed in the application from and after the date of the Commission's order.

220-178 O - 66 - 21

FEDERAL MARITIME COMMISSION

No. 1079

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE
EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

ORDER

Full investigation in this proceeding having been had and the Commission on this day having made and entered of record a report stating its findings and conclusions thereon, which report is hereby referred to and made a part hereof, and having found that the Exclusive Patronage (Dual Rate) contract of the Persian Gulf Outward Freight Conference submitted to the Commission should be approved with modifications made by the Commission:

Now, therefore, It is ordered, That the aforesaid contract of the Persian Gulf Outward Freight Conference, as modified and set out in appendix A to the aforesaid report, is permitted for use by the said Conference.

It is further ordered, That the Persian Gulf Outward Freight Conference shall file with the Commission a copy of the full terms of the contract it offers to shippers and or consignees within 30 days from the day that the contract is first offered.

By the Commission,

FRANCIS C. HURNEY,
Special Assistant to the Secretary.

APPENDIX A

APPROVED AGREEMENT FORM—DOCKET NO. 1079

Agreement No.______

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE

Eleven Broadway, New York 4, N.Y.

Merchant's Rate Agreement

MEMORANDUM of Agreement entered into at this day of 19 , by and between (hereinafter called the Merchant) a (corporation), (partnership) having (its), (his) principal place of business at and the Carriers who are parties to Federal Maritime Commission Agreement No. 7700, as amended, providing for the Persian Gulf Outward Freight Conference (hereinafter called the "Conference" or the "Carriers").

For their mutual benefit in the stabilization of rates, services, and practices and for the development of international maritime commerce in the trade defined in Article 1 of this Agreement, the parties hereby agree as follows:

1. The Conference undertakes, throughout the period of this Agreement, to maintain common carrier service which shall, so far as concerns the frequency of sailings and the carrying capacity of the vessels of the Carriers be adequate to meet all the reasonable requirements of the Merchant for the movement of goods in the trade from U.S. Atlantic and Gulf ports to ports in the Persian Gulf and adjacent waters in the range west of Karachi and northeast of Aden (but excluding both Aden and Karachi) (hereinafter called the "trade"); and the Carriers further agree that, subject to the availability of unbooked suitable space in the vessels of the Carriers at the time when the Merchant applies therefor, said vessels shall transport the goods of the Merchant in the trade upon the terms and conditions herein set forth. Ports from and to which service is offered by the Carriers shall be set forth in the Conference tariff.

2. (a) The Merchant undertakes to ship or cause to be shipped all of its ocean shipments moving in the trade on vessels of the Carriers unless otherwise provided in this Agreement.

The term "Merchant" shall include the party signing this Agreement as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this Agreement and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Merchant", any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this Agreement and be fully bound thereby, are listed at the end of this Agreement. The party signing this Agreement as "Merchant" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this Agreement on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its shipments to the vessels of the Carriers the Merchant promises and declares that it is his intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Merchant.

The Carriers agree that they will not provide contract rates to anyone not bound by a Merchant's Rate Agreement with the Carriers. The Merchant agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this Agreement, by making shipments under this Agreement on behalf of any such person.

(b) If the Merchant has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Merchant shall select one or more of the Carriers.

(c) If Merchant's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Merchant to select the carrier, Merchant shall be deemed to have the legal right to select the carrier.

(d) It shall be deemed a breach of this Agreement, if before the time of shipment, the Merchant, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(e) For the purposes of this Article, the Merchant shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment:

(1) with respect to which the Merchant arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

(2) with respect to which the Merchant's name appears on the bill of lading or export declaration as shipper or consignee.

(f) Nothing contained in this Agreement shall require the Merchant to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

(g) In order that the conference may investigate the facts as to any shipment of the Merchant that has moved, or that the Merchant or the conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Merchant, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Merchant where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the merchant [and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916].[1]

(h) Within ten (10) days after the event in any transaction in which the Merchant is a party and the legal right to select the carrier is vested in a person other than the Merchant, and if he has knowledge that the shipment has been made via a nonconference carrier, the Merchant shall notify the conference in writing of this fact, giving the names of the merchant and his customer, the commodity involved and the quantity thereof, and the name of the nonconference carrier; *Provided, however*, That where the activities of Merchants are

[1] Optional, but see the foregoing Commission report for required substitute language.

so extensive in area or the nature or volume of his sales makes it impracticable to give notice within ten (10) days, the Merchant shall give notice as promptly as possible after the event.

3. This Agreement excludes: (1) cargo of the Merchant which is loaded and carried in bulk without mark or count except liquid bulk cargoes (other than chemicals and petroleum products) in less than full ship load lots; (2) shipments on vessels owned by the Merchant or chartered solely by the Merchant where the term of the charter is for six months or longer, and the chartered vessels are used exclusively for the carriage of the merchant's commodities; and (3) shipments of cargoes for which no contract rate is provided.

4. The Merchant shall have the option of selecting any of the vessels operated by any of the Carriers. The Merchant agrees to request space with the carrier he desires as early as practicable and not less than five (5) days before the earliest date he wishes to have the cargo loaded aboard the vessel. The Merchant shall not be obligated to select a Conference carrier or carriers for any shipment which the Carriers cannot suitably accommodate within a ten (10) calendar day period requested by the Merchant for loading: *Provided, however,* that the Merchant shall first promptly notify the Conference of such unavailability of space and if within two (2) business days after receipt of such notice, the Conference shall not have advised the Merchant that his entire shipment can be suitably accommodated by a vessel or vessels (if the merchant by contract is obligated to make the shipment on a single vessel, suitable space shall be provided on a single vessel) of the Carriers within said ten (10) calendar day period, the Merchant shall be free with respect to such shipment to secure space elsewhere within a reasonable time.

5. This Agreement does not require the Merchant to divert shipments of goods from natural transportation routes not served by conference vessels where direct carriage is available. *Provided, however,* that where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Merchant shall be obligated to select the carriers' service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Merchant intends to assert his rights under this article, to use a carrier who is not a party hereto, and the port through which Merchant intends to ship or receive his goods is within the scope of this Agreement, Merchant shall first so notify the conference in accordance with the provisions of Article 4 hereof.

6. The rates applicable to shipments made under this Agreement shall be the contract rates in effect at the time of shipment as set forth in the tariff published by the Carriers and on file with the Federal Maritime Commission. Contract rates on every commodity or class of commodities shall be lower than the non-contract rates set forth in the Carriers' tariff by a fixed percentage of fifteen (15) per centum of the non-contract rates. In order that both the contract and non-contract rates may be stated in multiples of tweny-five (25) cents per revenue ton (or other customary shipping unit such as M.B.F. or per individual unit) or five (5) cents per hundred pounds or per cubic foot, the rates may be rounded out to the nearest twenty-five (25) cents per revenue ton or unit or five (5) cents per hundred pounds or cubic foot, as the case may be (not including additional handling or accessorial charges), which will not result in the difference between the rates exceeding fifteen (15) per cent of the non-contract rates.

7. (a) [The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results in an increase or decrease in cost to the Merchant, except as provided by Section 18(b)(2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however,*][2] the rates of freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance of the increases by publishing them ninety (90) calendar days in advance in the Persian Gulf Outward Freight Conference Tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the Merchant, the Merchant may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid, of the proposed increase: *Further provided, however*, that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the Merchant in writing that they elect to continue this Agreement under the existing effective rates and in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the Merchant's notice of termination had never been given.

(b) The Conference shall offer to the Merchant a subscription to its tariffs at a reasonably compensatory price, however, the Merchant shall be bound by all notices accomplished as aforesaid without regard to whether it subscribes to the Conference tariff. Tariffs shall be open to the Merchant's inspection at the Conference offices and at each of the offices of the Carriers during regular business hours.

(c) The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date [through filing with the Federal Maritime Commission][2] rather than to have become effective with the signing of this Agreement and notices of proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this Agreement.

(d) The Merchant and the Carriers recognize that mutual benefits are derived from freedom on the part of the Carriers to open rates, where conditions in the Trade require such action, without thereby terminating the dual-rate system as applicable to the commodity involved; therefore, it is agreed that the Conference, to meet the demands of the Merchants and of the Trade may suspend the application of the contract as to any commodity through the opening of the rate on such commodity (including opening subject to maximum or minimum rates) provided that none of the Carriers during a period of ninety (90) days after the date when the opening of such rate becomes effective shall quote a rate in excess of the Conference contract rate applicable to such commodity on the effective date of the opening of the rate and provided further that the rate shall not thereafter be closed and the commodity returned to the application of the contract system on less than ninety (90) days' notice by the Carriers through the filing of contract-non-contract rates in their tariff.

8. (a) The Merchant may terminate this Agreement at any time without penalty upon the expiration of ninety (90) days following written notice to the Conference of intent to so terminate: *Provided, however*, that the Merchant

[2] Optional.

may terminate this Agreement upon less than said ninety (90) days' notice pursuant to Article 7(a) hereof.

(b) The Conference may terminate this Agreement at any time without penalty upon the expiration of ninety (90) days following written notice to the Merchant of intent to terminate the Conference Contract Rate System.

(c) Termination as provided in this Article shall not abrogate any obligation of any party or parties to any other party or parties hereto which shall have accrued prior to termination.

9. (a) In the event of breach of this Agreement by either party, the damages recoverable shall be the actual damages determined after breach in accordance with the principles of contract law: *Provided, however*, that where the Merchant has made or permitted a shipment on a vessel of a carrier not a party hereto in violation of this Agreement, and whereas actual damages resulting from such a violation would be uncertain in amount and not readily calculable, the parties hereby agree that a fair measure of damages in such circumstances shall be an amount equal to the freight charges in effect at the time of such shipment computed at the Carriers' contract rates on the particular shipment, less the estimated cost of loading and unloading which would have been incurred had the shipment been made on a vessel of a Carrier party hereto. Such amount, and no more, shall be recoverable as liquidated damages.

(b) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within 30 days after receipt of notice by registered mail from the Conference that they are due and payable the Conference shall suspend the Merchant's rights and obligations under the contract until he pays such damages. If, within 30 days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within 30 days thereafter proceed in accordance with Article 14, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within 30 days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages. No suspension shall abrogate any cause of action which shall have arisen prior to the suspension. Payment of damages shall automatically terminate suspension. The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within 10 days after the event.

10. This Agreement and any shipments made thereunder are subject to all terms, provisions, conditions and exceptions of the then current conference tariff on file with the Federal Maritime Commission and of the permits, dock receipts, bills of lading and other shipping documents regularly in use by the individual Carriers and to all laws and regulations of the appropriate authorities.

11. Receipt and carriage of dangerous, hazardous or obnoxious commodities shall be subject to the special facilities and requirements of the individual Carrier.

12. The Conference shall promptly notify Merchant of changes in the Conference membership, and any additional carriers which become members of said Conference shall thereupon become parties to this Agreement, and the Merchant shall thereupon have the right to avail itself of their services under the terms of this Agreement. Any Carrier, party to this Agreement, which for any reason ceases to be a member of the Conference shall not be a party to or participate in this Agreement and the Merchant shall not be entitled to ship over said Carrier under this Agreement after such Carrier ceases to be a member of the Conference or after having thirty (30) days' written notice of the termination

of such Carrier's membership whichever is later. The Merchant may, at any time after notice that a Carrier has ceased to be a member of the Conference, cancel without penalty any forward booking with such withdrawing Carrier which was outstanding at the time such Carrier ceased to be a member.

[13. This Agreement shall be carried out in accordance with the provisions of the Shipping Act, 1916, and the rules of the Federal Maritime Commission promulgated pursuant to said Act.] (Article optional)

14. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be promptly submitted to arbitration at New York, N.Y., before an arbitration committee consisting of three (3) persons, one to be appointed by the Carriers, one by the Merchant or Merchants who shall be parties to the dispute, and one by the two so chosen or if they cannot agree, the third arbitrator shall be named by the American Arbitration Association. All of the arbitrators shall be commercial men. Either party may call for such arbitration by mailing to the other a written notice, specifying the name and address of the arbitrator chosen by it and a brief description of the controversy or claim to be arbitrated. If the other party shall not by a reply mailed within thirty (30) calendar days of the mailing of the first party's notice, appoint its arbitrator, then the second arbitrator shall be appointed by the American Arbitration Association. Each of the parties shall make available to such arbitration committee all information and data requested by it in connection with the subject matter of the controversy or claim. The decision in writing of two or more members of said committee of three, acting jointly throughout the arbitration, shall be binding on the respective parties, and any award shall be paid within thirty (30) calendar days after a copy of the decision has been mailed by the arbitrators to the party held liable, failing which judgment upon the award may be entered in any court having jurisdiction. [*Provided, however*, nothing herein shall deprive the Federal Maritime Commission of its jurisdiction.] [2] In any arbitration proceeding, including enforcement of any award, service of any and every notice and other paper may be made outside of the State of New York by registered mail, telegraph or cable with the same force as if made personally within said State. In each case of such service, reasonable time shall be allowed for response to the notice or other paper served.

15. (a) In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the Carriers in the trade covered by this Agreement, the Carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the Merchant of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by the Carriers, said Carriers shall forthwith reassume their rights and obligations hereunder and notify the Merchant on fifteen (15) days' written notice that the suspension is terminated.

(b) In the event of any of the conditions enumerated in Article 15(a), the Carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than 15 days' written notice to the Merchant, who may notify the Carriers in writing not less than 10 days' before increases are to become effective of its intention to suspend this Agreement insofar as such increase or increases is or are concerned, and in such event the Agreement shall be suspended as of the

[2] Optional.

effective date of such increase or increases, unless the Carriers shall give written notice that such increase or increases have been rescinded and cancelled.

(c) In the event of any extraordinary conditions not enumerated in Article 15(a), which conditions may unduly impede, obstruct, or delay the obligations of the Carriers, the Carriers may increase any rate or rates affected thereby in order to meet such conditions; provided, however, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The Merchant may, not less than 10 days' before increases are to become effective, notify the Carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the Carriers shall give notice that such increase or increases have been rescinded and cancelled.

[16. This Agreement may be amended from time to time subject always to the permission of the Federal Maritime Commission.] (Article optional)

For and on behalf of the Members of the Persian Gulf Outward Freight Conference

By --------------------

Secretary

Merchant

By --------------------

(Address of Merchant)

FEDERAL MARITIME COMMISSION

DOCKET NO. 1168

APPLICATION FOR FREIGHT FORWARDING LICENSE
LOUIS APPLEBAUM, 8–10 BRIDGE ST., NEW YORK, N.Y.

Decided September 24, 1964

Application of Louis Applebaum for freight forwarding license denied.

A partner in a firm primarily engaged in the business of selling and shipping goods to foreign countries does not qualify as an independent ocean freight forwarder as defined in Public Law 87–254 and cannot be licensed.

S. Robert Putterman for Applicant.
Gerald H. Ullman for New York Foreign Freight Forwarders and Brokers Association, Intervener.
Frank Gormley and *J. Scot Provan*, Hearing Counsel.
Herbert K. Greer, Hearing Examiner.

REPORT

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

This proceeding involves the application of Louis Applebaum for a license to operate as an independent freight forwarder under the provisions of section 44 of the Shipping Act, 1916 (46 U.S.C. 841(b)). In an initial decision the hearing examiner concluded that because the applicant was a partner in a firm primarily engaged in the business of selling and shipping goods to foreign countries, he could not qualify as an independent freight forwarder within the meaning of section 1 of the Shipping Act, 1916 (46 U.S.C. 801). The proceeding is before us upon applicant's exceptions to the initial decision.

Applicant's exceptions are directed to the examiner's findings and conclusions regarding constitutionality of the statute and the nature of applicant's so-called grandfather rights. In essence they constitute nothing more than a reargument of the issues and contentions resolved by the examiner in his initial decision.

A careful consideration of the record leads us to the conclusion that the examiner's disposition of these issues was well founded and proper except to the extent that the examiner's decision could be read as conditioning the so-called "grandfather rights" upon an applicant's status as an "independent ocean freight forwarder" prior to the passage of Public Law 87–254. Under such a construction, all persons engaged in the business of freight forwarding prior to the passage of Public Law 87–254 would thereafter continue to operate only at their peril should they not qualify under the new legislation. We think it clear that Congress intended no such result and that all forwarders regardless of their status as "independents" were entitled to continue operations until otherwise ordered by the Commission if they complied with the other provisions of section 44(b).

Accordingly, and to the extent that it is not inconsistent with the foregoing, we adopt the initial decision (a copy of which is attached hereto and made a part hereof) as our own.

Attachment.

FEDERAL MARITIME COMMISSION

No. 1168

APPLICATION FOR FREIGHT FORWARDING LICENSE
LOUIS APPLEBAUM, 8–10 BRIDGE STREET, NEW YORK, N.Y.

Application of Louis Applebaum for freight forwarding license denied.

A partner in a firm primarily engaged in the business of selling and shipping goods to foreign countries does not qualify as an independent ocean freight forwarder as defined in Public Law 87–254 and cannot be licensed.

S. Robert Putterman for Applicant.

George H. Ullman for New York Foreign Freight Forwarders and Brokers Association, Intervener.

Frank Gormley and *J. Scot Provan*, Hearing Counsel.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER [1]

Louis Applebaum (applicant) filed an application for a license as an independent freight forwarder pursuant to section 44 of the Shipping Act, 1916 (Public Law 87–254, 46 U.S.C. 841(b)). The Federal Maritime Commission (Commission) having considered the application, advised applicant that it intended to deny his application because as owner of a firm engaged in the export of housewares, hardware, plumbing and furniture, he could not qualify as a person eligible for licensing within the statutory definition of "independent freight forwarder." Applicant requested an opportunity to show that denial of his license would not be warranted and this proceeding was instituted to afford him that opportunity.

THE FACTS

1. Applicant is, and has been for approximately 30 years, engaged in the general exporting business, selling to customers in foreign countries, mainly in the Caribbean area, and dispatching shipments of goods which he owns or in which he has an interest.

[1] This decision became the decision of the Commission on Sept. 24, 1964 and an order was issued denying the application. (Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224, 502.228.)

2. The exporting business is conducted under the trade name of Mercury Sales and Export Co. (Mercury), a partnership owned by applicant and his wife; his wife does not actively participate in the business.

3. In the conduct of his exporting business, applicant gravitated into forwarding activities because of customer complaints that forwarding fees were excessive. On January 13, 1954, Certificate of Registration No. 1689, was issued to him by the Federal Maritime Board, predecessor to the Commission.

4. The main office of Mercury is located at 8–10 Bridge Street, New York City. Applicant operates a freight forwarding business at the same location under the name of Louis Applebaum, utilizing Mercury personnel, recording his business activities on Mercury books, and using the same banks and books of account.

5. Applicant does not collect a forwarding fee from purchasers of his products but renders this service as a means of establishing good will; however, with respect to freight forwarding services which he performs on other cargo, he does collect a "reasonable" fee. Brokerage on shipments handled by applicant is collected by him from carriers on both types of shipments.

6. Mercury's export business grosses approximately $500,000 per annum, 50 percent of which applicant attributes to the good will generated by the forwarding services rendered by him to his customers. Inability to dispatch shipments for his customers would, in applicant's estimation, result in a net loss of $15,000 to $18,000 per annum.

7. Applicant's gross income from brokerage is approximately $2,500 per annum and gross income from forwarding is approximately $1,500 per annum.

Discussion

Applicant takes the position that the intent and purpose of the Shipping Act, 1916, is to allow a person who is fully competent, qualified, honest, fit, willing and able, to operate as a freight forwarder although his basic occupation is that of shipping, as long as the combined operation is in furtherance of the development of foreign commerce. To support this premise, he argues that Public Law 87–254, amending the Shipping Act, is unconstitutional.

This is not the proper forum for determination of the constitutionality of the statute. The Commission is an administrative agency and is without authority, inherent or express, to consider the constitutionality of a statute under which it operates. It derives its authority from Congress and must act in accordance with congressional direction. Davis, Administrative Law Treatise, page 74; *Panitz* v. *District of Columbia*, 112 F. 2d 39 (1940).[2]

The Commission, being bound by the direction of Congress, will apply the statute in accordance with its terms. Public Law 87-254, in pertinent part, provides:

"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 indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest."

"SEC. 44 (a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business: *Provided, however,* That a person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license."

"(b) 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 and is fit, willing, and able 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, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied. Any independent ocean freight forwarder who, on the effective date of this Act, is carrying on the business of forwarding under a registration number issued by the Commission may continue such business for a period of one hundred and twenty days thereafter without a license, and if application for such license is made within such period, such forwarder may, under such regulations as the Commission shall prescribe, continue such business until otherwise ordered by the Commission."

The basic issue for decision is whether applicant comes within the prohibitions stated in the definition of independent ocean freight forwarders. In relating the facts adduced to the definition, there is no doubt that applicant is not, and does not intend to become, an independent forwarder. His principal occupation is selling and shipping to foreign countries and there is no ambiguity in the statutory prohibition against issuing a license to "a shipper or consignee or a seller or purchaser of shipments to foreign countries." Applicant does not seriously contend that he is eligible to be licensed in the absence of a determination that the statute is unconstitutional. Apparently, he considers this proceeding mainly as a prerequisite to submitting the question of constitutionality to the courts.

---

[2] See also the following agency decisions:
In re Becker (Becker Fruit & Produce Co.), 7 Ad L (2d) 151.
Blanton Co., 6 Ad L (2d) 736.
Curtis C. Wilson, 5 Ad L (2d) 247.
In the Matter of Moog Industries, Inc., 5 Ad L (2d) 138.
In re Edward R. Byer, et al., 4 Ad L (2d) 729.
In re Great Western Distributors, Inc., et al., 1 Ad L (2d) 592.
Air Transport Associates, Inc.—Enf. Proc., 1 Ad L (2d) 537.

The Commission is precluded from issuing a license unless it affirmatively finds "that the applicant is, or will be, an independent ocean freight forwarder as defined in this Act." Under the facts here presented, such a finding cannot be made. The statute makes clear that Congress intended to eliminate any connection between shippers and forwarders. If the wording of the statute permitted any doubt, it would be resolved by reference to the Legislative History of Public Law 87-254:[3]

> "This would make it clear that *all* shippers, consignees, sellers, purchasers, and carriers of ocean export cargoes are to be prohibited from obtaining a license regardless of whether these groups forward only their own cargoes or the cargoes of others." [Emphasis supplied.]

Applicant may, of course, dispatch shipments of the merchandise he sells without a license because his primary business is the sale of merchandise although the nature of his primary business prevents obtaining a license.

In addition to questioning the constitutionality of the statute, applicant has raised the question of whether denial of a license would be a constitutional application of the statute in view of the fact that he had been a "grandfather" forwarding agent and is entitled to "grandfather" rights which permit him to continue his forwarding activities. He relies on that portion of section 44(b) (above fully set forth) which permits "Any independent ocean freight forwarder who, on the effective date of this Act, is carrying on the business of forwarding under a registration number issued by the Commission" to continue to so operate for 120 days, and if his application for a license is filed within that period, to continue to operate "until otherwise ordered by the Commission." This provision does not authorize nor permit the Commission to issue a license to every forwarder who is the holder of a certificate. It does not recognize operating rights as being vested by virtue of the issuance of a certificate but merely permits *independent* ocean freight forwarders to continue their operation for a limited period of time during which application for a license must be presented together with evidence to prove qualification in accordance with the statutory requirements. This provision is not, in the true sense, a "grandfather clause." *Republic Carloading and Distributing Co., Inc., Freight Forwarder Application*, 250 I.C.C. 670 (1943). Moreover, the clause referred to grants permission to temporarily continue in business only to independent ocean freight forwarders. Inasmuch as applicant does not qualify as an independent forwarder under the statutory definition, he could not rely on the benefits limited to that category. *Gregg Cartage Co.* v. *U.S.*, 316 U.S.

[3] H. Rpt. 2333, 85 Cong., 2d sess. pp. 8-9.

75 (1942). The question of whether he has been operating illegally since the effective date of Public Law 87–254 has not been presented for decision. There is no question that applicant, as a partner in Mercury, owns or has an interest in Mercury shipments.

Conclusion

Applicant is a shipper and seller of shipments to foreign countries and is not eligible to be licensed as an independent freight forwarder under the provisions of Public Law 87–254.

An appropriate order denying the application will be entered.

(Signed) Herbert K. Greer,
Presiding Examiner.

June 24, 1964.

FEDERAL MARITIME COMMISSION

No. 1168

APPLICATION FOR FREIGHT FORWARDING LICENSE
LOUIS APPLEBAUM

AMENDED ORDER

The Commission having fully considered the above matter and having on September 24, 1964, made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the application for a license of Louis Applebaum is hereby denied, pursuant to Section 44(b), Shipping Act, 1916, and Rule 510.8 of General Order 4.

It is further ordered, That this order shall be effective as of December 31, 1964.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 881

GENERAL INCREASES IN ALASKAN RATES AND CHARGES

ORDER DISCONTINUING PROCEEDING AS TO RESPONDENT, ALASKA STEAMSHIP CO. AND DISMISSING PETITIONS FOR RECONSIDERATION

Order served October 16, 1964

On July 13, 1964, the Commission considered the petitions for reconsideration, briefs, and the transcript of oral argument held before the Commission. Present were John Harllee, *Chairman*, James V. Day, *Vice Chairman*, Ashton C. Barrett and John S. Patterson, *Commissioners*, being all the members of the Commission.* Chairman Harllee and Vice Chairman Day voted to reverse the prior decision of the Commission, for the reasons stated in their separate opinion attached hereto, and Commissioners Barrett and Patterson voted to affirm the prior decision for the reasons stated in their separate opinion also attached.

Reorganization Plan No. 7 of 1961 requires the affirmative votes of three Commissioners then in office to transact any business of the Commission, and as the proposal to reconsider the Report and Order previously entered and to set aside the increased rates under investigation has failed to obtain the necessary three votes,

It is ordered, That this proceeding be discontinued as to the respondent Alaska Steamship Co. and that the petitions filed by General Services Administration and the State of Alaska to reconsider the prior Report and Order and to set aside the increased rates under investigation be, and they are hereby, dismissed.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

**Commissioner* George H. Hearn was not a member of the Commission at the time.

FEDERAL MARITIME COMMISSION

No. 881

GENERAL INCREASES IN ALASKAN RATES AND CHARGES

October 16, 1964

John Harllee, *Chairman*, and James V. Day, *Vice Chairman:*

In our decision dated April 30, 1963 (7 F.M.C. 563), we found that increased rates and charges of Alaska Steamship Co. were just and reasonable. In so doing, we overruled the Presiding Examiner who had disapproved these rates and charges insofar as they operated in the future. On July 19, 1963, the State of Alaska and the Administrator of General Services, intervenors in the proceeding who have opposed the rate increases, filed petitions for reconsideration of our decision in accordance with the provisions of Rule 16(b) of the Commission's Rules of Practice and Procedure, 46 CFR § 502.262. Petitioners generally contend that certain errors in our decision render that decision unsupportable as a matter of law and urge us to disapprove the increased rates and charges. On April 21, 1964, we ordered that the proceeding be reopened for the purpose of receiving briefs on the errors alleged in the petitions. Briefs were filed by intervenors, Hearing Counsel, and respondents. Oral arguments were heard on June 16, 1964.

The basis for our earlier decision was the acceptance of respondent Alaska Steamship Co's. estimate that it would carry 472,392 tons of cargo for the year 1960. On the basis of this traffic, we found that respondent would realize a rate of return of 9.07%. Such a return, we believed to be reasonable. The Examiner rejected respondent's 1960 projections and had found a more reliable estimate to be 511,000 tons. We acknowledged that the Examiner may have been correct (7 F.M.C. 573). However, we did not accept his projection as the better estimate because we felt that certain facts in the record showed the year 1960 to be better than average. We are now convinced that the record does not lead us to this conclusion and that the Examiner's estimate should be accepted.

There are three findings on which we relied to show that 1960 was not a representative year. These were: (1) An unprecedentedly large salmon pack in Bristol Bay in 1960; (2) a large movement of MSTS cargo during the summer and fall of 1960 following withdrawal of three naval ships from service in the Alaskan trade; (3) a surmise that additional income stemming from the large pack would generate increased northbound traffic. We have reviewed the record and are convinced that these findings of fact should be reversed. Our discussion with respect to each follows:

1. The Bristol Bay salmon pack:

The first finding on which we based our earlier opinion regarding the year 1960 was that the salmon pack in Bristol Bay would be exceptionally large in 1960. However true this might be, it is offset by many considerations. Respondent Alaska Steam serves virtually every area of Alaska. Bristol Bay is only one area out of many which provide respondent with salmon traffic. Any meaningful evaluation of respondent's operations pertaining to this cargo must consider that the carrier also carries salmon from vast areas in western, central, and southeastern Alaska. Evidence of record shows, for example, that despite the good fortune in Bristol Bay, the salmon run in southeastern Alaska was the lowest since records have been kept, and that the other salmon areas served by respondent showed increases which were not noteworthy. Indeed, considering the total salmon pack for all Alaska, respondent's witness estimated as of July 27, 1960, that 24,953 additional tons were available for carriage by Alaska Steam in 1960 over 1959. At 30 cases per revenue ton, this represents an estimated increase of 748,590 cases over 1959. The record shows that the 1959 total catch was the lowest since records were first kept in 1905, totaling 1,600,886 cases. If the 748,590 additional cases in 1960 are added to the 1959 total, then the 1960 total catch, aside from small amounts possibly available to other carriers, would amount to 2,349,476 cases. This, however, is hardly a memorable figure. The record shows that the average catch for the period 1905–59 is 2,885,965 cases. By respondent's own estimate, therefore, the total salmon catch for 1960 was probably below average.[1]

The record shows that the western Alaska salmon area, which includes Bristol Bay, the Yukon River, and North Peninsula, produced as of July 24, 1960, 1,011,677 cases of salmon. Although this exceeded the average catch for the previous 10 years, it is by no means un-

[1] The record provides an alternative method to evaluate the 1960 total catch and likewise shows the year to be below average. As of July 17, 1960, the total Alaskan catch was 1,460,653 cases. On July 19, 1959, the catch was 851,136. The 1960 catch was thus running 1.716 times over that of the previous year. The total 1959 catch turned out to be 1,600,886. The complete 1960 totals would therefore be 2,747,120 cases (1.716 × 1,600,886. Again, this is below the average for the years 1905–59, inclusive.

precedented. In western Alaska, the annual salmon pack exceeded 1,000,000 cases on 10 occasions between 1933 and 1948. In Bristol Bay alone, the salmon catch exceeded 1,000,000 cases in 1943, 1947, and 1948.[2] Respondent itself did not believe that the million-case catch would significantly augment its carryings. Although its traffic witness predicted an increase of 24,943 tons in the movement of canned salmon overall, he offset this by estimated declines in military traffic and commercial cargo northbound. Despite the size of the Bristol Bay catch, therefore, he estimated a net increase of 11,392 tons, a mere 2.5% over the previous year.

Regardless of what support the record contains for our prior decision as to the significance of the 1960 Bristol Bay salmon pack, upon our review of the record we now believe the factors hereinabove discussed lead to the conclusion that the total salmon catch would not serve to make 1960 an exceptional year.

2. MSTS cargo movement:

The second finding we made with respect to 1960 being an exceptional year was the supposed fact that a large movement of MSTS cargo during 1960 resulted after the Navy had withdrawn three ships from service in the Alaska trade (7 F.M.C. at 574). We have reviewed the record and find reference therein to the withdrawal of one naval vessel, the U.S.N.S. *Harris County*, which occurred sometime after June 20, 1960. Alaska Steam's witness testified that with the naval vessel withdrawn, Alaska Steam carried all of the privately owned vehicles of military personnel and their families, that its MSTS tonnage for the first 5 months of 1960 increased, and that it appeared that increased tonnage was going to continue. The witness further testified, however, that he knew the naval ship was expected to be returned to the trade probably late in September and predicted that with her return and with her carrying all she could load he believed that his original forecast should be amended to indicate that Alaska Steam would carry in 1960 approximately the same tonnage as in 1959. The record does not refute this prediction. Hence, we view this testimony, disregarding respondent's statements about the withdrawal of several naval ships inadvertently incorporated in our prior decision, as sufficient support for our now concluding that military cargoes temporarily diverted to Alaska Steam would be minimal and the effect on respondent's overall 1960 operations insignificant.

3. Unusual northbound movement to Bristol Bay:

The third basis for our earlier decision with respect to the estimated 1960 operations of Alaska Steam is the surmise that an exceptionally

[2] In 1943, 1947, and 1948 the salmon catch out of Bristol Bay numbered 1,275,081; 1,335,031; and 1,236,226 cases, respectively.

large salmon pack out of Bristol Bay would by creating added income generate an increase in northbound cargoes (7 F.M.C. at 574). As we stated, this is merely a surmise.

The record shows that the income of fishermen in the Bristol Bay ranged from $20,000 to $53,000 for 1 month's work; that the large catch was "rather nice news" to Alaska Steam; and that when the catch is bad in the area, those people "don't buy refrigerators or automobiles" which Alaska Steam could hope to carry. There is not enough in the record, however, by which we can determine whether income of such size is unusually large in comparison with previous years, and we are unable to evaluate the other statements without engaging in additional speculation. We conclude on reconsideration that there is insufficient evidence to indicate that an unusually large movement of northbound cargo to Bristol Bay would, in fact, occur as the result of an exceptional catch of salmon in that region during 1960.

We believe that the foregoing findings amply demonstrate 1960 not to be an exceptional year. Significantly, Alaska Steam's traffic witness, after considering the Bristol Bay catch and MSTS cargo, adhered to a prediction of 472,392 tons. This amount is a mere 11,000 tons over the previous year's actual tonnages, and is considerably below the average tonnages for the 5-year period, 1955–59.[3]

Aside from the consideration of the foregoing factors, however, there is other evidence of record to support the Examiner's 1960 projection. Respondent maintains that 511,000 tons is too optimistic. However, the record shows an increasing trend of northbound carryings. Total tonnage carried for the first 7 months of 1960 reflected an increase of 12.6% over an equivalent period in 1959. Salmon, which is the principal southbound cargo of respondent had been unusually low in 1959 insofar as Bristol Bay was concerned, but this does not represent a trend, and the catch rebounded to healthy levels in 1960. A final factor which supports the reasonableness of the Examiner's estimate is the improvement of respondent's service. The record discloses that Alaska Steam substantially increased its voyages in 1960. Additional service to the rail belt area was initiated in May 1959, more particularly with respect to containerization. Service to southeastern Alaska was increased as well. Respondent hoped to attract additional cargo by means of these changes, yet its pessimistic 1960 projection apparently ignored this consideration. We believe that the record supports the Examiner's conclusions with respect to his 1960 projection.

---

[3] The average for the period 1955–59 is 490,462 tons based on the following actual operating results: 1955, 514,301; 1956, 532,214; 1957, 481,411; 1958, 482,202; 1959, 461,000.

CHARITABLE CONTRIBUTIONS

In our earlier decision, we allowed as an operating expense deposits in the Skinner Trust (7 F.M.C. at 576). The Trust was shown to be a depositary of charitable donations and recipients therefrom are all worthy objects of charitable contributions. The Examiner had disallowed such contributions, stating:

> While the contributions shown above by Alaska Steam, and similar contributions by its affiliates, are for a laudable purpose, they cannot be deemed to be operating expenses chargeable to the Alaskan trade, since to do so would impose upon the shipping public a double burden of meeting not only their own civic responsibilities but those of the contributors to Skinner Foundation Trust as well. The donations must therefore be disallowed as operating expense (Initial Decision, p. 19).

Intervenors and Hearing Counsel urge us to adopt the Examiner's position in this regard. Upon reconsideration, we feel that he was correct, and we concur with his reasoning. Charitable donations, however worthwhile, are not expenses relating to the cost of furnishing transportation. Moreover, not only are ratepayers charged a double burden as the Examiner stated but the very amount of the burden lies completely within the discretion of carrier management. An abundant although not unanimous body of authority in the courts holds that these donations are not legitimate expenses chargeable against ratepayers. See *Carey* v. *Corporation Commission*, 33 P. 2d 788, 794 (Okla. 1934); *C & P Telephone Co. of Maryland* v. *Maryland Public Service Commission*, 187 A. 2d 475 (Md. 1963); *Cleveland & Akron* v. *Hope Natural Gas Co.*, 44 P.U.R. (n.s.) 1, 29 (F.P.C., 1942); but see also *Public Service Co. of New Hampshire* v. *State*, 153 A. 2d 801 (1959).

In *The People Gas Light & Coke Co.*, 19 P.U.R. (n.s.) 177, 274 (Ill. 1937) it was stated:

> It has long been held that donations made by a public utility, no matter how worthy the charity to which the donation is made, are not a proper charge against the ratepayer and that a Commission should make no allowance for same in operating expenses.

We are convinced that the Examiner's decision in this area is sound and comports with legal authority.

CONCLUSIONS

On reconsideration we find that the Examiner's disapproval of the increased rates of respondent Alaska Steamship Co. was correct. We have reviewed the record and reverse our earlier finding that the year 1960 was to be an exceptional one overall. Evidence of record indicates rather the contrary and tends to corroborate the Examiner's findings.

On the basis of the Examiner's findings with respect to 1960, we adopt his conclusion that the increased rates would provide an excessive rate of return to respondent. We furthermore find that such rates were excessive from the date of their inception; i.e., January 10, 1960, and were not lawful during the pendency of this proceeding as stated by the Examiner. The Examiner, we believe, had given interim approval on the basis of an erroneous interpretation of law. The case of *Arizona Grocery* v. *Atchison Ry.*, 284 U.S. 370 (1932) on which he had relied merely held that a carrier respondent is entitled to rely on rates approved in the past by a regulatory agency and could not be subsequently penalized for such reliance. In the instant case, however, we had never given such approval prior to initiation of the proceeding and are consequently free to disapprove the subject rates from their inception.

Commissioners Ashton C. Barrett and John S. Patterson, supplementing Commission's Report of April 30, 1963:

A. *The issues before us:*

On May 6, 1963, the Commission served its report and order finding that increased rates of Alaska Steamship Co. (Alaska Steam) for the transportation of property between Seattle, Wash., and ports in Alaska were just and reasonable. Since that date, on July 19, 1963, the Administrator of the General Services Administration (GSA) and the State of Alaska (State) have filed petitions for reconsideration of our report and order. We held further oral argument on the petitions on June 17, 1964. The following assignments of alleged error were offered as justification for the petitions:

1. Disregard of the public interest in deciding this docket by not giving any consideration to the problems of consumers and shippers in Alaska and the inhibiting effects of high water freight rates on the State's economy.

2. The finding that 472,392 tons was a reasonable projection of traffic to be carried in the future, and that the Examiner's projection of 511,000 tons was not acceptable. The Commission also failed to consider an increasing trend of northbound traffic.

3. Consideration of extra-record material improperly placed before the Commission by Alaska Steam.

4. The estimate of Alaska Steam's 1960 revenues as $17,673,521.

5. The failure properly to weigh the effect of added voyages by Alaska Steam.

6. The failure to find that Alaska Steam's rates are unreasonably high as shown by diversion to other carriers.

7. The failure to make findings regarding evidence submitted by GSA demonstrating unreasonableness of individual rates and rate relationship in the Alaskan trade.

8. The provision, on the basis of the record, of a rate of return of 9.07% for Alaska Steam.

9. The failure to consider the contentions of the State with respect to the Examiner's initial decision.

10. The remand to an examiner of that part of the proceeding which related to the rates of Puget Sound Alaska Van Lines (PSAVL), Garrison Fast Freight, division of Consolidated Freightways, Inc., and Alaska Freight Lines.

11. It was also claimed that error was made when the Commission agreed with respondents to not suspend the proposed increase if respondents agreed to refund charges above those determined to be just and reasonable.

B. *What we did:*

1. Held further oral argument on the petitions on June 17, 1964.

2. Reviewed the unanimous report and order of the Commission served on May 6, 1963, which found that increased rates of Alaska Steamship Co. were just and reasonable, for the purpose of determining if any errors or language ambiguity existed in this report that prompted the petitioners' finding of "alleged errors."

3. Searched the record before us to determine if the alleged errors claimed by the petitioners were justified concerning the unanimous report by the Commissioners decided April 30, 1963, and served on May 6, 1963.

4. Received, read, and studied all briefs that were filed by Hearing Counsel, respondents, and intervenors.

C. *Our decisions:*

As a result of the oral argument held on June 17, 1964, coupled with our review of the Commission's unanimous decision given in its report and order served May 6, 1963, and our thorough search of the entire record before us, we concluded that:

1. No new facts have been presented.

2. The existing evidence of record fully sustains the conclusions reached in our first report that the rates of Alaska Steamship Co. are just, reasonable, and lawful.

3. No extra-record material was relied upon to influence the ultimate decision, and no error was committed in reaching our conclusions.

4. Without reference to or consideration of any extra-record material, there is in the record as cited in our report sufficient evidence to lawfully justify the ultimate conclusions reached concerning the 11 alleged errors offered by the petitioners.

5. A report supplementing and confirming our earlier conclusions would be made, based on the entire record before us, in order to clarify any language or basis for our reasoning alleged to have been ambiguous.

The only possible new fact since the time of the record on which our report was based was a reference by the General Services Administration in oral argument (Tr., p. 11) to the earthquake and ensuing disaster earlier in 1964 as affecting the needs of the people of Alaska in obtaining a level of freight rates to assist them in the reconstruction job. We would wish to be considered as in full sympathy with the needs of Alaskans in this regard. Our decision herein in no wise detracts from our desire to help. Much as one might be moved by compassion to make adjustments in freight rates to minimize the severe costs Alaskans must bear in recovering from this natural disaster, Congress has given us no authority to go back and adjust past rates based on conditions existing from 1960 onward to accommodate unfortunate events such as an Act of God occurring in 1964, nor may the respondent, a private carrier, be made to bear the burden of costs that must be made either from public funds or from insurance payments or from private resources.

To the extent these events have relevance to future rates after 1964, a new proceeding is an appropriate remedy.

D. *Our report:*

The purpose of this report is to supplement and confirm our earlier reasoning and decisions, based on the evidence of record before us and to cite specific references in the record supporting our conclusions.

The following is our response to the several assignments of error, together with references in parentheses to the portions of the record which sustain our findings:

1. *Public interest.* As long as the standard for measuring justness and reasonableness of rates in a business-managed enterprise such as Alaska Steam is based on the assumption that transportation service will be sold at freight rates at least approximately related to the cost of rendition of the service to shippers, there is very little scope for a welfare standard based on the shipper's ability to pay, as is implied in the State's contention that we consider the overall cost of living in Alaska, the inhibiting effect of the high level of water freight rates on the growth of the Alaskan economy, and the impeding effect of high costs on the development of natural resources.

We are cognizant of and sympathetic with the fact that the State of Alaska, because of its distance from the mainland of the United States and its geographic location, is dependent upon water transportation for importing its basic needs covering almost all types of merchandise. In full recognition of this fact, we know how very important it is for us to thoroughly evaluate any requests for an increase in rates by any carrier serving Alaska and to search the evidence of record so as to be certain that any rate we approve is just and fair. Even though we are cognizant of this fact and of its influence on the broader economic problems of the State, we have no authority through our control over the rates of Alaska Steam to change radically the economic problems of the State except insofar as we find the rates just, reasonable, and lawful.

In recognition of our responsibility to protect the public and in the public interest, we fully weighed each of the contentions as advanced and argued by the State of Alaska, and based on the facts and argument as presented we reasoned and concluded that unless these factors could be shown to be relevant measures having some practical application in determining reasonableness of rates under a cost standard, no useful purpose would be served by further prolonging discussion of them. We disclaim authority to consider such matters because we have no power to compel service at a loss nor the power to compel a waiver of charges to less prosperous shippers, no matter how worthy of public assistance. Any such action would, additionally, involve a discriminatory burden on other shippers. These problems are larger than our authority to deal with them and must be considered by legislatures rather than the Commission.

2. *Tonnage projections.* The complaint is made that the Commission had no basis for reducing the Examiner's tonnage projections, that "the projection of the Hearing Examiner should not have been manipulated."

A basic objective of ratemaking is to estimate future conditions affecting rates.

Rates for the future must be based on predicted tonnages of cargo to be carried, and the predictions must be reasonably related to past performance modified by reasonably foreseeable factors influencing future expectations. The tonnage to be carried controls the amount of revenue to be expected and in turn controls the return to be derived therefrom after subtracting anticipated expenses chargeable to shippers. Hence, the importance of a reasonable estimate.

The carrier has the burden of furnishing the facts necessary to estimate its future carryings and to provide reasonably supportable estimates establishing the reasonableness of its rates. We thought respondent had done this. Fault was found with Alaska Steam's estimate of 472,392 tons which we adopted. Petitioner states the evidence does not form a proper basis for such a finding, but by the same token neither does the evidence support any contrary finding. There are only disputes over the reliability of Alaska Steam's figures. An averaging of tonnages carried from 1955 through a projected year 1960 as shown in the record produces 490,462 tons. This is close to that supplied by the expert testimony of the carrier's witness. Our report dealt with certain relevant nonstatistical factors which were thought to have a depressing effect on future carryings, and to overcome the Examiner's belief that an admitted declining trend between 1955 and 1959 had come to an end and was being reversed to go back up to 511,000 tons, which would be well above tonnages carried during the last 3 years (481,411 tons in 1957, 482,202 tons in 1958, and 461,000 tons in 1959) and nearer the 514,301 tons carried in 1955 and 532,214 tons carried in 1956 (7 FMB 563, 572). Even these figures represented declined from earlier years as shown by other docket records involving respondent (Docket No. 828, 5 FMB 486, 490). In 1949, 690,626 revenue tons were carried. There was a peak year in 1951 (715,049 revenue tons), caused by the Korean war, but generally there has been a declining trend in Alaska Steam's traffic over the years since then. The declining trend seems to have leveled off and northbound carryings have increased, but competition northbound has also increased. We did not think a reversal of any magnitude would occur, and consequently the Examiner's assumption of a drastic reversal based on 1960 alone would not be a proper basis for fixing rates over the next few years. We thought facts showing a diversion of traffic in recent years would, if anything, influence a continuing downward trend. The Examiner's projection was based solely on what he foresaw as coming up for 1960 as a result of (*a*) the salmon pack for that year and (*b*) trends in northbound traffic. We conceded the possibility his estimate might be good for 1960. We believed the figures to be used in projecting future rates should be based on an average year. We thought no one had supplied any better figures than Alaska Steam's. The most that was done was to pick flaws in other estimates without supplying any better ones, nor were any facts showing a likelihood of increased traffic provided. The State has only insisted we use the Examiner's higher figures and denies our right to adjust them downward on the ground that we used improper data to prove 1960 was an above-normal year. Petitioners insist on the use of their estimates of 1960 actualities as a basis of decision instead of our average tonnage figure as a reasonable level for several years in the future. We don't think we should be bound to use what 1960 might show when estimated as accurately as possible. Rates would tend to fluctuate with changes in each year's net revenue results and would have to be adjusted every year if the result of only 1 year's operations, as estimated by the Examiner, is used in the test of the reasonableness of rates. This method would not be sensible ratemaking.

Other factors are presented as showing the invalidity of our conclusions about the long-term trend of Alaska Steam's business and the validity of 1960 alone as a test year for fixing future rate levels. These are the influence of increased northbound carryings, the declining trend of cargo-handling costs, and the effect of improved service. Undoubtedly such factors would be influential, but in this area of conjecture they did not seem conclusive or at least influential enough to overcome Alaska Steam's proofs and estimates of increased costs and the slower rate of tonnage increases caused by adverse influences on traffic. For example, it was shown that the tonnage of traffic to, from, and within Alaska carried by self-propelled dry cargo ships, which Alaska Steam uses, has declined from a 22% share in 1951 to 7% in 1958. Between 1951 and 1958 barge tonnage increased 125% compared with a dry cargo tonnage decline of 53% (Exhibits 74, 75, 76—Chart II; Tr., pp. 45–46, 2882).

There were also serious infirmities in the Examiner's tonnage calculations which were not discussed in the first report, but are now pertinent. First, the 12.6% tonnage increase used for the last 5 months of 1960 was incorrect, because all of the projected tonnage increase was not commercial cargo with which this rate proceeding was concerned, but was also military, mail, government, and Garrison Lines cargo. Commercial cargo increased only about 9½% and is 69% of the total cargo. Military Sea Transportation Service (MSTS) cargo went up 22% and is 16½% of the total. The Examiner's method of taking an average of several unrelated percentages to get 12.6% did not produce a correct result.

The insistence that we use the Examiner's erroneously computed figures is rejected. We know of no law or precedent restricting our authority in rate proceedings to the use of an examiner's findings, nor preventing us from adjusting his figures as a result of our judgment of the record.

The major thrust of the objections to our decision seems to be a determination that the results of 1960 are conclusive as to the reasonableness of respondent's rates. Both respondent Alaska Steam and the objecting intervenors insisted on this premise. As a consequence, Alaska Steam's efforts were devoted largely, during the hearing at least, to diminishing the effect of increases, to depressing the 1960 net income results, and to twisting an estimated average figure into an estimated actuality, while intervenors sought to inflate the 1960 tonnages and net income results. We took a third course and made an honest effort to base the rates on what could be discerned of longer term trends. We took Alaska Steam's forecast of 1960 actualities and used it as an estimate for an average year, because it was in line with past experience.

The State argues further that we are bound to use the Examiner's 1960 projections because some factors used to show its nonaverage characteristics were based on facts outside the record. The argument does not prove enough, however, since even without these facts we did not consider ourselves bound solely by the 1960 estimates of actual results, but bound only to consider such estimates with other record data as a guide to what might reasonably be estimated as tonnages to be carried over a future period based on an adjustment of 1960 figures. Our report expressly referred to "the reasonably expectable level of future carryings * * *" It is also considered that without the extra-record facts the eight proven factors in our report substantiate conclusions as to a slower increase in the trends in respondent's carryings.

3. *Extra-record information.* On reexamining the record, some information not produced in hearing and subjected to cross-examination was presented. The information was written in as a part of respondent's brief on exceptions to the Examiner's decision. It could only be excluded by requiring a rewrite of Alaska Steam's brief on exceptions. The information was disregarded instead. Alaska Steam also put in a lot of extra-record data containing untested tonnage and financial figures and self-serving statements of fact, by means of an alternative petition to reopen the proceedings and of two supplemental affidavits. Counsel for the State objected strenuously to the tactics of Alaska Steam. The State rightly cautioned that Alaska Steam's action could only "poison the Commission's thinking." Disregard of this material prevented any influence on us to the point where it changed our thinking or the result. The facts claimed to be prejudicial as not having any record basis are:

First, the exceptionally large salmon pack carryings from the Bristol Bay area in the late summer of 1960, disclosed after the record was closed.

Respondent's exceptions refer to "* * * the unprecedented run of salmon in the Bristol Bay area" and to "* * * the large southbound movement of canned salmon due to the exceptional catch in the Bristol Bay area * * *" as having been "anticipated and provided for." We thought these statements were substantiated by testimony that "Both state and industry representatives predict for the year 1960 a run well above the year 1959" (Tr., p. 2063). Further, the transcript reads:

Q. This was as of June—

A. [Interrupting.] I am speaking of June 20, the day I prepared this forecast about which you asked me.

Q. June 20, 1960, that was your prediction?

A. Yes, June 20. The estimates on the pack as of that time varied widely. We believe as of June 20 we could look for a southeastern Alaska pack somewhere around 25 or 30 percent above that of 1959 or roughly an increase of 180,000 cases, which would convert to some 6,000 additional revenue tons, there being 30 cases to a revenue ton of salmon. Of which, based on our recent experience, Alaska Steamship Co. could hope to carry some 77 percent of the pack, which would increase our tonnage in salmon by some 4,600 revenue tons 1960 over 1959, which was our expectation as of June 20.

Q. Of this year.

A. Of this year, yes, sir.

Other testimony substantiating a high forecast of Alaska Steam is as follows:

A. The run at Bristol Bay is finished. The pack as reported here, and I can give you the pack which I just got this morning for July 24, 1960. Western Alaska in which they show the complete pack, this includes the Yukon River, North Peninsula and Bristol Bay, and they have done it, they cracked a million cases, 1,011,677. That's rather nice news. I hadn't read that figure before. I had said in the forecast that I prepared that reforecast just under 1 million cases of salmon, which would give an increase this year over last year of 539,012 cases, which converts to 17,967 revenue tons, which figure I have shown on Exhibit 40. Now, I forecast just under a million, they say just over a million by 11,677 cases. I will stand by my forecast in view of the 12,000 cases that are on the government-owned steamer, *North Star*, which leaves the potential available to us, disregarding any fish that may move on cannery tenders, just under a million cases. I think I did pretty well.

That summarizes—

Q. Thanks to the *North Star*. Very well. Now, does that figure, Mr. Rose, of 17,967 revenue tons also appear on Exhibit 40 under "Bristol Bay salmon industry"?

A. Yes, sir, it does.

Q. Then, summarizing very briefly your July 27 forecast, under the recap of "all routes" and "all cargo," the first general column as in Exhibit 39, you show an increase in the first 5 months of 1,753 revenue tons?

A. Yes, sir.

Q. Then, the next column you have a forecast increase the last 7 months of 9,641 revenue tons?

A. Yes, sir.

Q. Or a total increase of revenue tons 1960 over 1959 of how many tons?

A. Eleven thousand three hundred ninety-four.

Q. Added to the tonnage for 1959 of 461,000. you then forecast a total revenue tonnage for the year 1960 of 472,394, is that correct?

A. That would be correct, yes sir (Tr. pp. 2173–2175).

This testimony is substantiated by statistics showing "Weekly Red Salmon Packs on Bristol Bay" going back to 1940 and covering up through the fourth week which is about the end of July. Total cases exceeded 1 million in 1943 (1,275,081 cases), 1947 (1,335,031 cases), and 1948 (1,236,226 cases), whereas most other years ran only a little over 300,000 cases to about 550,000 cases (figures compiled from U.S. Fish and Wildlife Service preliminary statistics—*Pacific Fisherman*, January 1960, p. 59, Exhibit 6).

The parties at this stage were trying to prove Alaska Steam's estimates for 1960 were too low, as indeed they were, but the premise of respondents and intervenors at that time was that 1960, estimated as accurately as possible, was to be the guiding year. We refused to accept this premise, believing that a hypothetical average year was proper and could be estimated on the basis of past experience and future trends as shown by 1960 experience as adjusted to reflect both presently known and anticipated future influences. We thought Alaska Steam had developed adequate estimates of average conditions. Petitioners do not say these statements are not so, but only that they could not have been made using the record before us. Petitioner points out that "Alaska Steam has * * * placed before the Commission its unsubstantiated extra-record claim that the 1960 pack at Bristol Bay was good." Petitioner seems to concede what actually happened, but is arguing that because it happened the Commission must have relied on the later information showing the prediction to be a fact. We cannot accept this restriction to preclude saying what we did. Record support from exhibits supports a showing 1960 was nontypical. The *Pacific Fisherman* for January 1960 stated: "After lean and variable years, Bristol Bay in 1960 faces the *possibility* of a rich Red salmon run. *If* it comes, the salmon industry will be pressed to cope with it, and the Alaska State Department of Fisheries will enter upon its first year of full authority face-to-face with a staggering problem in administration, conservation and wise-use-without-waste" (Exhibit 6, *Pacific Fisherman*, p. 53). Further: "The State of Alaska is in control of its fisheries for the first time in this year 1960, which thus becomes the basic milestone in the future history of the resource. Moreover, the possibility that Bristol Bay may have a rich Red salmon run comparable with the greatest in the past of Alaska's fisheries adds further dash to an immediate future already full of zest (Id., p. 59).

We think there is enough in the testimony to justify what was said in item 1 on page 573 of our Report in 7 F.M.C. 563. The quoted testimony was a forecast for the entire 12-month period for the purpose of showing that the total tonnages for Alaska Steam in 1960 would be less than the State contended and would be in line with respondent's projection. Whatever the purpose of the forecast, the evidence of the "nice news" that western Alaska has "done it, they have cracked a million cases, 1,011,677" plus the other testimony supports a conclusion of an "exceptionally large salmon pack," in the Bristol Bay area, although it was small in southeastern Alaska (Tr., p. 2173).

The Commission might have reopened the record to verify the information, but such a choice was made unwise by the fact that the Examiner took 11 months to hear the case (from January 7, 1960) and then refused to reopen the record at the time of the closing of the hearing on December 6, 1960, on the ground of a need for an expeditious decision. He followed this action by a delay of 16 months in issuing his initial decision served on April 3, 1962. We felt the need for a prompt decision was even more necessary.

Second, the Navy withdrew three ships during the summer and fall of 1960 from service in the Alaskan trade.

This statement is traced to a statement in the exceptions that the "Navy withdrew the U.S.N.S. *Harris County*, the U.S.N.S. *Funston*, and the U.S.N.S. *O'Hara* from service in the Alaskan trade," causing "an unusually large movement of MSTS cargo" which "is not likely to recur." A review of the record fails to disclose the source of this information, which must be regarded as untested. The hearing transcript record showed that the U.S.N.S. *Harris County* was withdrawn, as of August 2, 1960, from the Whittier-Seattle route and was "on an extended voyage in Arctic waters." As a result of the transfer, Alaska Steam was already carrying "all of the private owned vehicles * * * of military personnel * * * between Whittier and Seattle * * * and our MSTS tonnage for the first 5 months has increased rather than decreased, and it appears that increased tonnage is going to continue." At that time it was expected the *Harris County* would return, but this at least showed a temporary, nonrecurring increase in respondent's 1960 tonnages (Tr., p. 2164).

Other extra-record corroborating information that may be subject to official notice is that the "MSTS endeavor in the Seattle area was reduced from a Sub Area Command to an MSTS Office as of 1 January 1960, and the *Funston* and the *O'Hara* were retired to the National Defense Reserve Fleet" and the *Harris County* was diverted to "dumping ammunition" (Letter of May 11, 1962, from Military Sea Transportation Service Office, Pier 91 at Seattle, to Alaska Steam, as contained in an extra-record sworn affidavit).

Even with a complete disregard of the information about the movements of three small naval vessels, there is ample evidence in the record to support the decision reached. There has been no substantial prejudice caused by the presence of this evidence. We do not condone the practice of insinuating evidence in briefs on exceptions, but, since it has been done, we see no point in using such a minor, unprejudicial error as a basis of a reversal, as requested.

Third, the "surmise" that if the salmon pack was as large as it might be, the added local income would create a demand for merchandise to be shipped northbound, which would also increase 1960 carryings.

This statement was based on respondent's Brief on Exceptions in the record which stated "no one had anticipated the tremendous buying splurge which was indulged in by the residents of the Bristol Bay area at the end of the season" (p. 64). The point is made that it would be impossible to make this surmise on the available evidence and, because it parallels too closely the allegedly "poisonous" information supplied by Alaska Steam, a court would consider it an improper conclusion. In effect we are to be precluded from the conjecture if it turns out to be substantiated later, even though the properly admitted testimony might still support the conjecture. As proof of the latter possibility, we note that long before the allegedly poisonous information was in, at the time of briefs to the examiner based on the record closed in December 1960, hearing counsel was able to state in his reply brief, for example: "that 1960 had an abundant movement of salmon * * * and this incremental traffic not only brings in increased direct revenue, but also contributes to the general prosperity of Alaska and thereby indirectly generates other additional freight revenue" (Reply Brief, p. 7). The statement proves that at least perception of a relationship between "general prosperity" including the prosperity of a fishing community and its purchase of goods carried northbound as a form of additionally generated freight revenue is reasonably possible on the legitimate record. A witness also made a reverse conjecture, involving this same relationship where purchasing power is depressed, in the following testimony which came after testimony as to a poor salmon season in the southwestern part of the State: "Last year (1959) Bristol Bay was declared a disaster area. When those people don't have any money, they don't buy refrigerators or automobiles which we hope we can carry" (Tr., p. 2176). The converse that when there is prosperity northbound that goods are bought is equally plausible and may be made the subject of a more specific surmise based on the 1960 Bristol Bay prosperity-generated increase in purchasing power, then foreshadowed by testimony wherein a witness, after saying that fishing had practically finished in Bristol Bay, stated:

> However, I learned from telephone conversation with our Bristol Bay representative yesterday, conversation with our Mr. Renbarger, that although fish are still showing in the Bay, by that I mean you can look out and see them jumping, they [sic] were only two fishing boats out of the Nushagak side actually fishing. That would have been as of Saturday night. The reason he gave us is that these men have already made, the high fishermen this year has reported to have made $53,000 in about 1 month's work.
>
> Q. One fisherman
>
> A. Yes. And the low is going to be somewhere around $20,000, except for those individuals who only fish a day or two, not regular. The men are not interested in further fishing effort this season (Tr., p. 2173).

This is part of what was described as "rather nice news" about the high yield in Bristol Bay then foreshadowed for the rest of 1960. On the premise that 1960 might be used as the test year for tonnages, the Alaska Steam witness was trying to depress his figures, but respondent's motives for downgrading news of high tonnages aside, the witness' testimony provided facts which (1) showed that 1960 would not be a normal year, and (2) justified our action in adjusting or disregarding 1960 actual results as seen by the Examiner to achieve what we considered to be a result more in line with a longer term trend.

At the time conclusions were reached, the Commission was dealing with prophecy, not experience, with a forecast, not a survey. There is no need now to reject experience, particularly where it proves the validity of the forecast, as petitioners insist on, in the name of a rule confining a decision to the record.

All things considered, the accurately projected result for 1960, as seen by the Examiner's "better-than-average" projection and demanded by the State, was not regarded as a serviceable guide to future conditions for ratemaking purposes, but the tonnages in line with past experience were regarded as more serviceable guides in the light of the testimony.

In conclusion, we find, with reference to extra-record claims:

a. that some extra-record information was introduced by Alaska Steam;

b. that our findings were supported without reference to such information; and

c. with the exception of information about the movements of three small naval vessels, that only findings supported by the record were used in reaching our conclusions.

4. *Revenue estimates for 1960.* Our revenue estimates were based on the tonnage estimates. No change was made in Alaska Steam's revenue estimates, which were also based on such tonnages, and certain additional revenues and expenses, added or subtracted by the Examiner, were rejected to restore Alaska Steam's estimates. The respondent sustained its burden of proof in this part of the rate proceeding.

The Examiner's results were found to be distorted by some of his computations. The Examiner stated that at 1959 rates the additional income accruing to Alaska Steam from his projected tonnage increases from additional traffic, after allowance for cargo handling expense, would be $691,712. According to the Examiner, average income in 1959 on commercial and military cargo was $32.19 per ton, and cargo handling expenses in the first 5 months of 1960 averaged $14.27 per ton, leaving a net revenue of $17.92 per ton as the basis for his calculation (I.D., p. 30, f.n. 12). He then added the 1960 income projected by Alaska Steam as attributable to the rate increase on commercial traffic and found his projected net income before and after taxes (I.D., p. 31). The cargo handling expense, however, was predominantly applicable (the Examiner considered it impossible to make an allocation of handling costs to commercial cargo on this record) to commercial cargo because military cargo is handled on a free in-and-out (f.i.o.) basis, which means that the armed forces, instead of the carrier, pay for all loading and unloading. This proceeding is concerned only with rates on commercial cargo. The Examiner, in using average figures applicable to both commercial and military traffic, may have distorted the net revenue from commercial cargo by not deducting enough of the applicable cargo handling expenses. While theoretically such a method might have produced an equitable result, the uncertainties inherent in such a method led to the rejection of his method in favor of our own estimates.

Any excessive net revenue derived from his computations, plus his estimated increased tonnages for 1960, inflated the net revenue figures used to show the Examiner's excessive rate of return.

These tonnage and revenue distortions are added reasons for not relying on the Examiner's estimates and for our belief that Alaska Steam had done a better job in sustaining its burden of proof.

The claim of error in the petition for reopening is that the 1960 revenue estimates did not project the revenue increase of 12% over 1959 shown for the first 5 months of 1960 into the last 7 months, but only projected a 2.5% increase for the full year. This is another reflection of the basic difference of regarding 1960 figures determined as accurately as possible, which petitioners insist on, instead of regarding a rough estimate of 1960 as only a hypothetical average year for rate purposes with adjustments in visible actual results to reflect known adverse and nonstatistical influences.

5. *Added voyages by Alaska Steam.* The weight given added voyages by Alaska Steam was to consider that they increased expenses, without for the immediate future increasing revenues because cargo tonnages showed no great increase. Petitioner questions the increase as a management decision without justifying evidence. We know of no authority for the proposition that all management decisions affecting future rates have to be justified by evidence. Necessarily, such decisions are based on judgment and future hopes. Perhaps history will show that Alaska Steam was wrong and the petitioner right in deciding that one of two sailings a week in van container service competitive with barge lines "is an uneconomical operation." At this stage it could not be proven wrong either, and respondent was allowed latitude for the exercise of its business judgment.

6. *Effect on rates of diversion of traffic to other carriers.* It is claimed that evidence of diversion of traffic to other carriers should have been used to show rates are too high. The possibility that continuing increases in the cost of transportation will cause a decline in tonnages carried, an increase in unit cost, and a decline in net revenues is a real one, but we were not satisfied that it is a valid criteria for

finding rates unreasonable where the Commission is not authorized to compel service by the carrier. These factors should certainly be of serious concern to owners and managers. Reduced rates may well help respondent's business, but we know of no authority permitting us to find rates unreasonable because a different ratemaking policy would be better from someone else's point of view. Alaska Steam is entitled to a fair return on the facts as we estimate them. If respondent is determined not to lower its rates to where less than a fair return is available, in the hope of future gain, we cannot change its policy by saying lower rates and a lower return is required by law.

7. *Rate relationship issues.* The failure to make findings regarding evidence submitted by GSA demonstrating unreasonableness of rates and rate relationships in the Alaskan trade is not error because of the lack of relevance to a general rate increase proceeding.

Facts were submitted showing Alaska Steam's commodity rates were considerably higher than the corresponding class rates covering the same commodities. Under Alaska Steam's Tariff Rule No. 80 commodity rates supersede the otherwise applicable class rates. The proposed increases made preexisting discrepancies between commodity and class rates even more extreme. For example, the proportional LCL (less than carload lot) commodity rate on filing cabinets was increased from $6.56 to $7.22 per 100 lbs. or 66 cents while the class rate was $2.84 and after the increase, $3.12 per 100 lbs. or 28 cents. The increase on the former was more than double the increase on the latter. The widened differences ranged from 2 cents to 85 cents per 100 lbs. The class rate increases are and remain lower than the commodity rate increases. An uneven application of the rate increase was shown. For example, a local commodity rate of $2.98 per 100 lbs. to Seward was compared with a $3.00 per 100 lbs to Juneau before increase. The two were almost the same, although Juneau is nearer Seattle than Seward, but the proportional rate to Seward is even lower at $2.07. (The proportional rate provides for a division of through water and rail rates.) The local rates to Juneau and Seward were increased 30 cents, but the increase received by Alaska Steam from the proportional to Seward was only 21 cents (Exhibit 57). The local port traffic received the greater increase, and the traffic moving under the proportional rate to inland points was preferred by a lower increase of 9 cents per 100 lbs. The local traffic to Seward would be small in comparison with proportional traffic, so southeastern Alaska is getting a heavier share of the revenue burden as a result of the increases. The foregoing is a summary of the basic facts GSA wanted us to consider in passing on the lawfulness of the increased rates. The claim is made that such a system of rates does not lend itself fairly to general increases in rates. Other facts showed substantial rate distortions have unquestionably occurred, but these will be the subject of other proceedings. General rate increases to provide an overall fair return to a carrier are not invalidated by such distortions which appear to have occurred over the years and are not necessarily the result of a system. The variations should be challenged on the basis of unreasonableness of individual rates.

In our first report it was considered unnecessary to make findings demonstrating the unreasonableness of individual rates and rate relationships in the Alaskan trade because of lack of relevance of such findings in a general ratemaking proceeding. This is a general rate proceeding in which all rates are increased. The burden of the increase is shifted to all users of transportation service rather than on the shippers of the individual commodities whose rates might be adjusted based on facts pertaining thereto. No specific facts about rates for specific commodities were produced as a basis for conclusions as to lawfulness of separate rates. Absent such facts, it was sought to show that commodity rates which were higher than class rates were abnormalities requiring special justification. Normally, commodity rates are considered as exceptions to class rates and for this reason lower. These rules, however, are more applicable to rail transportation than to ocean transportation.

There are no commodity classification systems designed for ocean transportation rates. When a carrier wants to use a classification system, it adopts one designed for rail traffic, and Alaska Steam adopted the Western Freight Classification. In rail traffic, primary consideration is given to the weight and value of commodities, and less consideration is given to the volume or measurement of the commodity. The economics of ocean transportation require that more emphasis be given to the volume and measurement because space in ships' holds is limited. Until a realistic commodity rate is needed and established, class rates are used where there is historically little or no traffic. When a commodity rate is needed, a rate is negotiated and subsequently put in the tariff as a commodity rate. Accordingly, there is no essential relation that is reasonable or unreasonable between class and commodity rates in this proceeding which might be used to test the reasonableness or unreasonableness of a general increase.

8. *Rate of return.* The provision of a rate of return of 9.07% for Alaska Steam was based on a comparison of the resulting rate of return shown by this record with the rate of return for other ocean carriers. Our conclusion was based on the best available evidence caused largely by the intervenors' failure to introduce their own testimony and studies as to a proper rate of return for the respondent, and instead confining their attack to picking flaws in respondent's presentation. More was required than this, so the Commission of necessity

relied on the available expert witness' opinion and on the fact that what was allowed was close to what was allowed other carriers. GSA states that if the rate of return of 9.07% can be reduced "based on the higher revenue projection, disallowance of certain expense items, and other accounting adjustments as urged herein, the great importance of such a reduction to the State of Alaska and its residents" as well as this protestant, warrants the additional effort involved. But this effort has already been made, and a new effort at this time would only be a retrial of the case rather than passing on new issues and new facts.

9. *Alaska's contentions with respect to Examiner's Decision.* Other contentions were made by the State with respect to the Examiner's decision and not expressly passed on by the Commission. The State says failure to consider or mention these contentions in its "carefully prepared Exceptions and Reply" was error. No authority is cited for this proposition. To the extent the Commission "failed to mention" a contention, it was believed to be unnecessary or unrelated to the results.

10. *Remand of other carrier proceedings.* The remand of the proceedings involving respondents Puget Sound Alaska Van Lines (PSAVL), Garrison Fast Freight Division (Garrison), and Alaska Freight Lines, Inc. (Alaska Freight), was made because these carriers had supplied insufficient information to permit a decision. The State equates insufficiency with a failure to meet the statutory burden of proof as though the carriers had presented all they could and still failed to justify their rates. This was not the case. The record showed that these respondents relied on Alaska Steam being found to be the dominant carrier and being the carrier whose rates would govern all other forms of water transportation. We held Alaska Steam was not dominant in the trade on the routes these carriers served. In fairness, the other respondent carriers should be afforded an opportunity to justify their rates on a more complete record relating to their specialized services. We gave them the opportunity to make such a record before passing on their rates.

11. *Agreement to refund unlawful charges.* It is stated that error was made when the Commission, in response to letters by the respondents agreeing to refund charges above those determined to be just and reasonable, did not suspend the proposed increases. The power to suspend or not under Section 3 of the Intercoastal Shipping Act, 1933, is entirely discretionary with the Commission, and no consultation with State is required in spite of its interest in any suspension action. There can be no error under such circumstances. Whether or not any collections are a "trust", as suggested, or a "debt" to shippers or collectible only in a reparation proceeding if the rates are ordered reduced

is now immaterial in view of our ultimate conclusions as to the justness and reasonableness of the rates.

E. *Conclusion:*

Apart from the assignments of error, no few facts whatever, not existing at the time the record herein was developed, have been presented as justification for a revised decision. It is concluded for the reasons given herein that the eleven assignments of error, as summarized, are without merit and that the record citation and excerpts herein fully support the findings made, without reference to any extra-record information improperly placed before us by respondent Alaska Steam. The report and order issued by the Commission on April 30, 1963, and served May 6, 1963, is fully supported by evidence, findings, and reasons.

For the foregoing reasons, the petitions for reopening of Docket No. 881, and reconsideration of the Commission's report and order therein should be denied. This report shall comprise a supplement substantiating the conclusions reached by the above-named Commissioners insofar as they voted for the Commission's report of April 30, 1963.

FEDERAL MARITIME COMMISSION

No. 1078

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1080

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

Decided October 30, 1964

Respondent conferences permitted to use exclusive patronage (dual rate) contract in the form appended to this Report.

Elkan Turk, Jr., and *William Logan, Jr.*, for respondents.
George F. Galland for respondent, States Marine Lines, Inc.
Robert J. Blackwell and *Howard A. Levy*, Hearing Counsel.
C. W. Robinson, Hearing Examiner.

REPORT

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

In these consolidated proceedings two inbound steamship conferences from Japan seek (1) permission to institute contract/noncontract exclusive patronage systems (dual rates) in their respective trades and (2) approval of their proposed contracts under section 14b of the Shipping Act (75 Stat. 762; 46 U.S.C. 813a).

After the issuance of the order setting these matters down for investigation, hearings were held, briefs were filed with the presiding examiner, and an initial decision was issued on March 2, 1964. Exceptions and replies thereto followed the initial decision and oral argument was held on August 10, 1964.

No shipper or other interested party intervened in these proceedings. Each of the respondent conferences is engaged in the inbound trades to the United States from the Far East, principally Japan. In No. 1078, respondent is the Japan-Atlantic and Gulf Freight Conference (JAGFC) and respondent in No. 1080 is the Trans-Pacific Freight Conference of Japan (TFCJ). Each of these conferences has long been established and each employed a dual rate system before World War II.

After the war when commerical trading between Japan and the United States was resumed, the conferences again became operative. They did not, however, effectuate dual rate systems. Isbrandtsen, Co., Inc. (Isbrandtsen), an independent carrier, not a member of these conferences, then entered the trade in competition with the conferences. Isbrandtsen maintained a rate level generally 10 percent under the conferences' rates, and succeeded in capturing a substantial portion of the market.

To meet this competition JAGFC announced its intention to reinstate its dual rate system. That announcement was withdrawn due to legal ramifications present at the time. Ultimately, the conference filed a justification statement with the Federal Maritime Board pursuant to General Order 76, whereby a proposed dual rate system would become effective on January 23, 1953.

On January 22, 1953, the effectuation of the system was temporarily stayed and later the conference was enjoined from operating with dual rates until it had the prior approval of the Board after a hearing. *Isbrandtsen* v. *United States*, 211 F. 2d 51 (1954). The Board subsequently approved the system by orders served December 21, 1955, and January 1956, but those orders were reversed, *Isbrandtsen* v. *United States*, 239 F. 2d 933 (1956), and the reversal was affirmed in *Federal Maritime Board* v. *Isbrandtsen*, 356 U.S. 481 (1958).

Just prior to this protracted litigation, the companion conference, TPWC, issued its notice of intent to reinstate the system but withdrew it when General Order 76 was promulgated. In late 1953 it filed its statement pursuant to that general order, a hearing was ordered by the Board, and in view of the first *Isbrandtsen* decision the effectuation of the system was stayed pending the outcome of the hearing. The Board, after hearing, denied the use of the system in December 1955, *Contract Rates—Trans Pacific Freight Conf. of Japan*, 4 FMB 744 (1955).

Apart from these frustrated attempts to meet Isbrandtsen's competition by a system of dual rates, both conferences, on March 12, 1953, declared their rates on several selected major commodities "open." Rates in each trade dropped precipitously, and were not "closed" until the spring of 1958. In each trade conference carryings practically doubled between 1955 and 1957, and this fact prompted the closing of the rates. For all practical purposes the rates have remained closed since that time, although they are not at as high a level as they were when opened in 1953.

Isbrandtsen remains in the trade as an independent, but it maintains a rate level not significantly different from the conferences' levels. Other nonconference carriers in the trades occasionally reach a level 30 percent lower than the conferences. Even during the course of these proceedings, the conferences have adjusted some of their commodity rates downward in an effort to meet outside competition.

The record established that nonconference competition to the Atlantic and gulf from Japan increased from 1 to 6 carriers and from 25 to 91 sailings from 1959 through November 1962. Similarly, in the companion trade to the Pacific Coast, nonconference competition increased from 1 carrier to 16 between 1959 and 1962 and nonconference sailings increased from 25 to 54 from 1959 through 1961.

In addition to the foregoing, the record shows (1) shippers and consignees favor the system, (2) conference services are superior in quality and frequency of service to nonconference services and (3) the failure of respondents to use the system could result in the opening of the rates and a rate war. A rate war would be inimical to the interests of shippers and consignees as well as to carriers.

There is nothing in this record to show that the system, or the contracts, as modified herein, would be (1) detrimental to our commerce, (2) contrary to the public interest, or (3) unjustly discriminatory and unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors.

Under the act, if the system is not objectionable the contracts [1] may be employed if (1) they are available to all shippers and consignees on equal terms and conditions [2] and (2) they provide "lower rates to a shipper or consignee who agrees to give all or a fixed portion of his patronage"[3] to the carriers, and (3) expressly contain clauses covering eight specific matters and "contain such other provisions not inconsistent herein as the Commission shall require or permit."

The bulk of the evidentiary record and briefs were concerned with the various contract provisions, and the exceptions and replies were devoted exclusively to contractual matters.

[1] The form of contract in each of these cases, save for the insignificant details, is identical.

[2] Clause 7 clearly satisfies this requirement.

[3] Clause 2(a) meets this requirement. While these contracts do not afford the signatory shipper the option of being bound with respect to "all" or a "fixed portion" of his shipments, the contracts in this regard comport with our decision in *The Dual Rate Cases* served Mar. 27, 1964.

The Commission has recently issued its report in *The Dual Rate Cases* (March 27, 1964), wherein the matters raised here were carefully considered. Exceptions and replies here were filed after the issuance of that decision.

In sum, the conferences contend that the record in these cases requires a result different, in many respects, from the result in the *Dual Rate Cases*. Hearing counsel contend that respondents' exceptions constitute a "collateral attack" on *The Dual Rate Cases* and urge the reaffirmation of that decision here.

Despite the respondents' contentions, we believe our decision in *The Dual Rate Cases* is dispositive of the issues here. We cannot find circumstances so different from those presented in the earlier case that our conclusions and reasoning there would be inappropriate here. Nevertheless, we want to address ourselves to the principal matters raised by respondents.

The first of these is the "affiliates" clause. As is the bent of all conferences on the affiliates issue, respondents want *all* affiliates of the signatory shipper to be bound by the contract, not merely those over whom the signatory merchant regularly exercises working control in relation to shipping matters.

It was abundantly clear at the oral argument, that respondents desire the all inclusive affiliates clause as an aid to their policing of the contract. As we pointed out in the *Dual Rate Cases*, "no words in any agreement can assure that the parties will not breach their contract" and that the affiliates clause there—and here—approved "includes a specific provision regarding various subterfuges." In short, the easing of carrier sales effort and the aiding in strict observance of the contract offered by an all inclusive clause, is far outweighed by the legitimate business interests of autonomous subsidiaries or affiliates.

With respect to the conclusive presumption vis-a-vis the prima facie presumption in the legal right clause, we reiterate our statement in Docket No. 1079, *The Persian Gulf Dual Rate* case, decided August 31, 1964:

> Many of the proposed contracts contain language which would raise a conclusive presumption that the signatory merchant had the legal right to select the carrier if his name appeared on certain shipping documents or if he otherwise participated in the ocean routing or the selection of the ocean carrier. While we agree that these circumstances may suggest that the merchant has the legal right to select the carrier, the statute does not appear to permit such circumstances, and nothing more, to prove conclusively legal right to select the carrier. In short, the statute does not appear to permit a presumption here which would preclude the proof of the true situation, *The Dual Rate Cases.*

Respondents arguments regarding the merchant's option of furnishing pertinent data to the conference or permitting the conference to inspect such data at the merchant's place of business in respect to routing of a particular shipment questioned by the conference are not novel. A flat requirement that the merchant supply documents at the conference office, could, we perceive, result in harassment of the merchant. The option, resting with the merchant, of requiring on-the-spot inspection will serve as a brake upon the possibility of groundless fishing expeditions by the conferences.

Apart from the foregoing there has been nothing presented here which would dissuade us from the view that dual rate contracts, so far as possible should be uniform:

> It is the expectation of the committee that a standard form of contract to be utilized by all conferences will be approved * * * with such riders as may be required to suit the needs of a particular trade. This will greatly simplify the problem of shippers * * * with respect to interpretation and application of differing provisions (H. Rept. No. 498, 87th Cong., 1st sess., p. 9, 1961).

The full text of the contract form, as modified and approved, is attached hereto.

Commissioner Patterson, concurring and dissenting:

The application of the Japan-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan (herein called "applicants"), two conferences of common carriers in foreign commerce, for permission to use an exclusive patronage, dual rate contract titled a "Merchant's Agreement" has been adjudicated in accordance with the requirements of section 14b of the Shipping Act, 1916, as amended.

Based on an examination of the proposed standard form of contract between the applicants and shippers for shipments on their members' vessels, and of the facts pertaining to the particular trade described in the record herein, it is found:

1. The Merchant's Agreement will be available to all shippers and consignees on equal terms and conditions.

2. The Merchant's Agreement provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to the conferences.

3. The contract rate system proposed by the applicants, including the form of contract, will not be detrimental to the commerce of the United States, nor contrary to the public interest, nor unjustly discriminatory or unfair as between shippers, exporters, importers or ports, or as between exporters from the United States and their foreign competitors.*

*It is noted that the above finding is not responsive to the order of investigation which states the Commission will pass on whether the applicants' dual rate system will also be unjustly discriminatory as between carriers. Such an undertaking goes beyond what sec. 14b requires. States Marine Lines, Inc., asked that we resolve this issue as to it, but on May 22, 1964, advised the Commission that the exceptions of States Marine to the initial decision which failed to pass on the issue were withdrawn. It is considered the omission is no longer of practical concern to any of the parties.

4. The Merchant's Agreement contains the express provisions prescribed by items (1) through (8) of section 14b.

5. The Merchant's Agreement contains other provisions which are not inconsistent with the aforesaid prescribed provisions and which the Commission should require or permit.

Accordingly, I concur that we should permit the use of the Merchant's Agreement.

For the reasons stated in my concurring and dissenting opinion in *The Dual Rate Cases*, dated March 30, 1964, I dissent from the majority's action in prescribing modifications in the Merchant's Agreement without the essential preliminary finding of deficiencies in the applicants' contract. The finding is not to be implied nor is it supplied by a disclosure of deficiencies in the record as expressed in such statements as: "there is nothing in this record to show" the contracts would be detrimental, etc., or "we cannot find" the circumstances different than those shown in the record in Docket No. 1111, or "there has been nothing presented" which would "dissuade us from the view that dual rate contracts, so far as possible, should be uniform."

I would permit the use of the contracts on the basis of the supporting record herein pertaining to two inbound trade routes.

Eight modifications by the Examiner were adopted, and three additional modifications were made by the majority for the purpose of conforming the applicants' contract with the decision in *The Dual Rate Cases* in Docket No. 1111 (March 27, 1964).

The majority refers to its report in *The Dual Rate Cases* as dispositive of the issues in regard to the modified provisions. Such a reference, however, ignores a record herein containing evidence of conditions in trades from Japan to the United States, of the testimony of Japanese merchants, and of the testimony of American importers from Japan, and adjudicates on the record made in the earlier proceeding rather than on the basis of the record in Dockets Nos. 1078 and 1080. The latter dockets contain the record concerning trade between Japan and the U.S.A. and evidence the only proceedings in which respondents participated. Respondents did not participate in developing the record in *The Dual Rate Cases*, and the record therein is not conclusive as to these respondents. Respondents' rights are being violated by a decision not based on the present record, but on another record being used to determine their privileges.

I further disassociate myself from the statements regarding the efforts of the conference "to meet outside competition" and the record of increases in "nonconference competition" insofar as they imply that the contract is a necessary competitive measure justifying approval of a dual rate contract system in these trades. The other three factors referred to by the majority on page 3, 4th paragraph, have my concurrence. Competition is a factor on almost any ocean trade route, but it was not shown to be the dominating or controlling factor for initiating the exclusive patronage contract in these trades at this time. Applicants' contract and dual rate system are not being introduced as a necessary competitive measure.

APPENDIX

APPROVED AGREEMENT FORM—DOCKETS NOS. 1078 AND 1080

AGREEMENT NO. ______

(NAME OF CONFERENCE)

MERCHANT'S AGREEMENT

Memorandum of Agreement entered into at ________________________ this ______ day of ____________ 19__, by and between ________________________, having (its) (his) principal place of business at ________________________ (hereinafter called the "Merchant"), and the carriers who are parties to the U.S. Federal Maritime Commission Agreement No. ______, as amended, providing for the (name of conference) (hereinafter called the "Conference" or the "Carriers"), and which Agreement has been duly filed with the Ministry of Transportation of the Japanese Government.

For their mutual benefit in the stabilization of rates, services, and practices and for the development of international maritime commerce in the trade defined in Article 1 of this Agreement, the parties hereby agree as follows:

1. The Conference undertakes, throughout the period of this Agreement, to maintain common carrier service which shall, so far as concerns the frequency of sailings and the carrying capacity of the vessels of the Carriers, be adequate to meet all the reasonable requirements of the Merchant for the movement of goods in the trade from Japan, Korea, and Okinawa to (Pacific Coast ports of California, Oregon, Washington, Canada, and the ports of Hawaii and Alaska) or (U.S. Gulf ports and Atlantic Coast ports of North America) (hereinafter called the "Trade"); and the Conference further agrees that, subject to the availability of suitable space in the vessels of the Carriers at the time when the Merchant applies therefor, said vessels shall transport the goods of the Merchant in the Trade upon the terms and conditions herein set forth. Ports from and to which service is offered by the Carriers shall be set forth in the Conference tariff.

2. (a) The Merchant shall ship or cause to be shipped all of its ocean shipments moving in the Trade on vessels of the Carriers unless otherwise provided in this Agreement.

(b) The term "Merchant" shall include the party signing this Agreement as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this Agreement and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Merchant," any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this Agreement and be fully bound thereby, are listed at the end of this Agreement. The party signing this Agreement as "Merchant" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this Agreement on behalf of the said related companies and entities so listed (Art. 2(b) optional).

(c) In agreeing to confine the carriage of its shipments to the vessels of the Carriers the Merchant promises and declares that it is his intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms, or entities affiliated with or related to the Merchant.

(d) The Carriers agree that they will not provide contract rates to anyone not bound by a Merchant's Rate Agreement with the Carriers. The Merchant agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this Agreement, by making shipments under this Agreement on behalf of any such person.

3. (a) If the Merchant has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Merchant shall select one or more of the Carriers.

(b) If Merchant's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Merchant to select the carrier, Merchant shall be deemed to have the legal right to select the carrier.

(c) It shall be deemed a breach of this Agreement, if before the time of shipment, the Merchant, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(d) For the purposes of this Article, the Merchant shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment:

(1) with respect to which the Merchant arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

(2) with respect to which the Merchant's name appears on the bill of lading or export declaration as shipper or consignee.

(e) Nothing contained in this Agreement shall require the Merchant to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

(f) In order that the Conference may investigate the facts as to any shipment of the Merchant that has moved, or that the Merchant or the Conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Merchant, at his option, (1) will furnish to the Conference chairman, secretary, or other duly authorized Conference representative or attorney, such information or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Merchant where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the Merchant (and there shall be no disclosure of any information in violation of Sec. 20 of the Shipping Act, 1916).*

(g) Within ten (10) days after the event in any transaction in which the Merchant is a party and the legal right to select the carrier is vested in a person

---

*Optional, but if not used, the following language shall be inserted:

"and there shall be no disclosure of such information without the consent of the Merchant except that nothing herein shall be construed to prevent the giving of such information (1) in response to any legal process issued under the authority of any court, or (2) to any officer or agent of any government in the exercise of his powers, or (3) to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or (4) to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers, or (5) to arbitrators appointed pursuant to this Agreement."

other than the Merchant, and if he has knowledge that the shipment has been made via a nonconference carrier, the Merchant shall notify the Conference in writing of this fact, giving the names of the merchant and his customer, the commodity involved and the quantity thereof, and the name of the nonconference carrier: *Provided, however,* That where the activities of Merchants are so extensive in area or the nature or volume of his sales makes it impracticable to give notice within ten (10) days, the Merchant shall give notice as promptly as possible after the event.

4. This Agreement excludes: (1) cargo of the Merchant which is loaded and carried in bulk without mark or count except liquid bulk cargoes (other than chemicals and petroleum products) in less than full shipload lots; (2) shipments on vessels owned by the Merchant or chartered solely by the Merchant where the term of the charter is for 6 months or longer, and the chartered vessels are used exclusively for the carriage of the Merchant's commodities; and (3) shipments of cargoes for which no contract rate is provided.

5. The Merchant shall have the option of selecting any of the vessels operated by any of the Carriers. The Merchant agrees to request space with the carrier he desires as early as practicable and *not less than five (5) days before the earliest date he wishes to have the cargo loaded aboard the vessel.* The Merchant shall not be obligated to select a Conference carrier or carriers for any shipment which the Carriers cannot suitably accommodate within a ten (10) calendar day period requested by the Merchant for loading: *Provided, however,* That the Merchant shall first promptly notify the Conference of such unavailability of space and if within two (2) business days after receipt of such notice, the Conference shall not have advised the Merchant that his entire shipment can be suitably accommodated by a vessel or vessels (if the merchant by contract is obligated to make the shipment on a single vessel, suitable space shall be provided on a single vessel) of the Carriers within said ten (10) calendar day period, the Merchant shall be free with respect to such shipment to secure space elsewhere within a reasonable time.

6. This Agreement does not require the Merchant to divert shipments of goods from natural transportation routes not served by Conference vessels where direct carriage is available. Provided, however, that where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Merchant shall be obligated to select the Carrier's service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Merchant intends to assert his rights under this article, to use a carrier who is not a party hereto, and the port through which Merchant intends to ship or receive his goods is within the scope of this Agreement, Merchant shall first so notify the Conference in accordance with the provisions of Article 5 hereof.

7. The rates applicable to shipments made under this Agreement shall be the contract rates lawfully in effect at the time of shipment as set forth in the tariff or tariffs of the Conference, and on file with the Federal Maritime Commission. Contract rates on every commodity or class of commodities shall be lower than the ordinary rates set forth in the Carriers' tariff by a fixed percentage of fifteen (15) per centum of the noncontract or ordinary rates. The rates may be rounded out to the nearest multiple of five (5) cents (not including additional handling or accessorial charges) which will not result in the difference between the rates exceeding fifteen (15) per centum of the ordinary rates.

8. (a) The Carriers shall make no change in rates, charges, classifications, rules, or regulations which results in an increase or decrease in cost to the Merchant, except as provided by Section 18(b)(2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however,** The rates of the freight under this Agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance of the increases by publishing them ninety (90) calendar days in advance in the ______________________ Conference tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the Merchant, the Merchant may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid of the proposed increase: *Further provided, however,* That the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the Merchant in writing that they elect to continue this Agreement under the existing effective rates, and, in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the Merchant's notice of termination had never been given.

(b) The Conference shall offer to the Merchant a subscription to its tariffs at a reasonably compensatory price; however, the Merchant shall be bound by all notices accomplished as aforesaid without regard to whether it subscribes to the Conference tariff. Tariffs shall be open to the Merchant's inspection at the Conference offices and at each of the offices of the Carriers during regular business hours.

(c) The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date (through filing with the Federal Maritime Commission *) rather than to have become effective with the signing of this Agreement and notices of proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this Agreement.

(d) The Merchant and the Carriers recognize that mutual benefits are derived from freedom on the part of the Carriers to open rates, where conditions in the Trade require such action, without thereby terminating the dual-rate system as applicable to the commodity involved; therefore, it is agreed that the Conference, to meet the demands of the Merchants and of the Trade may suspend the application of the contract as to any commodity through the opening of the rate on such commodity (including opening subject to maximum or minimum rates) provided that none of the Carriers during a period of ninety (90) days after the date when the opening of such rate becomes effective shall quote a rate in excess of the Conference contract rate applicable to such commodity on the effective date of the opening of the rate, and provided further that the rate shall not thereafter be closed and the commodity returned to the application of the contract system on less than ninety (90) days' notice by the Carriers through the filing of contract-noncontract rates in their tariff.

9. (a) The Merchant may terminate this Agreement at any time without penalty upon the expiration of ninety (90) calendar days following written notice to the Conference of intent to so terminate: *Provided, however,* That the

*Optional.

Merchant may terminate this agreement upon less than said ninety (90) days' notice pursuant to Article 8(a) hereof.

(b) The Conference may terminate this Agreement at any time without penalty upon the expiration of ninety (90) calendar days following written notice to the Merchant. Termination by the Conference may be in whole or with respect to any commodity: *Provided, however,* That Agreements with similarly situated Merchants are also so terminated.

(c) Termination as provided in this Article shall not abrogate any obligation of any party or parties to any other party or parties hereto which shall have accrued prior to termination.

10. (a) In the event of breach of this Agreement by either party, the damages recoverable shall be the actual damages determined after breach in accordance with the principles of contract law: *Provided, however,* That where the Merchant has made or has permitted a shipment on a vessel of a carrier not a party hereto in violation of this Agreement, and whereas actual damages resulting from such a violation would be uncertain in amount and not readily calculable, the parties hereby agree that a fair measure of damages in such circumstances shall be an amount equal to the freight charges of such shipment computed at carriers' contract rates in effect at the time of shipment, less the estimated cost of loading and unloading which would have been incurred had the shipment been made on a vessel of a Carrier party hereto. Such amount, and no more, shall be recoverable as liquidated damages.

(b) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within thirty (30) days after receipt of notice by registered mail from the Conference that they are due and payable, the Carriers shall suspend the Merchant's rights and obligations under the contract until he pays such damages. If within thirty (30) days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within thirty (30) days hereafter proceed in accordance with Article 14, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within thirty (30) days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages. No suspension shall abrogate any cause of action which shall have arisen prior to the suspension. Payment of damages shall automatically terminate suspension. The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within ten (10) days after the event.

11. (a) This Agreement is not and shall not be construed to be a contract of carriage with the Carriers or any one of them. Shipments under this Agreement are subject to all the terms and conditions and exceptions of the then current Conference tariff on file with the Federal Maritime Commission, and of the permits, dock receipts, bills of lading, and other shipping documents regularly in use by the individual Carriers and to all laws and regulations of the appropriate authorities.

(b) (This Agreement shall be carried out in accordance with the provisions of the Shipping Act, 1916, and the rules of the Federal Maritime Commission promulgated pursuant to said Act) (Article optional).

12. Receipt and carriage of dangerous, hazardous, or obnoxious commodities shall be subject to the special facilities and requirements of the individual Carrier.

13. The Conference shall promptly notify Merchant of changes in the Conference membership, and any additional carriers which become members of said Conference shall thereupon become parties to this Agreement, and the Merchant shall thereupon have the right to avail himself of their services under the terms of this Agreement. Any Carrier, party to this Agreement, which for any reason ceases to be a member of the Conference shall thereupon cease to be a party to or participate in this Agreement and the Merchant shall not be entitled to ship over said Carrier under this Agreement after such Carrier ceases to be a member of the Conference or after having fifteen (15) calendar days' written notice of the termination of such Carrier's membership, whichever is later. The Merchant may, at any time after notice that a Carrier has ceased to be a member of the Conference, cancel without penalty or liability for damages any outstanding forward booking with such withdrawing Carrier.

14. All disputes arising in connection with this Agreement shall be submitted to arbitration by any party and any dispute so submitted to arbitration shall be finally settled under the Commercial Arbitration Rules of the Japan Commercial Arbitration Association. At the time a party makes a demand for arbitration to the Japan Commercial Arbitration Association it shall also submit the name of its arbitrator, and the other party shall have fourteen (14) calendar days thereafter to name its arbitrator and file same with the Japan Commercial Arbitration Association. The Japan Commercial Arbitration Association shall, within fourteen (14) calendar days thereafter, or within such other period as the parties may agree, name the third arbitrator, who shall act as chairman. *Any sum required to be paid* by an award of the arbitrators *shall be paid within thirty (30) calendar days* after a copy of the award has been mailed by the arbitrators to the parties. Judgment upon the arbitration award may be rendered in any court having jurisdiction thereof or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be. *In the event an action for judgment of execution* is brought in a court of competent jurisdiction on the arbitration award or on the judgment rendered thereon, the parties waive all rights to object thereto insofar as permissible under the laws of the place where the enforcement action is instituted. (*Provided, however,* Nothing herein shall deprive the Federal Maritime Commission of its jurisdiction).* The place of arbitration referred to in this paragraph shall be Tokyo, Japan, unless otherwise mutually agreed upon by parties concerned. The foregoing provisions regarding arbitrations shall apply unless the parties mutually agree to have any dispute settled pursuant to the rules of any other arbitration society and at any other place, or in any other manner.

If the intention with which any party hereto did or omitted, or caused or permitted to be done or omitted, any act or thing shall be an issue in any arbitration proceedings hereunder, such party shall have failed, refused, or omitted to furnish to any other party or to the arbitrators any information, document, or data, required to be furnished by it in accordance with this agreement, the arbitrators may draw from such failure, refusal, or omission, the inference that the information, documents or data contain facts adverse to the position of the party who so failed, refused or omitted.

15. (a) In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the Carriers in the trade covered by this Agreement, the Carriers may suspend the effectiveness of this

*Optional.

Agreement with respect to the operations affected, and shall notify the Merchant of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by the Carriers, said Carriers shall forthwith reassume their rights and obligations hereunder and notify the Merchant on fifteen (15) days' written notice that the suspension is terminated.

(b) In the event of any of the conditions enumerated in Article 15(a), the Carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than fifteen (15) days' written notice to the Merchant, who may notify the Carriers in writing not less than ten (10) days before increases are to become effective of its intention to suspend this Agreement insofar as such increase or increases is or are concerned, and in such event the Agreement shall be suspended as of the effective date of such increase or increases, unless the Carriers shall give written notice that such increase or increases have been rescinded and cancelled.

(c) In the event of any extraordinary conditions not enumerated in Article 15(a), which conditions may unduly impede, obstruct, or delay the obligations of the Carriers, the Carriers may increase any rate or rates affected thereby, in order to meet such conditions: *Provided, however*, That nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The Merchant may, not less than 10 days before increases are to become effective, notify the Carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the Carriers shall give notice that such increase or increases have been rescinded and cancelled.

16. (This Agreement may be amended from time to time subject always to the permission of the United States Federal Maritime Commission and filing with the Ministry of Transportation of the Japanese Government.) (Article optional.)

For and on behalf of the members of the Conference

Merchant (Full corporate, company, or individual name)

By --------------------------------

(Title)

(Address of merchant)

By --------------------------------

Chairman or secretary pro-tem.
(List of Carriers)

FEDERAL MARITIME COMMISSION

No. 1078

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1080

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

ORDER

Full investigation in these proceedings having been had and the Commission on this day having made and entered of record a report stating its findings and conclusions thereon, which report is hereby referred to and made a part hereof, and having found that the Exclusive Patronage (Dual Rate) contracts of the Japan-Atlantic and Gulf Freight Conference and Trans-Pacific Freight Conference of Japan submitted to the Commission should be approved with modifications made by the Commission:

Now, therefore, it is ordered, That the aforesaid contracts of the Japan-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan, as modified and set out in Appendix A to the aforesaid report, are permitted for use by the said Conferences.

It is further ordered, That the Japan-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan shall file with the Commission a copy of the full terms of the contract they offer to shippers and or consignees within 30 days from the day that the contract is first offered.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1192

APPLICATION FOR FREIGHT FORWARDING LICENSE—WM. V. CADY, 17 BATTERY PLACE, NEW YORK 4, NEW YORK

Application for freight forwarding license denied.

Employee of a firm primarily engaged in the business of selling and shipping goods to foreign countries does not qualify as an independent ocean freight forwarder as defined in Public Law 87–254 and cannot be licensed, notwithstanding present intention to restrict his operations as forwarder to transactions in which his employer is neither seller nor shipper.

Ralph H. Chew for applicant and for Intervener, A. E. Chew & Co., Inc.

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

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

INITIAL DECISION OF WALTER T. SOUTHWORTH, EXAMINER[1]

On January 12, 1962, respondent Wm. V. Cady filed with the Federal Maritime Commission his application for a license to engage in the business of forwarding, pursuant to section 44 of the Shipping Act, 1916, as amended. By letter of its managing director dated June 18, 1964, the Commission notified Cady that since he appeared to be a full-time employee of A. E. Chew & Co., Inc., a shipper to foreign countries, he was not within the statutory definition of an "independent ocean freight forwarder;" and that the application would therefore be denied unless he requested an opportunity to show at a hearing that denial was unwarranted, or submitted for Commission approval a plan to terminate his affiliation with A. E. Chew & Co., Inc. Cady requested a hearing, and this proceeding was thereupon instituted by order of the Commission served July 24, 1964, naming the applicant as respondent.

[1] This decision became the decision of the Commission on Dec. 23, 1964, and an order was issued denying the application. (Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224, 502.228.)

The Shipping Act, 1916, was amended by Public Law 87–254, effective September 19, 1961, to provide for licensing independent ocean freight forwarders. Section 44(b) of said Act as so amended (hereinafter the Act) directs the Commission to issue a forwarder's license to any qualified applicant found to meet certain conditions, among them that he be an "independent ocean freight forwarder" as defined. The Commission does not question Cady's ability and fitness to carry on the business of forwarding; the sole question is whether he is, or will be, an "independent ocean freight forwarder" as defined in section 1 of the Act:

> "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 indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest."

The New York Foreign Freight Forwarders and Brokers Association, Inc. (hereinafter the "Forwarders Association") was permitted to intervene and submitted a brief following its appearance by counsel at the hearing. A. E. Chew & Co., Inc. also appeared at the hearing by Ralph Chew (who described himself as "Mr. Cady's employer"), and was permitted to intervene. Mr. Chew, who has been admitted to practice as an attorney in the State of New York but works in a sales capacity for A. E. Chew & Co., Inc., submitted a brief "as employer and friend of William V. Cady", which is in effect respondent's brief.

As indicated above, the applicant is, and proposes to remain, in the employ of A. E. Chew & Co., Inc. Chew & Co., in its business as export representative or "foreign sales manager" for a number of firms, is a shipper or seller to foreign countries as agent for such firms or as principal; however, applicant's activity as a freight forwarder is and allegedly will be confined to shipments with which his employer is not concerned as seller or shipper, consignee or purchaser, or as agent of any such person, and in which it has no proprietary or other beneficial interest. His employer permits him to carry on such "personal" business from its office without deduction from his salary or charge for any use of office space or facilities, principally the firm's telephone.[2]

Hearing Counsel and the Forwarders Association, in their briefs filed after hearing, contend that applicant Cady is "controlled" by a shipper and seller of export shipments and therefore does not qualify as an "independent ocean freight forwarder" under the definition, and hence cannot be licensed. Respondent's brief in effect contends that Cady remains an independent forwarder under the statute as long as he

---

[2] In the reply brief filed on behalf of respondent, it is asserted that since the hearing Cady has been paying "rent, telephone and secretarial services." A finding to that effect is not permissible on the record; however, as hereinafter set forth, it is concluded that the matter of reimbursement is not determinative of the application.

does not act as a forwarder with respect to any shipments in which Chew & Co., his employer, is concerned or has any interest; and contends that the statute was not intended to apply to persons in Cady's position.

Findings of Fact

The applicant Cady has been employed by A. E. Chew & Co., Inc., for about 45 years—all or practically all his working life; he was born August 28, 1903. Chew & Co.'s business is essentially the solicitation and administration of export sales of food products of American manufacturers or producers. It operates through personnel located in this country or abroad or traveling, about 15 employees altogether. It works under various arrangements as to compensation. In some cases it receives a retainer, but more often is paid a commission on sales. In some cases, as with the State of Maine, it buys the goods and resells them for its own account. This latter arrangement was adopted because the State of Maine cannot legally take credit risks, and therefore Chew & Co. buys for cash and resells for its own account. There are also other situations, not described in the record, in which Chew & Co. "for particular reasons that are rather complicated" acts as exporter, buying the goods and reselling them abroad. Chew & Co. has dual-rate contracts with various conferences—contracts which entitle it, as a shipper, to reduced rates in return for its exclusive patronage. Otherwise Chew & Co. does not take title to the goods it sells, and its principal's name appears as shipper on the bill of lading with the further exception of consolidated shipments for several principals, where Chew & Co. appears as shipper. Chew & Co. is variously referred to as an exclusive export representative, foreign or export sales manager, manufacturer's representative, export sales company, shipper, and seller. Under whatever name, its primary business is the sale of food products abroad for various producers thereof, either as agent or as a sort of franchised dealer trading for its own account. It acts for about 17 such concerns at the present time.

Prior to 1962, Chew & Co. acted as freight forwarder with respect to all such merchandise. Cady was in charge of this function, with the title of export traffic manager, running his own department with several employees. Chew & Co. billed its principals for freight forwarding fees, but Cady personally retained the so-called brokerage which was received from carriers in connection with such shipments. Cady was paid a salary of around $7,000 or $8,000 per year, the exact amount of which he couldn't recall, although he testified that it has been "at a standstill". In addition he received an annual bonus, of the order of $700 or $800 per year, the amount of which was roughly related to the profit of his department but was entirely discretionary with Chew &

Co. Chew & Co. knew how much brokerage he received from carriers.

Cady's department handled 2,000 or more shipments per year. In 1961 Cady received $10,500, apparently including salary and bonuses from Chew & Co., and about $1,500 in brokerage from carriers.[3] In 1962 he received close to $4,000 in brokerage from carriers.

In 1950 Cady applied in his own name, under General Order 72 of the Federal Maritime Board, for a certificate of registration as a freight forwarder, and was assigned Freight Forwarder Registration No. 1102. His application did not reveal any connection with A. E. Chew & Co., Inc. The application form was perhaps not as explicit as it might have been, but complete candor would have suggested that his employment be revealed in answer to question 6: "Is registrant a subsidiary or affiliate of any other business?"—or question 7: "Does registrant control, or is he engaged, directly or indirectly, in any business other than forwarding?" Both questions were answered "No"; however, in 1958 Cady stated that he received a salary from Chew & Co. (which he described as "exclusive export representatives" of the shippers he served) in a letter to the Commission's predecessor, in response to an order pursuant to section 21 of the Shipping Act, 1916.

After he received his certificate of registration (and possibly before that time, although the record does not indicate), Cady had his own letterhead, and an invoice form which he used to bill carriers for brokerage. At that time, as at all times material to this proceeding, he had no office or telephone separate from those of Chew & Co., although until about a year ago, when the building was remodeled, his name appeared in the building directory and upon a door to the quarters occupied by Chew & Co. These listings did not describe him as a freight forwarder, nor was he so listed in the Manhattan telephone directory. The telephone number shown on his letterhead was paid for by and listed in the name of Chew & Co. He is listed as a freight forwarder in the 1964 New York metropolitan area issue of the Journal of Commerce Transportation Telephone Tickler, a free listing.

In or about 1962 Chew & Co. began to use "outside" forwarders—registered forwarders other than Cady—to handle forwarding services in connection with its business. (Such forwarders were referred to as "outside" forwarders throughout the hearing; in fact Cady, in a letter to the Commission dated December 11, 1962, had said concerning his arrangement with Chew & Co.: "We charge our overseas customers the going rate for forwarding fees just as we would do if an outside forwarder handled our shipments, or I were an independent forwarder".) It was found necessary either to do that or reorganize its

[3] This would be less than $1.00 per shipment. In 1957, according to Cady's reply to a Federal Maritime Board questionnaire, he received $1,291 on approximately 2,000 shipments (about 65 cents each) and nothing on 300 additional shipments (exhs. 10, 11).

traffic department, and Chew & Co. believed that the "new law" (Public Law 87–254, the licensing amendment, which had become effective September 19, 1961) required it to stop acting as a forwarder. Eventually (the evidence is conflicting as to just when) Chew & Co. turned over to outside forwarders the freight forwarding function with respect to all its transactions, including those in which it acted as exporter for its own account as well as those on which it received commissions or other compensation. Cady remained as export traffic manager, but his duties were correspondingly reduced. At present his duties for Chew & Co. consist principally of checking shipping documents in connection with Chew & Co.'s accounts, including papers prepared by outside freight forwarders used by the firm. His salary has not been reduced, but his bonus has or may be reduced or eliminated.

Cady has continued to handle, as a freight forwarder, certain shipments with which Chew & Co. has no concern either as exporter or selling agent. His principal customer has been Underwood & Co. Chew & Co. acts as exclusive export sales manager for Underwood & Co. with respect to certain finished food products manufactured in the United States and sold in foreign countries; however, shipments of such goods are not handled by Cady but by outside freight forwarders, as described above. Cady acts as freight forwarder for Underwood & Co. only with respect to raw material, containers and machinery which its ships to Venezuela, where Underwood & Co., or a subsidiary thereof, operates a factory. Chew & Co. as such has nothing to do with such shipments, and in fact has no arrangement with Underwood & Co. concerning Venezuela. Originally Underwood & Co. used another freight forwarder for the Venezuela shipments, but after it had had some trouble with the forwarder it turned the business over to Cady. The business was solicited for Cady by or at the suggestion of Ralph Chew. Cady has handled a few other shipments similarly disassociated from the regular business of Chew & Co., including some shipments for an account which Chew & Co. had lost due to corporate changes. Cady has been able to get freight forwarding business from that company, but Chew & Co. has never got the export sales account back.

Until June 1964, Cady turned over to Chew & Co. (or Chew & Co. collected—the mechanics are not clear) the freight forwarding fees received from this "personal" business, although Cady continued to retain any brokerage received from carriers. Chew & Co. takes the position that it has returned some part of the freight forwarding fees to Cady in the form of an annual bonus, while permitting Cady to use its office facilities to carry on the business. Since July 1964, the separation of this business from that of Chew & Co. has been carried farther. Cady has set up a separate bank account and his own books (apparently the transactions, except for brokerage paid by carriers, went through Chew & Co.'s books prior to that time) and now retains all forwarding fees as well as brokerage. Chew & Co. considers Cady a part-time employee, permitting him to carry on his freight forwarding operations from his desk in the offices of Chew & Co. Apparently he uses no other facilities of his employer except the telephone.

It is this rather meager freight forwarding business, considered personal to Cady and now disassociated from the business of his employer to the extent described above, for which Cady desires a license. His employer is anxious to have him licensed so that he may continue to carry on such business, purportedly for no other reason than Cady's own welfare. Ralph Chew testified that since the changes in the company's operations following the enactment of Public Law 87–254 eliminated Cady's function to an extent, he has tried to help Cady build up his little independent freight forwarding business; and that while this effort has not been too successful, the business is very important to Cady. Under Chew & Co.'s present method of operating, Cady's value to his employer has been reduced. At his age the possibility of finding more remunerative employment elsewhere is unlikely for a person of his experience and background. For similar reasons he is in no position to relinquish his salaried job to go into business entirely on his own. Whether or not he might be able to operate profitably a one-man, independent forwarding operation if he were assured some of Chew & Co.'s business, was not discussed. Neither was the possibility of his attending, as an employee of Chew & Co., to shipments of such merchandise as Chew & Co. may legally dispatch without a license (but without the collection of any compensation from carriers) as a "person whose primary business is the sale of merchandise", under section 44(a) of the Act. He is covered under his employer's retirement plan, although the nature of the plan (including the extent of benefits and any vesting provisions) was not described.

Discussion and Conclusions

"This licensing statute, like other licensing statutes, should be approached with a liberal attitude to the end that permits may be granted to qualified applicants. *Application for Freight Forwarding License—Dixie Forwarding Co., Inc.*, 8 F.M.C. 109, 112; and report on reconsideration, 8 F.M.C. 167. Nevertheless, if the applicant is not fairly within the definition of "independent ocean freight forwarder" set forth in Section 1 of the Act, there is no room for the exercise of liberality.

Cady's status under the definition depends on whether or not, within the meaning and intent of the statute, he is and will be controlled by a seller of, or person having a beneficial interest in, shipments to foreign countries, by reason of his employment by A. E. Chew & Co., Inc.

One of the principal purposes of Public Law 87–254 was to authorize payment of so-called brokerage by ocean carriers to freight forwarders, but only under such circumstances as not to result in any benefit to a shipper such as to constitute a rebate. To prevent the possibility of such indirect rebating, the definition of an "independent ocean freight forwarder" was established and conformity therewith made a condition to the granting of a license; and carriers were permitted to compensate only licensed forwarders. The definition was intended to exclude indirect as well as direct interests, including so-called "dummy forwarders"—concerns organized for the sole purpose of collecting compensation from carriers which would find its way back in whole or in part to the shipper. The language concerning shipper control was evidently taken from paragraph 244–13 of General Order 72 (covering the registration of freight forwarders) issued by the Commission's predecessor in 1950, where the existence of such control was expressly stated as one of the situations in which payment by a carrier to a forwarder would constitute a rebate:

> "* * * Registration shall not entitle a forwarder to collect brokerage from a common carrier by water in cases where payment thereof would constitute a rebate—i.e., where the forwarder is a shipper or consignee or is the seller or purchaser of the shipment, or has any beneficial interest therein or where the forwarder directly or indirectly controls or is controlled by the shipper or consignee, or by any person having a beneficial interest in the shipment. A forwarder shall not share any part of the brokerage received from a common carrier by water with a shipper or consignee."

As Hearing Counsel contend (and neither Cady nor Chew & Co. denies), Chew & Co. is a seller and shipper of shipments to foreign countries, as those terms are used in the definition of an "independent ocean freight forwarder". Its primary business is the sale of merchandise, for its own account as well as for the account of others. As to those shipments which it dispatches as exporter with title to the goods, it is the seller in the most technical sense. It is also a shipper in the regular course of its business, to such an extent that it has entered into dual rate (exclusive patronage) contracts with numerous steamship conferences.

The applicant Cady is an employee of Chew & Co., in the usual master-servant relation and not as an independent contractor, controlled by his employer in the details and method, as well as the result, of services rendered for his employer. Chew & Co. has actually exercised control over Cady with respect to his carrying on the business of forwarding as a registrant, as recently as June 1964. Until that time, Chew & Co. received and retained the freight forwarder's fees earned by Cady in his allegedly independent, personal forwarding business, and he operated, and continues to operate, in the office of his employer during his regular hours of work. While he remains an employee of Chew & Co., Cady, as the agent and servant of his employer, will remain subject to his employer's will as it may change from time to time. *Restatement, Second, Agency Sec. 33.*

While theoretically an agent and employee may properly refuse to do a particular act because it is beyond what he has contracted to do, the fact of Cady's dependence on his job with Chew & Co. (which is emphasized in respondent's brief and is in common to a greater or less degree with the position of every employee) leaves no doubt as to the affirmative as well as the negative control which Chew & Co., a seller and shipper, has and will have over Cady's activities, regardless of any present agreement or understanding. Cf. *American Steel Foundries Co.* v. *Tri-City Council*, 257 U.S. 184, 209.

Thus it is unimportant that his employer now permits Cady to retain brokerage and forwarders fees. Under the circumstances, the relation would not be changed substantially if Cady were in fact a part-time employee, as his employer now claims to consider him. Actually Cady remains a full-time employee, notwithstanding that he is permitted, at present, to carry on his "personal" business during his regular working hours. Likewise, it is immaterial whether or not Cady reimburses his employer for the use of its facilities; in fact reimbursement might well constitute a method of transmitting a rebate in violation of the Act.

On its face, the master and servant [4] relation between a shipper and licensed forwarder is inconsistent with the purpose of the Act that forwarders eligible to receive compensation from carriers be neither shippers nor sellers nor controlled by either. The present situation is no exception. The complete history of applicant's operations indicates that it grew out of a dummy forwarder setup employed by Chew & Co. and Cady since 1950. From that time until 1962, if not thereafter, Cady's forwarding activities were separate from his employer's affairs only in that Cady had a letterhead and an invoice form bearing his name, the latter used only to bill carriers for "brokerage"; his employer billed and retained all forwarding fees. Cady's customers were Chew & Co.'s customers, the transactions were recorded in Chew & Co.'s books, Chew & Co. provided all physical facilities (the "tools and instrumentalities") and Cady was its "export manager". It is unbelievable that Chew & Co., in fixing Cady's remuneration (includ-

[4] "Employee" is the modern term for "servant"; in general the words are synonymous. *Restatement, Second, Agency Sec. 220g.*

ing the discretionary bonus), did not take into consideration the brokerage he received from carriers; or that Cady did not recognize such brokerage as flowing from his employment with Chew & Co. and to be added to his salary and bonus. The registration in Cady's name presented just such a false facade as Public Law 87–254 was designed to eliminate.

To license Cady while he remains an employee of Chew & Co. would continue the same structure, susceptible at any time of use in flagrant violation of the purpose of the statute. The present intentions of Cady and his employer are immaterial, since the statute makes licensing depend upon the existence of control and not upon its exercise or nonexercise. Public Law 87–254 does not allow licensing upon condition that the forwarder refrain from collecting compensation from carriers with respect to shipments made by the forwarder or someone controlled by or controlling him. That was roughly the plan of General Order 72 in connection with the registration of forwarders. It is significant that Congress did not follow such an arrangement in Public Law 87–254—presumably because, as the legislative history shows, the prohibition in General Order 72 was frequently evaded through the use of dummy forwarders and the like.

Applicant Cady is and will be, while his present employment continues, controlled by a shipper and seller of shipments to foreign countries, and therefore not an "independent ocean freight forwarder", under the definition contained in section 1 of the Act.

Findings and conclusions proposed by the parties have been incorporated herein to the extent that they are found to be material and supported by the record, and are otherwise denied.

Upon the record herein, it is concluded that the Commission cannot find that the respondent, Wm. V. Cady is, or will be, an independent freight forwarder as defined in section 1 of the Shipping Act, 1916, as amended. Accordingly an order will be entered denying respondent's application, pursuant to section 44(b) of said Act.

(Signed) WALTER T. SOUTHWORTH,
Presiding Examiner.

DECEMBER 2, 1964.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 377

LUDWIG MUELLER CO., INC.

v.

PERALTA SHIPPING CORPORATION, AGENTS OF TORM LINES

SPECIAL DOCKET NO. 378

LYKES BROS. STEAMSHIP CO., INC., APPLICATION TO REFUND PART FREIGHT CHARGES COLLECTED ON SHIPMENT VIA SS "NANCY LYKES" FROM LEHAVRE, FRANCE, TO GALVESTON, TEX.

Decided January 13, 1965

Permision to grant refunds denied.

Kenneth G. Frazer for Ludwig Mueller Co., Inc.

K. W. Schmolze for Peralta Shipping Corp.

Walter T. Southworth, hearing examiner in No. 377.

Edward S. Bagley for Lykes Steamship Co., Inc.

P. D. Hugon for Mory, S. A.

Paul D. Page, hearing examiner in No. 378.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* George H. Hearn, John S. Patterson, *Commissioners*)

On August 19 we entered our notice of determination to review the initial decision in No. 377 and on August 21 we entered a similar notice with respect to No. 378.

These cases arise, as have many since the enactment of the Bonner Act[1] on October 3, 1961, and under long established rule 6(b) of the

[1] Public Law 87–346, 87th Cong. (75 Stat. 762), which *inter alia,* added sec. 18(b) to the Shipping Act (the Act), 46 U.S.C. 817(b).

Commission's rules of practice and procedure which reads:

(b) *Voluntary payment of reparation.* Carriers or other persons subject to the shipping acts may file applications for the voluntary payment of reparation or for permission to waive collection of undercharges, even though no complaint has been filed pursuant to rule 5(b). All such applications shall be made in accordance with the form prescribed in appendix II(5) herein, shall describe in detail the transaction out of which the claim for reparation arose, and shall be filed within the 2-year statutory period referred to in rule 5(c). [This provides procedurally for the filing of formal complaints under section 22 of the Act.] Such applications will be considered the equivalent of a complaint and answer thereto admitting the facts complained of. If allowed, an order for payment will be issued by the Board.

In both of these cases, as in other special docket proceedings, respondents initiated the action and they were prosecuted as "friendly suits." In neither was there a "contest" and the parties seek our quasi-judicial approval of a "settlement" authorizing a refund, in No. 377 of some $840 and in No. 378 of some $61.

We have chosen these two cases for careful review in an effort to spell out clearly Commission policy with respect to special docket proceedings. In each, to be sure, the equities pointing to relief are weighty. If we are clothed with the authority to grant the relief requested, these two cases merit that relief.

The pertinent facts in No. 377, briefly, are these. Complainant Ludwig Mueller, Inc. (Mueller), as sales agent for a Bulgarian seller, arranged for the reexportation of some 73,000 pounds of paprika from New York to Algiers. The movement to Algiers was accomplished by a vessel of the Torm Lines whose agent in the United States is Peralta Shipping Corp. (Peralta), the respondent here. There is no outbound movement of paprika from New York, and only the incidence of entry denial, most likely, would ever give rise to that product's exportation from the Atlantic coast.[2] Since paprika is not exported from the Atlantic coast, Torm Lines' eastbound tariffs from New York do not contain a commodity tariff item covering paprika. When the reexportation was made, therefore, the appropriate tariff classification for this commodity was $76.50 "weight or measurement" N.O.S.[3]

As the record shows, complainant did not question the weight or measurement feature of this tariff item but assumed that it would be rated on a "weight" basis since Torm's inbound (westbound) tariff from Morocco rates paprika on a weight basis. Furthermore, the shipper's assumption in this regard was fortified by the fact that eastbound rates to both Hamburg and Istanbul to which ports other portions of this original shipment of paprika were reexported were rated on a weight basis. Accordingly, at the time of shipment Mueller did

[2] The Food and Drug Administration refused entry into the United States of this paprika.
[3] Not otherwise specified.

not consider the possibility that the "measurement" basis would be applied to the shipment and assumed that the rate of $36 [4]—not $76.50—would obtain. When the measurement rather than the weight basis was applied, Mueller complained to Peralta and paid the freight bill under protest. This application ensued.

Complainant argues that through the inadvertent failure of the carrier to file a proper rate on this commodity that it has been assessed an unreasonably high rate which runs counter to common sense in that the failure of the Commission to grant the relief requested would result in a penalty to the shipper and an unconscionable windfall to the carrier.

Although Mueller had actual knowledge of the "weight or measurement" feature of the tariff item but relied on practices in other trades in assuming that the "measurement" basis would not be applied, the examiner, following our earlier decisions and stating that the "shipper has no reason to expect freight to be charged at a rate nearly two and one-half times what he knew had just been paid to move the same item a much greater distance," granted the refund, noting that to do otherwise would produce an oppressive, unjust and absurd result, and that the protection which the Act affords to shippers would be negated by a literal interpretation of the Act.

No. 378 involves a shipment of household thermometers from Le Havre to Galveston in 1964. On August 15, 1962, and thereafter, Lykes maintained a tariff rate indicating a $50 rate for household thermometers. Mory, S.A. (Mory), on occasion, shipped via Lykes household thermometers at the $50 rate. On January 9, 1964, Lykes amended its tariff effective January 15 and incorporated in that new tariff certain rate increases of approximately 10 percent. By "an erroneous transportation of the descriptive language" the commodity involved, "through a typographical error," was combined with the description of industrial and dairy thermometers. The rate on household thermometers was omitted and the applicable tariff became $103 rather than $55 w/m which would have resulted had the proposed increase of 10 percent been set out in the new tariff which became effective on January 15, 1964. The examiner found that Lykes' omission of the commodity classification constituted a "clerical error," and relying upon earlier Commission pronouncements in special docket proceedings, granted the relief "in spite of the provisions of section 18(b)(3)," citing the *Swedish American Line* case: [5]

In the past we have granted such applications where a shipper through previous shipments has come to rely on a given rate only to discover that subsequently,

[4] Torm's inbound rate on paprika from Morocco calculated on a weight basis.

[5] Docket No 371, decided June 12, 1964. 8 FMC 142, 143

the rate was inadvertently omitted from a new tariff and therefore theoretically inoperative, *Lykes Bros. Steamship Co. Refund of Freight Charges*, 7 F.M.C. 602 (June 4, 1963). As in that case, the relief granted here will relieve an innocent shipper of the carrier's failure to file a proper rate.

For reasons set forth below we disagree with both of these initial decisions. After a painstaking review, we are of the opinion, with respect to special docket proceedings in our *foreign* commerce, that the dissent in the *Swedish American Line* case, *supra*, reached the correct result. Neither "inadvertent clerical error"—the asserted ground in No. 378—nor the fact that the shipper had "no reason to expect freight to be charged at a rate nearly two and one-half times what he knew he had just paid to move the same item a much greater distance"—one of the indicia used in No. 377—is sufficient to overcome the clear obligation imposed by section 18(b) (3) which reads:

No common carrier by water in foreign commerce * * * shall charge or demand or collect or receive *a greater or less or different compensation* for the transportation of property * * * than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; * * * [Emphasis added.]

In No. 377, the applicable rate on the commodity was $76.50 "weight or measurement." It was "on file with the Commission" when the shipment was made. It was then "duly published" and it was "in effect." Likewise, in No. 378, oversight or not, the published, in effect, Commission-filed tariff for the commodity in question was $103.50 w/m—not $55, $50 or any other amount. Moreover, an unintentional failure to file a particular rate,[6] a bona fide rate mistake,[7] a hardship visited upon an innocent shipper by inadvertence of a carrier,[8] or a stenographic omission [9] are not sufficient reasons for departing from the requirements of section 18(b) (3).

We are aware that our decision in these two cases will result in some hardship, but we adopt the position that strict adherence to filed tariffs is mandatory. Moreover, we believe that strict construction of the statute will result in more careful tariff administration and management by carriers and conferences, and the obviation of possible undue or unfair preferences or advantages and discriminations.[10]

---

[6] *Y. Higa Enterprises* v. *Pac. Far East Line, Inc.*, 7 F.M.C. 62 (1962).

[7] *Martini & Rossi et al.* v *Lykes Bros. S.S. Co.*, 7 F.M.C 453 (1962)

[8] *Uddo & Taormina Corp et al* v. *Concordia Line*, 7 F.M.C. 473 (1962).

[9] *Lykes Bros. S.S Co.—Refund of Freight Charges*, 7 F.M.C. 602 (1963).

[10] Special docket decisions with respect to tariff and freight discrepancies in our foreign commerce, following the enactment of sec. 18(b), evince a policy to extend assistance and understanding to carriers and their employees in making the transition from the earlier tariff filing practices in our foreign trade to the new strict filing requirements. It is almost 3 years since sec. 18(b) was enacted and it should be expected that carriers are now thoroughly familiar with tariff filing requirements Such applications, which are addressed to some undefined wellspring of equity in the Commission rather than to any basis in law, have shown no sign of abating.

Judicial authority of long standing supports our view that no deviation may be made from the rates on file. As early as 1915, the Supreme Court, in *Louisville & N.R.R. Co.* v. *Maxwell*, 237 U.S. 94, was called upon to interpret section 6 of the Interstate Commerce Act—not unlike our section 18(b)(3)—which then read in part:

> Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, * * * except such as are specified in such tariffs.

Justice Hughes, speaking for the majority, wrote:

> Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

The *Maxwell* pronouncement has been followed recently in *Silent Sioux Corp.* v. *Chicago & North Western Ry. Co.*, 262 F. 2d 474 (1959):

> * * * the principle is firmly established that the rate of the carrier as duly filed is the only lawful charge.

and in *Johnson Machine Works, Inc.* v. *Chicago B&Q R. Co.*, 297 F. 2d 793 (1962):

> It is well established when the shipper designates the routing, the rate set out in the published tariff covering such route is the only lawful charge that can be properly made.

While it is true that the *Maxwell*, *Silent Sioux*, and *Johnson* cases (and the many that follow them) relate to the Interstate Commerce Act provision requiring the exaction by carriers of the filed tariff rate, that provision is similar to our section 18(b)(3). And we would be remiss, indeed, if we continued to construe the requirements of section 18(b)(3) in a manner contrary to the long established judicial interpretation of section 6 of the Interstate Commerce Act. *U.S. Nav. Co.* v. *Cunard SS Co.*, 284 U.S. 474 (1932).[11]

In light of the rules recited in the *Maxwell* case,[12] unless there is some other statutory basis for relief in these cases—and we can find none—the construction we have placed on section 18(b)(3) of the Act is dispositive of special docket applications grounded on rate or tariff deviations in our *foreign* trades.

---

[11] "* * * The settled construction in respect of the earlier Act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the Act relating thereto, requiring a different conclusion." 284 U.S. 474 at 481.

[12] "(T)he rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted under any pretext." 237 U.S. 94, 97.

It may be asked, at this point, what is the function of our special docket procedure and when may it be used. It is a procedure whereby there is approved a refund from a carrier to a shipper of the difference between a rate that the carrier admits and the Commission finds to be unreasonable (and therefore unlawful), and *a rate which the Commission adjudges to be reasonable.*

It becomes immediately apparent, therefore, that only in those cases where the Commission is empowered to direct the enforcement of a reasonable rate is our special docket technique applicable, i.e., those cases within the purview of section 18(a) of the Act and the provisions of Intercoastal Shipping Act, 1933. Such cases, of course, relate solely to the Commission's jurisdiction over common carriers in the so-called noncontiguous domestic trades. Section 18(a) requires such carriers to establish and observe "reasonable rates" and provides:

Whenever the board finds that any rate * * * demanded, charged, collected, or observed by such carriers is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable rate * * * .

Section 4 of the 1933 Act specifies:

Whenever the Commission finds that any rate * * * demanded, charged, or collected or observed by any carrier subject to the provisions of this Act is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum, or minimum, or maximum and minimum rate. * * *

This power of the Commission is not to be found in any provision of law respecting tariff or rate jurisdiction in our *foreign* commerce. To be sure, section 18(b) (5) provides:

The Commission shall disapprove any rate or charge filed by a Common Carrier by water in the foreign commerce of the United States or conferences of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

But strikingly absent from the authority conferred upon us over rates in the foreign trades is any power to set a "reasonable" rate. The extent of our reach, in such cases, is to "disapprove." This lack of authority is fatal to special docket applications in the *foreign* trades, for special dockets—like all complaint cases seeking reparation—require the fixing by the Commission, of *damages*, and the impotency to set or prescribe a "reasonable" rate forecloses our ability to arrive at the measure of damages, which, in unreasonable rate incidents, is the difference between the "reasonable" and the "unreasonable":

* * * (t)he plaintiffs have paid cash out of the pocket that should not have been required of them, and there is no question as to the amount of the proximate loss. *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U.S. 531 (1918).

Our reported special docket cases prior to *Y. Higa*, *supra*, reflect the view that the award of reparation stemming from an overcharge—

unlike an action establishing an unlawful discrimination or prejudice [13]—must be bottomed upon the ability (1) to find a rate "unreasonable" and (2) to state what the reasonable rate would be. In *Oxenberg Bros. Inc.* v. *United States*, 3 F.M.B. 583 (1951), it was found that a particular rate was "clearly unreasonable and, therefore, unlawful in violation of section 18" and "unlawful to the extent that it exceeded $10 per 2,000 pounds."

In sum, the special docket procedure, as a vehicle for avoiding the consequences of tariffs filed in accordance with section 18(b)(3) of the Act is no longer appropriate. Rule 6(b) therefore, cannot be used as authority to override the clear meaning of a statutory mandate.

What the parties have attempted here, and have attempted in other proceedings, could have been accomplished within the framework of the Bonner Act. While it is true that new and initial rates, and changes in rates which result in increases, must be filed to become effective not earlier than 30 days after they are filed, under section 18(b)(2), special permission may be granted whereby such rates may become effective almost immediately. Indeed, the great majority of special permission applications filed pursuant to section 18(b)(2) have shown sufficient "good cause" to warrant the grant of the requested permission. Further, where a carrier proposes to *reduce* a rate, the only requirement that must be met is that it be filed and made public. And to facilitate the filing of changes in tariffs the Commission, more than a year ago, established a policy whereby it would receive such changes by telegram or cable, even after the close of business at 5 p.m. on Fridays.

What we have said here, of course, does not extinguish or restrict the right of any person to file a complaint under section 22 of the Act alleging a violation thereof and inserting a claim for reparation for harm caused by such violation.

An order dismissing these applications will be entered.

VICE CHAIRMAN DAY AND COMMISSIONER BARRETT DISSENTING:

We would uphold the decisions of the examiners in the two cases here before us which granted the parties' applications for permission to refund portions of freight charges previously collected. Portions which amount to less than $900 in one case and less than $70 in the other.

We would grant the applications because we believe that a reasonable interpretation of section 18(b)(3) would not forclose the exercise of our administrative discretion to provide the relief which justice and equity demand.

[13] Specific pecuniary loss resulting from the discrimination must be proved. *Waterman* v. *Stockholms*, 3 F.M.B. 248 (1950), *West Indies Fruit Co. et al.* v. *Flota Mercante*, 7 F.M.C. 66 (1962).

In the Mueller case (special docket 377) the *shipper* assumed that the cargo of paprika would be charged on a weight basis in the light of his knowledge of rates applicable in trades where the subject commodity normally moved and had no reason to expect freight to be charged on a measurement basis and at a rate nearly 2½ times what he knew had just been paid to move the same item a much greater distance. The *carrier* would have adjusted its tariff to avoid such a measurement basis charge if the situation had been called to its attention beforehand. The *shipment* was made under unique circumstances in a trade where the commodity had never moved and could not reasonably be expected to move.

Thus, we have, in effect, an innocent shipper acting in reliance (upon facts it knew), inadvertence by the carrier (it was unaware of the situation presented), and a unique operation where granting the requested adjustment in the charge cannot discriminate against other shippers.

In the *Lykes* case (special docket 378) the *shipper* had previously shipped thermometers over the same route via the same carrier at about half the rate he was charged for the subject shipment. The *carrier* would have corrected its tariff if it had noticed its clerical error that specified the excessive charge. The *shipment* was the only one over the route tendered for carriage to Lykes prior to the time the carrier did, in fact, correct the aforesaid error in its tariff.

Thus, we have again here, in effect, an innocent shipper acting in reliance, inadvertence by the carrier, and a unique operation where granting the requested adjustment in the charge cannot result in discrimination against other shippers.

Granting the applications in these cases would be consistent with our prior decisions. See *Swedish American Line, Application to Refund*, 8 F.M.C. 142 (Special docket 371, decided 1964); *Midwest Export & Import Co., et al.* v. *Hartman & Co., Agents*, 8 F.M.C. 87 (special docket 366, decided 1964); *Lykes Bros. Steamship Co.—Application to Refund*, 7 F.M.C. 602 (1963). Accord, *Aichmann & Huber* v. *Bloomfield Steamship Co.*, 7 F.M.C. 811 (Special docket 290, decided 1964); *Nydia Foods Corps* v. *Java Pacific Line, General Agents*, 7 F.M.C. 808 (special docket 313, decided 1964); *Uddo & Taormina Corp.* v. *Concordia Line*, 7 F.M.C. 473 (1963); *Martini & Rossi, et al.* v. *Lykes Bros. Steamship Co.*, 7 F.M.C. 453 (1962); *Higa Enterprises, Ltd.* v. *Pacific Far East Line, Inc.*, 7 F.M.C. 62 (1962).

We recognize no circumstance now arising that should make invalid today what we have held valid before. Our statutory section 18(b)(3), requiring carriers to charge all shippers the rates listed in their tariffs, was designed to avoid discrimination between shippers which would result from charging one shipper one rate and another shipper another. The key issue in our special docket decisions has thus been whether discrimination was possible under the facts of the case. The wording of section 18(b) (3) does not constitute an inflexible requirement where discrimination is not, within reason, possible.[14]

To deny refund applications because of the literal wording of a statute produces oppressive, unjust, and even absurd results. Thus, in these present cases, the majority employs a statute to force shippers to pay rates which neither carrier nor shipper support and which will not be charged others. The majority employs a statute not to achieve that statute's antidiscrimination objective (for no discrimination could here be involved in the rate relief requested) but to freeze solid an inequitable result intended by none and regretted by all.

"We cannot impute to Congress an intent to produce an absurd result." *Yankee Network* v. *Federal Communications Commission*, 107 F. 2d 212, 219 (D.C. Cir. 1939). "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor the intention of its makers," *Holy Trinity Church* v. *United States*, 143 U.S. 457 (1892), and "all laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." *United States* v. *Kirby*, 74 U.S. 482, 486 (1868).[15]

---

[14] See *Chesapeake & O. Ry. Co.* v. *Burton*, 62 F. 2d 110, 112 (4th Cir., 1932).

[15] We are more persuaded by the above reasoning than by those opinions construing the Interstate Commerce Act which the majority favors; to wit: *Louis. & Nash. R.R.* v. *Maxwell*, 237 U.S. 94, 97–99 (1915) wherein the Court said that ignorance or misquotation of rates is no excuse for departure from tariff rates and that while such a rule was strict it embodied Congressional policy to prevent unjust discrimination. *Silent Sioux Corp.* v. *Chicago & North Western Ry. Co.*, 262 F. 2d 474, 476 (8th Cir., 1959) in which the Court held that "one of the prime reasons for the enactment under consideration is to prevent discrimination which in our view, would result from either a higher or lower misquotation of the lawful rate." *Johnson Machine Works, Inc.* v. *Chicago, B. & Q. R. Co.*, 297 F. 2d 793, 798 (8th Cir., 1962) where the Court remarked that "The cases denying a shipper relief in instances of misquotation of rates are based largely on the policy of avoiding discriminatory rates and the fear that the device of misquotation could readily be used for the purpose of affording one shipper an advantage over another." The Court distinguished the particular case before it, however, in adding that "the opportunity for discrimination in the situation presented by the * * * misrouting in this case is not apparent." In each of the special dockets here before us we expressly find that the particular shipment is a unique instance and that no discrimination can result from permitting use of the rate contemplated. Further, we do not believe that our so granting special docket applications, on a case-by-case basis, would open the door to any cognizable discriminatory trend or practice. In the above regard we would finally note *U.S. Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 481 (1932) where in comparing the early Interstate Commerce Act to our own Shipping Act the Court said "construction in respect of the earlier act must be applied to the later one, *unless, in particular instances, there be something peculiar in the question under consideration* * * *." [Emphasis added.]

In light of the foregoing we would make these observations. The antidiscrimination objective of our statute is clear. We are charged with administering the statute to achieve this particular objective. Such charge also entails (where we find that the statute's objective is not threatened) the discretion and authority to avoid unintended results in administering the statute and to grant relief in proper cases.[16]

Here then we do not construe section 18(b)(3) as barring us, where we here find no possibility of discrimination, from exercising our discretion to provide just and equitable relief for the parties before us.[17]

---

[16] See also *Martini & Rossi et al.* v. *Lykes Bros. S.S. Co., Inc.,* 7 F.M.C. 453 (1962).

[17] Employment of our rule 6(b) in these cases provides carriers with a ready means of making refunds with express Commission approval and we support the use of this procedural vehicle.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 377

LUDWIG MUELLER CO., INC.

v.

PERALTA SHIPPING CORPORATION AGENTS OF TORM LINES

SPECIAL DOCKET NO. 378

LYKES BROS. STEAMSHIP CO., INC., APPLICATION TO REFUND PART FREIGHT CHARGES COLLECTED ON SHIPMENT VIA SS "NANCY LYKES" FROM LEHAVRE, FRANCE, TO GALVESTON, TEX.

ORDER

In the absence of exceptions to the initial decisions in these proceedings, the Commission served notice of its intention to review the decisions.

The Commission having reviewed the decisions and, on the date hereof, having made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the applications of Peralta Shipping Corp. and Lykes Bros. Steamship Co., Inc., to refund certain freight charges are denied.

By the Commission.

(Signed) Thomas Lisi,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1117

PACIFIC COAST EUROPEAN CONFERENCE PROCEDURES FOR HEARING AND CONSIDERING SHIPPERS' REQUESTS AND COMPLAINTS

ORDER DISCONTINUING PROCEEDING

Decided January 14, 1965

This investigation was instituted for the purpose of determining whether the Pacific Coast European Conference (and its member lines) had violated section 15 of the Shipping Act, 1916, by failing or refusing to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints, and/or whether the Conference agreement (F.M.C. No. 5200) should be disapproved because of such failure. Section 15 of the Act directs the Commission to disapprove a Conference agreement if it finds, after notice and hearing, that there has been a failure or refusal to adopt and maintain such procedures.

In furtherance of the investigation, hearing counsel on June 25, 1963, moved under the Commission's Rule 12(k) for the discovery and production of documents in the Conference's possession, consisting of any correspondence which it received from shippers between June 30, 1962, and June 30, 1963, complaining about rates, rules, or practices, or requesting the Conference to change or reconsider any rule, rate, regulation, or decision; the Conference's responses thereto; and any Conference circulars, memoranda or other documents relating to its procedures for hearing and considering shippers' requests and complaints.

The Conference opposed this motion, arguing *inter alia* that Rule 12(k) was unauthorized. On July 22, 1963, the examiner overruled the Conference's objections and directed production of the documents. The Conference next moved to dismiss the investigation on the ground that the Commission's order failed to accuse it of violating any provision of the Act. After reply in opposition by hearing counsel, the Commission denied this motion and issued an amended order of investigation.

Meanwhile the Conference sought and was granted postponement of the date for its compliance with the discovery order, because it was challenging the validity of Rule 12(k) in a pending suit. The Conference therefore did not comply with the discovery order. Since Rule 12(k) was later held to be unauthorized,[1] the Conference has never complied with that order nor otherwise furnished the information sought.

A hearing was held in San Francisco on October 22–23, 1963, but because the Conference had refused access to its files, the record developed at this hearing was meager. It consisted of an affidavit by the Conference chairman, which he read into the record and on which he was examined, outlining the Conference's procedure for handling shippers' requests and complaints, and five letters which hearing counsel received during August 1963 from certain of the Conference's shippers. Thereafter, hearing counsel filed the motion to discontinue the proceeding which is before us for disposition.

In this motion hearing counsel express the opinion, based on the aforesaid record, that the Conference has adopted and is maintaining adequate shipper request procedures. They further point out that the Commission has instituted a general rulemaking proceeding dealing with shippers' requests and complaints (Docket 1156), thus indicating an intention to proceed by rule of universal application. They accordingly suggest that no purpose would be served by continuing the instant docket.

On the limited information presently available we cannot agree that the Conference has adopted and is maintaining reasonable procedures for promptly and fairly considering shippers' requests and complaints. As hearing counsel recognized at the outset, the requirements of section 15 are not satisfied by a mere statement of procedure for handling requests and complaints, such as the Conference offered here. The U.S. Court of Appeals for the D.C. Circuit recently so held in suits by this Conference and others attacking orders under section 21 of the Shipping Act which demand the production of documents showing the actual handling and disposition of shippers' requests and complaints.[2]

---

[1] *Federal Maritime Commission* v. *Anglo-Canadian Shipping Co., et al.*, 335 F. 2d 255 (9th Cir., 1964).

[2] *Far East Conference, et al.* v. *Federal Maritime Commission*, 337 F. 2d 146 (D.C. Cir., 1964); *Pacific Westbound Conference, et al.* v. *Federal Maritime Commission*, No. 18592 et al., per curiam order (D.C. Cir., Dec. 2, 1964).

However, in light of the court's action affirming the section 21 orders, as well as the pendency of the proposed shippers' request rules dealing generally with the subject, there appears to be no need for continuing the instant docket. Hearing counsel's motion is therefore allowed and,

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

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1172

PETER BRATTI ASSOCIATES, INC.

v.

PRUDENTIAL LINES, INC. AND WEST COAST OF ITALY SICILIAN AND ADRIATIC PORTS/NORTH ATLANTIC RANGE CONFERENCE (W.I.N.A.C.) ET AL.[1]

No. 1173

PETER BRATTI ASSOCIATES, INC.

v.

HELLENIC LINES, LTD. AND WEST COAST OF ITALY SICILIAN AND ADRIATIC PORTS/NORTH ATLANTIC RANGE CONFERENCE (W.I.N.A.C.) ET AL.[1]

Respondents' tariff found to be ambiguous as to the proper rate on tile and marble slabs from Italy to the United States. Reparation awarded.

Donald J. Capuano for complainant.
Elliott B. Nixon for respondents.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER [2]

Complainant seeks to recover alleged overcharges in connection with two shipments of marble made by it from Leghorn, Italy, to Baltimore, Md., via respondents Hellenic Lines, Ltd. (Hellenic), and Prudential Lines, Inc. (Prudential), both members of respondent West Coast of Italy Sicilian and Adriatic Ports/North Atlantic Range

[1] American Export & Isbrandtsen Lines; American President Lines, Ltd.; Compagnie de Navigation Fraissinet et Cyprien Fabre; Concordia Line; Giacomo Costa Fu Andrea-Genova; Dampskibsselskabet Torm A/S; Hansa Line; Hellenic Lines, Ltd.; "Italia" Societa per Azioni di Navigazione; Jugoslavenska Linijska Plovidba; Mitsui Steamship Co., Ltd.; A. P. Moller-Maersk Line; National Hellenic American Line; Villain & Fassio e Compagnia Internazionale di Genova Societa Riunite di Navigazione; Zim Israel Navigation Co. Ltd.

[2] This decision became the decision of the Commission on January 18, 1965, and an order was issued granting the reparations.

Conference (conference or W.I.N.A.C.). The two complaints were consolidated for hearing and decision because of similarity of parties and issues.

It is alleged that in conforming to a conference decision, Hellenic and Prudential violated section 16, First, of the Shipping Act, 1916 (the Act), by imposing unjust and unreasonable charges; that the conference tariff containing the charges assessed was ambiguous and vague and the charges were based upon conditions not set forth therein, in violation of section 18 of the Act. Complainant seeks an order directing respondents to cease and desist from such violations and to put into force and effect and to apply in the future such other rates and charges as may be determined to be lawful. Reparation is sought.

Findings of Fact

1. Complainant, a New York corporation, was at all material times engaged in the construction business, specializing in the installation of tile, terrazzo and marble.

2. Respondents Hellenic and Prudential are engaged in the foreign commerce of the United States.

3. Complainant submitted an offer to perform the marble work on a project known as No. 1 Charles Center, Baltimore, Md. (project). The offer was considered high by the project authorities and after discussions, complainant's president and a representative of the project went to Italy to determine whether the use of marble produced in that country would lower the cost.

4. During the trip, the project representative selected the marble to be used and complainant made arrangements for its fabrication in the sizes and shapes called for by the architect's specifications.

5. Complainant's president, after making inquiry as to reputable freight forwarders, contacted Arno and Pesci, Italian freight forwarders, and requested them to determine the cost of shipping the marble to Baltimore. He was informed that ocean rates on finished travertine, polished or unpolished, was $37.50 a ton, and that the rate on floor tile was $23 a ton. No direct inquiry was made by complainant of the carriers.

6. Complainant did not retain Arno and Pesci prior to the first shipment here in controversy, but did retain the Italian firm of Stimart, freight forwarders, to handle that shipment. On May 30, 1962, Hellenic issued an order bill of lading, notify complainant, at the rate of $37 per ton (2,400 pounds) on cargo described as follows:

1 case marble samples, kg. 50.
109 crates sawn travertine slabs, kg. 92.000.
1 case marble samples, kg. 50.

7. When the Hellenic shipment arrived in Baltimore, an employee of complainant pointed out to his president that the rate was not in accordance with an office memorandum prepared by the president, which memorandum showed that floor tiles should be transported at the $23 rate. The employee investigated and reported that the tariff was ambiguous. Needing the tile for the construction job, complainant paid the $37 rate but protested to Hellenic that the carrier had improperly classified the marble. Had the shipment been carried at the $23 rate, charges thereon would have been $1,289.40 less than those paid by complainant.

8. Complainant discharged Stimart and retained Arno and Pesci as freight forwarder. This firm handled the second shipment in controversy, which moved via Prudential under an order bill of lading dated October 24, 1962, notify complainant, at the $23 rate, the cargo being described as follows:

34 cases travertine tiles, kilos 42,000.

9. When the second shipment arrived in Baltimore, an inspection was made by Atlantic Cargo Inspection Co. at the request of the conference. The inspectors applied the rule, on advice of the conference, that any piece of marble over 60 x 60 centimeters square was to be classified as a slab. This resulted in a finding that the cargo had been misclassified and a penalty was assessed but later withdrawn. Acting under protest, complainant paid the $37 rate in lieu of the $23 rate. The charges amounted to $588 more than would have been payable at the $23 rate.

10. The marble in both shipments exceeded 60 x 60 centimeters in area and ranged in thickness from 3½ inches to ⅞ inch. It was used by complainant for interior and exterior flooring at the project. The Prudential shipment included 111 pieces 3½ inches thick ranging in area from 3 feet 11 inches x 1 foot to 7 feet 10 inches x 1 foot 1 inch; 36 pieces 2½ inches thick ranging in area from 3 feet 11 inches x 1 foot 8 inches to 6 feet 6 inches x 1 foot 8 inches; 213 pieces ⅞-inch thick ranging in area from 3 feet 11 inches x 1 foot 11 inches to 4 feet 1 inch x 1 foot 1 inch. The Hellenic shipment also contained pieces ranging from ⅞ inch to 3½ inches in thickness and varying in area from 3 feet 11 inches x 1 foot 11 inches to 6 feet 7 inches x 1 foot 5 inches, the majority of the pieces being the smaller sizes. This shipment included two crates of marble 11 feet 9 inches x 2 feet 2 inches in area to be used for benches to be placed on the plaza floor of the project, and two crates of marble 7 feet 11 inches x 1 foot 5 inches to be used for stair treads. The other marble was to be used for flooring.

11. At the time of the two shipments the conference had on file with the Commission the following tariffs, which provided, in pertinent part:

W.I.N.A.C. Tariff No. 13, page 33.

Marble, granite, travertine, limestone blocks, rough, quarried, sawn not further finished--

* * * * * * *

Slabs, polished
Rough, sawn, in crates or cases------------------------------
As marble works, all kinds-----------------------------------

* * * * * * *

Tiles—See Tiles, all kinds.

* * * * * * *

Works, all kinds:
Up to $750 (value per W/T)------------------------------------ $37 w/m

W.I.N.A.C. Tariff No. 13, page 54.

Tiles, all kinds . . . packed in cases, cartons, or crates---------------- 23 w/m

12. There were other shipments by complainant of marble from Italy on which both the $23 and the $37 rate had been applied. No controversy arose over those shipments, however, as complainant believed that he had paid the $23 rate for marble to be used as flooring and the $37 rate on marble to be used for other purposes.

13. During negotiations for a refund the carriers were of the opinion that the $23 rate should have been applied to both shipments, but the conference refused to permit a refund, taking the position that the $37 rate had properly been applied.

14. There is a contrariety of opinion in the marble trade as to the difference between a slab and a tile. Four Italian firms state that it is customary to refer to marble used for floors as tile, regardless of size, and that they frequently receive and fill orders from United States purchasers for tiles which exceed 60 x 60 centimeters in area. The University of Rome Institute of Science considers the maximum dimension of a tile to be 60 x 40 centimeters. The Italian Railway and other Italian marble firms express various opinions as to the area of a tile ranging from 40 x 40 centimeters to 3 feet x 3 feet. A United States importer of marble considers that all marble used for floors is not properly classified as tile, and that any piece in excess of 20 inches x 20 inches x three-fourths inches should be classified as a slab. Witnesses engaged in the marble business in the United States testified that all flooring is properly classified as tile.

15. The W.I.N.A.C. tariff, as applicable to marble, was amended subsequent to the shipments here involved, but no standards are provided which would permit a shipper to determine the rate applicable to a tile as distinguished from a slab.

DISCUSSION

The parties rely on the well-established rule that terms used in a tariff should be interpreted as they are generally understood in the trade. Complainant contends that the generally accepted definition of a tile includes any piece of marble used for floors. Respondents contend that any piece of marble over 60 x 60 centimeters is understood commercially to be a slab. The tariff under consideration makes no distinction as to size or use but applies a higher rate to slabs than to tiles. As hereinabove found, there is a wide variety of opinion in the trade; furthermore, subsequent to the shipments here involved, the respondent carriers disagreed with conference officials as to the proper classification of the marble. The conflicting interpretation points up a definite ambiguity in the tariff.

When the interpretation of a tariff is the issue, any ambiguity of the tariff provisions which in reasonableness permit misunderstanding and doubt by shippers must be resolved against the carrier, the party preparing the document. *Gelfand Mfg. Co.* v. *Bull S. S. Line, Inc.*, 1 U.S.S.B. 169, 171 (1930); *Rubber Development Corp.* v. *Booth S. S. Co.*, 2 U.S.M.C. 747 (1945). Thus, although there is support for the interpretation advocated by both parties, complainant's interpretation must prevail. However, neither a shipper nor a carrier may rely on a strained or unnatural construction of an ambiguous tariff. But Arno and Pesci did not apply an unreasonable interpretation in advising complainant that flooring was classified as tile. As previously stated, many persons in the trade understood and accepted that classification. There is no evidence of a difference in handling and towing crates containing slabs and crates containing tile. The value of the pieces was comparatively uniform and the quality was substantially the same.

Respondents argue that complainant was not misled and that inquiry as to rates was not made of any conference carrier or of the forwarder who handled the first controversial shipment. Although it is true that a shipper, if he has doubt as to the proper tariff designation of his commodity, has the duty to make diligent inquiry (*Markt & Hammacher Co.—Misclassification of Glassware*, 5 F.M.B. 509, 511 (1958)), complainant here was not in doubt nor was the question of the applicable rates ignored. Inquiry was made of a reputable Italian forwarder, who advised that the rate on floor tiles was $23 a ton. When complainant became aware of the contrary classification on the first shipment, he made prompt inquiry.

Section 18(b)(1) of the Act requires that carriers in foreign commerce shall file tariffs showing all rates and charges and that:

> Such tariffs shall contain the classification of the freight in force, and shall also state separately * * * any rules which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates or charges * * *

Respondents imposed the higher rate by applying an arbitrary size limitation on tile of 60 x 60 centimeters. This unpublished limitation established, in effect at least, a rule which affected the determination of the rates set forth in the tariff. The inspectors retained by the conference based their report on the rule. Demanding and collecting a greater compensation than specified in the tariff on file with the Commission is a violation of section 18(b)(3) of the Act. If respondents intended to except from the general classification of tiles any piece having an area over 60 x 60 centimeters it was their responsibility to set forth the exception in the tariff. *Gelfand Mfg. Co.* v. *Bull S. S. Line, Inc.*, *supra.* The tariff contained no reasonable method of distinguishing a tile from a slab. See *National Cable and Metal Co.* v. *American-Hawaiian S. S. Co.*, 2 U.S.M.C. 470, 473 (1941).

Four crates of marble included in the shipment via Hellenic contained pieces for purposes other than flooring. The record does not contain evidence of the weight of the individual containers.

ULTIMATE CONCLUSIONS

Respondents' tariff applicable to marble was ambiguous at the time of complainant's shipments.

Respondents unlawfully applied an unpublished classification to the shipments involved, thereby overcharging complainant and complainant is entitled to reparation from Prudential in the amount of $588. As to Hellenic, however, the amount of reparation cannot be ascertained from the record which does not disclose the weight or measurement of the four crates which contained marble to be used for purposes other than flooring. Complainant shall prepare and forward a statement in accordance with the provisions of rule 15(b) of the Commission's rules of practice and procedure.

The carriers having been willing to apply the lower rate, but having been prevented from doing so by the conference, interest will not be awarded on the reparation.

The conference shall amend their tariff to conform to the findings herein and to remove the ambiguity relating to the classification of tile and a slab.

An appropriate order shall be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

DECEMBER 22, 1964.

FEDERAL MARITIME COMMISSION

No. 1103

AGREEMENT NO 9025: MIDDLE ATLANTIC PORTS DOCKAGE AGREEMENT

Decided January 22, 1965

Agreement No. 9025 between terminal operators to establish dockage charge in relation to vessels engaged in interstate and foreign commerce approved pursuant to section 15, Shipping Act, 1916.

Robert R. Artz, *Rene J. Gunning*, *William P. Quinn*, *John S. Shannon*, *Preston C. Shannon*. and *Charles C. Rettberg*, *Jr*. for respondents Reading Co., the Pennsylvania Railroad Co., Canton Railroad Co., the Baltimore & Ohio Railroad Co., Western Maryland Railway Co., the Chesapeake & Ohio Railway Co., Lamberts Point Docks, Inc., Elizabeth River Terminals, Inc., Imperial Tobacco Co. (of Great Britain and Ireland) Ltd., Whitehall Terminal Corp., and Rukert Terminals Corp.

E. R. Bunch for protestant Hampton Roads Maritime Association.

Charles R. Seal for intervener Virginia State Ports Authority.

Robert J. Blackwell and *Wm. Jarrel Smith*, *Jr*., hearing counsel.

Benjamin A. Theeman, hearing examiner.

REPORT BY THE COMMISSION

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

The Commission instituted these proceedings under sections 15 and 22 of the Shipping Act, 1916, to determine if Agreement No. 9025: Middle Atlantic Ports Dockage Agreement should be approved, disapproved, or modified.

The signers of Agreement No. 9025 (the "proponents") are admittedly engaged in the business of furnishing general cargo terminal facilities in connection with common carriers by water at the ports of Philadelphia, Baltimore, and Hampton Roads. Accordingly each is an "other person" subject to the Act within the purview of section 1. They are designated as respondents herein and take a united position requesting approval.

Protests against approval of Agreement 9025 have been filed by Hampton Roads Maritime Association (Hampton Roads) an association of steamship companies and agents, freight forwarders, terminal operators and other maritime interests associated directly with the port activities of Hampton Roads; and by Steamship Trade Association of Baltimore, Inc. (Steamship). Subsequently the Commission granted Steamship's request to withdraw its protest.

Virginia State Ports Authority (Virginia) was granted permission to intervene in opposition to approval of Agreement 9025. Virginia is an agency of the Commonwealth of Virginia, with the general function of promoting the commerce and protecting the interests of the ports of Virginia.

Hearing counsel appeared, supporting approval of Agreement 9025 with certain modifications.

All of the above parties submitted affidavits of fact and memoranda of law to the examiner. No oral hearing was held.

Agreement 9025 provides that the parties thereto may agree "to establish and maintain just and reasonable rates, charges, classifications, rules, regulations, and practices for and with respect to the dockage of vessels engaged in the transportation of interstate and foreign waterborne general cargo traffic" at terminals in the ports of Philadelphia, Baltimore, and Hampton Roads. The agreement does not establish dockage rates or charges but provides that they may be established, assessed and collected in accordance with future agreements entered into by the parties. It further provides that no changes in the dockage tariffs shall be made without prior notice to the other parties and then only after 30 days' notice to the public, unless good cause exists for a change upon shorter notice. The parties retain the right of individual action with respect to the establishment and assessment of dockage charges; i.e., any party to Agreement 9025 may elect to establish a rate, charge, rule, regulation, or practice independently, and without the assent of the other parties. Any responsible general cargo terminal operator at ports covered by the agreement may become a party to Agreement 9025 except for just and reasonable cause. Any party may withdraw from the agreement upon notice in writing to the other parties.

In an initial decision, the examiner approved Agreement 9025 in substance, provided it is modified in the following respects:

1. By adding a provision for self-policing by the parties of the obligations under the agreement;

2. By including procedures for dealing with shipper requests and complaints;

3. By adding a provision, in accord with the stated intention of the parties, for prompt filing with the Commission of all tariffs, rates, rules, and regulations, etc., reached pursuant to the agreement. (The parties had indicated to the examiner their intention to file this information); and

4. By adding a provision requiring that a statement of the reason for changing a tariff upon less than 30 days' notice to the public shall be filed promptly with the Commission whenever any such change is made.

Agreement 9025 has been amended by the parties to include all of the above provisions.

In addition, the examiner's decision stated that when common rates and charges are arrived at pursuant to the agreement:

> There is no question that the subsequent agreement arriving at or establishing rates, charges, regulations, or practices must first be filed with and approved by the Commission.

Exceptions to the examiner's decision have been filed by Hampton Roads, by the proponents, and by hearing counsel.[1]

Hampton Roads excepts on the following grounds:

(1) That the approval of the agreement by the examiner (subject to the modifications discussed above) is inconsistent with his finding that rates entered into pursuant to the agreement must be filed with and approved by the Commission;

(2) That the agreement would destroy competition between Hampton Roads and the other parties to the agreement and would therefore be unjustly discriminatory and unfair as between ports;

(3) That approval would result in a decrease in the number of ships calling at Hampton Roads, and would thus operate to the detriment of the commerce of the United States;

(4) That approval of the agreement would be contrary to the public interest because of an adverse economic effect on the maritime industry of Hampton Roads; and

(5) That the ports of Hampton Roads are primarily controlled by railroad interests. These railroad interests already impose port charges on shippers of 7 cents per 100 pounds. To approve this agreement would be to permit these railroads to impose a double charge.

---

[1] Hearing counsel has excepted to the examiner's conclusion that a ratemaking agreement between terminals should require self-policing provisions; and procedures for handling shippers' requests and complaints. Since the parties to Agreement 9025 have already submitted these provisions voluntarily, we need not decide at this time whether or not they should be required in agreements of this type.

A reply to the exceptions of Hampton Roads was filed by the parties to Agreement 9025.

Hampton Roads' first exception can best be disposed of by considering the sole exception filed by the proponents of Agreement 9025. These parties except to the examiner's conclusion that despite our approval of Agreement 9025, which would permit them to discuss and agree upon rates, charges, and practices for their terminal facilities, nevertheless the fruits of these discussions—any rate, charge, or practice agreed upon by proponents—must be filed with, and approved by, the Commission before it is put into effect. We believe the examiner erred in this conclusion. Section 15 of the Act expressly provides that:

> Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; *except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof* (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, *shall be permitted to take effect without prior approval* upon compliance with the publication and filing requirements of section 817(b) [Shipping Act, 1916, Sec. 18(b)] of this title with the provisions of any regulations the Commission may adopt. [Emphasis added.]

Since the provisions of section 18(b) referred to above require the filing of tariffs only by carriers or conference of carriers, it might be said that the exception to the filing requirements under section 15 refers only to the rates, charges, etc., of approved conferences of common carriers. However, we see no reason to apply a stricter standard and additional requirements for a conference of terminal operators than the statute provides for a conference of common carriers. In this connection see *Empire State Highway Transportation Association* v. *Federal Maritime Board*, 291 F. 2d 336 (D.C. Cir. 1961), where the court of appeals held that certain tariff revisions arrived at by a conference of terminal operators, pursuant to an agreement approved under section 15 by our predecessor the Federal Maritime Board, need not be approved by the Board before becoming effective.

The substance of Hampton Roads' third and fourth exceptions is that the imposition of dockage charges would be detrimental to the interests of Hampton Roads as a port, and therefore to the economy of the entire Hampton Roads area.

The two principal docking areas at Hampton Roads are Norfolk and Newport News. These two areas are separated by approximately 8 miles of water, and no rail connection or free intraport interchange exists between them. Thus, a substantial number of vessels serving Hampton Roads ports must incur the additional expense of calling at two (and, sometimes, three or four) docking areas at Hampton Roads. Moreover, the vessels serving Hampton Roads often discharge small cargoes of under 150 tons.

Hampton Roads contends that the burdens of serving that area, coupled with the relatively small cargoes destined for their ports, have already caused a considerable amount of cargo to be diverted from Hampton Roads to other competing ports on the Atlantic coast. Hampton Roads believes that the imposition of dockage charges would add to the burdens already borne by carriers serving the Hampton Roads area, and would cause still further diversion of cargo from Hampton Roads ports.

The thrust of Hampton Roads argument, therefore, goes to the question of whether or not dockage charges should be imposed at all at Hampton Roads, rather than to the issue of whether or not the parties to Agreement 9025 should be permitted to agree on these charges. But even were we to disapprove Agreement 9025 the terminal operators of Hampton Roads would still retain the right to establish reasonable dockage charges on a unilateral basis, and conversely approval of the agreement would still allow the individual operators to exercise their right of independent action and decline to impose any dockage charges.

The real issue before us, therefore, is whether or not the parties to Agreement 9025 should be permitted to discuss and agree upon such charges, a practice which Hampton Roads condemns in its second exception as destructive of competition. We find nothing in the record to indicate that Agreement 9025 would contravene the standards of section 15 of the Act.[2]

Agreement 9025 provides only that the parties may discuss and agree upon rates and practices in the future, and such an agreement on dockage charges may well have the salutory effect envisioned by the act of creating uniform and stable rates, charges, classifications, rules, and regulations among the competing ports. Moreover, the right of independent action reserved by the parties provides a safety valve to insure that the interests of each port area will be protected.

---

[2] Section 15 compels us to disapprove any agreement upon a finding that it is:

> * * * unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act * * *.

Since Agreement 9025 does not itself impose any charges, it is impossible on this record to assess its effect on carriers, ports, and the commerce of the United States with any real degree of accuracy. The Commission's power over section 15 agreements, however, consists not only of initial approval, but of continuing supervision; and if at some time in the future, rates, charges, classifications, rules, or regulations are established pursuant to the agreement which violate the fair and reasonable standards of the Act the Commission may protect the public interest by withdrawing its approval of the basic agreement itself, or by requiring its modification. *Empire State Highway Transportation Association* v. *Federal Maritime Board*, *supra*.

As to Hampton Roads' fifth exception, we find in Agreement 9025 no attempt to impose a double charge for terminal facilities. The charges now imposed by the Hampton Roads terminal operators (largely railroads) are charges imposed on railroad shippers. They were approved by the Interstate Commerce Commission in *Increased Freight Rates*, 1958 (Ex Parte 212), 304 I.C.C. 289 (1958), and were imposed because the railroads performed many services on waterborne traffic that would normally be performed by shippers on overland domestic traffic. These include such services as loading, unloading, bracing, and blocking of freight. The Commerce Commission in the *Increased Freight Rates* case, *supra*, stated at page 352:

We find, on the whole, that respondents provide more facilities and perform more services in the ports for waterborne traffic than they do for domestic traffic.

Thus, the railroads in imposing the port charges sought to pass on the additional terminal cost of handling waterborne traffic to the users of such service, rather than burden all of its patrons, including shippers whose cargoes do not require the use of port facilities. The imposition of the charges contemplated by Agreement 9025 would not appear to result in a "double charge" since they would be dockage charges imposed on the vessel and not freight handling charges imposed on rail patrons.[3]

Based on the foregoing, we find that Agreement 9025 has not been shown to be unjustly discriminatory or unfair; operate to the detriment of the commerce of the United States; be contrary to the public interest; or in violation of the Act. It is approved.

(Signed) FRANCIS C. HURNEY,
Special Assistant to the Secretary.

[3] The Commission assumes that the term "dockage charge" is used in Agreement 9025 in its traditional sense to mean that charge assessed against a vessel for berthing at a wharf, pier, bulkhead, structure or bank, or for mooring to a vessel so berthed.

FEDERAL MARITIME COMMISSION

No. 1059

NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION—DUAL-RATE CONTRACT

Decided January 29, 1965

ORDER ON RECONSIDERATION [1]

On March 27, 1964, the Commission issued its order in this proceeding approving for use by the North Atlantic Westbound Freight Association a dual-rate contract form which was also approved by the Commission for other conferences engaged in the dual-rate proceedings. See *The Dual Rate Cases*, 8 F.M.C. 16 (1964). The approved contract form was appended to the Commission's report as appendix 16B. Thereafter, on November 24, 1964, attorneys for the North Atlantic Westbound Freight Association filed with the Commission a proposed draft of a dual-rate contract form which had been negotiated "in terms acceptable to British Shippers' Council and the North Atlantic Shippers' Association." Notice of this filing was given in the November 28, 1964, issue of the Federal Register (29 F.R. 15932) and interested parties were invited to comment thereon and request a hearing should the same be desired.

Three parties filed protests to the draft contract but none requested a hearing. They are U.S. Borax & Chemical Corp., the National Industrial Traffic League, and the Dow Chemical Corp. Neither U.S. Borax nor Dow Chemical ship in the trade covered by this proposed dual-rate contract. The National Industrial Traffic League represents "substantial importers and hence users of inbound conferences." (Comments of the League, p. 1.) We think it worthy of note that the principal parties involved, the British shippers and the association, have agreed as to the terms of the contract and ask only that the Com-

[1] See order decided Apr. 1, 1965, denying petition for reconsideration.

mission give its approval to this agreement, thereby officially sanctioning free and collective negotiation.

As stated in the notice of filing, the proposed contract form differs in three principal respects from the form of the Commission-approved, dual-rate contract appended to the March 27, 1964, report:

(1) The clause relating to exclusions does not specifically exclude chemical products, as provided by statute, and does not make any reference to petroleum products which the Commission excluded from contract coverage. In addition, the Commission provided for the exclusion of proprietary cargo when carried in owned or chartered (for a period of 6 months or longer) vessels. The association's draft, which excludes all "bulk cargoes without mark or count" (article 1(d)), satisfies the statutory requirements of section 14b(8) of the Shipping Act. Our attention has been invited to no past usage of chartered or owned vessels by contract signatories, and the interested shippers in the trade, through their chosen representatives, have stated that they do not desire a charter exclusion. Therefore, the Commission can see no objection to the deletion of such exclusion by the association's draft.

(2) The wording of the natural routing clause in the association's draft differs from the wording of the Commission's approved form of contract. However, the association's draft contains a more exact description of a "natural route" in that it specifically provides that the service provided by the carriers from ports in Great Britain, Northern Ireland, and Eire shall be deemed the natural routes. In view of the fact that this more specific definition is acceptable to the principal contract shippers and it fully satisfies the statutory requirements, it will be permitted by the Commission.

(3) The association's draft deletes paragraph C of the Commission's *force majeure* clause, which related to conditions not under the control of the carrier, but which did not stem from war, warlike operations, or hostilities. Essentially, this provision was for the benefit of the carriers in that it allowed rate increases on less than 90 days' notice for such circumstances. If the carriers are willing to forego this additional privilege accorded them by the Commission's decision, the Commission has no objection to its deletion.

The association's draft incorporates other minor changes which the Commission will permit in view of the fact that the interested shippers agree to them. Thus, any objections to these changes by the three protestants are hereby rejected.

Therefore, *it is ordered*, That the terms and conditions of the form of the dual-rate contract attached hereto [2] shall be used by the North Atlantic Westbound Freight Association to the exclusion of any other terms and provisions for the purpose of according merchants, shippers, and consignees contract rates.

By the Commission (JOHN HARLLEE, *Chairman*, JAMES V. DAY, *Vice Chairman*, GEORGE H. HEARN, *Commissioner*).

Commissioners Barrett and Patterson are not in agreement with the Order of the Majority, and their reasons for disagreement follow.

---

[2] The form of the dual-rate contract attached to the Commission's order is omitted due to its length.

REASONS FOR DISAGREEMENT WITH ORDER ON RECONSIDERATION, Docket No. 1059

NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION—DUAL-RATE CONTRACT

Commissioners Ashton C. Barrett and John S. Patterson dissenting:

Based on the record before us in this proceeding, we conclude there is no justification for the denial of a hearing to consider (a) certain serious issues involving government processes; (b) questions as to the nature of agency decisions raised by the protesters; and (c) questions raised by us as to the procedure followed in this case.

As regards our conclusion as stated above, the supporting reasons are as follows:

We dissent from the issue of an order permitting the use of a proposed "general shipper contract" in response to the application of the North Atlantic Westbound Freight Association (association), a conference of common carriers by water in foreign commerce, without a hearing followed by an adjudication on the protests thereto submitted by a national organization of shippers and by two shippers, because in the past it has been the practice to hear and answer serious protests and more time is needed for this purpose. This practice, coupled with the absence of unusual and compelling reasons and arguments, dictates review and adjudication of an exclusive patronage dual-rate contract such as the proposed "general shipper contract" when it deviates from the contract authorized in docket No. 1059 in *The Dual Rate Cases* (8 F.M.C. 16) report issued March 27, 1964 (petition for reconsideration denied, served August 3, 1964).

The majority has said on the requirement of uniform, prescribed contract provisions that the requirement was based on (a) the "expectation" of the House Committee on Merchant Marine and Fisheries (H. Rept. No. 498, 87th Cong., 1st sess., p. 9, 1961); (b) the "sentiment" of the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives ("Report of the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives Pursuant to H. Res. 56," 87th Cong., 2d sess., p. 390, 1962); and (c) the "consideration" that construction of the statute rather than the facts of a particular trade is involved (*The Dual Rate Cases*).

In its decision in docket Nos. 1078 and 1080, the majority reaffirmed its "conclusions and reasoning" in *The Dual Rate Cases* that absent a showing of circumstances peculiar to their trade which would make inapplicable the former reasoning and conclusions, such decision would prevail (pp. 1 and 5, report, docket Nos. 1078 and 1080). Other references to the requirement that all contracts are required to contain standard provisions are on pages 14, 16, 19, 23, 25, 28, 31, 38, and 41 of the majority report in *The Dual Rate Cases*. As a result of these announced principles, shipper interests are believed to have come to regard themselves as having a vested interest in the continuation without change in the required provisions, absent changed conditions.

At this time we are faced with certain higher issues than those separating the majority and the minority in *The Dual Rate Cases* relative to the form of the contract pursuant to section 14b of the Shipping Act, 1916, or the procedures for adjudicating disapproval pursuant to the Administrative Procedure Act. The two transcending issues now before the Commission and requiring a hearing before resolution are:

1. The Commission, in the words of a protester, "should maintain the integrity of its decision in the dual-rate cases by denying this petition for radical changes therefrom"; otherwise, in the words of hearing counsel, replying to an earlier petition for reconsideration, the "granting of petitions of this nature encourage attempts to seek reopening and relitigation of questions that have already been exhaustively argued and resolved." Vacillation on questions of principle can be a matter of serious consequence to the entire Commission, because it will invite a flood of changes which will erode the entire decision and orders, and cast doubt on the finality of all future orders.

2. There should be finality to adjudication. The use of the association's contract in docket No. 1059 was not permitted, and instead the Commission ordered that the association's agreements "are hereby approved in the form attached to this order" and that "the terms of the agreement attached hereto shall be used * * * to the exclusion of any other terms and provisions * * *". Attached was a redrafted contract prescribed by the Commission, different in significant respects from the one before us now. Finality in this adjudication was accomplished on August 3, 1964, when we denied a petition for reconsideration. In our opinion, docket No. 1059 is closed and is beyond "reconsideration." We agree with hearing counsel "that the dual-rate cases should remain closed," unless a showing of circumstances peculiar to the trade which would make inapplicable the earlier reasoning and conclusions is shown. None has been shown to the public. It is not considered that acceptability of terms to the British Shippers' Council and the North Atlantic Shippers' Association is such a circumstance.

Finally, with regard to the procedure followed in this case, the following observations which we consider cogent are in order. They are:

(a) The inadequacy of the communications from the association submitted to the Commission for consideration and processing as an application for permission to use an exclusive patronage contract.

(b) The lack of information to the public and all interested parties as regards all reasons considered by the applicants to be compelling and unusual which would warrant the deviation sought from the contract approved and authorized by the Commission on March 27, 1964, in docket No. 1059.

(c) The fact that the only written communication placing the proposed contract before the Commission, which reads as follows, relates to a new contract the applicants wish approved and does not constitute a petition to reopen docket No. 1059.

Re North Atlantic Westbound Freight
Association—General Shipper Contract.

FEDERAL MARITIME COMMISSION, NOVEMBER 24, 1964.
1321 H Street NW.,
Washington 25, D.C.

GENTLEMEN: I refer to my letter of September 1, 1964. I am now instructed by the North Atlantic Westbound Freight Association that the association has reached agreement with the British Shippers Council and the North Atlantic Shippers Council about the form of a dual-rate contract which the two shippers' councils are prepared to recommend to their members for adoption as from March 1, 1965. A copy of the draft form of contract is enclosed with this letter.

Sincerely,

KIRLIN, CAMPBELL & KEATING,
By RONALD A. CAPONE
Attorneys for North Atlantic Westbound Freight Association.

RAC: by
Enclosure.

The letter was received by a member of the staff and stamped received in the Office of the Secretary on November 24, 1964. It was metamorphosed into a petition, and a "Notice of Petition Filed for Approval" dated November 25, 1964, was published in the Federal Register on Saturday, November 28, 1964, over the signature of the Secretary (29 F.R. 15932), referring to the letter as a petition filed for approval pursuant to section 14b of the Shipping Act, 1916, and the contract into a contract filed for approval.

These actions have been construed by the majority as compliance with the provisions of section 14b, stating "* * * on application the Federal Maritime Commission * * * shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract * * *" followed by a description of the contracts of the type now before us. We disagree.

Even assuming no shift in policy, the applicants have not provided the public with any new facts or reasons why the three principal changes in the previously permitted contract form are needed or are superior at this time. A hearing would produce the relevant information, especially in the absence of it being communicated in a form by which the public could be informed. To our knowledge, neither the British nor American shippers, nor any parts of the public have been given the opportunity to obtain the necessary explanations and justifications. To say the least, the applicants should come forward with the needed information. We consider a hearing necessary for this purpose, especially since we hold that the communications from the applicants represent a request for the approval of a new contract which they deem more appropriate than the contract already approved by the Commission. To date, thorough consideration of the issues involved in the significant shift of policy that has occurred in relation to achieving compliance with these provisions in the light of such vital information has not allowed public participation, as a result of the procedures followed.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1059

NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION—DUAL RATE CONTRACT

Decided April 1, 1965

ORDER DENYING RECONSIDERATION

The Commission entered an order in this proceeding, January 29, 1965. That order approved for the use of the North Atlantic Westbound Freight Association a form of dual-rate contract submitted pursuant to section 14b of the Shipping Act, 1916, for use by the association. The Commission's order of that date emphasized that the draft contract had received the approval of the British shippers involved which represent the overwhelming majority of the shippers in this inbound trade, and the protestants to the form of contract were not shippers in the trade, and consequently, not affected by this contract. Further, none of the protestants requested a hearing.

On March 1, 1965, Protestant, U.S. Borax & Chemical Corp., filed a petition for reconsideration of that order. On March 5th, the North Atlantic Westbound Freight Association filed its reply to the instant petition, requesting that the petition be denied.

The instant petition has not brought to our attention any "matter claimed to have been erroneously decided" as required by rule 16(b) of our rules of practice and procedure.

The Commission wishes to reiterate that its approval of the form of contract submitted by the North Atlantic Westbound Freight Association was based on the peculiar facts of that trade, and such approval in no wise detracts from the principle of uniformity enunciated in the Commission's decision in *The Dual Rate Cases*, 8 F.M.C. 16 (1964). In that decision the Commission indicated that some variations in contract forms would be allowed where peculiar or special circumstances in a given trade warrant a variation. Our decision here should not signal the filing of petitions for contract modifications in other trades which are not based on substantial reasons therefor.

Now, therefore, *It is ordered*, That the petition of U.S. Borax & Chemical Corp., for reconsideration of the Commission's order entered in docket No. 1059 on January 29, 1965, be, and it hereby is, denied.

Commissioners Ashton C. Barrett and John S. Patterson dissenting:

Based on the petitions before us in this proceeding, we conclude there is not sufficient justification for the denial of a reconsideration of the decision and order served January 29, 1965, as indicated in our dissent therein and for the following reasons:

1. In spite of the disclaimer of departure from the report and order in *The Dual Rate Cases* requiring uniformity in contracts and allowing variations based on peculiar or special circumstances in a given trade, no such circumstances have been adequately shown, so there is actually a departure, and the basis or reasons therefor ought to be explained to the public.

2. Absent such an explanation, the order herein cannot avoid signaling the filing of petitions for contract modifications in other trades which are not based on substantial reasons.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1155

IMPOSITION OF SURCHARGE ON CARGO TO MANILA, REPUBLIC OF THE PHILIPPINES

Decided February 3, 1965

Except as to newsprint out of Searsport, Maine, surcharges imposed by respondents on cargo from the United States to Manila, found not to be in violation of sections 15, 16, 17 or 18(b) (5) of the Shipping Act, 1916.

Respondents Maersk Line and Pacific Star Line, by imposing a surcharge on newsprint at Searsport, Maine, while they do not apply a surcharge at nearby Canadian ports, have prejudiced and discriminated against shippers of newsprint at the Port of Searsport as well as the port itself.

Edward D. Ransom and *Robert F. Fisher* for Pacific Westbound Conference and member lines, respondents.

Elkan Turk, Jr. for Far East Conference and member lines, respondents.

George F. Galland for respondent Compagnie Maritime des Chargeurs Reunis.

Thomas R. Matias and *Robert J. Blackwell*, hearing counsel.

A. L. Jordan, presiding examiner.

REPORT

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

The Commission instituted this proceeding on its own motion to investigate the lawfulness of surcharges on cargo moving from ports in the United States to Manila, Republic of the Philippines. The purpose of the proceeding is to determine whether the surcharges are contrary to sections 15, 16, 17, and 18(b) (5) of the Shipping Act, 1916.

The Commission named as respondents the Pacific Westbound Conference and its members, the Far East Conference and its members, Hawaii Orient Rate Agreement and members, Pacific Star Line, Compagnie Maritime des Chargeurs Reunis, and Pacific Navigation System, Inc.

The Pacific Westbound Conference provides service to Manila from the Pacific coast of the United States and Canada. The Far East Conference serves Manila from U.S. Atlantic and gulf ports, but this range of service does not include Canadian Atlantic ports. Maersk Line, however, a Far East Conference member, serves Canada as an independent, and Isthmian Lines, also a Far East Conference member, lifts Manila-bound cargo at Halifax, Nova Scotia. Pacific Star serves ports on the Atlantic coast of the United States and Canada as an independent, and Compagnie Maritime des Chargeurs Reunis provides independent service from U.S. Atlantic and gulf ports. The service of Pacific Navigation is not described in the record.

The Far East Conference on July 25, 1963, and the Pacific Westbound Conference on July 29, 1963, filed with the Commission surcharges of $10 per ton, as freighted, on cargoes destined for discharge at Manila, to be effective October 28, 1963. At about this same time the other respondents imposed surcharges of $10 per ton on cargo destined for discharge at Manila.

The Far East Conference, the Pacific Westbound Conference, and Pacific Navigation reduced their surcharges from $10 to $5 per ton, effective December 26, 1963; Hawaii/Orient reduced its $10 surcharge to $5, effective December 28, 1963; Pacific Star changed its surcharge from $10 to 10 percent per ton, effective December 12, 1963; and Chargeurs also changed its $10 surcharge to 10 percent, with a maximum of $10 per payable ton, effective December 9, 1963. These charges are in effect at present.

The surcharges were imposed at the port of Manila as a result of a strike and related labor difficulties which began during mid-1963. The strike primarily affected the port Arrastre Service at Manila. The Arrastre Service, in the Philippines, has the authority "to acquire, take over, operate and superintend such plants and facilities as may be necessary for the receiving, handling, custody and delivery of articles, and the convenience and comfort of passengers and the handling of baggage. * * *" The Arrastre assumes responsibility for the handling of cargo on the Manila piers. Cargo is delivered directly into the hands of the Arrastre who assume responsibility for movement on the pier, sorting, storing, and the ultimate delivery of the cargo to the consignee. The ship's responsibility ends at its tackle.

The Arrastre has a history of both private and public ownership. Since 1962 it has functioned under the Bureau of Customs, but a plan has been formulated recently to return it to private enterprise.

During the middle of 1963, the port of Manila was practically closed by a strike primarily affecting the port Arrastre. The strike was accompanied by disorder and violence with a long-term disruptive effect on the port. The Arrastre strike of 1963 was precipitated by uncertainty of status of the Arrastre labor contract with the strike's intensity being later heightened by the jurisdictional issue between two labor factions. In May of 1963, longshoremen furnished by the contracting union struck. The Arrastre employed nonunion labor subsequent to the outbreak of the strike which appears to have precipitated an outbreak of violence resulting in the damage and destruction of hilos and other pier equipment. This, in turn, contributed to cargo accumulation and slow discharge of vessels. The strike continued through the summer, and in October the port was virtually closed down in an effort to control sit-in strikes. The strike terminated late in October, but some unrest continued due to the labor jurisdictional issue. Similarly, pier congestion continued because of the lack of adequate pier equipment and lessened labor efficiency.

In considering the imposition of the surcharge the respondent conferences considered both the amount and applicability of the charges. The Pacific Westbound Conference originally proposed a surcharge of 25 percent of the basic freight rate and, pursuant to the terms of agreement No. 8200 between the two conferences, sought concurrence from the Far East Conference. The Far East Conference refused concurrence on the ground that a percentage, when applied in a like amount by both conferences, would tend to upset the historical differential in basic rates which exist between the two conferences. Finally, the conferences agreed upon the $10 per ton figure.

Conferences in foreign-to-foreign trades also imposed surcharges on Manila-bound cargo. The Australian Conference imposed a 25-percent surcharge, effective July 22, 1963; the Far Eastern Freight Conference of London, and the Bay Bengal-Philippine Conference, imposed surcharges of 25 percent, effective August 1, 1963; the Malaya-China-Japan Conference, effective August 10, 1963, and the Hong Kong-Philippines Conference, effective August 23, 1963, imposed surcharges of 25 percent; and the Japan-Philippines Conference imposed a surcharge of $2, effective December 1, 1963. The Australian Conference 25-percent surcharge was not in effect at the time of the hearing. The Far Eastern Freight Conference of London's 25-percent surcharge was reduced to 10 percent effective December 30, 1963.

In the weeks following the effective date of the surcharges, there was improvement in conditions at Manila. Delay due to congestion lessened and vessel turnaround time improved. While this improvement by the close of 1963 did not find a return to "pre-strike normalcy," respondents reduced their surcharges in December. In the late months of 1963, Philippine authorities attempted to clear congestion in Manila. Army trucks were used to clear cargo backlogs, bonded warehouses were employed for the storage of cargo not ordinarily put in bond, and some equipment was borrowed. Nevertheless, due to both the intensity of the Arrastre strike, and to the disturbing effect of the strike's yet unsettled causes, the port of Manila is currently (time of hearing) operating at less than a normal level of efficiency. This fact has resulted in the curtailment of service at that port on the part of some operators and in frequent abnormal delays for vessels calling there in recent months. Respondents are in no way a party to or themselves the cause of the present conditions in Manila and the result is to place upon them an additional element of cost for the performance of their Manila services.

Respondents have offered two cost justifications regarding the level of the surcharges. One concerns the time or rate of vessel discharge, and the other, total time spent in port. The time or rate of discharge approach is keyed to the "tons per gang hour" concept. This is the number of tons handled by each gang per hour that it is working, and is computed by dividing the total number of hours worked by each gang into the number of tons discharged. While the rate of vessel discharge will vary extensively depending on the commodities involved, general cargo is being discharged at Manila at approximately half the rate that could be expected during a period of normalcy.[1]

The other statistical approach offered by respondents deals with the total time spent in the port of Manila for vessels arriving there in the several months before the hearing. In this connection respondents have shown that an unusually long amount of time is required for service in Manila.

The conferences set the initial surcharge of $10 per ton at a level to compensate the carriers for out-of-pocket expenses incurred at Manila. Expenses among conference members, of course, vary; the selection of one level of reimbursement logically required a formula of average expense. Such a formula was used by the Far East Conference, being arrived at in the following manner: the daily cost for the operation of a conference vessel ranges from $1,500 to $3,600 with the average daily cost being $2,500. Four days' delay was considered the average at the time, making the cost for the average vessel $10,000. This cost was passed on to cargo on the basis of the June 1963 conference carryings. During June, 28 conference vessels carried 29,000 tons of cargo to Manila, averaging approximately 1,000 tons per vessel. The average cost vessel, carrying the average tonnage of cargo, being delayed for an average period of time resulted in the determination that $10 for each ton of cargo compensated costs.

[1] According to American President Line's experiences during 1960–1961, cargo moved at the rate of 8 or 9 tons; during the strike period of 1963 at 1 to 3 tons; and in November and December 1963 at 5 tons per gang hours. Pacific Far East Line agreed that before the strike the 12-ton rate was normal for discharging general cargo at Manila. The experiences of Chargeurs as to vessel discharge time varies from those of APL but the pattern is similar.

The Pacific Westbound Conference used a similar formula showing that its average vessel carried roughly 800 tons to Manila; that it suffered roughly four days' delay over normal; that the average daily vessel cost was between $2,000 and $2,400, a figure representing a compromise between low-cost vessels and American ships whose costs ran $3,600 to $4,800 per day; and that taking the lower average figure of $2,000 per day, daily costs would be returned by a figure of $10 per ton.

The reduction of the conference surcharges in December to $5 per ton was not based upon a specific revaluation of costs but represented a 50 percent reduction on the basis of some port improvement.

Discussion

The presiding examiner found that the surcharges were not contrary to the applicable provisions of the Shipping Act. He found that the surcharges were additional charges for service at Manila which reasonably approximated the additional cost of providing the service. Furthermore, he found that the form and the impact of the surcharges were not prejudicial to shipping interests in the United States. The examiner concluded that the imposition of the surcharges was not violative of sections 15, 16, 17, and 18(b)(5) of the Shipping Act.

Hearing counsel excepts on the ground that the form of the surcharge—the fixed dollar amount as opposed to a percentage form—is unlawful since it is prejudicial to shippers of low-valued, low-rated commodities. Hearing counsel also excepts on the grounds that the application of the surcharge by Maersk Line and Pacific Star Line at Searsport, Maine, while no surcharge is applied at nearby Canadian ports is contrary to the provisions of sections 16, first and 17 of the Shipping Act.

Hearing counsel did not except to the examiner's finding that on the record the surcharges were justified because of port congestion or that the overall revenue derived from the surcharges was a reasonable approximation of the cost incurred in calling at Manila. Neither did hearing counsel except to the examiner's finding that there was no showing on this record that the different surcharges in different trades resulted in prejudice to American exporters. We adopt those findings to which no exception has been taken.

The basic purpose behind surcharges such as those in issue here is to reimburse the carriers for additional costs temporarily incurred by the performance of their service, and which costs the carriers are not recovering through their basic freight rates. It is not disputed that the overall revenue derived from a surcharge of $10 per ton reasonably approximates the additional extraordinary cost for calling at Manila. The only question raised then is whether it is proper for shippers to be assessed on a tonnage basis rather than on a percentage of the freight rate. We feel that the surcharge, based upon a specific dollar amount per ton (weight or cube, as freighted) is a perfectly proper method of recouping the loss due to delay and congestion.

Nevertheless, hearing counsel argues that the form of the surcharge is prejudicial to low-rated commodities and preferential to high-rated commodities. The argument has only superficial appeal, for it is premised upon the claim that the fixed dollar surcharge places an undue share of the cost of the delay on low-value, low-rated commodities. The record is quite to the contrary. The cost of the delay, which is admittedly recouped by the surcharge, is equally apportioned between all cargo. But hearing counsel submits that the surcharge is imposed without regard to "competitive quality, value, freight rate, handling or transportation characteristics." Therefore, they contend that low-rated commodities pay the cost of delay disproportionately high to its basic characteristics. But the argument overlooks the fact that the charge is constructed on the most basic characteristic of cargo weight or cube. In fact, many accessorial charges, including handling and wharfage, are levied on a per ton basis without regard to freight rate, value, etc. Although freight rates may reflect value of the commodity, the rate at least equally reflects stowage factors. Considering that one type of cargo creates no more nor less delay than another, we think the fixed-dollar-per-ton charge is fair.

Furthermore, the fixed-dollar-per-ton surcharge does not violate section 16, first, of the Act, because the requisite competitive relationship is not shown between high- and low-rated cargo. There can be no undue or unreasonable preference or advantage to one and no undue or unreasonable prejudice to another "person, locality, or description of traffic" absent a real competitive relationship between the one advantaged and the one disadvantaged. *West Indies Fruit Co.* v. *Flota Mercante*, 7 F.M.C. 66 (1962), *Boston Wool Trade Association* v. *M. & M.T. Co.*, 1 U.S.S.B. 24, 30 (1921). In order to demonstrate unjust discrimination and undue prejudice, the evidence must "disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or commodities. * * *" *Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U.S.S.B. 538, 541 (1936). Our holding in *West Indies*, is controlling here:

Prejudice to one shipper to be unjust must ordinarily be such that it constitutes a source of positive advantage to another. *Port of Philadelphia Ocean Traffic Bureau* v. *The Export S. S. Corp., et al.*, 1 U.S.S.B. 101 (1926). The competitive relationship is necessary not only to show the extent to which the complaining shipper was damaged by the alleged preference, prejudice or discrimination; its establishment is also necessary to prove the violation itself. *American Peanut Corp.* v. *M. & M.T. Co., supra; Boston Wool Trade Assn.* v. *M. & M.T. Co., supra.* (7 F.M.B. 66, 71–2.)

Likewise, the form of the surcharge is not contrary to section 17. The record does not show that American exporters have been discriminated against in favor of foreign exporters or that the surcharge, in general, is unjustly discriminatory between shippers and ports. Consequently, we reject hearing counsel's argument that respondents have violated sections 16 and 17 by discriminating against low-rated in favor of high-rated commodities.

Hearing counsel's exception to the examiner's failure to find that the Maersk Line and Pacific Star Line violated section 17 by imposing the surcharge at Searsport, Maine, is, in part, well taken.

The Great Northern Paper Company is an exporter of paper and newsprint, competing with Canadian mills for the Philippine market. It has traditionally shipped its products from Searsport, Maine, where the surcharge is applicable. Canadian competitors, shipping from eastern Canada, pay no surcharge in the Philippine trade. Newsprint is a low-rated commodity with a small margin of profit. During the first 9 months of 1963, Great Northern shipped about 700 tons of newsprint a month but none was shipped in November and December. Since Great Northern can avoid the surcharge by utilizing Canadian ports and thus maintain a competitive position in the Philippines, it has embarked on a program of diverting newsprint from Searsport, Maine, and has now begun to export from the Canadian port of St. John. This diversion to Canada is not without some expense to Great Northern, and it deplores the inability of Searsport to handle this cargo. Great Northern's business is so competitive in the Philippines that it has not been able to pass on the entire surcharge to its customers, and it lost sales totaling about 1,400 tons of paper in November and December 1963 that were made by Eastern Canadian mills.

These facts establish that Pacific Star Line and Maersk Line, by assessing a surcharge on newsprint at Searsport, Maine, while not at Canadian Atlantic ports, have unjustly discriminated against Great Northern and the port of Searsport while advantaging Canadian shippers of newsprint and the port of St. John. We find that a sufficient competitive relationship exists between the shippers and ports concerned; we find that Great Northern and the port of Searsport have suffered pecuniary harm by the imposition of the surcharge and the resultant diversion of traffic, and we find that the transportation conditions are similar from St. John and Searsport. Pacific Star and Maersk, therefore, have demanded, charged, and collected a charge which is unreasonable. We find this conduct to be contrary to the provisions of section 17, which provides that "no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors." *West Indies Fruit Co.* v. *Flota Mercante, supra.; Grays Harbor Pulp & Paper Co.* v. *A. F. Klaveness & Co., A/S* 2 U.S.M.C. 366, 369 (1940). We will order these carriers to cease and desist from this unreasonable practice by removing the inequality of treatment between shippers and ports by appropriate tariff amendments.

Ultimate Conclusions

1. Respondents are justified in imposing a surcharge on cargo unloaded at the port of Manila because of the extraordinary delay occasioned by labor difficulties and port congestion.

2. Respondents' surcharges, except as noted below, reasonably approximate the additional cost of serving the port of Manila and are, therefore, not in violation of sections 15, 16, 17, and 18(b)(5) of the Shipping Act, 1916.

3. Respondents' surcharges, imposed on a fixed-dollar-per-ton basis or on a percentage of the freight rate basis, are not unjust or unreasonable in violation of sections 16, first or 17 of the Shipping Act, 1916.

4. Respondents, Maersk Line and Pacific Star Line, by imposing a surcharge on newsprint at Searsport, Maine, while they do not apply a surcharge at St. John, New Brunswick, Canada, have demanded, charged, and collected a charge which is unjustly discriminatory between shippers and ports and unjustly prejudicial to exporters of the United States as compared with their foreign competitors contrary to section 17 of the Shipping Act, 1916.

An appropriate order will be issued.

FEDERAL MARITIME COMMISSION

No. 1155

IMPOSITION OF SURCHARGE ON CARGO TO MANILA, REPUBLIC OF THE PHILIPPINES

ORDER

This proceeding having been initiated by the Federal Maritime Commission pursuant to rule 5(g) of its rules of practice and procedure, and the Commission having fully considered the matter and having this day made and entered of record a report containing its findings and conclusions, which report is hereby referred to and made a part hereof;

It is ordered, That respondents Maersk Line and Pacific Star Line cease and desist from assessing on newsprint moving from Searsport, Maine, to Manila, Republic of the Philippines, a surcharge which is prejudicial and discriminatory to exporters of newsprint from the United States and to the Port of Searsport, Maine;

It is further ordered, That respondents Maersk Line and Pacific Star Line shall notify the Commission within 15 days of the date of this order the manner in which they shall eliminate such prejudice and discrimination.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1145

REDUCTION IN FREIGHT RATES ON AUTOMOBILES—NORTH ATLANTIC COAST PORTS TO PUERTO RICO

DOCKET NO. 1167

REDUCED RATES ON AUTOMOBILES—ATLANTIC COAST PORTS TO PUERTO RICO

Decided February 4, 1965

Reduced rate of respondents on automobiles from North Atlantic coast ports, gulf ports, and South Atlantic coast ports to ports in Puerto Rico found to be unjustly and unreasonably low under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, as amended, and minimum just and reasonable rate determined.

Alan F. Wohlstetter for respondent Motorships of Puerto Rico, Inc.
Robert N. Kharasch for respondent American Union Transport, Inc.
Carl H. Wheeler for respondents Waterman Steamship Corp. of Puerto Rico and Sea-Land Service, Inc., Puerto Rican Division.
Paul J. Coughlin for respondent Seatrain Lines, Inc.
Gerald A. Malia for respondent Containerships, Inc.
Edward T. Cornell and *C. Gordon Anderson* for respondent TMT Trailer Ferry, Inc. (C. Gordon Anderson, trustee).
John Mason and *Charles Colgan* for respondent South Atlantic & Caribbean Line, Inc.
John T. Rigby and *James W. Symington* for intervener the Commonwealth of Puerto Rico.
Donald J. Brunner, *William Jarrel Smith*, *Frank Gormley*, and *Robert J. Blackwell* as hearing counsel.
Charles E. Morgan, hearing examiner.

REPORT

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

These proceedings were instituted to determine the lawfulness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, of proposed reduced rates and related charges on automobiles of all of the carriers in the trades from North Atlantic, South Atlantic, and gulf coast ports of the United States to ports in Puerto Rico. Separate hearings were held before the same examiner who issued an initial decision in each of the proceedings. Exceptions and replies were filed upon which we have heard oral argument. Because the issues in large part overlap, the two proceedings are consolidated for decision.

The trades under investigation in these proceedings have historically been characterized by severe competition, the greatest competition existing between those carriers operating out of the same areas.

Five carriers, American Union Transport, Inc. (AUT), Sea-Land Service, Inc., Puerto Rican Division (Sea-Land), Containerships, Inc. (Containerships), Seatrain Lines, Inc. (Seatrain), and Motorships of Puerto Rico, Inc. (Motorships), operate out of North Atlantic ports. All had a 35-cent automobile rate plus a 2-cent arrimo charge at the time of service of the relevant initial decision, except AUT which had a rate of 32 cents plus 2 cents arrimo.

Containerships had also proposed an additional allowance of 12.5 percent, suspended by Commission order, on its 35-cent rate to shippers whose automobiles are carried on deck for the convenience of the carrier with the consent of the shipper.

Prior to these proceedings all of these carriers had operated at a 38-cent rate plus 2-cent arrimo for approximately 4 years.

Two carriers, TMT Trailer Ferry, Inc., C. Gordon Anderson, trustee (TMT) and South Atlantic & Caribbean Line, Inc. (SACL), presently operate from Florida ports to Puerto Rico, TMT at a 31-cent rate and the latter, taking into consideration its absorbed charges, at a 32-cent rate. The South Atlantic carriers do not publish a separate arrimo charge. Prior to these proceedings, TMT had maintained a 34-cent rate and SACL a rate of approximately 33.5 cents.

Waterman Steamship Corp. of Puerto Rico (Waterman), which operates from Gulf ports to Puerto Rico, was made a respondent but did not participate in these proceedings. Its current rate is 38 cents plus 2 cents arrimo.

Seatrain's southbound carryings of automobiles out of North Atlantic ports have been minimal and are not a major factor in the trade. Seatrain's rate policy is to maintain the same rate on autos as is maintained by Sea-Land.

Alcoa Steamship Company, Inc. originally was a respondent in No. 1145, but was dismissed from that proceeding after it withdrew its proposed reduced rate of 35 cents. It handled about 800 to 850 cars in a previous noncalendar year period.

The total annual automobile carrying capacity of the carriers in the Puerto Rican trade substantially exceeds the available automobile traffic. The examiner's rough calculation of the carriers' capacity is as follows:

Carrier	Autos per voyage	No. voyages	Autos per year
AUT	200	50	10,000
Sea-Land	400	35	14,000
Motorships	250	30	7,500
Containerships	80	25	2,000
SACL	100	50	5,000
TMT	100	76	7,600
Alcoa	?	?	800
Seatrain	?	?	?
Waterman	?	?	?
Total			46,900

The examiner, in his initial decision in docket 1145, declared the proposed 35-cent rate out of the North Atlantic ports to be "unjustly and unreasonably low and unlawful." The examiner concluded, based upon data relating to its past operations and projections relating to its future carryings based upon commitments obtained from automobile dealers, that "respondent Motorships probably could operate profitably at the 35-cent rate" provided its projections were correct. However, because of his additional findings that the proposed reduction would "bring about and aggravate the automobile rate war, and likely would cause rates on the basic commodities essential to Puerto Rico's economy to be raised," he set a minimum rate level of 37 cents from North Atlantic ports "effective for a period of two years, at the expiration of which time, the carriers will be left free to petition for adjustment of such minimum rate on the basis of the then volume of automobiles moving in the trade and other pertinent factors, including the economic health of the common carriers in the Puerto Rican trade * * * and the progress of the overall Puerto Rican economy, and how these factors relate to the ocean transportation rates."

In his initial decision in docket 1167, the examiner set as a proper standard for rates in the trade "minimum rates neither too high, so as to penalize the automobile shippers, nor too low, so as to force a number of carriers out of the trade, and thereby not only hurt the Puerto Rico automobile economy, but also other segments of the economy of the Commonwealth." He had found that "the trade is greatly over-tonnaged" and "that automobile carrying capacity far exceeds prosepctive automobile volume." He further found that "so far as this record shows, on the basis of normal accounting procedures no carrier of automobiles in this trade except TMT earned any profit on automobiles in 1963, or if any carrier other than TMT earned a profit it was a relatively small one." He therefore determined that, since most carriers are losing money at present levels, the rate should be higher than 35 cents. He concluded and found, estimating "some yearly increase in automobile volume," a rate lower than 38 cents, which had been in effect in the North Atlantic trade prior to these proceedings, may be justified.

The examiner then set 37 cents as the just and reasonable minimum level for the North Atlantic respondent carriers in these proceedings, plus a 2-cent arrimo charge per cubic foot, or an all-inclusive 39-cent charge.

Secondly, because of the tradition of maintaining the same rates from the North Atlantic and the gulf to Puerto Rico and the failure of the gulf coast carrier to participate in the proceedings, the examiner set the same minimum rates for automobile carriage from gulf ports to Puerto Rico as from North Atlantic ports.

Thirdly, the examiner, in the light of his findings that for a "long time past" a differential had existed between the North Atlantic carriers and the South Atlantic carriers without any appreciable diversion of new cars from the North Atlantic areas, preserved the differential but set it at 4 cents rather than the previous 7 cents to encourage the movement of used cars out of the New York area. The examiner also set a 1-cent differential of the rates of TMT under those of SACL which competes with TMT for the carriage of used cars. In other words, the minimum rates set for TMT and SACL were respectively 35 cents and 36 cents, inclusive of arrimo charges.

The examiner also disallowed the proposed 12.5-percent allowance of Containerships for on-deck carriage of automobiles as "an unduly disturbing factor in a trade already beset by a rate war" and "a competitively predatory device unjustified by the circumstances" in the trade.

We agree with the findings and conclusions of the examiner in these proceedings, and adopt them as our own with the exeception of the setting of a time period for the minimum rates.

The minimum rate from North Atlantic ports to Puerto Rico

None of the parties, other than Motorships, AUT, and hearing counsel, excepts to the ruling of the examiner fixing the North Atlantic and gulf rates at 37 cents plus arrimo.

Motorships contends that the examiner's finding that a 35-cent rate would "bring about and aggravate the automobile rate war" is not supported by the record here under consideration, and maintains that its 35-cent rate must be approved as the examiner found it to be compensatory.

AUT contends that the examiner erred in failing to find its proposed rate of 32 cents lawful, but does not object to a minimum rate if fixed uniformly for all North Atlantic carriers.

Hearing counsel maintain that the examiner should have established a 35-cent rate as the lawful minimum for the North Atlantic carriers.

The examiner found that Motorships, because of its commitments obtained from automobile dealers, could probably operate profitably at a 35-cent rate. However, he also found that most carriers made little profit at a 38-cent rate and were losing money at the 35-cent rate. The record shows that the 35-cent rates of the North Atlantic carriers other than Motorships were filed by them to maintain a competitive position, i.e., they were the product of a rate-war and were not such rates as would have existed normally in the trade.

In determining the propriety of a rate, the Commission must consider more than whether or not it is compensatory to the carrier. Rates which may be compensatory to some of the carriers may indeed not be compensatory to all of them. It is precisely to prevent this forcing of rates to unremunerative levels that the Commission has in the past set minimum rate levels, even though the rates of all carriers in the relevant trade had not been shown to be noncompensatory.

Intercoastal Rate Structure, 2 U.S.M.C. 285, 301–303 (1940).

However, even if it could be conclusively shown that all carriers in the North Atlantic-Puerto Rican trade could operate profitably at the proposed 35-cent automobile rate, we would be compelled because of our concern for the general public interest to disapprove the 35-cent rate. It is axiomatic in common carrier regulation that some commodities may, in the public interest, be required to bear more than their full share of allocated costs, *B. & O. R.R.* v. *United States*, 345 U.S. 146 (1953), and the Commission has recognized the applicability of this principle to its own determinations. *Increased Rates on Sugar, 1962*, 7 F.M.C. 404, 412–413 (1962). The Court of Appeals for the District of Columbia Circuit, in reviewing our decision *General Increases in Rates—Pacific/Atlantic-Guam Trade*, 7 F.M.C. 423 (1962), in *Guam* v. *FMC*, 329 F. 2d 251, 254 (1964), commented that "it frequently happens that, when general revenues and expenses are computed on an overall basis, applicable to the entire business of a carrier, some items, if separated, appear as carried at noncompensatory rates. This result ensues from the compelling obligation of the carrier to render public service, and it has been approved."

The record in this proceeding shows the necessity for higher rates on automobiles than would arise from purely competitive conditions because of the overall needs of the economy of Puerto Rico.

Puerto Rico has a population of some 2.4 million people and a per capita income of $717, which is one-fourth the average per capita income of the United States as a whole and only one-half that of the poorest of the several States. Because of its limited resources, it must depend upon ocean carriers travelling between it and the continental United States for movement of over one-half of the goods it consumes and exports.

The Commonwealth is at present engaged in a program of economic improvement through industrial development known as "Operation Bootstrap," which has already resulted in the establishment in Puerto Rico of almost 1000 industrial plants. However, despite the success of the program to date, unemployment continues to average approximately 12 percent.

Puerto Rico is dependent upon the United States, not only for basic consumer goods, but also for the raw, intermediate, and finished products required in connection with "Operation Bootstrap." In order to keep the cost of living within the limited means of its people and to insure the growth of "Operation Bootstrap," Puerto Rico must have ocean rates maintained at the lowest reasonable levels.

The Government of the Commonwealth from time to time has requested the ocean carriers serving between the United States and Puerto Rico to maintain rates on certain commodities at levels which may not be fully compensatory to the carriers. Such requests are made (1) in instances where an increased transportation rate (such as the rate on tinplate, southbound), would tend to inhibit the growth or continuation of industries in Puerto Rico, (2) in instances where an increased transportation rate (such as the rates on beans, potatoes, and onions, southbound), would result in higher consumer costs for basic foodstuffs, and (3) in instances where an increased transportation rate (such as the rate on coconuts, northbound), seriously would inhibit exports from Puerto Rico. The Commonwealth has been mindful that additional cost burdens would be cast upon other cargo moving in the trade, and believes that such ratemaking practices are necessary for the overall growth and health of the economy of Puerto Rico.

In the present proceeding, the Commonwealth strongly urged that the revenues which the carriers receive in this trade for the movement of automobiles should be such as to not only cover the cost of the movement of the automobiles, but sufficient also to support some share of the costs of the movement of the basic commodities, such as tinplate, beans, potatoes, onions, and coconuts.

The 38-cent rate on automobiles which has been in effect since 1959, has not impeded the movement of automobiles from New York to Puerto Rico. From the United States as a whole, the yearly movement of new cars to Puerto Rico has increased from roughly 8,000 in 1959, to 15,000 in 1962. This growth in the Puerto Rican automobile market is attributable to the growth in the economy of Puerto Rico.

The continued growth and health of the automobile industry in Puerto Rico depends largely upon the continued growth and health of the overall economy of Puerto Rico.

As the examiner found in docket 1167, some decrease in the 38-cent rate is justified by the increase in carryings which the record shows may reasonably be expected. The 37-cent rate will allow the automobile shippers to share in the benefits of this increase in carriage. At the same time, however, it will be high enough to allow a sufficient number of carriers to remain in the trade adequately to maintain the transportation of basic foodstuffs and products for "Operation Bootstrap" at a level which will not endanger the health of the overall Puerto Rican economy.

Conversely, the 35-cent rate is unjust and unreasonable because, as shown above, it is noncompensatory to a majority of the carriers and operates in a manner adverse to the overall economy of Puerto Rico.

We therefore, pursuant to the authority vested in us by section 4 of the Intercoastal Shipping Act, 1933, prescribe a rate of 37 cents a cubic foot, plus an additional charge for arrimo of 2 cents a cubic foot, as a just and reasonable minimum level for the North Atlantic carriers. In lieu of the above, the carriers may publish an all-inclusive rate of 39 cents a cubic foot.

The minimum rate from gulf ports to Puerto Rico

Waterman, the carrier from gulf ports, was made a respondent, but chose not to participate in these proceedings. Because of the nonparticipation of the gulf carrier and the fact that automobile rates from the gulf to Puerto Rico have traditionally been the same as those from North Atlantic coast ports, we determine that the minimum rate for all carriers operating from ports in the Gulf of Mexico should be the same as the minimum rate for carriers operating from the North Atlantic.

The minimum rates for the carriers from South Atlantic ports to Puerto Rico

TMT contends that the examiner erred in failing to find that SACL's minimum rates out of South Atlantic ports should be set at the same level as those of the North Atlantic carriers in light of SACL's statement that fluctuations in the North Atlantic carriers' rates on automobiles would not materially affect its carryings. It further maintains that it is entitled to a 31-cent rate less arrimo, thus establishing a 6-cent differential of its rates under those of SACL, arguing that the examiner failed to give adequate weight to all of the relevant competitive factors.

SACL contends that the examiner erred in granting differentials, but that if a differential is to be set below the rates of the North

Atlantic carriers, it should be set at the same level for SACL and TMT.

Hearing counsel and several North Atlantic carriers indicate in their exceptions that they feel that the examiner erred in setting differentials.

TMT and SACL, the carriers from South Atlantic ports to Puerto Rico, are in severe competition with each other for the carriage of used cars. SACL is unable, because of its on-deck mode of carriage, to compete with TMT for the carriage of new cars, whose dealers require that they be sheltered from the weather.

The amount of competition between the North Atlantic and South Atlantic carriers, however, is considerably less. The record does not show that there exists, or is likely to exist in the foreseeable future, any substantial diversion of new cars from the North Atlantic carriers to TMT. Almost all of the new automobiles of General Motors, Ford, and Chrysler move out of North Atlantic ports, and almost all of the new automobiles of American Motors move out of Florida. Although there was one test shipment of five General Motors cars from Atlanta, Ga., and the possibility of a shift in production of about 1,000 to 1,500 Chevrolets of a standard model from its Tarrytown, N.Y., facility to its factory in Atlanta, Ga., was considered, the testimony of the witness from General Motors clearly shows that nothing definite was decided as to a shift of production of Chevrolets to the Atlanta factory. General Motors' witness in fact admitted that he had not investigated the feasibility of such a shift, and the record fails to indicate that the shift is likely to take place or that new General Motors cars will travel on other than North Atlantic carriers. The record further fails to indicate any diversion of new Fords or Chryslers from the North Atlantic.

On the other hand, new Rambler distributors in Puerto Rico have testified that the difference in ocean freight rates determines that shipment will be made from Florida, and that in the absence of such difference, the North Atlantic carriers would be used.

The history of the automobile rates in the United States-Puerto Rico trade shows that a differential of TMT rates under the rates of the carriers operating out of the North Atlantic has been in effect for a number of years with no significant change in the port area from which new cars of General Motors, Ford, and Chrysler are shipped. Furthermore, some differential would appear necessary to preserve TMT's position as a carrier of the new cars which are required by the Puerto Rican dealers.

The examiner properly concluded, however, that the 7-cent differential which had been in effect in the trade was too great. In spite of

SACL's statement to the contrary, real competition does exist between the North and South Atlantic carriers with reference to the movement of used cars.

Evidence of record indicates that certain Puerto Rican used car dealers, when they were unable to secure the used cars they desired in Florida, have come to the New York area, but have not usually moved cars from that area because of the higher North Atlantic ocean rates. However, at the time when the differential was proposed to be cut from 7 cents to 4 cents (that is, when TMT's rate was 34 cents including almost 1 cent of insurance, and when Sea-Land proposed a rate of 35 cents plus 2-cent arrimo, not including insurance), Sea-Land was able to obtain commitments from the dealers for the movement of used cars out of New York to Puerto Rico. Thus, it appears that a 7-cent differential may have prevented the movement of some number of used cars from the New York area; on the other hand, a 4-cent differential would have allowed the movement of more used cars out of the New York area to Puerto Rico.

Admittedly the present rates of the South Atalntic carriers do not appear to be noncompensatory, although the carriers have operated under them for such a brief period that no definite conclusions as to their compensatoriness may be made. We do conclude, however, that they are unjust and unreasonable. To allow them to remain in effect would thwart our determination of the necessity of requiring the automobile carriers, in the public interest, to bear more than their full share of allocated costs. Further, it would be unfair to the North Atlantic and gulf carriers who have been required here to support the low-rated commodities.

A differential of approximately 4 cents would thus appear adequate to preserve the competitive relationship which naturally exists between the North and South Atlantic trades while at the same time benefiting the overall economy of Puerto Rico.

We agree with the examiner that TMT is entitled to 1-cent differential below the rate of SACL.

In our docket No. 1090, *General Investigation Into Common Carrier Freight Rates and Practices In The Florida/Puerto Rico Trade*, F.M.C. docket No. 1090 (Jan. 23, 1964), we were "unable to find that TMT's slower transit time is a disadvantage."

In these proceedings, however, the situation was different. A representative of TMT indicated that TMT's slower service made it difficult for it to attract cargo, and auto dealers indicated that TMT's lower rates were in part the reason why they shipped on its vessels. At a time when SACL and TMT had approximately the same rate (the second quarter of 1963), and SACL carried new cars, over 50 percent of the new car tonnage TMT was scheduled to handle was diverted to SACL.

The record indicates that from February 14, 1964, to March 13, 1964, during which period TMT had in effect a rate in excess of 3 cents per cubic foot lower than SACL, SACL continued to operate at substantial vessel capacity.

The examiner, weighing the above considerations together with the fact that the number of vessels of TMT might increase, determined that the differential could be somewhat smaller and still allow adequate protection to TMT. He therefore established a 35-cent rate for TMT (including arrimo and insurance), as opposed to a 36-cent rate for SACL (including arrimo and insurance).

In conclusion, we adopt the examiner's findings that the minimum rates of TMT and SACL, operating from Florida ports, respectively, should be 35 cents and 36 cents both not subject to any additional charges for arrimo.

Containerships' allowance for ondeck carriage

The examiner properly disallowed Containerships' 12.5-percent allowance for automobiles carried on deck, as to permit such a device would be to give an unfair advantage to one carrier over the others who do not utilize such a device in the attraction of cargo. More significantly than that, however, it would defeat the whole purpose of fixing a minimum rate in this proceeding by permitting one carrier to contribute less than the amount which would flow from the minimum rate to the welfare of the overall Puerto Rican economy.

No time period for minimum rates established

All respondents will be required to submit to the Commission within 15 days amended tariff schedules in accord with our decision. We will not, however, impose a time period during which these minimum rates must remain in effect. The number of docketed proceedings involving the Puerto Rican trade is sufficient to inform us of the impracticability of attempting to freeze rates for a specific period in so dynamic a trade.

An appropriate order will be entered.

Commissioner Hearn, Dissenting

I disagree with the conclusions reached by the majority.

In my opinion, the record shows that:

(1) the 35 cent rate plus a two cent arrimo charge for North Atlantic carriers is just and reasonable and therefore lawful;

(2) the 12.5 percent allowance proposed by Containerships for the movement of "ondeck" used cars is just and reasonable and therefore lawful;

(3) the 32 cent rate proposed by SACL is just and reasonable and therefore lawful;

(4) the 31 cent rate proposed by TMT is just and reasonable and therefore lawful: and

(5) TMT is not entitled to a differential vis a vis SACL.

The record clearly establishes that the volume of automobiles moving in this trade is steadily and substantially increasing. Offerings more than doubled from 13,018 in 1959 to 27,446 in 1963. The record reflects the introduction of innovations and refinements in the handling of automobiles by carriers during this period. For example, the usage of Peck and Hale gear and vessel conversions to specially accommodate automobiles have resulted in increased efficiency and lower transportation costs. In my opinion, automobile shippers should be permitted to share, substantially, in these cost savings resulting directly from these innovations.

With respect to the rates proposed by Motorships, the record is clear that the 35-cent rate is quite profitable. The majority's action, in my view, will tend to stultify incentives and provide an unwarranted protection for the inefficient and high cost carriage of automobiles in this trade.

It is not my conviction that a rate lower than 35 cents would be unlawful. Although at issue here is the 35-cent rate, which I believe to be a lawful one, I am not prepared to say that a 34-cent or even a 33-cent rate for automobiles from the North Atlantic would be unjust or unreasonable. Rates other than 35 cents, however, are not in issue. Nevertheless, there is a definite need for the economical movement of low revenue bearing commodities to Puerto Rico. I am also aware of the possibility of a rate war with respect to high revenue bearing commodities to the detriment of the movement of other necessaries which would prejudice the efforts of the Commonwealth in its "Operation Bootstrap." Moreover, the Commission has at its disposal ample authority to insure that these regulated carriers of general cargo will not prejudice the movement of other commodities to the advantage of higher revenue bearing commodities. Consequently, I would look with disdain at an automobile rate of 32 cents (plus 2 cents arrimo) proposed by any North Atlantic carrier in the foreseeable future on the basis of this record.

As to the 12.5 percent allowance proposed by Containerships for the "ondeck" carriage of automobiles, it is clear that the service offered is considerably less valuable than below deck storage. New car shippers, for example, find "ondeck" transit unacceptable to them. I am not at all convinced that this less desirable and less costly service should not be available to used car shippers who wish to utilize it at the 12.5 percent discount. The failure to approve this, in my opinion, will inhibit the movement of up to 2,800 used cars per year at attractive, yet remunerative, rates.

I subscribe to the long established custom, enunciated by the majority, that rates from gulf ports to Puerto Rico should be on parity with rates from the North Atlantic to Puerto Rico. Consequently, I would also approve a 35-cent rate from the gulf.

Turning now to the South Atlantic carriers, TMT and SACL, I support the continuation of lower rates than from the North Atlantic, based upon lower operating costs and shorter steaming time. And although I believe the record supports the legality of a 31-cent rate for TMT and a 32-cent rate for SACL, I would not order a 1-cent differential in favor of TMT. The slower and less costly barge service offered by TMT is not a factor that warrants protection from lawful competition through a built-in rate differential. The disparity between TMT's and SACL's transit time from Miami to Puerto Rico is the result of TMT's own managerial judgement. Shippers in this trade should not be denied a choice, if a superior service is offered by a competitor, through the device of a rate decision that assures guaranteed protection from price competition. Accordingly, I find that while the record establishes the legality of a 31-cent rate for TMT, that rate should also be available to SACL if it desires to adopt it.

In conclusion, I reiterate my fear that the decision of the majority will tend to eliminate the incentive for carriers to compete through the introduction of cost saving devices and will result in a distinct disservice to automobile shippers and ultimately the consumer in Puerto Rico. While the general public interest certainly is a factor which must affect our policy, the precise question presented here is the lawfulness of the rates in issue as measured by the standards set forth in the Intercoastal Shipping Act of 1933. The standard to be applied here is whether these proposed rates are just and reasonable. I believe that the 35-cent rate plus the 2-cent arrimo for North Atlantic and gulf carriers, the 31-cent rate for TMT and the 31-cent rate for SACL, should it desire to adopt it, are just and reasonable rates and should be offered to the shipping public.

COMMISSIONER JOHN S. PATTERSON DISSENTING:

I concur with Commissioner Hearn in disagreement with the conclusions reached by the majority and agree with his five points as to what the record shows.

Based on the record before me in this proceeding, my conclusions are as follows:

1. In establishing rates in the Puerto Rican trade, the majority has treated all the present carriers in the Puerto Rican trade as a whole

and has established a uniform level (floor) of rates for automobiles, without a full record of operating costs for each carrier. Consequently, there is not enough evidence in this record to provide a basis for any findings supporting such decision, (a) that any rate other than 37 cents per cubic foot plus 2 cents arrimo for the North Atlantic and Gulf of Mexico carriers and 35 cents per cubic foot for TMT and 36 cents per cubic foot for SACL without any arrimo is unjust, unreasonable, or unlawful for all respondents herein, or (b) that Containerships should be denied an allowance of 12½ percent for autos carried on deck.

2. Until an adequate record is provided, we should find, (a) respondents have sustained their burden of proof, and (b) the rates, established by the respondents' own decisions, based on existing market influences and the record herein, are just, reasonable, and lawful.

3. The compensatory standard applied by the majority does not apply to the situation disclosed by this record where there are several competing carriers operating without franchise and using a variety of new transportation methods.

4. The effect of the proposed rates on the "overall economy of Puerto Rico" has not been established by the record, and the conclusion that each proposed rate "operates" in a manner that is "adverse" to the economy was not proven. There is no legislative authority for any welfare standard. The Commission would be on shifting sands if it were to give undue weight to public welfare. To allow considerations of public policy and welfare to influence a rate case is wholly inconsistent with the pronouncement that the reasonableness of rates on particular items or articles is to be determined by their transportation characteristics.

5. The majority decision represents bad policy because the restraints placed on competition inhibit the search for market-formulated rates in furtherance of a policy that we should all do all we can to strengthen the thrust of this Nation's competitiveness, its competitiveness on the sea lanes of the world's oceans. Heavier reliance should be placed on competition in the maritime world in particular. Such policies apply to our oceangoing interstate commerce in general as well as in the context of this case where there are eight competing carriers. At least three different techniques of transportation are being used and cost-saving methods of transportation are being devised which are still undergoing a testing in the market for the transportation of automobiles. Competition has yet to prove the superiority of any of these techniques or the financial results therefrom, and the competition which might supply the proof has been stifled by the majority decision to impose a floor on rates sufficient to assure profits to the least competitive carrier at the expense of the public and to the detriment of

the efficient carrier. Who is to say the method ultimately devised to transport automobiles to Puerto Rico may not be used to transport automobiles in foreign commerce under more competitive conditions than now exist?

As regards my conclusions as stated above, the reasons in support of them and my dissent are advanced as follows.

The majority has ordered in docket No. 1145 that respondents Sea-Land Service, Inc., Puerto Rican Division (Sea Land), Motorships of Puerto Rico, Inc. (Motorships), and Seatrain Lines, Inc. (Seatrain); and in docket No. 1167 that respondents American Union Transport, Inc. (AUT), Sea Land, Containerships, Inc. (Containerships), Seatrain, TMT Trailer Ferry, Inc. (TMT), and South Atlantic & Caribbean Line, Inc. (SACL) shall increase their rates for transporting automobiles and other wheeled vehicles to Puerto Rico. The rates of Waterman Steamship Corp. of Puerto Rico (Waterman) are reduced. Rates are ordered revised to a minimum of 37 cents per cubic foot plus a charge for arrimo (short for "arrival money" not otherwise defined herein) of 2 cents per cubic foot or an all-inclusive rate of 39 cents per cubic foot from ports in the North Atlantic and Gulf of Mexico, and to a minimum of 35 cents per cubic foot by TMT and 36 cents per cubic foot by SACL from certain Florida ports. Containerships is forbidden to allow 12½ percent discount for automobiles carried exposed on deck.

The majority bases its order on its conclusion that respondents' rates filed pursuant to section 18(a) of the Shipping Act, 1916 (Act), and section 2 of the Intercoastal Shipping Act, 1933 (Intercoastal Act), are unjust and unreasonable or unlawful, stemming from the two findings that each rate "is noncompensatory to a majority of the carriers and operates in a manner adverse to the overall economy of Puerto Rico." The minority believes the record will not support either of these findings and that there are sufficient reasons of record and policy to sustain the proposed rates as just, reasonable, and lawful.

A finding that the existing rate "is noncompensatory to a majority of the carriers" should not control justness or reasonableness. Justness and reasonableness should be tested by the customary assumptions of a free enterprise market where, as here, no one is compelled to provide service, there are several competing carriers, and there is no monopoly. The customary assumptions in such a situation are that no one is assured compensation and pricing decisions are made in response to each participant's experienced costs and expectations of future earnings. Compensatoriness is a standard applicable to public rate regulation of private monopoly or near-monopoly enterprises. In other enterprises, economic forces will locate the level of rates better than a government order having as its own assumption a theory that a fixed minimum rate will achieve a level of vehicle carryings that provide revenues meeting all expenses and a profit for all respondents Such an assumption is not supported by the economic lessons of either the testimony or exhibits in the record.

The assumptions of the open market need no such record support.

Arguments having theories and assumptions as premises, however, are apt to be inconclusive. Therefore, one may put such premises aside, and accept, for the sake of argument, compensatoriness as the touchstone of reasonableness. We then find that what is reasonable for one carrier is not reasonable for another. This record has shown the existence of very recent (within the last 5 years) technical innovations in transportation. The rates in this record for two of the carriers are their first rates. The practical effect of a high rate may be that the specialized carrier is no longer competitive and, as a result, not compensated. TMT, a specialized carrier, provided slower service, but may no longer be compensated even with a 1 cent differential; and Containerships, without its 12½ percent "ondeck" discount, may be likewise noncompensated. The geographical differential may cause SACL to become noncompetitive and hence uncompensated. The record offers no assurance that the estimated 46,900 vehicle market will be neatly redistributed to provide a compensatory level of carryings to everyone. The only assurance is, to the contrary, derived from the arithmetic that if one carrier increases his carryings the others are diminished, assuming a fixed supply at the time. A rate level predicated on an increase in vehicles carried by one cannot apply to the others. The increased rate now ordered can only increase vehicles carried by the highest class service to the diminution of the lowest class service. The latter's costs depend on volume, and unit costs will increase as volume diminishes. So too will his compensation diminish as his unit costs go up and his revenues down. The majority, without record support, has thus embarked respondents on a pursuit of illusory objectives.

The competitive relationships which will determine whether the distribution of the available supply of vehicles will be compensatory have yet to be tested or to achieve equilibrium in view of the newness of the transport methods being used, as well as of the service offered. Competitive relationships affecting compensatoriness are everywhere, not just between the North and South Atlantic ports, which the majority considers significant, or between automobiles and food and clothing used by Puerto Ricans. The competitive relationships that determine compensation exist between ports, between areas, between services, efficiency, salesmanship, etc., and between methods of transportation. The exploratory activity causing the conflicting relationships disclosed by this record, where we do not have an old established trade employing the same types of ships, must be allowed to continue until some equilibrium is achieved. It is too soon to discuss "unremunerative levels." At such time as competitive balance is present and after a better classification of costs and a better assignment of dollar values thereto is developed, the Commission may not find respondents' rates unreasonable or unjust.

The second part of the majority's case is that the lower rate "operates in a manner adverse to the overall economy of Puerto Rico."

The unstated argument seems to be that any increase in price tends to curtail consumption. There is no proof such a theory works out in practice, but it is accepted here. An increase in rates on automobiles, the argument would go, may decrease purchase of automobiles, while an increase in rates on food and essentials of living may curtail consumption of the latter, and it is socially better to diminish consumption of the former than of the latter. The proceeds from the socially undesirable service should finance the uneconomic social objectives. For example, the majority states with reference to the Florida carriers that to allow the lower rates "to remain in effect would thwart our determination of the necessity of requiring the automobile carriers, in the public interest, to bear more than their full share of allocated costs." Having stated in the initiating order that the proposed rates "may have a detrimental effect on the rate structure," the majority has found this to be the case. The idea of detriment caused by failure to bear a "full share" must be based on the notion of a socially desirable share, which no one can really know about. The majority is taking its stand without reference to the economic lessons of the testimony or exhibits. Sometimes the economic and social effects of certain rates may be recognized, but the Commission is on insecure shifting sand if it modifies rates otherwise reasonable out of deference to these consequences. Whatever merit there is in such a theory of regulation, it is not applicable here.

Theories aside, the necessary factual base has not been established. There is no testimony in the record on the point, nor was it proven that any carrier of general cargo would increase rates on any other commodity as a result of approval of its rate. To the contrary, two witnesses stated no decision had been made on the subject (Tr. 440–441, 476). There are no exhibits establishing the need. The exhibits were confined to a general description of Puerto Rico's economy and problems as an island. Nothing therein justified making freight rates on any one commodity subsidize low rates on another. This argument remains unproven.

The issues herein must be based on the present record. The adjudicator must examine the results and discuss the record and take account of the real world of carrying automobiles to Puerto Rico by a diverse group of carriers using newly developed methods.

The history of these proceedings is set forth in appendix A.

The Commission's responsibility with regard to these changes in rates is defined in section 18(a) of the Act and section 3 of the Intercoastal Act. Essentially, this responsibility is to decide whether proposed rates are just, reasonable, and lawful, as the terms have been defined by the courts and by our precedents.

Therefore, before the Commission is authorized to determine, prescribe, and order enforced as a just and reasonable minimum rate, we must find that each respondent's proposed rate is unjust or unreasonable.

The last paragraph of section 3 of the Intercoastal Act provides that at any hearing "the burden of proof to show that the rate * * * is just and reasonable shall be upon the carrier or carriers." The carriers complied by filling out and submitting as exhibits a schedule 3002 "Vessel Operating Statement" (a Maritime Administration form of accounts), except Sea-Land, which furnished a "Profit and Loss Statement" for the year ended December 28, 1963.

Respondents furnished other fiscal information and estimates of what they expected to accomplish with their proposed rates, including a showing of profit as well as testimony by their officers, and took the position they had thereby discharged the statutory burden of showing justness, reasonableness, and lawfulness. They succeeded.

Respondents' operating statements, whatever their infirmities for comparison or other purposes, showed profits and losses as follows for the periods covered by their statements:

AUT	$844, 913. 00	
Containerships	72, 577. 63	
Motorships	(117, 498. 68)	(loss)
SACL	156, 550. 00	
Sea Land	149, 544. 00	
Seatrain	481, 302. 00	(not from auto carriage)
TMT	403, 126. 51	
Waterman	No figures furnished	

The infirmities in the fiscal record supporting these figures are discussed below, but they represent the basis for these entrepreneurs' own pricing decisions and claims to profits based on their past decisions. For the future, using respondent's own expectations, all claim profitable operations. AUT claimed that by lowering its rate, AUT could obtain sufficient additional carryings to offset the loss of revenue from the rate reduction, with a gross auto revenue increase at 32 cents per cubic foot of $140,188.14 (Ex. 4, p. 1) and an annual increase net auto revenue on the 32 cents per cubic foot basis of $14,672.16 (Ex. 4, p. 2 as explained in Ex. 10, p. 2, item IV).

Containerships' proposed findings, based on actual experience in 1963, using a 35 cents per cubic foot rate with a 12½ percent "on deck" allowance, show profits of $54,069.19 (3,000 units) and $334,596.34 (5,860 units) (Findings 99 and 100, Brief, pp. 40–41) and claimed its rates were compensatory, just, and reasonable. Containerships effects certain economies by a joint venture arrangement in which certain expenses only, such as actual time of loading, direct stevedoring, and administrative and general expenses, are charged to the venture.

Motorships states its reduction to a 35-cent rate is fully compensatory and "is justified as a reasonable action on a request of automobile shippers."

SACL proves its 32-cent rate per cubic foot, including wharfage at Miami and San Juan and handling at Miami, is just and reasonable and produces a profit of $26.21 per automobile (Ex. 14, p. 1, Findings 25, 28, and 29), and at 80-percent capacity returns a profit of $2.52 per automobile (Ex. 14, p. 1, Tr. 766, 767, Proposed Finding 61).

Sea-Land claims that by reducing the headroom in its compartments there is a resultant saving in loss of space and broken stowage (Tr. 348, Ex. 19). Sea-Land's exhibit covering nine voyages commencing September 29, 1963, and ending January 4, 1964 (Ex. 39 and Tr. 595), showed a profit of $32,981. Its earlier profit and loss statements showed a profit, but were claimed to be deficient because of the inclusion of certain charter revenue from Military Sea Transportation Service (MSTS). Sea-Land makes no claim as to what it might earn at a 35 cents per cubic foot rate.

Seatrain shows no separate financial results from automobile transportation, because it is not primarily engaged in this business, having carried only 96 privately-owned cars for owners (Ex. 29), using empty space between seamobiles or railcars (Ex. 30, p. 5).

TMT's exhibits show past profits, but no claim is made with regard to future profits.

Waterman submits no arguments about its prospects.

The respondents' assertions and proofs, absent clear disproof by intervenors or hearing counsel, substantiate a finding that they have discharged the statutory burden of proof requirements.

The record contained fiscal information and descriptions of operations showing that except for AUT, Seatrain, and Waterman, all started service relatively recently, using new handling and securing techniques and a variety of types of ships.

The fiscal and operating information in this record makes a reversal of respondents' proofs impossible.

The operating statements furnished did not all cover the same periods, nor include the same sources of revenue or descriptions of expense.

AUT, Containerships, Motorships, SACL, Seatrain, and TMT furnished operating statements using a uniform classification of accounts pursuant to a Maritime Administration form, Sea-Land furnished a profit and loss statement with its own account classifications (these were generally but not exactly similar to the Maritime Administration form), and Waterman furnished no report.

The AUT and SACL statements covered the period from September 31, 1962, to December 31, 1963; the Containerships statement period was from October 12, 1963, to December 31, 1963; the Motorships statement was from October 1, 1962, to September 30, 1963; the Sea-Land statement was for the year ended December 28, 1963; the Seatrain statement was from May 14, 1963, to December 31, 1963; and the TMT statement was from January 1, 1963, to December 31, 1963. The experience of three respondents was too recent to permit records for the full period requested.

AUT revenues include amounts for both general cargo (inbound and outbound) and automobiles and for foreign and MSTS revenues (Ex. 1). Containerships showed revenues from wheeled vehicles alone plus an amount received for time charter of the ship on inward voyages over double the amounts received from vehicles (Ex. 27). Motorships revenues are exclusively from vehicle transportation. SACL includes amounts for inbound voyages. Sea-Land revenues are almost entirely derived from other than automobile transportation. Seatrain furnished total revenue figures with no separation between outward, intermediate, and inward figures. An analysis of their scope is not possible. TMT revenues included charter and inward cargo revenues.

No uniform rule for allocating either revenues or expenses between the cargo covered by the rates under investigation and other cargo producing revenue or causing expense in the figures herein has been developed. For example, Sea-Land allocates ship expenses on "the vessel voyage concept", i.e., on a per diem basis (Tr. 376), terminal expenses on a weight basis; administrative expenses are assigned directly (Tr. 381). AUT allocates administrative expenses to follow the expense administered. Containerships charged a $75 a day management fee to its Puerto Rico operations. SACL allocated by "agreement" its fixed management expenses (Tr. 159), but used a revenue pro rate in allocating fixed vessel expenses (Tr. 744). Cross-examination disclosed diverse understandings about amounts to be put opposite various account classifications (e.g., Tr. 409).

AUT did not include as expenses amounts paid to an affiliated managing agent (the actual expenses were shown separately and an allocation provided).

Containerships expenses included nonrecurring expenses for equipment not used with vehicles, and included an amount for distribution to time charterer. Motorships included general administrative expense and depreciation charges. Sea-Land included depreciation and administrative and general expenses. Seatrain's expenses were practically all applicable to other types of carriage. TMT included both vessel and trailer depreciation figures. Those that excluded depreciation, interest, and general administrative expenses provided separate statements of the effect of deductions therefor.

Where separate computations considering depreciation, interest, and general administrative expenses were shown, a loss was shown in some cases.

No uniformity necessary to valid comparisons to be used in reversing respondents' decisions was provided by this record. Inadequate as these reports are, they were not controverted by better figures.

In no case was a balance sheet of assets and liabilities devoted to the trade furnished, nor any depreciation or other reserve figures or policies relative to accumulations, shown. No uniform rules governing allocations of the part of the business devoted to transporting automobiles in relation to other cargo were put in the record for use in adjudicating fair results among the respondents.

The absence of a balance sheet and an allocation of accounts to the vehicular trade involved herein, alone, might be adjudged fatal to any rational means of fixing rates of each respondent. This deficiency was increased because available figures are made more difficult to interpret and compare for lack of agreement on what account classifications covered or what the statements should include, and for failure to cover the same periods of time.

The diverse methods of operation followed and types of ships used created further impediments to rational adjudication. A description of the diverse operating methods is in the appendix hereto marked B.

The diversity of operating methods reflects the fact that the ships have been converted recently and the methods of handling cargo are new. The operators are gaining experience which alters expenses as time goes on. Evidence of continuing experience is shown by Motorships, which found earlier experience unreliable; (a) its operation has become more efficient and earlier expenses have been eliminated (Tr. 251–252); (b) claims expense diminished (Tr. 255); (c) vehicle handling was overstated (Tr. 256, 257); (d) overhead expense included too much insurance (Tr. 259, 260, and Ex. 4, App. 14); (e) there was a reduction on stevedoring expense in New York (Tr. 272, Ex. 10); and (f) a duplicate cargo survey could be eliminated (Tr. 402–403).

The diversity of fiscal information added to the changing financial results the various operating methods create, and the recency thereof under competitive conditions render the task of declaring existing rates unjust or unreasonable virtually impossible, let alone the task of deciding on a just and reasonable Government-prescribed rate.

The foregoing represents existing conditions and past results.

Whatever rate is prescribed must operate in the future. How the future will reward any single respondent absent a monopoly depends on an ability to persuade shippers to choose his service. Other considerations being equal, the choice will depend entirely on the rate. If other things were equal, a uniform rate that satisfied all respondents might make some sense. Other considerations are not equal, on this record, and it is impossible to fix a uniform rate as a result. Shippers' choices which take unequal conditions into account should not be precluded. A rate arrived at under conditions of competition will be preferable to a rate fixed by administrative decision where an evaluation of the varying conditions is necessary to make a reasonable choice.

What each respondent can accomplish in the market depends, as a witness stated, "on how many cars a carrier can attract" (Tr. 91). This elementary lesson is fundamental to the entire proceeding. The unit cost of carrying automobiles depends on the number carried. The revenues depend on the number of automobiles carried, and so do earnings, and both are needed to achieve the compensatory status sought by the majority. The number of automobiles carried depends on the rate in relation to the service offered. We cannot change the respondents' rates, in view of their proofs, and we have no control over service decisions. Consequently, our power to influence compensatoriness is limited, assuming it is a relevant factor as the majority states. The statute requires a finding of justness and reasonableness on the basis of available proofs.

The available proofs, coupled with a belief that the product of past competition produces market forces where everyone claims to be compensated for a variety of services at his chosen prices, eliminate a need for absolute standards of reasonableness or justness and might be used to sustain present rates.

My conclusions about the record are based on fact, but my belief as to the role of the market in establishing a standard of justness and reasonableness is based on policy.

Policy alone will not support a conclusion of justness and reasonableness, but in the Puerto Rico trade the number of carriers and the variety of choices offered shippers have created competitive conditions which permit a degree of relaxation of control through fixed standards and resort to policy. Normally, regulation is a substitute for competition where no competitive conditions exist and public control has to be substituted. Public control exists in the form of the Act and the Intercoastal Act which may not be disregarded, of course, but where competition is so effective as it is here there is less need to enforce exacting evidentiary requirements to the test of statutory guides before reaching conclusions as to justness and reasonableness in order to protect consumers of transportation services.

Protection of the consumer being achieved, it would seem to be a pursuit of unrelated public policy objectives inimical to the existence of competition to establish a minimum rate in the name of the overall economy of Puerto Rico. That this objective exists in regard to competition is shown by the arguments of Puerto Rico to the effect that automobiles help achieve lower rates for other commodities, particularly food, for those unable to buy automobiles. There is absolutely nothing in this record to show either, as we have already noted, or that it would be desirable to make the carriers perform what might be an unprofitable social service if an analysis of costs shows this to be the case. In this proceeding, to the contrary, five of the eight carriers did not carry general cargo to any degree, but were special-purpose carriers so the necessary proofs could not be supplied in any event. The emotional appeal of the argument alone makes the adjudicator's task hard enough, but it is even more difficult because of the unexpected results that come from the alteration of competitive positions caused by the pursuit. We should, therefore, not take on, without compelling reasons, the task of adjudicating results in opposition to market forces where they exist as here.

Whatever protection of shippers as consumers is achieved, by finding justness and reasonableness in rates determined by the market, may even be lost by the pursuit of unrelated objectives sought in the adjudicated minimum rate because both shippers of automobiles and the respondent carriers who may have a cheaper service to offer have been deprived the protection of an open market. This deprivation on both sides is one of the unexpected results shown by this record. This record shows the use of specialized ships carrying nothing but wheeled vehicles. Motorships and Containerships are already experiencing the results of innovation by forward shipper commitments. Any need for a rate to support low food rates, assuming the existence of proof of need, or to assure compensation, does not exist as to the respondents offering no general cargo service with specialized ships, yet the specialized operators must charge shippers a higher rate which the majority adjudicates to achieve the unrelated objective rather than one based on the costs and experience. The higher rate may inhibit full utilization of technical innovation, because shipper choice based on rates alone has been eliminated and the specialized carrier has no more to offer, or less to offer where he is slower, than the combined cargo carrier. Food may yet be the unexpected beneficiary of these developments if general cargo carriers increase their efforts to replace lost automobile cargoes.

This record falls so far short of supporting a finding of a need for what is, in effect, a cost guarantee rate for the least efficient, to the penalty of the innovator and the efficient, as well as of the shipper paying the higher rate, that competitive regulation added to the shortcomings of the exhibits and testimony of record ought to compel a finding of justness and reasonableness of the respondents' proposed rates. The complete absence of contradictory evidence should in no event be used to support, first, a finding of unjustness and unreasonableness and, second, a prescription of a minimum rate.

Finally, we have been asked to condemn the practice of obtaining forward commitments based on a rate to be established. This was shown to be a traditional trade practice. There is no ground for condemnation of anything we have studied in this record.

To SUM UP

The difference between the majority's and my minority rates per cubic foot for transporting wheeled vehicles to Puerto Rico from the mainland is shown as follows:

Carriers	Majority	JSP minority
AUT	37 cents plus 2 cents arrimo	35 cents.
Containerships	37 cents plus 2 cents arrimo (no discount)	35 cents (12% ondeck discount).
Motorships	37 cents plus 2 cents arrimo	35 cents.
Sea-Land	37 cents plus 2 cents arrimo	35 cents.
Seatrain	37 cents plus 2 cents arrimo	35 cents.
SACL	36 cents.*	32 cents.*
TMT	35 cents	31 cents.
Waterman	37 cents plus 2 cents arrimo	35 cents.

*Including handling and wharfage charges.

The referenced "Operation Bootstrap," a program of improving economic status of Puerto Ricans, has been referred to as justifying the minimum rate in spite of the absence of authority for a welfare standard. If such a standard is not validly applicable as I contend, the most secure ground on which to stand in regulating rates is primarily disapproval of any rate that is not just and reasonable. The converse, finding rates just and reasonable where disapproval is not warranted, is the best assurance of guarding and advancing the economy of Puerto Rico or any area. The majority has elected to put a floor under rates for transporting automobiles in the name of protecting the economy, but since automobiles keep the economy moving to some extent, and it takes four tires to keep the wheels of the automobile moving, one could hold that in the future a floor under automobile tire rates may also be necessary for consistency with the majority's regulatory philosophy. There is no end to this process, which I would reject, particularly where the record is so inadequate.

Ultimate Conclusion

For these several reasons, I dissent from the majority's conclusions and do conclude respondents' rates are all just, reasonable, and lawful.

FEDERAL MARITIME COMMISSION

Docket No. 1145

Reduction in Freight Rates on Automobiles—
North Atlantic Coast Ports to Puerto Rico

Docket No. 1167

Reduced Rates on Automobiles—
Atlantic Coast Ports to Puerto Rico

ORDER

This proceeding having been instituted by the Commission to determine the lawfulness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, of proposed reduced rates and related charges on automobiles of all of the carriers in the trades from North Atlantic, South Atlantic, and gulf coast ports of the United States to ports in Puerto Rico, and the Commission having this date made and entered its report stating its findings and conclusions, which report is made a part hereof by reference, and having found said proposed rates and charges to be unjust and unreasonable:

Therefore, it is ordered, That:

1. A rate of 37 cents a cubic foot, plus an additional charge for arrimo of 2 cents a cubic foot, be established as the just and reasonable minimum level for the North Atlantic carriers, respondents in both proceedings (docket No. 1145 and docket No. 1167). In lieu of the above, these carriers may publish an all-inclusive rate of 39 cents a cubic foot.
2. The minimum rate for respondents operating from ports in the Gulf of Mexico shall be the same as the minimum rate for respondents operating from the North Atlantic.
3. The minimum rates of TMT and SACL operating from Florida ports shall be 35 cents for TMT and 36 cents for SACL. These rates shall not be subject to any additional charges for arrimo.

4. Containerships' proposed allowance of 12½ percent to shippers of automobiles when such automobiles are carried on deck be disallowed.
5. Respondents promptly file with the Commission revised schedules of rates and charges in accord with our findings and conclusions herein, said schedules of rates and charges to be effective within 15 days from the date of service of this order.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX A

History of Proceedings

1. Alcoa Steamship Company, Inc., (Alcoa) and the other three respondents in docket No. 1145 filed to be effective September 15, 1963, a reduced rate of 35 cents per cubic foot on certain types of "Vehicles, Self-Propelled" shipped from North Atlantic coast ports. The effective date was suspended to January 14, 1964, and an investigation ordered September 12, 1963. Motorships filed first on July 31, 1963; Sea-Land on August 7, 1963; Seatrain on August 12, 1963; and Alcoa on August 16, 1963; to become effective September 15, except Alcoa with a September 16 effective date. Subsequently, all respondents except Motorships requested and were granted permission to cancel the 35-cent rate. Alcoa canceled its reduction and moved to be dismissed from the proceeding. The Alcoa motion was granted November 26, 1963. Motorships was ordered on January 7, 1964, to furnish information about its operations, and this order was rescinded on February 27, 1964.

2. AUT, Sea-Land, Containerships, and Seatrain, respondents in docket No. 1167, filed, to be effective January 16, 1964, a reduced rate of 35 cents per cubic foot on certain types of "Vehicles, Self-Propelled" shipped from Atlantic Coast ports. The effective date was suspended until May 15, 1964, and an investigation ordered January 7, 1964. No purpose was stated as such, but the order recited reason "to believe that the said reduced rate * * * may have a detrimental effect on the rate structure * * * and result in rates * * * which would be unjust, unreasonable or otherwise unlawful in violation" of the Act or the Intercoastal Act.

3. TMT filed, to be effective February 14, 1964, a reduced rate of 31 cents per cubic foot (down from 34 cents per cubic foot) on the same types of vehicles when shipped from Jacksonville and Miami, Fla. The proceeding in docket No. 1167 was expanded to include TMT, which was added as a respondent, and an investigation ordered February 13, 1964, but its rate was not suspended.

4. On February 13, 1964, after stating the purpose of the investigation "is to determine if the said rate would have an adverse effect upon the Puerto Rican economy", the suspension was vacated because the 4-month suspension period on Motorships' 35 cents per cubic foot rate expired January 14, 1964. Motorships was the only respondent

who did not cancel the 35-cent rate (see item 1 above). The effect of this action is to authorize the other respondents to meet the Motorships' rate without waiting until the end of their suspension period on May 15, 1964, but the assigned reason was "that the 3 cents per cubic foot differential is resulting in an adverse impact upon certain respondents in docket No. 1167 which threatens the continuation of their full service in the trade and may be harmful to shippers who are not transporting their automobiles via Motorships."

5. SACL filed, to be effective March 15, 1964, a tariff which permitted it to absorb handling and wharfage charges on automobiles shipped from Jacksonville and Miami, Fla. SACL's rate was not stated in the order. The proceeding was expanded to include SACL, which was added as a respondent and an investigation ordered February 27, 1964, but the new rule was not suspended.

6. Containerships filed, to be effective March 15, 1964, a tariff revision allowing a 12½ percent discount to shippers of automobiles when carried on deck for the convenience of the carrier with the consent of the shipper. The change was suspended for the reason that it "might be detrimental to the Puerto Rican trade, disrupt the *status quo* * * * and may result in rates * * * which would be unjust * * *"

7. Waterman filed, to be effective April 6, 1964, a reduction from 38 cents to 35 cents per cubic foot on the same types of vehicles when shipped from gulf coast ports. The proceeding in docket No. 1167 was expanded to include Waterman, which was added as a respondent and an investigation ordered March 10, 1964. Waterman later restored its 38 cents per cubic foot rate.

8. AUT filed, to be effective March 21, 1964, a reduction from 35 cents to 32 cents per cubic foot on the same types of vehicles when shipped from Atlantic coast ports. The reduction was suspended until July 20, 1964, by order on March 10, 1964, for the same reasons noted in item 6 above.

APPENDIX B

Diverse Methods of Operation

It was shown that six carriers use special-purpose ships which transport substantially only wheeled vehicles and one uses general purpose ships which transport general cargo and wheeled vehicles together. Of the special purpose ships, three (Containerships, SACL, and TMT) roll the vehicles on and off (when the top deck is used SACL uses a mobile shore crane) (Tr. 799), and two (Motorships and Sea-Land) lift the vehicles on and off. One (Seatrain) drives vehicles on and parks them between trailers loaded with general cargo. Of the general purpose ships, AUT lifts the vehicles on and off C–1–B type ships and stows them mixed with other cargo (volume in 1963 shown as 3,242,459 cu. ft. of automobiles and 8,848,177 cu. ft. of general cargo).

A variety of ships are used:

1. Containerships uses a motor vessel on which ships are rolled on and off.

2. Motorships uses a C–1–B steamship vessel converted to be an automobile carrier by the installation of automobile decks and specialized lashing gear. It carries a limited amount of cargo on deck, most of which is in trailers. Loading and unloading is effected by the lift-on/lift-off method (ex. 11).

3. Sea-Land uses a former seaplane tender "of the C–3 vintage that was modified and converted" (Tr. 481, 18). It was fireproofed and false decks were installed, together with booms for vehicle handling.

4. Seatrain uses ships which were not specifically identified in the record, but which are specially designed to transport truck trailers and railroad cars.

5. SACL uses "a roll-on/roll-off vessel, having one cargo hold, with access thru the stern" except for cargo on deck (Tr. 799). "She is twin-diesel powered * * * with a gross tonnage of 4,684 tons" (proposed finding of fact No. 6 and Tr. 797–798).

6. TMT uses four Landing Ship Tank (LST) vessels towed by an oceangoing tugboat (Tr. 919). The vessels are loaded by the roll-on/roll-off method with access through the stern. TMT's service is slow and in other respects is less desirable to shippers than that of competitive self-propelled ships.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65-2

AMERICAN & AUSTRALIAN STEAMSHIP LINE, AND PORT & ASSOCIATED LINES, PETITIONERS

v.

BLUE STAR LINE, LIMITED, HAMBURG SUD-AMERIKANISCHE DAMPFSHIFFAHRTS-GESSELLSCHAFT, EGGERT & AMSINCK (COLUMBUS LINE), UNITED STATES LINES CO., AND M. E. ROUGH, RESPONDENTS

Decided February 12, 1965

ORDER

This proceeding comes before the Commission upon an application filed on December 29, 1964, by American & Australian Line and Port & Associated Line, members of the Atlantic and Gulf/Australia-New Zealand Freight Conference, in which petitioners request the Commission to direct the other members of the conference to show cause why the Commission should not issue an order that respondents may not lawfully oppose, impede, or prevent the amendment of the conference tariff to eliminate Canadian rates and to terminate that part of the Merchant Rate Agreement which includes Canada. On January 12, 1965, we issued the requested show cause order and on February 1, 1965, the Commission heard oral argument on the matter.

The conference agreement, No. 6200, covers the trade from the United States to Australia and New Zealand. It does not specifically include Canada. Another agreement, 6200-A, between the conference and the M.A.N.Z. Line which serves Canada, provides for a parity of rates between the conference lines and M.A.N.Z. Line and provides that M.A.N.Z. shall be included in the conference dual rate system insofar as its Canadian operations are concerned. M.A.N.Z.

Line has given written notice to the conference of the cancellation of Agreement 6200–A to be effective February 15, 1965.

Upon termination of 6200–A only the basic conference agreement, which does not cover Canada, will remain. Petitioners, therefore, request that the conference delete the Canadian rates from its tariff and restrict the coverage of the dual rate system to the United States. Petitioners argue that Agreement 6200 authorizes neither publication of Canadian rates nor the inclusion of Canadian shipments within the dual rate system. They contend that upon the expiration of Agreement 6200–A there will be no provision in any section 15 agreement which permits the inclusion of Canada within the framework of Agreement 6200.

In rebuttal, respondents contend that irrespective of the cancellation of Agreement 6200–A the conference members, including petitioners, have entered into an agreement to publish Canadian rates in the conference tariff and to include Canadian shippers in the dual-rate contract system.

Upon considering the arguments and documents before the Commission in this proceeding, we are of the opinion that we will not order the relief requested by petitioners. Since it appears that the rights of respondents and certain shippers may be substantially affected by relief sought, we are unwilling to take the summary action requested on the limited record before us.

Our dismissal of this proceeding is, of course, without prejudice to the right of petitioners here to file a complaint pursuant to section 22 of the Shipping Act, 1916, and rule 5(b) of the Commission's rules of practice and procedure.

This proceeding is hereby dismissed.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1127

OVERSEAS FREIGHT AND TERMINAL CORP. (ALL CARGO LINE)—EXTRA CHARGES DUE TO DELAY IN UNLOADING CAUSED BY LONGSHOREMEN STRIKE

Decided February 12, 1965

Respondent charged shippers extra compensation for services rendered for delay in a voyage, when longshoremen strike prevented unloading, in reliance on clause in bill of lading, attached to tariff, that required cargo to pay proportionately expenses of carrier for services rendered cargo when cargo is retained on board and duration of voyage is extended. Not shown to be in violation of section 18(b) as a charge in excess of that shown in tariff, nor a violation of section 16 or 17 of the Shipping Act, 1916.

Marvin J. Coles, *Stanley O. Sher*, and *Armin U. Kuder*, for respondent.

J. Joseph Noble and *F. Herbert Prem* for intervener, International Packers, Inc.

Frank Gormley and *Norman D. Kline*, hearing counsel.

E. Robert Seaver, hearing examiner.

REPORT

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

This is an investigation on our own motion to determine whether or not the imposition by All Cargo Line of a 125 percent surcharge on shipments it was prevented from unloading at Mobile, Ala., due to a longshoremen's strike, was in violation of sections 16, 17 or 18(b) of the Shipping Act, 1916. In an initial decision the hearing examiner concluded (1) that the surcharge was not discriminatory under section 16 because it was assessed against all consignees equally; (2) that the surcharge was not in violation of section 17 because that section has never been construed to apply to a common carrier's ocean freight rates; (3) that clause 4 of the bill of lading which was attached to the back of the filed tariff satisfied the filing requirements of section

18(b)(1); (4) that there was no need for any additional filing because the carrier did not increase its rates within the meaning of section 18(b)(2); (5) that the hearing counsel and intervener have not proven that the "surcharge" imposed by the respondent is unlawful under section 18(b)(3); and (6) the reasonableness of the "surcharge" was not an issue in the order of investigation, and the parties offered no evidence to demonstrate that the charge was so unreasonably high as to be detrimental to the commerce of the United States under section 18(b)(5). The proceeding is before us upon hearing counsel's and intervener's exceptions to the initial decision.

Both hearing counsel's and intervener's exceptions are directed to the examiner's findings and conclusions under section 18(b)(3) and state that the section permits only the filing of rates and charges in specific predetermined amounts. Thus, any rule which provides for an unspecified charge contingent upon a future occurrence violates the principle that tariffs must be clear and unambiguous. In essence these exceptions constitute nothing more than a reargument of the issues and contentions resolved by the examiner in his initial decision.

A careful consideration of the record leads us to the conclusion that the examiner's disposition of these issues was well founded and proper. However, nothing in the decision is to be construed as sanctioning the particular apportionment of the carrier's expense arrived at here. As the examiner has noted, this issue was not present in this proceeding.

Accordingly, we adopt the examiner's initial decision as our own and make it a part hereof, and for the reasons stated therein this proceeding is hereby dismissed.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1127

OVERSEAS FREIGHT AND TERMINAL CORP. (ALL CARGO LINE)—EXTRA CHARGES DUE TO DELAY IN UNLOADING CAUSED BY LONGSHOREMEN STRIKE

Respondent charged shippers extra compensation for services rendered for delay in a voyage, when longshoremen strike prevented unloading, in reliance on clause in bill of lading, attached to tariff, that required cargo to pay proportionately expenses of carrier for services rendered cargo when cargo is retained on board and duration of voyage is extended. Not shown to be in violation of section 18(b) as a charge in excess of that shown in tariff, nor a violation of sections 16 or 17 of the Shipping Act, 1916.

Marvin J. Coles, *Stanley O. Sheer*, and *Armin U. Kuder*, for respondent.

J. Joseph Noble and *F. Herbert Prem* for intervener, International Packers, Inc.

Frank Gormley and *Norman D. Kline*, hearing counsel.

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

Background of the proceeding

The Commission's notice of investigation which instituted this proceeding describes the reported circumstances that gave rise to the investigation in this way: "[Respondent], Overseas Freight Terminal Corp. (All Cargo Line), a common carrier by water in foreign commerce of the United States subject to the Shipping Act, 1916, had charged or demanded a 125 percent surcharge on shipments transported aboard the SS *Cap Verde* on a voyage from Rotterdam, Netherlands, to ports in the United States, because the duration of the voyage was increased due to a longshoremen's strike. The carrier's bill of lading, a specimen of which is attached to the tariff and on file with the Commission, provides in paragraph 4 for the assessment of extra compensation for an increase in the duration of the voyage, and

[1] This decision was adopted by the Commission on Feb. 12, 1965.

further provides that the shipper and consignee shall pay proportionate additional freight."

The notice goes on to state that the carrier may have charged a greater or different compensation for the transportation of property than the rates and charges which are specified in its tariff on file with the Commission, in violation of section 18(b), Shipping Act, 1916, and by the imposition of said surcharge the carrier may have unduly preferred or prejudiced shippers in violation of section 16, and may have unjustly discriminated against shippers in violation of section 17. This investigation was ordered pursuant to section 22 of the Shipping Act, 1916, to determine whether respondent in applying the bill of lading clause and assessing the surcharge is in violation of section 16, 17 or 18(b) of the Shipping Act, 1916.

International Packers, Inc., a shipper who had cargo on the *Cap Verde* on the voyage in question and who, like the other shippers, was charged extra compensation for the extended duration of the voyage, has intervened in this proceeding. Hearing counsel, respondent, and intervener, being all of the parties, agreed to a stipulation of the facts to be considered in reaching a decision in this proceeding. The stipulation was negotiated with the approval of the examiner and it has obviated the need for the taking of testimony. The stipulation sets forth facts that are sufficiently clear and complete for the purpose of a decision in this proceeding. The agreed facts, in the words of the stipulation, are as follows.

The facts

Respondent All Cargo Line, is a common carrier by water operated by the Overseas Freight & Terminal Corp. It transports cargo between continental European ports in the range from Hamburg, Germany to Bayonne, France, and also Irish ports and South Atlantic and gulf ports of the United States. Its service to the Gulf is approximately every 4 weeks. Vessels used in this service are time chartered and in most instances fly the flag of West Germany.

Respondent filed its westbound freight tariff No. 1 pursuant to section 18(b) of the Shipping Act, in 1962. A specimen of the carrier's bill of lading was filed with the tariff and is attached hereto as exhibit A.[2] The tariff provisions are expressly made subject to the bill of lading. The following notation appears on the title page of the tariff:

> "Transportation under the terms and conditions of this tariff is subject to the terms and conditions of the line's bill of lading and other documents currently in use by the line."

---

[2] The entire document need not be set out in this decision, therefore all but clause 4 is omitted.

The voyage which ultimately gave rise to this proceeding was westbound voyage No. 6, on the MV *Cap Verde* which arrived in Rotterdam on December 3, 1962. The *Cap Verde* called at Rotterdam, Hamburg and Dublin and departed from the latter port on December 12 bound for Tampa, Mobile, Houston and New Orleans.

A longshoremen's strike commenced in all United States gulf ports on December 23, 1962 at 1700 hours. The *Cap Verde* arrived in Tampa, Fla., at 0910 hours, December 24, 1962. Upon the vessel's arrival at Tampa, Fla., respondent, because of the strike, was unable to discharge its cargo. On December 27 at 1815 hours, the *Cap Verde* sailed for Mobile, Ala., where respondent was hopeful that it might be able to discharge some cargo, but due to the strike, it was unable to do so. The vessel arrived at the Mobile anchorage on December 28 at 1724 hours. It left the anchorage at 0700 hours on January 14 for water and docked at Mobile at 0930 hours on January 14. The remainder of the time during which the strike ensued the vessel waited in the Mobile anchorage. The strike ended on January 26, 1963, at 2400 hours. The vessel discharged its cargo on January 27 at Mobile and then proceeded to Houston, New Orleans and Tampa where it discharged the remainder of its cargo. The itinerary of the vessel for this voyage is as follows:

	Arrived	Time	Sailed	Time	
Rotterdam	12- 3-62	0115	12- 6-62	1515	
Hamburg	12- 7-62	0310	12- 9-62	1010	
Dublin	12-11-62	2355	12-12-62	1910	
Tampa	12-24-62	0910	12-27-62	1815	No cargo worked strike.
Mobile	12-28-62	1724	1-27-63	1815	
Houston	2- 3-63	0435	2- 5-63	1815	
New Orleans	2- 7-63	0120	2- 8-63	1930	
Lake Charles	2- 9-63	2105	2-11-63	1700	
Tampa	2-13-63	1850	2-14-63	2400	

Throughout the strike, respondent believed that the strike would be terminated momentarily. From newspaper reports and other sources of information respondent believed that the Government would not permit such a prolonged strike of this magnitude. Respondent, as shown below, incurred additional expenses in excess of $60,000 during this strike. As the strike wore on, respondent became increasingly concerned with the mounting expense on the vessel.

Respondent is informed that other carriers under provisions similar, if not identical, to section 4 of its bill of lading, discharged nonperishable cargo in Puerto Rico or Mexico which was intended for strike-bound United States ports. Thereafter, the obligations of such carriers were discharged, and the consignees were required to accept the goods in Puerto Rico or Mexico and arrange for further transportation to the United States at their own expense.

International Packers, intervener, is unable to find any instances where perishable cargo has been discharged at foreign ports when intended for strikebound U.S. ports. Intervener's investigation disclosed there were no suitable warehouses in Puerto Rico or in Mexican ports that were available for acceptance in storage of this perishable product. The circumstances surrounding the handling and discharge of perishable cargo and general cargo are different since the former requires refrigeration.

Respondent had the opportunity to use the *Cap Verde* in the Caribbean trade during the period it was idle due to the strike period. The *Cap Verde* is well suited for this trade because of the substantial refrigerated space in the vessel. The vessel, however, could not be so employed in the refrigerated trades in the Caribbean as its refrigerated compartments contained meat cargoes of International Packers, which was the largest consignee on the voyage.

Respondent attempted to persuade longshoremen in the gulf to unload the meat cargo on the grounds that it might spoil. The longshoremen refused to do so. Respondent, then, on approximately January 10, called its agents in the gulf and in Tampico, Mexico, to arrange to discharge the meat cargo of International Packers, in Tampico, Mexico, thereby freeing the vessel for trading in the Caribbean or other trades which might reduce, or eliminate the losses that were continuously mounting due to the strike. Respondent notified International Packers that it was considering discharging such cargo in Tampico, Mexico, under section 4 of the bill of lading. International Packers told respondent that discharging its cargo in Tampico was unacceptable to it, but that if respondent elected to discharge in Mexico, International Packers had no alternative but to accept. Intervener also informed respondent that it would hold respondent liable for cargo damage due to unavailability of proper refrigeration facilities for storage or transportation. The unacceptable nature of the discharge at Tampico was for the following reasons:

(1) Investigation disclosed that there was no refrigerated warehouse in operation at Tampico capable of taking the meat cargo and maintaining zero degree temperature.

(2) There was no mechanical refrigerated equipment for shipment by rail to the U.S.A., and U.S.A. railroads would not allow their equipment to go to Tampico.

(3) The Mexican Government would not allow U.S. trucking companies into Mexico to pick up the meat cargo at shipside. There were some Mexican trucks that could handle the cargo only as far as the U.S. border, but ship discharge would be prolonged due to shortage

of equipment. International Packers advised respondent that the additional cost to International Packers would be about $30,000 to transport such cargo from Tampico, Mexico to its United States destination. Respondent, although believing that it could discharge the cargo in Tampico, Mexico under paragraph 4 of the bill of lading, did not do so.

The *Cap Verde* was on time charter from a related company at a cost of $1,750 per day. Insofar as relevant here, this figure covers all costs of running the vessel except bunkers. From the arrival of the vessel at Tampa on December 24, 1962, at 0910 hours until the termination of the strike on January 26, 1963, at 2400 hours the vessel lost a total of 33 days 14 hours, and 50 minutes. The expenses incurred during this period as follows:

Charter Hire	$58, 831. 50
Bunkers	1, 465. 60
Total	$60, 297. 10

Respondent has never had another vessel which has arrived at a port subsequent to the commencement of a strike. Parenthetically, it may be noted that the provision in paragraph 4 of respondent's bill of lading is a standard provision which has been in use for long periods of time and which may be found in many common carriers' bills of lading.

Respondent endeavored to compute what is believed would be a reasonable distribution of some, but not all, of the additional expense incurred due to prolongation of the voyage caused by the strike. Respondent arrived at a surcharge of 125 percent of the ocean freights, for the reasons discussed below. Because of the delay in discharging caused by the strike, respondent notified each consignee that a surcharge in the amount of 125 percent of the ocean freight charge was being imposed and that cargo would not be delivered prior to payment by certified check. Accordingly, the following notation was inserted on freight bills.

"Surcharge, due to duration of voyage being increased account strike longshore labor which is to be paid by certified check prior to delivery of this cargo.

In assessing this charge, respondents relied upon paragraph 4 of their ocean bill of lading. Paragraph 4 states in pertinent part:

"For any service rendered to the goods as hereinabove provided, the carrier shall be entitled to extra compensation; and if in following the procedure permitted herein the length or duration of the voyage of the ship is increased the shipper and consignee shall pay proportionate additional freight, all of which shall be a lien on the goods."

All consignees were equally assessed. The total ocean freight charges were $24,037.76 as shown on exhibit B attached. The surcharge amounted to $30,047.20. Respondent selected 125 percent to be the surcharge so that the shippers and the consignees, on the one hand, absorbed one-half of the $60,297 loss due to the strike, and respondent absorbed the remaining 50 percent of the loss. Individual shipments were small, the largest being consigned to intervener International Packers Ltd., who were assessed a surcharge of $10,744.39 on total freight charges of $8,595.51. Over half the shipments were under $100. Although most consignees paid the additional charge, some did so under protest. Intervener chose to post a bond in lieu of payment pending the establishment of the validity of the carrier's claim. Some consignees opposed the surcharge on the grounds that it was in contravention of section 3 of the Carriage of Goods by Sea Act of 1936 (46 U.S.C. 1304(3)).

In no prior or subsequent strike has International Packers been asked by an ocean carrier to pay a surcharge of the character demanded by respondent herein, although it has been consignee of cargoes laden on vessels tied up at American ports by reason of longshoremen's strikes.

International Packers is not aware of any instance where a carrier has demanded or collected a surcharge of the character demanded by respondent herein as a consequence of a longshoremen's strike.

No formal complaint for reparations has been filed by any consignee who has paid the surcharge.

The parties agree that any tariffs and bills of lading duly filed with the Federal Maritime Commission may be cited and referred to at any stage during this proceeding.

The bill of lading provisions

For conservation of space, the entire bill of lading, which is attached to the stipulation, is not set out above since clause 4 is the only portion that is relevant. That clause reads, in pertinent part:

In any situation * * * whether existing or anticipated before commencement of or during the voyage, which in the judgment of the carrier or master is likely to give rise to risk of * * * delay * * * or to give rise to delay or difficulty in arriving, discharging at, disembarking at or leaving the port of discharge or the usual or agreed or intended place of discharge or debarkation in such port, the carrier or the master may before, during or after loading or before the commencement of the voyage, require the shipper or other persons entitled thereto to take delivery of the goods at port of shipment and upon failure to do so may discharge and warehouse or otherwise store the goods, or any part thereof, at the risk and expense of the goods * * * or the ship may proceed or return, directly or indirectly to or stop at any such port or place whatsoever as the master or the carrier may consider safe or advisable under the circumstances, and discharge the goods * * * at any such port or place; or the carrier * * * may retain the cargo * * * until the return trip or until such time as the carrier or master, thinks advisable and discharge the goods * * * at any place * * * including the port of shipment: or the carrier or master may discharge and forward the goods or any part thereof, by any means, rail, water, land or air, * * * at the risk and expense of the goods * * *. For any service rendered to the goods as hereinabove provided, the carrier shall be entitled to extra compensation; and if in following the procedure permitted herein the length or duration of the voyage of the ship is increased the shipper and consignee shall pay proportionate additional freight, all of which shall be a lien on the goods.

Applicable statutes

The pertinent portions of sections 16, 17, and 18(b), of the Shipping Act, 1916, the statutes which under the notice of investigation govern the decision in this proceeding, provide:

(1) SECTION 16

That it shall be unlawful for any common carrier by water * * *

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic * * * or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage * * *.

(2) SECTION 17

That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers * * *.

(3) SECTION 17 (second paragraph)

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

(4) SECTION 18(b)(1)

Every common carrier by water in foreign commerce * * * shall file with the Commission * * * tariffs showing all the rates and charges of such carrier * * * for transportation to and from United States ports and foreign ports * * * on any through route which has been established. Such tariff shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement.

(5) SECTION 18(b)(2)

No change shall be made in rates, charges, classifications, rules or regulations, which result in an increase in cost to the shipper * * * except by the publication, and filing * * * of a new tariff or tariffs which shall become effective not earlier then 30 days after the date of publication and filing thereof with the Commission * * *.

(6) SECTION 18(b)(3)

No common carrier * * * shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; * * *.

Reasonableness of the charges

Before turning to the main questions presented, certain related issues can be disposed of. Among other things, the intervener contends that the surcharge of 125 percent of the basic freight is exorbitant and unreasonable under section 18(b)(5). That section provides:

The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States * * * which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

Respondent urges that the reasonableness of the rate or charge is not an issue in this proceeding and hearing counsel agree. In view of the preamble in the notice of investigation, quoted above, it must be concluded that this issue is not included within the scope of the investigation. In addition, in order for intervener to prevail on this point he would have to establish facts demonstrating that the rate or charge is so unreasonably high as to be detrimental to the commerce of the United States. Such facts are not included in the stipulation to which the intervener agreed.

Issues raised by sections 16 and 17

Intervener does not contend that sections 16 or 17 have been violated. Hearing counsel states that they have not been violated, pointing out that in this case the same charge was assessed against all consignees equally and therefore there can be no contention that section 16 first was violated. He concludes that since in all prior Commission cases bearing upon the regulations and practices covered by section 17 it has been held that the language is directed toward handling property at terminals and not toward rate making functions concerned with ocean line hull movement of property, that section 17 is therefore not applicable. These conclusions are sound and therefore it will be unnecessary to discuss further any issues based on sections 16 and 17.

Contentions of the parties based on section 18, discussion and conclusions

Hearing counsel first contend that the additional charge arising out of the delay due to the strike was made by respondent without the advance 30-day filing as required by section 18(b)(2) and that that section was therefore violated. Recognizing that it was impossible for respondent to file on 30 days advance notice in the circumstances of this case, hearing counsel argue that respondent should at least have taken advantage of the provision in the statute which allows a carrier to request the Commission for permission to file a change upon less than 30 days notice for good cause. Respondent correctly points out that, even assuming that the bill of lading provision for additional compensation was not already on file, the 30 days advance filing provision of section 18(b) (2) is inapplicable here. The examiner agrees. Once the cargo is loaded, the voyage begun, and the contractual relations of the parties are fixed, no time remains for obtaining special permission for a change in rates on short notice. This section is further inapplicable for the simple reason that respondent did not change its rate or charge. Its tariff provisions were the same as those that had existed for at least 30 days previously. Aside from this, since this decision finds that the tariff was properly filed, section 18(b) (2) need not be considered further.

The issues that are central to this proceeding flow from the provisions of section 18(b) (3) which prohibit the charging of compensation higher than that specified in the tariff filed with the Commission pursuant to section 18(b) (1). Hearing counsel and intervener contend that respondent has not satisfied the tariff filing requirements of the statute by merely attaching the bill of lading to the tariff, and that the surcharge for delay is therefore not provided for in the tariff. They further contend, in effect, that even if this method of filing were deemed to satisfy the filing provisions of the statute, the requirements of section 18 are violated because article 4 of the bill of lading does not set out in sufficiently definite or precise words or figures the charge that is to be made against shippers for unforeseen delay in the voyage such as that encountered in this case.

They rely heavily on three cases decided by predecessors of the Commission in support of the proposition that the tariff itself must contain every provision which would alter or change the rate charged; that shippers cannot be forced to look beyond the tariff itself to determine whether some rate or charge other than that specified in the tariff will be assessed; and that rate changes brought about by provisions in documents other than the tariff have no binding effect on shippers because of the prohibition contained in section 18(b) (3). *Puerto Rican Rates*, 2 U.S.M.C. 117, 131 (1939); *Transportation of Lumber Through the Panama Canal*, 2 U.S.M.C. 143, 145 (1939); *Alaskan Rates*, 2 U.S.M.C. 558, 581 (1941). These cases do support the general principles cited by these parties, but a close analysis of them reveals that they are no longer germane to the facts of this case.

In *Puerto Rican Rates*, the United States Maritime Commission had before it a general investigation of rates on shipments to Puerto Rico. The Commission also took up and considered certain tariff practices of the carriers and found that in their bill of lading the carriers stated that they did not undertake that the vessels were equipped to transport perishable goods, even though their tariffs named rates for the transportation of refrigerated cargo. The Commission required the elimination of this conflict, and in discussing it the Commission employed language relied upon by hearing counsel and intervener here, as follows:

However, irrespective of this conflict, shippers should not be required to look beyond the tariff for any provision affecting the application of the rates. Whenever a tariff refers to a bill of lading and states that the rates therein published are dependent upon conditions in that bill of lading, such conditions should be published in the tariff. * * * The statute requires the publication in tariffs of and rules or regulations which in anywise change, affect, or determine any part of the aggregate of the rates, fares, charges or the value of the service.

In *Transportation of Lumber Through the Panama Canal*, *supra*, the Commission had under investigation various rules and practices in the intercoastal trade. The carriers there had a tariff rule providing that each shipment should be subject to the terms, conditions, and exceptions of the bill of lading of the carrier in use at the time of such shipment, and that the shippers shall accept the same and be bound thereby. Hearing counsel and intervener rely on the general conclusion expressed by the Commission that "any provisions of the bill of lading which affect the charge for transportation or the value of the service, to be effective, must be incorporated in the tariff."

Alaskan Rates was also a general rate investigation in the course of which the Commision had occasion to discuss the tariff filing practice of the carriers involved there. The tariff provided "the steamer rates named herein are applicable subject * * * to the conditions of the company's shipping receipt, bills of lading, and livestock contracts * * *." The Commission condemned this clause, stating:

When rates are published, dependent upon conditions in the carrier's bill of lading, said conditions should be published in the tariff.

The three above cases were decided under the provisions of the Intercoastal Shipping Act, 1933, 46 U.S.C. 844, which are somewhat similar to section 18 of the 1916 Act governing foreign ocean commerce. Hearing counsel relies on an analogy between these decisions and the situation here in the apparent belief that the bills of lading of the carriers involved in those three cases, like that of All Cargo Line, were attached to the tariffs on file with the Commission. If this had been the case, these precedents would lend support to the argument of hearing counsel and intervener, since the Commission required bills of lading provisions similar to those involved here to be printed in the tariff. However, it must be concluded that in those cases a specimen of the bills of lading of the carriers was not in fact attached to the tariff and that this is why the Commission required parts of the bill of lading to be printed in the tariff.

It is true that in its present form, section 2 of the 1933 Act, like section 18(b)(1) of the 1916 Act, requires that the terms and conditions of the bill of lading shall be contained in the tariff filed with the Commission. However, a review of the history of section 2 demonstrates that there was no such requirement in the 1933 Act in 1939 and 1941 when the above three cases were decided. See volume 47, Statutes at Large, page 1425. The requirement that the bill of lading be incorporated in the tariff was first added when section 2 was amended by Public Law 85–810 of August 28, 1958. See volume 72 of the Statutes at Large, page 977.

The three decisions themselves demonstrate that the carriers involved in those three cases did not attach or incorporate the bills of lading to or in the tariffs. In *Transportation of Lumber Through the Panama Canal*, the Commission pointed out on page 145 of its decision that "such bills of lading are not reproduced in the tariff." This can only be taken to mean that the bill of lading was not stapled to the back of the tariff, pasted on an internal page of the tariff, or otherwise physically attached in its entirety to the tariff, as was done by the respondent in the instant case. In *Alaskan Rates*, the Commission cites the case of *Transportation of Lumber Through the Panama Canal* at page 581, together with the *Puerto Rico Rates* case, immediately following the above quoted language from the *Alaskan Rates* case. It is evident that the Commission considered the facts of the three cases, decided almost contemporaneously, to be the same in regard to the form of the tariff. It must be concluded that in none of the three instances were the bill of lading available to shippers in any way as part of the tariff.

If any doubt remains as to the meaning of the three Commission decisions relating to the incorporation of bill of lading provisions in tariffs, it is dispelled by the legislative history of Public Law 85–810, supra. As orginally introduced, the bill which became Public Law 85–810 provided that the carrier "may include the terms and conditions of any passenger ticket, bill of lading, contract of affreightment or other document evidencing the transportation agreement." The Congress adopted the recommendation of the Secretary of Commerce that the permissive word "may" be stricken from the bill and the word "shall" be inserted in lieu thereof. In discussing the reason for his recommendation that the inclusion of the bill of lading be a requirement rather than mere permission, the Secretary of Commerce had pointed out that the Maritime Commission had held in *Puerto Rican Rates* and *Alaskan Rates* that provisions of bills of lading affecting rates or the value of the service are not governing unless incorporated in the carriers published and filed tariff. U.S. Congressional News 1958, page 4093. It is clear that Congress intended that the statutory requirement that the entire bill of lading be attached supersede the rule of the Commission cases requiring certain bill of lading clauses to be included in the tariff.

It cannot be concluded that in addition to attaching the entire bill of lading to the tariff filed with the Commission, the carrier must also reprint in the tariff itself any terms and conditions of the bill of lading that affect the rates, charges or the value of the service. Since section 18(b)(2), enacted 3 years later, similarly requires that the bill of lading be filed with the tariff, it must be concluded that Congress did not intend that, in addition, provisions affecting rates and charges be printed again in the tariff itself. It is therefore concluded that the method employed by respondent, that is, the physical attachment of the bill of lading to the tariff with a provision in the rules and regulations portion of the tariff making the tariff subject to the terms and conditions of the bill of lading, satisfies the requirements of section 18 insofar as tariff makeup and filing requirements are concerned. No question is raised as to the bill of lading being the complete contract between the carrier and each shipper.

The other point raised by hearing counsel based on section 18, although apparently with less conviction, is the contention that even if paragraph 4 of the bill of lading had been physically included or printed in respondents tariff there "is doubt" as to its legality under section 18 because the provision of paragraph 4 is indefinite as to the amount of the charge for the services rendered. They argue that paragraph 4 of the bill of lading does not comply with the requirements announced in decisions of the Commission that tariffs must be specific and plain, citing *Intercoastal Lumber Rate Changes*, 1 U.S.M.C. 656, 658, and eight other cases decided by predecessors of the Commission; that a tariff is unlawful when shippers must obtain information not published in the tariff and must make mathematical calculations to determine the applicable rate; that in instances where charges are to be assessed against shippers of diversion the tariffs must clearly state what special services will be rendered and the specific sum that will be charged therefor; that charges undisclosed in the tariff may not be lawfully charged against the shipper, nor charges that are described in the tariff as being "subject to prior arrangement." Cases are cited for each of these latter propositions.

Hearing counsel point out that the purpose of tariff filing is uniformity in charges and rates, the prevention of and control over discrimination, and maintaining stability in rates, and they state that these objectives could not be achieved if carriers are allowed to utilize "amorphous" provision such as paragraph 4. They question how shippers can ever know, in advance, what their shipping cost will be by consulting this tariff and this bill of lading.

The contentions of the intervener stress the point urged by hearing counsel, discussed above, relating to the physical makeup of the tariff of respondents and he also contends, as hearing counsel does, that the carrier made a unilateral decision, apart from the terms of a filed tariff, that 125 percent of the basic freight was a proper charge to the shipper on account of the delay in the voyage * * * not 10 percent, or 50 percent, or even 200 percent. He argues that the Shipping Act does not permit such an arbitrary decision on the part of the carrier regarding the amount of charges.

Hearing counsel do not agree with the contention of respondent that a carrier has no way of specifying precise additional charges in circumstances such as those involved here, due to the unpredictable nature of the strike and the fact that no advance determination can be made as to what expenses will be incurred as a result of it or how long it will last. They suggest that the tariff might provide that in the event of delay caused by a strike certain additional freight, such as an extra 25, 50, or 75 percent, will be assessed. He implies that a fixed daily rate for such additional charges might be set forth in the tariff. He also mentions the possibility that the carrier could provide for delays in its voyages by insurance or by the inclusion in its overall rate structure of a cushion for such contingencies. These latter two proposals are possibilities, of course, but it is not in keeping with the purposes of the Shipping Act to encourage carriers to increase their rates and charges by such means. The suggestion for establishing a fixed charge for such delays would probably lead to greater evil than an *ad hoc* determination of the costs, after the event, because the actual expenses of the carrier might turn out to be somewhat less than the charges that would have to be assessed under a fixed formula. It would not be appropriate for the carrier to profit by a strike or casualty that results in delay or extension of the voyage. The charge here is not arbitrary, being related directly to the added expenses of the carrier.

In the cases cited by hearing counsel in support of the other general propositions outlined above, the Commission or its predecessors were concerned with tariff provisions applicable to regular, determinable voyage charges. It is apparent that tariff provisions as to such charges can be, as a practical matter, more exact than the clauses in the tariff whose purpose is to provide for the unknown, unforeseeable complexities of ocean transportation. The least that can be said is that neither hearing counsel nor intervener have suggested any solutions to this practical difficulty in tariff practices, and none occur to the examiner, that are so patently superior to the course followed by respondent that it can be held that respondent committed a violation of section 18(b). The cases cited by hearing counsel, involving domestic commerce, as well as the three cases discussed earlier, are of limited applicability here for the additional reason that section 18(a) delegates jurisdiction to the Commission over the "regulations and practices relating * * * to the issuance, form, and substance of * * * bills of lading" of carriers in the offshore domestic commerce that is not delegated by section 18(b) covering the foreign commerce.

Intervener raises the issue that respondent violated section 18(b)(3) by charging a rate greater than that shown in its tariff because the courts would not impose liability on shippers in these circumstances. In reply, respondent cites cases where the admiralty courts have allowed carriers to recover additional compensation for various services rendered or expenses incurred by the carrier, either based on contractual provisions in the bill of lading such as clause 4 or on general principles of admiralty. Respondent compares the case at hand to the recovery of a contribution from cargo in general average, to the recovery of freight even when the cargo was not delivered under the "Freight prepaid, goods or vessel lost or not lost" bill of lading clauses, and to voyage frustrations (due to belligerent action, search by government authorities, strikes, and other uncontrollable forces) preventing normal carriage and delivery of cargo. It urges that by the enactment of section 18(b) Congress did not intend to overturn the ancient admiralty principles that form the basis of recovery in such cases.

Intervener attempts to distinguish these analogies cited by respondent, and hearing counsel urged that to the degree that admiralty doctrines conflict with the Shipping Act the latter governs, citing sections 8 and 9 of the Carriage of Goods by Sea Act, 46 U.S.C. 1308 and 1309, which provide that nothing in COGSA shall affect the rights and obligations of carriers afforded and imposed by the Shipping Act nor be construed to permit discrimination in any way prohibited by the Shipping Act.

The system of regulation under the Shipping Act and other maritime statutes has long existed in harmony with admiralty principles. The Commission does not decide admiralty cases and it will not do so here. The courts have developed the doctrine of primary jurisdiction under which they leave to the Commission and other regulatory agencies the decision of issues under the regulatory statutes. Conflict could arise in a situation such as that presented here only if the Commission sought to require tariffs to be constructed and filed in a form that would make it impossible for accepted admiralty doctrines to be invoked.

Hearing counsel and respondent state, and the examiner agrees, that this is a case of first impression both before the Commission and the courts. That is to say, no court has held that a charge cannot be assessed under clause 4 for delay due to a strike when the goods are held on board the vessel at the port of delivery. It must be concluded, therefore, that it has not been demonstrated here that the surcharge would not be allowable by the courts and that for this reason it violates section 18(b)(3) as a greater charge than that shown in the tariff.

Turning to the final issue raised by intervener * * * that the language of clause 4 does not, by its terms, authorize the assessment of additional charges because respondent did not perform a "service" for the cargo beyond that required of it as a carrier * * * a court decision discussing this clause in a somewhat similar factual setting can serve as a useful guide. In *Colonialgrossisternes Forening* v. *Moore-McCormack Lines, Inc.*, 178 F. 2d 288 (C.A. 2, 1949), the carrier's vessel left the United States for Norway in March of 1940 and when it arrived it was unable to unload its cargo because of the belligerent activities of the German forces. It retained the plaintiff's cargo on board and finally had to return to the United States without discharging the cargo. The carrier's bill of lading contained a clause 4 like that involved here. The court upheld the action of the carrier in charging the shipper an extra amount equal to one-half the freight for the outward voyage. The ordinary freight had been prepaid. The court stated:

> It is plain that the master was justified in retaining the cargo on board until such time as he thought advisable. Under the concluding sentence of clause 4, the carrier was entiled to a "reasonable extra compensation" for "any services rendered to the goods as hereinabove provided." The question before us is whether keeping the goods on board and returning them to New York in respondents vessel was a "service rendered to the goods" within the meaning of the bill of lading. * * * In retaining the goods and carrying them back to New York, the vessel was obliged to safeguard them in every reasonable way and to act as a prudent bailee in protecting and caring for the merchandise. In the circumstances we can see no reason why a return of the goods to the carrier was not a service within the description of "services rendered to the goods" and just as compensable as would have been payments for forwarding them by some other carrier.

It is no less a service to the goods to retain them on board and ultimately discharge them at the port of destination, as was done by respondent, than to retain them on board and utimately return them to the port of loading, as was done by Moore-McCormack Lines. The cost to the carrier is the same except for the additional cost of fuel. The value to the shipper is greater because the goods are delivered to the desired destination.

The parties do not contend that a strike is not one of the incidents that would bring clause 4 into play. Neither do they contend that since an amount less than the added expenses due to the delay was apportioned among the shippers section 18(b)(3) was violated by making a charge "different" from that shown in its tariff. While the strictest reading of the notice of investigation might include this technical question as an issue to be decided, it is apparent from a reading of the preamble that the Commission had the protection of shippers in mind when it initiated this proceeding. This would not be achieved by inquiring whether they should be charged a 250 percent surcharge, rather than 125 percent.

Contentions of the parties not discussed herein have been found to be irrelevant or unsupported by the record. The arguments of counsel on the question whether the tariff is applicable until it is rejected or declared unlawful need not be discussed in view of the conclusions reached in this decision.

It is concluded that respondent has not violated sections 16, 17 or 18(b) by making the surcharge. The proceeding will be discontinued.

(Signed) E. ROBERT SEAVER,
Presiding Examiner.

JULY 29, 1964.

APPENDIX

EXHIBIT B

TOTALS

Ports	Ocean freights	Prepaid	Collect
Rotterdam to Tampa	$147.34	$147.34	None
Rotterdam to Mobile	3,081.78	3,081.78	None
Rotterdam to Hamburg	1,662.19	1,662.19	None
Hamburg to Tampa	907 96	907.96	None
Hamburg to Mobile	98.28	93.28	$5.00
Hamburg to Houston	8,633.45	1,308.14	7,325.31
Hamburg to New Orleans	683.36	255.96	427.40
Dublin to Tampa	5,274.24	None	5,274.24
Dublin to Mobile	3,530.37	None	3,530.67
Dublin to Houston	18.49	18.49	None
Grand total	24,037.76	7,475.14	16,562.62

Surcharge (125%): 125%×$24,037.76=$30,047 20.

Source: Manifests and bills of lading.

FEDERAL MARITIME COMMISSION

DOCKET No. 1150

HASMAN & BAXT, INC., VALENCIA BAXT EXPRESS, INC.—MISCLASSIFICATION OF GOODS IN CONTAINERIZED TRAILER VANS IN THE UNITED STATES/PUERTO RICO TRADE

Decided March, 8, 1965

(1) Hasman & Baxt, Inc. found to have violated section 16 of the Shipping Act, 1916, by misclassifying the contents of the trailer van containing leather.
(2) Hasman & Baxt, Inc., and Valencia Baxt Express, Inc., found to have violated section 16 of the Shipping Act, 1916, by false statement of cargo weight of the contents of the trailer van containing leather.
(3) Record held insufficient to support finding that either Hasman & Baxt, Inc., or Valencia Baxt Express, Inc., violated section 16 of the Shipping Act, 1916, with respect to certain shipments of bathtubs and synthetic rayon yarn.

Herbert Burstein, for respondent.
Roger A. McShea III, hearing counsel.
Paul D. Page, Jr., hearing examiner.

REPORT BY THE COMMISSION

(JOHN HARLLEE, *Chairman;* JAMES V. DAY, *Vice Chairman;* GEORGE H. HEARN; JOHN S. PATTERSON, *Commissioners*):

This is an investigation on our own motion to determine whether respondents Hasman & Baxt, Inc. (Hasbaxt), or Valencia Baxt Express, Inc. (Valbaxt), with respect to certain shipments made between January 1, 1960, and October 3, 1963, knowingly and willfully, obtained, or attempted to obtain, transportation by water for property at less than the rates or charges which would be otherwise applicable in violation of section 16 of the Shipping Act, 1916.

The proceeding is before us on exceptions to the initial decision in which the examiner concluded (1) that with respect to a containerized shipment which included bathtubs Hasbaxt had violated section 16 by misclassifying a portion of the shipment; (2) that with respect to a containerized shipment which included certain leather both Hasbaxt and Valbaxt had violated section 16 because of a false statement of weight; and (3) that the record was insufficient to support a finding that either Hasbaxt or Valbaxt had violated section 16 with respect to certain containerized shipments of yarn. The respondents except to the examiner's findings and conclusions on the bathtubs and leather, and hearing counsel excepts to the examiner's findings and conclusions on the yarn.

FACTS

Hasbaxt is a freight forwarder whose compensation consists of freight forwarder fees. As a forwarder, Hasbaxt tenders Sea-Land [1] approximately 700 container vans a year. These container vans or trailers contain numerous individual shipments which have been consolidated for ocean carriage. Valbaxt is a non-vessel-owning common carrier by water offering a door-to-door service to the public. Thus, it consolidates shipment trailers pursuant to a tariff on file with the Commission, which covers the ocean and inland transportation. This tariff is based on the commodity rates of Sea-Land and includes additional charges to cover the services between vessel and door. On shipments which it consolidates Valbaxt performs the function of a shipper vis-a-vis the ocean carriers operating between the United States and Puerto Rico.

As do other shippers of freight to Puerto Rico, Valbaxt seeks the benefit of the "freight all kinds" rate offered by ocean carriers. Under Sea-Lands' tariff the "freight all kinds" rate is applicable if the trailer contains three or more different commodities and no one shipment of a commodity weighs in excess of 15,000 pounds. Thus, if Valbaxt receives a shipment in excess of 15,000 pounds, its practice is to break-bulk and place the contents in more than one trailer. By paying the "freight all kinds" rate, Valbaxt attempts to recover its operating costs out of the difference between its own tariff charges to its customers and the "frieght all kinds" rate it pays the ocean carrier.

(1) *The bathtubs.*

On April 26, Sea-Land received at Port Newark a sealed trailer van (No. 3150) and certain shipping documents which accompanied it. The record does not show that Hasbaxt ever saw the contents of the van. Hasbaxt, acting as forwarder for the exporter, presented Sea-Land a bill of lading covering the shipment of van 3150 from Port Newark to Puerto Rico aboard Sea-Land's *Azalea City*. The bill of lading showed Hasbaxt as shipper, and described the contents of the van as 40 cases of pipe fittings, 20 cases of enameled sheets, and 25 cartons of plumbing materials (lavatories-bathtubs). The van's actual contents consisted of 85 bathtubs and a number of lavatories and/or

[1] Sea-Land Service Inc., Sea-Land of Puerto Rico Division, a common carrier by water operating between ports in the United States and ports in Puerto Rico.

sinks. The freight payable on the shipment as described in the bill of lading would have been $573.25. Sea-Land subsequently ascertained the actual contents of the van by inspection and prepared a corrected bill of lading, describing the contents as 85 bathtubs. Ocean freight on the shipment as described in Sea-Land's corrected bill of lading was $1,029.60 which Hasbaxt paid.

(2) *The leather.*

In February 1960, Loewengart & Co., shipped 25,152 pounds of leather to Puerto Rico via Valbaxt. Hasbaxt, acting as Valbaxt's forwarder presented to Bull Insular Line, Puerto Rico Service (Bull) a bill of lading covering trailer No. 4028 which Bull transported unopened to Puerto Rico on its SS *Elizabeth*. The bill of lading stated that the trailer contained 6,481 pounds of leather. Valbaxt's waybill 111 [2] shows that the Loewengart shipment of leather moved on the voyage of Bull Line's SS *Elizabeth* which carried the van which the bill of lading said contained only 6,481 pounds. A letter from Valbaxt to Loewengart, dated October 5, 1960, states:

> This will confirm conversation held with you that waybill 111 was shipped on the SS *Elizabeth*, voyage 233, dated February 18, 1960, in trailer van 4028.

The freight payable on the shipment as described in the bill of lading and actually paid by Valbaxt was $757.77, being computed at the "freight all kinds" rate.[3] Since the trailer actually contained all the Loewengart leather (approximately 25,000 pounds) the freight payable should have been computed at "commodity" rates, and would have been $1,124, if all other cargo shown on the bill of lading was contained in the trailer.

(3) *The yarn.*

On 18 vans shipped by Valbaxt to Puerto Rico via Bull and on 8 vans shipped by Valbaxt to Puerto Rico via Sea-Land, Hasbaxt presented to Bull and Sea-Land bills of lading showing that the vans in the aggregate contained quantities of rayon yarn substantially in excess of the quantities of rayon yarn shown by certain of Valbaxt waybills to have been intended for shipment on the vessels carrying the vans. Such rayon yarn was one of Bull's lowest rated commodities at the time of the shipments in question.

DISCUSSION AND CONCLUSIONS

(1) *The bathtubs.*

In finding that Hasbaxt had violated section 16 with respect to the shipment of bathtubs the examiner found that "The point for decision

---

[2] The waybill is a receipt for goods which Valbaxt gives to the exporter when it receives the exporter's cargo.

[3] Under Bull's tariff the "freight all kinds" rate does not apply to a trailer which contains more than 15,000 pounds of any one commodity in which case the respective individual commodity rates apply to the individual cargoes in the van.

is simply if Hasbaxt knowingly and willfully presented [the false bill of lading] to Sea-Land." Thus, the examiner found that it was unnecessary to determine whether Hasbaxt had any actual knowledge of the contents of the trailer in question or that Hasbaxt had prepared the false bill of lading. Such findings are unnecessary, as we understand the examiner's reasoning, because the mere presentation of a bill of lading to the carrier by the forwarder carries with it the implied representation that the bill accurately describes the contents of the trailer even when the trailer is received by the forwarder under seal and regardless of whether the forwarder has any knowledge of the trailer's contents. The examiner grounds his conclusions on "the duty of veracity and care with respect to cargo description" which the forwarder owes the carrier. To avoid the impact of this rule, a forwarder could as countervailing evidence, demonstrate that "it prepared the false bill of lading in reliance upon a description of the cargo furnished by the exporter, and that no such description furnished in the past by the same exporter had been inaccurate." To the examiner such evidence "would almost certainly establish the fact that a forwarder's conduct in presenting a false bill of lading to a carrier was neither careless nor culpable."

The initial decision lays down a rule governing the conduct of forwarders handling containerized shipments under seal. The validity of any such rule is, of course, its reasonableness, and in our view the reasonableness of the rule announced in the initial decision is dependent upon a far broader consideration of the day-to-day operations of forwarders handling containerized shipments than is possible from this record.

The nature and scope of the duties of various persons subject to section 16 have presented continuing problems to both the courts and our predecessors. See for example *Royal Netherlands* v. *FMC*, 304 F. 2d 938 (D.C. Cir. 1962); *Continental Can Co.* v. *United States*, 272 F. 2d 312 (2d Cir. 1959); *Misclassification and Misbilling of Glass Tumblers, etc.*, 6 F.M.B. 155 (1960) and *Hazel Atlas Glass Co.—Misclassification of Glass Tumblers*, 5 F.M.B. 515 (1958).

While it may eventually prove true that the forwarder must be held to an implied representation as to the correctness of the description of the shipments on the bill of lading, such a decision should be made only upon thorough investigation of the terms and conditions surrounding the handling of containerized shipments. Morevover, the investigation should include the question of the nature and scope of the duties and responsibilities of the exporter and the carrier under section 16.

For the foregoing reasons we find the record in this proceeding insufficient to conclude that Hasbaxt violated section 16 with respect to the shipment of bathtubs in question.

(2) *The leather.*

The examiner found that van No. 4028 contained the whole Loewengart shipment of leather (some 25,000 pounds), when the bill of lading stated that the van contained only 6,481 pounds. The examiner's findings are based on the two documents of Valbaxt's referred to above (Valbaxt's waybill 111 (exhibit 11) which shows that the Loewengart shipment moved on Bull's *Elizabeth* and the letter dated October 5, 1960, from Valbaxt to Loewengart (exhibit 12)). The letter states:

> This will confirm conversation held with you that waybill 111 was shipped on the SS *Elizabeth*, voyage 233, dated February 18, 1960, in trailer van 4028.

The respondents do not deny that the 25,000 pounds of leather was actually shipped in van No. 4028. They merely assert that there is insufficient evidence to prove that van 4028 contained all of the Loewengart leather. Respondents do not, however, have any explanation of their statement that the shipment for which waybill 111 was issued moved in van No. 4028. Since waybill 111 was issued as a receipt for the full 25,000 pounds of Loewengart leather, the only permissible inference is that the full shipment of 25,000 pounds moved in van No. 4028.

There is a distinction between Hasbaxt's handling of the bathtubs and the leather. The bathtubs were received from the exporter in a van already sealed, while the leather was not already "containerized" and was actually placed in a van or vans by Hasbaxt and Hasbaxt had actual knowledge of the contents of the van in question. Thus, by falsely stating the contents of the trailer as including 6,481 pounds of leather when it in fact included the entire Loewengart shipment of some 25,000 pounds, Valbaxt and Hasbaxt obtained transportation by false statement of weight in violation of section 16, Shipping Act, 1916.

(3) *The rayon yarn.*

The examiner found the record would not support a finding that there had been any falsifying of bills of lading on shipments of yarn. We agree with this conclusion. Hearing counsel excepts on the ground that a comparison of the waybills with the bills of lading demonstrates that on certain "entire sailings, upon which were shipped an undetermined amount of containerized trailer vans, Hasman & Baxt on behalf of Valencia Baxt had not shipped as much yarn as appeared on even one or two bills of lading." The examiner rejected this finding because it is dependent upon the determination that the waybills introduced into evidence by hearing counsel represented all of the yarn presented to Hasbaxt for shipment. The examiner could not say that one or more other exporters had not shipped yarn with Hasbaxt during the period in question, because to do so it would be necessary to examine all the waybills in Hasbaxt's files covering the period in question, which was not done. Thus, the examiner had to allow for the possibility that other exporters had made up the excess of the bills of lading over the waybills. We agree with the examiner's conclusion that the evidence is insufficient to show a violation of section 16 with respect to the trailers containing the yarn.

COMMISSIONER BARRETT *dissenting in part:*

I would uphold the examiner's finding that respondents violated section 16 of the Act with respect to the shipment of bathtubs and to that extent I disagree with the majority. As to the other shipments in issue, I agree with the findings and conclusions of the majority.

The proceeding is discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1158

IN THE MATTER OF AGREEMENT NO. 134–21

GULF/MEDITERRANEAN PORTS CONFERENCE

Decided March 15, 1965

Proposed amendment to Conference Agreement No. 134 whereby there will be exempted from conference jurisdiction full shiploads of one commodity shipped by one shipper, under charter conditions, found not in violation of sections 14 fourth and 16th first of Shipping Act, 1916.

Said amendment approved under section 15 of Shipping Act, 1916, and proceeding discontinued.

Frank Gormley, and *Howard A. Levy*, Hearing Counsel.
Edward S. Bagley for respondents.
T. R. Stetson for intervener, United States Borax & Chemical Corp.

REPORT

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

This proceeding is before us upon the exceptions of Hearing Counsel to the initial decision. In that decision the examiner found that approval of the proposed amendment to Agreement No. 134, the basic agreement of the Gulf/Mediterranean Ports Conference would not be violative of sections 14 fourth and 16 first or contrary to the standards of section 15 of the Shipping Act, 1916. The proposed amendment, Agreement No. 134–21, would exempt from conference jurisdiction full shiploads of one commodity shipped by one shipper, under charter conditions.

Hearing Counsel objects to the examiner's conclusion that the amendment should be approved because there is no need for the amendment and "the possibility of contrariness to the statute, coupled with the lack of need," dictate its disapproval. The examiner's decision clearly sets forth circumstances and reasons which prompted the proposed amendment, reasons which were sufficiently urgent to prompt the withdrawal of one member from the Conference in the face of the initial opposition of the other member to the proposed amendment. They are in our view, as in the examiner's, sufficient.

Were possible contrariness to the statute alone sufficient reason for disapproval of an agreement under section 15, it would be hard to conceive of an approvable agreement. For as we said in Agreement 8492—*T. F. Kollmar, Inc.* and *Wagner Tug Boat Co.*, 7 F.M.C. 511 (1963):

> We should not disapprove the agreement on the bare possibility that [the parties to it] could violate the Act. At least there ought to be a substantial likelihood of such conduct.

No such substantial likelihood appears from the record before us.

A careful consideration of the record in this proceeding leads us to the conclusion that the examiner's disposition of the issues herein was well founded and proper.

Accordingly, we adopt the initial decision (a copy of which is attached hereto and made a part hereof)[1] as our own, and for the reasons set forth in the decision,

It is ordered, That, Agreement No. 131-21 is hereby approved.

Commissioner Patterson concurs in the result.

(Signed) THOMAS LISI,
Secretary.

[1] Initial decision of Gus O. Basham, Chief Examiner, page 703.

FEDERAL MARITIME COMMISSION

No. 1104

PACIFIC SEAFARERS, INC.

v.

ATLANTIC & GULF AMERICAN-FLAG BERTH OPERATORS, ET AL.

Decided March 17, 1965

Agreements concerning rates and other matters described in section 15 of the Shipping Act, 1916, as amended, not within jurisdiction of the Commission where they relate solely to foreign interport trade in goods of foreign origin and destination, even though Agency for International Development financed the procurement and shipment of the goods and only American-flag carriers were involved.

Unfiled agreements outside territorial jurisdiction under Shipping Act, 1916, are not brought within jurisdiction by use of same organizations set up to administer other agreements filed with and approved by the Commission, where the approved agreements dealt with different subject matter and were not modified by the unfiled agreements.

Marvin J. Coles, *Stanley O. Sher*, and *Armin U. Kuder* for complainant, Pacific Seafarers, Inc.

Elmer C. Maddy and *Ronald A. Capone* for respondents Atlantic & Gulf American-Flag Berth Operators and its member lines, except American Export Lines, Inc., Isbrandtsen Co., Inc., Lykes Bros. Steamship Co., Inc., and Waterman Steamship Corp.

Edward D. Ransom and *Gordon L. Poole* for respondents American-Flag Berth Operators and West Coast American-Flag Berth Operators and their member lines, except Isbrandtsen Co., Inc., Lykes Bros. Steamship Co., Inc. (not a member of WCAFBO) and Waterman Steamship Corp.

Edward S. Bagley for respondent Lykes Bros. Steamship Co., Inc.

Sterling Stoudenmire for respondent Waterman Steamship Corp.

Richard W. Kurrus and *James Jacobi* (Donald Caldera of counsel) for respondents American Export Lines, Inc. and Isbrandtsen Co., Inc.

Herbert B. Mutter and *Robert J. Blackwell*, hearing counsel.

Walter T. Southworth, hearing examiner.

REPORT

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

This is a complaint case before us on exceptions to the initial decision of the examiner.

Complainant Pacific Seafarers, Inc. (PSI), alleges that respondents AGAFBO,[1] WCAFBO,[2] and AFBO,[3] together with their member lines, have unlawfully attempted to drive PSI out of the Taiwan-Thailand/South Vietnam trade. Complainant asserts that respondents: (1) Have violated section 15 of the Shipping Act (the Act) by operating pursuant to an agreement not filed with or approved by the Commission; (2) have violated section 18 of the Act (a) by not filing their concertedly established rates with the Commission, and (b) by maintaining rates that are so unreasonably low as to be detrimental to our commerce; and (3) have violated section 16 First of the Act by acting in a manner which is unduly prejudicial to complainant.

PSI operates a common carrier service with American-flag vessels in the Taiwan-Thailand/South Vietnam trade. It does not offer a service between the United States or any of its districts or territories or possessions on the one hand and a foreign country on the other hand. The principal commodity that it carries is cement and it was these cement offerings which prompted the institution of complainant's service. In addition to its common carrier service, a PSI affiliate operates a charter or tramp service in the same trade, again catering to cement principally. The cargoes carried by PSI are entirely commercial in nature originating in one foreign port and destined to another foreign port. The shipping arrangements as well as the sales of the commodities are made between foreign principals. Although the U.S. Government through the Agency for International Development (AID) ultimately finances the sales—including the cost of water transportation—our Government in no way participates in the transactions. Indeed, but for the cargo preference laws which require,

[1] Atlantic and Gulf Coast American Flag Berth Operators.

[2] West Coast American Flag Berth Operators.

[3] American Flag Berth Operators.

generally, that 50 percent of AID-financed cargoes move in American-flag bottoms, American-flag vessel participation in the movement might never have occurred. Further, the record is bereft of any evidence that the cement involved was cement transshipped from the United States.

AGAFBO is a conference of American-flag carriers which operates under approved Agreement No. 8086, WCAFBO operates under Agreement No. 8186. Parties to each of these agreements are permitted to act collectively in the negotiation of transportation rates and conditions of carriage respecting MSTS [4] cargoes (including related shipments) to and from U.S. ports and between foreign ports. Agreement No. 8750, an approved interconference agreement, permits meetings and discussions between AGAFBO and WCAFBO. None of these agreements permits the signatories to agree upon rates for either commercial or other Government-sponsored cargoes in our foreign commerce or in the foreign commerce of other nations. AFBO, an association of American-flag carriers organized in the early 1950's, is composed of carriers who are members of either AGAFBO, WCAFBO, or both, although membership in neither AGAFBO, nor WCAFBO, is a prerequisite to AFBO membership. AFBO purports to establish rates and conditions of carriage by its signatories between Taiwan/Japan and Thailand, Korea, Vietnam, the Philippines, Okinawa, and Cambodia. Its memoranda of agreed rates relate solely to commercial cargoes in these foreign interport trades. AFBO does not enjoy Commission approval under section 15 of the Act, nor are its tariffs filed with the Commission.[5]

Apart from the asserted violations of the Act, we are first confronted with the issue of jurisdiction. It is our judgment that the reach of the Act and, consequently our jurisdiction, does not extend to the matters complained of.

Admittedly, respondents entered into an agreement in the Taiwan-Thailand/South Vietnam trade and that agreement—AFBO—is the type which falls squarely within the purview of section 15. Parties to the AFBO agreement have not filed their agreement with the Commission, and have effectuated it without the Commission's prior approval. If our jurisdiction encompassed this trade, a classic violation of section 15 would be established, harm *vel non* to complainant notwithstanding.

While it is true that section 15 requires that:

> every common carrier by water * * * shall file * * * a copy * * * of every agreement with another such carrier.

---

[4] Military Sea Transportation Service.

[5] PSI, likewise, has not filed with the Commission any schedule of rates in the Taiwan-Thailand/South Vietnam trade.

the "common carrier by water" of section 15 is the entity defined in section 1:

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

And a common carrier in foreign commerce is defined as:

* * * a common carrier * * * engaged in the transportation by water of passengers or property between the United States or any of its districts, territories, or possessions and a foreign country, whether in the import or export trade. * * *

Hence, the reading of section 15 which Congress obviously intended requires that every common carrier by water in interstate commerce and every common carrier engaged in the transportation by water of passengers or property between the United States or any of its districts, territories, or possessions and a foreign country file with the Commission for prior approval certain species of agreements with other such carriers.

The record in this case makes perfectly clear that the conduct complained of is and has been exercised by carriers in a trade or trades other than between "the United States or any of its districts, territories or possessions and a foreign country," and no matter how offensive or horrendous that conduct, it does not fall within the authority of this Commission. There is not a modicum of evidence that brings the gravamen of the complaint within the purview of the Act. Complainants have attempted to cross the jurisdictional barrier on two grounds.

First, we shall deal with the claim that since the cargoes, including the cost of transportation, were financed by AID what otherwise might have been commerce between two (or more) foreign nations was converted to the commerce of the United States. We have noted, in this regard, that the ocean transportation and the sales were arranged between foreign principals and that neither AID nor any other agency of our Government participated in any of the commercial or shipping transactions. AID's concern began and ended with its role as financier.[6] The lending of funds by a Government agency to finance wholly foreign transactions, including ocean freight, does not convert foreign-to-foreign commerce into the foreign commerce of the United States, any more than would the lending of such money by an American private financial institution.

Our view in this regard is not unlike that generally held with respect to our antitrust laws:

---

[6] "AID, itself, does not procure any commodities or make shipping arrangements. As a general rule, AID acts only in the capacity of a financing institution." Deposition of David E. Bell, AID Administrator, exhibit 106.

* * * (I)t is clear that the mere financing by Americans of manufacturing, mining, or other local activities abroad does not come within the Sherman Act. *Report of the Attorney General's National Committee to Study the Antitrust Laws (1955).*

In short, our jurisdiction cannot be expanded or contracted merely by the underlying financial arrangements of ocean shipping.[7]

Finally, PSI argues alternatively that (a) AFBO itself, is an agreement within the purview of section 15 and should have been filed and approved before its effectuation, or (b) it is part and parcel of AGAFBO and/or WCAFBO which, as a modification thereof, should have been filed and approved prior to implementation.

As the record establishes, AFBO is an organization of American-flag vessels plying a trade totally within the confines of foreign Far Eastern ports. For the simple reason that the trade does not involve as one terminus any port in a State, district, territory or possession of the United States, the carriers, within the AFBO context cannot be deemed to be engaged in the foreign commerce of the United States.

Complainant's alternative argument, although equally defective, is more engaging. In support of its proposition it points to the use of AGAFBO and WCAFBO offices (and officers) for the transaction of some of AFBO's business and cites precedents which indicate that our jurisdiction often involves foreign-to-foreign commerce.

As the Examiner noted, the use of the "physical organization or 'machinery'" of the two approved agreements by the AFBO group is immaterial to whether or not AFBO constitutes an agreement within the purview of section 15.

There is no relationship between AFBO on the one hand and AGAFBO and WCAFBO on the other hand, save an overlapping of memberships and some confusing of the organizations administering the agreements. But it is crystal clear that AGAFBO and WCAFBO do not encompass the foreign-to-foreign movement of commercial cargoes, whether or not financed or owned by our Government. Were AGAFBO and WCAFBO to agree on rates and conditions of cargo moving on *our* foreign commerce not specifically authorized by the approved agreements, a different result might have been reached.

The cases cited by complainant fall far short of aiding its theories. In *States Marine Lines, Inc.* v. *Trans-Pacific Freight Conf.*, 7 FMC 204 (1962), the Commission considered the legality of an approved neutral body provision in the context of the filed and approved agree-

[7] A second argument advanced by PSI is not dissimilar from its AID claim. Briefly, its thrust is that the mere *operation* of U.S.-flag vessels constitutes a "part of the commerce of the United States." No authority is found to support this assertion. We have noted that PSI's operation has been wholly foreign. We believe such operation constitutes "other local activities abroad." *Attorney General's National Committee, supra.*

ments. The particular transaction which triggered the proceeding, the movement of oranges from Japan to Canada, was entirely irrelevant. The real question in issue was whether conference was effectuating a neutral body provision compatible with the one which had been approved as a modification to its basic or organic agreement. Upon review, the court, in *Trans-Pacific Freight Conference of Japan* v. *FMC*, 314 F. 2d 277 (1963), addressed itself to the jurisdictional issue in foreign-to-foreign commerce and concluded that the neutral body's fines were assessed *not* "for any act or thing done in connection with the shipments from Japan to Canada." The court significantly brushed aside the Conference's contention of no jurisdiction with the statement:

> * * * (W)e think that petitioners' assertion of lack of jurisdiction is without validity for a more fundamental reason. When the members of the conference chose to adopt their conference agreement and its various amendments, they deliberately elected to enter into a single unitary agreement "to promote commerce from Japan, Korea, and Okinawa to Hawaii and Pacific coast ports of the United States *and Canada*." (Emphasis ours.)

Further, *Oranje Line, et al.* v. *Anchor Line Limited*, 5 FMB 714 (1959), the Board noted that the trade between Canada and the United Kingdom was encompassed explicitly by the very terms of the agreement:

> It is clear that in this case, where the agreements cover both the foreign commerce of the United States and also the intimately related foreign commerce of Canada our jurisdiction exists.

In the case before us, the subject matter of the AFBO agreement is not set forth in the AGAFBO and WCAFBO agreements, nor is the subject matter "intimately related" to our foreign commerce.[8]

In the case at hand the AFBO agreement neither directly nor materially affected our foreign commerce.

Since we have no jurisdiction in the premises, we shall not address ourselves to the other contentions raised by complainants. Accordingly,

It is Ordered, That the complaint is hereby dismissed.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

---

[8] Complainant has placed some reliance on *United States* v. *Anchor Line, Ltd.*, 232 F. Supp 379 (1964). Involved in that case were agreements made abroad which directly related to the foreign commerce of the United States:

"The vital principle to the applied in determining whether the United States courts have jurisdiction over foreign-flag carriers who fail to file contracts entered into abroad is whether the performance of those contracts or effectuation of those arrangements *operated in this country so as to affect our foreign commerce directly and materially.*" (Emphasis added.)

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

---

[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. Maddy 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.

---

[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 agreement 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

[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 emergencies 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-

[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 schedule 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 well 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)

---

[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 exception 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.

---

[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,"

---

[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;

[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 unreasonably 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 'ederal 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 ›usiness day thereafter, at the same place. Such meeting shall be attended ›y representatives of the PACIFIC LINES and of the ATLANTIC/GULF LINES. All matters coming before the initial meeting for consideration and action shall ›e 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 .he 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 .he parties may be permitted to conduct by virtue hereof, including the provision ›f 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 :he initial meeting as from time to time amended to the contrary notwithstand-.ng, if either group of lines should determine that conditions affecting its opera-:ions require an immediate change in its tariffs, it may notify the other group :hereof, specifying the changes which it proposes to put into effect 48 hours ıfter the giving of such notice if given by telegram or 72 hours after the giving ›f such notice if given by airmail, and a summary of the facts which justify the ›hanges on said short notice. Forty-eight hours, or 72 hours, after the giving ›f such notice, dependent upon the medium by which such notice shall have been ;iven, the notifying group may make such changes as stated in said notice and the ›ther group may, at the end of 48 hours, or at the end of 72 hours, as the case may ›e, 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 ›f this agreement. The parties shall, however, promptly give to the governmental ıgency charged with the administration of section 15 of the Shipping Act, 1916, ıs 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 ›f proceedings with the Board, (2) admission of new parties to and .ermination of membership in conferences, (3) method of giving ıotices, (4) the effective date of the agreement, (5) expenses of repre-;entation, and (6) termination of the agreement.

The members of the respondent Conferences have met and adopted :esolutions or have collectively agreed to a common course of action at neetings held at least annually since 1953, as evidenced by written ninutes 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 evaporated 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 Westbound 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.

220-178 O - 66 - 38

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 minimum 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 commodities 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 Westbound 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

220-178 O - 66 - 39

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.

FEDERAL MARITIME COMMISSION

No. 890

IN THE MATTER OF UNAPPROVED SECTION 15 AGREEMENTS—SPANISH/PORTUGUESE TRADE

No. 891

IN THE MATTER OF RATES, CHARGES AND PRACTICES OF CARRIERS ENGAGED IN THE TRADE BETWEEN UNITED STATES AND SPAIN/PORTUGAL

Decided August 6, 1965

Three Respondents found during period from 1952 to 1959 to have entered into certain unapproved agreements or understandings in the trade between United States and Spain and to have failed immediately to file the agreements or understandings with the Federal Maritime Commission all in violation of section 15, Shipping Act, 1916.

Respondents found during period involved herein not to have been in violation of sections 16 and 17 of the Shipping Act, 1916.

Burton H. White and *Elliott B. Nixon*, on behalf of Compagnie de Navigation Fraissinet et Cyprien Fabre.

Ralph D. Ray, *Paul M. Bernstein*, *Stuart D. Baker*, *Carl S. Rowe*, *Frank B. Stone*, and *Lino A. Graglia* on behalf of American Export Lines, Inc.

Thomas K. Roche and *Sanford C. Miller*, on behalf of Concordia Line.

J. Joseph Noble, on behalf of Compania Espanola de Navegacion Maritima, S.A., and Compania Trasatlantica Espanola, S.A.

Seymour H. Kligler and *Herman Goldman*, on behalf of Naviera Aznar, S.A.

Frank Gormley, *William Jarrel Smith, Jr.*, *Roger A. McShea III*, and *Robert J. Blackwell*, as Hearing Counsel.

REPORT

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

These proceedings arose as a result of the 1959 hearings before the Antitrust Subcommittee of the House Commttee on the Judiciary, where testimony was adduced indicating that certain steamship companies engaged in the trade between the United States and Spain/Portugal had since 1950 entered into certain agreements within the contemplation of section 15 of the Shipping Act, 1916 (the Act) without having filed said agreements with the Federal Maritime Board for approval and had paid commissions, rebates, refunds, bonifications, gratuities, and bonuses, etc., to shippers, forwarders and brokers in violation of sections 16 and 17 of the Act. Subsequently, the case was referred to the Board [1] for agency investigation and determination. Two orders of investigation were issued, one concerning unfiled agreements in possible violation of section 15 was docketed as No. 890, the other concerning commissions, refunds, and concessions made to shippers and others in possible violation of sections 16 and 17 was docketed as No. 891. American Export Lines, Inc. (Export), Compagnie de Navigation Fraissinet et Cyprien Fabre (Fabre), Concordia Line (Concordia), Compagnia Espanola de Navigacion Maritima, S.A. (Cia Espanola), Compagnia Trasatlantica (Royal Mail), Compania Trasatlantica Espanola, S.A. (Spanish Line), Ybarra and Company (Ybarra), and Naviera Aznar, S.A. (Aznar) were named as respondents in each proceeding. Ybarra was subsequently dismissed as a respondent because it did not serve the trade involved during the period covered by the investigations. All the remaining lines are currently respondents in these proceedings; however, Hearing Counsel has conceded that as to Cia Espanola, Royal Mail, Spanish Line, and Aznar there is insufficient evidence of record on which to base any findings of violations of the Act. Examiner Edward C. Johnson has recommended their dismissal as respondents herein, a recommendation with which we agree and hereby adopt.[2]

All of the exhibits introduced in evidence in this proceeding, an anthology of nearly 200 documents, were drawn from the files of respondents or their agents. Although a large majority of these documents were from the files of Export, documents from the files of agents

*Commissioner Barrett did not participate.

[1] By Reorganization Plan No. 7, 1961, effective August 12, 1961, the functions of the former Federal Maritime Board were transferred to the Federal Maritime Commission. Hereafter, the Federal Maritime Commission, as well as its predecessors, will be referred to as the "Commission."

[2] Future references to "respondents" will thus refer to Export, Fabre, and Concordia.

for Concordia and Fabre were introduced as well. Approximately 1 week prior to the hearings, Hearing Counsel served on all respondents a "Statement of Matters of Fact and Law To Be Asserted," and on the opening day of hearings, all respondents were served with copies of the exhibits upon which Hearing Counsel would rely to support their contentions. On the first day of testimony, upon the insistence of respondents' counsel, each of these documents was individually identified and numbered, and during the course of Hearing Counsel's presentation, several of the more crucial exhibits were the subject of direct examination. At the close of Hearing Counsel's case, but before respondents had summoned any witnesses on their own behalf, the exhibits previously identified were offered into evidence and accepted by the Examiner. Hearings were adjourned upon completion of Hearing Counsel's presentation and respondents were given some 3 months in which to prepare their case. During this interim period Export renewed a prior Motion of Discovery to procure certain documents from the files of co-respondents Fabre and Concordia which were located abroad. This motion was denied by the Commission.

In an initial decision, the Examiner found that Export, Fabre, and Concordia had committed extensive violations of sections 15, 16, and 17 of the Act. These respondents have excepted to all of the Examiner's findings of violations, to the Commission's jurisdiction to entertain the issues in this proceeding, and to alleged procedural errors in the conduct of the hearings.

I. The Spanish-Portuguese/United States Trade

The respondents were, during the period under investigation, common carriers engaged in the foreign commerce of the United States in the Spanish-Portuguese/United States trade. Export and Fabre were engaged in the trade both eastbound and westbound between the United States, and Spain and Portugal. Concordia, on the other hand, took no part in the eastbound trade and maintained no service from Portugal. Its service was confined to the westbound movement of cargo from the single port of Seville, Spain.

For many years prior to the period under investigation, the westbound trade from Spanish and Portuguese ports to the United States was within the ambit of the Spanish/Portugal North Atlantic Range Conference (SPNARC), established pursuant to Agreement 7350 which was approved by the Commission in December 1941 and later terminated in March 1962. Prior to 1950 all of the respondents, including Cia Espanola, Spanish Line, Royal Mail, Ybarra, and Aznar, were members of that conference.

With the resignation of Fabre line from the Conference in December 1950, however, came disunity, instability, and the ultimate failure of the Conference system in the westbound trade. Fabre line proved to be a formidable competitor of the Conference lines, setting rates below Conference levels, and siphoning off a significant amount of cargo from Conference carriers.

Although recognizing the problem, the Conference lines could not agree on a solution. While Export favored reducing Conference rates to meet Fabre's competition, the Spanish lines maintained that Conference rates were already too low and insisted upon increasing them. Unable to resolve this dispute, Export resigned from the Conference in March 1952.

Export's resignation brought a second principal carrier in the trade into competition with the Conference and further aggravated an already unstable situation. The rate on olives, the principal commodity, comprising 80 percent of the trade, was declared open by the Conference, and a rate war caused olive rates to drop 50 percent to a noncompensatory level. This situation led Export and Fabre to form the Spanish United States North Atlantic Ports Olive Conference (FMC Agreement 8160), which was entered into on August 26, 1952, and approved by the Commission on October 14, 1952. Concordia became a member of the Olive Conference on January 15, 1954. Against a background of these conditions, the Examiner has found that Export, Fabre, and Concordia embarked on a 7-year course of violations of sections 15, 16, and 17 of the Act between August 1952 and November 1959.

II. Section 15 Violations

The Examiner found the following violations of section 15:

(1) During October 1952, Concordia, Export, and Fabre entered into an agreement in Paris, France, to charge the same rates for the carriage of olives from Spain to the United States.

(2) On May 15, 1954, Export, Fabre, and Concordia entered into a "gentlemen's agreement" at Barcelona, Spain, fixing certain rates and a common level of commissions payable to shippers, customshouse brokers, and forwarding agents on certain commodities moving in the eastbound and westbound trades between the United States and Spain and Portugal.

The Examiner found that by the terms of this agreement special rates were fixed by the respective lines for the carriage of steel sheets, steel plates, leaf tobacco, lubricating oil, milk, cornmeal, beans, and cheese in the eastbound trade; and a special rate was fixed by the respective lines for the carriage of all foodstuffs consigned to the order of certain charitable institutions.

(3) On July 3, 1954, through their agents at Alicante, Spain, Export and Fabre entered into an agreement establishing a common level of freight rates for the carriage of cargo in general, with certain exceptions, and maximum refunds from that rate ranging from 15 percent to shippers to 3 percent to forwarding agents on movements from Spain to the United States.

(4) On July 22, 1954, Export, Fabre, and Concordia entered into an agreement at Seville, Spain, establishing a common level of freight rates for the carriage of olives stuffed with anchovies, cork board (agglomerated), essential oils, and medicinal oils from Spain to the United States.

(5) On July 24, 1959, Export and Fabre entered into an agreement in Barcelona, Spain, fixing the amounts of brokerage and/or commissions to be paid to shippers, forwarding agents, and customshouse brokers on the carriage of tiles, red oxide, mercury, cork, and lead bars westbound from Spanish ports in the Barcelona/Seville range to the United States.

(6) During the year 1958, Export and Fabre entered into an agreement fixing the freight rates for the carriage of lead bars from Spain to the United States.

None of the above agreements was filed with the Commission for approval as required.

A. Jurisdiction

Respondents take exception to the jurisdiction of the Commission to find the violations charged. It is urged that the alleged agreements were executed abroad by foreign nationals and were for the purpose of solving local Spanish and Portuguese problems. For the Commission to take jurisdiction over these activities and to encompass them within our regulatory authority would, according to respondents, give extraterritorial effect to the laws of the United States. The Commission "by applying its own theories of regulation," respondents contend, would impugn the sovereignty of foreign nations.

Respondents' arguments to the contrary notwithstanding, there can at this late date be no serious question as to the so-called "extraterritorial" application of the Shipping Act. *Kerr Steamship Co.* v. *United States*, 284 F. 2d 61 (2d Cir., 1960); *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 147 (D.C. Cir., 1961), *Hellenic Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 138 (D.C. Cir., 1960); *United States* v. *Anchor Line, Ltd.*, 232 Fed. Supp. 379 (S.D.N.Y. 1964). Respondents, however, urge that the circumstances of this case set it apart from those previously considered by the Commission. While admitting that extraterritorial application of the Shipping Act would be justified in some instances, respondents contend that in this case,

> No American interest was prejudiced, and there is not the slightest evidence of those substantial effects within the United States necessary to support the extraterritorial application of American laws, even under the extreme doctrine of certain antitrust cases. * * *

This argument ignores the clear language of section 15 and suffers the infirmity of an improperly drawn analogy from the antitrust laws.

Respondents are all common carriers by water in foreign commerce within the meaning of the Act, and there is no question that the agreements in issue are of the kind covered by section 15, i.e. agreements fixing or regulating transportation rates or fares and regulating, preventing, or destroying competition in our foreign commerce. These facts having been established, nothing more is needed and the failure to file such agreements results in a violation of section 15. For in requiring the filing and approval of such agreements as a condition precedent to their lawfulness, Congress itself has determined that the agreements by their very nature have an "effect" on our foreign commerce. The precise nature and degree of that effect is irrelevant to any determination as to the applicability of the filing requirements of section 15. It is, however, important to a determination of whether or not a given agreement should be approved. Thus, respondents' contentions that the agreements in question actually benefited our commerce are premature and would have been relevant only to the question of approval under section 15. Moreover, respondents would seem to have placed themselves in the untenable position of arguing that there must be some period of operations under an agreement before any determination can be made as to the applicability thereto of section 15. For respondents argue that the acts regulated were of purely local significance because no "American * * * shipper or importer ever complained to the Commission or to anyone else that it had been unjustly or unfairly prejudiced or disadvantaged in any way." Just how respondents would square pre-approval operations under an agreement the "effect" of which bring it under section 15 with the clear language of that section making such operations unlawful does not appear anywhere in their contentions.

B. Evidence

Respondents take exception to the admissibility and probative value of the evidence on which findings of section 15 violations were based. We find that the record supports the Examiner's findings, except as specifically set forth in the discussion that follows:

1. The Paris Agreement, October 1952

The Spanish United States North Atlantic Ports Olive Conference agreement was signed by Export and Fabre on August 26, 1952, and approved by the Commission on October 14, 1952.

On October 6, 1952, however, prior to the approval of the Olive Conference agreement, a meeting was held in Paris between representatives of Export, Fabre, and Concordia. Mr. Orenstein, an official of Boise-Griffin Steamship Co., agents for Concordia, was present at this meeting and testified as to what transpired.

According to Mr. Orenstein's testimony, during these Paris discussions, Mr. Nicol of Export represented both Export and Fabre, and Mr. Haaland, managing director of Concordia, represented that line. The purpose of this meeting was to try to bring stability to the olive trade. The method adopted would be to try to get olives removed from the scope of the SPNARC. Once removed, Concordia (at this time still a member of the SPNARC) would join the Olive Conference, and Export and Fabre (the original signatories to the Olive Conference agreement) would rejoin the SPNARC, which would then cover all cargo except olives. Concordia agreed to the arrangement providing the members of the SPNARC could be persuaded to do the same. When asked whether any determinations were made as to westbound olive rates at this meeting, Mr. Orenstein testified:

> Yes. * * *
> [I]n this meeting * * * I raised no objection * * * that we would quote a higher rate than the cut rate we were then quoting, because I felt during the meeting that this was a * * * gesture of good will on our part to show American Export and Fabre that * * * that our desire was to try to stabilize the markets.
> The fact is that we didn't carry many olives at the new rate because it was higher than the rate that the Garcia & Diaz was carrying it at.
> * * * At any rate, we did agree that we [Concordia] would quote the same rate that they [Export and Fabre] would quote as from, I think, October 1st or something of that kind—I think 30- or 45-day period was to elapse before the new rates would be taken into effect * * *, in order that the trade itself might have sufficient notice of it.

The Paris agreement on olive rates lasted approximately 2 or 3 months, during which time Export, Fabre, and Concordia quoted the same rates on olives. Because of the refusal of the Spanish members of the SPNARC to go along as planned, however, the above agreement was terminated, and, according to Mr. Orenstein, "all rates returned to the starvation level."

Respondents except to the finding of a violation on the basis of this testimony on several grounds. Respondent Fabre stresses the fact that no officer or employee of Fabre was present at this meeting, but

Mr. Orenstein's testimony expressly indicated that Fabre was represented at this meeting by Mr. Nicol of Export.

Both Export and Fabre (but not Concordia) contend that the rates discussed were not to take effect for a period of 30–45 days after the meeting; and since the Olive Conference was approved 8 days after the meeting, the rates under the agreement were sanctioned by the Commission's approval of the Olive Conference agreement. Concordia's action in quoting the same rates is interpreted by respondents Export and Fabre as a unilateral decision to adopt the same rates as those of the Olive Conference. We believe Mr. Orenstein's testimony compels a more plausible inference, i.e. that Export and Fabre persuaded Concordia to enter into an agreement to charge the same rates as they would charge. This agreement, during a 2- or 3-month period, resulted in all three lines quoting the same rates on olives. It is true that several days later the Commission approved the Olive Conference agreement that lent official sanction to the rates before they were put into effect 30–45 days later. But the Olive Conference was approved as a bipartite agreement between Export and Fabre, not as a tripartite agreement between those carriers and Concordia. The inclusion of Concordia as a party to a rate agreement on olives was an action beyond the scope of the Commission's approval. It was a material modification of the agreement approved by the Commission and was required to be filed with the Commission for approval under section 15. The failure to inform the Commission of this modification was a violation of the Act on the part of Export, Fabre, and Concordia. *States Marine Lines* v. *Trans-Pacific Freight Conference of Japan*, 7 F.M.C. 257 (1962).

2. The Gentlemen's Agreement of May 15, 1954

The record amply supports the Examiner's conclusion that in May 1954, Export, Fabre, and Concordia entered into a gentlemen's agreement at Barcelona, Spain, fixing certain rates and a common level of commissions payable to shippers, customshouse brokers, and forwarding agents on certain commodities moving in the westbound trade between the United States and Spain.

Exhibit 73, introduced into evidence by Hearing Counsel, was a letter from the John F. Gehan organization, general agents of American Export for Spain and Portugal.[3] The letter was written by one José Gonzales, district director for Spain and Portugal, and addressed to Mr. F. G. Slater, general traffic manager of Export, who testified in this proceeding.

[3] John Gehan was actually vice president of Export. Export's agency in Spain, however, was operated under Mr. Gehan's name in order to gain a tax advantage available under Spanish law.

The letter indicated that:

A list of the commissions being paid at Spanish ports to forwarding agents and shippers, in accordance with the usual practice, and following our talks in Barcelona with the Fabre and Concordia Lines on May 15, 1954, is also attached, as well as a detail on eastbound cargo, giving our special rates in force and commissions being paid to receivers.

A statement concerning Portugal is also attached hereto.

Attached to this letter was a document entitled: "Detail of Commissions Paid At Spanish Ports On Westbound Cargoes, To Shippers and Forwarding Agents, In Accordance With The Gentlemen's Agreement Reached In Barcelona on May 15, 1954, With The Fabre and Concordia Line."[4]

This document set forth a list of Spanish ports (Barcelona, Tarragona, Valencia, Alicante, Malaga, Cadiz, Cartagena, and Seville), and for each port indicated a percentage of commission agreed to be paid to shippers, and, in some cases, to forwarding agents and custom brokers.

Also relevant in showing the existence of an agreement between these respondents is a portion of Mr. Slater's direct testimony in which he stated that he was aware of an agreement between Export, Fabre, and Concordia which was entered into some time during 1954.

Exhibit 99 was a contemporaneous travel report compiled by Mr. S. Marabotto, Export's director of freight traffic for Europe. Mr. Marabotto's report indicates that the meetings at Barcelona were held from May 4–7, 1954, not May 15, as indicated on exhibits 72 and 73, Parts of that report read as follows:

Mr. S. Marabotto's Report on trip to Barcelona with Mr. A. R. Sasseville

May 4/7, 1954

* * * * * * *

Purpose of the trip was to attend a joint meeting with Representatives of the Fabre Line and Concordia Line and with our respective Agents in Spain (Concordia Line was present only for what regarded the port of Seville), in order to avoid unnecessary competition among the three Lines and possibly improve the present freight situation in Spain.

There follows an extensive account of agreements between the lines as to rates and commissions from Spanish ports.

[4] This attachment to Mr. Gonzalez' letter, except for minor variations, was the same as Exhibit 72, a document with the same title. Exhibit 72 included a schedule of commissions to the port of Almeria as well as those ports named in Exhibit 73. Exhibit 72 indicated that a shipper called "Industries Cemar would receive a 5 percent commission on shipments from Valencia where other shippers would receive 3 percent, whereas Exhibit 73 had no such notation. Similarly Exhibit 73 indicated that a shipper named "Oxidos y Pinturas," shippers of red oxide would receive an 8 percent commission out of Malaga, where other shippers would only receive 3 percent. Exhibit 72 made no such distinction. Exhibit 72 was dated Jan. 12, 1958; Exhibit 73, Oct. 8, 1957. In all other respects the exhibits were materially identical.

Mr. Sasseville, who attended these meetings with Mr. Marabotto, was questioned concerning them as follows:

Q Now as a result of this trip and meeting of representatives of various lines—you did have a meeting with the various lines as a result of the trip with Mr. Marabotto?

A. Yes.

Q. Do you recall who attended that meeting?

A. Could you give me the date?

Q. I believe it was May 4th or 5th, 1954.

A. I do recall that there was a meeting in early May in Barcelona. The Fabre Line and the Concordia Line were present and [these were] all the lines I can think of at this time that attended that meeting.

[The witness was then shown Exhibit 99 for identification]

Q. To your knowledge, does that accurately reflect what transpired at that meeting and on that trip?

A. I believe you have to be a little more specific because this is written, I believe, by Mr. Marabotto, and like I have said before, the use of the English language—who use it as a second language, sometimes is not exact as to the interpretation which might be given here in the United States to words used by them.

Examiner Johnson: Otherwise, does it represent a reasonably accurate representation of what happened?

The Witness: It represents a reasonably accurate representation of what happened.

Exhibit 185 was a letter dated November 13, 1959, from Mr. J. T. Graziano, vice president of Export, to an official of the Maritime Administration. The letter reported, inter alia, as to westbound shipments from Spain:

American Export has been paying since May, 1954, according to statements made by the Freight Traffic Department, commissions to customs brokers, shippers, and forwarding agents at various ports and on certain commodities.

Mr. Graziano, the author of this letter, testified as follows:

[Hearing Counsel]: Do you know whether the payment by American Export Lines of commissions to custom house brokers, shippers and forwarding agents was done pursuant to an agreement with Fabre Line and Concordia Lines?

* * * * * * *

[Mr. Graziano]: I know now.

[Hearing Counsel]: When did you become aware of that?

[Mr. Graziano]: After the testimony at the Cellar Committee Hearing. I don't recall the exact date.

Respondents have indicated numerous exceptions to the Examiner's findings that an agreement between Export, Fabre, and Concordia was made at the May 1954 Barcelona meetings and to his conclusion that the activities of these respondents at Barcelona constituted any violation of section 15.

On the basis of the evidence set forth, the Examiner concluded that at the Barcelona meetings Export, Fabre, and Concordia had agreed on rates both in the eastbound and westbound Spanish and Portuguese trade. Respondents contend that regardless of any inferences that might be drawn from respondents' Barcelona discussions, these discussions were concerned only with the westbound Spanish trade, and that no discussion of the Portuguese trade, nor of the eastbound trade from Spain took place.

Respondents' exceptions in this regard are well taken. The Examiner's conclusion is apparently based on a misconstruction of exhibit 73. The quoted paragraphs of exhibit 73, Mr. Gonzalez' letter, indicate that three documents were enclosed with that letter: (1) A "Detail of Commissions paid at Spanish Ports on westbound cargoes, to shippers and forwarding agents, in accordance with the Gentlemen's Agreement reached in Barcelona on May 15, 1954, with the Fabre and Concordia Lines"; (2) A list of special rates and commissions on "Eastbound Traffic to Spain"; and (3) A "Detail of conditions prevailing from Portuguese ports."

However, the mere fact that items two and three were enclosed in the same letter as item one does not indicate that they are part of item one, or that the matters treated in items two and three were the product of the joint discussions at Barcelona. Indeed, all the relevant testimony and exhibits dealing with the Barcelona meetings indicate that they were concerned solely with westbound shipments from Spanish ports. Therefore we find insufficient evidence in the record to support a finding that the Barcelona agreement covered the eastbound Spanish trade and the Portuguese trade as well.

In addition, Concordia excepts to the Examiner's finding that it was a party to the Barcelona agreement. Concordia stresses the fact that although exhibits 72 and 73 indicate Concordia as a party, these documents were dated 1958 and 1957, respectively, despite the fact that the alleged agreements were entered into in May 1954. In contrast, Concordia contends, exhibit 99, "the only *contemporaneous* written evidence as to what transpired at the Barcelona meeting," shows that Concordia took no part in any agreements that may have been made. Our reading of exhibit 99 constrains us to reach a different conclusion. The above-quoted portion of exhibit 99 expressly indicated that Concordia's representatives took part in the discussion at Barcelona pertaining to Seville. The results of these discussions are set forth in exhibit 99 as follows:

Seville:

Mr. Haaland [Concordia's Managing Director] and his Agent, Mr. Siljestrom were present besides the Representatives of Fabre and A.E.L.

Instructions were passed to the effect that the rate of $17.00 should be enforced on Olive Oil as from June 15th.

Furniture:	Tariff rate, less 3%.
Essential Oils:	A.E.L. is charging $80.
	Concordia charges $30.
	(Wide difference between the two quotations will be noted.)
Cork:	Agreed to enforce immediately the rate of $22.00 from Seville and all other Spanish ports.

We believe on the basis of all the evidence that Concordia's participation in the Barcelona agreement was confined to agreements with Fabre and Export pertaining to the westbound trade from the port of Seville (the only port in the Spanish/Portuguese-United States trade regulary served by Concordia). But that Concordia was a party to the Barcelona agreement insofar as the port of Seville is concerned is clear, as an examination of exhibit 99 will show.

Respondents' next exception to the Examiner's finding of unlawful agreements arising out of the meeting in Barcelona states, in substance, that there was no intent by the participants at Barcelona to enter into any binding agreement. Rather, it was the purpose of these lines to discuss the problems of the trade with a view toward eliminating malpractices and to pave the way for the eventual formation of a conference. When asked whether the result of these meetings was agreement between the Lines on uniform rates and commissions, Mr. Sasseville, vice president of Export, who attended the Barcelona conferences, testified as follows:

> No; it was actually my interpretation of the thing that it was a meeting of the minds of the different lines in Barcelona; there was actually the liberty of each line to more or less conform with it or if they could do so, it would have been probably a way of normalizing the trade, which had been, more or less, disrupted * * *. And, what actually happened after this meeting is that insofar as we were concerned, we tried to maintain these rates and conditions, but whatever the other lines have done, we had no way of ascertaining * * * if they kept this agreement or not.

On the basis of this testimony, respondents contend that there was no multilateral assent to a common course of action since each of the lines retained the power to either adhere to or depart from these understandings. However, Mr. Sasseville's testimony expressly indicates that an agreement was, in fact, reached. While it might be true that the understandings of the lines did not create any legally enforceable rights or duties; nevertheless, a uniform level of rates and commissions was established to which each line would "more or less conform * * * if they could do so."

It is well settled that the scope of section 15 goes beyond the formally executed, legally enforceable contract. Its provisions apply with equal force to meetings of minds, tacit understandings, and other informal arrangements, whether oral or written. For an extended discussion of this point see, *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159, 189–190 (1962).

The Barcelona agreement between Export, Fabre, and Concordia, an informal understanding among these lines that certain uniform rates would be charged and uniform commissions paid, was clearly the type of informal arrangement contemplated by the Act. The failure to file a memorandum of this agreement with the Commission was a violation of section 15 by Export, Fabre, and Concordia.

3. The July 1954 Agreement at Alicante and Seville

During the course of the hearing in this proceeding, Mr. Sasseville testified that the negotiations at Barcelona did not result in final solutions to several of the problems existing in the trades from Alicante and Seville.[5] Accordingly, Export, Fabre, and Concordia directed their agents to meet at some time in the future to iron out whatever difficulties remained after the Barcelona discussions.

Hearing Counsel presented two documents in evidence, exhibits 63 and 64, setting forth agreements as to rates on various commodities moving from Seville (exhibit 63) and as to both rates and commissions from Alicante (exhibit 64). The Barcelona meetings were held, as indicated, on May 4–7. Exhibit 63 was dated July 22, 1954, and the names of the agents for Export, Fabre, and Concordia appear thereon. Exhibit 64, dated July 3, 1954, contains the names of agents of Export and Fabre.

The opening paragraph of exhibit 64 reads:

> In accordance with instructions received from American Export Lines Inc. and Cie De Navigation Cyprien Fabre, their respective Agents in the port of Alicante, Mr. Fernando Flores and J y A Lamaignere, got together on July 3rd, to consider the conditions established in the principal meeting held in Barcelona. * * *

These links produce a chain of evidence which led the Examiner to conclude that Export, Fabre, and Concordia entered into an agreement fixing rates from the port of Seville and that Export and Fabre entered into an agreement fixing rates and commissions from Alicante.

Respondents except to the Examiner's conclusion and contend that the evidence is insufficient to show that any such agreements existed. Respondents also claim that even if these agreements were made, they

[5] As we have noted, however, there were certain agreements reached at Barcelona as to the trade from Alicante and Seville.

were not authorized by the principals and did not constitute violations of section 15.

We think the evidence of record supports the Examiner's findings. Mr. Sasseville's testimony that at Barcelona, Export, Fabre, and Concordia referred the problems of Alicante and Seville to their agents, together with documents from Export's files bearing the names of these agents executed soon after the Barcelona discussions and setting forth various agreements covering the trade from these ports, convinces us that anticompetitive agreements covering these ports were in fact entered into by Export, Fabre, and Concordia.[6]

Respondents contend, however, that even if these agreements were made, they were entered into by foreign agents acting without authority, and uninformed as to the requirements of American law. Accordingly, respondents contend, no violations of the Act arose from these agreements. Respondents rely on exhibit 62, a letter from a vice president of Export, to Export's European traffic director, purportedly repudiating these agreements. The letter, dated September 13, 1954, reads in part:

> I am returning to you the entire file, as this is absolutely illegal, and should never have been worked. The wording indicates that the principals have instructed the agents to do something which the principals, not having a conference, cannot do.

As is obvious from the whole record, it was a most common occurrence in this trade for Export, Fabre, and Concordia to conduct much of their business through agents. Respondents' delegation to agents of such considerable authority carries with it an obligation to thoroughly apprise their agents of the applicable law; for it is no less damaging to the public interest when the law is violated by design, or inadvertently; by an agent, acting on behalf of a principal, or by the principal itself. Sound enforcement of the Shipping Act of necessity demands that those subject to its terms be held to a strict standard of accountability for the acts of agents representing them. As we made clear in *Hellenic Lines Ltd.—Violation of Sections 16 (First) and 17*, 7 F.M.C. 673, 676 (1964), we cannot allow a carrier to "immunize itself from the common carrier responsibilities placed upon it by the Act by dissociating itself from any of its agent's activities which are brought into question." Such responsibilities extends to liability of the principal for violations of law by his agent.

[6] Concordia was not a party to the Alicante agreement. Hence, no violation by Concordia arising from the agreement is found. The record also shows that part of the agreement at Seville dealt with the freight rate on olives. Export, Fabre, and Concordia, at the time of the Seville agreement were members of an approved Olive Conference and were legally entitled to set common rates on that commodity. However, as we have indicated, the agreement at Seville encompassed more than olives and thus was beyond the scope of the Commission's approval.

The purported repudiation relied upon by respondents is insufficient to absolve this responsibility, for in fact it was no repudiation at all. "A repudiation by a principal of his agent's unauthorized act must be made in a definite, positive, and unequivocal manner, [and] communicated to the other party to the transaction," 3 C.J.S. 160 and cases there cited.

The exhibit which respondents consider to be a repudiation was merely an intracompany communication between officials of Export. There is no indication that the sentiments expressed in that letter were communicated to Fabre and Concordia, or, for that matter, even to Export's own agents, or that they had any effect in reversing the course already taken by respondents' agents. Respondents' exceptions pertaining to the agreements at Alicante and Seville are rejected.

4. The 1959 Agreement at Barcelona

The examiner found that Export and Fabre entered into an agreement at Barcelona in July 1959 fixing uniform levels of commissions on westbound shipments from Spanish ports.

The primary evidence of this agreement is exhibit 92, a document indicating the names of the principals and agents attending the July 1959 meetings, and a detailed statement of the resulting agreements between Export and Fabre. It is dated July 24, 1959, and is signed by Mr. Sasseville, Export's vice president, and by Mr. Regis Fraissinet, an official of Fabre Line.

On direct examination, Mr. Sasseville testified that although after the meetings at Barcelona in 1954, conditions in the trade were "more or less normal," "some years afterwards it would happen that the conditions which were prevalent prior to that meeting were coming to the surface again." The 1959 Barcelona meeting was an effort by Export and Fabre to regain the normalcy that had existed after the 1954 understandings at Barcelona. Mr. Sasseville was shown exhibit 92, and he testified that it was an accurate representation of what took place at the July 1959 meeting at Barcelona.

Reinforcing this convincing evidence is exhibit 2, an intraorganization message written by Mr. Slater, reading as follows:

Mr. F. O. Slater July 17, 1959
Vice Pres., Freight Traffic
GENOA Att: Mr. S. Marabotto
Dir. of Freight Traffic-Med. & Red Sea

SPANISH AGENTS MEETING

We have received your letter of June 25th and note the meeting between Mr. Regis Fraissinet and Mr. Sasseville, for the purpose of discussing the Spanish business, has been postponed to July 24th.

F. G. Slater

FGS–ha
cc to Mr. J. T. Graziano

Mr. Graziano: This meeting is for the purpose of standardizing westbound rates on cargo and commissions to agents, which has been the subject of various inquires from members of your department. I will advise you the outcome as soon as possible. The discussion will cover all westbound shipments, including those which come within the scope of the olive conference, as well as those which are not covered by any conference agreement.

FGS/

We think the evidence clearly supports the Examiner's finding that the July 24, 1959 agreement was made, and that the failure to file that agreement with the Commission was a violation of section 15.

5. In addition to the above violations, the Examiner found that in 1958, Export and Fabre entered into an agreement fixing the freight rates for the carriage of lead bars from Spain to the United States.

The Examiner apparently based his conclusion on exhibit 109, a cable sent by Mr. A. P. Portal, then assistant traffic manager for Export, to Export's headquarters in Genoa, Italy. The cable reads:

ELWELL ADVISES FABRE AND YOUR OFFICE AGREED QUOTE LEADBARS SPAIN USNH DOLLARS 14 XX TON ADVISE URGENT.[7]

This cable would appear merely an inquiry seeking to verify something the writer had heard. There is no response to this inquiry in the record, nor does any other evidence establish that an agreement existed. We agree with respondents that the evidence of this agreement is not sufficient to support a finding of a violation of the Act.

In addition, respondents except to each of the Examiner's findings of violations of section 15 based on the inadmissibility and insufficiency of the evidence relied upon. Respondents contend that Hearing Counsel offered most of their exhibits in evidence at the close of their direct case en masse without a proper showing of authenticity and relevance and that the exhibits were largely hearsay. Accordingly, respondents urge that the Examiner erred in accepting exhibits so offered and that findings based thereon were not supported by reliable, probative, and substantial evidence as required by section 7(c) of the Administrative Procedure Act.

The ultimate evidentiary use of the exhibits and the admissibility at the time of hearing are two different questions. As aptly stated by Professor Davis:[8]

---

[7] Elwell refers to Fabre's agents.

[8] Davis, Administrative Law Treatise, vol. 2, p. 251 (1958).

In cases tried before judges or administrators, the focus is less and less upon the somewhat artificial question of what evidence should be admitted or excluded and more and more upon the highly practical question of what weight should be given to particular evidence.

We will consider first the question of admissibility. We agree with the Examiner that the documents are relevant to the issues enumerated in the orders instituting these consolidated proceedings. As to the question of inadmissibility of these documents as hearsay, we reaffirm our holding on the same argument made in *Unapproved Section 15 Agreement—South African Trade*, 7 F.M.C. 159 (1962). Hearsay evidence may be admissible. Thus, the Examiner did not err in allowing Hearing Counsel's exhibits in evidence.

We turn now to the question of the weight to be afforded to these documents and to the question of the sufficiency of the evidence as a whole to support the findings made above. Again this subject was treated extensively in the *South African* case.

Weighing the evidentiary value of these documents must be done in the light of the entire record. For instance, a given document admitted in evidence, standing alone, may not be of sufficient weight to sustain a finding. However, that document may be supported by other related evidence; together these items of evidence may form the basis for a rational and dependable conclusion. Following this approach we have already rejected several of the Examiner's findings as unsupported by reliable, probative, and substantial evidence. However, where we have found violations of section 15, we have set forth the principal evidence of the violation in some detail. In each case, there is a reliable, probative, and substantial combination of documentary evidence and oral testimony. In each case, oral testimony amply corroborates the documentary evidence.

Respondents' contention that they were deprived of their right of cross-examination is likewise without merit. At all times during the proceeding respondents were aware of the matters of fact and law to be asserted by Hearing Counsel and were in possession of the exhibits on which Hearing Counsel would rely, each of which was given an exhibit number for identification. However, these documents were not formally offered into evidence until the close of Hearing Counsel's case. Nevertheless, respondents continually maintained that they were unable to conduct proper cross-examination until the exhibits were formally introduced in evidence. We believe that even at this stage of the proceeding, respondents had ample opportunity to cross-examine. But even if we should accept respondents' contention, still further opportunity presented itself to elicit from Hearing Counsel's witnesses any testimony that might tend to cast additional light on the testimony and exhibits introduced. For, as indicated, at the close of Hearing Counsel's case, when all the documents in question were received in evidence, respondents had yet to put on their own case.

Practically all of the witnesses called by Hearing Counsel were either present or former officials or agents of the respondent lines. These were the type of witnesses readily available to respondents. In fact, Mr. Sasseville, an Export vice president, whose testimony was heavily relied upon by Hearing Counsel, was expressly advised by the Examiner, after his direct examination by Hearing Counsel, that at some time in the future he might be required to return to the stand for purposes of cross-examination. Yet when hearings were reconvened for the purpose of taking respondents' evidence, despite the fact that all of Hearing Counsel's testimony and exhibits were now part of the record, and despite the fact that Hearing Counsel's witnesses (respondents' own agents and officials) were available for either direct or cross-examination, *respondents did not recall one of these witnesses to the stand.* If, in fact, these witnesses could have contributed any facts to the respondents' case, the lack of any such evidence must be attributed to respondents' own neglect, rather than to any procedural unfairness.

Still another exception is raised by American Export Lines, the only respondent whose vessels fly the United States flag. Export contends that since most of the evidence in this proceeding came from its files, only Export was effectively investigated, and therefore the brunt of any adverse findings must fall on its shoulders. Further, Export contends that the denial of its motion to obtain discovery and inspection of documents from the files of Fabre and Concordia prevented its acquiring evidence which it claims would have demonstrated that no section 15 violations existed.

Export's first contention can scarcely be sustained in the light of the fact that our decision, while based largely on documents from Export's files, concludes that the Act was violated not only by Export, but by Fabre and Concordia as well. The very nature of a section 15 violation, i.e., unlawful agreements between two or more parties, is such that evidence of such an agreement will normally be sufficient not only against the line from whose files it originates, but against other parties to the unlawful agreement. So it was with the evidence obtained from Export. Our ultimate conclusions from this evidence left Export in no worse position than its coviolators, Fabre and Concordia.

The same reasoning can be applied to Export's claim that documents from the files of Fabre and Concordia could have disproved the existence of these unlawful agreements and that the Commission's denial of its discovery motion to obtain these documents was prejudicial to Export. The agreements alleged by Hearing Counsel, and the evidence introduced to support these allegations, demonstrated that during the period of investigation Fabre and Concordia as well as Export were parties to unlawful agreements. Surely, if any material from the files of these respondents tended to show that agreements between Export, Fabre, and Concordia did not exist, it is not unreasonable to assume that Fabre and Concordia would have produced such evidence for the record.

In a final exception, respondents contend that there can be no finding that section 15 of the Act was violated by a mere failure to file agreements between carriers. Rather, respondents contend there must be a showing that these unfiled agreements were, in fact, carried out by the parties.

Here again, respondents raise an issue that has been the subject of much administrative consideration. The definitive rejection of this interpretation of section 15 is set forth in *Unapproved Section 15 Agreements—South African Trade*, *supra*, and that ground need not be traveled again.

On the basis of the foregoing, we conclude that Export, Fabre, and Concordia, by entering into the October 1952 Paris, France, agreement; the May 1954 Barcelona, Spain, agreement; and the July 1954 Seville agreement; and failing to file the aforesaid agreements with the Commission as required, have violated section 15 of the Shipping Act. In addition, Export and Fabre, having entered into the July 1954 Alicante agreement, and the July 1959 Barcelona agreement; and having failed to file those agreements with the Commission as required, have violated section 15 of the Shipping Act.

III. Violations of Sections 16 and 17

The violations of section 15 found by the Examiner consisted in large part of agreements to pay uniform "refunds," "commission," etc., to shippers, forwarders, and customhouse brokers. The Examiner found that the payment of these refunds constituted unlawful rebates in violation of sections 16 and 17 of the Act. We do not believe there is a sufficient legal basis for these findings.

(1) Section 16 First and section 17.

Section 16 First of the Act makes it unlawful:

To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 17 reads in pertinent part:

That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors.

The crux of these sections is found in the words "advantage," "disadvantage," and "discriminatory." Their provisions were designed to prevent sellers of goods from gaining a larger share of the market for their product than they would normally attract because of cost advantages resulting from their goods being shipped at lower rates than those of their competitors.

In our opinion, there is insufficient evidence on this record to warrant a finding that sections 16 First and 17 have been violated.

(2) Section 16 Second.

This section makes it unlawful:

To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair means.

Thus the elements of a violation of this section are (1) the existence of a regular rate, and (2) the departure therefrom by unjust or unfair means.

In 1961, section 18(b) of the Shipping Act was amended to require all common carriers in the foreign commerce of the United States "to file with the Commission and keep open for public inspection tariffs showing all the rates and charges of such carrier or conference carriers for transportation *to and from* United States ports and foreign ports. * * * Public Law 87-346, 87th Cong., H.R. 6775 (1961). [Emphasis supplied.]

This amendment supplanted certain regulations which required only rates and charges *from* U.S. ports to be filed with the Commission.

During the period under investigation, therefore, these respondents were not required to file their rates and charges from Spanish ports to the United States, and, in fact no such schedule was filed.

It is respondents' contention that it was proper and lawful during that period to state their rates in terms of a given figure, less a given percentage refund to shippers, forwarders, and customshouse brokers, and that this base rate less discount was the "regular rate" for cargo moving in the Spain-United States trade. Respondents further contend, and the testimony supports their statement, that whenever a shipper was given a lower rate or a higher "commission" on any commodity all shippers of that commodity were given identical concessions. Thus, this newly negotiated rate became the "regular rate" for all shippers of that commodity.

We believe the quotation of rates in terms of a given figure less a percentage to be clumsy, confusing and fraught with opportunity for unlawful rate discrimination. On the basis of the record before us, however, we cannot find that the rates quoted by respondents were other than the "regular" rates for any commodity at that time, and thus cannot conclude that section 16 (Second) was violated.

In this connection we make one additional observation. Section 18 (b) now requires that all inbound rates be filed with the Commission and open to public inspection. The "regular rate" for the transportation of a commodity is the rate appearing in the carrier's tariff, and none other. Any discounts from that rate, or absorptions by the carrier of any chargs which would normally be borne by the shipper, must appear in the carrier's filed tariff. Our decision in this proceeding is not to be construed as authorizing charges or concessions at variance with rates on file with the Commission.

Commissioner JOHN S. PATTERSON concurring and dissenting:

SUMMARY

1. I concur with the majority insofar as it concludes that three respondent common carriers by water have failed to file agreements and have carried out agreements without approval in violation of section 15 of the Shipping Act, 1916, as amended (Act) and finds no violations by the five Spanish carriers; but dissent from the failure to find violations of sections 16 and 17 of the Act, to the extent noted herein, and from the decision to interpret section 18(b) of the Act.

2. The Examiner should be sustained in his conclusions that violations by the respondents American Export, Concordia, and Fabre of sections 15, 16, and 17 of the Act have been proven.

3. Respondent Fabre's exception that there is no proof of actual refunds to certain shippers from Alicante, Spain, and respondent Concordia's exception that there is no proof of undue preference and advantage in violation of section 16, second paragraph, subparagraph "First", or discrimination in violation of section 17, first paragraph, as a result of commissions agreed to at Barcelona, should be sustained.

4. The exceptions disputing our jurisdiction to adjudicate the consequences of actions occurring entirely outside the United States are not proper subjects for decision in this proceeding.

INTRODUCTION

The proceeding concerns two investigations ordered by our predcessor, the Federal Maritime Board (Board), by orders served January 18, 1960. The order in Docket No. 890 instituted an investigation of respondents' activities to determine whether agreements referred to in the recitals of the order had been entered into and carried out prior to approval in violation of section 15 of the Act, and the order in Docket No. 891 instituted an investigation of the same respondents' activities to determine whether such activities "have been carried out in violation of sections 16 and 17" of the Act.

Section 15, after requiring every common carrier by water to "file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier" dealing with specified subjects, and requiring approval or disapproval thereof, states:

"Any agreement * * * not approved, or disapproved, by the Commission shall be unlawful * * * before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *"

Section 16 makes it unlawful for any common carrier by water:

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, Provided, that * * *."

"Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means."

and section 17 makes it unlawful for any common carrier by water to:

"demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports * * *."

For the purposes of this report, the respondents named in the preceding opinion and the abbreviated designations are used. This report will also refer to the Federal Maritime Commission as the "Commission," as transferee of the functions of the Board under Reorganization Plan No. 7, 1961.

REASONS FOR A SEPARATE REPORT

A separate report is deemed necessary because the majority report is considered to be inadequate for the following reasons:

First, it goes beyond the scope of the orders instituting the two investigations by vouchsafing an observation amounting to an interpretive rule on compliance with section 18(b), when there was no notice that compliance with this section was an issue in this adjudication.

Second, it does not show the ruling upon each exception presented as required to be shown by section 8(b) of the Administrative Procedure Act (APA).

Third, it does not identify each agreement by subject, date, and

220-178 O - 66 - 41

parties bound, nor state what was done "to carry out in whole or in part" each agreement, nor make a determination as to all the specific agreements which have not been filed, nor specify the dates to show how many days agreements were not filed (the penalties in section 15 of the Act apply to "each day such violation continues").

Fourth, it omits discussion of certain facts relevant to a claim American Export, Concordia, and Fabre charged less than established rates and charged different shippers of the same commodities different rates relevant to the violations of sections 16 and 17, and fails to find any violations of sections 16 and 17.

SUMMARY OF EXCEPTIONS

My reading of the briefs discloses 16 subjects of exceptions (because of subdividing only 13 are numbered herein) instead of the 10 which I count as expressly ruled on in the preceding report. Two exceptions pertaining to 1958 actions, one Concordia exception pertaining to a failure to rule on proposed findings and conclusions, two separate exceptions dealing with violations of sections 16 and 17, and one exception relating to refunds by Fabre do not appear to have been ruled upon.

All respondents did not except to the various points as stated in the preceding report. Cia, Espanola, Spanish Line, Spanish Mail, Trasatlantica, and Aznar filed no exceptions. Also, all respondents did not make the same specific exceptions, as the preceding report implies. Therefore, my findings would apply only to the exceptions made by the specified respondents as noted in the summary herein of what are considered to be the exceptions.

The exceptions are as follows:

1. American Export and Fabre except to the finding that an agreement was proven to have been entered into October 6, 1952, at Paris, France, fixing rates for transporting olives from Spain to the United States.

2. American Export, Concordia, and Fabre except to the finding that an agreement was proven to have been entered into May 15, 1954, at Barcelona, Spain, fixing the percentage of freight rates to be paid to certain forwarders, shippers, and customhouse brokers in transportation east and westbound between United States, Spain, and Portugal.

3. (a) American Export and Fabre except to the finding that an agreement was proven to have been entered into July 3, 1954, at Alicante, Spain, fixing rates and refunds to shippers and forwarding agents for transporting various commodities between Spain and the United States.

(b) Fabre excepts to the finding that it refunded to certain Alicante shippers approximately 15 percent of the freight for the carriage of certain commodities to the United States and refunded to certain other shippers approximately 20 percent of the freight and these refunds were later reduced to 10 percent and 15 percent.

4. American Export, Concordia, and Fabre except to the finding that an agreement was proven to have been entered into July 22, 1954, at Seville, Spain, fixing rates for the transportation of anchovy-stuffed olives, corkboard, essential oils, and medicinal oils from Spain to the United States.

5. Fabre excepts to the finding that an agreement was proven to have been entered into with American Export "during the year 1958", and thereafter carried out, fixing the rates for the transportation of lead bars from Spain to the United States.

6. Fabre excepts to the finding that "during the year 1958" there was a practice of paying commissions or rebates of 7 percent and 7½ percent of the freight charges which were divided between a Portuguese forwarder and the ultimate receiver of the goods.

7. American Export and Fabre except to the finding that an agreement was proven to have been entered into July 24, 1959, at Barcelona, Spain, fixing rates of commissions to be paid to shippers, forwarders, and customhouse brokers for handling the transportation of tiles, lead oxide, mercury, cork, and lead bars from Spain to the United States.

8. (a) American Export excepts to the conclusion that violations of sections 16 and 17 are supported by findings of fact or evidence in the record.

(b) Concordia excepts to the finding that a violation of sections 16 and 17 was proven by the payment of commissions pursuant to the May 15, 1954, agreement at Barcelona, and excepts to the conclusion that violations of sections 16 and 17 are supported by findings of fact or evidence in the record.

(c) Fabre excepts to the conclusion that violations of sections 16 and 17 are supported by findings of fact or evidence in the record.

9. Concordia excepts to the Examiner's failure to rule on its proposed findings and conclusions.

10. American Export, Concordia, and Fabre except to the Examiner's failure to find and conclude that the Commission has no jurisdiction over the acts of these respondents performed outside the United States.

11. (a) American Export excepts that the Examiner's conclusions as to violation of sections 15, 16, and 17 of the Act are not supported by either sufficient findings of fact or evidence.

(b) Concordia and Fabre except to the Examiner's failure to find and conclude that the evidence in the record was not reliable, substantial, or probative, sufficiently to establish any statutory violation on the part of Fabre and Concordia.

12. American Export excepts that the procedural requirements of the APA, the Commission's Rules of Practice and Procedure, and due process of law were not complied with in this investigation.

13. American Export and Fabre except to the conclusion that each has violated section 15 in the absence of proof that agreements were carried out.

PROPOSED RULINGS ON EXCEPTIONS

Based on the facts and for the reasons hereinafter stated, the rulings on the exceptions should be as follows:

A. Exceptions noted in the items 1, 2, 3(a), 4, 5, 6, 7, 8(a), 8(b), and 8(c), 11(a), 11(b), 12, and 13 should be overruled as not being substantiated.

B. Exceptions noted in items 3(b) and 9 should be sustained.

C. Exception 10 is not ruled on.

The facts used as a basis for my findings and the discussion that follows are those set forth at the end of this report.

DISCUSSION AND REASONS FOR RULINGS ON EXCEPTIONS

Running through all of respondents' exceptions is a challenge of the validity of the evidence used to prove acts violating the law. Therefore, an essential preliminary is to justify the use of the evidence incorporated in the record. The evidence consisted of documents and testimony. The documents in the exhibits were copies of letters, interoffice memorandums, notes, telegrams, and minutes reproduced by photographic or other reproduction processes. Some were copies of originals, showing signatures; others were copies of carbon copies showing either no signature or typed-in names of signers. There were no original documents or certified copies. Other papers contained copies of minutes without signatures, but showed those present by name and briefly what was decided at the meetings. The documents referred to facts as having occurred and to agreements, but in the case of agreements did not constitute the agreement itself since the agreements were largely oral. The testimony was by officials of the respondents, and by others having knowledge of transactions. The documents were all introduced in evidence, examined by the Examiner and by the parties choosing to look them over, subject to cross-examination if desired, and admitted to the record by the Examiner. No one was denied the opportunity of inspection and challenge. All papers were available for challenge. The cross-examination developed efforts to say the words in the papers did not necessarily mean what they appeared to mean. Counsel complained or found fault with the way they were admitted to record. Arguments of counsel questioned the validity of the evidence because of such faults, but no witness challenged the validity of any evidence of signatures and no one denied his signature on original papers here in copy form only; the veracity of the writers of the documents or the basic truth of the statements of facts described was not denied. There was no claim of forgery or lack of authenticity. There was ample opportunity to claim or prove any of these shortcomings. Some witnesses claimed lack of first-hand knowledge of events, but neither witnesses nor counsel claimed or proved that documents contained falsehoods or were not true evidence of what they purported to be on their face. Respondents did not prove lack of authority in any of their agents, officers, employees, or representatives. No witness was denied participation for the purpose of challenging any document, nor for any other purpose.

With regard to the testimony; much of it was equivocal and exculpatory. A person who is involved in talking about prices or concessions, or refunds with a competitor or with customers knows he is dealing with a subject which is also a subject of legal prohibitions dealing with agreements on prices or discriminatory treatment under American law (e.g., see Tr., p. 522 and p. 523). A carrier employee discussing ocean freight rates with a competitor is presumed to be aware of the Act in relation to his conduct. Inevitably such a person will be careful, ambiguous, or disingenuous to obscure the applicability of the law's prohibitions if they are being disregarded. He will not speak plainly, nor allow his conduct to be interpreted correctly, if possible. His words and conduct will have to be interpreted on the assumption of awareness of the law. Consequently, we cannot expect to find clear statements of intent to agree, prefer, or prejudice, nor to find, years later after opportunity to reflect and confer, witnesses who are responsive or candid about what they were doing in the first place. On the contrary, we can expect, as a matter of protection, reluctance to speak plainly, unresponsiveness, and confused incoherence as a product of guilty apprehensiveness. Most of the papers and witnesses had already been subjected to the investigations of a congressional committee regarding the acts adjudicated herein, creating real grounds for apprehensiveness. The consequences of the facts, if proven, had been made quite clear by the committee. Some of the testimony, but not all, reflects a great deal of obfuscation. In any event, the admission of key facts exists uncontroverted except as to the quality of the proofs which are admittedly far from excellent, but not fatally defective.

Accordingly, the facts discussed are derived from all the documents found in the exhibits and on the basis that such documents contain reliable information and are true and correct copies of the exhibits received in evidence as established by a certification to this effect by the presiding examiner.[9] Reliance is also placed on the veracity of all the testimony as I interpret such testimony.

Following is a discussion of each exception:

1. The actions and words of respondents' agents, who met at a common time and place, in Paris, October 6, 1952, and, to use their own words, reached "an agreement" and "have further agreed" to adhere to the freight rates of an existing Conference tariff ("to maintain Spanish Conference rate structure") to which they were not otherwise obligated to maintain, prove an agreement meeting the description in section 15. The agreements concerned the rates to be charged for transporting olives and other commodities into the United States and therefore are agreements "fixing or regulating transportation rates * * *". The agreement by three competitors to use someone else's rates instead of each acting independently to choose his own rates is equivalent to fixing and regulating rates. The facts presented by the respondents concerning their resignation from a conference, a "rate war", efforts to reform a conference, and policy decisions have nothing to do with the existence or nonexistence of such an agreement. An agreement is usually preceded by negotiations and by conditions impelling agreement. An agreement is usually followed by acts of performance and further discussion as to the details of performance. What happens before and after the moment of agreement may not be used to obscure the fact that a meeting of minds on a common course of future action was achieved. All the evidence points to such achievement in Paris in 1952, and none of the respondents chose to deny that the records herein showing agreement occurred were truthful statements of the facts they reported, or that the persons involved were honorable persons who meant what they said and said what they meant. The first exception is not substantiated, and an unapproved agreement was entered into on a subject described in section 15 of the Act between American Export and Fabre, and existed from October 6, 1952, to October 14, 1952, when Agreement No. 8160 was approved to authorize rate fixing.

[9] With regard to the certification of the exhibits in relation to the time at which this report was prepared, the Docket binder containing exhibits was furnished this office May 10, 1965. The exhibits as certified by the Hearing Examiner as true and correct copies were placed therein by the Office of the Secretary during the week of May 3, 1965.

2. The actions and words of respondents' agents at Barcelona, Spain, on May 15, 1954, show agreement was achieved between American Export, Concordia, and Fabre when they reduced to a written memorandum showing a whole series of percentages to be deducted from freights paid on shipments in both directions and refunded to various classifications of persons shipping commodities. The participants, agents of respondents herein, agreed on commissions and agreed "to get together" from time to time for the purpose of revising the percentages or changing the recipients. The words of agreement appear more than once in the papers in evidence to show the intent of what was to be done by each. None of these adjustments in freight moneys are shown in any tariffs, but are given only to the preferred categories of persons known only to the respondents. Evidence showing that three competitors agreed to fixed percentages of freight charges to be refunded to specified shippers, forwarders, and customhouse brokers by name, and showing the declared purpose of the meetings, establishes an agreement fixing rates, giving special privileges and advantages, and regulating competition. The second exception is not substantiated, and an unfiled, unapproved agreement on a subject described in section 15 between American Export, Concordia, and Fabre existed and was carried out from May 15, 1954, to November 17, 1959, when it was terminated.

3. (a) The actions and words of respondents' agents at Alicante, Spain, on July 3, 1954, show agreement was achieved between American Export and Fabre to use certain existing conference freight rates for commodities shipped into the United States subject to specified percentage refunds of freight money. It was also shown that importers in the United States named the carriers and presumably paid freights in dollars. The agreement by two competitors to use someone else's rates and to fix percentages of freights to be refunded establishes an agreement to fix rates and give special privileges and advantages. The exception in 3(a) is not substantiated, and an unfiled, unapproved agreement on subjects described in section 15 between American Export and Fabre existed and was carried out from July 3, 1954, to November 17, 1959, when it was terminated.

(b) The actions shown by the minutes of the Alicante meeting on July 3, 1954, and by the American Export memorandum of September 13, 1954, prove that Fabre agreed to refund to at least four Alicante shippers 15 percent of the freight and to reduce other refunds. The evidence does not show proof of actual refunds and to this extent the exception in 3(b) is sustainable.

4. The actions and words of the respondents' agents at Seville, Spain, on July 22, 1954, show agreement was achieved between Amer-

ican Export, Concordia, and Fabre to establish freight rates on olives and other products shipped into the United States and to correspond with a shipper. An agreement between three competitors to establish prescribed freight rates on commodities and to make inquiries for the purpose of establishing a common rate likewise proves an agreement fixing rates. The fourth exception is not substantiated, and an unfiled, unapproved agreement on a subject described in section 15 between American Export, Concordia, and Fabre existed and was carried out from July 22, 1954, to November 17, 1959, when it was terminated.

5. The writings and explanation thereof by American Export's agents concerning the transportation of lead bars to New York show that an agreement existed as of September 2, 1958 (it is not possible from the record to fix the date the agreement came into being before September 2, 1958), between American Export and Fabre, fixing rates on lead bars. The fifth exception is not substantiated, and an unfiled, unapproved agreement on a subject described in section 15 between American Export and Fabre existed and was carried out from, at the latest, September 2, 1958, to November 17, 1959, when it was terminated.

6. The testimony and documents concerning the refund or commission out of part of the freight money paid for commodities transported by Fabre from United States to Portugal in August or September 1958 show that the practice of paying commissions or rebates in fact existed and that American Export was harmed by efforts to make exporters not choose its ships. Fabre thereby gave undue preference or advantage to all traffic on which the commissions or rebates were given and subjected American Export to undue prejudice and disadvantage in violation of section 16. If this were a case of Fabre paying a foreign importer or agent from a foreign country without reference to what happens in the United States, our laws would not apply to the actions, but where the payment is used to influence decisions made in the United States concerning which carrier to choose in routing of cargo originating in this country and to charge the amount paid out of freight moneys to forwarders in the United States, our laws apply. The applicable law is section 16 insofar as it makes it unlawful for any common carrier by water acting alone and indirectly to subject any particular person to undue disadvantage. American Export as a particular person was subjected to undue disadvantage in soliciting exporters in the United States to choose American Export as the carrier for commodities originating in the United States. Fabre violated section 16 by its actions. The sixth exception is not sustained.

7. The actions and words of respondents' agents at Barcelona, Spain, on July 24, 1959, show agreement was achieved between American Export and Fabre, fixing the commission rates or brokerage that would

be paid or divided up out of freight moneys for transporting specified commodities, including tiles, lead oxide, mercury, cork, and lead bars, to the United States and the absorption of transshipment expenses. An agreement between two competitors fixing commissions and brokerage percentages to be paid out of freight, specifying payment of transshipment expenses on certain commodities, and consulting on how to meet competition of other carriers establishes an agreement fixing freight rates, regulating competition, giving special privileges and advantages, and providing a cooperative working arrangement. The seventh exception is not substantiated, and an unfiled, unapproved agreement between American Export and Fabre on subjects described in section 15 existed and was carried out from July 24, 1959, to November 17, 1959, when it was terminated.

8. (a) The testimony and documents showing that American Export allowed commissions to shippers on freight in varying percentages, both as to types of shippers by commodities and to specified shippers by name, prove that American Export both alone and in conjunction with Fabre gave undue preference and advantage to the particular shippers receiving the commissions or refunds in violation of section 16, second paragraph, subparagraph "First". None of the commissions were shown to have been available to the public generally or to be in the tariffs. The testimony and documents showing that American Export allowed adjustments, reductions, or refunds from manifested rates for shippers of mercury, shelled filberts, olive oil, onions, and electrical equipment, but not to other shippers generally of the same commodities, regardless of tariff rates, and gave four named Alicante shippers a greater percentage commission than all other shippers, prove that American Export both alone and in conjunction with Fabre allowed such persons to obtain transportation of property at less than the regular rates then established and enforced on American Export's line by an unfair means in violation of section 16, second paragraph, subparagraph "Second". The same evidence, insofar as it shows only favored shippers were allowed an adjustment or a lower percentage with no other facts to distinguish them from other shippers, proves American Export charged or collected a rate or charge which is unjustly discriminatory between shippers in violation of section 17, first paragraph.

(b) The documents and testimony showing Concordia discounted westbound freight rates for equipment transported from Seville to New York by 18 percent for only one shipper proves that Concordia gave undue preference and advantage to the particular shipper receiving the discount from the current freight rate in violation of section 16, second paragraph, subparagraph "First". The same evidence proves Concordia allowed such shipper to obtain transportation at les than the regular rates then established and enforced on Concordia' line by an unfair means in violation of section 16, second paragraph subparagraph "Second", and charged a rate that was unjustly dis criminatory between shippers in violation of section 17. With regarc to the commissions agreed to at Barcelona, applicable to westbounc shipments out of Seville, Concordia, by making agreements affecting rates not appearing in tariffs known to the public generally, allowed shippers to obtain transportation at less than the regular rates then established and enforced on Concordia's line by an unfair means in violation of section 16, second paragraph, subparagraph "Second", but since all shippers were treated equally there is no undue preference or advantage under section 16, "First", and no discrimination under section 17 as result of these particular acts. It is considered unfair not to publish the commission so shippers may see what all the terms of tranportation are and not have to rely on secret deals between carriers.

(c) The testimony and documents showing that Fabre allowed commissions to shippers on freight in varying percentages, both as to types of shippers by commodities and to four specified shippers in Alicante by name, prove that Fabre both alone and in conjunction with American Export gave undue preference and advantage to the particular shippers receiving commissions or refunds in violation of section 16, second paragraph, subparagraph "First". The testimony and documents showing that Fabre transported an automobile for a single shipper without charge and gave four named shippers a greater percentage commission than all other shippers prove that Fabre both alone and in conjunction with American Export allowed such persons to obtain transportation of property at less than the regular rates then established and enforced on Fabre's line by an unfair means in violation of section 16, second paragraph, subparagraph "Second". The same evidence, insofar as it shows only favored shippers were allowed either a greater percentage reduction in freight with no other facts to distinguish them from other shippers or were not allowed free transportation of automobiles, proves Fabre charged or collected a rate or charge which is unjustly discriminatory between shippers in violation of section 17, first paragraph. The preceding report finds no violation of sections 16 "First" and 17 by any respondent, but the simple assertion in conclusory form that "there is insufficient evidence on this record" to warrant a finding of violation does not satisfy standards requiring identifiable record support to refute what the Examiner found on this controversial issue. Judge Tenney recently rejected as faulty support for injunctive relief sought by the Commission testimony of a witness that was "conclusory rather than factual" and "supplied no facts and figures to support his conclusion that public interest required the grant of the instant relief", *Federal Maritime Com'n* v. *Atlantic & Gulf/Panama Can. Zone*, 241 F. Supp. 766 (DCSDNY 1965). The case is not controlling here, but the reasoning contains wise advice. The Commission also has a responsibility to convince by facts and reasoning rather than by expecting review courts to accept its conclusory pronouncements on faith alone in the name of expertise. The facts showing grants of commissions to named persons and presumably not to others, refunds to selected named shippers, and paying forwarders a split of commissions, will have to be explained away by far more than conclusory assertions. Accordingly, I dissent from the preceding report insofar as it fails to reach any conclusion as to violations of sections 16 and 17 of the Act. I would conclude that the exceptions of American Export, Concordia, and Fabre in 8(a) and 8(b) are not substantiated and the Examiner should be sustained, except as to Concordia's exception in 8(b) regarding the Barcelona agreement transactions as a violation of section 17. Concordia is correct on the latter point.

9. Concordia's exception that the Examiner failed to rule on proposed findings and conclusions is sustainable, although the failure was not prejudicial because the Examiner disclosed how he would have ruled. A reading of the Examiner's decision shows he failed to rule expressly on each proposed finding as contemplated by section 8(b) of the APA, which requires that "the record shall show the ruling on each such finding" or conclusion presented. The reference is to the preceding sentence affording parties the opportunity to submit "proposed findings and conclusions" and "supporting reasons". Concordia used the opportunity and presented proposed findings and conclusions. Even though the proposed findings and conclusions were dealt with generally in the decision, and the courts support this technique, Concordia took the trouble to be explicit about its proposals, so it should have been easy to respond with a more precise compliance with the law's directions.

10. With regard to the tenth exception, the Commission initiated these two investigations on the premise it had jurisdiction over the respondents and over the subject to be adjudicated. As the facts were exposed in hearing, it was developed that the acts claimed to constitute violation of law were performed in Europe but involved products transported to the United States and the freight charges therefor,

most of which were paid here in dollars. (The tariffs are quoted in dollars, and it is assumed payment was in the same currency. The desirability of using dollar currency in our foreign commerce is also officially recognized in the light of trading conditions at the time.) The carriers used were chosen by importers in the United States. Whether the fact that initiating acts were performed and agreements consummated in Europe deprives us of jurisdiction or not is an issue that must be considered by others. As far as the words of the Act are concerned, the place of action makes no difference if foreign commerce is affected. Congress and the President have delegated responsibilities to the Commission to adjudicate the consequences of actions even though done outside United States boundaries recognized by international law. If such delegation is beyond the authority of the Congress or the President, the decision that this is so will have to be made either on the basis of constitutional or international law as defined by the judicial branch, or by Congress through amendment of the Act, or by international agreement. I would defer to higher authority and make no ruling on the tenth exception.

11. Exception 11 questions the evidence used. Such questions are discussed above. It is concluded that the evidence, lacking appropriate challenge of its basic veracity, is adequate. All the findings and conclusions are supported by reliable, substantial, and probative evidence in words and records. The eleventh exception (both parts (a) and (b)) is not substantiated. Insofar as 11(a) contains a separate exception, apart from the question of evidence, as to a conclusion of violation of sections 15, 16, and 17 of the Act, the exception is dealt with separately in rulings on exceptions 1 through 8.

12. The basis of American Export's exception as to compliance with the APA, our Rules of Practice and Procedure, and the Constitution of the United States in regard to "procedural due process", is that hearing counsel, as proponent of the order alleging violation, failed to meet the burden of proof. With regard to the latter, no specific provision of the Constitution is cited, and I do not pass on the constitutional issue. Presumably such issue will be reviewed in the courts if the issue is a serious one. Rule 10(o) of the Rules of Practice and Procedure and section 7(c) of the APA are cited to require that "the burden shall be on the proponent of the rule or order." Hearing counsel successfully obtained receipt by the Examiner of all the evidence needed to substantiate the charges in the order, as discussed in the reasons for overruling the eleventh and preceding exceptions. What happened was that after identification of the documents and allowance of testimony concerning them, respond-

ents did not bring in any invalidating documents or testimony, although given 3 months to do so. Respondents' failures may not be translated into proof of the documents' inadmissibility or invalidity. The documents were corroborated to the point where invalidation by respondents became necessary but was not forthcoming. The twelfth exception has not been substantiated.

13. There is no express provision in section 15 of proof that agreements must be "carried out", i.e., performed before a violation of the filing requirement is proven. The violation occurs when an agreement has been proven not to have been "filed immediately". Before filing, no approval is possible, because the Commission has nothing before it to approve. Carrying out, i.e., performing, agreements before approval is a separate, unlawful act under section 15. *Unapproved Section 15 Agreements—South African Trade*, 7 FMC 159 (1962). The thirteenth exception is not substantiated.

Finally, it is noted that the initiating order did not refer expressly to violations caused by failure to file immediately agreements as discussed herein, but this issue was known to the parties by the reference to section 15 of the Act and their claim that no agreements were entered into which required filing.

FACTS

The facts relevant to the alleged violations and used in the discussion are as follows:

1. A meeting held in Paris, France, on October 6, 1952, is referred to in a "promemoria" written under American Export letterhead, signed by the director, Freight Traffic—Europe, as of November 3, 1952, attended by "ourselves, Fabre, and Concordia at which 'an agreement was reached on different points' " (exhibit 84A, p. 2). The status of the agents or employees of the respondents and their authority to represent their principals or employers at this meeting was not denied. At this meeting, "a telegram of the following tenor was despatched to the Secretary of the Spanish Conference":

"CABLED SPANISH CONFERENCE * * * STOP AS FRIENDLY GESTURE FABRE AEL HAVE FURTHER AGREED WITH CONCORDIA THAT PENDING FORMAL MEETING AND HOPED FOR AGREEMENT TO MAINTAIN SPANISH CONFERENCE RATE STRUCTURE FROM THIS DATE AND REQUEST THAT MEMBERS SPANISH CONFERENCE ASSOCIATE THEMSELVES WITH SUCH STEPS THEREBY IMPROVING ATMOSPHERE AND LAYING FOUNDATION FOR SUCCESSFUL MEETING STOP * * *" (Exh. 84A, p. 3).

American Export was not a member of the "Spanish Conference", i.e., the Spanish-Portuguese Westbound Conference, and was not bound to observe its rates without an agreement. The telegram also referred to a "newly formed olive conference now awaiting approval Maritime Board Washington * * *" and to "olive traffic". The traffic was from Spain (including the Port of Seville) and Portugal to the United States. Copies of correspondence relating to these subjects were marked for Fabre Line at Marseilles and for Concordia at Haugesund (exhibit 84A, Tr. 521–525).

2. A meeting was held in Barcelona, Spain, on May 15, 1954, attended by named individuals representing American Export, Concordia, and Fabre. The status of these individuals as agents, officers, or employees of the respondents and their authority to represent their principals or employers was not denied. At this meeting the respondents' representatives prepared a three-page schedule containing, according to its title, a "detail of commissions paid at Spanish ports on westbound cargoes to shippers and forwarding agents in accordance with the gentlemen's agreement reached in Barcelona, Spain, on May 15, 1954, with Fabre and Concordia Lines" (exhibit 72). Westbound cargoes meant cargoes going to the United States. Other details of commissions paid show at Alicante 5 percent "to all shippers", except an essential oil shipper by name, and three named paprika shippers who received 10 percent. Custom brokers received 3 percent. At Almeria, almond shippers, and at Malaga, all shippers received 3 percent. At Cadiz, all shippers received 5 percent, but 11 named wine shippers and shippers of paprika received 10 percent. At Seville, shippers of general cargo received 3 percent; forwarding agents of cork shippers, 3 percent; and shippers of essential oils and herbs, 3 percent. Commissions were prescribed as follows:

	Percent
Miguelness S. A., Importers of Agricultural Machinery	3
Macaya S.A., Lube oil importers	5
Mobil Oil S.A., Lube oil importers	5
Cofinanso, Importers of Tallow	3

(Exch. 70)

A "detail on conditions prevailing from Portuguese Ports" states:

LISBON

Rebates on Eastbound Cargo:

	Percent
General Electric Portuguesa S.A.R.L., Importers of Electrical Material	10
Mendes & Anjes Lda., Importers of Stainless Steel	10

Sardine shippers are granted "a compensation of Escudos 60.—per ton" on shipments via Portimao (exhibit 71). Importers and eastbound cargo refer to cargoes coming from the United States. American Export, Concordia, and Fabre are all competitors as common carriers by water in trade between ports in Spain and Portugal and ports on the Atlantic Coast of the United States, except that Concordia's competition is confined to shipments westbound to the United States from Seville, Spain. The travel report of May 11, 1954, of the director general for Europe for American Export states the purpose of his trip was:

"* * * to attend a joint meeting with the representatives of the Fabre Line and Concordia Line and with our respective agents in Spain (Concordia Line was present only for what regarded the port of Seville) in order to *avoid unnecessary competition* among the three lines and possibly improve the present freight situation in Spain." (underlying in exhibit copy) (Exh. 99, p. 2).

The report listed under each of the Spanish ports which became subject of actions on May 15, 1954, the names of the representatives of Concordia and Fabre at those ports. Further, the report stated, "It was agreed that the agents of the three lines in Seville will get together every month and will submit the questions that they may have to principals for decision." (Id., p. 4.) The notes show agreement to revise percentages and recipients from time to time. Other officials of American Export knew of these arrangements. American Export's vice president of Freight Traffic testified as follows:

"Q. Mr. x x x yesterday I asked you if you were aware of any agreement between Export and Fabre and Concordia, which was entered into sometime in 1954. Your answer was 'No, sir, I was not aware of any agreement.' Would you want that answer to stand on this record this morning?

"A. No.

"Q. Is your answer to that question this morning * * * it would be what, please?

"A. Yes." (Tr., 129–130).

A vice president of American Export testified:

"A. Well, it would appear from reading that first paragraph here under 'Barcelona' (Ex. 99) that there is a relation there as to what existed before the meeting took place * * * that these were matters that were reported at the particular meeting in Barcelona as said to be existing on shipments moving out of Barcelona. Earlier if you followed through under the same heading, 'Barcelona', you would see that there was an endeavor to bring law and order into the booking of cargo out of the port of Barcelona.

"These were the conditions of brokerage that were to be paid after the meeting on cargo, below a certain stated amount per ton and above a certain stated amount per ton. And looking at this document and from my recollection, this was to be paid to everybody." (Tr., 383.)

A letter under the letterhead of a general agent for Spain and Portugal, American Export Lines, Inc., Lisbon, October 7, 1957, addressed to the general freight traffic manager of American Export in New York, stated:

"In whet (sic) refers to Westbound traffic as you know we have a gentlemen's agreement with Fabre and Concordia, to which the Spanish Lines have also adhered."

The letter was signed by a district director for American Export, and copies were marked for other officials of American Export participating in the meetings referred to herein (exhibit 35). Correspondence in exhibits confirms that these agreements were being carried out.

3. A meeting was held in Alicante, Spain, July 3, 1954, attended by an agent of American Export and an agent of Fabre. The status of these persons as agents authorized to act for respondents is not denied. A translation of their notes (exhibit 64) states that "in accordance with instructions" from American Export and Fabre "their respective agents in the port of Alicante * * * got together July 3rd to consider the conditions established in the principal meeting in Barcelona, having agreed to the following * * *". There follows a statement that "the rates of freight to be applied and which will serve to determine the refunds agreed upon will be those of the old S&PNARC" (the Conference). The refunds were 15 percent to shippers and 3 percent to forwarding agents except four named "firms to which shall be granted a 20 percent refund plus 3 percent to the forwarding agents" from Conference rates. Exceptions were made for melons in cases, orange peels, and "Alluminum hollow" and the applicable rates were stated in dollars. Orange peels were allowed "15 percent and 3 percent refunds." The rates on aluminum were "exclusively for products of the firm" followed by the name of a Madrid firm (exhibit 64). An American Export interoffice memorandum marked "Confidential", dated September 13, 1954, from the director—Freight Traffic—Europe to the assistant freight traffic manager—New York, subject Spanish Traffic Alicante, refers to "the agreement existing with the Fabre Line" and states, "it has been agreed by the Alicante agents, viz., ours and the Fabre Line's, that effective October 1, 1954, the present refund of 20 percent on the rates of freight will be reduced to 15 percent on cargo loaded by the following shippers", and lists four named firms, "whereas for all other shippers the refund will be brought down from 15 percent to 10 percent." The memorandum shows the signature and lists carbon copies for an agent, the accounting department and "Seville" (exhibit 123). Correspondence in exhibitions confirms that these agreements were being carried out.

4. A meeting was held in Seville, Spain, July 22, 1954, attended by an agent of American Export, an agent of Concordia, and an agent of Fabre (the translation of the "Minutes"—exhibit 63—is signed by the above agents on behalf of an agent for American Export and

"agents" for Fabre and "Agencia Concordia" for Concordia). The status of these persons as agents authorized to act for respondents is not denied. The translated minutes show "resolutions" taken to establish the rate of freight from Seville, Spain, to the United States "for olives stuffed with anchovies in cases", corkboard, essential oils, and medicinal oils. It was "agreed" to write to a named shipper "to find out the value of essential and medicinal oils". The meeting was adjourned with no further business. Correspondence in exhibits confirms these agreements were being carried out.

5. A former employee of American Export (from July 1952 to August 1960—Tr., 588) as solicitor for westbound traffic from the Mediterranean area with the title of assistant traffic manager, advised the Genoa office of American Export that Fabre's New York agent by telegram dated September 2, 1958, "advises Fabre and your office agreed quote leadbars Spain USNH dollars 14 ton advise urgent" exhibit 109). With regard to the meaning of this cablegram, the witness whose name appears as sender was asked:

"Q. * * * what was the purpose of your advising the Genoa office of a $14 rate arrived at between yourselves and Fabre?

"A. Well, I get calls from time to time from the importer and these—you are quoting the same rate as the Fabre Line. I try to get—many a time I call the competitor and find out what they are quoting. In this case, I couldn't get any information, so I cabled Spain—I cabled Genoa, I should say, in this case." (Tr., pp. 608–609.)

There is no disproof that this agreement was carried out.

6. A witness employed by a forwarding company in New York having an agent in Portugal testified, and exhibits showed, that in 1958 (Tr., p. 686—referred to as "in the summer; August or September" 1958 in connection with shipments of petroleum products) the practice existed whereby part of the freight paid to Fabre for transportation eastbound to Portugal was refunded and the refund was divided between a Portuguese forwarding agent and the ultimate receiver of the goods or paid to consignees (exhibit 56). The refund was 7½ percent and 10 percent of freight paid (exhibits 10, 13, 16, 18, 27, 56; Tr., 692–702). Importers in Portugal, in response to the agent's solicitation efforts, would request that the forwarder's services be used by means of instructions to U.S. exporters to make shipments through the forwarder (Tr., 685). The agent was paid a commission for every shipment obtained (Tr., 686). The exporting shippers chose the carrier to be used. When American Export was chosen by American exporters, the Portuguese importers refused to pay the forwarding charges "and other insurance and departmental expenses" because American Export should not have been chosen (exhibits 173, 174, 175,

220-178 O - 66 - 42

176). American Export's Lisbon agents advised the Genoa and New York office that an importer of lubricating oil products was "lately approached by representatives of Fabre Line * * * who have granted them a bonus on freights of 7 percent * * *" (exhibits 16 and 18). Elsewhere the "bonus" was referred to as a "rebate" (exhibit 14).

7. A meeting was held in Barcelona, Spain, July 24, 1959, attended by two individuals representing American Export and a representative of Fabre and their respective agents at 10 cities in Spain. The minutes are signed by the American Export and Fabre representatives (exhibit 92). The minutes contain a statement of the "brokerages and/or commissions payable at Spanish ports Barcelona/Seville range" which "have been agreed upon, effective July 17, 1959". The agreed amount was "5 percent on the net revenue" except that tiles, lead oxide, mercury, cork, and lead bars were assigned other specified percentages. At the ports of Barcelona, Tarragona, Alicante, or Malaga, there was a "division of the 5 percent brokerage and/or commission" and it was "agreed among agents that the distribution will be 3½ percent for the shipper/forwarding agent and 1½ percent to the Custom House broker involved". "It is further agreed that the lines will absorb transhipment expenses * * *". The minutes continued: "In order to meet the action of competitive lines, it is hereby agreed that agents at any particular port may consult the agent of the other line * * *" (exhibit 92). All of the foregoing applied to cargoes to or from the United States. The American Export representative acknowledged he knew the meeting was to be held and the subjects to be discussed (exhibit 2). A copy was marked for a vice president of American Export with a detailed note concerning the purpose of the meting. Other proofs indicate these agreements were being carried out.

8. (a) American Export, on March 17, 1954, relative to a shipment of 2,500 flasks of Spanish mercury shipped from Cadiz to New York, covered by bills of lading "Nos. 9 and 10," wrote its general freight agent after referring to the rate shown on the manifest as $25 per ton: "This will be your authorization to adjust the rate on the above shipment to $20.50 per ton." (Exhibit 75.) Similar adjustments at different times in the same trade were made with respect to 4,750 flasks to $21 per ton (exhibit 77) and 2,500 flasks to $21 per ton (exhibit 78). On June 22, 1953, relative to a shipment of shelled filberts in 400 bags shipped from Barcelona to New York, covered by Bill of Lading 14, American Export's freight traffic manager wrote its general freight agent, after referring to the rate shown on the manifest of $33 per ton as the tariff rate, "This will be your authorization to adjust * * * to $30 per ton." (Exhibit 79.) On January 28, 1953, relative to 34 bills

of lading, Seville to New York, 2 bills of lading, Seville to Boston, 2 bills of lading, Seville to Philadelphia, and 5 bills of lading, Malaga to New York, covering drums of olive oil, authorization was given "to adjust the rates on the above shipments to $9.00 per ton" from the manifested tariff rate of $21 per ton (exhibit 81). Similar adjustments were made on Barcelona to New York shipments (exhibits 82, 84). The New York office of American Export was asked to refund, pursuant to agreement with an olive oil exporter, $288.48 to cover a reduction "on the established rate of $21.00 per ton on all their shipments of Olive Oil to U.S.N.A. ports". It was noted that "freights were payable at destination" and asked that payments be made to the exporter's New York agents in terms of dollars (exhibit 85). Similar refunds were made to New York agents of exporters of onions shipped from Seville to New York, resulting in a freight different from what was shown on bills of lading (exhibit 86). Other factually similar transactions were shown (exhibit 88; Tr., 141, 142, 151, 154, 155, 252–257, 327, 328, 346, 347, 506–515, 536–538). Reductions in 1955 and 1956 from manifested rates on shipments of electrical equipment from the United States to Spain were shown (exhibit 39; Tr., 42–44, 58).

(b) Concordia on October 15, 1958 (referring to "yesterday") "agreed" to a "demand" for an "18 percent rebate on the current freight rate" on certain equipment shipped from Seville to New York (exhibit 186). The letter, on Agencia Concordia Line, Sevilla (Spain) stationery, dated October 15, 1958, addressed to Concordia's New York agent, stated, "The rebate is to be deducted at yours when collecting the freight". The "yours" refers to the addressee agent of Concordia's office in New York (exhibit 186). Other documents confirm shipments and a bill of lading and schedule of eight shipments from Seville, Spain, westbound, are shown. There was also evidence of a dispute over the higher eastbound rate in comparison with the lower westbound rate, but this had no relation to the 18 percent reduction or discount from the "current freight rate," whatever it was (exhibits 186, 187). The testimony as to the dispute tended to obfuscate the true transaction by a discussion of the consequences of transshipment and the fact that the disputed rate involved an increase in applicable freight (Tr., 466–491).

(c) Fabre refers in a response from Marseilles, France, dated September 20, 1954, to reports from its U.S. representative in New York to not recalling "having agreed to the free transportation" of an automobile for a shipper but stated, "we are not opposed to renewing this gesture if it was not made uselessly last year" (exhibit 172, pp. 4–5, heading "AUTOMOBILE POUR M. FELIX GOZLAN") (a translation is in exhibit 171).

9. The President of American Export, by letters dated November 17, 1959, wrote the managing director of Fabre Line and the president of Concordia Line, "if and to any extent any such agreement exists between our companies * * * it is terminated forthwith". The reference was to agreements relating to cargo moving between Spanish and Portuguese ports and ports in the United States. There is no evidence in the record and no claim that any alleged agreement herein was terminated before the date of these letters. Concordia provided transportation service only from Seville, Spain, westbound to the United States (Tr., 555).

10. Shipments of many commodities, olives in particular, are controlled in the United States by importers. Freights were payable at destination (United States) and receivers "had at all times a word to say regarding the routing of cargo" (exhibit 84A).

11. The record shows without denial, and it is substantiated by the files of the Commission, that no true copy or true and complete memorandum of any agreement subject of the proceedings was filed immediately or at any other time with the Commission.

Findings and Ultimate Conclusion

Based on these facts and the reasons advanced, the decision of the Presiding Examiner should be affirmed with only the reservations noted herein.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

No. 890

In the Matter of Unapproved Section 15 Agreements—Spanish/Portuguese Trade

---

No. 891

In the Matter of Rates, Charges and Practices of Carriers Engaged in the Trade Between United States and Spain/Portugal

---

This proceeding was instituted by our predecessor, the Federal Maritime Board, upon its own motion. Investigation of the matters involved having been completed by the entry, on the date hereof, of the Commission's report containing its findings and conclusions, which report is made a part hereof by reference:

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

By the Commission.

(Signed) THOMAS LISI
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 397

BARR SHIPPING CO., INC.

v.

ATLANTIC LINES, LTD.

Application under Rule 6(b) for permission to grant refund of portion of freight money. Denied.

Stephen Doolos, Esq., for respondent Atlantic Lines, Ltd.

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

PRELIMINARY

In this proceeding Atlantic Lines, Ltd. (Atlantic), styles itself as respondent and asks permission to pay $977.06 to Barr Shipping Co., Inc. (Barr), named herein as the complainant. In pertinent part Atlantic's application states:

THE FACTS

"This application for an order authorizing the payment to the above named Complainant of 44 Beaver St., New York, N.Y., the sum of *nine hundred seventy-seven dollars and six cents* ($977.06), as reparation in connection with a shipment being specifically described as follows:

(1) Commodity, creosoted yellow pine, one shipment consisting of 23 bundles, measuring 807 cubic feet, weighing 80,962 pounds from New York to St. Thomas, Virgin Islands. Said shipment went forward on the M/V *Atlantic Pearl*, Voyage #10-South and is covered by Bill of Lading No. 27, New York/St. Thomas, dated July 27, 1964, a copy of which is enclosed.

The shipper as indicated on the bill of lading is Cross Austin & Ireland Lumber Co., with consignee shown as I.T.T. Caribbean Sales & Service, Virgin Islands Telephone Corp. at Charlotte Amalie, St.

[1] This decision became the decision of the Commission on August 6, 1965, and an order was issued denying the application.

Thomas, Virgin Islands. The freight figures for the subject shipment are as follows:

80962# @ 40.00/2000#	1,619.24
Tonnage due, 0.50/2240#	18.07
Landing charges, 0.216/100#	174.88
	1,812.19

Payment in full has been received by this office from Messrs. Barr Shipping Co., Inc., their check number *01496*, dated *7–31–64*.

While under the provisions of Atlantic Lines, Ltd., Southbound Freight Tariff No. 3, F.M.C.—F. No. 3, the rate is correct, and Atlantic Lines, Ltd., is no way in violation of any of the provisions of the Shipping Act of 1916, as amended.

The shipper has based his freight calculations on the rate charged by the Alcoa Steamship Co., and has refused to reimburse Messrs. Barr Shipping Co., Inc., for any amount in excess of this figure.

On the basis of the Alcoa Steamship Co. tariff, the subject shipment would be freighted at follows:

17,989 B/F @ 31.50/1000	566.65
Plus 20% since creasoted	113.33
Landing charges, 7.62/1000	137.09
Tonnage dues	18.07
	835.13

The difference between the above and the freight charged by Atlantic Lines, Ltd., is $977.06, and as we have been paid in full, Messrs. Barr Shipping Co., Inc., are now out of pocket in this amount.

Under these circumstances, Atlantic Lines, Ltd., shall with the authority and permission of the Commission agree to the refund in question.

Comments and Conclusion

Beyond the scanty facts submitted in this complaint, it would appear that there is no basis for equitable relief or the granting of any refund, as requested. Admittedly, the southbound freight tariff provisions of Atlantic Lines, Ltd., covering this commodity provided for a total charge of $1,812.19 for the services performed and Barr Shipping Co., Inc. (Barr), freight forwarder and broker of New York City, has paid the full amount involved. The shipper, Cross Austin & Ireland Lumber Co. (Cross Austin) discovered, it would appear, altogether too late, and unfortunately for them, that Alcoa Steamship Co.'s (Alcoa) tariff was less and that Alcoa would have covered the shipment involved for the lesser amount of $835.13.

The shipper, Cross Austin, has refused to reimburse Barr Shipping Co., Inc., for any amount in excess of this lesser figure of $835.13 and respondent Atlantic Lines, Ltd., now seeks authority to refund to Barr Shipping Co., Inc., the difference of $977.06.

On this record there is no basis for a finding that the carrier, at any time, intended to apply other than the rate which was charged. There was no misquotation of any rate, no showing of any inadvertence, oversight, or inadequacy on the part of anyone involved in this proceeding. The rate charged was the rate on file by Atlantic Lines, Ltd., even though it was a rate in excess of that charged by a competing line (Alcoa). There is no showing that the rate charged was unreasonable and unjust. In consequence, the application for permission to make the refund is accordingly denied.

Section 2 of the Intercoastal Shipping Act, 1933, as amended, requires that any common carrier by water in domestic commerce charge and collect the legally applicable tariff rates on file with the Federal Maritime Commission and in effect at the time the services were performed. Respondent Atlantic Lines, Ltd., is therefore required to collect the applicable tariff charges or exhaust all available legal remedies in an attempt to do so.

(Signed) EDWARD C. JOHNSON,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 396

SEA-LAND SERVICE, INC.—APPLICATION TO WAIVE UNDERCHARGES

Application under Rule 6(b), for permission to waive undercharges on shipments of general cargo in the domestic offshore trade between New York and Puerto Rico, granted.[1]

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

INITIAL DECISION OF BENJAMIN A. THEEMAN, HEARING EXAMINER [2]

This application seeks approval for the waiver of undercharges totaling $476.15 on 257 shipments tendered to Sea-Land Service, Inc. (Sea-Land), by shippers in the New York Metropolitan area during the period from December 1, 1964, through December 4, 1964.

Sea-Land maintains a "containerized" service between New York and Puerto Rico for the land-water transportation of general cargo. As part of the service, Sea-Land provides a pick up and delivery of cargo at inland points. The pick up and delivery is performed by motor carriers licensed by the Interstate Commerce Commission (ICC) to operate between the inland points and Sea-Land's New York terminal. The motor carriers charge Sea-Land in accordance with their ICC tariff. Sea-Land's rules, regulations and charges governing pick up and delivery are published in its Freight Tariff No. 7, FMC–F No. 3 [3] filed with the Federal Maritime Commission (Commission).

On October 16, 1964, Sea-Land issued and filed with the Commission 3d Revised Page No. 7, FMC–F No. 3, increasing, effective December 1, 1964, certain of its pick up and delivery rates in the New York Metropolitan area. This was done because the motor carriers were pro-

[1] Commissioner Patterson dissents because he holds that the conclusion of the majority supporting the Examiner's disposition of the issues is not in compliance with the law as he interprets it. The tariff filing rule in sec. 18(a) of the Shipping Act is just as stringent as the requirements of sec 18(b). The significant point is compliance with the law not whether it would be "equitable" which is the Examiner's unexplained reason for not enforcing the filed tariff.

[2] This decision became the decision of the Commission on August 12, 1965, and an order was issued granting the application.

[3] Sea-Land's rates for the water transportation are contained in its Outward Freight Tariff No. 2, FMC–F No. 3 (Pan-Atlantic SS Corp. FMC–F series) but are not pertinent to this proceeding.

posing to revise their tariffs to increase the level of charges by approximately 7 percent effective December 1, 1964. Sea-Land's revised rates were intended to compensate it for the increases it would be paying the motor carriers.

On or about November 24, 1964, Sea-Land learned that the motor carriers had deferred publication of their increased rates. Not desiring to put its increase into effect first, Sea-Land on November 24, 1964, petitioned and received special permission from the Commission to cancel Sea-Land's proposed increase set forth in 3d Revised Page No. 7. Accordingly, Sea-Land issued 4th Revised Page No. 7, canceling the proposed increases effective December 1, 1964.

Due to a clerical omission 4th Revised Page No. 7 was inadvertently not filed with the Commission and, therefore, never became effective. Sea-Land, however, under the impression that it was in effect, printed and distributed the page among the users of its tariff. Under these circumstances, the applicable rate effective December 1, 1964, was the increased rate shown on 3d Revised Page No. 7.

On the afternoon of December 3, 1964, Sea-Land became aware of its failure to file. Immediately, it petitioned the Commission for special permission to issue on not less than one day's notice another 4th Revised Page No. 7 canceling the increases. On December 4, 1964, the Commission again granted special permission. On the same day, Sea-Land issued a second 4th Revised No. 7 bearing an effective date of December 5, 1964. This revised page was duly filed with the Commission, thereby canceling the increase as of December 5, 1964, and restoring the rates that had previously been in effect for over two years.[4]

From December 1 through December 4, 1964, while the increased rate was applicable, Sea-Land picked up 257 separate shipments for movement through its transportation system. Sea-Land billed the shippers at the lower rate as shown on 4th Revised Page No. 7 but did not bill any of them at the increased rate and collected no part of the increase. The 257 shipments weighed a total of 399,887 pounds. The total amount billed was $2,208.55. The applicable rate charges totaled $2,684.70. The difference yields the undercharges of $476.15 for which approval to waive is requested.

Sea-Land states there are no shipments other than the 257 listed herein entitled to consideration by the Commission.[5]

---

[4] See Original Revised Page No. 7, FMC–F No. 3, effective October 15, 1962, on file with the Commission.

[5] There are no other parties to this proceeding.

DISCUSSION

The application does not include shippers' certificates as set out in the form in Appendix II (5) of the Commission Rules.[6] In response to FMC's request that the application include such certificates, Sea-Land replied that it would not be possible to comply, would create too great a burden on all parties and that no "real purpose would be served by obtaining the requested certificates, since neither shipper nor consignee could certify that the charges had been borne and paid by them."

Sea-Land could comply with the Rules by obtaining and filing a modified certification as to each shipment conforming to the facts herein. However, the 257 undercharges range from \$0.02 and \$0.28 to \$6.50; the average undercharge is \$1.85; and about 155 of the 257 items do not exceed \$1.50. Under these circumstances to require Sea-Land to obtain a modified certificate would cause Sea-Land undue hardship in that Sea-Land would be compelled to incur excessive cost in relation to the amount of the undercharge, undergo considerable inconvenience and expend a disproportionate amount of time. Such a requirement would not further the purpose of the special docket proceeding which "is designed to reduce, insofar as possible, the time and expense of the parties, the Commission and its staff." Special *Docket No. 268, South Atlantic & Caribbean Line, Inc.*, mimeo decision dated June 30, 1964. Accordingly, pursuant to Rule 1(i) the requirement of filling the shippers' certificates is hereby waived.

There is no question that the legal rates for the shipments in question during the period December 1 through December 4, 1964, were the increased rates stated in 3d Revised Page No. 7. Sea-Land, however, has charged the lower rate stated in the 4th Revised Page No. 7. The provisions of section 18(a) of the Shipping Act of 1916, as amended, and section 2 of the Intercoastal Shipping Act of 1933, make it unlawful to charge or demand or collect or receive a greater or less or different compensation for the rates, fares, and/or charges which are specified in the schedules filed with the Commission and in effect at the time of the shipment. The facts show that the failure to file the first 4th Revised Page No. 7 with the Commission was neither deliberate nor intentional and was due solely to the error of the carrier. Under the circumstances it would not be equitable that the burden of this failure should fall on the innocent shippers.

The shipments considered herein were transported in the domestic off shore trade. In such instances, the Commission has held that under

[6] This certificate reads as follows:

"I hereby certify that charges of \$_______ on the shipments involved herein were paid and borne as such by ___________________ Company, and by no other."

the authority granted by section 18(a) of the act and section 4 of the Intercoastal Act, the special docket technique long used by the Commission is applicable.[7]

It has been held that when rates are maintained for some time, increased for a short period, and then reduced to the former basis, a presumption arises that the advanced rate was unreasonable.[8] In this instance, the presumption is buttressed by the fact that the increase was put into effect to compensate for a cost that did not materialize, i.e., the proposed increase of the motor carriers.

The lower rate has been in effect since October 15, 1962, except for the four days in question. Examination of the Commission records show no evidence of any complaint about the reasonableness of the lower rate since its inception.[9] Under these circumstances, an active rate in existence for this length of time is presumptively reasonable.[10]

Under the special circumstances of this record, it appears clear that the lower rate was reasonable and the advanced rate was unreasonable and unjust to the extent of the increase.[11]

No discrimination will result as among shippers if the application is granted because there were no shipments made via Sea-Land during the period in question out of the New York Metropolitan area other than those which are the subject of this proceeding.

The application is accordingly granted.[12]

(Signed) BENJAMIN A. THEEMAN,
Presiding Examiner.

MARCH 18, 1965.

[7] Note the language on pages 6 and 7 of the mimeographed decision of the Commission dated January 13, 1965 in Special Dockets Nos. 377 and 378, *Ludwig Muller Co., Inc.* v. *Peralta Shipping Corp., Agents, etc., Application of Lykes Bros. Steamship Co., Inc.*

[8] *Auburn Mills* v. *Chicago & A.R. Co.*, 221 I.C.C. 475, 507, citing *Ocheltree Grain Co.* v. *St. Louis & S.F.R. Co.*, 13 I.C.C. 46; *Millar* v. *N.Y. Central & H.R.R. Co.*, 19 I.C.C. 78; *Gannet Co., Inc.* v. *B. & O. RR. Co.*, 219 I.C.C. 617. See also *H. Kramer & Co.* v. *Inland Waterways Corp.*, 1 U.S.M.C 630, 632.

[9] See *Holly Sugar Corporation* v. *Alton Railroad Co. et al.*, 216 I.C.C. 85, where the ICC stated on page 90 that it "has recognized that in determining the reasonableness of rates in the past, consideration should be given to the fact that during the time they were in effect no complaint thereof was made."

[10] *In the Matter of Sugar from Virgin Islands to the United States*, 1 U S.M.C. 695, 697; *Gulf Westbound Intercoastal Soya Bean Oil Meal Rates*, 1 U.S.S.B.B. 554, 560; *S. H. Kress & Co.* v. *Baltimore Mail Steamship, etc.*, 2 U.S.M.C. 450, 451, 452. Also, *Crude Petroleum from Mississippi to Illinois, etc.*, 255 I.C.C. 763, 765.

[11] See *Oxenberg Bros. Inc.* v. *United States*, 3 FMB 583, cited on page 7 *of Special Dockets Nos. 377 and 378*, supra; also *H. Kramer & Co.* v. *Inland Waterways Corp.*, supra at page 632.

[12] Under circumstances closely similar to those contained in this record, the Commission granted the waiver requested on the basis that the nonfiling of the page of the tariff was an unfair practice. See *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Lines, Inc.*, 7 FMC 62, 64, decided January 18, 1962.

FEDERAL MARITIME COMMISSION

No. 1082

THATCHER GLASS MANUFACTURING CO., INC.

v.

SEA-LAND SERVICE, INC., PUERTO RICAN DIVISION

Decided August 13, 1965

Minimum rate of $500 per trailerload for transportation of glass bottles from Jacksonville to Puerto Rico with transshipment at Port Newark found (1) not to be unjust and unreasonable; and (2) not to favor Port Newark shippers to the undue or unreasonable prejudice or disadvantage of Jacksonville shippers.

Raymond W. Mitchell and *Charles S. Doskow* for complainant.
C. H. Wheeler for respondent.

REPORT

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

This proceeding was initiated by the complaint of Thatcher Glass Manufacturing Co., Inc. (Thatcher), against Sea-Land, Inc., Puerto Rican Division (Sea-Land), alleging that Sea-Land's minimum charge of $500 per container on shipments moving between Jacksonville, Fla., and Mayaguez, Puerto Rico, are unduly and unreasonably prejudicial, unjustly discriminatory, and unjust and unreasonable in violation of sections 16 and 18 of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. Thatcher seeks reparations in the sum of $2,036.19.

Examiner Benjamin A. Theeman in his Initial Decision concluded that Thatcher had failed to establish any of the alleged violations and recommended dismissal of the complaint. Exceptions and replies have been filed. No oral argument was requested and none was held. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts, or not related to material issues in this proceeding.

FACTS

Thatcher is a domestic manufacturer of glass bottles and containers and maintains plants at Elmira, New York, Streator, Illinois, Lawrenceburg, Kansas, Saugus, California, and Tampa, Florida.

Respondent, Sea-Land, is a common carrier by water operating in the offshore domestic trade and the coastwise trade. The offshore domestic trade is conducted by the Puerto Rican Division of Sea-Land, and the coastwise trade is conducted by Sea-Land's Coastwise Division. Under Sea-Land's general management each division is set up as a separate operating division, each has its own vessels, personnel, terminal facilities, etc., and each division maintains separate books and accounts and files separate tariffs. For the period in question, the Coastwise Division provided a weekly service between ports of the Gulf and Atlantic Coasts including Jacksonville and Port Newark. The Puerto Rican Division offered a direct service between Baltimore and Port Newark on the U.S. Atlantic Coast and San Juan, Ponce, and Mayaguez, Puerto Rico.

In addition the Puerto Rican Division offered an indirect service from Jacksonville to Puerto Rico by loading the cargo aboard a Coastwise Division vessel at Jacksonville, carrying it to Port Newark, and there placing it aboard a Puerto Rican Division vessel for shipment to Puerto Rico.[1] The total distance of the indirect route is about 2,400 miles, and the distance from New York to Puerto Rico is about 1,500 miles. A carrier operating directly between Jacksonville and Puerto Rico would travel a distance of approximately 1,300 miles. Although Sea-Land's applicable tariff did not mention transshipment at Port Newark, the record is clear that Thatcher was aware that Sea-Land maintained no direct service from Jacksonville to Puerto Rico.

On September 29, 1962, Thatcher shipped via Sea-Land from Jacksonville to Mayaguez five trailer loads of glass bottles manufactured at its Tampa factory; four of these weighed 24,006 pounds each, the fifth weighed 24,229 pounds. In October Thatcher shipped four trailer loads each weighing 23,500 pounds. All of the trailer loads in question measured in excess of 1,400 cubic feet.

At the time the shipments in question were made, Sea-Land's applicable tariff was Outward Freight Tariff No. 2 on file with the Commission as FMC–F No. 3. The applicable rate on glass bottles from all ports of call to Puerto Rico was 115 cents per 100 pounds except that from Jacksonville, the tariff provided that "* * * trailer

[1] In April 1963, Sea-Land commenced a direct service between Jacksonville and Puerto Rico. In August 1963, direct service ceased, and indirect service was reestablished.

load shipments will be accepted, subject to the following minimum charges per trailers. * * *

Dry cargo or open top trailer. (For the purpose of this rule, a trailerload shipment of dry cargo is defined as one that weighs 24,000 lbs. or more or measures 1,400 cubic feet or more.) $500.00 per trailer."

Accordingly, Thatcher paid freight at the rate of $500 for each trailer load, a total of $4,500. The same cargo computed at the rate of 115 cents per 100 pounds totals $2,463.81. The difference between the two totals, or $2,036.19, is the amount claimed by Thatcher as reparation.[2]

In his initial decision the Examiner found that the $500 per trailerload minimum rate from Jacksonville to Puerto Rico had not been shown (1) to be unjust or unreasonable or (2) to illegally favor Port Newark shippers to the undue or unreasonable prejudice or disadvantage of Jacksonville shippers. We agree with the Examiner.

DISCUSSION AND CONCLUSIONS

The gravamen of Thatcher's complaint is that Sea-Land's rate out of Jacksonville is too high, yet it has presented no evidence to demonstrate the unjustness or unreasonableness of this $500 minimum charge. To the contrary, Sea-Land has shown that the rate is insufficient to cover the cost of transporting the bottles from Jacksonville to Puerto Rico.

We are of the opinion, therefore, that the Examiner properly concluded that on the record the $500 minimum rate from Jacksonville to Puerto Rico had not been shown to be unjust or unreasonable within the meaning of section 18 of the Shipping Act, 1916, and of sections 3 and 4 of the Intercoastal Shipping Act, 1933.

Thatcher also contends that the difference between the rate from Jacksonville as compared to the rate for the carriage of like articles from other ports results in undue preference, prejudice or discrimina-

[2] For the purpose of this proceeding and ease of calculation, the parties used a standard trailer load of glass bottles having a cubic content of 1,800 cu. ft. and a weight of 24,000 lbs. On this basis the following schedule shows the approximate rate per cubic foot and per hundred pounds for a trailer load shipment by Sea-Land from Jacksonville and from Port Newark.

	Rate (Cents/Cu. Ft.)	*Rate (Cents/CWT)*	*Rate Per TL (Dollars)*
Jacksonville/Puerto Rico (via Port Newark)	27.8	208.0	500.00
Port Newark/Puerto Rico	15.3	115.0	276.00

The record shows that for bookkeeping purposes, Sea-Land allocated the revenue received in the Puerto Rican trade on the basis of 40 percent to Coastwide Division and 60 percent to Puerto Rican Division. The distribution was based on the distance in the leg covered by each division in the Puerto Rican trade. There has been no showing that this allocation reflected either rates or costs.

tion in violation of section 16 First of the Shipping Act, 1916, as alleged. This contention is grounded on the allegation that Sea-Land had failed to justify its indirect service from Jacksonville to Puerto Rico. Thatcher argues that this results in the application of a higher charge from a port closer to the destination of the goods than from a more distant port which in turn subjects Thatcher to the payment of rates which are unduly discriminatory.

We agree with the Examiner who correctly concluded that Sea-Land legally initiated and maintained its indirect service and that the Commission does not have the power to compel a direct service.[3]

Therefore, absent a direct service from Jacksonville, the fact of transshipment plus its attendent costs does warrant the existence of a higher level of charges from Jacksonville than from Port Newark.

Thatcher asserts it received no benefits from the 900-mile backhaul from Jacksonville to Port Newark, but that the additional transit time and extra handling at Port Newark is detrimental to its operations. Yet Thatcher has produced no evidence to substantiate its position that the backhaul has caused it any loss or delay in connection with any of its shipments. In fact, although there were alternate carriers available to it, which offered direct service from Florida to Puerto Rico, Thatcher continued to transport its cargo via Sea-Land's vessels.[4] Thatcher testified, in effect, that it used Sea-Land because (1) the type and quality of Sea-Land's service was of major importance to Thatcher's Puerto Rico business and (2) Sea-Land's rate was lower than TMT's or SACL's.

On the basis of this testimony, it is clear to us, as it was to the Examiner, that in evaluating the services available to it, Thatcher did not allow the transshipment factor appendant to Sea-Land's indirect service to deter it from making use of that service.

Section 16 first makes it unlawful for any common carrier by water to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever. By its express terms, this section provides that only those preferences or advantages which are undue or unreasonable are

[3] See *Harbor Commission, City of San Diego, California* v. *Matson Navigation Company*, 7 FMC 394, 400 (1962).

[4] During September and October 1962, TMT Trailer Ferry, Inc. (TMT) maintained a direct containerized service from Jacksonville and Miami, Fla., to San Juan, Puerto Rico. South Atlantic & Caribbean Line, Inc. (SACL) maintained a direct but noncontainerized service from Savannah, Ga., and Miami, Fla., to San Juan, Puerto Rico. The rate for a comparative trailer load on TMT to San Juan was 32¢/cu. ft. or $576/TL. On SACL it was 28¢/cu. ft. or $504/TL.

In December 1962, two additional lines, Waterman of Puerto Rico and Indian River Towing Co., commenced direct service to Puerto Rico at a rate for a comparative trailer load of 31¢/cu. ft. or $558 a trailer load. One was the Indian River's service out of Tampa ; Waterman's was from Mobile, Ala.

deemed to be unlawful. A discrimination in rates, resulting from a substantial difference in the cost of operation, in the services performed, or in the transportation conditions, may not be unreasonable.[5] Indeed, in *Philadelphia Ocean Traffic Bureau* v. *Export SS Corporation*, 1 USSBB 538, 541 (1936), the Shipping Board stated:

The uniformity of treatment contemplated by the Shipping Act is a relative equality based upon transportation conditions only. To justify an order compelling the equality of rates, the complainant must show a substantial similarity of conditions surrounding the transportation under the rates sought to be equalized.

As the Examiner found, Thatcher has failed to show a similarity of transportation conditions in the two trades. Absent such a showing of similarity, there is no sound basis for a comparison of the charge from Port Newark to Puerto Rico with the charge from Jacksonville. Thatcher again disregards the fact that Sea-Land's indirect service is legally maintained and that absent a direct-service traffic moving out of Jacksonville must be backhauled some 900 miles to Port Newark. In this connection, Sea-Land has shown that substantial differences in circumstances and costs are incurred incidental to its common carriage of goods between Jacksonville and Puerto Rico as opposed to the transportation of goods between Port Newark and Puerto Rico.

The record shows that the additional services performed by Sea-Land due to its indirect service consist of making the booking arrangements at Jacksonville, dispatching a container to pick up the freight, stevedoring the container aboard a coastwise vessel, transporting the cargo to Port Newark, and tendering it to a Puerto Rican Division vessel for carriage to Puerto Rico.

Sea-Land testified that due to the difference in operation it incurred an increased cost of \$.097 per cubic foot to transport cargo to Puerto Rico via Port Newark and that it was because of the additional expense involved in the indirect movement that it established the \$500 minimum rate.[6] Thatcher objects to the adoption of Sea-Land's cost

---

[5] *U.S.* v. *Illinois Cent. R.R.*, 263 U.S. 515, 524 (1924).

[6] Evidence was introduced at the hearing by Sea-Land showing the cost incurred by it in transporting a cubic foot (cu. ft.) of cargo from Jacksonville to Puerto Rico indirectly (via Port Newark), and from Port Newark to Puerto Rico directly during 1962. This cost may be summarized as follows:

Ports	*Cost (cents)*
(1) Jacksonville/Port Newark	0.190
Port Newark/Puerto Rico	.379
Total	.569
(2) Port Newark/Puerto Rico	.472

The difference between the cost figures for the direct cargo from Port Newark and the transshipped cargo results from the inclusion in the former of a factor for terminal handling of local cargo in Port Newark that does not occur in connection with the transshipped cargo.

figures by the Examiner on the ground that Sea-Land is building unjustifiable elements into its cost by utilizing two divisions and an artificial allocation of costs. These contentions, however, appear to be no more than conjecture, since nowhere in the record has Thatcher presented any concrete evidence in support of their allegations. In our view, the manner in which Sea-Land divides its revenues and costs between its two divisions has no relevancy to this case because the sole issue in this proceeding is the justness and reasonableness of the total charge applied by it from Jacksonville to Puerto Rico.

Thatcher also offered considerable evidence to attempt to show that it was unable to quote prices competitively from its Tampa plant because of the existence of Sea-Land's $500 minimum rate and that consequently it suffered a lessening of business. The Examiner properly concluded that the evidence in the record did not support this contention.

Thatcher started its Tampa plant in 1960 the year that Sea-Land commenced its indirect service to Puerto Rico. Thatcher submitted a schedule showing shipments of bottles to Puerto Rico from its Tampa factory via Jacksonville for the period 1960 through April 1963.[7] Thatcher points to the fact that for the first 4 months of 1963 it did less business with Puerto Rico than it did in the first 4 months of 1962, and it attributes this decline to Sea-Land's minimum rate. Even a cursory examination of the schedule submitted demonstrates that Thatcher is not seeing the forest for the trees, for this schedule also shows that during the years 1960 through 1962 inclusive Thatcher tripled its tonnage while increasing the dollar value of its exports from its Tampa plant from $116,000 to $328,000. During this period, Sea-Land's 115 cents per 100 lb. rate from Port Newark was in effect, Sea-Land's $500 minimum rate from Jacksonville, and the higher rates of SACL and TMT were all in effect. Utilizing Thatcher's own figures, we can only conclude that Sea-Land's minimum $500 rate in no way stifled or lessened Thatcher's business. As the Examiner stated:

> It appears odd that after operating for 3 years with the $500 rate and effecting a rather marked increase in business during that period that Thatcher should now claim that the $500 rate has been unduly prejudicial and operated to its disadvantage.[8]

[7] This schedule read as follows:

Shipments to Puerto Rico from Tampa Plant—by Year

Year	*Dollars*	*Tonnage*
1960	116,000	1,004
1961	146,000	1,318
1962	328,000	3,243
1963 (4 mos.)	72,000	623

[8] It is well established that the value of a service to the shipper in a general sense is the ability to reach a market at a profit. See *Gulf Westbound Intercoastal Soya Oil Meal Rates*, 1 USSBB 554, 560 (1936); *Eastbound Intercoastal Lumber*, 1 USMC 608, 620 (1936).

On the basis of the foregoing, we are of the opinion that the existence of Sea-Land's minimum charge of $500 per container load shipment cannot and does not subject shippers to undue prejudice or discrimination in violation of the Shipping Act, 1916.

An order dismissing the complaint will be entered.

By the Commission.

FEDERAL MARITIME COMMISSION

No. 1082

THATCHER GLASS MANUFACTURING CO., INC.

v.

SEA-LAND SERVICE, INC., PUERTO RICAN DIVISION

ORDER

This proceeding being at issue upon complaint, having been duly heard, and full investigation having been had, and the Commission on this day having made and entered a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding is dismissed.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1084

Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports

Decided August 18, 1965

Assessment of wharfage charges on grain moving through marine terminal elevators on the Pacific coast pursuant to the Department of Agriculture's Uniform Grain Storage Agreement found not to constitute an unjust or unreasonable practice under section 17 of the Shipping Act, 1916.

Joseph E. Quin and *Charles W. Buck* for Secretary of Agriculture and Commodity Credit Corporation, Intervener.

H. Stanton Orser for Stockton Elevators, Port of Stockton Grain Terminal, Inc., Port of San Francisco Grain Terminal, Inc., Koppel Bulk Terminal, PVO Long Beach Elevators, Los Angeles Harbor Grain Terminal, West Coast Checkerboard Elevator Co., and California Association of Terminal Elevators; *Clarence Morse* for Sacramento Yolo Port District; *J. Richard Townsend* for Stockton Port District; *Arthur W. Nordstrom* and *Walter C. Foster* for Port of Los Angeles; *Miriam E. Wolff* for San Francisco Port Authority; *Thomas J. White* for Archer-Daniels-Midland Co., Kerr Grain Corp., Continental Grain Co., F. H. Peavey & Co., North Pacific Grain Growers, Inc., Cargill, Inc., Lewis Dreyfus Corp. and Harbor Island Dock Co.; *Leslie E. Still* for Port of Long Beach; *J. Kerwin Rooney* for Port of Oakland; *Aaron H. Glickman* for California Association of Port Authorities, and *William R. Daly* for San Diego Unified Port District; respondents and interveners.

Norman D. Kline and *Frank Gormley*, Hearing Counsel.

Report

By the Commission (John Harllee, *Chairman;* James V. Day and Ashton C. Barrett, *Commissioners*):

This case comes before us on exceptions by the Department of Agriculture to an Initial Decision of the Chief Examiner. Agriculture excepts generally to the entire Initial Decision as well as specifically to certain alleged errors of the Examiner.

The exceptions fall into three general categories:

a. Those making arguments raised before and correctly disposed of by the Examiner.

b. Those pointing out alleged factual errors in the Initial Decision.

c. Those alleging that portions of the Initial Decision are unclear.

The vast majority of Agriculture's exceptions was considered by the Examiner and in our opinion correctly disposed of in the Initial Decision.

We therefore adopt the Examiner's Initial Decision as our own with modifications which have been made to correct factual errors pointed out by Agriculture or for the purposes of clarification. Footnotes have been inserted indicating places where changes have been made and places where suggested changes have been rejected:

By order dated December 19, 1962, the Commission instituted an investigation to determine whether the practice of assessing wharfage charges on grain moving through marine terminal elevators on the Pacific coast of the United States pursuant to the Department of Agriculture's Uniform Grain Storage Agreement (UGSA) constitutes an unjust and unreasonable practice within the meaning of section 17 of the Shipping Act, 1916. The marine terminal elevators listed below were named respondents.[1]

The order recited that both the General Accounting Office and the Commodity Credit Corporation (CCC) had questioned the propriety of such wharfage charges which are assessed on CCC-owned grain at Pacific coast elevators only.

The Department of Agriculture and CCC, an agency thereof, intervened. They are hereinafter referred to as "Agriculture." Also intervening were Sacramento-Yolo Port District, San Diego Unified Port District, the California Association of Port Authorities, and the California Association of Terminal Elevators. The latter interveners sup-

[1](a) Port of Stockton, Calif.; San Francisco Port Authority, San Francisco, Calif.; Port of Long Beach, Long Beach, Calif.; Port of Los Angeles, Los Angeles, Calif.; Port of Oakland, Oakland, Calif.

(b) Stockton Elevators, Stockton, Calif.; Port of Stockton Grain Terminal, Inc., Stockton, Calif.; Port of San Francisco Grain Terminal, Inc., San Francisco, Calif.; Koppel Bulk Terminal, Long Beach, Calif.; Pacific Vegetable Oil Corp., Long Beach Elevators, Stockton, Calif.; Los Angeles Harbor Grain Terminal, Wilmington, Calif.; West Coast Checkerboard Elevator Co., Oakland, Calif.; Cargill, Inc., Portland, Oreg.; Continental Grain Co., Portland, Oreg.; Lewis Dreyfus Corp., Portland, Oreg.; Kerr Grain Corp., Portland, Oreg.; F. H. Peavey & Co., Portland, Oreg.; Archer-Daniels-Midland Co., Portland, Oreg.; Harbor Island Dock & Warehouse Co., Seattle, Wash.; North Pacific Grain Growers, Inc., Portland, Oreg.

port respondents' position and hereinafter will be included in the term "respondents".

The UGSA is entered into by CCC and various warehouses about the Nation covering the receiving, storing, and loading out of CCC or other Government-owned grain. Respondents who are signatories to UGSA have been asked by Agriculture to execute a "Port Supplement" to UGSA, the effect of which is to delete the requirement that CCC pay wharfage. Only one of the respondents, the Lewis Dreyfus Corp. (Portland, Oreg.), signed the supplement.[2]

The publicly owned port terminals lease their grain elevators to independent contractors, who conduct the public port terminal operations. The public port terminals are not signatories to UGSA, but collect wharfage on bulk grain (including CCC grain) and other commodities.

The other respondents are signatories to UGSA. These include the lessee operators at public terminals in California, which do not receive wharfage, and the privately owned or the leased terminals in the Pacific Northwest, which do assess and collect wharfage on CCC and other bulk grain, with the exception of the Dreyfus Corp.

Contentions of parties

Agriculture contends that the practice in question is unjust and unreasonable because (1) no service, either direct or indirect, is offered by respondents in return for wharfage; (2) that the UGSA rate for receiving, storing, and loading out fully compensates respondents; (3) that there is no economic justification for wharfage under the UGSA; (4) that operations of marine terminal elevators should be looked at *en toto* and Pacific coast elevators should be treated in the same manner as other elevator operators; and (5) that the operation of a marine terminal elevator is a nonwharfinger activity under the so-called Freas formula (approved by the Commission in docket 640 *infra*), and therefore assessment of a wharfage charge is improper.

Agriculture states that it does not object to wharfage on sacked grain, that it is not seeking any exemption from the payment of wharfage on bulk grain on the ground that as a Government agency its situation would be different from that of other shippers, and that wharfage is not a proper charge even against commercial bulk grain.

The position of respondents, which is concurred in by Hearing Counsel, is the exact opposite of Agriculture's. Additionally, they contend that historically, wharfage has been recognized as a valid charge for the *use* of the facilities; and that since wharfage is a user charge, no physical service is involved.

The level of the wharfage charges is not an issue.

[2] This paragraph and the two following it have been reworded to correct the errors noted in Agriculture's first exception.

Jurisdiction of Commission [3]

In certain cases the Commission has considered the status of grain elevators which not only provide storage for grain but also have facilities used to load grain into common carrier vessels. It has held consistently that while the storage operation was not subject to its jurisdiction, the operation of loading ships was a terminal activity over which it did have jurisdiction. *D. J. Roach* v. *Albany Port District*, 5 F.M.B. 333 (1957); *Agreements 8225 and 8225-1*, 5 F.M.B. 648 (1959); *California Stevedore & Ballast Co.* v. *Stockton Port District*, 7 F.M.C. 75 (1962).

Wharfage generally

The Commission in *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21, 24 (1948), approved the following definition of wharfage contained in the tariff of the Port of Seattle:

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

In all essential respects this is the meaning of wharfage as defined in the tariffs of all respondents herein, also as used in the Freas formula. Wharfage is assessed against bulk grain as on other commodities.[4]

In *Interchange of Freight at Boston*, 2 U.S.M.C. 671 (1942), the Commission held that the practice of charging wharfage for use of wharf facilities by cargo passing on, over, or through the facilities was a lawful practice, and that the wharf operator had a clear right to compensation for the use of its facilities.

In *Evans Cooperage Co. Inc.* v. *Board of Commissioners of the Port of New Orleans*, 6 F.M.B. 415 (1961) the cargo was transferred to ship from a barge alongside the ship which was moored to the wharf, and the cargo did not move across the wharf. The Commission, nevertheless, held that the wharfage charge was properly assessed; and that whether the wharf space alongside the ship being served is utilized by others or not does not alter the obligation of maintaining the facility and of assessing users of the facility reasonable charges which will provide continued existence of the facility.

---

[3] As used here "Commission" includes its predecessor agencies.

[4] Agriculture asserts that the Examiner's reliance on the definition of wharfage contained in the tariff of the Port of Seattle was faulty as not being typical of respondents' tariffs. Our review of the evidence leads us to affirm that the Examiner was correct in stating that essentially Seattle's tariff was typical. The wharfage provisions in all the tariffs are alike in that they clearly show that wharfage is intended to be a "use" rather than a "service" charge.

The courts recognized early the right of riparian owners to levy a reasonable wharfage charge as compensation for the use of their facilities. *Ensminger* v. *People*, 95 Am. Dec. 495 (Illinois 1868); *Ouachita Packet Co.* v. *Aiken*, 121 U.S. 444 (1887).

Wharfage had its inception on the Pacific coast more than 100 years ago. Tariffs of terminals in both California and the Pacific Northwest issued prior to 1920 show that wharfage was assessed at that time. It has been assessed on both general cargo and bulk cargo; and on bulk grain moving pursuant to the UGSA since that agreement was established. Charges range from 36 cents per net ton in the Northwest to 45 and 50 cents in California.

(1) *It is found and concluded* that (a) wharfage by definition is a charge against cargo for the use of terminal facilities, not for physical services rendered to the cargo; (b) that the owners of marine terminal facilities are entitled as a matter of law to compensation for the use of their facilities; (c) that use of facilities is made by the cargo even though it does not touch the wharf; (d) that wharfage is justified on the Pacific coast from a historical standpoint; and (e) that wharfage on bulk grain has been assessed at marine terminal elevators on the Pacific coast since the inception of such movement.

Applicability of the Freas formula

The pattern of port terminal charge at California ports was established in Commission dockets 555 [5] and 640.[6] This pattern was extended to ports in the Pacific Northwest in docket 744,[7] wherein the Commission approved the application of the Freas formula to terminals at those ports.

In docket 555 the Commission recognized the principle of allocation of expenses and charges to the various uses and services, and the identification and separation of charges as between ship and cargo, based on the so-called Edwards-Differding formula. It found also that the failure of a port terminal to charge compensatory rates for a particular service casts an unfair burden on users of other service in violation of sections 16 and 17 of the 1916 act.

In docket 640 the Commission approved the Freas formula,[8] which was a refinement and simplification of the Edwards-Differding formula, "as a proper method of segregating terminal costs and carrying charges, and of apportioning such costs and charges to the various wharfinger services." The Commission also found that publicly owned

[5] *Practices, Etc., of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941).

[6] *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 (1948).

[7] *Terminal Rate Structure—Pacific Northwest Ports*, 5 F.M.B. 53 (1956).

[8] Howard G. Freas, then rate expert of the California Public Utilities Commission, was employed by the U.S. Maritime Commission to make this study.

terminals, as well as privately owned terminals, were entitled to a fair return on investment in wharfinger facilities.

Freas' study, which embraced the operations of 10 California port terminals for the fiscal year 1939–40, covered the primary function of interchanging cargo from inland carriers to oceangoing vessels; i.e., receiving, holding, and delivery of cargo, which activities he classified as wharfinger operations. Activities not closely related thereto were classified as nonwharfinger operations.

Freas prepared a series of schedules designed to allocate the costs of providing marine terminal facilities. Included in the schedules was a column allocating costs for "special facilities." In such column he placed oil terminals, which consist of a wharf for tying up vessels, for the support of pipelines, and for personnel engaged in tying up vessels and making line connections. In applying the formula to oil terminal wharves, Freas determined that the pipeline going over or under the wharf, and the structures and land which support it should be classified as a part of the wharfinger facility.

Respondents contend that if marine terminal elevators handling bulk grain had been in existence in California in 1940, which they deny, Freas would have included them in "special facilities," as he did oil wharves, and therefore would have classified them as wharfinger facilities.

Agriculture contends that grain terminals did exist at Stockton and San Francisco in 1940, and that Freas excluded them as nonwharfinger facilities, therefore the formula does not apply here. Its contention is based upon the opinion to that effect given by R. V. Cearfoss, a traffic manager for Agriculture, whose knowledge of the Freas formula was obtained from reading the formula and report thereon, and the testimony and decisions thereon.

Respondents' contention that the Freas formula does apply is based upon the testimony of Philip E. Linnekin, a certified public accountant who worked with Freas in developing the formula; who visited the terminals involved and gathered the basic data used in the study; and who has appeared as an expert witness on the application of the Freas formula in several Commission proceedings.

Linnekin and another qualified witness testified that in 1940 all of the grain moving over California terminals was in sacks; that the so-called grain terminals at Stockton and San Francisco were warehouses for sacked grain, located away from the dock; that the movement of sacked grain from warehouse to ship involved the use of wharfinger facilities; that wharfage was charged on such grain; and that bulk grain did not commence to move over marine terminal elevators in California until after World War II. The wharfage charge was continued on bulk grain—by both port authorities and marine terminal elevators on the Pacific coast.

Linnekin also testified that if there had been bulk grain terminals in California at the time of the Freas study (1940), they would have been included in Wharfinger operations as "special facilities", as were bulk oil and lumber terminals, and the costs of such operations would have been separately determined. After including lumber and oil terminals as special facilities, the formula states: "A like course should be followed in connection with the handling of any other commodity that moves in large quantities under circumstances which are unique," citing as an example a wharf devoted exclusively to the handling of sugar.

Linnekin testified further that under the Freas formula a portion of all costs pertaining to facilities which are required by and used by the cargo in connection with interchange between inland carriers and oceangoing vessels is properly allocated to wharfage; that such principle is applicable to bulk grain, as well as to other cargo; that wharfage is assessed and has been assessed for many years on all cargo for the use of terminal facilities; and that it is a clearly justifiable charge against bulk grain under the Freas formula.

The following facilities at port terminal elevators should be allocated to wharfage under the principles of the Freas formula, according to Linnekin: Land, railroad trackage, foundation, headhouse, dock or wharf, ship gallery, cleaning and conditioning equipment, scales, elevator legs, conveyors, truck dumper, railroad car tipple, barge unloader and barge dock, inspection station, locomotives or truckmobiles, dust collection system, and improved roads.

The formula provides separate charges for labor and services in connection with handling the cargo. Linnekin states, therefore, that when the formula is properly applied, it is not possible to duplicate costs in more than one tariff charge.

(2) Upon basis of the foregoing testimony *it is found and concluded* that the marine terminal elevators involved here are engaged in wharfinger operations, and that under the principles of the Freas formula, the assessment of wharfage on bulk grain at such facilities is justified.

Economic justification of wharfage on bulk grain

Respondents presented testimony to show that the assessment of wharfage is economically justified as a means of recovering compensation for the use of their facilities which pertain to the terminal aspects of their operations, i.e., those facilities which they are required to provide for the rapid and efficient interchange of bulk grain from inland carriers to oceangoing vessels.

Linnekin compared the facilities of a group of 11 port terminal elevators with a group of 5 country, i.e., inland elevators, using examples in each category which he considered typical on the Pacific coast. The country elevator was used because he considered that it represents the extent of the facilities of grain elevators which are used for purely storage purposes. This purpose was to contrast what he regarded as the relatively simple operation of a country elevator with the complex operation of a marine terminal elevator.[9] He testified that the facilities required by the marine terminal elevator were those described above; and that they were necessary to the interchange of cargo between inland carriers and oceangoing vessels. Similar evidence was presented by Harry N. Starr, a civil engineer experienced in the construction of grain terminals, and Pacific coast superintendent of respondent Cargill, in charge of three marine terminal elevators and eight country elevators. Starr showed the difference between a marine terminal elevator and a country elevator, stating that the country elevator was located away from a seaport. Its operations are relatively simple. It has two main purposes, receiving or collecting grain from its local producing area and forwarding the grain domestically or to the marine terminal elevator. Linnekin's comparison shows, among other wide differences, that the average marine terminal elevator, compared with the average country elevator, can receive twice as much grain per hour by truck, can handle almost five times as many rail cars per day, requires twice as much land, and has an investment per bushel of more than three times that of the country elevator, i.e., $1.19 per bushel as against $0.36 per bushel. Agriculture computes an average capital investment of $0.46 per bushel for 36 country and inland elevators in California, Oregon, and Washington.

Respondents emphasize that despite these significant differences, marine terminal elevators receive the same compensation as country elevators on CCC-owned grain.

Agriculture points out a wide variance between the average capital investment in country elevators shown by Linnekin and Starr. This is not significant when it is considered that Linnekin used original cost without deducting depreciation, while Starr used replacement cost; and Linnekin showed the investment in the complete marine terminal elevator, including the storage facility, while Starr considered only those items of cost at the marine terminal elevator that are allocated to wharfage, excluding the storage facility.

Agriculture contends that investment per bushel should be com-

---

[9] He pointed out that at country elevators there are no wharves, the structures are less costly, there is far less machinery, and the area and value of land is greater—than at marine terminal elevators.

puted upon basis of the volume handled rather than on capacity of the elevator. While the rate of turnover might be a consideration in determining the level of the rate, which is not involved here, it would have no bearing on the question of whether wharfage is properly assessed because the investment must be made to provide adequate facilities and it must be recovered, regardless of whether there is a turnover of once or many times a year.

In an effort to show that the country elevators used by Linnekin and Starr were not typical, Agriculture presented testimony to the effect that inland elevators elsewhere in the country and on the Pacific coast have equipment similar to and sometimes more elaborate than those of marine terminal elevators.[10] Since the area of this investigation is limited to the Pacific coast, the testimony as to elevators in the Midwest and elsewhere is not germane.

Agriculture's tenth exception involves the semantics of this grain elevator classification. As Agriculture admits the validity of the classification was not at issue, the exception is rejected.

While it is true that all of the inland terminals cited by Agriculture combined might have the same equipment and do generally the same things that a marine terminal elevator can do, they cannot do all of the things the latter can do, for instance loading oceangoing ships.

(3) From the foregoing *it is found and concluded* that marine terminal elevators have an investment in facilities which pertain to the terminal aspects of their operations, and that there is an economic justification for their assessment of wharfage in order to recoup the investment in such facilities.

Coverage and adequacy of UGSA payment

Agriculture contends that even if wharfage is proper, it is compensated for by the UGSA rate for receiving, storing, and loading out of grains. Its position is that such rate compensates the marine terminal operator for all services rendered from the time grain is received until it leaves the spout over the ship, and to be compelled also to pay wharfage constitutes a double payment.

The public port terminals who are not parties to the UGSA point out that even if the UGSA rates are fully compensatory to the ter-

[10] Agriculture divides grain elevators or warehouses into (1) terminal elevators or warehouses and (2) country elevators or warehouses, on the basis of whether official weights and grades can be secured at the warehouse. These are furnished by the former but not the latter. The terminal elevators are divided into marine or port terminal elevators and inland terminal elevators, the latter being known generally as subterminal elevators. It is not apparent that this classification for the purposes of the UGSA is any more valid than that used by respondents.

minal elevators with whom Agriculture has a UGSA contract, such rates provide no compensation at all to them as nonsignatories to such contract. They contend therefore that the UGSA can have no legal effect upon their right to collect any and all lawful charges.

Agriculture relies upon a cost study to prove that the UGSA rates compensate for wharfage. This cost study made in 1959, was adjusted to cover eight of the marine terminal elevators on the Pacific coast, and elevators in seven Western States. After adjustments were made in items of depreciation, interest on investment and working capital, the storage and handling costs were found to be 12.26 cents per bushel at the eight port terminals; and 12.9 cents at the country elevators and 12.29 cents at the port terminals in the seven Western States. Agriculture emphasizes that all of these costs are substantially less than the 16 cents paid for storage and handling under the UGSA. From this fact Agriculture concludes that such charge provides compensation for all cost items which relate to the operations of grain elevators, including wharfage.

Respondents criticize this cost study on the following grounds. It admittedly covers storing and handling only and specifically excludes wharfage and all expenses of wharfage, value of wharfage facilities, return on investment therein, and cost of shrinkage and deterioration. It is outdated and is involved in technical disputes such as a possible distortion because the basic cost used, although adjusted, is an average for all terminals throughout the country and therefore not applicable to marine terminal elevators on the Pacific coast. It is unrealistic to assume that a marine terminal elevator and a country elevator can operate on the same charges, and that no additional charge should be made at marine terminal elevators for use of added facilities which are not required at country elevators. The cost of operation of marine terminal elevators has increased from 25 to 40 percent since 1959, compared with the 30 percent differential between the developed cost of 12.29 cents per bushel and the storage and handling rate of 16 cents per bushel provided by UGSA. Since the present-day volume of grain handled is less than in 1959, the cost per bushel obtained by dividing the total cost by bushels handled would be materially higher, resulting in a narrower margin between cost per bushel and the UGSA rate.

Agriculture admits that costs probably have increased, but states that as a result of the Examiner's ruling, it was unable to obtain later cost data from respondents.[11] Agriculture also admits that it excluded wharfage as income or expense and did not make an allowance for return on investment because "The study was designed to

[11] Considering the findings hereinafter made and the basis therefor, the fact that the cost study is not up to date is irrelevant.

show the revenues and costs of the operations of the grain elevator in receiving, storing, and loading out grain under the UGSA. If wharfage figures had been included they would now have to be taken out to reveal what we contend is the pertinent and proper data for the total operations of the grain elevators."

Thus far, it has been found that wharfage is justified under the Freas formula and from an economic standpoint, but that it was not included as a factor in establishing the UGSA rate, and that if it had been included it would be taken out.

Further concerning the coverage of the UGSA rate, it is important to note that the UGSA expressly provides for the payment on CCC grain of "Customary or mandatory wharfage charges where grain is received at port locations." A similar provision has been in effect in the UGSA since 1940. Wharfage charges published in respondents' tariffs fit this description. The UGSA does not provide for any other type of compensation in lieu of wharfage, nor does it provide that wharfage will not be paid. This being so, how can it be said that other types of compensation specified in UGSA would compensate for wharfage?

The only other form of compensation specified in the UGSA, except wharfage, relates solely to the handling and storing of grain. The handling charge—for receiving and loading out—is for the service of the physical handling of the grain into and out of the elevator, while wharfage is for the use of terminal facilities. Storage is the service of safekeeping the grain in the warehouse and includes insuring, preparation of warehouse receipts and other similar services. Storage is assessed on the basis of time per bushel, and wharfage on a per-bushel or per-ton basis.[12]

Finally, it will be noted that the rates paid for handling and storing CCC grain are the same for marine terminal elevators, and for country elevators which do not have terminal facilities. This indicates that the charges cover only what the name implies—the storing and handling of grain. This is apparent because the additional charges which were to be paid, i.e., wharfage charges, were to be paid only at port locations. The only logical conclusion to be drawn from these facts is that handling and storage charges were not intended to cover compensation for the additional facilities of a terminal nature which are not found at a country elevator.

(4) *It is found and concluded* therefore that the UGSA handling and storing charges are not a duplication of the wharfage charge, and that they do not provide any compensation for wharfage.

---

[12] The statements concerning the differences between wharfage and handling and storing charges are based upon the testimony of Harvey B. Hart, manager of the port of Longview, Wash.

Assuming that such rates did compensate in some manner for wharfage, the fact that Agriculture prefers to pay for terminal services and uses in a lump sum does not render the Commission approved and required[13] practice of publishing and charging individual rates for separate service unlawful. This is especially true on the Pacific coast where the terminal rate structure, more than in any other region of the country, has been litigated before, and analyzed and approved by, the Commission. It is inconceivable that a rate system which has been stabilized upon such sound principles, should be suddenly upset because of Agriculture's preferred method of dealing with marine terminal elevators in the storing and handling of CCC-owned bulk grain. To the contrary, it would seem more logical and less difficult for Agriculture to clarify the ambiguities in its agreements and practices concerning wharfage, and to make clear provisions in the UGSA for legitimate wharfage.

(5) In view of the fact that the UGSA provides for the payment of customary and mandatory wharfage at port locations, and the further fact that its rates for storing and handling do not compensate for wharfage, *it is found and concluded* that the UGSA is not relevant to the question of whether the practice of assessing wharfage on CCC-owned bulk grain at marine terminal elevators on the Pacific coast is lawful.

Justification of wharfage though no service is provided

Agriculture maintains that wharfage is not justified because no service is provided in return for the wharfage charge.

It is clear from the approved definition of wharfage at Seattle in 3 U.S.M.C. 21, *supra*, from the similar definitions in respondents' tariffs, from the treatment of wharfage in the Freas formula and Linnekin's testimony, thereon, and from the distinction made by Hart between handling and wharfage, that wharfage is a user charge and does not contemplate the performance of a physical handling service as contended by Agriculture.

The marine terminal elevators here, like general cargo terminals, provide berthing facilities, i.e, docks and wharves, vertical instead of horizontal transit sheds, cargo areas, equipment to load and unload trucks and rail cars, and conveyors to load ships. Bulk grain uses the conveyor system for the interchange from elevator to ship in the same manner as oil uses a pipeline.

---

[13] In *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21 (1948) the Commission stated that "We are of the opinion that there should be uniform and clear definitions of various terminal services, and a clear and inclusive list of the specific activities contained in each definition in order to enable the terminal operators, the shipping public, carriers, and us to determine whether such service is bearing its fair share of the cost load."

Agriculture contends that the conveyor and spout, also the berthing facilities are necessary to the operation of the elevator and to a degree are a part of the investment in the elevator. It also maintains that whatever benefit the ship receives from the use of the wharf is compensated for by dockage, and in some cases service charges paid to the marine terminal elevator. As seen hereinbefore, these contentions cannot be sustained under the principle of the Freas formula.

Agriculture admits that there is some use made of wharf facilities, i.e., "electricity to operate trimming machines if required, and the use of piers for the movement of men and equipment to and from the ship."

(6) *It is found and concluded* that CCC-owned bulk grain uses respondents facilities when transferred from elevator to oceangoing vessels, and as stated hereinbefore, respondents are entitled to assess wharfage for the use of such facilities.

Consequences of elimination of wharfage on CCC-owned grain [14]

The record shows that respondents have invested large sums in the construction of marine terminals and that they rely heavily upon wharfage to recoup their investment, and for maintenance and improvements. For instance, at the port of Los Angeles wharfage is responsible for about 37 percent of total revenue, bulk wharfage amounting to almost 7.5 percent. At the port of Long Beach wharfage on bulk commodities represents 7 percent of total revenue, which if eliminated would reduce its profit from 12 to 5 percent.

The exemption of bulk grain from wharfage might unlawfully prejudice or disadvantage other commodities using the wharf, and the exclusion of Agriculture from the wharfage charge which other signatories to the UGSA are required to pay might be an unlawful prejudice against them.

Exclusion by Examiner of evidence relating to wharfage at Gulf and Atlantic ports

Agriculture states that "respondents look at the issue from the point of view of the west coast export trade, and that [Agriculture] approaches it from a national viewpoint." It adds that the operations of grain elevators under the UGSA should be looked at *en toto*, since those on the Pacific coast are no different than other elevators in the United States.

Agriculture offered evidence relating to wharfage practices of marine terminal elevators at gulf and Atlantic ports, which was excluded as evidence by the Examiner, but accepted as an offer of proof.

[14] This section has been reworded to clarify the portions of the Initial Decision objected to in points 16 and 17 of Agriculture's exceptions.

This testimony is not relevant for the following reasons. The order concerns only grain moving through port elevators on the Pacific coast. The terminal rate structure on the Pacific coast is patterned after decisions of the Commission, which is not true as to the terminal situation at gulf and Atlantic ports. Many of the port terminals on the east coast are owned by railroads which do not assess wharfage because such charges are included in a shipside rail rate covering all terminal services, and applying to and from nonrail as well as rail terminals. For this reason nonrail terminals cannot assess wharfage on rail traffic because to do so would result in double charges for wharfage and consequent loss of business to the nonrail terminals. *Wharfage Charges and Practices at Boston, Mass.*, 2 U.S.M.C. 245 (1940). Also, the Commission refused to consider the failure to charge wharfage at New York as pertinent to the practice in the gulf, stating that "The New York area undoubtedly reflects such costs in charges for other services." *Evans Cooperage case*, *supra*.

ULTIMATE FINDINGS AND CONCLUSIONS

In view of the findings and conclusions reached hereinbefore, *it is found and concluded* ultimately that the practice of assessing wharfage charges on grain moving through marine terminal elevators on the Pacific coast pursuant to the Department of Agriculture's Uniform Grain Storage Agreement does not constitute an unjust or unreasonable practice within the meaning of section 17 of the Shipping Act, 1916.

The proceeding is discontinued.

Commissioner Hearn concurring:

I concur in the result reached by the majority. My concurrence is based on the simple fact that terminal operators' properties are being *used* for the lading of Agriculture's grain, and the use of those facilities merits, indeed requires, compensation. The level of that compensation, i.e., the rate, is not in issue here. It is unrealistic, I believe, to suggest that only *services* merit compensation.

John S. Patterson, Vice Chairman, dissenting:

CONCLUSION

Based on the record before me in this proceeding, my conclusion is that the assessment of wharfage charges on bulk grain stored and loaded out through port elevator facilities of the respondents pursuant to the Uniform Grain Storage Agreement (UGSA) between Commodity Credit Corporation (CCC) (an agency of the United States administered within the Department of Agriculture (Department)) and bulk grain terminal operators is an unjust and unreasonable practice in contravention of section 17 of the Shipping Act, 1916 (Act).

As regards my conclusion stated above, the reasons in support and my dissent are advanced in the following statement, after noting the points on which I have no differences and the points on which I differ with the majority report herein.

I have no differences with the majority opinion in regard to our jurisdiction, nor to its findings (1) as to points (a) through (e) on what wharfage is for or (2) that terminal operators are engaged in wharfinger operations or (3) that there is an economic justification for assessment of wharfage by terminal operators or (6) that CCC-owned bulk grain uses respondents' facilities, except for the statement respondents are "entitled" to assess wharfage presumably by virtue of such use. I do not agree with the findings (4) and (5).

Findings (1), (2), (3), and (6) are adequate as far as they go, but fail to reach the basic problems of, *first*, *whether* the use of terminal facilities available for general cargo is the same as the use of bulk grain facilities under modern conditions and, *second*, whether it is a reasonable practice to charge wharfage for the latter use when other means of compensation exist. With regard to the *first point*, the majority refers to charges against "cargo," to "terminal facilities," to "compensation," and to "wharfinger operations" as though these were all well understood things for which the cargo must bear a charge in order to allow recovery of an investment. Whether or not any regulation or practice making a charge is just and reasonable, however, requires detailed examination of what is described by such terms as disclosed by the present record. When the cargo is bulk grain and the terminal facilities are highly specialized equipment and the compensation is a schedule of rates paid by contract and the wharfinger operations of the past no longer exist, we must go further and adjudicate the special consequences of the new facts, instead of relying on the testimony of a witness as to what might have been almost 25 years ago if today's facts existed then. With regard to the *second point*, the majority refers to the adequacy of compensation by finding fault with a cost study used to determine the schedule of rates to be paid by contract, but such a complaint does not reach to the reasonableness of a regulation or practice of charging wharfage by respondents as "other persons"; rather it is addressed to an economic issue over which we have no jurisdiction; namely, whether another Government agency has adequately negotiated and compensated for what it uses.

Both (4) and (5) seem to agree that wharfage is justified because the UGSA rates and charges pursuant thereto do not provide the terminal operator with enough money to "compensate" for the use of wharf facilities by storers of bulk grain. If wharfage is justified by economics the regulation or practice becomes a just and reasonable one, the argument goes. This conclusion, stated one way or another, is also reflected in the majority's findings and conclusions (1), (2), (3), and (6), and whether it is so or not seems to be the central issue. The response is that the facts do not support a conclusion of noncompensation for what is used unless wharfage is paid. First, the CCC as a storer of bulk grain does not use the general cargo wharf part of the terminal, and, second, CCC pays for everything it uses under the UGSA; consequently, charging wharfage for bulk grain handled under UGSA is an unjust practice.

The majority's reasoning is also supported by rhetoric which fails to take these significant factors of separation and differences in operations into account. Typical of reliance on verbal forms is the semantic quibble over whether wharfage is a use rather than a service charge. The use of a facility is the same thing as obtaining a service. If there is a charge for service involving use and then another charge for "use," there is a duplication of charges for the same thing. Another example is Finding (2) "that the marine terminal elevators involved here are engaged in wharfinger operations." Such a verbal classification as "wharfinger" is not enough to resolve the issue of reasonableness in what respondents are doing, regardless of how the operations are labeled.

The facts and discussion of the consequences therefrom follow:

FACTS

1. The Department's Uniform Grain Storage Agreement Form CCC-25 (5-17-60) provides, with respect to wharfage:

> 5. AGREEMENT TO COVER ALL THE GRAIN ACCEPTED—(a) The provisions of this agreement shall apply to all the grain accepted by the warehouseman and the Uniform Grain Storage Agreement Schedule of Rates, hereinafter referred to as "Schedule of Rates," shall apply to all the grain on which warehouse charges are payable by CCC. All the grain accepted by the warehouseman shall be received, stored (if in storable condition) up to the capacity made available by him, conditioned, loaded out, billed and shipped as requested by CCC or other authorized persons in accordance with the provisions of this agreement.

The same provision has been in prior forms. The "Schedule of Rates" referred to contains the provision, "The following additional rates shall apply: * * *. 2. Customary or mandatory wharfage charges where grain is received at port locations" (exhibit 28).

Under the UGSA the warehouseman represents that he owns or operates the warehouse and has the specified equipment and facilities for receiving, handling, conditioning, warehousing, storage, and loading out bulk grain covered by the agreement. Receiving grain is defined as receiving and unloading grain from cars, boats, barges, trucks, or other conveyances and elevating into the storage place. Loading out includes moving to and loading into cars, boats, etc., and other conveyances (exhibit 28). Language of the same or similar import has been used since 1940 (exhibit 36).

2. Wharfage charges paid pursuant to UGSA obligations on CCC grain at west coast ports for the 6 months ended December 31, 1961, amounted to $375,000, or an average of $2,000 per day (Id). Wharfage is not paid by CCC at gulf coast, east coast, and Great Lakes ports (Id). Wharfage is not paid at one bulk-grain terminal facility at Portland, Oreg.

3. Fairly typical examples of tariff provisions relating to wharfage at ports in California, Oregon, and Washington are as follows:

PORT OF STOCKTON, CALIF., TARIFF NO. 3—Wharfage is the charge assessed against merchandise, cargo, vessels' stores, fuel, and supplies, for passage on, over, under, or through any wharf, pier, or sea-wall structure, inward or outward, or loaded or discharged while vessel is moored in any slip, basin, channel, or canal.

Oregon—Washington—Wharfage is a charge for the use of grain facilities and is assessed on all grain received therein whether or not such grain is eventually delivered to the vessel. No services are covered by this charge. (See the following tariffs: LDC Dock and Elevator Terminal and Grain Tariff No. 6—applying at LDC Dock & Elevator, Portland, Oreg., operated by Lewis Dreyfus Corp., owner; Cargill Incorporated Grain Tariff No. 15—Seattle, Wash., and Portland, Oreg.; Archer-Daniels Midland Grain Tariff No. 5—Vancouver, Wash., and Tacoma, Wash.; Long Bell Warehouse Grain Tariffs 8 and 17—Longview, Wash., elevator, operated by Continental Grain Co.; Continental Portland Elevator Grain Tariff No. 6—elevator operated by Continental Grain Co., owner; F. H. Peavey & Co. Tariff No. 2—Portland, Oreg.; Kerr Grain Corp. Tariff—Portland, Oreg.; North Pacific Grain Growers Tariff—Seattle, Wash. The only exception is Harbor Island Dock & Warehouse Co. Tariff No. 11—Seattle, Wash.) (The tariff of Seattle is not relevant because bulk grain is not subject to the tariff.) Grain terminals, as distinguished from port authorities, have comparable provisions, including express statements that make wharfage applicable to "all grain," "whether or not delivered to vessel," and "grain and other bulk commodities" (exhibit No. 17).

4. Wharfage began as a charge on the west coast more than 100 years ago and tariffs issued prior to 1920 show wharfage charges at that time (Tr., 137–138, 199–200).

5. Grain formerly was moved in sacks and wharfage was collected thereon the same as on general cargo (Tr., 52; 138, 1. 16–25; and 510). Before the modern terminal was developed, when grain was handled in bulk, it was by means of a gantry crane and "clam shell" or bucket-type holders. Fast conveyor belts and pneumatic methods had not been developed (Tr., 52, 1. 4–8). When grain began being moved in bulk, wharfage continued to be charged (Tr., 138–9, 202–3). Bulk movements did not begin through California terminals until after World War II (Tr., 139, 1. 1–4). The movement of grain in bulk and facilities therefor was common in the Northwest before 1948, but was just starting in California during 1944–1946 when the U.S. Maritime Commission made a study applied "to terminal operations for the prewar fiscal year ending June 30, 1940", 3 USMC 57, 59. At the time of the study, "the only grain handled was in sacks entirely" at Stockton (Tr., 510). The change to bulk in California occurred mostly after 1948 (Tr., 511).

6. Bulk movement of grain by conveyor systems began after the construction of silo storage facilities on land adjacent to deep water sufficient for a ship. Such facilities consist of the following:

(1) Headhouse.
(2) Ship gallery and dock.
(3) Elevator legs.
(4) Cleaning and conditioning equipment.
(5) Conveyors.
(6) Truck dumper.
(7) Railroad car tipper.
(8) Barge unloader.
(9) Dust collector.
(10) Inspection and weighing station.
(11) Locomotives, scoopmobiles, trucks, etc.
(12) Storage silos.

A diagram of typical facilities is a part hereof as attachment I. These facilities are separate from general cargo wharves, but may be adjacent thereto, as shown on attachment II.

7. A wharf is a structure built on the shore and extending into deep water for the purpose of enabling ships to come along-side to receive or discharge cargo or passengers thereon. Wharfage is a charge made for the use of the wharf, including temporary storage or resting by cargo before being moved further on its journey. Property and passengers usually move to and from land to water conveyance over the surface of the wharf (De Kerchove International Maritime Dictionary

and Glossary of Shipbuilding and Outfitting Terms by Eddington). Wharfage is charged or assessed to the owner of the cargo.

8. The purpose of a marine grain elevator is to get the grain from the elevator to the ship (Tr., 394). At a grain elevator terminal, grain is transferred from a storage bin or silo by elevation to a height, then out along conveyors high above the platform to which ships are moored, to movable spouts over the ship where the grain comes out into the ship's holds or storage bins for stowing by stevedores working in the holds. The stevedores spread the grain around so as to keep the ship trimmed and floating properly. The complete process was described as follows: "The men open valves under the storage bins to allow grain to flow onto the conveyor which delivers it to an elevator leg and the grain is then elevated to a shipping scale where it is weighed by a state licensed weighman. It is then dumped from the scale through a surge bin onto a conveyor which moves it from the elevator headhouse to the ship gallery. There it is taken off the conveyor belt and put down a spout which delivers it to the ship" (Tr., 20, 1. 19–21, 1. 7). The ship gallery houses the conveyors and spouts. All the work of stevedores is performed in or on the ship and the only use made of a wharf is as the source of an electrical outlet for wires connecting trimming machines, if required, and for the use of the platforms for movement of men and equipment between the land and the ship. At such facilities grain may also be inspected and classified by grade and quality.

9. At the port of Los Angeles, in charge of the Board of Harbor Commissioners, no contract with CCC is entered into, and all cargo, including bulk grain, pays wharfage only (Tr., 181, 1. 3–8). At this port there is a conveyor over the dock and along the dock reaching to ships (Tr., 176, 1. 25; 177, 1. 1–6). The grain terminal uses a small part of the wharf and has a gantry crane on the wharf and is the only fixture on the wharf (Tr., 178, 1. 22–25). The conveyor occupies a small space on the wharf, "probably two high line rail tracks * * * from an area of about 18 by 20" (Tr. 179, 1. 1–3). The plant for the grain is in the rear of the wharf (Tr., 177, 1. 11–24). The compensation that a private operator pays the Board for its use of leased premises does not include any right or compensation for the conveyor system (Tr., 178, 1. 3–8). The whole wharf is tied up to load a ship (Tr., 179, 1. 5–6). The Board is compensated entirely for use of the conveyor through wharfage (Tr., 178, 1. 9–13; 179, 1. 21–22), and the practice of assessing what passes over the wharf has existed since 1911 (Tr., 180, 1. 1–4). Counsel for San Francisco stated for the record that its "operation is physically the same as the operation at Los Angeles" (Tr., 222). (Note: The state-

ment is accepted at face value, but not as a substitute for evidence. The record lacks detailed evidence as to this port.)

10. The Department of Agriculture, Commodity Stabilization Service, Grain Division, prepared a study of commercial grain storage and handling direct operational costs. Its purpose was "to develop valid information on the actual costs of handling and storing grain in commercial facilities" (exhibit 29, p. 1) to serve as the basis for a fee schedule to compensate grain handlers. The survey was preceded by the issue of a 43-page manual for the use of personnel engaged in the study. The manual stated the purpose to develop such information and covered the techniques to be followed and the information to be developed by means of questionnaires, interviews, preparation of schedules containing data, summaries, and finally reports. The study covered approximately 100 warehouses in area 1 (see below), including 8 terminal port warehouses (Tr., 410). Detailed summary tabulations of grain storage costs and grain handling costs were prepared, which are now official records of the Department of Agriculture (Tr., 412) (exhibits 31–32). A combined storage cost and a combined handling cost summary tabulation for the eight selected west coast port terminals was presented, showing totals in cents per bushel of grain (exhibits 33–34). Survey schedules covered revenue by functions, depreciation of assets, and operating costs prorated according to business activities (exhibit 30). Each covered detailed accounting items of fixed and variable costs relative to interest on investment, insurance, taxes, licenses, leases, and rentals, personnel expenses, and so on. The survey did not include revenues or expenses expressly applicable to wharfage as such (Tr., 412, 436). Costs with reference to any part of the warehouse facility that should be allocated to wharfage were not deleted in the study (Tr., 436). The survey was completed in February 1960. The survey disclosed the following average costs:

"UGSA rate area	Average cost per bushel (cents)		
	Storage per annum	Handling	Total
1	8.7	2.8	11.5
2	7.1	3.6	10.7
3	7.7	3.3	11.0
4	8.1	5.2	13.3
5	16.5	1.8	18.3
National average	8.0	3.4	11.4
Current UGSA rates	13.5	2.5	16.0

"(Above figures are rounded to a one decimal fraction)" (exhibit 36). Area 1 comprises Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington.

11. The testimony showed the following items of expense are included in part in those recovered from wharfage charges and are also

included in those recovered from the charges to the Department under UGSA:

(1) Railroad trackage in roadways (Tr., 102, 1. 8–17; 103, 1. 2–9).
(2) Cleaning and conditioning equipment (Tr., 103, 1. 10–23).
(3) Scales.
(4) Elevator legs.
(5) Conveyors.
(6) Truck dumpers (Id).
(7) Railroad car tipper (Tr., 106, 1. 19, 1. 25; 107, 1. 1–23).
(8) Barge unloader equipment (Tr., 107, 1. 24–25; 108, 1. 1–19).
(9) Dust collection systems (Tr., 108, 1. 20–25; 109, 1. 1–9; 110, 1. 1–11).
(10) Inspection stations (Tr., 110, 1. 17–24).
(11) Small locomotives or trackmobiles (Tr., 111, 1. 1–18).
(12) Superintendence, cleaning sheds and docks and watchmen (Tr., 111, 1. 19–25; 112, 1. 1–21).

12. A witness asserted that the following additional facilities are required at a marine terminal elevator facility:

(1) Additional land.
(2) Additional railroad trackage.
(3) Heavy piling for foundations due to proximity to water.
(4) Larger more complex headhouses for housing equipment.
(5) Wharf.
(6) More elaborate equipment such as conveyor systems, scales, dust control, and electrical control equipment and elevator legs.
(7) More elaborate systems for speedy handling of incoming grain, including platform truck dumpers, railroad car tippers, and barge unloaders.
(8) Sampling and inspection offices.
(9) Cleaning and conditioning equipment (Tr., 75–7).

It was further asserted that wharfage includes charges for a portion of superintendence, checking, direct dock labor, watchmen, claims, clearing sheds, salaries, payments to general officers, clerical, accounting, legal, and traffic and solicitation expenses. Wharfage was also claimed to include charges to meet police and fire protection expenses.

13. The annexed attachment II shows a separation at the port of Stockton, Calif., between areas, facilities constructed thereon, and types of platforms to which ships are moored with regard to a bulk-grain elevator facility and a wharf facility (exhibit 37). (The labels and separating line have been added for the purpose of this report.)

Similar separation of facilities was shown at Longview, Wash. (exhibit 1), Kalama, Wash. (exhibit 10—no general cargo wharf shown), and Long Beach, Calif. (exhibits 12 and 23 at p. 2).

FINDINGS

Considering these facts, the following findings should be made in this proceeding:

1. A tariff regulation creating, and the practice of charging, wharfage for handling, including loading out, grain in bulk is a regulation and practice relating to or connected with the handling, storing, or delivering of property.

2. The receiving, storing, processing, and loading out of bulk grain through conveyors and spouts into ships involve the handling, storing, or delivering of property.

3. Respondents are compensated by the CCC pursuant to the UGSA for the use of all facilities and for all related services connected with the handling, storing, and delivery of bulk grain.

4. The charge of wharfage in addition to payments under the UGSA results in the establishment, observance, and enforcement of a regulation and practice of charging either payments for the use of a facility that does not exist in storing, handling, and loading out bulk grain, or double payments for the use of a facility already paid for under the UGSA.

5. Double payment for the same service is accomplished when railroad trackage, foundation, headhouse, dock or wharf, ship gallery, cleaning and equipment, scales, elevator legs, conveyors, truck dumper, railroad car tipper, barge unloader and barge dock, inspection station, locomotives or truckmobiles, dust collection system, and improved road facilities are attributed to wharfage and charged for as wharfage as well as under the UGSA. Payment for facilities and services that do not exist is accomplished when wharfage is charged for services and facilities used for general cargo rather than for bulk grain.

6. Respondents are other persons subject to the act.

7. Both Los Angeles and San Francisco claimed to have the same "physical situation"—relating to the intrusion of grain facilities on the wharf and direct use thereof—and both not to have entered into a UGSA. San Francisco claimed further, contrary to the assertion herein, that facilities and services covered by wharfage were not compensated by rentals from a grain storage operator. It is not considered to be possible on this record to adjudicate and make any findings as to the justness and reasonableness of these respondents' rules until the precise application of all payments can be determined on a more complete record. The foregoing may possibly apply to other persons who are not contracting operators of bulk-grain facilities, but are lessors of property occupied by bulk-grain facilities. As will be discussed, the CCC does not contest the justness and reasonableness of the establishing, observing, and enforcing of any regulation or practice which involves a charge for actual services rendered or use of facilities furnished and not otherwise compensated.

REASON OR BASIS FOR FINDINGS

My reasons for the findings and conclusions herein follow.

There is virtually no dispute as to the facts, nor that the respondent grain elevator terminal operators are "other persons subject to this act" as defined in the first section of the act. Inferences to be drawn from the agreed facts are in dispute. The sole question is whether charging CCC wharfage as a "practice" or "regulation" in tariffs is a just and reasonable one relating to or connected with the receiving, handling, storing, and delivering of bulk grain, as property, when respondent operators perform the UGSA and receive compensation thereunder at any facility where wharfage is charged (with the exceptions noted).

I have only the two basic reasons noted above, and restated in more detail below, for believing the charge is an unreasonable practice on the facts herein:

1. Because of the facts showing an entirely separate and different operation for handling bulk grain as differentiated from the facilities for handling general cargo, wharfage, however defined and however long applied in the past, is not applicable to CCC as an owner of bulk grain handled and loaded out pursuant to the UGSA.

2. The payment of the fees provided in the UGSA schedule of rates compensates operators for all use of their facilities and for all their costs of handling and loading out bulk grain; consequently, added wharfage should not be charged against bulk grain under UGSA. In other words, the facts show separation and differentiation of bulk grain facilities from those used for general cargo to which wharfage is applicable and compensation for the separate facilities used.

Changed conditions have created the separate and different grain handling operation and have converted wharfage from what was once a charge for facilitities actualy used to a charge on CCC for facilities not used, but paid for by other means. Bulk grain no longer moves over a wharf as it once did when wharfage was applicable to then existing facts. The changed conditions have not resulted in any additional expenses that are not paid for from wharfage on grain, and, if anything, have resulted in less expense as far as use of the traditional wharf is concerned.

With regard to the first point, past and present conditions have to be compared to see just how wharfage is no longer chargeable for what happens to bulk grain in modern, separate grain-handling facilities.

At the time the Department developed its uniform contract form, including the obligation to pay customary or mandatory wharfage, there was no bulk delivery of grain in California. There may have been some bulk handling at Stockton and Los Angeles (the record is not clear), and there was bulk handling in Oregon and Washington, but not with the storage and handling facilities used today. Cranes and digging and lifting equipment were used to hoist any bulk grain at wharves. At that time it was customary to carry grain across a wharf in sacks. To the extent this type of operation continues, and with regard to such operations, the Department is not seeking exemption from the payment of wharfage (Tr., 184, 1. 14–25; 185, 1. 1–2). Wharfage was and is justified where sacked grain is handled. Sacked grain is handled the same as general cargo at port locations. The physical possession of such cargo changes hands at a place on the wharf, in a shed or at some place of rest adjacent to the pier. The identifiable change of possession is considered a use or service. The needed facilities, such as shelters, platforms, trucks, and other moving equipment, are furnished as part of the use. Sacked grain may be stored free of charge for a specified period while being assembled into cargo lots, and the wharf is not usable for other cargo to some extent by this activity. The delay is an expense to the wharfinger. The time of use is compensated for in wharfage. In such cases, wharfage is the *only* payment to the terminal operator.

The modern grain terminal is apart from the traditional wharf facility with its flat platforms and storage sheds. Storage and handling of grain no longer involve the use of the wharf. Other methods of paying the terminal operator now exist. The UGSA is one of these methods of payment. Performance of the UGSA does not require use of a general cargo wharf.

The facts shown in items 5 and 6 establish that today the function of providing wharf facilities and bulk grain terminal facilities in the usual west coast arrangement are different and unrelated and that the investment in each and most of the services performed at each involve unrelated expenses to be met from charges for the use of each. There is some overlapping, such as the use of railroad tracks, but what is used is paid for. The facts equally establish that storage in a silo is not the same as the resting of general cargo on a wharf awaiting shipment, and the passage of grain through conveyors is not the same as the movement of general cargo over a wharf platform to the ship's side. There is a difference of function and use of facilities. The facts show that if a ship were to take on both bulk grain and general cargo, it would have to move from one berth to another at most of the ports described in this record. At the general cargo wharf, there would be no other compensation to the operator other than wharfage. At the grain terminal, fees based on bushels handled are the compensation. Separation of, and differences in, facilities used reasonably demand that wharfage applicable to facilities used for transferring general cargo not be applied to facilities used for entirely different types of cargo handling facilities and even different types of ships and covered by other payments. It is not a reasonable regulation to take a generalized definition such as wharfage, which speaks of commodities conveyed "over, onto, or under wharves", but which was so formulated before there was any such thing as modern bulk grain handling and then saying the words are broad enough to apply and therefore it is reasonable to apply them to bulk grain. If the facts had changed only slightly, there might be some reason to the position, but this is far from the case. Wharfage is for the use of a limited type of terminal facility, not for anything that might be built on the water used by ships. The bulk cargo owner who pays for what he uses under a contract is not justly treated when he has to pay wharfage for general cargo facilities he does not use. A reasonable distinction may be made between the two facilities used, based on separation and other differences of handling techniques and different methods of charging justified for each.

Mention was made of the Department's position of not seeking exemption from wharfage on general cargo, nor in those cases where bulk grain may make direct use of the general cargo wharf (possibly the case at Los Angeles and San Francisco). The Department has made it clear in briefs and testimony that CCC is willing to pay for all facilities actually used and for services rendered including wharfage if it is shown to have received something for its money. The CCC is not seeking any exemption as a Government agency as distinguished from other shippers, although recognizing there may be different facts as to the relationship because of obligations under the UGSA (Tr., 184–188).

Neither our predecessor's report in docket No. 640 of August 24, 1948 (3 USMC 57) nor the testimony of a witness who helped prepare the study helps the majority. If anything, the report substantiates exclusion of wharfage as a charge applicable to bulk grain handled at separate facilities under present conditions showing grain has moved away from the wharf. In that report a formula was approved, providing for the segregation of port expenses among wharfinger and non-wharfinger operations. Wharfinger expenses were apportioned among various charges in port tariffs. The charge for wharf-related expenses was found to be the proportionate cost of ownership and maintenance of the cargo resting areas, sheds, and rail and truck areas and facilities. The study, however, did not include bulk grain silos, conveyors, and appurtenant rail and truck areas as the basis for computing wharf and other port charges. Grain warehousing was not considered a wharf function under the formula (3 USMC at 97 and Tr., 275, 278, 283–284). The study was based on facts existing at most California ports, without reference to bulk grain operations, and was made with reference to the fiscal year ended June 30, 1940, before operations of the type described herein existed to any extent. The study did not cover Oregon and Washington where some bulk grain facilities of the type used at that time existed. Such facilities were not shown to be the same as what we have today. Even this study, however, is of no help in a classification of modern operations, because the author of the study expressly identified the port grain facilities at San Francisco and Stockton as "grain terminals and nonwharfinger operations" (Tr., 275, 283–284). The bulk facilities were known about and were excluded. Comparisons between relatively nonexistent bulk grain operations in California in 1939–40 and then existing bulk oil and lumber handling facilities are of no help either, because the handling of these commodities involved direct use of the wharf (as where the oil pipes were laid on the surface and the part of the wharf they used could not be used for anything else and lumber was put down on the wharf platform), and there was no showing that the wharfinger was compensated in any other way such as by a contract comparable to the UGSA.

The testimony of the witness who worked on preparing the record in docket No. 640 involved what might have been if modern facilities existed. The witness was a certified public accountant and had no particular competence for giving the technical proof needed to show differences between what goes on at a wharf and at a grain facility. Much of his testimony was speculation as to what "would have been included" in the study "if there had been bulk grain terminals". He appeared primarily as the expert witness on what was meant by the 1946 study our predecessors caused to be made, because he was employed in making the study with Mr. Howard Freas, his supervisor, over 18 years ago. What he says today is only his understanding, rather than a statement of present facts, and this understanding is relevant only if the study itself bears on the decision made today. The study itself is of no significance to the present decision, because the study dealt with entirely different facts and because its use presupposes the issues herein are resolved simply by applying the right labels—wharfinger or nonwharfinger—to what happens when grain is stored in bulk silos and loaded out by conveyors under a special contract. The testimony covers theories, opinions, and explanations supporting the majority understanding of the situation, but it does not provide any helpful analysis of what goes on today in relation to wharfage on bulk grain.

It is also not possible for the testimony about the formula devised in docket No. 640 to provide any helpful guide, because it is a formula only, rather than a principle to be applied to today's facts. Neither does the formula guide the justness of the charges. The formula was used merely to allocate costs among the services from which revenue was derived at a wharf as it was known in 1946 and earlier. The formula provided an operator with information as to revenue, cost, and profit or loss from each unit of service and enabled an operator to decide what rates should be for each service, based on accurately determined and allocated costs and profits (exhibit 14, Tr., 58–59). It is important to note the formula has no ratemaking function, nor does it justify by itself any particular charge. Whether or not the result of using the formula discloses a justification for assessing wharfage depends on the facts to which the result is applied. The purpose of this adjudication is to find out these matters.

What the majority has done with this testimony and the formula is to decide that the entire terminal area, including the part on which bulk grain storage elevators are located, must bear an allocation for wharfage, regardless of use of the general cargo wharf part and possibly regardless even of the existence of a general cargo wharf, and has decided that the word "over" in reference to cargo passing over the wharf may also be stretched to cover the aerial transit of bulk grain over the narrow service platform to which the ship is moored and through overhead conveyors out of spouts into a ship. The traditional type of wharf is not used; nevertheless, the wharfage charge pursues unsacked bulk grain even though new contract obligations were devised to take care of the cost of the new facilities.

The second point is that the UGSA schedule of rates based on the number of bushels handled fully compensates respondents for all their expenses of performing the contract; therefore, it is an unreasonable practice to apply wharfage tariff rules to obtain additional compensation.

The schedule was developed for the purpose of determining what costs and expenses a terminal operator incurs in performing obligations under the UGSA and what fair rates per bushel should be paid by the Government. The Department conducted a survey of bulk grain terminal operations in October and November 1959 to develop the necessary information. The study showed all the conditions of performance of contracts and the cost elements requiring reimbursement to contractors in connection with grain operations. It was a comprehensive nationwide survey of every reasonably related cost of owning (see Exhibits 29, 34), leasing (Id., p. 35), operating and maintaining (Id., pp. 35–40 and exhibits 30–31) grain terminals and handling facilities. The study disclosed that the elements included in wharfage charges applicable at port locations to bulk grain were considered and included (exhibit 29). Wharfage as a separate cost element was not included. The purpose of not including wharfage charges, but of including ("not deleting") costs allocable to wharfage, was to prevent the very overlapping of payments that the wharfage regulation creates if it is enforced.

The survey was designed to develop average costs in an area. Respondents claim their greater costs were not considered and wharfage elements were excluded. The facts do not substantiate the claim. Eight elevator terminals located at west coast ports were included in the western area survey which included the area in which these respondents operate. The record showed that similar inland elevators included in the survey existed that were built just as substantially and had the same facilities, including heavy pilings, railroad car tippers, etc., to the same extent as port elevators, although no two facilities were alike or included the identical facilities. Many inland elevator terminals surveyed were unquestionably smaller, but their costs only contributed to a determination of the average and the survey left out nothing peculiar to respondents' larger terminal facilities. The average costs developed were used to prepare a uniform rate schedule acceptable to all contractors, not to provide a cost-plus contract for a particular group or individuals which might have higher costs. The survey did not disclose that the west coast area port terminal operators had higher costs of performing storage and handling functions, nor disclose that any operator was not being fully compensated. Everything in fact 6 was considered where these elements existed. The comprehensiveness of the costs to be paid from the rates left nothing to be met from wharfage charges payable by CCC. Fact 10 shows adequately the comprehensive nature of the survey.

Nevertheless, respondents claim and the majority agrees that something was left out. This omission is established in several ways. It is stated operators are "entitled as a matter of law to compensation" and "wharfage is justified," or under the "Freas formula the assessment of wharfage on bulk grain * * * is justified" (the formula deals with cost allocation to determine compensation), or the operators "have an investment in facilities" and "there is an economic justification for the assessment of wharfage * * * to recoup the investment * * *" and, finally, "rates for storing and handling do not compensate for wharfage." These statements fall short of deciding whether an economic justification for the use of the terminal facilities also justifies charges for using terminal faciilties that are not used or charges for terminal facilities that are already paid for in another form. The economic justification of payment for the use of a wharf is not questioned. Whether or not the wharf is used is questioned. The objective of the survey was to develop a fee schedule which would provide the justified compensation for what is used, no matter what the payment may be called. An objective of this adjudication was to find out just how the wharf is used, and I found out it is not used, but CCC is supposed to pay for it anyway. The rate schedule was to pay for all, not just some, costs, and this objective was also accomplished, as substantiated by the testimony and documents in the record.

The claimed extra facilities not covered by the survey were summarized as being the following:

(1) Extra wharf facilities necessary only at port terminals;

(2) A share of superintendence service, certain labor items and administrative overhead expense; and

(3) "Other aids and benefits" consisting of police and fire protection.

The extra wharf facilities in item (1) and any other extras, such as those referred to in item 12 in the facts were not only accounted for in the survey and influenced the averages developed, but are part of the "equipment and facilities listed" in the contractor's agreement "for the receiving, handling, conditioning, warehousing, storing, and loading out of grain" which the contractor represents he "owns or operates" for performing the UGSA (exhibit 28). The contractor does not represent that he has only part of the equipment needed, or that the fees pay for only part of what he has to perform with, but everything needed to perform and thereby earn his scheduled payments. Neither the UGSA nor the survey contemplated payment for additional land, railroad trackage, heavy piling, or any other of the nine items in fact 12 to be compensated separately if needed to perform. Where the contractor is an operator under a lease from a port agency, the port gets its share of money for the wharf-related expenses from the rent. The contractor-operator obtains his expenses, of which rent is one, from the UGSA payments. If the rent does not cover the charge, as may be possible at Los Angeles or San Francisco, CCC is willing to review its payment obligations, as I understand its testimony. Even if a special platform over the water is needed to get to a ship with equipment, as shown in the pictures, there is no use of it as a wharfinger facility, as traditionally understood, by moving freight between a place of rest on the wharf and ship's sling. It is

220-178 O - 66 - 45

stated wharfage is the charge for the use of wharf and does not include charges for any other service. *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21, 24 (1948). The statement is not questioned. The grain delivery operation involves no such use, however, whether or not there is a "service."

In *Interchange of Freight at Boston*, 2 U.S.M.C. 671 at page 673 (1942), wharfage was defined:

As used herein the term "wharfage" means a charge made by a pier owner or operator against shippers or consignees for cargo conveyed on, over, or through a terminal facility, or loaded or discharged while a vessel is on berth. It is a charge for use of the pier alone. Wharfage charges or rates quoted in this report will be those applicable on general merchandise package freight. It is unnecessary to consider special rates or services relating to such commodities as bulk grain, coal, coke, ore, lumber, shingles, ship's stores, or fuel oil.

With reference to superintendence, labor, and administrative overhead under (2) above, the record contains no facts showing how the share of superintendence and other expenses are not paid for if wharfage is eliminated. The share of expenses for superintendence checking, direct dock labor, watchmen, claims, cleaning of sheds, salaries, expenses of general officers, and clerical, accounting, legal, traffic, and solicitation functions were considered in the survey and compensated insofar as they pertain to grain terminal operations (Tr., 245) and are required to perform the contract.

Other aids and benefits referred to in item (3), such as police and fire protection, are exactly the same as they would be anywhere away from the water at any other grain terminal and are not attributable to furnishing a wharf alone, but to the entire property. These costs too were considered in making up the rate schedule.

A witness stated that to a large extent he was basing his justification for a wharfage charge "on the investment in port terminal elevators" (Tr., 106, 1. 6–15). The claim is that when "CCC pays the respondents' charges for receiving and loading out grain, they are paying for a specific service, that is, the physcial handling of the grain into the elevator and away from the marine terminal facility into ocean vessels * * *" and wharfage is something more for the use of the marine terminal facility (Tr., 206) to cover the omitted items of expense. The Department's rate schedule, however, was not just based on manpower costs, omitting depreciation and investment. Performance of the UGSA required use of the physical facilities as well as the services of people and both are paid for. The Department produced its 43-page manual showing in detail what figures were to be developed by enumerators participating in the nationwide survey of grain storage handling costs. Detailed schedules showing they were brought together and summarized were produced in evidence and finally over 50 pages of summaries of enumerators' tabulations were placed on record, showing both bushels of grain handled and dollar-and-cents costs of handling the grain under various conditions. The survey was shown to cover all types of elevators, whether "country" or "inland" terminals, and those at port localities. The survey covered terminals with both light and heavy investments, without distinction. Nothing was left out or given special treatment, although the survey did not include detailed examinations of private business accounting records. Tables showing combined storage and handling cost items at eight selected west coast port terminals was produced. The rates were based both on the nationwide study and on "subsequent negotiations with the warehouse industry", according to the General Accounting Office's letter to the Agricultural Stabilization and Conservation Service (exhibit 36—attachment—see: 3d para.), "It provided for the inclusion of all costs applicable to owning or leasing necessary warehouses, equipment and facilities as well as operation and maintenance and other costs incident to storing and handling grain". The survey and the rates based thereon did not just cover storing and handling in the elevator itself (Id.). It included load-in and loading-out.

In spite of this preponderance of evidence, the majority, in effect, is taking a witness' testimony, with no additional documented proof, to convince itself that something was left out, such as use of the investment, to be compensated by wharfage.

To the claims that the Department's cost survey covered only "country" elevator facilities and excluded the many additional items of investment and expense of elevators at marine loading places (Tr., 206) and marine terminal wharf facilities are "over and above" those at country elevators, I can only say I have been unable to find proof of the omitted extras.

The majority accepts the testimony that country elevators were of relatively simple operation in comparison with "the complex operation of a marine terminal operation". There was other testimony, however, substantiating what the survey showed, that some inland country elevators were just as complex, being built on strong pilings, having railroad car tippers and other facilities already noted, and this testimony was backed up by photographs in the record plus testimony of the Department's witnesses. Others do not, as has been noted, but all contribute to the average. Some of these inland facilities were on rivers and were included in the nationwide survey underlying the fee schedule. Also, west coast terminal elevators were included in the cost survey used to make up the fee schedule. A supplemental survey of the latter was made. Therefore, any conclusions based on separate treatment of the two types of elevators have no premises to support them.

The respondents by comparison do not support the reasonableness of the practice of applying wharfage tariff rules to obtain additional compensation for respondents by any such ascertainment of costs or of what wharfage pays for at grain terminals. The record is limited to testimony by witnesses of their understanding of what costs wharfage covers based on facts existing 25 years ago as reported by our predecessor with respect to practices traditional at that time, and to arguments apparently based on the simultaneous appearance of an obligation to pay wharfage in the UGSA and in the respondents' tariff rules. The inapplicability of these ancient facts and formulas, both from the point of view of what exists today and of what the UGSA rate schedule pays for, has been covered.

The wharfage definition arguments are reflected in the majority's statement that "the UGSA expressly provides for the payment on CCC grain of 'Customary or mandatory wharfage charges where grain is received at port locations'" and "Wharfage charges published in respondents' tariffs fit this description" followed by the unanswered rhetorical question, "how can it be said that other types of compensation specified in UGSA would compensate for wharfage?". The answer depends on the facts, not on what may be said now in questioning someone's consistency. The inference is that if it may be said wharfage described in the tariff fits the description of the customary and mandatory wharfage that may be paid, all issues will be neatly resolved because the Department would not be so inconsistent as to write such a contract and to pay if it were not due for something. I do not see the issue as one of pure logic to be decided by matching up the simultaneous appearance of references to wharfage in two documents to achieve such expensive consequences for the Department. It is not reasonable to find that because a definition is broad enough to cover the operation it automatically applies to contemporary facts of bulk grain handling. The issue is whether it is a just and reasonable practice in handling property if today's facts involve charging twice for the use of the same facility and related services if the terminal area is viewed as a unit, or to charge anything if nothing is furnished, no matter how the function may be defined or classified or matched up or logically explained. We are not dealing with rhetoric, but with real obligations to pay money at the rate of $2,000 wharfage a day to west coast grain terminals in exchange for objectively ascertainable use.

Finally, there is no question of injustice through noncompensation of respondents even if the wharfage charges are dropped under the facts of this case. One elevator facilitiy at Portland, Oreg., does not now charge wharfage, apparently recognizing the reality of such factors. The survey cost for the eight west coast facilities was 12.70 cents per bushel, and adjusted costs were 12.26 cents. For all marine terminal elevators in the seven Western States, the survey cost was also 12.70 cents and the adjusted cost was 12.29 cents. The 16 cents paid under the UGSA was 3.3 cents or 26 percent higher than the survey costs and, respectively, 3.74 and 3.71 cents or 30.5 and 30.2 percent higher than adjusted costs. The 1960 schedule of rates under the UGSA exceeded all costs of receiving, handling, conditioning, warehousing, storage, and loading out of bulk grain. The majority uses these figures to discuss the coverage and adequacy of UGSA payments and states that anyway if they are compensatory to contractors they are not to public port terminals which do not have UGSA obligations. Amounts for rent may cover wharfage due by operators to port authorities. The CCC's liability for wharfage where there is no contract is not an issue. We are not adjudicating the public port terminals' right to wharfage apart from the UGSA. Possibly, CCC is liable for wharfage under other conditions. The Department has stated its willingness to look into any such situation.

Flaws were also detected in the Department's studies. Defects in the Department's study are irrelevant, however. If there are flaws the Department is willing to restudy the matter and negotiate adjustments. The point is that the study is only the basis for making administrative decisions about a fee schedule that is supposed to cover all costs of storing and loading out (handling) grain. Negotiations preceded adoption of the schedule. Further changes were made. Thereafter, contractors were tendered the contract. If the rates fail to compensate today, new negotiations are in order to change the fees, rather than efforts on our part to distort a charge for wharfage by justifying its application to bulk grain handling because the study is flawed by being outdated or the rates inadequate. If the rates do not now compensate, the remedy is not to justify the practice or regulation of charging wharfage for unproven use of adjacent wharves, but to change the rates.

A great deal of the difficulty is this case has been caused by failure of the Departmental employees, for so many years, to perceive what has been happening until more perceptive employees of the General Accounting Office pointed it out to them. No need is seen, however, to keep going on with an obvious unfairness that has grown up over the years without anybody ever noticing it until the Comptroller General made an issue of the problem. Continued old wrongs do not make a present right. The time has come to straighten out these wharfage charges so that each type of shipper pays for what he uses and does not pay for what he does not use, thereby subsidizing other users, which is unfair. In the meantime, the CCC has obligated itself, in addition to fully compensatory payments, to pay for something it was not getting. There appears to be a feeling that respondents have acquired a vested right to the continuation of this condition. Respondents' argument to some extent is that it is a just and reasonable practice to hold the CCC to its generous bargain. The argument has appeal, but our authority does not extend to the relief of this situation, only to the enforcement of section 17. The CCC will have to negotiate its way out of its bargain. Our authority extends to adjudicating what are just and reasonable practices by respondents in the handling of property and to deciding that wharfage regulations applied to CCC are unjust and unreasonable because the respondents are in fact compensated for all the uses provided CCC as a storer of bulk grain and respondents do not provide the use of wharf facilities to CCC.

SUMMARY

I would conclude that by applying wharfage regulations to CCC under the facts shown, respondents violate section 17 of the act.

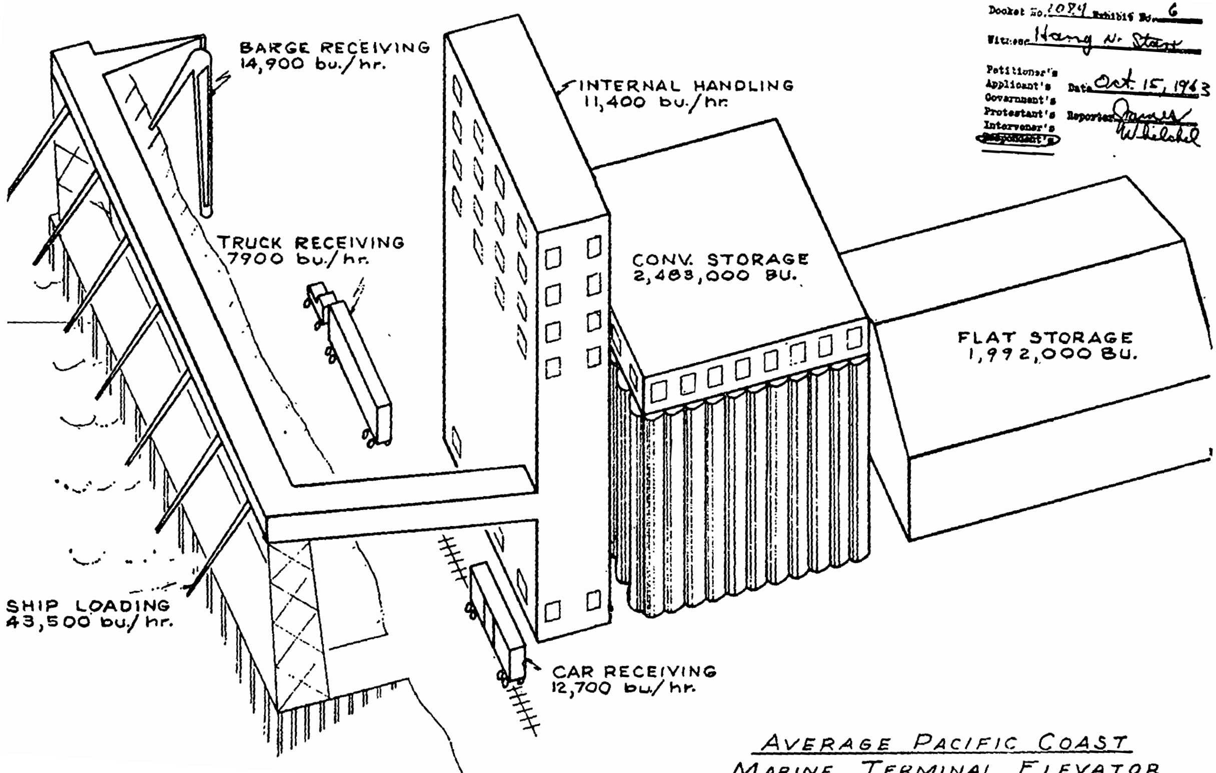
For the reasons advanced above, my ultimate conclusion requires my dissent from the majority's opinion finding no such violation.

(Signed) Thomas Lisi,
Secretary.

ATTACHMENT II

PORT OF STOCKTON — Stockton, California

Docket No. 1094 Exhibit No. 6
Witness Harry N. Starr
Petitioner's
Applicant's
Government's
Protestant's
Intervener's
~~Respondent's~~
Date Oct. 15, 1963
Reporter James Whitchel



AVERAGE PACIFIC COAST
MARINE TERMINAL ELEVATOR

FEDERAL MARITIME COMMISSION

No. 971

NEW ORLEANS STEAMSHIP ASSOCIATION

v.

BUNGE CORPORATION AND SOUTHERN STEVEDORING COMPANY, INC.

Decided August 24, 1965

Operations of respondents found not to violate Shipping Act, 1916, as respondent Bunge held not subject to Commission jurisdiction.

Transportation by Bunge on chartered vessels on f.o.b. and c.i.f. bases for multiple consignees does not of itself constitute common carriage or the furnishing of terminal facilities in connection with a common carrier by water.

Walter Carroll and *Edward S. Bagley* for complainant.

Andrew P. Carter, *Michael Greenberg*, and *Philip Kazon* for respondent Bunge Corp.

Henry C. Vosbein for respondent Southern Stevedoring Co.

REPORT

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

This is a complaint proceeding in which New Orleans Steamship Association alleges that respondents, Bunge Corp. and Southern Stevedoring Co., Inc., entered into and are carrying out an unapproved exclusive stevedoring agreement in violation of section 15 of the Shipping Act, 1916 (46 U.S.C. 814), and that respondent Bunge Corp., in furtherance of the agreement, has denied stevedores access to its dock and the use of its electrical supply in violation of sections 16 and 17 of the act (46 U.S.C. 815, 816). Chief Examiner Gus O. Basham held hearings and issued an initial decision; we heard oral argument.

New Orleans Steamship Association is a trade association composed of steamship owners, steamship agents, and stevedores engaging in business in an around the port of New Orleans.

Respondent Bunge, a New York corporation, owns and operates a waterfront terminal grain elevator located at Destrehan, La., on the Mississippi River above New Orleans, at which it regularly stores grain prior to export to customers abroad. Bunge also owns, through a wholly owned subsidiary, the Port Richmond Elevator at the port of Philadelphia, Pa.

Respondent, Southern Stevedoring Co., Inc., is a Louisiana corporation which is engaged in the stevedore business in the New Orleans area.

FACTS

Bunge's terminal grain elevator, which was put into operation in September 1961, was constructed at a cost in excess of $7 million. In its first full year of operation, 1962, the elevator loaded out to vessels 195.5 million bushels of grain, a tonnage greater than any other elevator in the world.

The maritime facilities, those facilities located out over the Missisippi River, consist of a dock on which is constructed a loading gallery, barge unloading equipment, and a storage shed and office leased to Southern. The dock structures are owned by Bunge, except for a powerline which Bunge has permitted Southern to install from Bunge's substation to the dock area in order to supply electric current for Southern's grain trimming machines.

Bunge's warehouse facilities at Destrehan are covered by a license issued by the Department of Agriculture pursuant to the United States Warehouse Act (7 U.S.C. 241–273).[1] The dock and other waterfront facilities are neither described in nor subject to this license. Bunge obtained a license from the Department of Agriculture solely in order to be eligible for storage in the elevator of grain of the Commodity Credit Corporation (CCC). The Uniform Grain Storage Agreement between CCC and Bunge requires Bunge, inter alia, to load out and ship grain as requested by CCC, or other authorized persons, in the "transportation conveyance" specified by the owner of the grain which includes "cars, boats, barges, trucks, or other conveyances." All CCC grain is accepted subject to the condition, imposed by Bunge, that it may buy such grain in storage, which it does.

Bunge's initial tariff, Dock Tariff No. 1, which was published on September 1, 1961, and filed with the Commission prior to the com-

[1] Sec. 254 provides as follows:

"Every warehouseman conducting a warehouse licensed under this chapter shall receive for storage therein, so far as its capacity permits, any agricultural product of the kind customarily stored therein by him which may be tendered to him in a suitable condition for warehousing, in the usual manner in the ordinary and usual course of business, without making any discrimination between persons desiring to avail themselves of warehouse facilities."

mencement of operations at the elevator, contained, among other things, the usual provision for preference to "liners" in the assignment of berths. However, within the first 2 months of the elevator's operation, it became apparent that the potential volume of the elevator could not be fully utilized if part cargoes were to be loaded; too much time was lost in docking and undocking and preparing the vessel for loading, in relation to the tonnage loaded, where a part cargo was involved. Furthermore, the small space available for loading on a liner did not enable the elevator to get a run of grain at full elevator speed, and the steamship companies insisted on preference in loading which required taking the liners out of chronological order to the detriment of charterers of other vessels.

After a meeting of Bunge officials with members of the Commission staff, who suggested that if part cargoes were not to be loaded, the dock tariffs should be amended to specify that no common carriers would be accepted for berthing, the Bunge management published and filed with the Commission, on November 22, 1961, Supplement No. 2 to Dock Tariff No. 1, which provided that "until further notice common carriers by water as defined by the Shipping Act of 1916, shall not be accepted for loading at the elevator * * *."

During the time between the opening of the elevator in mid-September 1961, and November 22, 1961, Southern loaded at the Bunge elevator at Destrehan a total of six regularly scheduled liners. In the course of the loading of these vessels at the Destrehan elevator, Bunge furnished the dock, loading gallery, and appurtenances; and Southern furnished grain-trimming machines, the electrical powerline owned by it, and spouts, nozzles, extensions, etc., necessary to convey the grain from the end of spout on the elevator to the hold of the vessel. Since the effective date of Supplement No. 2 to Dock Tariff No. 1, the only vessels which have been permitted to call at the facility have been vessels under charter for the carriage of full cargoes of grain, and no loading of parcels of grain or other general cargo has been permitted.

Bunge maintains solicitation offices abroad through which grain sales are made. Such sales are generally on the basis of f.o.b. or c.i.f. terms.

A large majority of the vessels which load at the facility is under charter to Bunge to carry cargoes of grain sold by it to customers on a c.i.f. basis. Bunge's ocean marine chartering department concludes charter parties with the vessels' owners or agents, usually voyage or consecutive voyage charters, for the carriage for Bunge as shipper of a full cargo of grain. Whether the cargo may eventually be delivered to one or more than one consignee-customer, Bunge appears on the bill of lading as the shipper.

Bunge has the right under its c.i.f. contracts of sale to decide, within 5 days after the vessel has put to sea, which buyer's contract it will make a declaration against and so notify. If a premium price develops during the 5-day period, Bunge may sell the grain to a new customer during the voyage. Only after the decision has been made are the bills of lading prepared for the vessel agent's signature and issued. All grain loaded on the vessels chartered by Bunge is used to fulfill its prior c.i.f. sales commitments under which it has the obligation to deliver to the foreign port.

On f.o.b. sales, where the obligation is upon Bunge's customer to take delivery at the elevator and to provide for transportation of the grain, Bunge's published dock tariff requires the vessel chartered by the customer to make application for a berth.

Bunge has the right to appoint the stevedore for the large majority of vessels, since the major proportion of its sales are on c.i.f. terms and, as to these, it charters the vessels to carry the grain, with the proviso in the charter party that Bunge may select the stevedore. On all f.o.b. sales the selection of the stevedore rests with the owner of the vessel or the buyer of the grain, depending upon the terms of the charter party.

There are two agreements between Bunge and Southern: (1) a written agreement dated August 31, 1961, providing that Southern shall stevedore all vessels loading at Bunge's Destrehan facility with respect to which Bunge has the right to designate the stevedore and that the rates and conditions governing the stevedoring "shall be equal to the competitive rates and conditions prevailing in the port of New Orleans, which shall be mutually agreed upon from time to time and set forth" in an appended schedule; and (2) a written agreement dated June 27, 1961, leasing storage and office space to Southern on Bunge's dock and providing for maintenance and repair work on Southern's equipment by Bunge's maintenance crew in return for a "rental and service charge" of 2 cents per ton on bulk carriers and self-trimmers and 5 cents per ton on all other vessels. This charge covered all vessels loaded by Southern at the Bunge elevator and produces revenue paid by Southern to Bunge of at least $144,000 per year. The "rental and service charge" was described by Bunge as an "access" cost paid by Southern to gain access to vessels over the dock. Southern's president stated that he could not afford to pay this charge to Bunge absent the "arrangement."

Neither agreement is for a specified term; both may be terminated by Bunge unilaterally. There is no agreement between Southern and

Bunge concerning the appointment of stevedores for vessels of which Bunge is not the charterer, although Bunge informed interested persons, by a memorandum dated November 1, 1961, that although they were free to appoint outside stevedores, Bunge did not desire to encourage other stevedores in working at Destrehan, and that use should be made of Southern "in order to further the interests of all concerned."

Bunge has developed a grain elevator at Destrehan which has a loading-out rate greater than that of any other grain elevator in the world, and it has built this facility at great expense, largely for the handling of its own grain. It has decided that for the most economically efficient functioning of this facility, it is necessary that only one stevedore be allowed access to its dock and electric supply.

Bunge believed, based upon its past experience with Southern at other terminals in the gulf area, that Southern would be the stevedore best qualified for the job.

Bunge has required Southern as a condition of its appointment and continued employment to (1) make available trimming machines of sufficient power to take full delivery capacity of the elevator, (2) provide sufficient labor and equipment to maximize mechanical trimming speed,[2] and (3) provide the maximum hand trimming labor which can be efficiently utilized during the loading of tankers.

Southern has the advantage of having the same crew and supervisory personnel stevedoring on a regular basis at the facility. While the labor used by Southern at Destrehan is drawn from the same labor pool as that of the other New Orleans area stevedores, the contracting foreman has the right of choice of the men he will employ. Southern has exercised this right to develop an experienced crew of longshoremen who are familiar with the facility because of their regular employment there.

There is no agreement between Bunge and Southern to exclude outside stevedores from Bunge's dock. However, Bunge does unilaterally restrict the use of its dock to Southern and has so informed other stevedores or ship's agents who have inquired. When stevedoring a vessel at Destrehan, other stevedores must bring their labor force and all necessary machinery to the vessel by launch. Stevedoring equipment, including trimming machines, spout extensions, nozzles, elbows, and an electricity power source for trimming machines, must be supplied by the stevedore. However, where either an owner or charterer of a vessel appoints a stevedore other than Southern, Bunge's elevator personnel fully cooperate with that stevedore.

---

[2] Southern is required to have a minimum of three trimming machines and three machine gangs available for the loading of all dry cargo vessels, while it is the customary practice of other stevedores to use only two such machines.

Except for nine vessels stevedored by Louisiana Stevedores, Inc., at Destrehan, no shipowner or charterer has employed a stevedore other than Southern at the facility. On an experimental basis, Louisiana borrowed the nozzles, extensions, and spouts required for the operation from another grain elevator in the area. It hired its personnel to report to a launch engaged to transport them, together with the stevedoring equipment, to the vessel's side as it was moored to the dock at Destrehan. The equipment and personnel were removed from the vessel by discharging them over the side to the launch which was standing by on the outboard side of the vessel.

On dry-cargo vessels, it was necessary for it to hire a barge and generators to furnish electricity for its grain-trimming machines in addition to the launch facilities required for its personnel and other equipment. The additional inconvenience and expense which Louisiana was required to incur forced it to conclude that on dry-cargo vessels it was not in a position to offer effective competition, even at the rates fixed by Bunge and Southern. Louisiana, however, found that it could under-quote the Southern rates on bulk carriers and tankers on which no machine trimming is required, and ultimately Southern was forced to reduce its rates on tankers.

A comparison of Louisiana's and Southern's loading time on the SS *Mauritanie*, a dry cargo vessel, which both loaded at Destrehan, reveals that Louisiana increased loading time by about 7 hours as a result of its failure to have sufficient labor and adequate machines to take the full capacity of grain that the elevator could have delivered. This loss of 7 hours represents a loss to the elevator of at least 4,200 tons of production (based on rate of 600 tons per hour) and a loss to the vessel in turnaround time.

On the tanker, SS *Richmond*, loaded at Destrehan, both by Southern and Louisiana, with full cargoes of the same type of grain, Southern averaged 614 tons per hour to Louisiana's 560 tons per hour and stowed 117 tons more in the vessel in 2½ hours less than Louisiana's loading time. The total financial advantage to the owner from Southern's performance in full loading and faster turnaround time was in excess of $2,000.

Bunge contends that the combination of narrow roadway, swift current, and activity on the dock creates a potentially hazardous situation for persons unfamiliar with the facility. One Bunge employee who fell off a barge and was sucked under by the current was drowned; seamen have fallen from the dock.

Bunge has sought to protect itself against these hazards and liability for injury with respect to the stevedoring operations by limiting the use of the dock solely to its resident stevedore and by requiring Southern to carry adequate insurance against all risks involved and to hold Bunge harmless from any claim by stevedoring personnel. Southern works regularly at the facility and its employees, therefore, have become familiar with the dock and the barge unloading operation. Risk of their interference with Bunge's barge unloading employees and equipment is thereby minimized, as is the danger of accident and injury.

DISCUSSION

The Chief Examiner in his initial decision determined that Bunge, since November 22, 1961, was neither a common carrier by water nor other person subject to the act. He, therefore, concluded that, since any claim under sections 15, 16, and 17 of the act, regarding the operation of Bunge's Destrehan facility, must be based upon the Commission's jurisdiction over Bunge, and since the Commission was without jurisdiction, no relief could be granted.[3]

Complainant New Orleans Steamship Association excepts to the examiner's failure to find that respondents are subject to Commission jurisdiction. Complainant's jurisdictional argument is premised upon the following grounds: (1) the present operations of respondents are conducted in connection with a common carrier by water; (2) Bunge, having served common carrier vessels, could not divest itself of the status created thereby by its tariff modification that it would not serve common carriers; and (3) Bunge's operations at Destrehan are subject to the Commission's jurisdiction by virtue of its operations at Port Richmond.

Initially, complainant argues that Bunge, by maintaining a continuity of service of individual vessels, regularity of service in its overall operation, carriage on a single voyage for a variety of cargo owners on a c.i.f. basis, and solicitation through its sales offices, is itself a common carrier.

The argument is ingenious, but will not bear up under examination. While, as complainant correctly points out, the status of a person as a common carrier is not dependent upon publication of a sailing schedule, solicitation of cargo, or advertisement, there is one ingredient of common carriage which is essential to its existence and which is not present in Bunge's operations—the undertaking to carry for hire for those seeking to employ the carrier.

[3] Although the Chief Examiner found that Bunge was subject to the act as an "other person" before Nov. 22, 1961, he made no substantive findings for that period under sec. 15, 16, or 17, because less than 2 months of operation was involved, because the matter was moot, because there was no question of reparations, and because no regulatory purpose would be served by giving further consideration to the allegations. No exception was taken to this finding.

In some, though admittedly not most, cases, sales of grain are made to Bunge's customers on an f.o.b. basis, in which instances carriage is not aboard Bunge's vessels but on those chartered by the customers. Even with respect to those sales made under c.i.f. terms, Bunge has the right under its contracts of sale to decide within 5 days after the vessel has put to sea which buyer's contract it will fulfill. Such an arrangement could not by any stretch of the imagination be called a sale of space. All of Bunge's shipments are in fulfillment of contracts for the sale of grain. Bunge does not undertake to carry for anyone; it does not sell ocean transportation; it merely delivers grain in chartered vessels to its customers.

Complainant admits that the utilization by a grain merchant of a c.i.f. sales contract does not make the merchant a common carrier. It further concedes that the consolidation of shipments for various consignees on a c.i.f. basis would not make Bunge a common carrier. What complainant is in fact contending is that because Bunge regularly sells to many consignees on a c.i.f. basis, it is a common carrier. Where, however, as here, a merchant also regularly sells on a f.o.b. basis and does not undertake to carry for anyone or sell ocean transportation, it cannot be held to be a common carrier. We, therefore, find that since November 22, 1961, the day Bunge barred common carriers from calling at its Destrehan facility, we have had no jurisdiction over its operations there.

Secondly, complainant excepts to the initial decision on the grounds that the examiner erred in failing to find that Bunge was subject to our jurisdiction since Bunge, once subject to our jurisdiction, could not divest itself of that status. Specifically, complainant alleges that the refusal to serve common carriers embodied in Bunge's tariff is illegal as Bunge has an obligation under its warehouse license and the Warehouse Act, supra, to load grain on any "transportation conveyance" specified by the owner of the grain in the nondiscriminatory manner.

The warehouse license covers storage, not maritime facilities. As we have often stated, jurisdiction residing in the Secretary of Agriculture over the storage portion of facilities in no way affects our jurisdiction over the terminal portion of those facilities.[4] Moreover, even assuming that our deliberations are to be influenced by the policy relating to Bunge's obligations as a public warehouseman, we cannot say that Bunge has breached any of these obligations. Section 254

---

[4] *Agreements 8225 and 8225-1,* 5 F.M.B. 648, 653 (1959), aff'd sub. nom.; *Greater Baton Rouge Port Commission* v. *United States,* 287 F. 2d 86 (5th Cir. 1961); *Calif. S. & B. Co.* v. *Stockton Port District,* 7 F.M.C. 75, 81 (1962); *D. J. Roach, Inc.* v. *Albany Port District,* 5 F.M.B. 333, 334 (1957).

of the Warehouse Act merely requires that a warehouseman not discriminate between the users of his facilities. Bunge has not discriminated—it has imposed its refusal to furnish terminal facilities in connection with common carriers with reference to all of the grain in its elevator, regardless of ownership. Furthermore, no user of the storage facility has objected to the ban on common carriers, and there is no showing that any such user has ever demanded a common carrier as a "transportation conveyance." Even if such a demand were made in the future, Bunge would have the alternative of surrendering its license rather than opening its facilities to common carriers.

Complainant also excepts to the Chief Examiner's finding of a lack of jurisdiction because Bunge operates as an "other person" elsewhere. In support of this argument, complainant cites *Grace Line, Inc.* v. *FMB*, 280 F. 2d 790 (2d Cir. 1960), implying that common carriers are subject to our jurisdiction not only to the extent of their common carriage, but over all their activities. Accepting arguendo that the argument is applicable to "other persons" as well as to "common carriers," it is clear that the import of the language is this: a person manifestly subject to our jurisdiction may not so segment its operation to make part of it subject and part of it exempt when this segmentation is unjustly discriminatory. Here, there is no showing that Bunge's other operations have in any manner affected the Destrehan facility.

The complaint is dismissed.

Commissioner HEARN concurring:

I concur in the result reached by the majority and I adopt their rationale.

With respect to the period during which Bunge, in the operation of its Destrehan facility, was an "other person" subject to the Shipping Act, *International Trading Corp.* v. *Fall River Pier Line*, 7 FMC 219 (1962), I note the presiding examiner's failure to make substantive findings on the ground that the matter was moot and because reparation was not sought. Since no exceptions were taken and since the matter before us is a simple complaint and answer case, I agree that the matter should not here be examined.

Commissioner JOHN S. PATTERSON concurring and dissenting:

CONCLUSIONS

Based on the record before me in this proceeding, my conclusions are as follows:

1. Complainant New Orleans Steamship Association (New Orleans) has failed to prove that respondent Bunge Corp. (Bunge) violated section 15 of the Shipping Act, 1916, as amended (Act).

2. Complainant has proven that respondent Bunge violated section 16 of the Act by subjecting stevedores other than respondent Southern Stevedoring Co., Inc. (Southern Stevedoring), to unreasonable disadvantage.

3. Complainant has proven that respondent Bunge before November 22, 1961, failed to establish and enforce just and reasonable practices relating to or connected with the handling and delivering of property contrary to section 17 of the Act.

4. Complainant has failed to prove that respondent Southern Stevedoring is now subject to the provisions of sections 15, 16, or 17 insofar as the facts in this record are concerned; therefore, Southern Stevedoring is not now violating any provision of the Act.

I further conclude and concur with the majority that complainant's exceptions are not substantiated and the Commission at this time has no jurisdiction over either respondent because neither is within the definition of common carrier by water or of an "other person subject to this act."

INTRODUCTION

As regards my conclusions stated above, the reasons in support of them and for my concurrence and dissent are as follows:

The Federal Maritime Commission (Commission), where a violation of law is charged by complainant, having reasonable grounds therefor, is not authorized to disregard, as the majority has done, a responsibility to adjudicate the consequences of actions by Respondents before November 22, 1961, either because the examiner made no findings or because no exceptions were taken to the failure. The report fails to respond to all the charges in the complaint which covered actions before and after said date, and to give reasons why each charge is proven or not proven as support for rulings. The facts showed that before November 22, 1961, Bunge was carrying on the business of furnishing wharfage, dock, and other terminal facilities in connection with a common carrier by water as defined in the first section of the act. Having acknowledged the existence of jurisdiction in this period, the majority may not disregard adjudicating responsibilities with respect thereto. If actions during this period violate the law, a court, in the discharge of its responsibilities for fixing the amounts of penalties prescribed in sections 15, 16, or 32 of the act, might be influenced by the fact of presently changed operations, but not the Commission, whose functions under Reorganization Plan No. 7 of 1961 and the act are subject to no exception from the responsibility to adjudicate complaints and decide on the consequences of facts no matter when the facts occurred as shown in hearings.

The complaint states that:

1. In violation of section 15, respondents entered into an agreement which was not filed immediately and was carried out before approval, "providing for the giving and receiving of special rates, accommodations, and other special privileges or advantages, controlling, regulating, preventing and destroying competition and providing for an exclusive preferential and cooperative working arrangement, * * *" (Complaint, par. 6 and 8); and acted to the detriment of commerce in other specified ways (Complaint, par. 9).

2. In violation of section 16, Bunge gave Southern Stevedoring preferential rates and, by preventing other stevedores from using Bunge's property, gave, as I construe paragraph 7 of the complaint, undue advantage to Southern Stevedoring.

3. In violation of section 17, respondents observed unjust and unreasonable regulations and practices relating to and connected with the receiving, handling, storing, and delivering of property (Complaint, par. 10).

After hearing the evidence, the examiner decided the respondent was not, after November 22, 1961, an "other person" as defined in the first section of the Act, and therefore not subject to the provisions of the Act. Before November 22, 1961, the examiner decided that since the acts subject to the complaint had ceased, "the matter is moot" and "no regulatory purpose would be served by giving further consideration" to the complaint, and the complaint should be dismissed because no one asked for reparation. No authority is cited for this exercise of discretion. Actions subject to penalty (sec. 15), or alleged to constitute misdeameanors (sec. 16), or prohibited (sec. 17) do not become "moot" because they have stopped, or did not last long, or complainants did not ask for reparation. Serving a regulatory purpose and the existence of a claim for reparation are not prequalifications on the discharge of adjudicating responsibilities under any law applicable to the Commission's functions.

The majority was silent about the far-reaching implications of these considerations as justifications for avoiding administrative adjudication, and dealt solely with the exceptions as to the Commission's jurisdiction. The rulings on the two exceptions as to our jurisdiction over Bunge were correctly made, but do not go far enough.

FACTS

A short recapitulation of the facts, the elimination of many irrelevant ones, and the addition of some omitted but significant ones will make the findings herein more clear:

1. Bunge, in the summer of 1961, completed construction of a large grain elevator facility at Destrehan, La., on the east bank of the Mississippi River, about 13 miles north of the upper limits of the port of New Orleans, La. (exhibit 19, par. 2).

2. (a) Bunge's Dock Tariff No. 1, effective September 1, 1961 (exhibit 18), provides "vessels classified as 'liners' shall be given preference in the assignment of berths over all other vessels" with certain exceptions (Id., p. 3, par. 5). A "liner" is defined as "a vessel whose steamship company has regular scheduled sailings * * * whose sailing has been advertised * * *" (Id.).

(b) Between the opening of Bunge's facility in mid-September 1961 and November 22, 1961, Southern Stevedoring loaded five ships which were regularly scheduled liners (Tr., 246–247).

(c) On November 22, 1961, Bunge issued Supplement No. 2 to its Dock Tariff No. 1 (exhibit 18), by which "common carriers by water, as defined by the Shipping Act of 1916, shall not be accepted for loading at the elevator."

3. Southern Stevedoring performs no other services than loading or unloading grain to or from ships (Tr., 613, 614). To perform its services Southern Stevedoring provides and uses trimming machines and appurtenant parts, nozzles, spout extensions, elbows, wagons, and miscellaneous gear such as light extensions (Tr., 31–32, 614–615). Southern Stevedoring owns all the equipment used after the grain leaves the spout (Tr., 33). Bunge provides the spouts, galleries, and other grain conveyors.

4. Bunge entered into two contracts dated June 27, 1961 (exhibit 1), and August 31, 1961 (exhibit 4), together giving stevedoring rights at the Destrehan facility to Southern Stevedoring. The June 27 agreement allowed Southern Stevedoring to use a small office building and storage shed, which photographs showed to be a little smaller than an average single-car garage, and made its maintenance crew available for repairing the stevedores' equipment. The rental and service charges resulted in at least $144,000 a year paid to Bunge (Tr., 279). The August 31 agreement obligated Southern Stevedoring to "stevedore all vessels loading at owner's [Bunge's] dock at Destrehan, La., with respect to which owner has the right to designate contractor [Southern Stevedoring] as stevedore * * *" (par. 1). Rates were prescribed per ton of 2240 pounds for various types of grains and ships, and it was stated: "Contractor shall invoice the party responsible for the stevedoring service * * *" (par. 2).

5. Louisiana Stevedores and other stevedores which might be retained by ships as to which Bunge did not have the "right to designate

contractor as stevedore" were not allowed to move across the wharf (Tr., 254, 430) in the event of retention and had to furnish their own stevedoring equipment for handling the grain (Tr., 431). Bunge made no efforts to make electricity available nor to have Southern Stevedoring make electricity available (Tr., 586–587), and, when requested for either electricity or access to the wharf, Bunge gave such answers as "since the activity which they sought to perform was to be conducted wholly upon the vessel they make whatever arrangements they could to do the job themselves and not to look to us" (Tr., 587). Powerlines and spout extensions were not available to other stevedores (Tr., 89, 90), although such facilities and pipes, nozzles, and knuckles were "ordinarily required of the elevator" (Tr., 102) and were supplied by other elevators (Tr., 108–109).

6. Other stevedores who were treated the same as Louisiana Stevedores also had to use launches or barges for personnel and equipment needed to stevedore ships at the Bunge facility (Tr., 103–105). Electric generators had to be supplied (Tr., 104). Armed guards prevented overland use of the facility by others (Tr., 105 and exhibit 10). The time consumed by access to ships by "alternative means" (Tr., 588), i.e., by launch (Tr., 589), was greater, and it was more expensive than for those using the wharf (Tr., 107–108).

7. The record showed that Louisiana Stevedores' employees were denied access and were required to use launches, tugs, and barges in stevedoring nine ships between February 2, 1962, and February 25, 1963, as they would have been required to do from September 1, 1961, onward. The ships were not shown to be common carriers by water. Bunge's policies and practices provided for exclusion of other stevedores before November 22, 1961 (see Fact No. 8). The first inquiry that was made for permission "to stevedore vessels standing at the Bunge dock" involved "one of the first vessels that was loaded," but the testimony did not show the status of the carrier (Tr., 430). The inquiring stevedore was told in substance, "they would not be permitted access over the dock, that they would have to furnish their own stevedoring equipment for handling the grain" (Tr., 430–431).

8. Bunge, in a "Memorandum" to the public dated November 1, 1961, stated that to operate its facility efficiently, "it had been necessary to exercise control over various aspects of an integrated grain export operation oftentimes left in the hands of others or not attended to at all" (exhibit 19, par. 1). Further, in order to minimize the problem of inefficiency in stevedoring, "Bunge decided to appoint a resident stevedore to perform all stevedoring work which it controls" (exhibit 19, par. 4); the memorandum stated its reasons for this action.

Bunge disavowed "the authority in some cases to dictate to a vessel owner the stevedore that must be employed on vessels * * *," but "does not desire to encourage other stevedores in working at Destrehan * * *" and "earnestly requests" vessel owners and charterers "to make use of the resident stevedore in order to further the interests of all concerned" (exhibit 19, par. 5). A "Statement by Bunge Corp. of its Policy and Practices With Respect to Stevedoring at its Destrehan Elevator" dated October 26, 1961, contained similar statements as the later memorandum and stated: "Bunge has decided to refrain from making its dock facilities available to other than its resident stevedore" (exhibit 21, par. 4, p. 10).

Findings

1. (a) Between the time Bunge began operations and until November 22, 1961, Respondent was an "other person subject to this act" as defined in the first section of the Act.

(b) Southern Stevedoring was not at any time an "other person subject to this act," because it furnished no facilities described in the first section of the Act.

2. Respondents did not make any agreement of a type described in section 15 of the Act.

3. Respondents before November 22, 1961, subjected particular persons to unreasonable disadvantage.

4. Respondent Bunge's agreement, policies, and practices established an unjust and unreasonable regulation and practice related to the handling and delivering of property consisting of bulk grain.

5. After November 22, 1961, Respondents' activities have not been subject to the Act.

REASONS AND DISCUSSION

Finding 1. Bunge's tariffs and actions in serving before November 22, 1961, common carriers by water at its dock, wharf, and terminal storage facilities showed that Bunge furnished such facilities in connection with common carriers by water. Southern Stevedoring did not furnish wharf, dock, or terminal facilities, but furnished only services of stevedoring which are not one of the facilities covered by the definition of an "other person." Southern Stevedoring also is not a common carrier by water.

Finding 2. Agreements subject to section 15 must be between parties who are both subject to the Act as a common carrier by water or as an "other person." On this record only one party, Bunge, was subject to the Act as an "other person." Accordingly, Bunge was not required to file immediately its agreements with Southern Stevedoring and has not violated section 15.

Finding 3. Before November 22, 1961, Bunge excluded stevedores other than Southern Stevedoring from the grain terminal facilities and dock by maintaining exclusionary policies and by responding to an inquiry with a denial of access to the dock. By adopting a policy of excluding all stevedores except Southern Stevedoring and by the application of the policy to a stevedore making inquiries, Bunge, acting alone and directly, gave an unreasonable advantage to Southern Stevedoring as a particular person and subjected other stevedores such as the inquiring stevedore as a particular person to an unreasonable disadvantage. The disadvantage was in the added difficulties and expenses involved in getting on the ship to perform services caused by not being allowed to use the dock available to everyone else.

Finding 4. Section 17 merely requires that every other person subject to the Act "shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property." The "policies and practices" statement of Bunge is equivalent to regulations and practices. The promulgation to the public in memorandum form is equivalent to establishment thereof and subsequent actions showed the regulations were observed and enforced. The discharge of bulk grain and its loading into ships involve handling and delivering of property. The practice of compelling other stevedores, as Bunge's witness stated, to make whatever arrangements they could to do the job themselves and not look to Bunge for the customary access and facilities establishes an unjust and unreasonable practice related to the handling by directing the grain coming out of conveyors and spouts into the ship's hold and delivery of grain to the ship. The regulation was unjust and unreasonable, not only by virtue of the expensive interference the regulations cause stevedores by having to use launches, but because of the practical effect amounting to denial of the right of the ship to choose a stevedore in spite of a disclaimer of denial. The location of the real power is disclosed to some extent by the fact that Bunge by contract obligated Southern Stevedoring to invoice ships for services rendered. There is a variance between the words and actions of Bunge. The rhetoric of rights of other than Bunge-controlled ships to choose stevedores is preserved in the exclusive agreement and policy statement, but the accompanying actions make the right overly difficult and expensive to exercise. The right of ships to choose stevedores is there, but the power to use it is not. I believe protection of a shipowner's effective power to select stevedores ought to be bedrock principle in administering the law. The power of the ship operator to select a stevedore he trusts to load his ship must never be interfered with as long as the law fixing the responsibility of operators for the safety of their ships at sea exists in its present form. Loading cargo in the holds vitally affects the safety of the ship. The responsibilities of the carrier under the Carriage of Goods by Sea Act are relatively exacting. The absolute right to choose the loading stevedore is based on these considerations. Anyone who interferes with the effective exercise of the choice is guilty of an unreasonable regulation or practice under section 17. The examiner mentions the time it takes to load as a possible justification for interference by making Bunge's stevedores work for everyone, but time is not everything. Quality and trust are important. Perhaps there isn't much room for quality in loading bulk grain, and perhaps trust is to be assumed; nevertheless, whatever quality or trust there is in loading should not be sacrificed and a decision should not be made which makes a sacrifice possible. It is noted that the charter contract is not only to load the ship, but the ship must be properly "trimmed," i.e., the ship must float evenly after loading (exhibit 41, par. 1). Loading is just as important as the "Grain Charter Party" warranty: "That the said ship being tight, staunch and strong, and in every way fitted for the voyage * * *" etc. (exhibit 41, par. 1). An improperly loaded ship is not in every way fitted for a voyage. For these reasons, I consider Bunge's regulations to make ineffective the stevedore selection process contrary to section 17 of the Act.

Finding 5. By its tariff revision of November 22, 1961, Bunge effectively severed any "connection" (the word used in the first section of th Act in defining "other person") between its dock and terminal facilities furnished and common carriers by water. Such ships are no longer furnished any facilities. If the words of the tariff and later acts of Respondents disclose a variance, another issue will be presented at such time. In the meantime, the tariff restriction must be accepted as a truthful commitment.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1158

IN THE MATTER OF AGREEMENT NO. 134–21 GULF/MEDITERRANEAN PORTS CONFERENCE

Proposed amendment to Conference Agreement No. 134 whereby there will be exempted from conference jurisdiction full shiploads of one commodity shipped by one shipper, under charter conditions, found not in violation of sections 14 Fourth and 16 First of Shipping Act, 1916.

Said amendment approved under section 15 of Shipping Act, 1916. and proceeding discontinued.

Frank Gormley Hearing Counsel.

Edward S. Bagley for respondents.

T. R. Stetson for Intervener United States Borax & Chemical Corporation.

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

The Commission, by order dated November 19, 1963, instituted this investigation to determine whether a proposed amendment to the Conference Agreement of the Gulf/Mediterranean Ports Conference may be in violation of sections 14 Fourth and 16 First of the Shipping Act, 1916 (the Act), and whether said amendment should be approved, disapproved or modified pursuant to section 15 of the Act.

The amendment, Agreement 134–21, would exempt from conference jurisdiction full shiploads of one commodity (except cotton and cotton linters) shipped by one shipper, under charter conditions.

The Conference and members thereof, which are engaged in common carriage in the Gulf and South Atlantic/Mediterranean trade, were named respondents. United States Borax & Chemical Corporation intervened as favoring the amendment, but offered no testimony at the hearing, held on June 8 and 9, 1964.

[1] This initial decision was adopted by the Commission March 15, 1965 and the Report is at page 459, Volume 8 FMC.

THE CONTENTIONS

Hearing Counsel oppose approval of the amendment on the grounds that it would result in (1) discrimination between large and small shippers in violation of section 14 Fourth of the Act; (2) undue preference and prejudice to shippers or descriptions of traffic in violation of section 16 First of the Act; and (3) diversion of berth service offerings to tramp service contrary to the public interest—all three results being in contravention of section 15 of the Act.

Respondents contend (1) that the Commission is without jurisdiction to deny approval of the amendment. Assuming jurisdiction, respondents maintain (2) that no unjust discrimination or other illegal situations would result from approval of the amendment since any advantages obtained by a shipper of full-vessel loads is inherent in the movement itself rather than the identity of the carrier under the charter party; and (3) that failure to approve the amendment would result in detriment to the involved shippers, carriers, commerce and conference.

THE FACTS

The testimony summarized below and a stipulation of facts are found to be the evidentiary facts of record.

The Vice President in charge of traffic for respondent Waterman Steamship Corporation testified that Waterman, a U.S.-flag nonsubsidized member of the Conference, owns 28 ships, most of which are in berth service; that it has a seasonal surplus of idle ships; that it has had to cancel sailings for lack of cargo, consolidating bookings on two sailings onto a single ship, but that it does not make it a practice to cancel a berth sailing when it has cargo booked thereon; and that when the berth service is not remunerative it charters ships out if it can break even or make a slight profit.

He testified that Waterman sponsored the amendment at a meeting of the Conference on January 15, 1963; that it was rejected whereupon Waterman submitted its resignation from the Conference effective February 14, 1963; but that the Conference on February 8, 1963, upon reconsideration adopted the amendment, and Waterman withdrew its resignation.

He testified also that Waterman's only interest in securing approval of the amendment is to be able to participate in the carriage of U.S. Government financed cargoes under Public Law (P.L.) 480,[2] primarily full shiploads of flour shipped from the Gulf to the Mediterranean area; that 50 percent of such cargo is allocated to U.S.-flag

[2] Shipped under U.S. Government export subsidy and aid programs.

ships, 90 percent of which is now being carried by U.S.-flag tramp ships; that Waterman would bid for these cargoes against such tramp vessels; that a small amount of such cargo moves in parcel lots on conference ships at liner rates; that 50 percent of P.L. 480 cargoes are carried by foreign tramps at rates about 50 percent below rates of U.S.-flag ships; that liner vessels cannot compete with tramps for full shiploads of either commercial or P.L. 480 cargo; that approval of the amendment will not create a new group of carriers competing for this bulk cargo, since U.S.-flag tramps have always and will continue to compete for such cargo; but that approval simply means that Waterman and other members of the Conference will be in a position to compete for such cargo, the U.S.-flag lines for a portion of the 50 percent allocated to U.S.-flag lines, and the foreign-flag lines for a portion of the 50 percent allocated to foreign-flag lines.

Furthermore, he testified that approval of the amendment would not in his opinion, affect the stability of liner rates on the commodities involved, or the participation of the members of the Conference in the liner movement since full cargoes shipped by one shipper under charter conditions will not become available for conference liner service, the only cargo available to them being the 10 percent of odd lot movements.

Finally, the Waterman official testified that the only alternatives left to it if the amendment is not approved either is to charter its surplus ships to others and/or put them in P.L. 480 trades outside the Mediterranean area, an unsatisfactory solution, or to resign from the Conference, which it indicates it will do.

The Secretary of the Conference testified that a unanimous vote is required to exempt any traffic from the jurisdiction of the Conference; that phosphate rock, grain and sulphur, in bulk, are so exempted; that the Conference tariff contains dual rates, volume discount rates and so-called "project" rates; that the cargoes which would be exempted under the amendment would still be subject to tariff rates if shipped on liner vessels; that he foresaw no serious effects on the stability of such rates if the amendment were approved; that no complaints have been received from shippers against the proposed amendment;[3] that both U.S.-flag and foreign-flag lines could take advantage of any benefits resulting from the amendment; and that both the Gulf/French Atlantic Hamburg Freight Conference and the Gulf/United Kingdom Conference, of which he is also Secretary, exempted full shipload cargoes in their basic conference agreements in 1930 and 1931 respectively, with the approval of the Commission's predecessor.

[3] No protests against approval of the amendment were received by the Commission following its publication in the Federal Register of March 15, 1963.

A Vice President of respondent Lykes Bros. Steampship Company, a member of the Conference, testified that the exemptions in the two conferences mentioned above were secured to enable the conference lines to participate in bulk movements to the United Kingdom and the Continent which would otherwise be carried by tramps. He states that it was used to considerable advantage in carrying tremendous amounts of flour and foodstuffs to the occupation forces in Germany after World War II, but that it has not been used to any great extent otherwise.

He also testified that Lykes voted for the proposed amendment the second time, but opposed it originally because, as a subsidized line, Lykes would have to obtain permission from the Commission to handle full shipload cargoes, by which time the cargo probably would be lost; that if it carried them it would forfeit the subsidy thereon; and, in any event, Lykes was not interested in full cargoes because the rates thereon were on the low side.

The stipulation of fact entered into between Hearing Counsel and respondents is as follows:

1. The Conference carriers have agreed that the reference to "full cargoes" in the proposed amendment is to be defined as follows: The Conference uses the term in the manner generally understood in the trade, although the cargo may not fill either the entire cubic or displacement capacity of the vessel, it would constitute a "full cargo" where it substantially occupied the vessel and did so to the exclusion of any other cargo carried on that vessel in the voyage.
2. The Amendment agreed upon by the Conference at the meeting of February 8, 1963, was the same amendment to the Conference Organic Agreement which had been considered and rejected by the carriers at the meeting of January 15, 1963.
3. The exclusion from Conference coverage proposed by the Amendment under consideration would apply equally to all carriers, cargoes and shippers similarly situated. All of the Conference members would be entitled to solicit for carriage of such "full cargoes" whether the cargoes were financed under the provisions of P.L. 480 or were otherwise subject to the Cargo Preference Laws, or were not in any manner subject to the Cargo Preference Laws. At the same time the Confererence is not aware of any full cargo shipments moving in the trade which would involve nonbulk quantities other than those financed pursuant to P.L. 480.
4. There are no instances of such "full cargoes" of nonbulk commodities which have moved in the other trades employing

similar exceptions, the Gulf/French Atlantic Hamburg Range Freight Conference and the Gulf/United Kingdom Conference. This also applies to the present trade except for cargoes financed under P.L. 480 as here set forth.[4]

5. It is the intent of the carriers and of the Amendment under consideration that the charter vessels would be available to all shippers whether or not a particular cargo was financed under P.L. 480. At the same time, as indicated above, there have been no instances of such cargoes being offered in this trade other than the flour shipments under P.L. 480 previously referred to in these proceedings.

DISCUSSION AND CONCLUSIONS

At the outset is the question of the Commission's jurisdiction which has been challenged by respondents. They point out that section 1 of the Act exempts from regulation "a cargo boat commonly called an ocean tramp," in which capacity the ships would be operating when carrying the exempted traffic. They analogize this movement to foreign-to-foreign trade which the Commission has held is properly excludable from section 15 agreements. *States Marine Lines, Inc.* v. *Trans-Pac. Freight Conf.* 7 F.M.C. 204, 213 (1962).

Admittedly, tramp operations as such are not subject to the Commission's jurisdiction. However, it is well settled that while a common carrier may engage in both common and contract (tramp) carriage, it—

> "may [not] so contrive its operations in such dual capacity as to work unwarranted discrimination against the shipper patrons of its common carrier service." *Transp. By Mendez & Co., Inc. Between U.S. and Puerto Rico* 2 U.S.M.C. 717, 721 (1944).

Certainly, respondents are engaged in common carrier service in the Gulf/Mediterranean trade under their basic conference agreement, and as such are subject to the Act and therefore the jurisdiction of the Commission. Hence the Commission is empowered to disapprove the amendment in question if it finds that the contract operations of the common carriers pursuant thereto would result in unlawful discrimination against their common carrier patrons. Exactly in point here is the statement of the Commission in *Agreements 6210 etc.* 2 U.S.M.C. 166, 170 (1939) that "where a carrier subject to our jurisdiction attempts to operate [dually as a common and contract carrier] we may order the removal of any violation of that section [16] resulting from the operation of the contract portion."

[4] That is, within the memory of those presently attending meetings of the conferences involved.

Hearing Counsel does not oppose an amendment exempting P.L. 480 traffic in full cargoes, because (1) such cargoes are not available to the berth operators, and (2) the carriage thereof would not violate either section 14 Fourth, or section 16 First, of the Act.

There is no question that such a limited amendment is approvable under section 15. The record shows as a fact that such cargoes are not available to the berth operators, and their participation in this traffic as tramp operators would not affect the stability of the rates or of the trade. On the other hand such participation would benefit Waterman and other carriers with idle ships. Moreover, since P.L. 480 cargo is not commercial cargo in the accepted sense, the prohibitions of section 14 Fourth and section 16 First do not come into play.

However, the amendment was framed to cover all cargoes in full shiploads, except as noted earlier, as a standby authority to afford an opportunity to all members of the conference to compete for tramp-ship offerings of full cargoes in the trade, as the conference carriers in the Gulf/United Kingdom and Gulf/Continent trades are permitted to do, and the amendment must be approved as it stands unless the Commission finds that it would contravene section 15 of the Act.

Hearing Counsel argue that the amendment cannot be approved because "a carrier cannot operate both as a common carrier and as a tramp in the same trade with respect to identical commodities", citing a number of familiar cases defining common carriers, stating their duties and obligations toward the public, and limiting their activities as contract carriers.

It is not unlawful *per se* for a common carrier to act as a contract carrier, or to discriminate in any other manner as between shippers in the legitimate furtherance of its business, so long as the discrimination or prejudice is not unjust or undue—a factual question. This is all that sections 14 Fourth and 16 First of the Act prohibit. Hence, all of the cases which deal with the question here necessarily hold that a carrier can be both common and contract *in the absence of* a finding of unjust or undue discrimination against shippers in the form of specific transportation evils, either existing or reasonably anticipated. Thus, in the most recent decision on the question, *Agreements 8492—Alaskan Trade*, 7 F.M.C. 511, 519 (1963), the Commission said:

We are unwilling, from our review of the cases PSAVL cites [*Absorption or Equalization on Explosives*, 6 F.M.B. 138 (1960); *Transportation by Mendez & Co.*, 2 U.S.M.C. 717 (1944); cf. *Grace Line* v. *F.M.B.*, 280 F. 2d 790 (2d Cir. 1960); *Flota Mercante Grancolombiana, et al.* v. *F.M.C. & U.S.*, 302 F. 2d 887 (D.C. Cir. 1962).] to accept its contention that the agreement must be disapproved because a mixture of common and contract carriage on one vessel (or barge tow) on the same voyage would, without more, be unlawful. We think the better approach is that such a mixture of cargoes may not be used to evade regulation and must not result in a carrier's avoidance of its common carrier obligations with respect to the fair, nonpreferential and nondiscriminatory treatment of shippers.

We have no evidence which would warrant our concluding that the parties will, or that they intend to handle contract and common carriage under Agreement 8492 in a manner which would violate the Shipping Act. We should not disapprove the agreement on the bare possibility that they could violate the Act. At the least there ought to be a substantial likelihood of such conduct. If it develops that the parties' actual operations entail rate or other practices of questionable legality, the provisions of the Shipping Act afford ample means for reaching and if necessary correcting same.

It is also a cardinal regulatory principle that a common carrier may compete for traffic; that the fact of such competition must be considered in determining whether there is undue preference or disadvantage (*Texas & Pacific Ry.* v. *I.C.C.* 162 US 197); and that because it engages in competition the carrier cannot be charged with creating unjust discrimination or undue prejudice unless it can be shown that the disfavored shipper suffers injury by reason of the discrimination, and that this injury will cease if the discrimination is removed, regardless of the manner of its removal. *Duluth Chamber of Commerce* v. *C., ST. P., M. & O. Ry. Co.* 122 ICC 739, 742 (1927).

These are the principles under which the legality of the proposed amendment must be judged.

The basic facts derived from the testimony bearing upon the question of discrimination are that respondent common carriers cannot compete with tramp operators for full shiploads of one commodity at liner rates; that such cargoes will move at tramp rates whether respondents bid for them or not; that any preference or advantage obtained by a shipper of vessel-load quantities is entirely inherent in the shipper's ability to enter upon the charter market and cannot be characterized as undue or unreasonable; that, likewise, the treatment obtained by such shipper will not be unfair or unjustly discriminatory; that a shipper of less-than-shipload cargoes via a common carrier would not suffer any more because such common carrier carried his competitors goods in full shiploads at a lower contract rate than if a tramp carried such full cargoes at a lower rate; and that a shipper of less-than-shipload cargoes via a common carrier would not benefit from the nonparticipation of such common carrier in tramp carriage of the same commodity.

The proposed amendment has been tested in the parallel trades of the Gulf-U.K. and Continent conferences without any evidence of resulting unlawful discrimination. No shipper has protested the amendment; in fact the only shipper interested intervened in support thereof.[5]

For the foregoing reasons it is found and concluded that the proposed amendment will not be violative of section 14 Fourth or section 16 First of the Act.

Respondents maintain that denial of the amendment or adoption of the amendment modified to cover P.L. 480 cargo only would give rise to the following consequences. These carriers would be denied the right to compete for this movement, solely by reason of their conference membership, which, in turn, would serve to weaken, if not destroy, the Conference itself. Full-cargo shippers in the trade would be denied the lower rates which presumably would result from the increased competition on such full-cargo shipments where these carriers were free to offer their services. Shippers bound by dual-rate contracts, through being precluded during the existence of those contracts from trading in full-shipload lots under charter conditions, would be faced with the loss of sales to their foreign competitors. The shipper of a Government-sponsored cargo, under Hearing Counsel's proposal, would be accorded an advantage over the shipper of a cargo not so sponsored where the advantage properly lies in the full-carriage commitment rather than in the form of sponsorship under which the cargo moves.

Respondents also contend that failure to approve the amendment will result in detriment to the conference system where meaningful enforcement by the Commission is not possible. They argue that the rule reached through the denial of the proposed amendment would be completely unenforceable, leaving the following "loopholes" among others: (1) It would apply only to a Conference carrier, since quite obviously the Commission cannot dictate to the carriers in our foreign commerce (apart from those under U.S. subsidy commitments) the employment in which their vessels are to serve. (2) Even as to the Conference carriers, essentially the same reuslts could be obtained through chartering subsidiaries and/or the charter of an individual vessel to another carrier operating outside of the scope of the Conference. While it is not possible to fully evaluate these prophecies due consideration must be given to the consequences to the carriers involved if the amendment is not approved as presented.

---

[5] In the *Texas Pacific case, supra*, the Supreme Court at page 239 said: "The mere fact that the disparity between the [rates] was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination—much less did it justify the court in finding the entire difference between the two rates was undue or unreasonable, *especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity.*" (Emphasis supplied)

ULTIMATE FINDINGS AND CONCLUSIONS

The proposed amendment will not be violative of sections 14 Fourth or 16 First of the Shipping Act, 1916. The said amendment should be approved under section 15 of said Act.

An appropriate order will be entered.

JULY 17, 1964.

(Signed) GUS O. BASHAM,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1105 (SUB. 1)

AGREEMENT NO. 8900—RATE AGREEMENT

UNITED STATES/PERSIAN GULF TRADE

Decided April 14, 1965

Agreement No. 8900 approved pursuant to section 15 of the Shipping Act, 1916, subject to compliance with General Order No. 7.

Agreement No. 8900 found not to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Shipping Act when there is no substantial competition between two groups making or conferring on rates in regard to ports served, shippers served, cargoes carried, or service offered.

Marvin J. Coles, *Stanley O. Sher*, *Armin U. Kuder*, for respondents Hellenic Lines, Ltd., Hansa Line, N. V. Nedlloyd Lijnen, and Constellation Line.

Thomas K. Roche and *Sanford C. Miller*, for respondent Concordia Line.

Elmer C. Maddy, *Paul F. McGuire*, and *Baldvin Einarson*, for intervener Persian Gulf Outward Freight Conference.

Frank Gormley, *J. Scot Provan*, and *Howard Levy*, Hearing Counsel.

E. Robert Seaver, Hearing Examiner.

REPORT

BY THE COMMISSION: (James V. Day, *Vice Chairman;* John S. Patterson, *Commissioner*)

On November 9, 1962, Concordia Line, Deutsche Dampschiffahrts-Gesellschaft "Hansa", Hellenic Lines, Ltd., Nedlloyd Line (now N. V. Nedlloyd Lijnen), Kulukundis Lines, Ltd., and Kulukundis Maritime Industries, Inc., filed with the Federal Maritime Commission (Commission) and applied for approval under section 15 of the Shipping

Act, 1916 (Act) of a proposed agreement for consultation on freight rates for service between U.S. Atlantic and Gulf ports and ports in the Persian Gulf and adjacent waters in the range west of Karachi and northeast of Aden, assigned Agreement No. 8900. Since the proceeding was instituted, both Kulukundis applicants ceased to participate in the proceeding, and Crescent Line, Ltd., was accepted as a party to Agreement No. 8900 and added as an applicant. Since the close of the record, the name of Crescent Line, Ltd., has been changed to Constellation Line. The applicant lines are now operating independently of the Conference and are referred to herein as either "applicants" or "independents". All signers of the Agreement are common carriers by water in foreign commerce as defined in the first section of the Act.

The Persian Gulf Outward Freight Conference (Conference or protestant) protested approval of Agreement No. 8900, and we instituted this proceeding by our Notice of June 4, 1963, naming applicant carriers as respondents. The Conference at the time of the institution of the proceeding consisted of Central Gulf Steamship Corp. and Isthmian Lines, Inc. Later, Stevenson Lines joined the Conference (Exhibit 2).

An examiner has decided, after hearings, that the proposed Agreement No. 8900 should be disapproved, and exceptions to his initial decision have been filed. We held oral argument.

The applicants, respondent Concordia Line, and hearing counsel submitted exceptions, summarized as follows:

1. The record does not support any of the statements, findings, or conclusions made by the examiner in regard to competition between the applicant and protestant carrier groups as to ports served, cargoes carried, rates charged, or services to shippers.
2. The record does not support, and it was error in the interpretation of the law to conclude that anything "that encourages ship lines to stay out of approved conferences is inimical to the public interest"; and that approval of Agreement No. 8900 will militate against the re-formation of a single conference.
3. The record does not support the findings that approval of Agreement No. 8900 and the creation of a second rate-regulating group would lead to increased strife and rate instability.

Exception was also taken to several statements as being contrary to the facts, such as that the applicants prevented their rejoining the Conference by refusing to negotiate a pooling agreement, that competition by the independents was "directed at the conference lines", and to the discussion of the *Oranje Line* case (infra) as being contrary to law, which do not control our decision and are disregarded as irrelevant.

For the reasons herein stated, the exceptions are sustained and the examiner's initial decision is reversed. Based on the findings and reasoning herein, we conclude that Agreement No. 8900, regulating transportation rates and regulating competition, a true copy of which has been filed with the Commission, should be approved and the protest rejected.

I. FACTS

The following facts have been shown:

1. The five applicants are common carriers by water, engaged in transporting property between U.S. ports along the Atlantic and Gulf of Mexico coasts and ports in the Persian Gulf area. The ports called at in this area during the period between September 1, 1962, through August 31, 1963 (the period selected by the parties as providing a typical presentation of operations) by the five applicant carriers and the approximate number of calls were as follows:

Abadan, Iran	23
Abu Dhabi, Saudi Arabia	6
Ad Dammam, Saudi Arabia	66
Al Bahrayn, Bahrein Is	49
Al Basrah, Iraq	81
Al Kuwayt, Kuwait	88
Bandar-e Shapur, Iran	6
Busheir, Iran	9
Das Island (not located by country)	2
Dubayy, Trucial Coast (coastal sovereignty undefined)	9
Jabal Dana (not located by country)	4
Khor El Muffata, Neutral Zone	19
Khor al Ami (not located by country)	1
Khorramshahr, Iran	87
Mina al Ahmadi, Kuwait	18
Muscat, Saudi Arabia	3
Ras Al Khafgi (Neutral Zone)	4
Shatt El Arab (not located by country)	1
Um Said, Qatar	12

(Figures compiled from Exhibits 3, 6, 8, 16, 38.)

2. The protestants are likewise common carriers by water engaged in transporting property between the same areas. The ports called at in this area in same period by the two carriers and the approximate number of calls were as follows:

Central Gulf Steamship Corp.	
Ad Dammam, Saudi Arabia	1
Bandar-e Shahpur, Iran	21

(Figures compiled from Exhibit 19, Schedule 2.)

Isthmian:	
Ad Dammam, Saudi Arabia	14
Al Basrah, Iraq	1
Al Kuwayt, Kuwait	2
Bandar Abbas, Iran	2
Bandar-e Shahpur, Iran	17
Bushehr, Iran	2
Khorramshahr, Iran	14
Ra's at Tannurah, Saudi Arabia	9

(Figures compiled from Exhibit 22.) (Ships calling twice at one port on a single voyage—unloading outbound and loading inbound—counted as one call.) There are no facts in the record regarding calls by Stevenson Lines.

Of the foregoing ports, Ad Dammam is primarily a tanker port that is used by Isthmian ships working for Arabian American Oil Co. Ra's at Tannurah is called at when Ad Dammam is crowded. Bandar-e Shahpur is primarily a port for Iranian Army equipment cargo and is not a regular port of call for commercial cargo, except when Iranian authorities direct cargo there because of port congestion at Khorramshahr.

3. The ports called at in this area during the same period by both applicants and protestants herein were shown to be as follows:

Ports	Conference	Independents
Al Basrah	1	81
Ad Dammam	15	66
Al Kuwayt	2	88
Bandar-e Shahpur	38	6
Busheir	2	9
Khorramshahr	14	87

There were no overlapping calls at any of the other ports.

4. Central Gulf and Isthmian cargoes to the Persian Gulf and to non-Persian Gulf ports were as follows:

Cargo carryings, Sept. 1, 1962–Aug. 31, 1963, in payable tons

Lines	To Persian Gulf	Other than to Persian Gulf	Percentage carried other than to Persian Gulf
Central Gulf	79,667	222,141	73.60
Isthmian	87,456	140,694	61.67

(Exhibits 19, 23.)

5. The applicants' cargoes to the Persian Gulf were approximately 603,481 payable tons out of a total 803,794 payable tons (Exhibits 4, 6,

10, 14, 18, 45, 47, 48, Tr., 183). The balance of 200,313 payable tons went to non-Persian Gulf ports. Of applicants' total payable tons carried, 40% to 50% was estimated to be from automobiles and trucks.

Cargo carryings, Sept. 1, 1962–Aug. 31, 1963, in payable tons

Lines	To Persian Gulf	Other than to Persian Gulf	Percentage carried other than to Persian Gulf
Concordia	150,352	37,631	20.01
Hansa	148,905	35,852	19.40
Nedlloyd [1]	79,412	41,335	34.23
Hellenic	153,064	57,452	27.29
Crescent [2]	71,748	28,043	28.10

[1] See Tr. 317.
[2] Includes Kulukundis Lines, Ltd.

6. The protestants' cargoes to the Persian Gulf were estimated to be between 60% and 70% Government-"financed". Government-"financed" cargo is that portion of cargo reserved by law to U.S.-flag carriers under section 901(b) of the Merchant Marine Act of 1936,[1] Public Resolution No. 17, 48 Stat. 500,[2] and cargo of the Department of Defense (MSTS cargo), all of which must be carried under 10 U.S.C. section 2631 [3] on American-flag ships. The Conference carriers cannot accurately determine the percentage of Government-sponsored cargo they carry as their records do not distinguish between cargo sponsored by the Agency for International Development ("AID"), other cargo, and commercial cargo. The applicants carry about 86.9% to 90.2% of the commercial cargo in this trade (Exhibits 4, 6, 10, 14, 18, 19, 23). The estimated 30% to 40% of the 167,000 pay-

[1] "(b) Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas: . . ."

[2] Pub. Res. No. 17, 48 Stat. 500, Ch. 90—"Resolved . . . That it is the sense of Congress that in any loans made by . . . any . . . instrumentality of the government to foster the exporting of . . . products, provision shall be made that such products shall be carried exclusively in vessels of the United States . . ." unless the Maritime Administration certifies there are not enough vessels, or in sufficient capacity or "at reasonable rates".

[3] 10 U.S.C. 2631—"Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force or Marine Corps . . . Charges made for the transportation of those supplies by those vessels may not be higher than the charges for transporting like goods for private persons."

able tons of commercial cargo carried by the two Conference lines is 50,100 to 66,800 payable tons.

If MSTS or AID cargo to the Persian Gulf were discontinued, it would be extremely difficult for the protestants to continue in the trade. Central Gulf, moreover, has not been offered any commercial shippers' cargo.

7. The applicants' and protestants' rates on most commodities in tariff schedules show differentials from 15% to 25%. The rates of protestants on the commodities most frequently carried are from 25% to 100% higher than those of applicants. These rates are as follows:

Rates quoted by foreig -flag lines on Persian Gulf commodities

Exhibit number Lines	46 Crescent	42 Hasna	43 Hellenic	44 Nedlloyd	55 Concordia
Principal commodities:					
Autos and trucks:					
Boxed	$26	$26	$26	$26	$26
Unboxed	30	30	30	30	30
Lubricating oil or petroleum products packed	28	28	28	28	28
Bagged flour	22	22	24	24	22
Bagged rice	22	22	24	22	
Air conditioners	35	35	35		35
Refrigerators	31	31	31	31	31
Oil production equipment	34	34			34
Machinery, industrial, road building, agricultural	38	39. 15	38	39. 15	39. 15
Canned. bottled goods/foodstuffs		40. 50		40. 50	
Iron and steel pipe		29. 25		29. 25	
Tallow in drums	25		22. 50		
Vegetable oil			22		
Tires			100	100	
Auto parts					26
Tinplate					22
Steel sheets					20

A comparison between the rates quoted by the applicants and the protestants on certain commodities shows the following:

Rates quoted by independents and conference carriers on Persian Gulf commodities

Principal commodities	Applicants	Protestants	Percent Conference higher
Autos and trucks:			
Boxed	$26. 00	$33. 00	27
Unboxed	30. 00	44. 00	47
Lubricating oil or petroleum products, packed	28. 00	36. 25	29
Bagged flour [1]	22. 00	43. 50	98
Bagged rice [1]	22. 00	43. 50	98
Air conditioners	35. 00	46. 75	34
Refrigerators	31. 00	38. 00	23
Oil production equipment	34. 00	41. 75	23
Machinery, industrial			
Road building	38. 00	46. 25	22
Agricultural [1]	38. 00	50. 00	32
Canned. bottled goods/foodstuffs	40. 50	49. 50	22
Iron and steel pipe	29. 25	35. 75	22
Tallow in drums [1]	25. 00	35. 75	43
Vegetable oil	22. 00	44 00	100
Tires	100. 00	133. 00	33
Auto parts	26. 00	33. 00	27
Tinplate	22. 00	30. 25	37
Steel sheets	20. 00	36. 75	84

[1] Differences exist among the applicants on these commodities.

8. Four of the applicants resigned from the Conference in 1960 and became independent carriers for the purpose of protecting their steady shippers by meeting the rates of occasional competitors which enter the trade. The Conference had refused to reduce its high rates which had attracted such competition. Nedlloyd resigned in late 1959, and shortly afterwards Concordia, Hellenic, and Hansa resigned. Thereafter, wide rate fluctuations occurred as the result of competition between the resigned and now independent carriers.

Central Gulf and Isthmian remained in the Conference.

When Stevenson associated itself with the Conference, it considered only the Conference rates and gave no thought to what the non-Conference lines were charging. During the period of rate fluctuation, automobile rates went from $40 a ton to $19 a ton. A count of the applicants' rates shows that their rates vary between them on at least 360 tariff items (Exhibit 12), although it was estimated in testimony that their rates are presently somewhat similar. When rate changes are made, their effective dates are different (Tr. 340–341).

9. Most of the applicants' ships depart with free space (Exhibit 14; computations from Exhibits 6, 7, 10, 15, 18, 45, 47, 48). (Counsel's representations as to "free space", in the context of his arguments, and comparison with Conference ships were taken to mean the ships were not fully loaded in terms of weight or space and could take on additional cargo if available.) The Conference ships seldom depart from U.S. ports with any free space (Exhibits 19, 23).

10. Shippers many times have to call four and five carriers to make sure that all lines are quoting the same rates. The proposed Agreement provides that each party delivers to the others copies of its tariffs and changes therein (sec. 3).

11. The most frequently moving commodities, such as automobiles, bagged flour, lubricating oil, and others, are also imported into the Persian Gulf ports from foreign countries. Under the protestants' rate it costs $640 to ship an automobile (based on a standard-sized Chevrolet or Ford) and $450 under the applicants' rate. Hansa's witness stated his belief that if it were to adopt the Conference rate of $43.50 on flour in bags, its main cargo buyers would find other import sources (referred to in testimony as $44).

Arabian American Oil Co., a non-Government commercial shipper, ships approximately 6,000 payable tons each year on Isthmian for other reasons than the rates, and indicated the possibility of diverting purchases to foreign countries from the United States.

12. Meetings were held in the spring of 1963 to determine whether the applicants could be induced to join the Conference. It was de-

termined that they would not join because of the rate differential between the groups (Exhibit 11). The rate differential has increased since 1963. The applicants have remained out of the Conference since 1960 and there is no indication in the record that the now independent applicants will join the Conference in the future.

13. The proposed Agreement No. 8900 contains seven sections providing for: Consultation on rates, agreement thereon based on majority "assent" (including the right to take independent action), separate maintenance of tariffs, addition of parties to the agreement, effectiveness after Commission approval, furnishing of minutes of meetings to the Commission, and termination.

II. Findings

Based on these facts, and as developed in the following discussion, we find:

1. Agreement No. 8900 is an agreement regulating rates and competition between common carriers by water in the foreign commerce of the United States between ports on the Atlantic and Gulf coasts and ports in the Persian Gulf and adjacent waters in the range west of Karachi (Pakistan) and northeast of Aden (Aden Protectorate), but excluding both Aden and Karachi.
2. The Persian Gulf Outward Freight Conference operates in the identical area under a Commission-approved agreement.
3. There is no substantial competition between applicants and the Conference in regard to either ports served, cargoes carried, rates charged, or services to shippers.
4. There is no record proof that refusal of common carriers by water in foreign commerce to join the Conference or that the existence of two rate-regulating agreements covering the same trade is contrary to public policy on the facts of this proceeding.
5. There is no record proof that approval of Agreement No. 8900 and the creation of a second rate-regulating group would lead to increased strife and rate instability.

III. Discussion

Underlying the Examiner's disapproval of Agreement No. 8900 is the conclusion that relations between the applicant carriers and the existing Conference carriers in the event of approval will create destructive competition which will cause unfairness between carriers, exporters, and others, detriments to commerce, and injury to the public, and that applicants will be induced to rejoin or re-form in the existing Conference in the event of disapproval. It is argued that the law favors only one conference in a trade, not two. The conclusion rests on treating future events that may never happen as though they had happened. Such use of unproven suppositions is not reasonable. Conclusions should be based on a comparison of what the record shows exists or is reasonably foreseeable based on past and present events and of the express terms of the Agreement with the conditions for disapproval stated in the second paragraph of section 15 of the Act.

The facts show there is substantially no present or foreseeable competitive relation between the parties in regard to either ports served, cargoes carried, rates charged, or service to shippers. Lacking any conflicting competitive conditions, the basic premises of the initial decision vanish. The existence of two ratemaking associations in a single trade, by itself, is not a valid test for disapproving agreements under section 15, and the suppositions as to re-formation of the presently approved Conference following disapproval, and of future strife and rate instability following approval, are not supported by fact or reason.

1. Competition between the parties

a. Ports served

The facts showed that the applicant and protesting carriers call at only 6 out of 21 ports served by all of the carriers herein and that at the 6 ports where there are overlapping calls there are substantial differences in the number of calls and service. Ad Dammam is called at over four times as often by applicants with commercial cargoes. Bandar-e Shahpur is called at over six times as often by the protestants with Army equipment cargo and is not a regular port for commercial cargo, and Khorramshahr is called at over six times as often by applicants. At the remaining 3 ports protestants' service seems insignificant, not exceeding 2 in the period covered in comparison with 81, 88, and 9 calls by the applicants (Facts, Nos. 1–3). There is no basis for disapproval in regard to ports served.

b. Cargoes carried

The protestants' cargoes carried to ports covered by the proposed Agreement are from 26.40% to 38.33% of their total cargoes, the balance going to ports in other areas, and of area bound cargoes between 60% and 70% are not cargoes obtained in the open market, but are so-called Government cargoes which are reserved to U.S.-registered ships. Applicants carry from about 66% to 80% of their total cargoes to area ports, and obtain their cargoes from commercial shippers under competitive conditions. Protestants carry about 21% of the commercial cargo carried (Facts, Nos. 4–6). These facts show that there is no basis for disapproval in regard to cargoes carried.

c. Rates charged

The present Conference is composed of only a minority of the carriers in the trade and has not been effective in serving or offering rates on commercial cargo which are attractive to shippers. Protestants' rates, varying from 22% to 100% higher than those of applicants, virtually preclude all competition for cargoes in the trade. Because of the presence of other carriers ready to transport at the same or lower rates, there is no practical basis for believing applicants will ever adopt present higher Conference rates. Nor is there any evidence that the Conference will lower its rates. The protestants have no competitive need to reduce their rates because they neither serve the same ports to any extent nor carry similar commodities as cargoes because Government cargo is carried on their ships (Facts, Nos. 7–9). In spite of lower rates, applicants' ships depart with free space, and in spite of higher rates, protestants depart with full ships, showing that rates are not a significant factor with respect to Conference cargoes and that other nonmarket factors influence relations between the carriers. The largest shipper in the trade already makes substantial purchases abroad and indicated it might increase such procurement if the applicants increased their rates (Tr. 291). As a result of the higher Conference rates and the absence of any market compulsion for the two sides to have similar rates, there is no unjust discrimination or unfairness to shippers or exporters in the proposed Agreement, nor is there any possibility of rate instability caused by competition between the two groups resulting in detriments to commerce.

d. Service to shippers

The applicants and protestants provide entirely different service to shippers, and to the extent applicants are allowed to agree, better service will be provided. It was shown some of their ships have greater lifting capacity. Protestants are engaged primarily in transporting Government-controlled cargo not available to applicants. Applicants will tend to provide shippers with uniform rate service through assurance of identical quotations and effective dates of rates. Exporters of commodities competitive with similar commodities shipped from foreign countries will have some assurance of more competitive rates (Facts, Nos. 8, 10, 11). Because of the differences in the quantity and quality of service by applicants, there is no basis for disapproval as to carriers, shippers, or exporters under Agreement No. 8900.

2. Re-formation of present Conference

The possibility of the independents rejoining the Conference is held to be enough to justify disapproval of Agreement No. 8900. Re-formation of the single conference with the five applicants, on this record, assuming relevance to the possibility, is impossible at this time. We must approve or disapprove the Agreement on the facts we have before us. If the facts change and create other conditions affecting approval or disapproval, their effect can be adjudicated at the time they are claimed to create a need for other conclusions. Our task is not to approve for all time, but only to pass on what we have before us.

Agreements must be approved "unless we find them contrary to the provisions of that section", *Alcoa Steamship Co.* v. *CAVN*, 7 FMC 345 (1962) aff'd 321 F. 756 (D.C. Cir. 1963). Full conference participation may be more desirable, but such a value judgment is not a basis for disapproving an agreement. Agreement No. 8765, *Gulf Mediterranean Trade*, 7 FMC 495, 499 (1963).

This record does not support any predictable possibility that approval of the applicants' contract will be detrimental to commerce later on. Neither will disapproval encourage re-formation of a single large conference, assuming further public interest in such an objective, in view of the proven market situation which has nothing to offer either group by way of incentives to agree in the absence of a common area of economic interest. Existing rate differentials shown by applicants' tariffs and the Conference's tariffs are dictated by market forces and are not capable of being eliminated under the existing Conference Agreement. About 90% of commercial cargo tonnage controlled by shippers and carriers is not available in the market for commercial cargoes represented by Conference carriers at their rates, nor does it go in any volume to the same ports. The Government or noncommercial market as seen by the Conference dictates a level of rates which the majority of shippers will not pay. The threat of competition as well as the demands of shippers as seen by the applicants, on the other hand, dictates a lower level of rates which shippers will pay. Testimony in the record shows that disapproval of the proposed Agreement will not induce membership, but will deter membership. A history of 4 years' operations outside the Conference is more convincing than unsupported speculations that there is a possibility of rejoining the Conference. Market influences reenforce the intention not to join to the point where the possibility of a single conference is not a real factor in this case.

We do not find that entrance of another conference in the trade will result in instability of rates with a consequent detriment to commerce or injury to the public interest. The proposed new conference members are concerned with commercial cargoes while the existing Conference is dedicated almost exclusively to Government-sponsored cargoes.

We would not foreclose opportunities to independents to form what might well prove to be an effective conference and by such foreclosure prompt them (even if such prompting were possible) to join the present high-rate Conference; thereby insuring its existence, thereby having only high rates available to commercial exporters from the United States, and thereby reducing the opportunities for U.S. exporters to participate in the trade in competition with foreign competing shippers who possibly might have lower rates available to them.

3. Increased strife and rate instability

Record support for a supposition of future "increased strife between the two competing camps and to increased instability" is entirely missing because all the evidence is to the effect that approval will decrease "strife" and instability. The only present competition is between applicants themselves, and the possibility of conflict is here, not with the protesting Conference.

The record shows further that if rate wars and instability are a factor they will be diminished by approval because all the incentives to reduce rates opportunistically exist between the applicant carriers rather than between applicants and protestants. There is a potentially destructive competitive relationship among the independent applicant carriers which compete in regard to rates and serve many ports in common.

The competitive relationships among the five applicants is such as (a) to create unstable rate conditions, with no remedy, (b) to deprive shippers of a central source of rate information, and (c) to cause a possible loss of markets for American exporters if rates are induced to go to Conference levels. Approval of Agreement No. 8900 will remove these three detriments to our commerce.

The Commission has stated: "We and our predecessors consistently have based approval of agreements at least partly on the anticipated rate stability which would result therefrom." *Oranje Line et al.* v. *Anchor Line, Limited, et al.*, 5 FMB 714, 731 (1959). Where rate stability exists, as at present in this trade, "the threat of rate disorganization cannot be overlooked." *Contract Rates—North Atlantic Con'l Frt. Conf.*, 4 FMB 353, 367 (1953). There have been fluctuations in rates in the past harmful to shippers, and rapid changes may occur again unless applicants confer on rates. Instability in rates is harmful to shippers because it injects a speculative risk in the closing of future sales contracts. This risk would be reduced. The Commission, by favoring "anticipated rate stability" where rate stability exists, accepts the theory that predictability of rates over a forward term is desirable, and by approving rate-fixing agreements, on such ground, agrees that some limitations on market forces are essential for this purpose. The rate agreement is supposd to provide the latter. The facts here show that a market level of rates has been achieved after a period of intense competition and extreme changes in rates. Having achieved a relative stability dictated by economic realities, it seems sensible to take the next step which is to stabilize the present situation by approving the proposed Agreement. This action would not be a detriment to commerce.

The Commission has held that the duties imposed on conferences by section 15 "are intended, in furtherance of the policies of the Shipping Act, . . . and . . . place upon Conference members the duty to consider shippers' needs and problems, and to provide for the orderly receipt and careful consideration of shippers' requests with full opportunity for exchange of views." *Pacific Coast—European Rates and Practices*, 2 U.S.M.C. 58, 61 (1939). The inconvenience of checking five sources for prevailing freight rates may be eliminated, because each carrier will be able to provide the prevailing rate for all signatories. Disapproval of Agreement No. 8900 would leave six entities (the five applicants and one Conference) shippers have to deal with and approval would leave only two.

The legislative history of section 15 indicates that the approval of conference agreements thereunder would:

(1) assure exporters fixed rates and regular sailing opportunities which place all merchants "on the same basis as regards their estimates on contracts," thus producing stability of rates over long periods of time and "much better results for the exporter."

(2) permit shipowners who "depend for success upon the good will of shippers" to build up business by establishing rates "which will enable their American clients to compete successfully with foreign merchants engaged in the same trade."

Investigation of Shipping Conferences Under House Res. 587, 63d Cong., 2d sess., 1914—Report vol. 4, p. 298, and see pp. 295–303.

The findings herein show that Agreement No. 8900 will assist in achieving the objective of enabling U.S. merchants to compete better in the Persian Gulf area, particularly in regard to automobiles and bagged flour. The testimony regarding Arabian American Oil Co. operations lends further support to the possibilities of diversion of trade. Such factors outweigh any conceivable detriments to our commerce as a ground for disapproval.

With regard to the *Oranje Line* case, the two groups had numerous rates which were the same (pp. 726–727), served the same ports (pp. 725–726) and were presently as well as in the immediate past in rate competition. One of the findings was that the parties "agree" that "rate wars" would result (p. 731). None of these findings can be made here. The case is not applicable.

The applicants' proposed Agreement does not contain provisions covering policing of obligations under it, as required by the third paragraph of section 15 and General Order 7. If such provisions are provided, further consideration will be given to final approval.

IV. CONCLUSIONS

It is concluded:

1. The existence of another ratemaking group in the same trade on the facts of this proceeding will not destroy rate stability, nor subvert the existing Conference.

2. Approval of Agreement No. 8900 would not undermine the entire Conference system.

3. Approval of Agreement No. 8900 will not operate to the detriment of the commerce of the United States nor be contrary to the public interest.

The proceeding is dismissed.

JOHN HARLLEE, *Chairman*, concurring

This proceeding comes before us upon the application of five presently independent lines for approval under section 15 of Agreement No. 8900, Rate Agreement—United States/Persian Gulf Trade. The proposed agreement provides for discussions of freight rates and other tariff matters and for the establishment of uniform rates by the members with a reservation of independent action by any member upon 48 hours notice to other members. Each member must file its tariff with the Commission and provide copies to other participating carriers.

In this proceeding we must decide whether the Commission should sanction two conferences, with general ratemaking authority, in the same trade. The question arises upon the protest of the Persian Gulf Outward Freight Conference, Agreement No. 7700, a conference already established in this trade. Underlying this issue, however, is the ever present judgment: how shall we regulate this trade to insure the greatest benefit to the shipping public.

The filing of Agreement No. 8900 is the culmination of a bitter rate war which commenced with the entry into the trade of a strong independent line, followed by the partial breakup of the Conference because of the need of some Conference members for greater flexibility in combating the independent competition, and ending in all-out fight between the independent lines for the available cargo, which was accompanied by a rapid deterioration of rates. At present, the trade languishes in a precarious stability. The Conference remains, now made up of Isthmian Lines, Central Gulf Steamship Co., and Stevenson Lines, all U.S.-flag lines catering almost exclusively to Government-sponsored cargo. In addition, five independent lines, Nedlloyd Lines, Hellenic Lines, Hansa Lines, Concordia Lines, and Constellation Line —the parties to proposed Agreement No. 8900, serve the trade.

There is no question that the Commission must take steps to provide the public with the service it requires in this trade and to protect the carriers serving the trade from the threat of future rate wars. But what is the most practical way to stabilize the trade?

On this record, there are two alternatives: (1) We can disapprove proposed Agreement No. 8900, thereby strengthening the Conference, with the expectation that the five independent lines would reenter the Conference in order to end the destructive competition among themselves or (2) we can approve proposed Agreement No. 8900 with the assurance of a cessation of ratecutting among the independents but with the possibility of future rate competition between the Conference group and the independent group.

In his initial decision, the Examiner concluded that approval of Agreement No. 8900 would result in a fundamentally unstable situation with two ratemaking groups in the same trade. He surmised that this inherent instability would probably deteriorate eventually into a serious rate war between the two groups. Thus, the Presiding Examiner chose to disapprove the agreement. In doing so he relied heavily on a policy favoring strong conferences—the traditional vehicle of dependable service at fair, stable rates. In addition, the Presiding Examiner sought to follow the rationale of *Oranje Line* v. *Anchor Line*, 5 F.M.B. 714 (1959) in which the Board concluded that approval of agreements setting up two competing ratefixing groups in the same trade in all likelihood would engender rate instability and rate wars.

While the Presiding Examiner correctly delineated existing policy, I cannot agree that his is the best, immediate solution. In judging the alternatives presented to him, the Presiding Examiner concluded that the ideal solution—one strong conference made up of the important carriers in the trade—should be our goal. Thus, he found Agreement No. 8900, which was incompatible with that goal, to be unapprovable as detrimental to our commerce and contrary to the public interest. But in my view, his ideal solution is precarious. The disapproval of the Agreement might simply rekindle the previous hostility in the trade. However, if we approve Agreement No. 8900, we will insure at the very least short term stability. In light of the history of drastic, disruptive competition in this trade, this is a meritorious, even if temporary, objective. Since we have continuing responsibility to supervise competitive conditions in our foreign trades, we may accept a pragmatic, and somewhat less than ideal, solution in order to effect stability. The rate stabilizing influence of Agreement No. 8900 is, therefore, in the public interest.

At present, the Conference and the independents do not compete for the same cargoes. As noted, the Conference, since they were priced out of the general cargo market by the rate war, are substantially limited to Government cargo; the independents carry commercial cargo. So long as the Conference is unable or unwilling to meet the prevailing independent rates, no conflict will exist between the two groups. Thus, the *Oranje* decision is distinguished. At the same time, the competitive relationship between the independents, upon approval of this Agreement, will be ameliorated. Currently, our approval of Agreement No. 8900 will serve the immediate needs of the trade. Later on, if conditions warrant, we may reexamine the practical justification for continued approval of the Agreement.

COMMISSIONER BARRETT dissents. Neither the record nor the majority report has convinced him that the Initial Decision served was not correct. He therefore concurs with the Examiner and upholds his decision.

By the Commission.

(SEAL)

(Signed) THOMAS LISI,
Secretary.

TABLE OF COMMODITIES

Automobiles. Atlantic Coast Ports to Puerto Rico. 404
Beet pulp. U.S. Gulf ports to Puerto Rico. 94
Box shooks. U.S. Gulf ports to Puerto Rico. 94
Citrus pulp. U.S. Gulf ports to Puerto Rico. 94
Coal in bags. U.S. Gulf ports to Puerto Rico. 94
Corn meal. U.S. Gulf ports to Puerto Rico. 94
Cotton or felt waste. U.S. Gulf ports to Puerto Rico. 94
Crude natural rubber. New York to Turkey. 280
Dried beans. U.S. Gulf ports to Puerto Rico. 94
Feed and Feedstuffs. U.S. Gulf ports to Puerto Rico. 94
Glass bottles. Jacksonville to Puerto Rico. 645
Laundry soap. U.S. Gulf ports to Puerto Rico. 94
Logs. Colombia to New Orleans. 537
Lumber. Pacific Coast-Hawaii Trade. 258
Paperboard. Pacific Coast-Hawaii trade. 258
Salmon. Seattle-Tacoma, Wash. and Alaskan points. 467
Slacked lime. U.S Gulf ports to Puerto Rico. 94
Soda ash. U.S. Gulf ports to Puerto Rico. 94
Structural steel. New Orleans to Honolulu. 160.
Tile and marble slabs. Italy to United States. 385
Wall or insulating board. U.S. Gulf ports to Puerto Rico 94

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

ADMINISTRATIVE PROCEDURE ACT. See Practice and Procedure.

ADMISSION TO CONFERENCE MEMBERSHIP. See Agreements under Section 15.

AGREEMENTS UNDER SECTION 15. See also Jurisdiction; Ports; Terminal Leases.

—In general

An agreement between U.S.-flag carriers establishing rates and conditions of carriage of commercial cargoes in a foreign interport trade was not brought within the purview of section 15 because the organization used the machinery of two organizations set up to administer other agreements filed with and approved by the Commission. The subject matter of the agreement was not set forth in the approved agreements, it was not intimately related to our foreign commerce, and it did not directly or materially affect our foreign commerce. Pacific Seafarers, Inc. *v.* American & Gulf American-Flag Berth Operators, 461 (465,466).

The scope of section 15 goes beyond the formally executed, legally enforceable contract. Its provisions apply with equal force to meetings of minds, tacit understandings, and other informal arrangements, whether oral or written. An undertsanding between carriers, establishing a uniform level of rates and commissions to which each line would "more or less conform . . . if they could do so", was required to be filed with the maritime agency. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (607–608).

Sound enforcement of the Shipping Act of necessity demands that those subject to its terms be held to a strict standard of accountability for the acts of agents representing them. Carriers which had delegated most of their ratemaking authority to agents who entered into a rate agreement, could not successfully claim that the agreement, carried out without Commission approval, did not constitute a violation of section 15 because it was not authorized. A purported repudiation was insufficient because it was merely an intra-company communication, and there was no indication that the sentiments expressed were communicated to the other carriers. Id. (609–610).

Conclusion that an agreement establishing a second ratemaking conference in a single trade should be disapproved because it would create destructive competition which will cause unfairness between carriers, exporters, and others, detriment to commerce, and injury to the public, and because applicant would be induced to rejoin or re-form in the existing conference rests on treating future events that may never happen as though they had happened. Such use of unproven suppositions is not reasonable. Conclusions should be based on a comparison of what the record shows exists or is reasonably foreseeable based on past and present events and of the express terms of the agreement with the conditions for disapproval stated in the second paragraph of section 15 of the Shipping Act. The record showed there was substantially no present or foreseeable competitive relation between the parties in regard to ports served, cargoes carried, rates charged, or service to shippers. The existence of two ratemaking associations in a single trade, by itself, is not a valid test for disapproving agreements under section 15, and suppositions as to reformation of the presently approved conference following disapproval and of future strife and rate instability following approval, were not supported by the facts or reason. Agreement No. 8900—Rate Agreement United States/Persian Gulf Trade, 712 (719, 720).

—*Administrative estoppel*

The fact that minutes of meetings and memoranda of decisions taken by conferences were filed with the Commission, and that Commission officials were aware of ratemaking agreements between the conferences, did not mean that the agreements, which were outside the scope of the basic approved agreement, were approved. The doctrine of administrative estoppel was not applicable. The conferences had continually been aware of the regulations with respect to the filing of agreements and of the proper manner in which to file them, but they had not filed any memoranda in accordance with the regulations. Agreements were not approved merely because the agency was silent. Joint Agreement Between Member Lines of the Far East Conference and of the Pacific Westbound Conference, 553 (558–559).

—*Agreements required to be filed*

The fact that "contingent agreements," for example, an agreement to raise rates if other carriers raised their rates, were never implemented, would not excuse the failure to file such agreements. Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade, 503 (515).

The fact that an agreement would probably have been approved is no excuse for failure to file and obtain the required approval. Id (515).

Respondents which agreed to narrow the differentials between their rates and those of another carrier in the trade by approximately 50%, and failed to file their agreement, violated section 15 of the Shipping Act, 1916. Id. (515).

Respondents which agreed to charge a certain rate to carry raw silk for one month, and failed to file their agreement, violated section 15 of the Shipping Act, 1916. Id. (515).

A supplementary agreement between conferences, concerning maintenance of rate differentials for commodities from the overland territory could not be approved or disapproved, since the approvability was not at issue in the proceeding, and the record did not indicate what the complete agreement might be Respondents were required to file their overland rate agreements to permit their lawfulness to be determined separately. Joint Agreement Between Member Lines of the Far East Conference and of the Pacific Westbound Conference, 553 (565).

Section 15 is violated by a failure to file agreements between carriers. A showing that unfiled agreements were carried out is not necessary. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (614).

—*Approval of agreements*

Possible contrariness to the statute alone is not sufficient reason to disapprove an agreement under section 15. There must be substantial likelihood of conduct in violation of the Shipping Act. Agreement No. 134–21, Gulf/Mediterranean Ports Conference, 459 (460).

Amendment to conference agreement to exempt from conference jurisdiction full shiploads of one commodity shipped by one shipper, under charter conditions, would not violate section 14 Fourth or 16 First or be contrary to the standards of section 15 of the Shipping Act, 1916. An agreement should not be disapproved on the ground of possible contrariness to the statute. There must be a substantial likelihood of conduct in violation of the Act. Id. (460).

Carriers engaged in common carrier service in a trade under their basic conference agreement are subject as such to the Shipping Act and therefore to the jurisdiction of the Commission. Hence the Commission is empowered to disapprove an amendment to the basic agreement which would exempt from conference jurisdiction full shiploads of one commodity shipped by one shipper, under charter conditions, if it finds that the contract operations of the common carriers pursuant thereto would result in unlawful discrimination against their common carrier patrons. Id. (707).

The legality of a proposed amendment to a conference agreement which would exempt from conference jurisdiction full shiploads of one commodity shipped by one shipper, under charter conditions, must be judged by the following principles: It is not unlawful per se for a common carrier to act as a contract carrier, or to discriminate in any other manner as between shippers in the legitimate furtherance of its business, so long as the discrimination or prejudice is not unjust or undue. A common carrier may compete for traffic and the fact of such competition must be considered in determining whether there is undue preference or disadvantage. Merely because it engages in competition the carrier cannot be charged with creating unjust discrimination or undue prejudice unless it can be shown that the disfavored shipper suffers injury by reason of the discrimination, and this injury will cease if the discrimination is removed, regardless of the manner of its removal. Id. (708, 709).

Proposed amendment to conference agreement which would exempt from conference jurisdiction full shiploads of one commodity (not limited to P.L. 480 cargo) shipped by one shipper, under charter conditions, would not violate section 14 Fourth or section 16 First, where the conference carriers cannot compete with tramp operators for full shiploads of one commodity at liner rates; such cargoes will move at tramp rates whether the conference carriers bid for them or not; any preference or advantage obtained by a shipper of vessel-load quantities is entirely inherent in the shipper's ability to enter upon the charter market and cannot be characterized as undue or unreasonable; the treatment obtained by such shipper will not be unfair or unjustly discriminatory; a shipper of less-than-shipload cargoes via a common carrier would not suffer any more because such common carrier carried his competitors' goods in full shiploads at a lower contract rate than if a tramp carried such full cargoes at a lower rate; and a shipper of less-than-shipload cargoes via common carrier would not benefit from the nonparticipation of such common carrier in tramp carriage of the same commodity. Id. (709, 710).

One instance of discrimination against a shipper, which involved competitive detriment to West Coast ports versus East Coast ports, was not of sufficient magnitude to warrant disapproval of the basic agreement between two conferences, pursuant to which agreement the discrimination had occured. Joint Agreement Between Member Lines of the Far East Conference and of the Pacific Westbound Conference, 553 (566).

Where supplementary agreements between two conferences, relating to ratemaking initiative, overland rates and concurrence procedures, were before the Commission in the form of exhibits and could not be treated as filed agreements; and it was not possible on the record to determine the scope of the agreements, the precise subjects covered, the objectives to be acheived, and whether or not the agreements were approvable under section 15 standards, the Commission would not guarantee reapproval of the basic agreement if the supplementary agreements were filed in accordance with Commission regulations. The conferences were ordered to cease and desist from carrying out their supplementary agreements until filed and approved. Id. (566).

Where applicants for approval of a second ratemaking conference in a single trade and protesting carriers, members of the existing conference, called at only 6 out of 21 ports served by all of the carriers, and at the 6 ports where there were overlapping calls, there were substantial differences in the number of calls and service, there was no basis for disapproval in regard to ports served. Agreement No. 8900—Rate Agreement United States/Persian Gulf Trade, 712 (720).

Where the carrier members of an existing conference carried from 26.40% to 38.33% of their total cargoes to ports covered by a proposed agreement to establish a second ratemaking conference in the trade, and of area bound cargoes between 60% and 70% were government-sponsored cargoes, whereas the carriers who would constitute the second conference carried from 66% to 80% of their total cargoes to area ports, and obtained their cargoes from commercial shippers under competitive conditions. There was no basis for disapproval of the second conference agreement in regard to cargoes carried. Id. (720, 721).

Where the rates charged by members of an existing conference in the trade were from 22% to 100% higher than those of applicants for approval of a second conference in the trade, thus virtually precluding competition for cargoes in the trade; there was no reason for believing that applicants would ever adopt the higher conference rates, since there were other carriers ready to transport at the same or lower rates; there was no evidence the conference would lower its rates; the conference members had no competitive need to lower rates because they did not serve the same ports to any extent and did not carry similar commodities as cargo since government cargo was carried on their ships; applicants' ships departed with free space, whereas the conference carriers departed with full ships; and the largest shipper in the trade made substantial purchases abroad and indicated it might increase such procurement if the applicants increased their rates, the applicants' agreement could not be disapproved on the basis of unjust discrimination or unfairness to shippers or exporters, or on the basis of any possibility of rate instability caused by competition between the two groups of carriers resulting in detriment to commerce. Id. (721).

Where applicants for approval of a second conference in a trade provided entirely different service to shippers, and if the agreement were approved, would provide better service; members of the existing conference carried primarily government-controlled cargo not available to applicants; applicants would tend to provide shippers with uniform rate service and exporters of commodities competitive with similar commodities shipped from foreign countries would have some assurance of more competitive rates, there was no basis for disapproval of the second conference agreement as to carriers, shippers or exporters. Id. (721).

The possibility that applicants for approval of a second conference in a single trade might rejoin the existing conference was not ground for disapproval. On the record, re-formation of the single conference with the applicants was impossible. Approval or disapproval had to be given on the facts. If the facts changed and created other conditions affecting approval or disapproval, their effect could be adjudicated at the time they were claimed to create a need for other conclusions. Full conference participation may be more desirable, but such a value judgment is not a basis for disapproving an agreement. Id. (722).

The record did not support any predictable possibility that approval of applicants' agreement for a second conference in a single trade would be detrimental to commerce. Disapproval would not encourage re-formation of a single conference—rate differentials were dictated by market forces and were not capable of being eliminated under the existing conference agreement and about 90% of commercial cargo tonnage controlled by shippers and carriers was not available in the market for commercial cargoes represented by conference carriers at their rates and did not go in any volume to the same ports. Disapproval of the proposed agreement would not induce membership, but would deter membership. A history of 4 years' operations outside the conference was more convincing than unsupported speculations about the possibility of rejoining the conference. Id. (722).

Entrance of another conference in the same trade would not result in instability of rates with a consequent detriment to commerce or injury to the public interest. The proposed new conference members were concerned with commercial cargoes, while the existing conference was dedicated almost exclusively to government-sponsored cargoes. The Commission would not foreclose opportunities to independents to form an effective conference and by such foreclosure prompt them, if possible, to join the high-rate conference, with the result that commercial exporters would have only high rates available and would have reduced opportunities to compete with foreign competing shippers who might have lower rates available to them. Id. (723).

Approval of second conference in a trade would not be withheld on the ground there would be "increased strife between the two competing camps and . . . increased instability" of rates. All of the evidence was to the contrary. Applicants for approval were competing between themselves, not with existing conference members. Approval would, if anything, diminish rate wars and instability because all the incentives to reduce rates opportunistically existed between the applicant carriers rather than between applicants and existing conference members. The competitive relationships among the five applicants was such as to create unstable rate conditions with no remedy, deprive shippers of a central source of rate information, and cause a possible loss of markets for American exporters if rates were induced to go to conference levels. Approval would remove these detriments to our commerce. Id. (723).

Where rate stability exists in a trade, the threat of rate disorganization cannot be overlooked. Thus, where applicants for approval of a second conference in a trade had managed to achieve a market level of rates after a period of intense competition and extreme change in rates, it would be sensible to take the next step which would be to stabilize the situation by approving the agreement for a second conference. Such action would not be a detriment to commerce. Id. (724).

—Conference membership

Any provision in a conference agreement, establishing criteria for conference membership, must meet two statutory tests: (1) the terms of membership must be reasonable and equal; and (2) they must not be unjustly discriminatory, contrary to the public interest, detrimental to United States commerce or otherwise in violation of the Shipping Act. Agreement No. 9218 Between the Member

Lines of the North Atlantic Continental Freight Conference and the Continental North Atlantic Westbound Freight Conference, 170 (172).

While the "reasonable and equal" provision of section 15 relating to admission to conference membership constitutes legislative recognition of the prior administrative policy of "open" conference membership; the statute permits "reasonable and equal" conditions to be imposed. The determination that a particular condition of membership is reasonable or unreasonable is necessarily a factual one. Id. (172).

Agreement between eastbound and westbound conferences operating between certain United States ports and ports in Germany, Holland and Belgium, which provides that where a member line of either conference operates within the scope or range of the other conference it must be a member of both conferences, does not violate section 15 and should be approved. As a practical matter the trades must be considered as a single trade. Membership in the conferences is common; the same vessels are used eastbound and westbound; accounts are kept on a round voyage basis; and rates charged are based on profit and loss figures computed on a round voyage basis. Under such circumstances it would be excessive deference to formality to say that what is acceptable conduct for a single two-day conference becomes unreasonable, and detrimental to commerce when practiced by two conferences. It is not unreasonable for the conferences to protect themselves against the possibility of a line, operating conference outbound and nonconference the other way, offering reduced rates inbound to induce the exporter-importer to ship with it both ways. The existence of strong nonconference competition in the trades involved is an important factor, since the agreement is not likely to drive nonconference competition from the trade. Moreover, the trade is overtonnaged and there does not appear to be any likelihood that the agreement will restrict the movement of goods. Id. (172).

A reasonable term and condition of admission to conference membership may be one which facilitates the elimination of differentials in rates for transporting the same goods over the same routes but in a different direction as well as one which promotes rate stability. Agreement between conferences operating eastbound and westbound, respectively, between United States and European ports, which provides that where a member line of either conference operates within the scope or range of the other conference it must be a member of both conferences, would be a very limited step in this direction by facilitating discussion of ways and means to eliminate differentials and still maintain rates at levels that will produce a reasonable profit on a round voyage basis. The agreement is reasonable according to the terms of section 15. Id. (174, 175).

The statutory mandate that provisions governing conference membership be "equal" is satisfied if an outsider is granted membership on the same terms as those already in the conference, and on the same terms as other applicants. Agreement between eastbound and westbound conferences providing that in all instances where a member line of either conference operates any vessel within the scope or range of the other conference, it must be a member of both conferences, is "equal" within the meaning of the provisions of section 15. Id. (175, 176).

—Evidence of existence

As to a carrier's contention that rate uniformity was the product of "conscious parallelism" rather than agreements between carriers, and that mere proof of "conscious parallelism" is not proof of an agreement, "conscious parallelism" is an antitrust term of "uncertain meaning and legal significance", and is a label for one type of evidence which may or may not be relevant if proof of conspiracy under the antitrust laws. Whatever the relevance of this antitrust doctrine may be to a section 15 Shipping Act case, the record established far more than proof of mere parallel business behavior. It established agreements between the parties which were entered into in violation of section 15. Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade, 503 (514–515).

—Pooling agreements

A pooling agreement which grants preferred status to "national flag" carriers (carriers flying the flag of the country of origin or destination of the cargo) is contrary to the policy of the Shipping Act which seeks to insure that all carriers operating in our foreign commerce regardless of flag do so as equals. The Commission is prohibited from approving such an agreement (covering coffee imported from Brazil) just as it would be prohibited from using its regulatory powers to attempt to insure that U.S.-flag carriers received a given percentage of this country's export trade. A pooling agreement which allocates percentages or any portions thereof on the basis of flag or national interest is discriminatory as between carriers within the meaning of section 15. Nopal Line v. Moore-McCormack Lines, Inc., 213 (229).

While the mere fact that a party's carryings under a pooling agreement result in its paying large sums to other pool members would not in and of itself render the agreement discriminatory and thus compel Commission disapproval, other factors must exist which justify the payments, and these factors must be consonant with the policies and purposes of the Shipping Act. Id. (218).

Use of "pioneering efforts", as distinguished from carryings, as a factor in allocating percentages under a coffee pooling agreement was improper where the record contained no indication of what value was assigned to the pioneering efforts of pool members who had entered the trade several decades ago, and the junior member had given regular and dependable service for 14 years. Id. (230).

Nopal's Line's share of revenues from the carriage of coffee from Brazil to U.S. Gulf ports under Agreement 9040 is unjustly discriminatory and unfair as between carriers within the meaning of section 15 because the factors of national interest and so-called pioneering efforts were improperly given weight in making the allocations between the carriers. Id. (231).

Where factors other than past carryings are used in allocating pool quotas, they must be acceptable ones under the Shipping Act. A section 15 agreement is not a private contract and the rights of the parties are restricted to those which the Commission authorizes when, guided by and subject to the requirements of section 15, it approves the agreement. Where, in fixing pool quotas, the parties gave consideration to factors which were contrary to the standards of section 15, the Commission would not fix specific quotas but would grant the parties an opportunity to make adjustments in the quotas in a manner not inconsistent with the decision. Id. (231).

Freezing of pool quotas so that members would not receive increased quotas on the basis of increased carryings is not justified on the ground that malpractices and alleged rebates would be curtailed and stability in the trade assured. An effective system of selfpolicing rather than complete elimination of all competition is the solution to rumored malpractices and alleged rebates. Id. (232).

Pooling agreement between an American-flag and a Brazilian-flag carrier (entered into primarily to solve difficulties created by a Brazilian decree relating to Brazilian government-controlled cargoes), and providing for the pooling of revenues on commercial as well as U.S. and Brazilian government-sponsored cargoes transported by the carriers from U.S. Atlantic ports to Brazil and for strict cooperation in solicitation of cargoes, the result of which would be that each carrier would do everything possible to insure routing of commercial cargo via the other when it could not accommodate the cargo and that the services of third-flag lines would be lessened or abandoned, would be contrary to the public interest, unjustly discriminatory and unfair as between carriers, and detrimental to the commerce of the United States, within the meaning of section 15. In addition, complaining carriers and shippers of commercial cargo would be subject to undue and unreasonable disadvantage in violation of section 16. The agreement would be approved if all references to commercial cargoes, as well as the provision for cooperation in soliciting cargo were eliminated from the agreement. River Plate & Brazil Conferences *v.* Lloyd Brasileiro and Moore-McCormack Lines, Inc., 476 (489, 490, 492).

Agreement between an American-flag and a Brazilian-flag carrier, providing for pooling of revenues on U.S. and Brazilian government-controlled cargoes transported by the carriers from U.S. Atlantic ports to Brazil, would not be disapproved on the ground that cargo would be diverted from Gulf ports. The volume of Brazilian-controlled cargo was much larger than that of U.S.-controlled cargo and the routing could be dictated without help of the agreement. Diversion from the Gulf was not the purpose of the agreement; the Brazilian-flag carrier did not normally influence traffic to one coast or the other; and the Gulf U.S.-flag carrier intervenor's interest in Brazilian-controlled cargo was about 4 percent in 1962 and 1963. Id. (490, 491).

—Rates and tariffs

Rates, charges, etc. agreed on by terminals pursuant to an approved agreement providing for discussion and agreement on rates, charges, etc. need not be filed with and approved by the Commission before being put into effect. While section 18(b) requires the filing of tariffs only by carriers or conference of carriers, so that the exception to the filing requirements under section 15 might be said to refer only to rates, charges, etc. of approved conferences of common carriers, there is no reason to apply a stricter standard and additional requirements for a conference of terminal operators than the statute provides for a conference of common carriers. Agreement No. 9025: Middle Atlantic Ports Dockage Agreement, 381 (384).

—Right of independent action

Where an agreement between two conferences provided that both conferences must concur in matters voted on, and further provided for the right of independent action by each conference, the concurrence provision was not illegal as not meeting the tests of the "independent action" provision of P.L. 87–346. The agreement met the statutory requirement in specific terms. If, later, it was found that the agreement was being carried out in a manner detrimental to commerce or contrary to the public interest, disapproval would be in order. Joint Agreement Between Member Lines of the Far East Conference and of the Pacific Westbound Conference, 553 (560–561).

Where a conference refused to take independent action, under its agreement with another conference, to act on rate change requests of a shipper with respect to a particular commodity because the latter conference would not concur in the placing of the commodity on the initiative list of the former, although under the agreed-upon rule for giving ratemaking initiative, concurrence should have been given, both conferences subjected the shipper, certain ports, as localities, and the commodity to unreasonable disadvantage in violation of section 16. The failure to abide by commitments when it suited the interests of the parties, without satisfactory reason, made the disadvantage "unreasonable". One conference violated section 16 by not taking independent action when it clearly had the right to do so; the other conference violated the section by failing to fully implement the terms of supplemental agreements between the conferences. It was immaterial that this failure related to unfiled and unapproved agreements. Id. (562–564).

—Scope of approved agreement

The test of whether arrangements are routine, and thus exempt from the filing requirements of section 15 is whether or not the basic 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 it is to work, without resort to inquiries of the parties or an investigation by the Commission. Where an agreement was nothing more than evidence of a general intention of the parties to enter into concerted ratemaking, supplementary agreements relating to ratemaking initiative, overland rates, rate differentials and concurrence procedures (except for placement of items on the agenda of the initial meeting) were without sanction in the basic agreement and were required to be filed for approval. Joint Agreement Between Member Lines of the Far East Conference and of the Pacific Westbound Conference, 553 (558).

Where an approved agreement between the conferences provided for concurrence as to all matters coming before the initial meeting held pursuant to the agreement, before such matters could be placed on the agenda of the initial meeting and, thereafter, the parties extended the concurrence procedure to other matters (assignment of items to the initiative list, rate changes on competitive items, and rate changes on initiative items where the conference requesting a change did not have the initiative) which went far beyond an agreement to concur in matters voted on, the conferences were required to file their concurrence procedures for approval by the Commission. Id. (559, 560).

Where two carriers, parties to an approved olive agreement, included a third carrier, the inclusion was an action beyond the scope of the approved agreement and was a material modification required to be filed for approval. The failure to inform the agency of the modification was a violation of the Act on the part of all three carriers. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (603).

—Self-policing

In view of the voluntary inclusion in a ratemaking agreement between terminals of self-policing provisions and of procedures for handling shippers' requests and complaints, the Commission will not decide whether such provisions should be required in agreements of terminals to establish dockage rates and charges. Agreement No. 9025: Middle Atlantic Ports Dockage Agreement, 381 (383).

—Shippers' requests and complaints

Although the requirements of section 15 are not satisfied by a mere statement of procedure for handling shippers' requests and complaints, investigation to determine whether a conference has violated the section by failing or refusing to adopt and maintain reasonable procedures for promptly and fairly hearing and considering requests and complaints, will be dismissed in the light of court action affirming the section 21 orders in the case, as well as the pendency of proposed rules dealing generally with the subject. Pacific Coast European Conference—Shippers' Requests and Complaints, 371 (373, 374).

In view of the voluntary inclusion in a ratemaking agreement between terminals of self-policing provisions and of procedures for handling shippers' requests and complaints, the Commission will not decide whether such provisions should be required in agreements of terminals to establish dockage rates and charges. Agreement No. 9025: Middle Atlantic Ports Dockage Agreement, 381 (383).

ARBITRATION. See Dual Rates.

AUTHORTY OF COMMISSION. See Freight Forwarders; Jurisdiction; Ports.

BILL OF LADING. See Misclassification of Goods; Surcharges; Tariffs.

BROKERAGE. See Freight Forwarders.

COMMON CARRIERS. See also Ports.

The owner of a water-front terminal grain elevator which maintained a continuity of service of individual vessels, regularity of service in its overall operation, carriage on a single voyage for a variety of cargo owners on a CIF basis, and solicitation through its sales office, was not itself a common carrier. The essential missing ingredient was an undertaking to carry for hire for those seeking to employ the carrier. With respect to sales made under CIF terms, the elevator owner had the right to decide within five days after the vessel put to sea which buyer's contract it would fulfill. Such an arrangement could not be called a sale of space. All of the shipments were in fulfillment of contracts for the sale of grain. The owner did not undertake to carry for anyone; it did not sell ocean transportation; and it merely delivered grain in chartered vessels to its customers. Where a merchant, as in the present case, also regularly sells on an FOB basis and does not undertake to carry for anyone or sell ocean transportation, it cannot be held to be a common carrier. New Orleans Steamship Assn. *v.* Bunge Corp., 687 (693, 694).

CONTRACT RATES. See Dual Rates.

DEMURRAGE. See Free Time.

DETRIMENT TO COMMERCE. See Agreements under Section 15; Ports; Surcharges; Terminal Leases.

DEVICES TO DEFEAT APPLICABLE RATES.

The term "obtain" in the introductory paragraph of section 16 of the Shipping Act is not synonymous with "receipt" or "accepting". Mere acceptance of wharfage at less than the applicable rate is not obtaining transportation at less than the rate otherwise applicable. Certain Practices of Stockton Elevators, 181 (199).

Assuming that a single instance of accepting wharfage at less than the applicable rate could be designated as a "device or means", or the instance of "arranging" for reduced wharfage or five instances of granting allowances on grain shipments could be considered as "practices", no violations of section 16 or 17 were shown under circumstances where the reduced wharfage and allowances were granted to a grain trading company by a corporation operating grain elevators in order to promote the sale of surplus wheat in the Orient and to free up space for the elevators. No one suffered a disadvantage, and the fact that the allowances represented only the differences between the prices paid by the ultimate purchasers of the grain and the costs to the grain trading company to obtain the grain from government stocks stored with the elevator operator, negated a finding that the trading company benefited. There may have been

inequality, but there was no unjustness, unfairness, or unreasonableness. As to the charge that the elevator engaged in a "practice", the essence of a practice is uniformity, and only occasional transactions were involved; in any event there was no unjustness or unreasonableness. Id. (199–201).

Forwarder and non-vessel-owning common carrier violated section 16 when they obtained transportation by water of property at less than rates and charges which would have been otherwise applicable, by knowingly and wilfully falsely stating that certain leather weighed 6,481 pounds, whereas it weighed some 25,000 pounds. The leather was not containerized when received by the forwarder and the forwarder had actual knowledge of the contents of the van in which the leather was transported. Hasman & Baxt, Inc.—Misclassification of Goods in Containerized Trailer Vans, 453 (457).

Carrier's practice of unloading at its own cost shipments in rail cars moving under a tariff which required the consignee to unload, allowed persons to obtain transportation at less than the regular rates by unjust means in violation of section 16, and was contrary to the tariff provision under which the cargo was rated and carried in violation of section 18(a) of the Shipping Act and section 2 of the Intercoastal Shipping Act. Since the carrier was operating in domestic offshore commerce only, section 17 was not applicable. Seatrain Lines, Inc.—Rates on Shipments in Railroad Cars, 516 (517, 519–520).

Where, during a period when rates to United States ports were not required to be filed, carriers stated their inbound rates in terms of a given figure less a given percentage refund; and whenever a shipper was given a lower rate on any commodity all shippers of that commodity were given identical concessions, so that the newly negotiated rate became the "regular rate" for all shippers of that commodity, the rates quoted could not be found to be other than the "regular" rates for any commodity, and thus no violation of section 16, Second could be found. Section 18(b) now requires that all inbound rates be filed. The "regular rate" for the transportation of a commodity is the rate appearing in the carrier's tariff. Any discounts or absorptions must appear in the filed tariff. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (615–616).

DISCRIMINATION. See also Agreements under Section 15; Rates and Rate Making; Reparation; Surcharges; Terminal Facilities; Terminal Leases.

The Commission's duty under section 17 is to remove all unlawful discriminations whether there is an intent to discriminate or not. The same harm flows from an unintended discrimination as from fully intended. It is the consequence of, not the motive behind the discrimination which produces the harm. California Stevedore & Ballast Co. *v.* Stockton Elevators, Inc., 97 (103).

Respondents' rate on natural rubber sold and shipped by the government to foreign purchasers, which rate was substantially higher than the rate on synthetic rubber, was not unduly or unreasonably preferential, prejudicial or disadvantageous in violation of section 16 First, or unjustly discriminatory or preferential in violation of section 17, where the government in comparing the rates failed to show the character and intensity of the competition, that the difference in rates had operated to the shipper's disadvantage in marketing the commodity, that one person had been deferred or preferred to another, and that there had been unequal treatment between competing shippers or ports. It was necessary for the government to prove that an effective competitive relationship existed between itself and U.S. exporters of synthetic rubber. Congress had directed that the excess natural rubber program be carried out with due regard to the protection of producers and others against avoidable disruption of their

usual markets. The government could not enter into an effective competition since it had been limited in selling, and had sold, on the basis that "the quantities actually released from time to time may vary considerably in order to avoid undue disruption of markets". A rate differential is not unreasonable and there is no unjust discrimination or undue preference in the absence of proof that the differential is not justified by the costs of the services rendered, by their values, or by other transportation conditions. United States, by General Services Administration *v.* American Export Lines, Inc., 280 (290, 291).

The crux of sections 16, First and 17 (first paragraph) is found in the words "advantage", "disadvantage", and "discriminatory". Their provisions were designed to prevent sellers of goods from gaining a larger share of the market, for their product than they would normally attract because of cost advantages resulting from other goods being shipped at lower rates than those of competitors. There was insufficient evidence to find any violation of these sections by carriers which, under unfiled agreements, paid uniform "refunds", "commission", etc. to shippers, forwarders and custom house brokers. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (615).

DUAL RATES. See also Terminal Facilities.

—In general

Dual rate contracts may include Canada and/or Mexico where these areas are included in the service offered by the conference, and also such areas as Communist China and Cuba in order to facilitate resumption of service when conditions permit. The River Plate Brazil Conferences (Dkt. No. 1043) will not be permitted to include Great Lakes ports when only one conference member serves those ports and then with only one sailing per month. Dual Rate Cases, 16 (43, 44).

A dual rate contract may contain a provision that contracts of carriage must be made with the individual conference carrier and that the other conference carriers have no liability under such contracts. Id. (45).

Consolidation of ten conferences in the Pacific Coast/Latin American Trade was approved where the effect would be to create five new conferences under a single administrative office, with only those carriers providing service in the particular trade area voting on rates and practices applicable to that area, and, where it did not appear that there would be an undue increase in competitive strength by reason of the arrangement. A dual rate contract would be approved for each area, with merchants having the option to execute a contract for any or all of the areas. It would be contrary to the public interest and detrimental to commerce for the conference to require that a merchant obligate himself to exclusive patronage in all of the areas in order to obtain contracts in a single trade. Id. (49, 50).

A conference is not required to demonstrate a positive need for a dual rate system as a prerequisite for approval. The statute authorizes use of the system if certain safeguards are met. Id. (50).

Conference may at its option, rather than mandatorily, provide in dual rate contract the contract is to be carried out in accordance with the provisions of the Shipping Act and the Rules of the Commission. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (296, 304).

The Commission will not summarily (in a show cause proceeding) order the Atlantic and Gulf/Australia-New Zealand Freight Conference to delete Canadian rates from its tariff and restrict the coverage of the dual rate system to the United States, after expiration of an agreement between the conference and a carrier which served Canada, under which parity of rates between the conference lines and the carrier was established and provision made for the carrier to be included in the conference dual rate system insofar as its Canadian operations were concerned. The rights of the conference members opposing the relief sought and of certain shippers might be substantially affected. Complainants, conference members, were free to file a complaint pursuant to section 22 of the Shipping Act and Rule 5(b) of the Commission's Rules. American & Australian Steamship Line *v.* Blue Star Line, Ltd., 433 (434).

—Affiliates of merchant

Conferences which desire to bind a merchant's affiliates by a single contract must use a uniform clause which binds only those affiliated companies over which the signatory merchant regularly exercises direction and working control in relation to shipping matters. All companies over which the merchant exercises such control must be listed in the contract. Desire of conferences to bind all affiliates to ease sales efforts, and to make it less easy for the merchant to evade his obligations through the subterfuge of using an affiliated company, is not sufficient to permit a clause which would bind all affiliated companies without regard to the merchant's control. Dual Rate Cases, 16 (32, 33).

A conference will not be permitted to have a clause in its dual rate contract binding all affiliates of the signatory shipper and not merely those over whom the merchant regularly exercises working control in relation to shipping matters. The easing of carrier sales effort and the aiding of strict observance of the contract offered by an all inclusive clause is far outweighed by the legitimate business interests of autonomous subsidiaries or affiliates. Japan-Atlantic and Gulf Freight Conference Dual Rate Contract, 337 (340).

—Arbitration

Arbitration clauses in dual rate contracts are not objectionable if they provide that "nothing herein shall deprive the Federal Maritime Commission of its jurisdiction" Dual Rate Cases, 16 (44).

In view of the holding in the *Swift* case [306 F. 2d 277], that the Commission may upset the decision of the arbitrators where their decision is not in conformity with the Shipping Act, notwithstanding the absence of any provision to that effect in the dual rate contract, deletion of the phrase "nothing herein shall deprive the Federal Maritime Commission of its jurisdiction" from the "arbitration" clauses of dual rate contracts is approved. Deletion would not change in any fashion the exercise of jurisdiction by the Commission in the proper case. Dual Rate Cases, 267 (268).

Clause in arbitration provision of dual rate contract, namely, "which does not be within the jurisdiction of the Federal Maritime Commission" was disapproved. Instead, the conference may optionally use: "Nothing herein shall deprive the Federal Maritime Commission of its jurisdiction." Persian Gulf Outward Conference Dual Rate Contract, 293 (296, 304).

—Breach of contract; burden of proof

No clause in a dual rate contract which places the burden of proof on the merchant, where a breach of contract is alleged, will be approved. Dual Rate Cases, 16 (42).

Dual rate contract may not flatly require that the merchant supply documents at the conference office with respect to questioned nonconference shipments. The merchant's option of furnishing data to the conference or permitting the conference to inspect data at the merchant's place of business will serve as a brake upon the possibility of groundless fishing expeditions by the conference. Japan-Atlantic and Gulf Freight Conference Dual Rate Contract, 337 (341).

—Cargoes excluded from contract

All dual rate contracts must exclude liquid bulk petroleum in less-than-full-shipload lots. The same factors which prompted the exclusion of liquid chemicals would serve also to exclude liquid petroleum. Dual Rate Cases, 16 (39, 40).

Provision of conference dual rate contract which excludes all "bulk cargoes without mark or count" satisfies the requirements of section 14b(8) and will be approved, in lieu of a clause specifically excluding chemical products, as provided by the section, and petroleum products which the Commission had excluded from contract coverage. Approval is based on the peculiar facts of the trade and does not detract from the principle of uniformity. North Atlantic Westbound Freight Association—Dual Rate Contract, 387 (388, 393).

—Consignee contracts

The intent of the language of section 14b, that the Commission shall permit contracts which are "available to all shippers and consignees on equal terms and conditions", is to permit the continuation of so-called consignee contracts rather than to demand that if a contract is used it must be offered both to the exporter in one country and to the importer in the other country. The decision whether to solicit signatures on both sides of the ocean, like the decision of whether to use a dual rate system at all, will be left to the conference. Dual Rate Cases, 16 (24, 25).

—Damages

Clauses in dual rate contracts which permit the carriers to suspend or terminate the merchant's right to contract rates prior to any adjudication that the merchant has breached his contract, and which would keep the merchant bound to exclusive patronage at the noncontract rates during the pendency of arbitration or adjudication, are not permissible. The limits of the merchant's punishment for violation of his contract are the damages provided by the statute and nothing more. However, provisions which would suspend the merchant's obligations and his rights if he does not promptly dispute or deny alleged breaches, or which would suspend his obligations and rights during a period that he fails to pay damages adjudged are not contrary to section 14b as being punitive. Such provisions may be included in the contract at the option of the conference. Where a liquidated damage provision is used the deduction from the contract rate shall be the "cost of loading and unloading". Dual Rate Cases, 16 (36–38).

—Disclosure of information

Optional deletion of the reference to section 20 of the Shipping Act in the "disclosure" clause of dual rate contracts is approved, provided that language is inserted to limit the use of information obtained from the merchant. Dual Rate Cases, 267; Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (296).

The disclosure of information and notice of shipment via nonconference carrier clauses of a dual rate contract, as approved in the Dual Rate Cases, will be approved for the dual rate contract of the Persian Gulf Outward Freight Conference. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (294, 295).

—Fixed portion of shipments

The legislative history shows that intent underlying the phrase "all or any fixed portion" in section 14b was not to require that under all dual rate contracts lower rates had to be offered for a fixed percentage of the merchant's cargo. The phrase was intended rather to make it clear that if such fixed portion contracts were offered they would be subject to the same safeguards as "exclusive patronage" contracts. Therefore, conferences will not be required to permit shippers the option of offering only a fixed portion of their shipments in exchange for lower rates. Dual Rate Cases, 16 (25, 26).

Dual rate contract would not be modified to permit less than full shipper commitment on the ground that the exclusive patronage aspect of the contract was detrimental to the commerce of the United States. No rationale for such a finding was provided. No suggestion was made as to what percentage would be appropriate. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (294).

—Legal right to select carrier

Section 14b does not permit a conclusive presumption that the merchant had the legal right to select the carrier if his name appeared on certain shipping documents or if he otherwise participated in the ocean routing or the selection of the ocean carrier. A dual rate contract may, at the option of the carriers, contain a provision which will raise a rebuttable presumption that the merchant possessed the legal right at the time of shipment to select the ocean carrier if he participated in the arrangement for ocean transportation or if his name appears on a bill of lading or export declaration as shipper or consignee. All contracts must contain a provision that the merchant is not required to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person; and a provision that if the merchant's vendor or vendee fails to exercise his legal right to select the carrier (if he has such right), or otherwise permits the merchant to have the legal right, the merchant shall be deemed to have the right. Dual Rate Cases, 16 (30–32).

The legal right clause of a dual rate contract will not be approved if it contains a conclusive, rather than a prima facie, presumption that the shipper has the legal right to select the carrier when his name appears on the bill of lading or when he participates in the arrangements for selection of a carrier. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (294).

Language in a dual rate contract which would raise a conclusive presumption that the merchant had the legal right to select the carrier if his name appeared on certain shipped documents, or if he otherwise participated in the ocean routing or the selection of the ocean carrier, is not permitted by section 14b. A prima facie presumption is permissible. Japan-Atlantic and Gulf Freight Conference Dual Rate Contract, 337 (340).

—Merchant's right to use owned or chartered vessels

All dual rate contracts, whether or not they previously did so, must permit merchants to transport cargoes on their owned vessels, or on vessels chartered by the merchant provided the term of the charter is six months or more. Dual Rate Cases, 16 (42, 43).

Article in dual rate contract excluding shipments on vessels owned by the merchant or chartered solely by the merchant where the term of the charter is for six months or longer, and the chartered vessels are used exclusively for the carriage of the merchant's commodities, was approved as according conference reasonable protection from spot raiding of cargoes and according merchants the right to engage in bona fide proprietary carriage under reasonable conditions. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (295).

In view of the fact that there had been no past usage of chartered or owned vessels by dual rate contract signatories in the trade, and interested shippers had stated that they did not desire a charter exclusion provision, the Commission will approve deletion of a chartered or owned vessels clause from the conference dual rate contract. Approval is based on the peculiar facts of the trade and does not detract from the principle of uniformity. North Atlantic Westbound Freight Association Dual Rate Contract, 387 (388, 393).

—Modifications of contract

All dual rate contracts must contain a provision specifically stating that all modifications are subject to the Commission's approval, and that interpretations of the contracts must be made in the light of the Shipping Act and the rules and regulations of the Commission. Dual Rate Cases, 16 (44, 45).

Provision of dual rate contracts, providing that contracts must state that all modifications are subject to Commission approval and that interpretations must be made in accordance with the Shipping Act and the rules of the Commission, is made optional rather than mandatory. Dual Rate Cases, 267 (269).

Conference may at its option, rather than mandatorily, provide in dual rate contract that the contract may be amended subject to the permission of the Commission. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (296, 305).

—Natural routing

As to natural routing, dual rate contracts must uniformly provide for notice to the conference of the merchant's desire or need for service on the direct route and for an opportunity for the conference to provide such service. The contracts must also require shipment on conference vessels unless this would constitute unnatural or indirect routing. Thus the merchant would not be permitted to escape his obligations when nonconference service was no more natural than that of the conference. Dual Rate Cases, 16 (34, 35).

A natural routing clause of a dual rate contract which contains a more exact description of a "natural route" than that previously approved by the Commission, and which is acceptable to the principal contract shippers in the trade, will be approved. Approval is based on the peculiar facts of the trade and does not detract from the principal of uniformity. North Atlantic Westbound Freight Association—Dual Rate Contract, 387 (388, 393).

—Opening of rates

Conferences may provide for the opening of rates without advance notice but the individual carrier members would not be permitted to charge rates in excess of the last published conference contract rate for a period of 90 days after the rate has been opened. The conference would have to give 90 days' notice of the return of the rate to the conference dual rate system. The Commission's interpretative ruling to the contrary will be withdrawn. Dual Rate Cases, 16 (45, 46).

Open rate clause of dual rate contract, identical with that approved in the *Dual Rate Cases*, was approved for minority conference in trade. The clause provided flexibility to the conference, which was particularly important in the instant case, and protected merchants by requiring notice of a return of a commodity, to the contract rate system. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (295).

—Prompt release

With respect to the requirement of section 14b for prompt release of the contract shipper, all dual rate contracts must, by their terms, fix the time period by which the conference must respond to a request for space and the time by which the conference must furnish space. Some variation in these times is permissible among the various trades depending upon what appears to be the reasonable commercial needs in the particular trade. Dual Rate Cases, 16 (27).

In view of the fact that the conference was composed of only a minority of carriers in the trade and therefore the occasions upon which the carriers would be unable to accommodate the contract shippers might arise, more frequently than in other trades, the prompt release clause of the conference's dual rate contract must be more favorable to shippers, and a prompt release period of 10 days, rather than 15, was approved. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (295).

—Rate increases; suspension of rates

The overriding intent of the section 14b language, which read literally would simply require that rates not be increased more than once every 90 days, and the reasonable requirements of our foreign commerce demand that merchants be given a minimum of 90 days' advance notice of increases in rates. All dual rate contracts must include clauses providing for (1) 90 days' advance notice, (2) 30 days thereafter in which the merchant may decide to terminate the contract, (3) 30 additional days for the carrier to decide to continue existing rates, (4) conformance of rate changes with section 18(b)(2) and the Rules of the Commission, (5) offer by the conference to the merchant of a subscription to its tariffs, (6) rates and notices of proposed rate increases to become effective on their original effective dates through filing with the Commission rather than with the signing of an individual contract, and (7) notice by tariff publication. Dual Rate Cases, 16 (27–29).

Dual rate contracts may provide for suspension in case of war or other governmental action interfering with the carriers' service, and for resumption on 15 days' notice, or for rate increases on 15 days' notice if the conference desires to continue its contract system notwithstanding war or other governmental action. The approved clause would also permit continuation of the contract system at higher rates imposed in compliance with section 18(b) of the Shipping Act in other extraordinary circumstances which unduly impede or delay the carrier's service. Id. (47, 48).

Provision in the rate increases clause of dual rate contracts, providing for no changes in rates, etc. which result in an increase or decrease in cost to the merchant except as provided by section 18(b)(2) and the Rules of the Commission, is made optional rather than mandatory. Dual Rate Cases, 267 (268); Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (296).

Clause in rate increases provision of dual rate contracts, namely, "through filing with the Federal Maritime Commission," (with reference to effective date of rates initially applicable under the contract), is made optional rather than mandatory. Id. (269); Id. (296).

A force majeure clause of a dual rate contract which allowed rate increases on less than 90 days' notice in certain circumstances not under the control of the carrier but not stemming from war or hostilities, may be deleted. The provision was for the benefit of the carriers and if they are willing to forego the additional privilege accorded them by the Commission, the Commission has no objection to deletion of the clause. Approval is based on the peculiar facts of the trade and does not detract from the principle of uniformity. North Atlantic Westbound Freight Association—Dual Rate Contract, 387 (388, 393).

—Shipment via nonconference vessel

Dual rate contracts may contain a provision requiring the merchant to notify the conference of a shipment via nonconference vessel within 10 days after the shipment, if practical, or as promptly as possible, in cases where the merchant is party to a transaction and the legal right to select the carrier is vested in someone else. Only the bare essentials of the transaction need to be included in the notice and hence the burden on the merchant should be slight. Dual Rate Cases, 16 (40, 41).

Dual rate contracts may contain a provision requiring the merchant to disclose the facts concerning shipments via nonconference vessels, with the merchant having the option to furnish information or copies of documents, or allowing conference representatives to examine documents on the premises of the merchant, and a provision that pricing data and similar information may be deleted from documents at the option of the merchant and there be no disclosure of any information in violation of section 20 of the Shipping Act, 1916. Id. (41, 42).

—Single carrier contracts

Single carrier dual rate contracts are permissible under section 14b, even though the carrier may be in competition with a conference. Dual Rate Cases, 16 (48, 49).

—Spread between contract and noncontract rates

A 15 percent spread in dual rate contracts is reasonable. Provision for the statement of rates in the highest multiple of 5 cents, or 25 cents, which does not result in a spread greater than 15 percent is reasonable and will be permitted. Dual Rate Cases, 16 (38–39).

ELEVATORS. See Devices to Defeat Applicable Rates; Jurisdiction; Terminal Facilities; Wharfage.

EVIDENCE. See also Agreements under Section 15.

Photostatic copies of documents taken from carriers' files were properly admitted in evidence where copies were given to the carriers long before the opening of hearings, officers of the carriers or their agents testified that the documents were from their files, and despite repeated urgings by Hearing Counsel and the Examiner, the carriers did not challenge the authenticity of any particular document or claim that any single document was not a true photostat of the original from their files. The identifying witnesses were given an opportunity to read through each document. At very least Hearing Counsel had made a prima facie showing of authenticity. Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade, 503 (510–511).

As to contention of carriers that the Examiner's findings that the carriers entered into agreements were not supported by reliable and probative evidence but by hearsay, the "hearsay" question was laid to rest in *Unapproved Section 15 Agreements—South African Trade*, 7 FMC 159. The record contained ample reliable and probative evidence to demonstrate that the carriers entered into the agreements in question. Id. (514).

Hearsay evidence is admissible in investigatory proceedings before the Commission. The evidentiary value of a particular document admitted in evidence depends on the entire record. A given document, standing alone, may not be of sufficient weight to sustain a finding. However, the document may be supported by other related evidence; together these items of evidence may form the basis for a rational and dependable conclusion. In this case, the Commission rejected several of the Examiner's findings as unsupported by reliable, probative and substantial evidence. Where the Commission found violations of section 15, there was a reliable, probative and substantial combination of documentary evidence and oral testimony. In each case, the oral testimony amply corroborated the documentary evidence. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (612).

EXCLUSIVE PATRONAGE CONTRACTS. See Dual Rates.

FAIR RETURN. See Rates and Rate Making.

FOREIGN COMMERCE OF THE UNITED STATES.

Where the General Services Administation sold natural rubber to foreign purchasers for a consideration and shipped the commodity sold from United States ports to foreign ports, the transactions were commercial in nature and within the category of foreign commerce of the United States, regardless of whether the United States accepted payment in cash or diverted the proceeds of the sale to an aid program. United States, by General Services Administration *v.* American Export Lines, Inc., 280 (287).

FREE TIME.

Where respondent unjustly discriminated against complainants in the matter of storage charges and free time allowances in comparison with treatment accorded complainants' competitor; the commodity, cement, was imported through the same terminal, at the same time for sale in the same general market area; and cement was a thoroughly standardized product and in a normal market the price would undoubtedly approach uniformity so that complainants could not increase prices to compensate for the prejudicial charges, complainants were entitled to reparation on the basis of the difference between the storage charges and free time allowance unlawfully assessed against them over and above those charges assessed against complainants' competitor. *Eden Mining*, 1 USSB 41, is not to the contrary, since there was no contention that the business of complainants was competitive with those of contract shippers, and a showing of charging of different rates from shippers receiving the same service did not, as a matter of course, establish the fact of injury and the amount of damages. International Trading Corp. of Va., Inc. *v.* Fall River Pier, Inc., 145 (148–150).

Neither the Commission's Order in the matter of free time and demurrage charges at the port of New York, nor the decision in *American President Lines, Ltd.* v. *FMB* [317 F. 2d 887], require that "first period" rates be applied after the expiration of the "free time" period to cargo shipped to New York by the Austrian Trade Delegate for use in constructing the Austrian Pavilion at the World's Fair, and left on the pier until it could be used in constructing the pavilion. However, the terminal would be authorized to accept an amount approximately equivalent to a "first period" rate as full payment since the cargo was destined to the World's Fair, an essentially noncommercial endeavor from the standpoint of foreign governments; the cargo was owned by the Austrian Government; and other consignees were not prejudiced in the matter of storage space because of the delay of Austrade in picking up its cargo. Austrian Trade Delegate *v.* Universal Terminal & Stevedoring Corp., 278.

FREIGHT FORWARDERS. See also Misclassification of Goods.

—In general

While licensing statutes should be liberally construed and past violations of law are not an absolute bar to approval under a licensing statute, it is equally clear that violations of law can and should be taken into consideration in determining the fitness of an applicant for a license, such as a freight forwarder license. Dixie Forwarding Co., Inc.—Freight Forwarding License Application, 109 (112). See p. 167, supra.

Where an applicant for a freight forwarder license knew that a license was required, but failed to file a timely application and operated in violation of section 44; knowingly filed a falsely dated balance sheet with the name of certified public accountants improperly placed thereon in an effort to mislead the Commission; falsely certified with intent to deceive that it was licensed by the Commission as an independent ocean freight forwarder in order to collect brokerage from carriers in violation of section 44, and when specifically appraised of the falseness of the certification failed to cause its removal from invoices; and demonstrated a lack of that kind of financial responsibility compatible with the duties and responsibilities of an independent ocean freight forwarder, the applicant was not fit to receive a license from the Commission. Applicant's assurances of good behavior in the future and his demeanor on the witness stand could be given little weight in view of his past conduct. A freight forwarder occupies a position of enormous competitive and economic power as to carriers and enjoys a fiduciary relationship with shippers and his business integrity must be above reproach. The philosophy of section 44 is that the shipping public should be entitled to rely on the responsibility and integrity as well as the technical ability of a freight forwarder. Id. (115–118). See p. 167, supra.

Section 44 of the Shipping Act places upon the Commission the duty of determining that an applicant for a freight forwarding license is fit, willing and able to properly carry on a forwarding business, and further, that he is willing and able to conform with the Act and the Commission's requirements, rules, and regulations. The determination must be made by application of the Commission's sound discretion. Discretion may not be exercised in an arbitrary or capricious manner and in licensing or refusal to license, consideration must be given to constitutional and lawful safeguards of individuals and their right to make a living. Carlos H. Cabezas—Freight Forwarding License Application, 130 (131).

An application for a freight forwarding license must be denied where the applicant failed to respond to the Commission's proper inquiries, thus foreclosing an affirmative finding that he is willing and able to conform with the freight forwarder law and requirements, rules, and regulations of the Commission; and where the applicant failed to furnish documentary evidence of his financial status, Hearing Counsel presented evidence of lack of financial ability, and a federal court had determined that applicant's financial status was marginal and had appointed an attorney for his defense in a matter involving violation of the Shipping Act. Id. (131, 132).

In view of the commitment of applicants for freight forwarding licenses to adhere scrupulously to requirements of the law in the future, applicants will be given the opportunity, under close supervision, to continue to offer their services on condition that they submit to the Commission every six months an independently certified audit of their financial status, with such requirement to remain in effect for two years. Dixie Forwarding Co., Inc.—Freight Forwarding License Application, 167.

The Commission is not the proper forum for determination of the constitutionality of Public Law 87–254 (the freight forwarder law). The Commission has no authority to consider the constitutionality of a statute under which it operates. Louis Applebaum—Freight Forwarding License Application, 306 (309).

—Grandfather rights

Section 44(b) does not, in the true sense, set forth a "grandfather clause" and the holder of a certificate issued prior to P.L. 87–254 has no vested rights. The section specifically permits *independent* ocean freight forwarders to continue their operation for a limited period of time during which an application must be presented together with evidence to prove qualification in accordance with statutory requirements. A license holder not qualifying as an independent freight forwarder has no statutory authority to continue a temporary operation. Louis Applebaum—Freight Forwarding License Application, 306 (307).

—Independence of forwarder

A partner in a firm primarily engaged in the business of selling and shipping goods to foreign countries does not qualify as an independent ocean freight forwarder within the meaning of section 1 of the Shipping Act and cannot be licensed under section 44. If there were any doubt that the law eliminated any connection between shippers and forwarders, the legislative history resolves the doubt. Louis Applebaum—Freight Forwarding License Application, 306 (310).

The freight forwarder law, like other licensing statutes, should be approached with a liberal attitude to the end that permits may be granted to qualified applicants. Nevertheless if the applicant is not fairly within the definition of "independent ocean freight forwarder", there is no room for liberality. Wm. V. Cady—Freight Forwarding License Application, 352 (357).

One of the principal purposes of Public Law 87–254 (freight forwarder law) was to authorize payment of brokerage by ocean carriers to freight forwarders but only if no benefit to a shipper would result such as to constitute a rebate. The definition of independent ocean freight forwarder was intended to exclude indirect as well as direct interests, including so-called "dummy forwarders", concerns organized solely to collect compensation from carriers which would find its way back to the shipper. Id. (358).

An employee of a firm shipping goods abroad did not qualify as an independent ocean freight forwarder. The employee had in the past been in the usual master-servant relationship, and the employer had exercised actual control over the employee with respect to his carrying on the business of forwarding as a registrant and had received and retained the forwarder fees earned by the employee in his allegedly personal forwarding business. As to the future, the employee was dependent on his job and such dependence left no doubt as to the affirmative as well as negative control which his employer would have, regardless of any present understanding. Thus it was unimportant that the employer now permitted the employee to retain brokerage and forwarder fees, that he was permitted to carry on his "personal" business during his regular office hours, and that the employee would reimburse his employer for the use of its facilities. Reimbursement might well constitute a method of transmitting a rebate in violation of the Act. The freight forwarder law makes licensing depend on the existence of control and not on its exercise or non-exercise. The law does not allow licensing on condition that the forwarder refrain from collecting compensation from carriers with respect to shipments made by the forwarder or someone controlled by or controlling him. Id. (358–360).

Where an applicant for a freight forwarding license had changed her operations in several respects to free and divest herself of any control by or over her brother's shipping companies, the application would be granted subject to the condition that applicant move her offices out of the space occupied by her brother's enterprises. Morse Shipping Co.—Freight Forwarding License Application, 473.

A freight forwarder which has 50% of its stock owned by an exporting firm is not an independent ocean freight forwarder. The intention of the exporter not to exercise control and the intention of other 50% owner of the freight forwarder company not to let the exporter exercise control are immaterial. However, fairness requires that the exporter be given an opportunity to divest himself of his stock in the freight forwarder license applicant. Such divestiture could result in granting of the application and saving the jobs of employees. Effective date of denial of application is deferred to permit exporter to divest himself of his interest in the applicant. Del Mar Shipping Corp.—Freight Forwarding License Application, 493 (497).

—Revocation of license

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 which such business necessitates". Therefore, the phrase "fit, willing, and able to properly carry on the business of forwarding" appearing in the law, concerning initial licensing, means that a forwarder is unfit and unable to perform his duties when he misuses funds entrusted to him for purposes not otherwise intended and thereafter fails to pay bills incurred in connection with his forwarding activities. Aetna Forwarding Co., Inc.—Revocation of Freight Forwarder License, 545 (550–551).

Where a licensed freight forwarder had accepted freight monies from exporters for the express purpose of paying ocean freight charges on their shipments, and had failed to pay such charges; and had executed due bills with steamship companies to pay the charges, and the due bills were not honored, the licensee was not financially responsible and, therefore, was unfit to carry on the business of freight forwarding, and revocation of license was required. Id. (551).

Failure of a freight forwarder to furnish a bond was ground for revocation of license. Id. (551–552).

Freight forwarder which was not dispatching shipments was no longer carrying on the business of forwarding, and revocation of license was therefore required. Id. (552).

GRAIN TERMINAL. See Terminal Facilities.

INITIAL OR RECOMMENDED DECISIONS. See Practice and Procedure.

JURISDICTION.

The existence of a state court suit by complainant against respondent would not bar complainant from bringing a complaint before the Commission. Pendency of such a suit cannot defeat Commission jurisdiction even if the suit and complaint were predicated on the identical matter. Respondent, by virtue of its carrying on the business of "furnishing wharfage, dock, warehouse, or other facilities . . ." was an "other person" subject to the Shipping Act and thus subject to the Commission's jurisdiction. International Trading Corp. of Va.. Inc. *v.* Fall River Line Pier, Inc., 150 (151, 152).

The Commission has no jurisdiction over an agreement between U.S.-flag carriers establishing rates and conditions of carriage of commercial cargoes in a foreign interport trade, where the cargoes are of foreign origin and destination, shipping arrangements and sales of the commodities are made between foreign principals, and the Agency for International Development participates only to the extent of financing the transactions. The lending of funds by a government

agency to finance wholly foreign transactions, including ocean freight, does not convert foreign-to-foreign commerce into United States foreign commerce, nor does the mere operation foreign of U.S.-flag vessels constitute a "part of the commerce of the United States". Pacific Seafarers, Inc. *v.* American & Gulf American-Flag Berth Operators, 461 (462–464).

The Commission's jursdiction over agreements executed abroad by foreign nationals, fixing rates in United States commerce, was not defeated by the alleged circumstances that "no American interest was prejudiced, and there is not the slightest evidence of those substantial effects within the United States necessary to support the extraterritorial application of American laws". The agreements were clearly of the kind covered by section 15 and failure to file such agreements results in a violation of section 15. Congress itself determined that such agreements have an "effect" on our foreign commerce. The nature and degree of that effect is irrelevant to a determination of whether the filing requirements of section 15 are applicable. It is, however, important to a determination of whether or not a given agreement should be approved. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (600–601).

The Commission has consistently held that while the storage operation of grain elevators is not subject to its jurisdiction, the operation of loading the grain into common carrier vessel is. Wharfage Charges on Bulk Grain at Pacific Coast Ports, 653 (656).

Commission jurisdiction over a terminal grain elevator operator which served common carriers did not continue after the operator refused to serve common carriers, on the basis that the refusal was illegal, since the operator had an obligation under its warehouse license and the United States Warehouse Act to load grain on any "transportation conveyance" specified by the owner of the grain in a non-discriminatory manner. Jurisdiction residing in the Secretary of Agriculture over the storage portion of facilities in no way affects the Commission's jurisdiction over the terminal portion of those facilities. Assuming that the Commission's deliberations are to be influenced by the policy relating to the obligations of a public warehouseman, the operator had not discriminated between users of its facilities, since it had refused to furnish terminal facilities in connection with common carriers with reference to all of the grain in its elevator, regardless of ownership. If any user of the storage facility demanded a common carrier as a "transportation conveyance", the operator would have the alternative of surrendering its license rather than opening its facilities to common carriers. New Orleans Steamship Assn. *v.* Bunge Corp., 687 (694–695).

The fact that the owner of a water-front terminal grain elevator on the Mississippi River was an "other person" subject to Commission jurisdiction in connection with an elevator operation elsewhere, did not mean that the Commission had jurisdiction over the operation on the Mississippi River. While a person manifestly subject to the Commission's jurisdiction may not so segment its operation to make part of it subject and part of it exempt when this segmentation is unjustly discriminatory, there was no showing that the other operation had in any manner affected the facility on the Mississippi River. Id. (695).

MISCLASSIFICATION OF GOODS. See also Devices to Defeat Applicable Rates.

On the record, the Commission would not conclude that a forwarder knowingly and wilfully presented a false bill of lading in violation of section 16, where the conclusion depended on a holding equivalent to a rule that the mere presentation of a bill of lading to the carrier carried with it the implied repre-

sentation that the bill accurately described the contents of containers even when the containers were received by the forwarder under seal and regardless of whether the forwarder had any knowledge of the container's contents. Such a rule should be made only on thorough investigation of the terms and conditions surrounding the handling of containerized shipments, and the investigation should include the question of the nature and scope of the duties and responsibilities of the exporter and the carrier under section 16. Hasman & Baxt, Inc.—Misclassification of Goods in Containerized Trailer Vans, 453 (456).

Where a freight forwarder presented to carriers bills of lading showing that vans in the aggregate contained quantities of yarn substantially in excess of the quantities shown by certain of the exporter's waybills to have been intended for shipment on the vessels carrying the vans, falsification of the bills of lading was not shown. The record did not show that the waybills represented all of the yarn presented to the forwarder for shipment. Other exporters may have made up the excess of the bills of lading over the waybills. Id. (457, 458).

OTHER PERSONS SUBJECT TO THE ACT. See Jurisdiction; Terminal Leases.

OVERCHARGES. See Reparation.

POOLING AGREEMENTS. See Agreements under Section 15.

PORTS.

In *San Diego Harbor Commission* v. *Matson Navigation Co.* [7 FMC 394], the Commission did not attempt to define the extent of its authority under section 16 First of the Shipping Act to require common carrier service to a port in order to prevent undue or unreasonable prejudice to that port or prejudice to another port. It found that the estimated volume of cargo in the trade between San Diego and Hawaii was quite small compared to the volume offered at the competing port at Los Angeles. Therefore, the Commission found no reason to interfere with the carrier's managerial decision not to serve San Diego based on the carrier's judgment of the economics of serving the port. Practices in the Great Lakes/Japan Trade, 270 (274).

Failure of carrier to serve a particular Great Lakes port inbound from Japan while serving the port outbound was not a violation of section 16 First. In view of the relatively small amount of inbound cargo offered and the fact that the carriers were not aware that their vessels would call at Duluth until after their inbound itineraries were fixed and the vessels had sailed, it could not be concluded that their decision resulted in undue or unreasonable prejudice to the port within the meaning of the section. There was no suggestion of a design to prefer another Great Lakes port where one of the carriers discharged cargo destined for the allegedly prejudiced port area. Id. (275).

Where two carriers, acting under an approved agreement, decided not to include inbound calls from Japan to a particular Great Lakes port (while serving other Great Lakes ports) in their joint tariff, and each carrier would have taken the same action independently if there had been no agreement, it could not be concluded that the Commission-approved agreement was in any part the basis for the carriers' action or that the carriers effectuated an agreement not to serve the port in violation of section 15. Id. (275).

Agreement between terminals at the ports of Philadelphia, Baltimore and Hampton Roads to establish dockage charges was not contrary to the public interest, detrimental to commerce or unjustly discriminatory and unfair as between ports, on the ground that imposition of such charges at Hampton Roads

where there had never been such charges would add to the burdens already borne by carriers serving Hampton Roads, and would cause still further diversion of cargo from Hampton Roads ports. The right of independent action reserved by the parties provided a safety valve to insure that the interests of each port area would be served. Since the agreement itself did not impose any charges, it was impossible to assess its effect on carriers, ports and United States commerce with any real degree of accuracy. If in the future rates, charges, etc., established under the agreement violated the fair and reasonable standards of the Shipping Act, the Commission could withdraw approval of the basic agreement or require modification. Agreement No. 9025: Middle Atlantic Ports Dockage Agreement, 381 (385, 386).

PRACTICE AND PROCEDURE. See also Evidence.

—Complaints

Procedure of joining another party as party complainant by means of an amended complaint was proper where no new issues were introduced requiring that respondent be given an opportunity to reply. International Trading Corp. of Va., Inc. *v.* Fall River Line Pier, Inc., 145 (147, 148).

Where a complaint had been amended to join a subsidiary of the original complainant as a party complainant, evidence of ownership of the subsidiary was immaterial. In any event, adequate evidence of ownership had been offered at the original hearing. Id. (148).

Motion by respondent to dismiss on the ground that a complainant was not properly added as a party because a formal motion to amend the complaint should have been filed instead of the amended complaint which was offered and accepted at the hearing in remand, was denied. Such a motion to amend had been made and denied at the original hearing, and after argument on exception to the Examiner's action, the Commission had ruled with complainant and directed that the amendment be allowed. Therefore, respondent had the opportunity to argue the matter to the Commission and no basis existed for requiring the filing of a second motion to amend at the hearing on remand. The facts and issues remained unchanged. Id. (151).

—Cross-examination

Where respondents were aware at all times of the matters of fact and law to be asserted by Hearing Counsel, and were in possession of the exhibits on which Hearing Counsel would rely, respondents were not deprived of their right of cross-examination because the exhibits were not formally offered and accepted in evidence until the close of Hearing Counsel's case. Practically all of the witnesses called by Hearing Counsel were present or former officials or agents of the respondents, but not one of them was recalled to the stand. If, in fact, these witnesses could have contributed any facts to respondent's case, the lack of any such evidence had to be attributed to respondents' own neglect, rather than to any procedural unfairness. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (612–613).

The fact that most of the evidence with respect to unfiled agreements between respondents came from the files of one respondent did not mean that only that respondent was effectively investigated, and therefore the brunt of any adverse findings must fall on its shoulders, since the decision was that the Act was violated by all three respondents. The very nature of a section 15 violation is such that evidence of an unlawful agreement will normally be sufficient not only against the line from whose files it originates, but against the other parties. Id. (613).

A contention that denial of a respondent's motion to obtain discovery and inspection of documents from the files of the other two respondents prevented acquisition of evidence which would have demonstrated that no section 15 violations existed, could not be sustained. The evidence showed that all three respondents were parties to unlawful agreements, and if any material from the files of the other respondents tended to show that agreements between respondents did not exist, it was not unreasonable to assume that the other respondents would have produced such evidence. Id. (613, 614).

—Initial or recommended decisions

While entitled to weight, any recommended or initial decision which comes before the Commission for review remains only a recommendation. In reviewing an initial decision, the Commission is not under the same restrictions as a court in its review of a final decision of the Commission, but rather exercises all the powers it would have in making the initial decision itself. Dixie Forwarding Co., Inc.—Freight Forwarding License Application, 109 (112). See p. 167, supra.

Where a carrier charged that the proceeding was discriminatory, in violation of its right to equal protection of the laws under the 14th Amendment, in that other carriers similarly situated were not being investigated, the Examiner should have treated the "issue" or stated his reason for failing to do so. Insofar as the initial decision failed to treat the question, it was not in compliance with the requirements of section 8(b) of the Administrative Procedure Act or Rule 13(f) of the Commission's Rules. As to the merits of the contention, even if some form of discrimination had crept into the administration of section 15, the remedy would not be dismissal of the instant proceeding, but broader enforcement. However, the carrier would be allowed to treat this portion of the Commission's decision as an initial decision by the Commission, and would be permitted to file exceptions within 15 days from date of service of the opinion. Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade, 503 (512–513).

—Issues

In a complaint case, the issues before the Commission are those framed by the pleadings. Thus, findings of the Examiner that a shipper and a carrier violated section 16 in certain respects were not adopted, since the matters were not in issue. Jordan International Co. *v.* Flota Mercante Grancolombiana, 537 (540).

—Special docket cases

The Special docket proceeding is designed to relieve applicants of the time and expense of litigating formal proceedings. No hearings are contemplated since all relevant facts are admitted by the carrier and the shipper. Thus, the application must set forth all the facts relevant and material to a decision on the merits. The Commission's authority in an informal proceeding is no greater than its authority in a formal proceeding. While Examiners should freely utilize their authority to obtain any additional information deemed necessary to insure that approval of applications will not result in discrimination, the extent to which an Examiner will go in trying an applicant's case for him is essentially within the discretion of the Examiner. Chave Ramirez *v.* South Atlantic & Caribbean Line, Inc., 203 (204).

The Commission's application form for Rule 6(b) applications prescribes the manner in which all 6(b) applications must be made, and the information called for therein represents the minimum upon which a decision on the merits could be made. In some cases additional information may be required to be submitted to prevent discriminations or preferences. Applicants seeking relief should exercise the greatest of care to insure that all relevant facts are in the application. The Commission will accept supplementary material offered in exceptions to the initial decision in the instant case in order to avoid any unnecessary prejudice to the merits of the application. Id. (204).

PREFERENCE AND PREJUDICE. See also Free Time; Ports; Reparation; Surcharges.

Respondents' rate on natural rubber sold and shipped by the government to foreign purchasers, which rate was substantially higher than the rate on synthetic rubber, was not unduly or unreasonably preferential, prejudicial or disadvantageous in violation of section 16 First, or unjustly discriminatory or preferential in violation of section 17, where the government in comparing the rates failed to show the character and intensity of the competition, that the difference in rates had operated to the shipper's disadvantage in marketing the commodity, that one person had been deferred or preferred to another, and that there had been unequal treatment between competing shippers or ports. It was necessary for the government to prove that an effective competitive relationship existed between itself and U.S. exporters of synthetic rubber. Congress had directed that the excess natural rubber program be carried out with due regard to the protection of producers and others against avoidable disruption of their usual markets. The government could not enter into an effective competition since it had been limited in selling, and had sold, on the basis that "the quantities actually released from time to time may vary considerably in order to avoid undue disruption of markets". A rate differential is not unreasonable and there is no unjust discrimination or undue preference in the absence of proof that the differential is not justified by the costs of the services rendered, by their values, or by other transportation conditions. United Sates, by General Services Administration *v.* American Export Lines, Inc., 280 (290, 291).

PUBLIC INTEREST. See Agreements under Section 15; Ports; Terminal Leases.

RATES AND RATE MAKING.

—In general

Rates in the Alaskan seasonal service should be tested by the results of operation in the "seasonal trade" and not by the overall operations of the carrier. The rate increases applied to commodities moving principally in the "seasonal trade". The carrier enjoyed a virtual monopoly in the "seasonal trade" and had reduced its rates in the scheduled trade where it faced keen competition. Shippers in the "seasonal trade" should not be burdened with the carrier's losses in the scheduled trade. The separation of services and construction of a partial rate base, while perhaps subject to some infirmities regarding exactitude of allocations, was the fairest method of testing the increases. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (2, 3).

Where a carrier presented all the information required for a separation of seasonal and scheduled services in the Alaskan trade, sufficient for construction of a partial rate base for the seasonal service, the fact that the carrier did not present a computation of a partial rate base could not be equated with a failure to meet its burden of proof. Id. (3).

Since a proposal to reconsider the Commission's decision in the proceeding to investigate the lawfulness of respondent Alaska Steamship Company's increased rates in the Alaska trade failed to obtain the necessary three votes, the proceeding was discontinued as to the respondent and petitions to reconsider and set aside the increased rates were dismissed. Chairman Harllee and Vice Chairman Day voted to reverse on the ground that the record supported higher tonnage projections and that, therefore, the increased rates provided an excessive rate of return. Commissioners Barrett and Patterson voted to affirm on the ground that respondent had met its burden of furnishing the facts necessary to estimate its future carryings and of providing reasonably supportable estimates establishing the reasonableness of its rates, and that, while some extra-record information had been introduced by respondent, the Commission's findings were supported without reference thereto. General Increases in Alaskan Rates and Charges, 314.

No time period will be imposed during which minimum rates prescribed by the Commission for carriage of automobiles from Atlantic and Gulf ports to Puerto Rico must remain in effect. It would be impracticable to attempt to freeze rates for a specific period in so dynamic a trade. Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico, 404 (413).

Carrier's rates, charges and practices applying to interstate transportation between Seattle-Tacoma, Washington, and points in Alaska were not unjust, unreasonable, or otherwise unlawful. In three of the past five years, the carrier had lost money and, in the other two years, its rate of return was 7.8 and 2.4 percent. Traffic to certain points bore a significantly larger burden than shipments to other points, based on the distances involved, but the consignees at the more distant points were unable to bear further increases due to their substandard economic condition. Rates on salmon outbound were promotional in nature, but the carrier operated a salt-curing plant and hired fishermen and purchased their entire catch, and the fishing industry provided a substantial part of the livelihood of the native population, which in turn contributed to the merchandising activities of the carrier. Increased Freight Rates—Alaska Lower Yukon River Area, 467 (469–471).

Where a shipper presented no evidence to demonstrate the unjustness or unreasonableness of a minimum rate per trailer-load for transportation of glass bottles from Jacksonville to Puerto Rico with transshipment at Port Newark, and the carrier showed that the rate was insufficient to cover the cost of transportation, the rate was not shown to be unjust or unreasonable within the meaning of section 18 of the Shipping Act, and of sections 3 and 4 of the Intercoastal Shipping Act. Thatcher Glass Mfg. Co., Inc. *v.* Sea-Land Service, Inc., 645 (647).

Where a carrier's minimum rate of $500 per trailerload of glass bottles from Jacksonville to Puerto Rico, with transshipment at Port Newark, was higher that the rate from Port Newark; the fact of transshipment plus its attendant costs warranted a higher rate absent a direct service from Jacksonville; transportation conditions in the two trades were not shown to be similar; alternate carriers were available which offered direct service from Florida; and, over a three-year period while the minimum rate was in effect, complainant shipper had greatly increased its shipments of glass bottles to Puerto Rico via the carrier's indirect service, the existence of the carrier's minimum charge could not and did not subject shippers to undue prejudice or discrimination in violation of the Shipping Act. By its express terms section 16, First provides that only these preferences or advantages which are undue or unreasonable are deemed to be unlawful. A discrimination in rates, resulting from a substantial difference in cost of operation, in the services performed, or in the transportation conditions, may not be unreasonable. Id. (648–651).

—***Affiliates of carrier***

The profits of Alaska Terminal and Stevedoring Company were properly included in the income account of Alaska Steamship Company for rate base purposes. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (5).

—***Allocations***

Allocation of administrative and general expenses according to the proportion that total vessel operating expense in the carrier's seasonal and scheduled Alaskan service bears to the total vessel operating expense, was proper rather than an allocation according to "vessel days" computed pursuant to Maritime Administration General Order 60 premised on the proposition that, since the carrier has considerable pre-season and post-season activity in regard to its seasonal operation, use of the formula under General Order 60 is more fair. While the carrier may comply with General Order 60 in its accountings to the Administration, the Commission is not prevented from prescribing a different allocation procedure. Since administrative and general expenses are a mixture of salaries and expenses that pertain to the overall management and operation of the carrier, logical reasoning dictates that their allocation should follow those expenses (i.e. vessel operating expenses) that management must control to profitably operate the business. Alaska Steamship Co.—General Increase in Rates in the Peinsula and Bering Sea Areas of Alaska, 1 (4).

Allocation of depreciation, inactive expenses, vessel values, and working capital attributable to the carrier's seasonal and scheduled Alaskan services, on the assumption that the asset was available for use in the regulated trade for 365 days, so that in allocating the value of an asset, the numerator would be days in service and the denominator would be 365, was proper. The asset was available for use in the regulated trade for 365 days each year, and this fact should be accorded weight in the allocation of inactive expenses, vessel values, depreciation, and working capital. Id. (5).

Where the carrier's actual tax liability for its seasonal and scheduled operations in the pertinent year was less than hypothetical liability of 52% on its seasonal service profits (the carrier lost money on its scheduled service), it was proper, for rate base purposes, to allow as tax against the income of the seasonal service only that amount of federal income taxes which the carrier incurred on its overall operation. Otherwise, the carrier would be allowed to subsidize its scheduled service at the expense of the seasonal rate payers, and would receive a return over and above that shown to be just and reasonable in the seasonal service. The carrier had a virtual monopoly in its seasonal service, whereas it was subject to competition in its scheduled service; the Commission's duty was to protect the rate payers of both services. Id. (6, 7).

Allocation of administrative and general expenses as between subsidized and unsubsidized service on the basis of voyage expense is the fairest of the "doctrinal bases" on which overhead expense may be allocated. General Increases in Rates Pacific-Atlantic/Guam Trade, 498 (499).

Allocation of administrative and general expenses as between subsidized and unsubsidized service on the basis of voyage expense was reasonable, in view of data showing the close relationship between the allocation of 31.5 percent of overhead expense to the unsubsidized service 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 operations (68.6 percent). That proportion of overhead was also closely comparable to the ratio of revenue in the unsubsidized trade (30 percent) to total revenue. Id. (499).

Use of voyage expense prorate in allocating administrative and general expenses as between subsidized and unsubsidized service is amply justified by equitable considerations. A subsidized carrier, for subsidy accounting purposes, is required to compute overhead expense pursuant to Maritime Administration General Order 31, using the voyage expense prorate. To require use of another formula, producing a lower figure for overhead expense, would result in a failure to charge to any service part of the carrier's actually incurred overhead expenses. Because of the limitations imposed on the carrier's return in each of the services, the carrier would thus be precluded from recovering from its revenues the full expense incurred by it in serving the public. Id. (499, 500).

The Commission will not use a revenue prorate method of allocating administrative and general expense as between a carrier's subsidized and unsubsidized service. Id. (500).

—Commodity rates

A barge carrier's rates for lumber and paperboard from the Pacific Coast to Hawaii were justified and lawful where they were established to meet competition with a noncommon carrier, and the barge carrier showed that it could make a profit after fully distributed costs if it carried nothing but those commodities to Hawaii and returned the barges empty. Evidence that the rates were 16% to 17% below those of the dominant carrier which operated fast self-propelled ships was not sufficient to overcome the barge carrier's estimates, and that carrier's managerial judgment should be allowed a chance to prove itself. There is no rule of law which says that the barge carrier must charge as much as the dominant carrier. Reduction in Rates—Pacific Coast-Hawaii—Oliver J. Olson & Co., 258 (265).

—Noncompensatory rates

Where, as to increased rates on certain commodities under investigation, the carriers' revenues were less than their fully distributed costs on all but a few of the commodities, the increased rates were just and reasonable. Atlantic/Gulf Puerto Rico Trade Increased Rates, 94 (96).

A carrier's revised noncompensatory rates in a new service should be allowed to stand until the carrier has had the opportunity to experiment and discover the rates at which traffic will be attracted and provide a profit. A carrier does not have to charge compensatory rates during the preliminary period of its operations in a new service. Reduction in Rates—Pacific Coast-Hawaii—Oliver J. Olson & Co., 258 (263).

Where the Commission has held a rate structure to be unlawful because it was not noncompensatory it has been on a finding that rate reductions were adopted by carriers in order to fight competition or take unfair advantage of other carriers in the trade through rate levels not based on costs of operation. The compensatory test was designed primarily to test a carrier's good faith motives in establishing reduced rates. Id. (263).

Where a carrier's noncompensatory rates for a new service were not shown to have been adopted in furtherance of unfair competition, and the evidence pointed to the fact that the rates could one day be compensatory, if the carrier were successful in attracting additional cargo, the rate structure was not unlawful. If new transportation experiments are to be adequately tested, they must be given sufficient time to realize their inherent advantages. To compel them to fully compensate the owner from the beginning would doom many promising services to the shipping public to an early death. Id. (264, 265).

In determining the propriety of a rate, the Commission must consider more than whether it is compensatory to the carrier. Rates which may be compensatory to some carriers may not be compensatory to all. It is to prevent the forcing of rates to unremunerative levels that the Commission has set minimum rate levels, even though the rates of all carriers in the relevant trade were not shown to be noncompensatory. Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico, 404 (408).

—Operating ratio test

The operating ratio test will not be used to test rate increases of the carrier in the Alaska seasonal trade. The carrier has a substantial investment in property used and useful in providing service, and even though it charters vessels to round out its seasonal fleet, the owned equipment used in the service is not so unsubstantial as to warrant departure from the prudent investment standard. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bearing Sea Areas of Alaska, 1 (9).

—Property devoted to service

The fact that non-owned property consists of chartered vessels, which the carrier claims to be indispensable to its Alaskan seasonal service, does not alter the principle that such property is not included in the rate base. The rate of return is essentially a return on invested capital, and non-owned property does not represent an investment of the owner's capital. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (4).

—Public interest

Even if all carriers in the North Atlantic-Puerto Rican trade could operate profitably at the 35-cent automobile rate proposed, the Commission would be compelled to disapprove the rate because of its concern for the public interest. The overall needs of the economy of Puerto Rico require that carriers be permitted to maintain rates on certain commodities basic to the economy of Puerto Rico at levels which may not be fully compensatory. A 37-cent rate plus an arrimo charge of 2 cents would be compensatory and would be high enough to allow a sufficient number of carriers to remain in the trade adequately to maintain the transportation of basic foodstuffs and products for "Operation Bootstrap" at a level which would not endanger the health of the overall Puerto Rican economy. The 35-cent rate is unjust and unreasonable because it is noncompensatory to a majority of the carriers and operates in a manner adverse to the overall economy of Puerto Rico. The minimum rate for carriers from the Gulf ports should be the same. The Gulf carrier did not participate and automobile rates from the Gulf had traditionally been the same as from North Atlantic ports. Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico, 404 (408–410).

While present rates of South Atlantic carriers of automobiles to Puerto Rico, which rates were differentially lower by 7 cents than the rates of North Atlantic carriers, did not appear to be noncompensatory, they were unjust and unreasonable. To allow them to remain in effect would thwart the Commission's determination of the necessity of requiring the automobile carriers, in the public interest, to bear more than their full share of allocated costs. Further, it would be unfair to the North Atlantic and Gulf carriers who have been required to support the low-rated commodities basic to the economy of Puerto Rico. A differential of approximately 4 cents would be adequate to preserve the competitive relationship which naturally exists between the North and South Atlantic trades while at the same time benefiting the overall economy of Puerto Rico. A 1-cent differential below the rate of one of the South Atlantic carriers was justified for the carrier with slower transit time. Id. (412, 413).

A carrier would not be allowed a 12.5 percent allowance for automobiles carried on deck to Puerto Rico, since to permit such a device would be to give unfair advantage to one carrier over the others who do not utilize such a device in the attraction of cargo. More significantly, it would defeat the whole purpose of fixing a minimum rate by permitting one carrier to contribute less than the amount which would flow from the minimum rate to the welfare of the overall economy of Puerto Rico. Id. (413).

—Rate of return

Considering the nature of the seasonal operations of the carrier in the Alaskan trade, the possible higher degree of risk involved than in other steamship operations, and, on the other hand, its efficiency of operation and its monopolistic position in the seasonal service, and the well settled criteria to be employed in determining a rate of return, rate increases are unjust and unreasonable to the extent that they allow the carrier a rate of return in its seasonal service in excess of 10%. A return of 20 to 25%, claimed by the carrier to be needed, would be allowed only on a showing of the most exceptional circumstances, which were not shown. It is not necessary for the Commission to make a finding as to what would be a reasonable maximum rate of return. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (10, 11).

—Test period

Use of 1962 as the test period for rate increases in the carrier's seasonal Alaskan service, rather than a period of 3 to 4 years to take into account the red salmon run cycle, was proper. The record did not contain adequate information on seasonal operations over a 3 to 4 year period to support the use of such a period as the test period. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (9).

Where the year 1960 had been used throughout the rate proceeding as the test year for revenues and expenses, it would be unjustifiable to arbitrarily shift to 1957 because its use would produce the lowest allocation of overhead expenses to the carrier's unsubsidized service of any year covered by the record. 1957 had no more to recommend it as a test year than years following when more overhead was allocated to the carrier's unsubsidized service. General Increases in Rates Pacific-Atlantic/Guam Trade, 498 (500).

—Vessel values

The Commission will not depart from the use of net book value, utilized in several previous rate cases, in valuing ships for rate base purposes. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (3).

Where a carrier's seasonal ships were used in its scheduled Alaskan service when necessary, it was proper not to include the entire net book value of all vessels used in the seasonal service in the partial rate base for that service inasmuch as the ships also generated revenue for the scheduled service. Id. (3).

—Working capital

Exception to non-inclusion in a rate base of investment in deferred charges and expenses, and of a specific amount for working capital of related companies, were rejected. Allowance as working capital of an amount approximately equal to one round voyage expense for each ship in the service was sufficient to provide not only for current operating expenses of the carrier, including the costs of services performed for it by related companies, but also for deferred charges and expenses. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (3).

Allowance as working capital of an amount approximately equal to one round voyage expense for each ship in the carrier's Alaskan seasonal service, rather than an allowance based on the difference between current assets and liabilities on the carrier's balance sheet at a given time plus an additional sum for contingencies, was proper. The allowance must be realistic. In the light of the carrier's need to maintain a year-round staff to insure that its seasonal operations go smoothly, inactive vessel expenses attributable to the seasonal service, administrative and general expenses attributable to the service, and cash requirements to meet other expenses when revenues do not cover costs, the allowance was realistic and fully justified. A reduction of the allowance by five-twelfths on the ground that the carrier's seasonal services cover only 7 months of the year would not be warranted and might impede the seasonal operations. Id. (7–9).

An allowance for working capital in the rate base of an amount equal to one round average voyage expense for each vessel in the trade was proper, notwithstanding that the allowance was 47 percent of the total rate base. Vessels and working capital made up over 95 percent of the carrier's total rate base, and the carrier's vessels were nearing the end of their depreciable life. However, the low value of the carrier's owned fixed assets did not diminish its total requirements for a fund to meet current operating expenses. The carrier's allowable working capital under the round voyage formula was 19 percent of its annual cash operating expenses, and this compared favorably with ratios allowed by the ICC. As to the contention that, to the extent freight charges were prepaid, the carrier was not required to supply working capital from its own funds, working capital was needed for reasons other than to meet a "revenue lag," such as expenses caused by vessel layups, repairs, and strikes. The practice of other agencies was in accord with the Commission's approach. General Increases in Rates Pacific-Atlantic/Guam Trade, 498 (500, 501).

RATES IN FOREIGN COMMERCE.

The government failed to meet its burden under section 18(b)(5) of the Shipping Act of showing that respondents' rate on natural rubber from New York to Turkey and Morocco was unreasonably high where it relied on the similar composition and use characteristics of natural and synthetic rubber, the fact that other carriers apply the same rates to both commodities, the fact that a foreign-to-foreign rate on natural rubber is substantially lower than respondents' rate, as is their rate on synthetic rubber in the same trade; and respondents showed that costs in domestic-to-foreign commerce exceed like costs in foreign-to-foreign commerce and that there is a substantial difference in the shipping characteristics of natural and synthetic rubber in the New York/Istanbul trade. Respondents had cast doubt on any inference which might have been raised by complainant's evidence and complainant did not produce evidence sufficient to erase that doubt. Any remaining inference would be founded on conjecture or speculation and would not be sufficient to support complainant's allegations. United States, by General Services Administration *v.* American Export Lines, Inc., 280 (289, 290).

REBATES. See Devices to Defeat Applicable Rates.

REPARATION. See also Free Time.

—In general

Settlement of claims for reparation, with the amounts calculated on the basis of the difference between the noncontract rate paid and the contract rate sought, plus a nominal amount of interest, was approved and the complaint dismissed with prejudice. H. Kempner *v.* Lykes Bros. Steamship Co., Inc., 126 (129); 209 (211, 212).

The Commission does not have authority to correct "any" shipper misunderstanding of law or regulation by permitting freight adjustments. Rule 6(b) does not provide a panacea for every wrong or misunderstanding arising from the business relations between carriers and shippers. Rule 6(b) does not provide a loophole for escape from the prohibitions of section 18(b)(3) of the Shipping Act, 1916. Bernard Bowman Corp. *v.* American Export Lines, Inc., 155 (158, 159).

Neither "inadvertent clerical error" on the part of a carrier in filing a tariff, nor the fact that the shipper had "no reason to expect freight to be charged at a rate nearly two and one-half times what he knew he had just paid to move the same item a much greater distance," are sufficient to overcome the clear obligation imposed by section 18(b)(3) that no common carrier in foreign commerce "shall charge or demand or collect or receive a greater or less compensation . . . than the rates and charges which are specified in its tariffs on file with the Commission." The *Swedish American Line* case is overruled. An unintentional failure to file a particular rate, a bona fide rate mistake, a hardship visited upon an innocent shipper by inadvertence of a carrier, or a stenographic omission are not sufficient reasons for departing from the requirements of section 18(b)(3). Strict adherence to filed tariffs is mandatory. Ludwig Mueller Co., Inc. *v.* Peralta Shipping Corp., 361.

In construing the requirements of section 18(b)(3), the Commission is bound to follow the long established judicial interpretation of section 6 of the Interstate Commerce Act, a similar law which has been held to require that a carrier must charge the rate on a commodity as duly filed. In the absence of some other statutory basis for relief, the construction placed on section 18(b)(3) is dispositive of special docket application grounded on rate or tariff deviations in our foreign trades. Id. (365).

The Commission's special docket procedure is a procedure whereby there is approved a refund from a carrier to a shipper of the difference between a rate that the carrier admits and the Commission finds to be unreasonable (and therefore unlawful), and a rate which the Commission adjudges to be reasonable. Therefore, the procedure is available only in those cases within the purview of section 18(a) of the Shipping Act and the provisions of the Intercoastal Shipping Act, 1933. Such cases relate only to the Commission's jurisdiction over common carriers in the so-called noncontiguous domestic trades. Id. (366).

Section 18(b)(5) of the Shipping Act which requires the Commission to disapprove any rate filed by a common carrier in United States foreign commerce which it finds to be so unreasonably high or low as to be detrimental to United States commerce, does not give the Commission any power to set a "reasonable" rate. This lack of authority is fatal to special docket cases in the foreign trades, since special dockets require the fixing by the Commission of damages and the lack of power to prescribe a "reasonable" rate forecloses the ability to arrive at the measure of damages which, in unreasonable rate incidents, is the difference between the "reasonable" and the "unreasonable". Id. (366).

While the special docket procedure is not available in cases involving foreign commerce, parties may achieve the same results by requesting, in the cases of new and initial rates, special permission to make such rates effective almost immediately, and, in the case of reduced rates, by filing and making public the rates. The Commission will receive changes in rates by telegram or cable, even after the close of business at 5 p.m. on Fridays. A person may always file a complaint under section 22 of the Act alleging a violation thereof and inserting a claim for reparation for harm caused by such violation. Id. (367).

Where a carrier received payment from a forwarder for a shipment of lumber from New York to the Virgin Islands, strictly in accordance with the tariff rate; and the shipper discovered that the commodity could have been shipped for less via another carrier and refused to reimburse the forwarder for the amount in excess, there was no basis for permitting the carrier to refund the difference to the forwarder. There was no showing that the rate charged was unreasonable and unjust, and the carrier was required to collect the tariff rate pursuant to section 2 of the Intercoastal Shipping Act. Barr Shipping Co., Inc. *v.* Atlantic Lines, Ltd., 638 (640).

—Overcharges

Application to refund a portion of freight charges collected in accordance with the carrier's applicable N.O.S. rate was granted, where the shipments of jute rags which had originated in Bombay were tied up at Suez and were transferred to the carrier's vessels for shipment to New York and Philadelphia; due probably to mutual mistake the carrier was not aware that jute rags were included in the transferred cargo and, if it had known, it would have amended the applicable tariff to provide the same rate as from Bombay; the rate charged was more than 175 percent greater than the rate to move the same goods all the way from Bombay; although it was not necessary to show unjustness or unreasonableness, the rate charged appeared to be prima facie unjust and unreasonable; and since the commodity did not move normally in the Red Sea/USA trade, there could be no discrimination by reason of granting the application. Midwest Export & Import Co. *v.* F. W. Hartmann & Co., Inc., 87 (90–92).

Where a carrier inadvertently omitted a rate on binder twine from a new tariff, and it was the intent and understanding of the carrier and the shipper that the equivalent of the rate in the old tariff would apply to the shipment involved as had been the case in the past, the carrier would be authorized to make a refund on a shipment on which freight had been computed at the higher N.O.S. rate. An innocent shipper would be relieved of the carrier's failure to file a proper rate. Swedish American Line—Refund of Freight Charges, 142 (143).

Where the carrier transported a used automobile from Puerto Rico to the Dominican Republic at its N.O.S. rate, and the shipment was connected in some way with a U.S. government agency and moved under a government bill of lading, the shipment did not come within the purview of section 18(b) (3) or (5) of the Shipping Act, since it was not that type of "commerce of the United States" which could be detrimentally affected by the level of the rate; it was not a commercial movement. The carrier was required to assess the N.O.S. rate in the absence of a commodity rate, but since the shipment moved on a government bill of lading and since it did not appear that a lower rate sought to be collected by the carrier was unduly preferential or prejudicial, waiver of collection of a portion of the charges assessed would be permitted. Department of State, AID *v.* Lykes Bros. S.S. Co., Inc., 153 (154).

—Retroactive rate reduction

Where the shipper knew or was charged with knowledge that a particular rate was the only rate the carrier could legally charge; there was no evidence that the shipper believed or had reason to believe that the rate would be reduced prior to the shipment made; there was no evidence that the shipper believed that the rate would be reduced retroactively, and when the conference undertook to reduce the rate it did not attempt to bring the shipment involved within the scope of the reduction; and, most importantly, the conference could not make the rate effective retroactively and the shipper knew this, there was no basis for an order authorizing payment to the shipper of the difference between the amount actually collected and the amount sought to be applied retroactively. L'Aluminium Francais *v.* American Export Lines, Inc., 83 (85, 86).

Where a carrier charged the applicable tariff rate on a shipment of goatskins and later discovered that the rate was far higher than that being charged by its competitor; the carrier agreed that its rate should have been at the same level as its competitor's and explained that the rate had been carried over inadvertently from an older tariff and had not been detected because no shipments of the commodity had been offered to it; the carrier reduced its rate but not in time to affect the shipment involved; and the consignor and consignee knew or should have known what the tariff was, the carrier's application to refund a portion of the charges collected was denied. The case was not one for the application of the doctrine that innocent shippers should not have to bear the consequences of a carrier's neglect in filing a tariff rate that the parties, acting in good faith, had agreed would apply. Retroactive application of rates is forbidden. E. Mahlab *v.* Concordia Line, 133 (135, 136).

Application to refund a portion of freight charges imposed in accordance with the carrier's tariff on file with the Commission must be denied where the refund is to be effected by the device of granting retroactive effect to a dual rate contract between the carrier and the shipper. Granting the application would be in direct contradiction to the prohibitions in section 18(b)(3). The Commission has permitted relief only when a carrier or conference has failed to file a new rate in accordance with section 18(b)(2), although the shipper had been led to believe such rate would become the lawful rate. As to the application of principles of equity and justice, the shipper had taken it for granted that a rate it had been paying on shipments to Israel would apply to shipments to Turkey, but the carrier had not misled the shipper, and unilateral assumptions by shippers, unrelated to a misleading act of a carrier, will not support equitable relief. Bernard Bowman Corp. *v.* American Export Lines, Inc., 155 (158).

—Undercharges

Where the carrier's failure to extend a special rate on milk powder from New York to Israel was due to an oversight and the result of events of which the shipper was innocent (longshoremen's strike and disruption of the carrier's normal clerical procedures when its office employees honored the picket lines at the carrier's office premises), the carrier was authorized to waive collection of that portion of the charges on two shipments, which was the difference between the charges based on the tariff rate and the special rate. Government of Israel Supply Mission *v.* American Export Lines, Inc., 14.

Where the conference secretary, through oversight, failed to file a corrected tariff page which would have prevented a higher rate from becoming effective, and carriers, their agents and shippers believed the lower rate was effective, permission to waive collection of undercharges on shipments of pineapple products from Hawaii to Japan during the time involved was granted. Granting of the relief sought would not result in discrimination and would relieve innocent shippers from the consequences of the carrier's failure to effectuate the intended tariff filing. California Packing Corp. *v.* Hawaii/Orient Rate Agreement, 78 (81, 82).

Where the carrier expressed its willingness to transport unboxed automobiles to Puerto Rico at flat rates ($115, $150, and $175, depending on the cubic footage of the automobile), and to charge $150 for "dead freight" during any month in which an agreed minimum of units was not shipped; the carrier later directed its agents to charge not less than $150 per car for the ocean freight on an "open account" basis; the carrier filed two tariffs covering the rates, except the dead freight rate, but one was rejected and the other withdrawn; the cargo was billed at the applicable tariff rate for automobiles, and on payment of $150, the carrier issued a due bill for the balance; and the shipper never questioned the bills of lading as rated by the carrier or the additional freight charges due under the due bills, the shipper knew or should have known that the tariff rate was still in effect. Complainant was never entitled to rely on a flat $150 rate for all automobiles shipped with the carrier and application for permission to waive collection of undercharges was denied. Chave Ramirez *v.* South Atlantic & Caribbean Line, Inc., 203 (205–208).

Where a carrier applied for permission to waive numerous undercharges, averaging $1.85, the requirement that a shipper's certificate be filed as to each shipment was waived. The requirement would cause the carrier undue hardship in that it would be compelled to incur excessive cost in relation to the amount of the undercharge, undergo considerable inconvenience and expend a disproportionate amount of time. Such a requirement would not further the purpose of the special docket proceeding. Sea-Land Service, Inc.—Application to Waive Undercharges, 641 (643).

Where a carrier increased its pickup and delivery rates for shipments between New York and Puerto Rico, in the expectation that the motor carriers were about to increase their charges to the carrier; the carrier inadvertently failed to file a revised tariff with the Commission, restoring the old rates, after it had secured special permission to cancel the increased rates, on learning that the motor carriers were not increasing their rates; and the result was that the carrier undercharged shippers for a period of four days, permission to waive the undercharges was granted. It was inequitable for the burden of the failure to file to fall on the innocent shippers. The lower rate which had been in existence for two years was presumptively reasonable; the advanced rate was presumptively unreasonable in view of the short period it was in effect, the reduction to the former level, and the fact that the increase was put into effect to compensate for a cost which did not materialize. Id. (642–644).

SHIPPERS' REQUESTS AND COMPLAINTS. See Agreements under Section 15.

STEVEDORING. See Terminal Facilities.

STORAGE CHARGES. See Free Time.

SURCHARGES.

A fixed dollar form of surcharge on cargo to Manila based on tonnage (otherwise justified by abnormal vessel delays due to a Manila Arrastre strike), was proper. The form of surcharge did not place an undue share of the cost of delay on low-value, low-rated commodities. The charge was constructed on the most basic characteristic of cargo weight or cube. Although freight rates may reflect value of the commodity, the rate at least equally reflects stowage factors. Considering that one type of cargo creates no more nor less delay than another, the fixed dollar per ton charge was fair. Surcharge on Cargo to Manila, 395 (400).

A fixed dollar form of surcharge on cargo to Manila based on tonnage was not violative of section 16 First, since the requisite competitive relationship between high- and low-rated cargo was not shown. Likewise, the form of surcharge was not contrary to section 17. There was no showing that American exporters had been discriminated against in favor of foreign exporters, or that the surcharge, in general, was unjustly discriminatory between shippers and ports. Id. (400, 401).

Carriers which imposed a surcharge on newsprint to Manila from a Maine port, while not imposing a surcharge from Canadian ports, violated section 17 in circumstances where a shipper of newsprint, who ordinarily shipped from the Maine port and who was in competition with Canadian exporters of newsprint to the Philippines, was forced to divert the newsprint to a Canadian port in an attempt to maintain its competitive position. A sufficient competitive relationship existed between the shippers and the ports concerned, the American shipper and the Maine port had suffered pecuniary harm, and transportation conditions were similar at the ports concerned. The carriers had demanded and collected a charge which was unjustly prejudicial to United States exporters as compared with their foreign competitors and unjustly discriminatory between shippers and ports. Id. (401, 402).

The reasonableness, under section 18(b)(5), of a surcharge imposed on cargo because of a delay in unloading due to a longshoremen's strike was not placed in issue by the order of investigation, and, in any event no facts were shown to demonstrate that the rate was so unreasonably high as to be detrimental to the commerce of the United States. Overseas Freight and Terminal Corp.—Extra Charges Caused by Longshoremen Strike, 435 (444).

Surcharge imposed by carrier when longshoremen's strike prevented unloading of vessel did not raise any questions of section 16 or 17 violations, where the same charge was assessed against all consignees equally and handling of property at terminals was not involved. Section 17 had never been construed to apply to a common carrier's ocean freight rates. Id. (444).

Additional charge assessed against consignees of cargo, arising out of delay due to longshoremen's strike and made without advance 30-day filing, was not a violation of section 18(b)(2) of the Shipping Act. Section 18(b)(2) was inapplicable. Once the cargo was loaded, the voyage begun, and the contractual relations of the parties fixed, no time remained for obtaining special permission for a change in rates on short notice. Furthermore, the rate was not changed. The carrier's tariff provisions were the same as those that had existed for at least 30 days previously and the tariff was properly filed. Id. (444, 445).

Where a carrier imposed a surcharge when a longshoremen's strike prevented unloading of the vessel, in reliance on a clause in the bill of lading attached to the tariff on file with the Commission, the carrier did not violate section 18(b) of the 1916 Shipping Act by charging a greater or different amount than the charges and rates specified in its filed tariff. In prior cases relied on to support a contrary conclusion the carrier's bill of lading had not been attached to the tariff on file, and the cases were decided under the Intercoastal Act when that Act did not require that the bill of lading be incorporated in the tariff. When section 2 of the Intercoastal Act was amended in 1958 so as to require incorporation of the bill of lading in the tariff, Congress intended that the rule of the cases requiring certain bill of lading clauses to be included in the tariff be superseded. Since section 18(b) of the Shipping Act, enacted three years later, requires that the bill of lading be filed with the tariff, it must be concluded that Congress did not intend that, in addition, provisions affecting rates and charges be printed again in the tariff itself. Id. (445–448).

Surcharge imposed when a longshoremen's strike prevented unloading of the vessel was not illegal under section 18(b) because the applicable provision of the carrier's bill of lading did not specify the amount of the charge (the carrier had apportioned 50% of the expenses caused by the delay in unloading equally among the consignees and had absorbed the remaining 50%. Tariff provisions which are applicable to regular, determinable voyage charges can be, as a practical matter, more exact than clauses whose purpose is to provide for the unknown, unforeseeable complexities of ocean transportation. Prior agency cases which support the proposition that tariffs must state the specific sum that will be charged for special services rendered, were concerned with regular, determinable voyage charges. Such cases involved domestic commerce and thus were of limited applicability, since section 18(a) delegates jurisdiction to the Commission over "regulations and practices relating . . . to the issuance, form, and substance of . . . bills of lading" of carriers in the offshore domestic commerce that is not delegated by section 18(b) covering the foreign commerce. Id. (448–450).

Carrier which imposed a surcharge when a longshoremen's strike delayed unloading, in accordance with its bill of lading clause which did not specify the sum to be charged, did not violate section 18(b)(3) by charging a rate greater than that shown in its tariff because the admiralty courts would not impose liability on shippers in such circumstances. Since no court had held that a charge could not be assessed under such a bill of lading clause for delay due to a strike when the goods were held on board the vessel at the port of delivery, it had not been demonstrated that the surcharge would not be allowable by the courts and that for this reason it violated section 18(b)(3) as a greater charge than that shown in the tariff. Id. (450, 451).

TARIFFS. See also Devices to Defeat Applicable Rates; Surcharges; Terminal Facilities.

A carrier's tariff must provide a certain and unvarying method of weighing and measuring cargo and of calculating proper freight charges. This can be accomplished only by taking the weight and measurement as the cargo is received on the dock by the carrier. The applicability and reasonableness of the charges cannot be determined after loading in the vessel; or by determining how much the shipment would measure or how it would stow, on the assumption that it was disassembled into its component parts. Orleans Materials and Equipment Co. *v.* Matson Navigation Co., 160 (165).

Charges assessed on shipments of structural steel from New Orleans to Honolulu based on measurement (with outside measurement governing) of the cargo as received from the shipper, taking depth, width and length in such manner that the cubage was determined through ascertainment of the smallest rectangular container into which the piece or package would fit, were not unreasonable or otherwise unlawful. The carrier's measurements were taken in accordance with the usual practices pertaining to cargo freighted on a measurement or alternative weight-or-measurement basis, and the carrier's method of "rectangularizing" is generally followed in ocean trades according to recognized authority in the field. While, in some instances and where practicable other cargo was "nested" in a part of the space not occupied by the the steel, it would have been highly speculative to say, on the basis of the evidence, how much of the alleged cubic feet of unused space was occupied by "nested" cargo and how much was actually occupied by the shipments together with the timber and other material required to secure them safely. Id. (165, 166).

Any ambiguity of a tariff provision which in reasonableness permits misunderstanding and doubt by shippers must be resolved against the carrier. Where a tariff made no distinction as to size or use but applied a higher rate to marble slabs than to tiles, there was a wide variety of opinion in the trade as to the difference between a slab and a tile, and one of the carrier respondents had applied the higher rate and described its shipment as slabs while the other applied the lower rate and described its shipment as tiles, there was a definite ambiguity in the tariff. While a shipper, if he has doubt as to the proper tariff designation of his commodity, has the duty to make diligent inquiry, the shipper in the instant case was not in doubt and had inquired of a reputable forwarder as to the rate on floor tiles. Peter Bratti Associates, Inc. *v.* Prudential Lines, Inc., 375 (379).

Where carriers had on file tariffs showing a rate on marble slabs and a lower rate on marble tiles, and the application of the rates to marble depended on whether the marble pieces were more or less than 60 x 60 centimeters, a limitation not published in the tariffs, the carriers violated section 18(b)(3) when they demanded and collected the higher rate on marble to be used as flooring on the basis that the pieces shipped exceeded 60 x 60 centimeters in area. Id. (380).

Retention of goods on board during a longshoremen's strike and ultimate discharge at the port of destination was a "service rendered to the goods", and the carrier was entitled to extra compensation for the service in accordance with a clause in its bill of lading calling for extra compensation in such circumstances. Overseas Freight and Terminal Corp.—Extra Charges Caused by Longshoremen Strike, 435 (451).

Tariff rate on logs from Colombia to New Orleans was not shown to be unduly prejudicial, unjustly discriminatory, detrimental to commerce, or in contravention of the Shipping Act. The rate was duly filed with the Commission and the shipper was charged with knowledge of it. There was no justification for the claim that the log rate would be one which, when the log is reduced to recovered lumber, should approach the rate for loose or bundled lumber. The logs had inherent properties which made them far less attractive than lumber to carriers. The requisite showing of substantial similarity of transportation conditions between the lumber and logs to rule that the dissimilarity in rates was unlawful, was not made. Jordan International Co. *v.* Flota Mercante Grancolombiana, 537 (541).

TERMINAL FACILITIES. See also Terminal Leases; Wharfage.

The employment of one stevedoring subcontractor by a grain terminal in preference to another or even to the exclusion of another does not necessarily constitute an unreasonable regulation or practice under section 17. California Stevedore & Ballast Co. *v.* Stockton Elevators, 97 (103).

A grain terminal's tariff item naming a rental charge for use of equipment in loading cargoes is ambiguous in not stating who is to pay the charge. Therefore, the grain terminal could place the charge against the stevedore, the vessel or the cargo and could make the charge against some stevedores and not others, and as here could bury the charge in a lump-sum "mark-up" which includes its profits. This is an unreasonable practice which may be a source of potential discrimination. Id. (104).

The passing on to the vessel of a rental charge, for use of loading equipment, by means of a mark-up, would place a grain terminal and its subcontractor which performs the terminal's stevedoring under an exclusive contract on a competitive parity with other stevedoring firms which are assessed the rental charge. However, there is no compulsion on the terminal to include all or any part of the rental charge in the mark-up. The flaw in the arrangement, from a regulatory standpoint, is that the so-called rental mark-up is mixed up with profit mark-up, and no one but the terminal knows which is which. In burying the rental charge in a lump-sum mark-up which also includes profit, the terminal has opened the door for discrimination of a most invidious nature. Id. (104, 105). Not only potential discrimination in unequal application of a tariff but the mere possibility of a variance between regulation and practice render both the regulation and practice unreasonable. Id. (105).

A grain terminal's practices of (1) passing on to the ship its established rental charge, for the use of loading equipment, in the form of a lump-sum mark-up which also includes its profit on stevedoring; (2) failing to publish the charge specifically to apply against the ship, or the cargo, or against all stevedores alike; (3) failing to assess the charge against its subcontractor, which performs the terminal's stevedoring under an exclusive contract; and (4) assessing the charge exclusively against competing stevedores—are unreasonable in violation of section 17. By tariff rule the charge may be assessed against the ship, or the cargo, or all stevedores, including the subcontractor. Id. (106).

Tariffs providing for different handling charges for woodpulp, in bales, in units under 1,000 pounds and in units 1,000 pounds or over, must be given a fair and reasonable construction. The terms must be construed in the sense in which they are generally understood and accepted, and shippers cannot be permitted to avail themselves of strained or unnatural construction (unless a number of bales were bound together to facilitate movement as a single unit, the individual weight of each would govern under the tariff). Bulkley Dunton Overseas, S. A. *v.* Blue Star Shipping Corp., 137 (140).

Where an exporter shipped woodpulp in bales weighing about 500 pounds each which were not bound together but were usually handled in stacks of five bales, and the terminal tariff provided for a handling charge of 69¢ per ton for woodpulp in bales of 1,000 pounds and over and of 95¢ per ton for woodpulp in "units" under 1,000 pounds, the terminal properly charged the 95¢ rate. The units moved were the bales not the stacks. The number of the units that were stacked on a conveyance was irrelevant and could not be seized upon to sustain a claim of tariff ambiguity or confusion. Id. (140).

Provision in a terminal tariff for the stevedore to receive one third of the applicable tariff rate for handling cargo, need not have been in the tariff and was a matter strictly between the stevedore and the terminal. The Stevedore was at liberty to waive payments and the shipper was not entitled to a refund of that portion of a handling charge waived by the stevedore, on the ground that the terminal was engaging in an unreasonable practice under section 17. Id. (140, 141).

Dockage charges imposed on the vessel for berthing at a wharf, pier, etc., or for mooring to a vessel so berthed would not result in a "double charge" for terminal facilities, where other charges imposed by the terminal operators on railroad shippers were for such services as loading, unloading, bracing, and blocking of freight. Agreement No. 9025: Middle Atlantic Ports Dockage Agreement, 381.

TERMINAL LEASES.

Municipal corporations which own and lease terminal facilities and retain wharfage and dockage charges at the facilities are furnishing terminal facilities within the meaning of section 1 of the Shipping Act, and are, therefore, other persons subject to the Act. Terminal Lease Agreements—Oakland-Long Beach, Calif., 521 (527).

A "pier" lease and a "truck terminal" lease covering areas in the same locale, with the activities accomplished on the property being essential to the lessee's related carrier's integrated containerized operations, will be considered as a composite arrangement for section 15 purposes. Id. (528).

Where an agreement is strongly protested, the Commission must examine not only its terms, but also the competitive consequences which may be expected to flow from it and other facts which show the objectives and results of the agreement, in order to determined whether the agreement is subject to section 15. Id. (529).

Municipal corporations, in granting via terminal leases, the exclusive use of a berth for a consideration which substantially deviated from tariff charges applicable to others, gave a special rate which brought the leases within the purview of section 15. Id. (530).

Contention that only agreements which are intended to restrain competition in per se violation of the Sherman Act need be filed under section 15 must be rejected. The effect of the agreement, not its intent, is the basis for inclusion or exclusion from the requirements of section 15. Section 15 is not ambiguous. It is not explicitly limited to agreements that are per se violative of the Sherman Act. Id. (531).

Terminal leases were not unjustly discriminatory because the lessee paid a flat rental while others had to pay tariff rates, and because the rents were allegedly noncompensatory. The record demonstrated that the leases would provide adequate revenue on their investment, and there was no evidence of any unlawful discrimination against any carrier, port or terminal. The lessee had the legal duty to establish and enforce just and reasonable regulations concerning the handling of cargo, and there was no evidence that it would do otherwise. Id. (531–533).

While the Commission might consider state or local law in determining what the public interest may be, it cannot disapprove terminal lease agreements as contrary to state law, where there is no showing that any adverse ramifications will ensue on approval. Since the Commission cannot anticipate any consequences which might be contrary to the public interest, the legality of the terms of the leases under state law is a matter for the state, not for the Commission, in a section 15 proceeding. Id. (533, 534).

Terminal leases on a flat-rental basis were not contrary to an agreement between port authorities. The agreement permitted uniform, stable terminal rates as far as might be practicable; it did not require uniformity. The terminal operators were justified in departing from the concept of uniformity. Id. (533).

In the absence of evidence to warrant a finding that terminal leases would have an unlawful impact or would be detrimental to commerce or would be contrary to the public interest, the Commission would not disapprove them on the basis of speculation alone. In fact, the leases were beneficial to the ports, the carrier and the shipping public. It was in the public interest to preserve the traditional system of terminal charges on the Pacific Coast, but the leases (flat-rental type) were not endangering the system. Id. (534).

UNDERCHARGES. See Reparation.

VESSEL VALUES. See Rate and Rate Making.

WHARFAGE. See also Devices to Defeat Applicable Rates; Jurisdiction.

Wharfage is a charge against cargo for the use of terminal facilities, not for physical services rendered to the cargo; owners of marine terminal facilities are entitled as a matter of law to compensation for their facilities; use of facilities is made by the cargo even though it does not touch the wharf; wharfage is justified on the Pacific Coast from an historical standpoint; and wharfage on bulk grain has been assessed at marine terminal elevators on the Pacific Coast since the inception of such movement. Wharfage Charges on Bulk Grain at Pacific Coast Ports, 653 (657).

Marine terminal elevators handling bulk grain are engaged in wharfinger operations, and under the principles of the Freas formula the assessment of wharfage on bulk grain at such facilities is justified. Id. (659).

Marine terminal elevators have an investment in facilities which pertain to the terminal aspects of their operations, and there is an economic justification for their assessment of wharfage in order to recoup the investment in such facilities. Id. (661).

In view of the facts that rates paid for handling and storing grain, under the Department of Agriculture's Uniform Grain Storage Agreement, are the same for marine terminal elevators and for country elevators which do not have terminal facilities and that the Agreement provides for customary or mandatory wharfage charges where grain is received at port locations, the logical conclusion is that handling and storage charges were not intended to cover compensation for the additional facilities of a terminal nature which are not found at a country elevator. The UGSA handling and storage charges are not a duplication of the wharfage charge and do not provide any compensation for wharfage. Id. (663).

In view of the fact that the Department of Agriculture's Uniform Grain Storage Agreement provides for payment of customary and mandatory wharfage at port locations, and that the rates for storing and handling do not compensate for wharfage, the Agreement is not relevant to the question of whether the practice of assessing wharfage on CCC-owned bulk grain at marine terminal elevators on the Pacific Coast is lawful. Id. (664).

Wharfage is a user charge and does not contemplate the performance of a physical handling service. Marine terminal elevators which charge for storage and handling of bulk grain under an agreement with the Department of Agriculture, are entitled to assess wharfage for the use of the elevators' facilities for transferring CCC-owned bulk grain from elevator to ocean-going vessels. Contentions that the conveyor and spout, also the berthing facilities are necessary to the operation of the elevator and to a degree are part of the investment in the elevator, and that whatever benefit the ship receives from use of the wharf is compensated for by dockage and in some cases service charges paid to the marine terminal elevator, cannot be sustained under the principle of the Freas formula. Id. (664, 665).

Evidence relating to wharfage practices of marine terminal operators at Gulf and Atlantic ports is not relevant to the question of the lawfulness of wharfage charges on bulk grain at Pacific ports. The terminal rate structure on the Pacific Coast is patterned after decisions of the Commission which is not true as to the terminal situation elsewhere, and conditions at Gulf and Atlantic ports are different from those at Pacific ports. Nonrailroad terminals on the East Coast cannot assess wharfage on rail traffic because to do so would result in double charges and consequent loss of business to the nonrail terminals. Id. (665, 666).

Practice of assessing wharfage charges on grain moving through marine terminal elevators on the Pacfic Coast pursuant to the Department of Agriculture's Uniform Grain Storage Agreement does not constitute an unjust or unreasonable practice within the meaning of section 17 of the Shipping Act. Id (666).

WORKING CAPITAL. See Rates and Rate Making.