FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 398

HARAS & CO., INC.

v.

BOISE GRIFFIN STEAMSHIP CO., INC.

Under section 18(b)(3) tariff rates covering foreign commerce cannot be modified retroactively. Application denied.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER [1]

Complainant is a foreign freight forwarder. On behalf of Archer Daniels Midland Company, Minneapolis, Minnesota (Shipper) it booked with respondent a shipment of 34,310 pounds of Petroleum Ink Oil in drums from Chicago to Genoa, Italy, via vessel scheduled to sail July 9, 1963. A copy of the bill of lading, thereafter received, revealed that the ocean freight charges had been computed on the basis of the carriers N.O.S. rate, or 932 cubic feet at $71.50 per 40 cubic feet. The total was thus $1,665.95. In September 1962, less than a year earlier, complainant had booked a shipment of the same commodity from the same shipper to the same consignee. The freight charges were then computed at the rate of $44.75 per 2,240 pounds. Had this rate been applied to the later shipment here in question the freight charges would have been some 59% lower.

Upon investigation complainant found that this apparent discrepancy was attributable to the fact that the American Great Lakes-Mediterranean Eastbound Freight Conference, of which the above captioned line is a member, issues a completely new tariff at the start of each annual season. The 1962 tariff contained a commodity rate covering "Oil, Ink" but the 1963 tariff did not. Effective August 22, 1963, six weeks after the shipment was moved, the conference restored an "Oil, Ink" commodity rate increased to $50.75 per 2,240 pounds

[1] This decision became the decision of the Commission on April 15, 1966 and an Order was issued denying the application. *Commissioners* Barrett and Day would grant the application.

Thereafter the consignee by whom the disputed freight charge had been paid deducted the sum of $998.85 from a balance due Shipper and Shipper debited complainant's account accordingly. By application filed November 18, 1965, pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure, complainant seeks reparation and offers to accept $777.34 "as full settlement of the claim" [2]

CONCLUSIONS

Section 18(b)(3) of the Shipping Act, 1916, provides as follows:

"(3) No common carrier by water in foreign commerce or conference on 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."

In Special Docket No. 377, *Ludwig Mueller Co., Inc.* v. *Peralta Shipping Corp.*, Vol. 8 F.M.C. 361, the Commission concluded that it is without authority to grant special docket relief permitting deviations from foreign trade rates on file. At the time of the 1963 shipment concerned, the applicable tariff "on file with the Commission and duly published and in effect" contained no commodity rate for this commodity. The only lawful rate was therefore the N.O.S. rate. The finality of the statutory mandate against deviations cannot be avoided by presuming to give retroactive effect to a subsequent tariff change.

An order denying this application will be entered.

JOHN MARSHALL,
Presiding Examiner.

WASHINGTON, D.C.
February 24, 1966

[2] Although specific finding is unnecessary to decision in this case, it appears that the application may be time barred by the two-year statutory period prescribed by section 22 of the Shipping Act, 1916, and referred to in Rule 6(b).

FEDERAL MARITIME COMMISSION

No. 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

Decided April 18, 1966

Agreement No. 9218, which provides that where a member line of one conference operates within the range of the other conference the line must be a member of both conferences, is contrary to the provisions of section 15.

Burton H. White and *Elliott B. Nixon*, for respondents.

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

REPORT ON RECONSIDERATION

By the Commission (John Harllee, *Chairman;* Ashton C. Barrett, *Commissioner.*):

THE PROCEEDINGS

The Commission instituted this proceeding on July 26, 1963, to determine whether Agreement No. 9218 should be approved, disapproved, or modified. After moving through the usual procedural steps, the Commission on June 30, 1964, approved the agreement pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814).[1] However, Hearing Counsel, who had advocated disapproval of the agreement, petitioned the Commission to reopen the record to take further evidence and to reconsider the decision. The Commission granted Hearing Counsel's petition, but Agreement No. 9218 remained approved. On March 5, 1965, counsel for respondents notified the Commission of respondents' decision to cancel the agreement. The Commission, however, elected

[1] See the Commmission's Report and Order in *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,* Docket No. 1100 (Sub. 1) June 30, 1964. 8 F.M.C. 170 (1964).

not to discontinue the proceeding. Examiner Herbert K. Greer issued an initial decision in which he found that Agreement No. 9218 contravened the standards of section 15. Hearing Counsel, while agreeing with the examiner's ultimate conclusion, excepted.

In our previous report we considered the approvability of Agreement No. 9218. However, since the agreement in controversy has been canceled, the Commission must now decide a variation of that issue. At this juncture we must decide, not whether we should approve, disapprove, or modify Agreement No. 9218, but whether our former decision was legally correct. This is so because this decision, as do all formal Commission pronouncements, should serve as a regulatory guideline for the industries we regulate. Consequently, it is important that each decision, or guideline, correctly sets forth the prevailing interpretation of the Commission. Thus, it is not so important here to rule on the approvability of a specific agreement; rather it is most important to enunciate the Commission's views in the critical area of the rights of carriers to join or resign from conferences. In this light, the fact that Agreement No. 9218 is inoperative is of no practical consequence.

The overall issue, therefore, is whether that former decision was legally correct.[2] We hold that it was not.

THE FACTS

On July 3, 1963, the North Atlantic Continental Freight Conference (eastbound conference) and the Continental North Atlantic Westbound Freight Conference (westbound conference) jointly filed Agreement No. 9218 for approval under section 15. The agreement provides as follows:

> 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 on one, be a member of the other Conference.
>
> The undersigned Conferences further agree to take all steps necessary or appropriate to effectuate this agreement.
>
> This agreement shall be effective only upon approval by the Federal Maritime Commission of the United States of America.

The eastbound conference covers the trade from United States ports in the Portland, Maine/Hampton Roads, Va. range to ports in Germany, Holland, and Belgium. The westbound conference covers the same trade in the opposite direction. While the conferences have many

[2] Sections 23 and 25 of the Act empower the Commission to reconsider former decisions.

members in common, the conferences have remained separate, primarily because of considerations dealing with the setting of rates.

Agreement No. 9218 does not apply to carriers that operate in one direction only. It does require a member to resign from conference membership if he operates within the trading area of both conferences and refuses to become a member of both conferences. However, neither the two organic agreements nor Agreement No. 9218 guarantees to a member of one conference automatic membership in the other.

Since the time Agreement No. 9218 was approved, membership in the eastbound conference and the westbound conference has been common with the exception of French Line which does not operate westbound. In addition, American Export Isbrandtsen Lines, once a member of both conferences, resigned from the eastbound conference in 1964, and North German Lloyd and Hamburg America Line resigned from the westbound conference effective April 5, 1965. Finnlines was a member of the eastbound conference and operated as an independent westbound, but on March 31, 1963, Finnlines resigned from the eastbound conference because of its objection to Agreement No. 9218.

THE FORMER DECISION

The Commission's decision of June 30, 1964, approved Agreement No. 9218. That decision interpreted section 15 to mean that conference membership is not unequivocally open; rather, prerequisites may be imposed so long as such conditions are "reasonable and equal." Thus, the Commission stated:

> 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.
>
> 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 conference is common (with the exceptions indicated above); the trades covered by each of the conferences constitute 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 trade), 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.

The decision goes on to point out that a one-way member would have a decided advantage over carriers who are conference members in both directions in soliciting cargo from persons who are both importers as well as exporters. Thus, the decision finds:

> 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 independent having a voice and a vote in conference decisions which affect both the eastbound and the westbound trades.

The decision further points out that the agreement is not likely to drive nonconference competition from the trade since nonconference lines have always been a strong factor in these trades. Moreover, the decision states that the trade is overtonnaged, and there appears to be little likelihood that the agreement will restrict the movement of goods. The decision also observed that an identity of membership in the two conferences will have a meritorious effect on disparities between eastbound and westbound rates on similar products. Accordingly, the Commission found the requirements for membership in both conferences were "reasonable and equal" and approved the agreement.[3]

THE INITIAL DECISION UPON FURTHER HEARING

In his initial decision on further hearing, the examiner held that section 15 required that the agreement be disapproved. The examiner stated the primary issue to be whether a conference may impose a condition for membership relating to a trade not served by that conference; or in other words, whether membership in a conference may be conditioned upon adoption of the rate practices of another conference in a different trade. Section 15, according to the examiner, does not permit such a qualification on membership. The examiner based the decision upon the legislative history of the pertinent language in section 15, the Commission's interpretation of this language in FMC General Order No. 9, and the Commission's traditional "open door" membership policy.

DISCUSSION

We must decide whether an agreement between two separate conferences which requires that membership in one conference shall be con-

[3] In a dissent, two Commissioners argue that the record would not permit the findings upon which the majority report was based. The dissenters concluded that 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 or meet other routine conditions, would be contrary to the essential 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.

tingent upon membership in another conference covering the reciprocal trade is approvable under section 15. Section 15 provides:

No such agreement shall be approved, nor shall continued approval be permitted * * * in respect to any conference 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, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.[4]

Furthermore, section 15 provides that 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 * * *.

Agreement No. 9218 would allow each conference to impose upon its members and applicants a condition for membership affecting participation in a trade not included within the trade covered by the conference. Thus, the westbound conference could prevent its members from operating as independents in the eastbound trade. Similarly, the eastbound conference could control participation of its members in the westbound trade.

Restrictions on freedom to join or resign from conferences are not novel in the Commission's experience. In fact, the synthesis of our former decisions establishes an emerging open door policy regarding conference membership.[5]

In early cases dealing with admissions, conferences were permitted to bar applicants to membership under certain circumstances. These exclusions were permited because an applicant demanded a rate advantage over other members, because an applicant was a subsidiary of an existing conference member, because an applicant demanded participation in an approved sailing agreement, because the trade was overtonnaged and unprofitable, because an applicant had outstanding forward bookings at nonconference rates, and because an applicant was

[4] The membership clause was added to section 15 by Public Law 87–346, 75 Stat. 763, October 3, 1961.

[5] 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." (Report of the Antitrust Subcommittee of the House Committee on the Judiciary, H. Rept. No. 1419, 87th Cong., 2d sess., p. 97 (1962).)

not serving the trade and admission was not necessary to meet the needs of the trade.[6]

Later the Commission began to examine restrictions on membership more critically. The Commission refused to accept as justification claims of conferences that the trade was overtonnaged, that applicant's vessels were chartered, that applicant was not a regular carrier in the trade, that there was possibility of applicant ceasing operations, and that applicant refused to divulge financial data.[7]

Indeed, the type of limitation on membership presented here has been considered previously. In *Cosmopolitan Line* v. *Black Diamond Lines, Inc.*, 2 U.S.M.C., 321 (1940), the Commission considered an attempt of a conference to deny membership in an eastbound conference because of failure to join the reciprocal westbound conference. The Commission held:

> The approved conference agreements refer to "the trade covered by this agreement," and the conferences are to be governed by rules and regulations within the purpose and scope of the approved agreements. Requirements for admission have been herein noted. Although it is defendants' [conferences'] position that because the same ships generally are used to transport eastbound and westbound cargo there is but a single trade, and that uniform rates, rules, regulations, and practices in each direction should be observed, the agreements do not so provide, and no rule or regulation has been promulgated which requires an applicant for eastbound conference admission to become a member of conferences operating westbound. 2 U.S.M.C. at 329.

The Commission directed the conferences to admit the applicant to full and equal membership.

In *Sigfried Olsen* v. *Blue Star Line, Limited*, 2 U.S.M.C. 529 (1941), the Commission considered a comparable problem:

> There is testimony by complainant [applicant] that, southbound, he has charged rates above, below, and the same as those of a different conference in the southbound trade. The charging of the lower rates southbound is advanced by defendants as ground for debarring complainant from the northbound conference despite the fact that complainant has been denied membership in the southbound conference, as well as in the northbound conference. Defendants [conference] even contend that complainant should be excluded from the northbound conference unless he again make application for southbound conference membership. Such a position is unreasonable. No provision of the northbound

[6] See respectively, *Wessel, Duval & Co.* v. *Colombian S.S. Co., et al.*, 1 U.S.S.B.B. 390 (1935); *Application Red Star Line For Conf. Membership*, 1 U.S.S.B.B. 504 (1935); *Seas Shipping Co.* v. *American South African Line, Inc., et al.*, 1 U.S.S.B.B. 568 (1936); *Application of G. B. Thorden for Conference Membership*, 2 U.S.M.C. 77 (1939); *Hind, Rolph & Co., Inc.* v. *French Line*, 2 U.S.M.C. 138 (1939).

[7] *Phelps Bros. & Co., Inc.* v. *Cosulich-Societa, etc.*, 1 U.S.M.C. 634 (1937); *Sprague S.S. Agency, Inc.* v. *A/S Ivarans Rederi*, 2 U.S.M.C. 72 (1939); *Waterman S.S. Corp.* v. *Arnold Bernstein Line*, 2 U.S.M.C. 238 (1939); *Cosmopolitan Line* v. *Black Diamond Lines, Inc.*, 2 U.S.M.C. 321 (1940); *Sigfried Olsen* v. *Blue Star Line, Limited*, 2 U.S.M.C. 529 (1941).

conference agreement requires any party thereto or applicant for membership to make even one application to the southbound conference. 2 U.S.M.C. at 533.

The conference was directed to admit the applicant to membership.[8]

Finally, in *Black Diamond S.S. Corp.* v. *Cie M't'me Belge (Lloyd R.) S.A.*, 2 U.S.M.C. 755 (1946), the Commission not only ordered the conference to admit an applicant, but it also promulgated criteria requiring the admission of any common carrier in the trade who furnishes evidence of ability and intention in good faith to institute and maintain a regular service.[9]

The legality of restrictions on conference membership was further refined in *Pacific Coast European Conf.—Limitation on Membership*, 5 F.M.B. 247 (1957). There the conference agreement provided that carriers "giving substantial and reliable evidence of operating regularly in the trade" could qualify for membership except for "just and reasonable cause." [10] In this case the conference conditioned membership upon abandonment by the applicant of certain formal complaints against the conference which were pending before the Commission at that time. Basically, this was a question of whether the condition of membership was a new agreement or modification requiring agency approval or was an exclusion for "just and reasonable cause." Our predecessor held that concerted refusal of the conference to admit the applicant was an entirely new scheme controlling membership and its effectuation without approval was a violation of section 15.

All in all, the previous decisions dealing with admissions show that the Commission must look closely at attempts to prevent bona fide carriers from entering a conference. And the rationale of these cases, we believe, supports our reversal of our previous decision.[11]

With these precedents in mind, we now turn to the amendment to section 15 contained in Public Law 87–346 which requires conferences to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade. The provision, in application to this proceeding, requires a determination of what is meant by "reasonable and equal terms and conditions." The legislative history of this provision in effect demon-

[8] Both *Cosmopolitan* and *Olsen* depend heavily upon the finding that the membership requirement that an applicant belong to a conference in the reciprocal trade was not explicitly stated in the organic agreement. However, there is every indication that the Commission considered the restriction on membership to be unreasonable as well.

[9] Accord, *The East Asiatic Co., Ltd.* v. *Swedish American Line*, 3 U.S.M.C. 1 (1947).

[10] The conference voluntarily added these conditions of membership during the pendency of *Pacific Coast European Conference*, 3 U.S.M.C. 11 (1948).

[11] An exhaustive treatment of these and other cases dealing with admission to conference membership is contained in *McGee, Ocean Freight Rate Conferences in the Economic Value of the United States Merchant Marine*, 396–404 (1961) and *McGee, Ocean Freight Rate Conference and the American Merchant Marine*, 27 U. Chi. L. Rev. 191, 243 (1960).

strates that Congress intended to ratify and codify the Commission's open door policy. This is so because legislation was written in cognizance of the denunciation of restrictions on membership voiced by the Antitrust Subcommittee of the House Committee on the Judiciary.[12] And while the House and Senate reports accompanying the legislation do not elaborate extensively upon the "admissions" language, various passages of the floor debates indicate that conference membership was to be available to any common carrier in the trade subject to normal administrative requirements. For instance, the manager of the bill in the Senate, Senator Engle, stated:

> The bill specifically provides that the conference may be set up, when approved by the Maritime * * * [Commission], with certain restrictions, and that any common carrier who wishes in can get in on equal terms. 107 Congressional Record 19308 (1961).

In the same debates Senator Butler added:

> I urge all Senators to bear in mind that we are the only nation which requires steamship conferences to keep their membership doors open to all common carriers making a reasonable showing of willingness and ability to serve the trade regularly. Our conferences are thus 'open shop' affairs; every applicant must be admitted on the same reasonable and equal terms and conditions available to all other members. 107 Congressional Record 19310 (1961).

We, therefore, conclude that the legislative history supports our view that "reasonable and equal terms and conditions" means that membership must be completely open subject only to routine conditions.

The amendment to section 15, contained in Public Law 87–346, also had as a purpose the outlawing of conditions for membership which involved rate practices in areas beyond the scope of the conference in which membership is sought to be attained or retained. This is clear from the language of the statute. The phrase "in the trade" can only mean the trade covered by the conference.[13] We, therefore, conclude that Congress placed upon the Commission the duty of enforcing an "open door" membership policy strictly.

By approving Agreement No. 9218, however, the Commission sanctioned an agreement which would allow each conference to impose upon applicants a condition for membership, neither reasonable nor equal, and affecting participation in a trade not included within the scope of the respective conference agreements. Thus, the westbound conference could prevent its members and prospective members from operat-

[12] The denunciations are reflected in the Committee Report, H. Rept. No. 1419, 87th Cong. 2d sess. pp. 97–98 (1962). The recognition by Congress of this report in enacting the pertinent statutory language appears at H. Rept. No. 498, 87th Cong., 1st sess. pp 3, 6–7 (1961); S. Rept. No. 860, 87th Cong., 1st sess. p. 10 (1961).

[13] We do not here determine questions of membership in a single conference operating in both directions.

ing 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 could influence the participation of its members in the westbound trade.

Respondents point to the "unique" competitive position of the one-way operator as a demonstration of the reasonableness of the imposition of the membership condition here at issue. 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 * * *"[14] 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.[15]

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 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 shippers ship 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 it 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.

Consequently, Agreement No. 9218 imposes a condition of membership which is neither reasonable nor equal.

As pointed out by the examiner, the respondents have chosen to maintain their separate existence notwithstanding their contention that the two trades are in reality but one—apparently to satisfy the "in the trade" requirement of section 15. The only reasons proffered for the retention of their separate existence of the eastbound and westbound conferences are some rather vague references to "administrative rea-

[14] Finnlines 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 Finnlines' "unique" position.

[15] 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 conditions.

sons."[16] Respondents take the position that the trades of the two conferences are so interrelated and interdependent that they may, under the statute, be considered as one trade. Our former report adopted this contention and found interdependence and interrelationship had been demonstrated by evidence that (1) membership in the conferences is common except for French Line, a one-way operator, and that American Export Isbrandtsen, a carrier operating over both routes, although a member of only one conference, had indicated its consent to the agreement; (2) the trades covered by both conferences constitute a round voyage and vessel owners operating in each trade are identical; (3) the same vessels are used both eastbound and westbound; (4) accounts are kept on a round voyage basis; and (5) the rates charged both eastbound and westbound are computed on the basis of the round voyage.

A review of these facts, in the light of the evidence adduced at the further hearing, causes them to lose much of the meaning ascribed to them. Membership in the two conferences has changed. French Line, American Export Isbrandtsen, Hamburg-Amerika Linie, and Norddeutscher Lloyd are not members of both conferences. All, save French Line, operate in both directions.

The fact that the two-way operators keep their accounts on a round voyage basis is not unique to these trades and has little persuasive value as to interrelationship of these or any other trades. Nor is it unique, insofar as the record discloses, that in these trades the same vessels are used on both legs of the round voyage. Moreover, the record now discloses that another fact previously considered persuasive of interrelationship has lost its stature. The rates charged eastbound and westbound are not to any significant extent interrelated. The additional testimony emphasizes that each leg of the voyage stands on its own, ratewise.

The record does not permit the conclusion that the two trades are so interrelated and interdependent that they must be considered as one.

Conferences primarily are ratemaking bodies. In performing their primary function the conferences consider the two trades unrelated to the extent each must have its rates separately determined. It is not consistent to treat the trades as one for the purpose of enforcing common membership but as distinct trades for the purpose of ratemaking. In any event, interrelationships between the two trades could not overcome the statutory requirement that membership conditions must be

[16] Respondents point to the fact that different representatives attend the meetings of the respective conferences. However, 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."

limited to the trade covered by the conference in which membership is sought to be attained or retained. Congress intended to prevent subtle guises to avoid the "open door" policy. Respondents' interconference agreement amounts to an attempt to accomplish by a joint agreement the imposition of a condition which a conference, acting independently, could not accomplish.

The Commission has previously espoused this view, for in implementing the specific membership requirement added to section 15 by Public Law 87–346, it published General Order No. 9, requiring a conference agreement to contain substantially the following clause:

(a) Any common carrier by water which has been regularly engaged as a common carrier *in the trade covered by this agreement*, or who furnishes evidence of ability and intention in good faith to institute and maintain such a common carrier service between ports *within the scope of this agreement*, and who evidences an ability and intention in good faith to abide by all the terms and conditions of this agreement, may hereafter become a party to this agreement by affixing its signature thereto. (Italic supplied.)

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 other routine conditions) are contrary to the essential 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 contrary to section 15. We, therefore, uphold the examiner and overrule our former decision.

Commissioner HEARN concurring:

I concur in the majority opinion since I am not swayed by the argument that circumstances have rendered this decision moot and inoperative. One of the prime functions of an administrative agency is *ad hoc* rulemaking. In my opinion, to allow the decision of June 30, 1964, which I did not participate in, to stand as a guide to the regulated industry is not in the public interest, and section 25 of the Shipping Act, which permits the Commission to "reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it" is ample authority for our action herein.

Vice Chairman JOHN S. PATTERSON, dissenting:

After the respondents decided to cancel the agreement subject of this proceeding, the issues as to the approvability no longer existed or, as the parties have pleaded, the issue "has been mooted by the cancellation of Agreement No. 9218." There is no controversy and there are no parties before us to be ordered. Our function has ended.

The decision and final order in our earlier report in the same docket (8 FMC 170 (1964)) applied to the agreement and facts in the record before me at that time and to nothing else. The decision is held to be legally correct. The present proceeding does not fit into either our adjudicating, rulemaking, or licensing functions in the absence of a controversy or of an application for approval on a record and parties before us at the time of decision. Accordingly, the regulatory guideline commands no action from anyone and has no more status than the interpretive rule discussed in *American President Lines Ltd.* v. *Federal Maritime Com'n*, 316 F. 2d 419 (1963).

All properly made decisions of the Commission should serve as regulatory guidelines for the industries we regulate. I endorse and would wish to be identified with the use of such guidelines or ad hoc rules for public use, but when we go beyond our functions by making a decision when there is no agreement to be approved nor any claim of law violation, we are providing neither specific guidelines nor ad hoc rules but are voicing abstract opinions.

The pursuit of a decision in a proceeding beyond our assigned functions disturbs me somewhat because of its effect on public confidence in the processes by which we reach decisions.

A regulatory agency decision after adjudication is publicly respected not only because it is authorized and followed by an order of the Federal Government, but because it is considered fair in its own right. Contributing to fairness is the knowledge that the decision was reached through procedures assuring (1) a real controversy, not old issues perpetuated for reevaluation purposes, (2) the review of evidence, (3) an opportunity for argument by interested parties, and (4) a reasoned decision settling the rights of the parties based on the meaning of the evidence and arguments in the proceeding.

Only when these procedures are followed is the regulated industry, the legal profession, and the public provided with a compelling precedent as a "guideline." Therefore, in my opinion, failure to follow these procedures erodes public confidence in the fairness of the decision.

In this case, Hearing Counsel's advice to limit the issue to whether the Commission should approve cancellation is not being taken. The initiative of continuing the approvability issue is ours alone. If we initiate review of uncontroverted issues when no rights are to be changed and there is no argument, the public is confronted with grave doubts and may rightly wonder, if not suspect, what the aim is when the review is not related to the basic settlement of rights.

Surely an agency should not reconsider issues for such insubstantial objectives as self-satisfaction or of insuring abstract rightness. Whenever it elects because of such objectives to reconsider, I am certain that the element of fairness becomes clouded with doubt, wonderment, and subject to a justified challenge; hence, not in the interest of public good.

It is my belief on the record before me that the only perceivable aim here is a second chance to decide an issue, followed by an announcement of a rule for everyone without obeying section 4 of the Administrative Procedure Act. I want to obey the Administrative Procedure Act. The majority's aim as I see it is contrary to public good. I hold that the effect of the aim, as I interpret it, can only be intimidation, and hence the decision is not fair in its own right, if not unauthorized.

For these reasons I dissent from the report of the majority.

Commissioner JAMES V. DAY, dissenting:

A review of the record including the evidence adduced at the further hearing leads to the conclusion, *inter alia*, that the two trades involved are so interrelated as to be considered substantially one and the dual membership requirement is both reasonable and equal. More particularily, the record on remand contains additional testimony showing membership in both conferences is substantially common, the keeping of accounts on a round voyage basis, and the interrelationship of eastbound and westbound rates generally. The evidence stands that the trades covered by each of the conferences constitute a round voyage and vessel owners operating in each trade are substantially identical. All these factors support the one trade concept. The remanded record also contains more testimony (citing examples) of the power of the two-way operator who is a member of only one conference to adversely affect his conference members. This evidence supports the reasonableness of the dual membership requirement. There remains sufficient evidence (see our former opinion) to show that the requirement is equal. I am of the opinion that our former decision was correct, and I would uphold that decision now.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Special Docket No. 400

WATERMAN STEAMSHIP CORPORATION

v.

CHRYSLER INTERNATIONAL S.A.

Application pursuant to Rule 6(b) to refund overcharges allegedly created by inadvertent failure of carriers in foreign commerce to file change in tariff denied in accord with the authority exercised by the Commission under Section 18(b)(3).

C. G. Boyle, Traffic Manager for Waterman Steamship Corporation.

INITIAL DECISION OF BENJAMIN A. THEEMAN, PRESIDING EXAMINER [1]

This application under Rule 6(b) signed by the steamship company and concurred in by the shipper seeks approval for the voluntary payment by Waterman Steamship Corporation to Chrysler International S.A., of $7,373.31 as alleged overcharges for 4 shipments of boxed and unboxed sedans and trucks from Detroit to Aqaba.

On November 12, 1965 Waterman booked the above shipments and stated to Chrysler that it would establish a rate of $35.00 W/M for unboxed vehicles and $32.00 W/M for boxed vehicles. Based on this statement and in good faith Chrysler made the shipment.

Pursuant to a B/L dated November 19, 1965, the shipments moved on the Waterman SS *Hoegh Cliff* and were delivered on January 15, 1966. The charges were paid on December 14, 1965.

The applicable and existing tariff rate for this shipment was $53.50 W/M for unboxed vehicles; and $44.50 W/M for boxed vehicles.

Waterman through error failed to establish the lower rates and in lieu applied the higher existing rate.

The freight collected totalled $22,086.11; the freight sought to be applied would total $14,712.80. The difference of $7,373.31 equals the amount sought to be refunded here.

[1] This decision became the decision of the Commission on April 21, 1966, and an order was issued denying the application. Commissioners Barrett and Day would grant the application.

In support of their request the parties state that:

. . . the shipper has been injured and carrier desires to relieve this injury by refunding to the carrier the difference between the rates actually charged and the rates agreed upon with the shipper at the time of the booking.

The contract of affreightment was entered into in good faith and both parties in this proceeding had reason to believe that the reduction had been made legally effective prior to shipment. Applicant had inadvertently failed to place on file with the Commission the reduction in the Tariff quoted rate covering the shipments involved. Unless the relief sought is granted a hardship results which is neither equitable nor sought or desired by any litigant.

They state further:

While no violation of the act is admitted or denied with respect to the actual rate collected, "as stated in *Lykes Bros. Steamship Co., Inc., Application to Refund,* 7 F.M.C. 602, 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 from the consequences of the carrier's failure to file a proper rate . . .'" (See Special Docket No. 366) [2]

DISCUSSION

Applicants ask the Commission to perform an act that the Commission declared it has no authority to perform in Special Docket No. 377, *Ludwig Mueller Co., Inc.* v. *Peralta Shipping Corp.*, served January 13, 1965.[3] In that case the Commission stated that it is controlled by 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 effect, the Commission concluded it is without authority to grant special docket relief under the Shipping Act, 1916, permitting deviations from foreign trade rates on file, or to give effect to an unfiled and unpublished tariff.

The Commission has since consistently adhered to the principle laid down in Special Docket No. 377 in relation to foreign commerce.

Accordingly, it is concluded that the decision in Special Docket No. 377 is dispositive of the application herein.

[2] Applicant neither contends nor admits evidence to show that the filed rate is "unreasonably high" within the meaning of Section 18(b)(5).

[3] Special Docket Nos. 366, 367 and 371 cited by Applicant have been overruled by Special Docket No. 377. In further support of its position Applicant no doubt inadvertently quotes from the Hearing Examiner's decision in Special Docket No. 380 as a statement by the Commission. There, the Hearing Examiner granted the relief requested which the Commission in its decision dated June 30, 1965, denied, relying on Special Docket No. 377.

An order denying this application will be entered.

(Signed) Benjamin A. Theeman,
Presiding Examiner.

MARCH 30, 1966.

FEDERAL MARITIME COMMISSION

No. 66–3

CONTRACT BETWEEN THE NORTH ATLANTIC MEDITERRANEAN FREIGHT CONFERENCE AND THE UNITED ARAB COMPANY FOR MARITIME TRANSPORT (MARTRANS)

Decided May 2, 1966

The agreement of the carriers to enter into a "Requirements Contract" with the United Arab Company for Maritime Transport is not an interstitial or routine operation under Conference Agreement 7980 and requires Commission approval.

Proceeding referred to Chief Examiner for assignment for hearing on the remaining issues in the Order to Show Cause.

Burton H. White and *Elliot B. Nixon* for respondent North Atlantic Mediterranean Freight Conference.

Mohamed Mansour and *Mohamed Ismail* for United Arab Company for Maritime Transport.

Edward S. Bagley for Gulf/Mediterranean Ports.

Howard A. Levy and *Donald J. Brunner* as Hearing Counsel.

REPORT

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

The North Atlantic Mediterranean Freight Conference (Conference) has filed with us an agreement,[1] designated "Requirements Contract," which it had entered into with the United Arab Company for Maritime Transport (Martrans), an agency of the United Arab Republic (UAR), by which Martrans agreed to ship on Conference lines "all cargo of whatever kind and nature, moving by sea from United States ports in the Hampton Roads, Virginia/Eastport, Maine, range," to UAR Mediterranean ports.[2] The Conference agreed that it would

[1] The contract was submitted to us in the alternative, for informational purposes if it did not require Commission approval, or as filed for approval if it did.

[2] Notice of the filing of the contract was published in the Federal Register on Oct. 15, 1965, and no written statements, comments, protests, or requests for hearing in response thereto were received.

charge Martrans approximately 10 percent below the contract rates established in the conference tariff; the contract would also allow a further 5 percent deduction in the rates at destination.

In our order served on January 24, 1966, we directed the Conference *inter alia* to show cause:[3]

1. Why the parties to the Conference, in agreeing to and entering into the subject contract, have not exceeded the authority granted them pursuant to Agreement No. 7980, their organic conference agreement.[4]
2. Why the contract does not require approval under the Shipping Act, 1916, as amended.
3. Why the contract, if found to be subject to the requirements of sections 14b and 15, should not be disapproved thereunder.

Respondent has filed its Memorandum of Law to which Hearing Counsel has replied. Martrans and the Gulf/Mediterranean Ports Conference have intervened in this proceeding. Martrans filed a memorandum supporting the Conference, but the Gulf Mediterranean Ports Conference filed neither memorandum nor affidavit.

Discussion and Conclusion

The first issue presented is whether the Conference carriers in agreeing to and entering into the "Requirements Contract" have exceeded their authority under Agreement No. 7980. Respondent takes the position that "there is clear and specific authority for the action taken" in the language of its conference agreement,[5] and that even if its section

[3] The Show Cause Order read, in relevant part:

"The contract is anti-competitive on its face because all inbound cargo to the UAR from U.S. North Atlantic ports is to be given to Conference at rates which are approximately 30 percent below the non-contract rates as provided in the Conference tariffs. The contract has the purpose of a dual rate contract as governed by section 14b of the Shipping Act, 1916, as amended, without the statutorily prescribed safeguards (which were converted into uniform language in *The Dual Rate Cases*), to wit, the contract lacks the following: prompt release provision as per section 14b(1); legal right to select carrier provision as per section 14b(3); natural routing provision as per section 14b(4); damages recoverable for breach provision as per section 14b(5); a provision restricting the spread between contract rates and non-contract rates to no more than 15% as per section 14b(7), since the contract permits a spread of 30%; and provision excluding liquid bulk petroleum in less-than-full shiploads lots as required by the Commission in *The Dual Rate Cases* pursuant to section 14b(8) * * *."

[4] The Conference agreement, as amended, provides for the promotion of commerce from North Atlantic ports of the United States in the Hampton Roads/Eastport, Maine, range, either direct or via transshipment, to all ports served on the Mediterranean Sea (except Spanish and Israeli ports), on the Sea of Marmara and the Black Sea, and on the Atlantic Coast of Morocco.

[5] Clause 1 of Agreement No. 7980 reads in part:

"This Agreement covers the establishment and maintenance of just and reasonable rates, charges and practices, for or in connection with the transportation of all cargo in vessels, owned, controlled, chartered or operated by the Members in the trade covered by this Agreement."

Clause 3 of that agreement provides in part:

15 agreement were not so specific, "the action taken is merely in implementation of the general rate making authority provided in the agreement." We disagree with respondent. On the contrary, we find that the agreement of the Conference carriers to enter into the "Requirements Contract" with Martrans presents a new scheme of control of competition not covered by the basic agreement.

In support of its position that its basic agreement provides cover of authority for this "Requirements Contract", respondent relies heavily on the decision of our predecessor, the United States Shipping Board, in *Section 15 Inquiry*, 1 U.S.S.B. 121 (1927). The Board there determined that not "*every agreement*" within the literal meaning of section 15 requires Commission approval.[6] In so limiting the language of section 15, the Board, at page 125, explained that:

> * * * a too literal interpretation of the word "every" to include routine operations relating to current rate changes and other day-to-day transactions between the carriers under conference agreements would result in delays and inconvenience to both carriers and shippers.

We find this principle inapplicable here. Indeed, *Section 15 Inquiry* itself precludes characterization of the present arrangement between the Conference carriers with regards to the "Requirements Contract" as a "routine operation." The matters which the Board in *Section 15 Inquiry* excepted from the requirements of section 15 were "*copies of minutes* * * * and of *circulars* and *tariffs* * * * , which contain references only to *routine arrangements* for the carriers' record and guidance * * *" (Underscoring added).[7] Here the agreement to enter into the "Requirements Contract" is in respondent's own words, a "particular and very special relationship" created to deal with a matter which the Conference itself labels as "a unique politico-economic situation." Moreover, respondent admits that the circumstances giving rise to the contract "are not comparable to ordinary rate nego-

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"The Conference may provide specific contract and noncontract rates in an effort to stabilize rates and permit of forward trading for the common good of the members and exporters and the permanent Chairman and/or Secretary is hereby empowered to negotiate and execute such contracts as may be authorized by the Conference."

[6] Sec. 15 reads, in pertinent part:

"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 of character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement." (Emphasis ours.)

[7] *Sec. 15 Inquiry, supra.* p. 125.

tiations between carriers and shippers." As such, it certainly cannot be seriously contended to be analogous to an agreement providing for a *conventional* rate change or some such routine arrangement.

A judicial standard for determining agreements which require approval, as distinguished from routine day-to-day activities flowing from approved agreements was laid down in *Isbrandtsen Co. Inc.* v. *United States, et al.*, 211 F. 2d 51 (D.C. Cir., 1954), *cert. denied sub nom Japan Atlantic and Gulf Conference* v. *United States*, 347 U.S. 990 (1954). In holding that a dual rate system was not a routine activity under the basic agreement, the Court declared at page 56:

> "Agreements" referred to in the Shipping Act as defined to include "understandings, conferences, and other arrangements." Clearly, a scheme of dual rates like that involved here is an "agreement" in this sense. It can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme or rate combination and discrimination not embodied in the basic agreement.

and in *Empire State Highway Transp. Ass'n.* v. *F.M.B.*, 291 F. 2d 336 (D.C. Cir., 1961), the Court emphasized that "a conference agreement is not a canopy under which to inaugurate without prior Board approval a dual rate contract system of charges and rates." [8]

In *American Union Transport* v. *River Plate & Brazil Conference*, 257 F. 2d 607 (C.A. D.C., 1958) *cert. denied* 358 U.S. 828 (1958) the Court affirmed the conclusion of the Federal Maritime Board that notwithstanding a provision in the basic agreement authorizing the conference "to consider and pass upon * * * any matter * * * involving brokerage," the conference action prohibiting payment on specified shipments of a particular shipper required approval under section 15. (See *AUT* v. *River Plate & Brazil Conference*, 5 F.M.B. 216 (1957).) See also, *Pacific Coast European Conf.—Payment of Brokerage*, 4 F.M.B. 696 (1955) and *Mitsui Steamship Company* v. *Anglo-Canadian Shipping Co.*, 5 F.M.B. 74 (1956).

Recently, we ruled in *Pacific Coast European Conference—Port Equalization Rule*, 7 F.M.C. 623 (1963) that the routine or interstitial agreements between conference carriers that did not require additional approval were those which were limited to the "*pure regulation of intraconference competition.*" In that case we held that the conference port equalization rule did "not constitute conventional or routine

[8] *Empire State* is cited by respondent in further support of its contention that their agreement to contract is "merely in implementation of the general rate-making authority provided in the [basic] agreement." Respondent's position is untenable. *Empire State* merely confirms the principle laid down in *Section 15 Inquiry*. Therefore, the rationale in the *Empire State* decision is only applicable to the extent that the rationale in *Section 15 Inquiry* is applicable. We have already determined that the agreement of the Conference carriers to contract with Martrans is not a "routine arrangement" within the meaning of the rule announced in *Section 15 Inquiry*.

rate-making among carriers." Rather it introduced a "new arrangement for the regulation and control of competition" not embodied in the basic agreement. See also *Agreement and Practices Pertaining to Brokerage—Pacific Coast European Conference* (Agreement No. 5200), 4 F.M.C. 696 (1955).

Under the standards laid down in the foregoing cases, we think it apparent that the agreement among the member lines of the Conference to contract with Martrans cannot be considered a "routine arrangement" within the cover of authority of the approved basic agreement. It is not an "interstitial sort of adjustment" and it clearly establishes a new anticompetitive rate system not embodied in the original agreement introducing a "new scheme of regulation and control of competition."

The foregoing also disposes of the question of whether the "contract" requires approval under the Shipping Act, 1916. The contract is not within the ambit of the approved Conference agreement and it clearly covers anticompetitive activity for which respondent must secure our approval. But whether this approval should be under section 14b or section 15 of the Act is a different question.

It would appear that the "Requirements Contract" is a dual rate contract within the meaning of section 14b since it provides a "lower rate" than the "applicable rate" [9] to a shipper (Martrans), "who agrees to give all * * * of his patronage to such * * * conference of carriers" (respondent).

Respondent, however, argues that its contract with Martrans is not subject to section 14b, contending that the contract is not available to all shippers and consignees on equal terms and that, moreover, the contract does not provide for dual rates but "only for a single rate available on cargo shipped to a single consignee." [10] Respondent likens its contract rate to "project rates" relying heavily on Fact Finding Investigation No. 8, where it is disclosed that a "project rate" situation prevails in the trade to India. Respondent contends that the requirements of section 14b are inappropriate and inapplicable to such a type of "special rate" situation. Hearing Counsel reply that the contract is subject to section 14b, and that it should not be permitted pursuant to that section for failure to comply with the mandatory requirements

[9] The "Requirements Contract" defines "applicable rate" as "a commodity rate shown in a current freight tariff on file with the Federal Maritime Commission * * *."

[10] Sec. 14b reads in pertinent part:

> "* * * the Federal Maritime Commission (hereinafter "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, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers * * *."

of section 14b(1)-(8) and the rules promulgated by the Commission pursuant to 14b(9). They argue that there are many factual and legal distinctions between "project rate agreements" and the contract between Martrans and the Conference.

Moreover, even assuming for the sake of argument, the contract is not found subject to section 14b, the agreement between the carriers is clearly subject to section 15. On its face the "Requirements Contract" provides "an exclusive, preferential, or cooperative working arrangement" within the meaning of section 15 by which the Conference intends to fix or regulate transportation rates; control, regulate or prevent competition; give special rates, accommodations or other special privileges to Martrans.

Respondent has advanced the contention that the "contract" is not one within the scope of section 15. This argument is predicated upon the proposition that since Martrans is not a "common carrier" or "other person subject to this Act" within the meaning of section 1 of the Shipping Act, 1916, the "contract" is not between such a carrier or other person with another such carrier or other person, within the meaning of section 15.[11] We had imagined this issue laid to rest long ago. In *Anglo Canadian Shipping Co.* v. *United States*, 264 F.2d 405 (1958), the Court of Appeals expressly rejected the contention that section 15 does not require the filing or approval of contracts between common carriers and shippers. The Court there stated at page 410:

> We think petitioners' position on this matter is not well taken. It is plain that such agreements as these between carriers and shippers are necessarily an integral part of any arrangement for an exclusive patronage contract/noncontract dual rate system. It is an agreement regulating transportation rates or fares or for receiving special rates, privileges or advantages within the plain language of § 15.[12]

The rationale of these cases is that an agreement between a conference and a shipper involves concerted action between the carriers themselves covering a subject specified in section 15, and it therefore

[11] Sec. 1 provides in part:

"The term 'other person subject to this act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

[12] See also: *U.S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932); *Far East Conference* v. *U.S.*, 342 U.S. 570 (1952); *Isbrandtsen & Co.* v. *U.S.*, *supra; River Plate & Brazil Conference* v. *Pressed Steel Car Co.*, 227 F. 2d 60 (2d Cir. 1955); *Pacific Westbound Conference* v. *Leval & Co.*, 201 Ore. 390, 269 P. 2d 541. For agency precedents, see *Pacific Coast European Conference Agreement 5200, Etc.*, 3 U.S.M.C. 11 (1948); *Contract Rates—N. At'l. Cont'l. Frt. Conf.*, 4 F.M.B. 355 (1954); *Contract Rates—Japan Atl.—Gulf Frt. Conf.*, 4 F.M.B. 706 (1955); *Contract Rates—Trans-Pacific Frt. Conf.*, 4 F.M.B. 744 (1955); *Sect. Agriculture* v. *N. At'l. Cont'l. Frt. Conf.*, 5 F.M.B. 20 (1956); and *Mitsui* v. *Anglo Canadian*, *supra*.

becomes amenable to that section. In none of these cases was the applicability of section 15 based upon a prior finding that the shipper or consignee was "another person" within the Shipping Act. To adopt respondent's position would effectively frustrate the Commission's duty and authority under section 15 "to ensure that the conduct thus legalized [by section 15] does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." *Isbrandtsen Co., Inc.* v. *United States*, *supra*, p. 57.

Thus, it is clear that the "Requirements Contract" requires approval under the Shipping Act. Inasmuch as the determination to approve in this instance should be made only after a full evidentiary hearing, we are not disposed to determine under which section approval must be secured in this show cause proceeding and by doing so deny respondents and Hearing Counsel the right to offer, and the examiner the right to find and apply, such facts as they think have a bearing on the ultimate determination. It is clear from the record that the "Requirements Contract" does not meet the requirements of section 14b and could not be approved thereunder in its present form. Moreover, there is not sufficient information in the present record of conditions and circumstances in the trade upon which to determine the "contracts" approvability under the standards of section 15, assuming it is not found subject to section 14b. Accordingly, we will refer the proceeding to the Chief Examiner to be assigned to a Hearing Examiner for the taking of evidence and initial decision on the remaining issues raised in the Order to Show Cause.

There remains the issue raised by the "Suggestion of Lack of Jurisdiction By Reason of Sovereign Immunity" filed by the Ambassador of the United Arab Republic to the United States, Doctor Moustafa Kamel. Ambassador Kamel "suggests that the Commission lacks jurisdiction over the subject matter and over the United Arab Republic and its agency, the United Arab Company for Maritime Transport and * * * requests that in its deliberations the Federal Maritime Commission not make any order or ruling affecting the sovereign rights of the United Arab Republic."

Whatever may be the validity of the assertion of sovereign immunity by the United Arab Republic under the doctrine of sovereign immunity adopted in this country (See *National City Bank* v. *Republic of China* 348 U.S. 356 (1955)) our action here in no way infringes upon that immunity. Thus far we have asserted only our jurisdiction over an agreement between common carriers by water in foreign commerce all clearly made subject to the Shipping Act by section 1 thereof. Our approval or disapproval of the "Requirements Contract" is in no way dependent upon subjecting the United Arab Republic or its agent Martrans to our jurisdiction.

An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

No. 66–3

CONTRACT BETWEEN THE NORTH ATLANTIC MEDITERRANEAN FREIGHT CONFERENCE AND THE UNITED ARAB COMPANY FOR MARITIME TRANSPORT (MARTRANS)

ORDER

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusion thereon, which report is hereby referred to and made a part hereof; and having further concluded that the record before us is insufficient for the resolution of all of the issues raised by the Order to Show Cause,

Therefore, it is ordered, That this proceeding be referred to the Commission's Office of Hearing Examiners for hearing before an Examiner at a date and place to be hereafter determined and announced by the Chief Examiner, on the following issues:

1. Whether the contract between Martrans and the North Atlantic Mediterranean Freight Conference (Conference), is subject to section 14b, and if so, whether it meets the requirements of section 14b and should be permitted pursuant to that section.

2. Assuming the contract is a dual rate contract, whether the Conference may have more than one dual rate contract system in effect at the same time in the same trade.

3. If the contract is not subject to section 14b, whether it should be approved, disapproved or modified pursuant to section 15.

4. Whether implementation of the contract would not give rise to a situation as contemplated by section 19(1) (b) of the Merchant Marine Act, 1920, in which a foreign government, through its laws, rules or regulations, creates conditions unfavorable to shipping in the foreign trade of the United States, and such that approval of the contract would be incompatible with the responsibilities of the Commission under this statute.

It is further ordered, That any person who desires to actively participate in this proceeding may file a petition to intervene with the Secretary, Federal Maritime Commission, Washington, D.C. 20573, by close of business May 20, 1966.

It is further ordered, That this order and notice of hearing shall be published in the Federal Register, and a copy of such order and notice of hearing shall be served upon respondents.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1171

OUTBOUND RATES AFFECTING THE EXPORTATION OF HIGH-PRESSURE BOILERS (UTILITY TYPE), PARTS AND RELATED STRUCTURAL COMPONENTS

Decided May 5, 1966

An investigation of alleged disparities in rates of respondents on utility-type boilers and components from United States and foreign ports to the same destinations, and of alleged disparities on the same commodities in inbound and outbound rates between the United States and Japan, did not show any violation of section 17 of the Shipping Act, 1916, as amended; nor were the rates shown to be so unreasonably high as to be detrimental to commerce of the United States under section 18(b)(5) of said Act; nor were respondents' respective approved conference agreements shown, by reason of maintenance of said rates, to require disapproval or modification under section 15 of said Act.

Herman Goldman, *Seymour H. Kligler*, and *Thomas A. Liese* for Respondent Far East Conference.

Elmer C. Maddy and *John M. Linsenmeyer* for Respondent, India, Pakistan, Ceylon & Burma Outward Freight Conference.

John Mahoney, *David Orlin*, *Edmund Smith*, and *William Lamb* for Respondent River Plate and Brazil Conferences.

Maywood Boggs for Intervener International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO.

Robert J. Blackwell and *Roger A. McShea III* as Hearing Counsel.

REPORT

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

This proceeding is an investigation of outbound conference rates applicable to utility-type boilers, parts, and structural components. The Commission instituted the proceeding because it appeared that the rates from the United States to certain foreign destinations were higher than rates from France, the Netherlands, West Germany, and the United Kingdom to the same foreign destinations, and that the rates outbound from the United States to Japan were considerably higher than the comparable inbound rates.

The order recites that conference rates on boilers and boiler components may be unjustly prejudicial to exporters of the United States as compared with their foreign competitors in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. 816), or so unreasonably high as to be detrimental to the commerce of the United States in violation of section 18(b)(5) of the Act (46 U.S.C. 817(b)(5)). The order further recited that maintenance of these rates pursuant to conference agreements may be contrary to the provisions of section 15 of the Act (46 U.S.C. 814).

The respondents are three conferences and their member lines: Far East Conference, operating from United States Atlantic and Gulf ports to destinations in the Orient; the River Plate and Brazil Conferences, operating from United States Atlantic and Gulf ports to Brazil and Argentina; and India, Pakistan, Ceylon and Burma Outbound Freight Conference, operating from United States Atlantic and Gulf ports to India and Pakistan.

FACTS

The facts are substantially as found by Examiner Walter T. Southworth.

Utility-type boilers are huge, high pressure steam boilers of the type used by electric utilities to drive turbo-generators. These boilers are often as large as a twenty-story building.

Utility boilers are frequently sold as part of a larger project, such as a complete generating plant; in such cases the prime contractor sells the entire plant and the boiler manufacturer is a subcontractor. Boilers are generally sold f.a.s. a United States port; hence, freight is for the account of the purchaser. However, the amount of freight will be a factor in the prospective purchaser's evaluation of a bid, along with f.a.s. selling price, performance, and delivery time, which may be as long as four years from the date of sale. Each boiler is individually designed to meet engineering specifications for the job it is required to do. It is not necessary to be low bidder to be successful if the customer can be shown that he will save more than the extra cost over the life of the equipment; and, of course, cost to the purchaser means the cost installed on his property, including f.a.s. price, ocean freight, and erection costs.

No manufacturer, seller or purchaser, shipper or consignee of utility boilers testified. General testimony concerning the product and industry was provided by a trade-association executive, Mr. M. O. Funk. Mr. Funk is manager of the American Boiler Manufacturers Association (ABMA) whose members produce industrial and commercial boilers—relatively small units usually shipped completely assembled—as well as the much larger utility-type boilers, the parts of which are shop-fabricated for field assembly, and shipped over a period of from one to two years. ABMA has 40 members who manufacture boilers and fuel burners, but only four manufacture the utility-type boilers with which this proceeding is concerned.

Although some statistics were given as to world-wide export sales by ABMA members of all kinds of boilers in the aggregate, no figures were furnished as to the total amount of actual or potential shipments of utility boilers to any of the destinations in issue, either by United States manufacturers or by their competitors. World-wide ABMA exports of utility boilers were approximately $52,800,000 in 1962 and about $24,000,000 in 1963. In October 1964, ABMA exports were running at about the 1962 rate.

The record contains some evidence of foreign competition. Its identity, its participation, and its importance are not set forth. Nevertheless, on the basis of the record, the Commission finds from a preponderance of the evidence that United States exporters actually are confronted with competition from foreign exporters. The record contains several general references to competition of utility boiler manufacturers in Japan, West Germany, United Kingdom, Switzerland, and Sweden. The record, however, is scant as to the foreign areas where a conflict arises between a U.S. manufacturer and its foreign competitor. Apparently, the U.S. boiler manufacturer faces competition in the Philippines from West Germany and Japan, as well as Japanese competition in Japan itself. There also appears to be undisclosed European competition in India. Apparently there is competition in the boiler market in Brazil and Argentina from West Germany and Switzerland, but the record discloses no actual shipments from Europe. In summary the record contains some indication of world-wide competition but little in the way of specifics.

Under a "rough rule of thumb" of $2.50 per pound/per hour of steam generating capacity used for utility boilers manufactured in the United States, a utility boiler of 700,000 lbs./hr. capacity (considered by Mr. Funk the typical export size) would have a f.a.s. value of $1,500,000 to $2,000,000. By the same rule, a boiler of 4,300,000 lbs./hr. capacity sold to Japan in 1964 would have a f.a.s. value of around $10,750,000; while mention was made of a "$15,000,000 job" for India on which the United States manufacturers bid.[1] Thus, the sale of one or two large utility boilers can affect aggregate sales figures very substantially. But while the meager figures as to export sales of utility boilers reveal no trend or any reliable expectation of aggregate annual sales, the amount involved in even a single export sale is enough to be important to the foreign commerce of the United States.

The United States manufacturers maintain an advantage over foreign makers, at least in the largest types of boilers, because they have had more experience in building large units than anyone else in the world. Thus, although Japan builds utility boilers, and was described as the chief competition in the Philippines, utility boilers of United States manufacture are exported to Japan, notwithstanding the inherent competitive disadvantage of ocean transport costs.

While the domestic manufacturer may be confronted with foreign competition, the record does not show that a domestic manufacturer ever lost a sale to a foreign competitor because of higher rates applicable in the United States foreign trades. Neither was there any concrete evidence whatever of detriment to the trade in utility boilers or to the commerce of the United States in general by reason of the level, absolute or comparative, of ocean freight rates. Mr. Funk testified that he knew of no instance where business was lost because of the freight rate or of any case where the freight rate was a contributing element to the loss of a job, or of any specific complaint about freight rates, although he qualified this testimony by saying that there was never any one reason for losing a job. The testimony stands for the general proposition that ocean freight is one of many factors, including labor and material costs, taxes, and cost and availability of financing, that affect an exporter's ability to do business. As Mr. Funk put it: If a competitor has an advantage in the matter of ocean freight, whether due to proximity to the market or otherwise, the cost disadvantage "has to be counter-balanced by other advantages that we do not like to lose."

While no loss of sales has been shown, the record in this proceeding shows that ocean freight rates are a fairly important element to the exporter in determining what bid he may make on a particular utility boiler. It would appear that the record is adequate to show some indirect harm to the exporter even if it is merely a limitation of the profit that could be made from a sale. This finding depends upon the record summarized by Mr. Funk as follows:

[1] They lost to a European competitor, for reasons not related to freight rates.

So that transportation is an integral direct cost in any evaluation. And we feel that our margins of advantage are being reduced, either artificially or by general development of some of those competing countries, that we have to be extremely concerned with any cost differential that is going to make our position that much less desirable. And ocean freight rates is one of our direct factors that we have to be concerned with.

Hearing Counsel undertook to show whether rates from the United States to foreign destinations were higher; and if so to what extent, than rates and freight charges from the Continent and United Kingdom to the same destinations or, in the case of Japan, from Japan to the United States.

Such comparisons are not as easy as might be expected. In the first place, there is not in any of the trades under consideration a single rate applicable to utility-type boilers, or to parts or related components thereof. Utility boilers are never shipped as a complete unit, either set up or knocked down. Instead, shop-fabricated components, parts, and materials coming under various commodity classifications are shipped in partial lots to be assembled for the first time at the site of the generating plant of which they are to become a part.[2] The shipping process may take well over a year.

Recognizing that the freight charges for any particular utility boiler depend upon the "mix" of different commodities shipped, Mr. Funk established a shipping list for a typical export boiler. The different commodity rates existing in each pertinent trade were applied against this shipping list in order to compare the total freights. To develop the shipping list, Mr. Funk requested the four ABMA members who manufacture utility boilers to estimate "tonnage and cubage" for ten components of a 700,000 lb./hr. boiler designed to operate at 1,400 pounds per square inch pressure at 950° Fahrenheit. Only three of the four manufacturers responded. And the figures submitted varied widely in the various categories to the extent that no reasonably comparable boilers were involved.[3]

In digesting these data, Mr. Funk averaged some categories, dis-

[2] Some of the commodity descriptions (not necessarily tariff descriptions) covering various parts, materials, and components of utility boilers as shipped are the following:

Boiler parts (which include, generally, everything that cannot be rated under another description), such as the following:

Boiler tubes (bent, straight, packed and unpacked).

Steel tubes.

Fabricated structural steel.

Ducts.

Firebricks.

High-temperature bonding mortar (also called plastic refractory-setting material).

Insulating material.

[3] Apparently some of the figures did not relate to a complete boiler but contemplated that some of the material was supplied locally.

carded others, and in other situations he averaged combined categories. A theoretical shipping list on a typical boiler resulted as follows:

Description	Pounds	Cubic feet
Boiler parts	720, 000	30, 300
Fabricated structural steel	304, 000	11, 200
Fabricated sheet steel	168, 000	10, 300
Bent steel boiler tubes	320, 000	18, 000
Bent steel pipe	21, 000	1, 600
Firebrick	34, 000	700
Total	1, 567, 000	72, 100

To these data were applied freight rates (obtained as hereafter described) in the various trades to arrive at comparable figures for total ocean freight.

The rates used to make the various comparisons in the record were obtained in the following ways:

(1) In 1963, a member of ABMA requested a freight forwarder in Bremen, Germany, to supply "ocean freight rates on boiler parts, bent boiler tubes, straight boiler tubes, bent steel tubes, straight steel tubes, fabricated structural steel, fabricated sheet steel, firebrick and high temperature bonding mortar" from named ports in Germany, Holland, Belgium, France, Great Britain and Scotland, to eleven named ports including Calcutta, Manila, Buenos Aires, and Rio de Janeiro.

(2) General Services Administration wrote to various shipping agencies in Europe for "conference rates and tariff commodity description plus allowances and rebates, if any, which were effective March 1, 1964," covering a list of thirteen "high pressure boiler components" as well as charges for loading, extra length and heavy lift, and "other charges, if any, applicable at the loading port."

(3) Use of tariffs on file with the Commission.

Foreign tariffs, like tariffs in United States commerce, are generally on a "weight or measurement" basis; that is, the carrier may charge on the basis of a weight ton or a measurement ton, whichever yields the greater revenue.[4] In our commerce the weight ton is 2,000 or 2,240 lbs., and the measurement ton, 40 cu. ft.; whereas in the foreign-to-foreign trades from the Continent, the weight ton is the metric ton of 2,204.6 lbs., and the measurement unit the cubic meter, equal to

[4] Based upon the overall measurement available, it appears that utility boiler components, other than firebrick, generally go on a measurement basis.

about 35 cu. ft. The relation between United States and foreign rates varies substantially, therefore, according to whether comparison is on a weight or measurement basis. Continental rates must be increased by over 13% to make them comparable to United States rates on a measurement basis, but by only 1.6% to make them comparable on a weight (long ton) basis.

Some foreign rates depend on the ratio of weight to measurement of a particular parcel; for example, in the case of boiler parts from Bremen to Rio, the rate is $29, $39, or $47 per ton depending on whether the parcel, in terms of measurement tons, is over five times, three to five times, or less than three times its actual weight in tons. Rates on boiler tubes vary substantially in some tariffs, according to whether they are packed or unpacked and according to length and diameter. For different tariffs, the classifications do not "break" at the same point; e.g., one tariff may show an increased rate for extra length at 25 ft., while another increases at 30 ft. Some rates vary according to the value per ton of the goods. It was also shown that differences in heavy lift charges may substantially affect comparative over-all freight costs.

Of particular concern were rate comparisons on boiler parts, those undefined parts, materials, and components of utility boilers which are not shipped under other, generally lower-rated, commodity classifications, such as boiler tubes, steel pipe, fabricated sheet steel, fabricated structural steel, insulating material, and firebrick. The particular tariff descriptions under which boiler parts are rated vary with the different trades; few, if any of them, seem to have been established with utility-type boilers, as actually shipped, in mind.

Rates to India and Pakistan

The India-Pakistan Conference tariff reflects an agreement with the Government of India pursuant to which all material, equipment, and supplies for government projects are carried at a discount of 30%, subject to a minimum of $32.50 W/M. Pakistan is given the same terms as the Indian Government. The discount applies to goods consigned to state or local governments or to any other local or autonomous bodies or enterprises under the control of the Indian Government. A long list of "autonomous bodies and enterprises" in the tariff includes several which are identifiable as electrification projects. Another list of projects subject to the terms of the Indian Government contract includes numerous power projects in Pakistan as well as India. Some of these may be private enterprises, which are frequently given project rates as favorable as the government contract provides, but in general those projects likely to include utility boilers appear to be public projects. However, the government and project rates mentioned above exclude "Iron and Steel Articles", a group of commodities which includes some utility boiler material, such as boiler tubes and structural steel. Nevertheless, the Conference tariff provides that individual Conference carriers may, at their discretion, discount the Conference tariff rates up to 30%.

Hearing Counsel offered three tabulations to compare freight charges on the typical boiler from the Continent and United Kingdom to Calcutta with freight from New York to Calcutta. The rather vital matter of the government, project, and "Iron and Steel" discounts was ignored on the ground that this proceeding is concerned only with regular rates, not project and contract rates and discounts. On this basis, Hearing Counsel contend that the corrected exhibits disclose a disparity of 24.3% in 1964 and 5.8% in 1963.[5]

Since utility boilers in fact move to India and Pakistan under the 30% government contract discount, the Examiner took the discount into consideration. Rate comparisons on this basis show no disparity unfavorable to United States shippers in the movement of utility boilers to India and Pakistan compared with a comparable shipment from the Continent or the United Kingdom. Hearing Counsel contend that the rates on boiler parts are between 43% and 53% higher than the rates from the United Kingdom and Continent. After the 30% discount, the comparison for boiler parts becomes:

To Calcutta from	Rate per 40 cu. ft.	Excess (U.S. Rate)	Percent Excess (U.S. Rate)
United States	$42.00		
Hamburg	34.21	$7.79	18.5
United Kingdom	34.20	7.80	18.5

The average distance from the Continental ports of Antwerp Amsterdam, Hamburg, and Le Havre to Calcutta is 8,010 nautical miles and from United Kingdom ports to Calcutta 7,910 nautical miles, against an average distance of 10,207 nautical miles from U.S. Conference ports. It is more than 27% farther to Calcutta from the United States than from the Continent and United Kingdom. Expressed as a percentage of the United States-Calcutta distance, the

[5] The difference between the rates shown for the two years seems to result principally from the fact that the 1964 calculations were prepared without the benefit of any comparative rates on the important item of boiler tubes, while the 1963 tabulation had rates for boiler tubes but none for the equally important item of boiler parts.

mileage difference is upwards of 21%, compared with a rate difference of 18.5%.

Rates to Brazil and Argentina

The tariff of River Plate Conference contains, under the caption "Project Rates," special provisions on "Power Plant Machinery and Equipment for the construction and/or enlargement of Power Plants" in Brazil and Argentina. At the time of Hearing Counsel's 1963 comparison, these tariffs provided that where rates on such machinery and equipment moving to Rio de Janeiro, Santos, and Buenos Aires were between $70 and $44 per ton, the carriers would assess a rate of $44 per ton. These rates were applicable to all utility boilers moving from the United States to Brazil and Argentina. No conference carrier has transported a utility boiler to Brazil or Argentina at other than project rates since 1958.

The Brazil Rates

Even without regard to project rates, freight charges to Rio de Janeiro on the "typical boiler" would be 2.1% less than freight from the Continent to Rio as of 1963, and 2.6% less in August 1964.

The rate for boiler parts is $46 increased from $44 on October 1, 1964 from the United States, and $47.92 from the Continent. These rates give effect to the project rates described above, as well as to a disputed 10% rebate in the Continent tariff.

The record contains no evidence of rates from the United Kingdom to Brazil. As to the Continent, the record discloses that on utility boilers the project rates from the United States to Brazil are lower than the rates from Bremen, Hamburg, Rotterdam, Antwerp, and Le Havre to Brazil.

Rates to Argentina

With respect to Argentine rates, Hearing Counsel contend that there is a 14.9% disparity in favor of the Continent without giving effect to project rates. However, utilizing the applicable project rates under which the utility boilers actually move, it would cost about 6% *more* to ship the typical boiler from the Continent to Buenos Aires than from New York; but only about 3.2% less from the Continent if the Continental rates are given the benefit of a 10% deferred rebate available to contract shippers (in addition to lower contract rates) provided ocean freight is payable at port of shipment. However, data were not available to compare heavy lift charges which are higher in the foreign-to-foreign trade.

Hearing Counsel contend that respondents' rates on boiler parts are 25.4% higher than comparable rates from the Continent to Buenos

Aires. As of the date of comparison in 1963, the applicable Continental rate to Buenos Aires for boiler parts, after giving effect to the 10% deferred rebate, was the equivalent of $37.22 per cubic foot, against the nominal U.S. rate of $52.00 for "Boilers, Power, Industrial and Integral Parts," the difference being $14.78, or 28.4% of the respondents' rate. However, the project rate of $44.00 is the applicable rate. Using the project rate, the rate from the Continent was $6.78 (15.4%) less than respondents' applicable project rates on boiler parts.[6]

Furthermore, the Continental rates to Buenos Aires are depressed for reasons having nothing to do with competition between U.S. exporters and their foreign competitors. Although it is about 1,000 miles farther from Continental ports to Buenos Aires than to Rio de Janeiro, the Continental rate on boiler parts is $47.92 to Rio against $37.22 to Buenos Aires—$10.70 (22%) less than the rate to Rio, a spread considerably greater than the $6.78 (15.4%) spread between United States and Continental rates to Buenos Aires.

Apparently, the rates from the Continent to the River Plate(which includes Buenos Aires) are traditionally lower than to Brazil, because of the large volume of traffic and the fact that return cargo is more plentiful than in the Brazil trade. Thus competition for outbound cargoes to the River Plate depressed rates, while ships going to Brazil have to continue on to the River Plate for return cargoes.

Rates to the Philippines

The rates, as applied to the shipment of a typical boiler, according to Hearing Counsel reflect a disparity of somewhat less than 29%. The record, however, is inadequate to permit a closer analysis. More specifically, Hearing Counsel assert that a comparison of the rates on boiler parts reveals a disparity in favor of foreign-to-foreign shipments of 41%.

The rate on boiler parts, which is specifically provided in the Continental tariff, is equivalent to $37.32 per cu. ft., after a 9½% immediate cash discount to contract shippers. The Far East Conference contract rate, as of the same date in 1964, was $63.25 per 40 cu. ft. as "Boilers, N.O.S., as Machinery and Parts, N.O.S." The difference of $25.93 is about 41% of the Far East Conference rate. The Continental rate, however, does not include loading, which makes up a substantial part of a carrier's tackle-to-tackle rates.

[6] There are substantial heavy lift charges in connection with boiler parts which are higher from the Continent than from the United States. On the other hand, U.S. loading costs are higher.

The distance from Hamburg to Manila is shown to be 9,986 nautical miles and from New York to Manila 11,388 nautical miles—1,402 miles and 14% farther.

Rates to Japan

In the case of Japan, comparison is made not with rates from the Continent or United Kingdom to Japan, but with inbound rates from Japan to the United States.

Hearing Counsel presented two tabulations to show inbound versus outbound freight, one on a typical boiler and the other on a much larger boiler concerning which the Far East Conference had received a request for a project rate. The tabulation based upon the typical boiler showed a disparity of 12.1 percent. On brief, Hearing Counsel adjusted the comparison on the actual boiler to show a disparity in favor of the inbound rates ranging from 16 percent to 19 percent. The figures are based upon assumptions regarding the proper tariff interpretation as to a 25 percent discount on bent boiler tubes shipped in a loose or unpacked condition and the rate applicable to high temperature bonding mortar and structural steel. Hearing Counsel also argue that the Far East Conference has maintained a rate on boiler parts 31.4 percent higher than rates inbound from Japan to the United States.

In both the inbound and outbound conference tariffs, boiler parts are rated under "Machinery and Parts, N.O.S." The inbound rate is $42.00 per ton, the outbound rate $61.25 W/M.[7] The difference is $19.25, which is 31.4% of the outbound rate.

On the other hand, the inbound rate for bent boiler tubes is $40.25 per measurement ton while the outbound rate is $38.00 less 25%, or $28.50, if the tubes are shipped loose as they apparently are, a difference of $11.75 per ton in favor of the outbound rates, amounting to about 41% of the outbound rate. Rates for straight boiler tubes, insulating material, and bonding mortar, are considerably higher inbound than outbound, while certain steel products—casing, ducts, and sheets—are higher inbound.

Discussion

In his Initial Decision the Examiner found that tariff rates of the Far East Conference, the River Plate and Brazil Conferences, and the India, Pakistan, Ceylon and Burma Outward Freight Conference, applicable to high pressure utility boilers, parts, and related structural components were not unjustly prejudicial to exporters of the United

[7] Rate was increased to $63.25 W/M on May 1, 1964.

States as compared with their foreign competitors in violation of section 17 or so unreasonably high as to be detrimental to the commerce of the United States in violation of section 18(b)(5). In addition, the examiner found that none of the conference agreements, because of the level of freight charges applicable to the transportation of utility boilers, operated in a manner unjustly discriminatory or unfair between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest, or otherwise in violation of the Shipping Act, so as to require disapproval, cancellation, or modification of the agreements as provided in section 15.

Upon exception, Hearing Counsel agree that none of the respondents violated sections 17 or 18(b)(5) because no specific detriment, attributable to ocean freight, has been established and no specific harm to an exporter from the United States and specific advantage to a foreign competitor has been shown. Nevertheless, Hearing Counsel urge that with respect to all destinations in issue except Brazil, respondents have maintained rates on boiler parts so far above rates in comparable trades as to render their basic conference agreements contrary to the public interest. Hearing Counsel recommend that the Commission require respondents to establish rates on boiler parts on a parity with rates from the United Kingdom or the Continent to such destinations or that, in the alternative, the Commission withdraw approval of conference agreements under which the rates are established.

According to the Examiner, respondents' approved agreements cannot be disapproved merely to the extent that they relate to boiler parts. He concluded that the agreements subject to section 15 are the basic agreements to establish uniform rates. The particular tariffs and rates implementing the authority to establish uniform rates granted by approval of the basic agreements do not require approval under section 15 and, therefore, cannot be disapproved thereunder. Disapproval, if it is required under section 15, must extend to the basic conference agreement.[8]

Hearing Counsel, however, argue that section 15 permits the Commission either to disapprove the conference agreements to the extent of the authority to set rates on boiler parts or to lower the rates to foreign-to-foreign levels. Hearing Counsel argue that respondents' basic conference agreements are contrary to the public interest because the conferences set the rates on boiler parts at "such obvious, glaring

[8] For this proposition, the Examiner cites: *Empire State H'w'y Transp. Ass'n. v. American Export Lines*, 5 F.M.B. 565, 586 (1959); *Edmond Weil v. Italian Line "Italia"*, 1 U.S.S.B.B. 395, 398 (1935); *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28, 30 (1939).

and gross levels above the levels on such items moving in the trades from English and Continental ports to the same destinations, which levels have not been justified by respondents."

In support of this proposition, Hearing Counsel rely upon the legislative history of the Act, in particular, "Advantages of Shipping Conferences and Agreements in the American Foreign Trade" in the Alexander Report, which specifically considered as one advantage to passage of the Shipping Act, the "maintenance of rates from the United States to foreign markets on a parity with those from other countries, thus enabling American merchants to compete successfully with foreign merchants."[9] For conferences not to maintain "those very standards which impelled Congress to legalize them in the first place" would necessarily, say Hearing Counsel, be contrary to the public interest.

The Commission has recently discussed the role of section 15 in the regulation of rates set pursuant to conference authority. In *Iron and Steel Rates, Export-Import*, 9 FMC 180, the Commission stated that it was empowered to disapprove or modify an agreement if the rates set by the conference are so unreasonably high or low as to be detrimental to the commerce of the United States.[10] This is true of the "contrary to the public interest" criterion as well.

Indeed, in *Edmond Weil*, the Commission described its authority as follows:

> An unreasonably high rate is clearly detrimental to the commerce of the United States, and upon a showing that a conference rate in foreign commerce is unreasonably high, the Department will require its reduction to a proper level. If necessary, approval of the conference agreement will be withdrawn. . . . 1 U.S.S.B.B. at 398.

In *Imposition of Surcharge by the Far East Conference at Searsport, Maine*, 9 FMC 129, the Commission reiterated the *Weil*, concept by holding that the Commission may act under section 15, not merely against the terms of section 15 agreements but against rates fixed in concert as well. Thus, section 15 does not limit the Commission to the formal terms of an organic conference to the exclusion of the viable implementations—joint rates—of approved agreements. Consequently, if circumstances warrant, the Commission can act against

[9] *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, Committee on the Merchant Marine and Fisheries, H.R. Doc. No. 805, 63d Congress, 2d Sess., Vol. IV at 301 (1914).

[10] The Commission relied upon *Edmond Weil* v. *Italian Line "Italia"*, 1 U.S.S.B.B. 395, 398 (1935); *Pacific Coast–River Plate Brazil Rates*, 2 U.S.M.C. 28, 30 (1939); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342, 347 (1940); and *Empire State Highway Transp. Ass'n.* v. *Federal Maritime Bd.*, 291 F. 2d 336 (D.C. Cir. 1961).

rates on boiler parts under section 15.[11] Such action could be based upon a finding that a section 15 agreement operated in a manner contrary to the public interest or upon one of the other prohibitions of section 15. *Imposition of Surcharge by Far East Conference at Searsport, Maine*, *supra*. Thus, we hold that rating practices under an approved conference agreement are not immune under the public interest standard if it can be shown that the agreement actually operates in a manner contrary to the public interest. However, neither the public interest standard nor the legislative history requires absolute parity between United States-to-foreign rates and foreign-to-foreign rates. In addition to rate comparisons, we require a tangible showing that an agreement operates in a manner contrary to the public interest.

The Examiner found that the record did not disclose any unlawful rate disparities. The Examiner found that boilers exported from the United States actually move under project or discount rates to the destinations in issue, except those in the Orient. He, therefore, considered the rates under which the boilers actually move. Hearing Counsel except to the use of project rates; they assert that the rates under investigation here are the regular tariff rates, not project rates, and that by employing these rates for the purpose of comparison the Examiner erred. Furthermore, Hearing Counsel contend that there is no evidence of foreign-to-foreign project rates and that the only meaningful comparison contained in this record is between the regular tariff rates.

We agree with the Examiner; we are here interested in the real, not hypothetical impact of rates upon exporters in the United States. The actual rates are project rates. Accordingly, we overrule Hearing Counsel's exception as to the use of project rates.

Using the project rates, the record shows no disparity unfavorable to United States exporters of utility boilers to India or Pakistan or to Brazil or Argentina, where project rates are regularly employed. With respect to boiler parts, using the applicable project or discount rates, the disparities are significantly diminished from the "obvious, glaring and gross" levels attacked by Hearing Counsel. The rates are still higher to India from the United States than from the Continent by 18.5%, and the rates are still higher by 15.4% than the Continental rates to Argentina. However, as set forth above, it is 27% farther to Calcutta from the United States than from the United

[11] Respondents contend that the Commission may scrutinize rate-making activities only under sections 17 and 18(b)(5). These provisions permit limited rate regulation of ocean carriers, both independent lines and conferences. Section 15, however, has a different role; its impact is against collective action, including ratemaking.

Kingdom or the Continent. Regarding Argentina, we have found that rates from Europe are depressed for reasons other than competition between United States and foreign exporters; and in neither the Indian nor the Argentine trade is there any showing that these disparities have any tangible impact on the shipping public. Therefore, the rates on boiler parts are not contrary to the public interest.

The Far East Conference does not apply project rates. Nevertheless, no disparity on the ordinary tariff rates to the Philippines has been shown because the Continent to Philippine data are insufficient to make a probative comparison. In the Japanese trade, we compare inbound-outbound rates. Giving effect to Hearing Counsel's assumptions, a slight disparity is shown in favor of the inbound shipment on a utility boiler. However, the record does not disclose that an actual boiler ever moved inbound to the United States under the slightly more favorable rate. Nor is there a showing that the outbound rate has been harmful to exporters of utility boilers or otherwise harmful to the public.

On boiler parts which are rated as "machinery and Parts, N.O.S.", the rate outbound is higher than the inbound rate by 31.4%. However, this rate is not limited to boiler parts, and rates on other utility boiler components are less outbound than inbound.

While we have held that conferences, in fixing rates, are answerable for the level of such rates under section 15, the paramount issue in a situation where the rate from the United States to a particular foreign destination is significantly higher than the rate from a foreign port to the same destination arises under section 17. This is the so-called triangular disparity which may be unjustly prejudical to an exporter from the United States as compared with a foreign competitor.

Section 17 provides:

> That no common carrier by water in foreign commerce shall demand, charge, 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.

We here consider the portion of section 17 concerning the prohibition of rates which are "unjustly prejudicial to exporters of the United States as compared with their foreign competitors." The elements necessary to show a violation of this provision have not been fully delineated by the Commission or its predecessors.[12] How-

[12] In *Imposition of Surcharge to Manila, Republic of Philippines*, 8 FMC 395 (February 3, 1965), the Commission held that a carrier, by assessing a surcharge at a United States port while not assessing a surcharge at a neighboring Canadian port, unjustly prejudiced an exporter from this country as compared with a foreign competitor.

(Continued on next page)

ever, in order to sustain a finding that a rate runs afoul of this language, the Commission must make the following general findings:

1. That the U.S. exporter and the foreign exporter are competitors.
2. That the U.S. exporter is charged a higher ocean freight rate than his foreign competitor under comparable conditions.
3. That the rate charged to the U.S. exporter is harmful to him.
4. That the carrier has demanded, charged, or collected a rate which is unjust.

As we found above, United States exporters have competitors in Japan, the United Kingdom, West Germany, Switzerland, and Sweden. The record discloses that in some instances rates on utility boilers exported from this country are higher than rates in the foreign-to-foreign trades. And it appears that the United States-to-foreign trades and foreign-to-foreign trades under study here are comparable in material respects.[13] This is so because most of the rate comparisons have weighed the various similarities and dissimilarities in the pertinent trades. Project rates, deferred rebates, heavy lifts, etc., have, where known, been considered and appropriate adjustments made. Indeed, we recognize that certain costs in our foreign commerce are higher than in other trades. While it may be excusable for rates in U.S. foreign commerce to exceed rates in foreign-to-foreign trades, there is no reason why a comparison of these rates cannot be meaningful. If carriers in two separate trades have noticeably different levels of rates on the same item, and no obvious differences in transportation circumstances appear, we will proceed on the assumption that the two trades enjoy similar conditions.

Next, we consider the question of whether the rate disparity is harmful to the exporter in this country.[14] Proof of this detriment might run from a showing of loss of a market or of a particular sale to some intangible limitation of the ability to participate profitably in a market. Here, the record shows that ocean freight is one of myriad factors contributing to a manufacturer's ability to compete

Other cases involving this issue, but where no violation was found are: *R. A. Ascher & Co.* v. *International Freighting Corp.*, 1 U.S.S.B. 213 (1931); *Pacific Forest Industries v. Blue Star Line, Ltd., et al.*, 2 U.S.M.C. 54 (1939); and *Pacific Coast-European Rates and Practices*, 2 U.S.M.C. 58 (1939).

[13] Section 17 requires that such differentials as have been shown to exist between United States rates and foreign-to-foreign rates be shown to exist in trades which are fairly comparable in material respects. c.f. *Investigation of Certain Rate Practices—Great Lakes to Europe*, 7 F.M.C. 118, 119 (1962); *California Packing Corp. v. States S.S. Co.*, 1 U.S.S.B. 546, 548 (1936); *Edmond Weil* v. *Italian Line "Italia"*, 1 U.S.S.B. 395, 396 (1935); *Atlantic Refining Co.* v. *Ellerman & Bucknall S.S. Co.*, 1 U.S.S.B. 242, 250 (1932); *United States* v. *Illinois Cent. R.R.*, 263 U.S. 515, 524 (1924).

[14] Under section 17, there must be evidence of prejudice to the American exporter and advantage to a competitive interest. *West Indies Fruit Co. et al.* v. *Flota Mercante*, 7 F.M.C. 66, 69 (1962); *Imposition of Surcharge on Cargo to Manila*, supra.

in a foreign market. Thus, the level of freight can be considered to be harmful even if it merely constitutes a limitation on the net profit that could be realized from a sale.

Assuming that the rate offered to the American exporter is significantly higher than rates offered to a foreign competitor and the American exporter is shown to be harmed in some way, the rate still must be found to be unjust. If the rate is significantly higher than a rate on a similar product in another trade under comparable transportation circumstances, and some harm is shown to the American exporter, we believe the rate may be presumed to be unjust subject to refutation of one of these elements or to proof by the carrier that the rate is justified on the basis of cost or other transportation circumstances. As a practical matter and in fairness to all parties, we believe section 17 should be interpreted in this manner.[15]

Hearing Counsel did not contend, nor did the Examiner find, that the rates under investigation ran afoul of 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 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.

There is no evidence of record of the reasonableness of the rates as measured by the excess of revenue over costs of moving the cargo. Thus, the only probative measure of the reasonableness of the rates must be based upon a consideration of rate disparities, either triangular or reciprocal. As we said in *Iron and Steel Rates, Export-Import, supra*, the existence of a disparity, in and of itself, has no conclusive legal significance. The Commission did state, however, that:

> When a rate disparity in reciprocal trades, on similar commodities appears, and when movement of goods under the higher rates has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable. 9 FMC 180.

[15] For instance, in *Iron and Steel*, the Commission espoused a similar test under section 18(b)(5):

> When a rate disparity in reciprocal trades, on similar commodities appears, and when movement of goods under the higher rates has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable. All facts pertaining to the reasonableness of the rates are uniquely in the possession of the carriers. Unless so interpreted, section 18(b)(5) becomes a nullity and we will not impute to the Congress the enactment of a meaningless statute. The mere existence of a disparity does not necessarily mean that the higher rate is "detrimental to the commerce of the United States." The Commission would still have the burden of proving that the rate has had a detrimental effect on commerce; e.g., that tonnage is handicapped in moving because the rate is too high. The carrier would be required to justify the level of the rate by showing that the attendant transportation circumstances require that the rate be set at the level. 9 FMC 180.

This statement is appropriate in terms of the rates of the Far East Conference as compared with the inbound rates from Japan to the United States. Hearing Counsel's exhibits disclose a slight disparity in the case of the typical boiler and a disparity on boiler parts of 25 to 40%. Since the record shows that no boiler or boiler parts have moved inbound under these rates and since the record shows no impairment of the movement of the goods under the higher rate, no showing has been made which would require justification of the rate by the Far East Conference. Therefore, no sufficient showing was made which would require justification of the rates by the Far East Conference.

Section 18(b)(5) has never been interpreted in the context of triangular disparities. Nevertheless, following the guidance of *Iron and Steel Rates, Export-Import*, we believe triangular disparities should be measured in a similar fashion. Consequently, where a rate disparity is shown between a rate from the United States and a rate from a foreign port to the same destination on similar commodities, and the movement of goods under the higher rate has been impaired, the carrier quoting the rate from the United States should demonstrate the reasonableness of the rate by showing that the transportation conditions in the two trades are not the same in material respects or that the attendant transportation circumstances require that the rate be set at that level. Of course, the record does not show that, even where the rates from the United States are higher than the foreign-to-foreign counterparts, the movement of utility boilers has been impaired under the higher rates. Thus, we find that the rates under investigation are not so unreasonably high as to be detrimental to the commerce of the United States.

Ultimate Conclusions

Upon the record in this proceeding it is concluded that: 1. The freight rates set forth in the respective tariffs of the Far East Conference and its member lines, the River Plate and Brazil Conference and its member lines, and the India, Pakistan, Ceylon and Burma Outward Conference and its member lines, applicable to High Pressure Boilers (Utility Type), Parts and Related Structural Components from United States Atlantic and Gulf ports to ports in Japan and the Philippines, Brazil and Argentina, and India and Pakistan, respectively, have not been shown to be in violation of section 17 of the Shipping Act, 1916, as amended, or so unreasonably high as to be detrimental to the commerce of the United States, within the meaning of section 18(b)(5) of said Act; and

2. None of the Conference agreements of the aforesaid Conferences heretofore approved by the Commission has been shown, by reason of the maintenance of said freight rates, to be unjustly discriminatory or unfair 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 in violation of said Act, so as to require disapproval, cancellation or modification as provided in section 15 of said Act.

This proceeding is discontinued.

Vice Chairman John S. Patterson, concurring separately:

I concur that no violation of law has been proven on this record.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 66–1

LOMEN COMMERCIAL COMPANY, A DIVISION OF ALASKA STEAMSHIP COMPANY—INCREASED RATES IN THE NORTHWEST-BERING SEA AREA OF ALASKA

Proposed rates for lighterage and coastal barge service in the Northwest-Bering Sea area of Alaska found just and reasonable and otherwise lawful; and not in violation of the Commission's order in Docket No. 969. Proceeding discontinued.

Stanley B. Long and *Donald E. Leland* for respondents.

Warren C. Colver and *George Benesch* for intervener State of Alaska.

Thomas Christensen, Hearing Counsel.

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

Respondent Lomen Commercial Company (Lomen), a division of respondent Alaska Steamship Company (Alaska Steam) filed Tariffs FMC–F Nos. 17 and 18 to become effective January 10, 1966. The rates therein, some reflecting increases, were not to be used until June 1, 1966, when the navigation season opens in the Bering Sea area.

No protests were filed against the proposed schedules. However, the Commission by order dated January 6, 1966, served January 12, 1966, as amended, suspended the increases and ordered a hearing to determine whether they are unjust, unreasonable or otherwise unlawful; and whether they are in violation of the Commission's order in Docket No. 969, *Alaskan Seasonal Rate Increases (1962)*, 8 F.M.C. 1 (1964).[2] A motion to dismiss was filed by respondents, but a hearing was called in order to develop the factual matters pleaded, which cannot be resolved on a motion to dismiss. In view of the result reached on the merits, further consideration of the motion is unnecessary.

[1] This decision became the decision of the Commission on May 5, 1966 and the proceeding was discontinued.

[2] This decision found that Alaska Steam's rates (tackle-to-tackle) were unjust and unreasonable to the extent they yielded a return in excess of 10 percent. Lomen's rates were not involved therein.

The State of Alaska intervened. Briefs were waived by all parties in the interest of expediting the decision herein.

Lomen provides lighterage service on cargo transported by vessels of Alaska Steam from Seattle to Nome and Teller, Alaska.[3] Due to shallow water, high tides and some-times stormy weather, the ships anchor 1½ to 3 miles from port and discharge their cargo at end of ship's tackle to Lomen's barges which are then towed by tugs to the beach.[4] Adverse weather conditions may delay discharging a week. The cargo is discharged from barge direct to the beach or to warehouse platform by cranes or manual labor at Nome and Teller,[5] and some of it is delivered to consignees located there. Oil cargo is pumped from tanks on barges through a pipeline to storage tanks. Lomen's rates include stevedoring costs, and terminal, handling and storage charges.

The foregoing ship-to-shore lighterage service is covered by Tariff No. 18.

The remainder of the cargo is assembled and reloaded in barges for shipment in Lomen's coastal service which extends North to Kotzebue and South to Unalakleet. In between, calls are made at other outports, including Shishmaref and Wales under hazardous and expensive landing conditions, due to shallow water and tide action.[6] This coastal service is covered by Tariff No. 17.

Lomen (and Alaska Steam) meet competition from air freight lines serving Nome direct from Fairbanks and Anchorage, Alaska. This service, which almost doubles each year, carries all of the dry goods shipped to Nome, and substantial amounts of liquor, beer, fresh meats and vegetables, and small machinery. This competition, plus the fact that no major construction projects are in view at this time, leads Lomen's manager to predict a decrease in traffic during 1966.

Lomen is also in the retail mercantile business, and sells Standard Oil Company products on a commission basis. It carries a considerable inventory of lumber, machinery and supplies primarily to maintain its own facilities.[7]

Lomen's stated purpose in filing Tariff No. 17 was to afford shippers the benefit of more favorable conditions which had resulted in certain decreases in costs, and to make some increases where operating ex-

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[3] Alaska Steam calls at Teller once and at Nome three times a year, during the ice-free months of June–October.

[4] Lomen's fleet consists of six steel and one wooden barge, and three tugs. This equipment is pulled out of water for overhaul after each season.

[5] An additional barge is sent to Teller containing a crane and forklift truck.

[6] At Wales, for instance, it is necessary to detach barge from tug and work it in to beach with "skin" boats.

[7] It was testified that no one else was willing and/or financially able to engage in this type of business due to the heavy inventories required. In 1965 its gross profit from noncarrier operations was $44,001.

perience and conditions tended to increase costs, as at Shishmaref and Wales. On cargo transported between Nome and the Teller area (representing over 50 percent of the traffic) the reduction amounted to 3 percent. On return trips to Nome the rates were reduced by 25 percent. Applying the Tariff No. 17 rates to the 1965 volume of traffic, there would be a reduction in revenue of $41.44 or 0.07 percent.

Lomen explained that Tariff No. 18 was designed (1) to update and consolidate the existing tariff, which included several supplements; (2) to harmonize commodity classifications with those of Alaska Steam so that computerized billing could be made by IBM machines; and (3) to make minor rate adjustments to equalize cost increases since rates were last adjusted, in 1960. Longshore labor wages, which represent 44½ percent of operating costs, have risen approximately 60 percent since the last rate adjustment. The items in Tariff No. 18 producing 77.7 percent of the revenue remain unchanged. They represent nearly all of the subsistence commodities moving in substantial volume, such as groceries and cargo N.O.S. Tariff No. 18 rates, if applied to traffic moving during 1965, would result in an increase in revenue of $2,703 or 1.5 percent. The combined results under both tariffs would be an increase of 1.1 percent. Lomen emphasizes that there was no intent to secure a general revenue increase.

The lighterage rates in Tariff No. 18 compare favorably with those of barge lines operating to the North and South of Lomen's area; i.e., B. & R. Tug & Barge, Inc. which serves points North of Shishmaref, and Alaska Rivers Navigation Company which operates out of St. Michaels and Unalakleet and South to Yukon River points. Conditions affecting the operations of the three companies are comparable, such as weather, labor, equipment used, cargo carried and the general economy.

Lomen submitted revenue and expense figures for 1964 and 1965 which showed that their lighterage operations were being conducted at a loss. Although there was a net profit from *combined carrier and non-carrier* operations in 1965 of $56,933 before taxes, there was a net loss of $14,159 on the lighterage operations here involved.[8] The new rates would reduce this loss by only $2,700.

The Field Auditor of the Commission in Seattle testified that the revenue and expense figures submitted by Lomen were accurate according to his audit of the underlying records. From them he constructed a rate base for the property and equipment devoted to lighterage operations, following General Order 11:

[8] The loss would be $14,627 if expenses were allocated on the General Order 11 basis.

Book cost of property and equipment	$83,831
Working capital	23,403
Rate base	107,234

The revenue necessary to yield a return of 10 percent on this rate base would be $10,723. The net loss for 1965, on the General Order 11 basis, exceeds this theoretical return by $3,900.

Lomen takes issue with the depreciation theory of General Order 11, and the method of figuring working capital, i.e., allowing one-twelfth of operating expenses. It points out the unusually large amount of accounts receivable, $276,034,[9] carried on its books in 1965, the fact that it does not operate the full 12 months, and the fact that for 1946, the Commission's predecessor approved a figure of $63,514.39 as working capital. *Rates Between Places In Alaska*, (1948) 3 U.S.M.C. 33, 39.

Inasmuch as there was no other evidence adduced on the rate base, and it is clear that Lomen is earning no return on a minimum rate base, it is not necessary to make any findings on the subject.

Finally, a word concerning Lomen's position that the effect of the suspension herein, if continued during the period stated in the order (June–September), would actually increase its revenue, and accordingly increase the rates payable by the shippers and consignees.

The Commission's order suspended the increases in Tariffs 17 and 18 from June 1, 1966, until October 1, 1966, unless this proceeding is concluded prior to June 1. However, it did not suspend Tariffs 17 and 18, which cancelled the respective tariffs previously in effect. Therefore, the only legally applicable tariffs are and will be Tariffs 17 and 18.[10]

Lomen points out that several of the commodities whose rates were suspended in Tariff 18 would have to take higher Freight, N.O.S., rates. This is so because during the suspension period the lower suspended commodity rates in Tariff 18 cannot be applied. Lomen figures that this would result in an increase in revenue to it of approximately $3,100.

It is confidently expected that this situation will not arise because of the ample time remaining for final decision between now and June 1, 1966.

[9] Respondents attribute this large figure to the so-called "grub-stake" economy still lingerinng in the area, under which debts are settled only once a year. There is no allocation made to lighterage operations in this amount.

[10] This interpretation of the effect of the suspension was given to Lomen's Traffic Manager by the Commission's Bureau of Domestic Regulation.

ULTIMATE FINDINGS AND CONCLUSIONS

Upon consideration of the foregoing facts it is found and concluded that the rates under suspension herein will be just and reasonable and otherwise lawful; and that the establishment of said rates will not violate the terms of the Commission's order in Docket No. 969.

Ordered, that this proceeding is hereby discontinued.

(Signed) GUS O. BASHAM,
Presiding Examiner.

APRIL 12, 1966.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1187

REDUCED RATES ON MACHINERY AND TRACTORS FROM UNITED STATES ATLANTIC PORTS TO PORTS IN PUERTO RICO

DOCKET NO. 1187 (SUB. 1)

FURTHER REDUCTION IN RATES ON MACHINERY AND TRACTORS FROM UNITED STATES PORTS TO PORTS IN PUERTO RICO

Decided May 9, 1966

Fifty-cent rates of North Atlantic carriers not found to be "unjust or unreasonable."

Rates of North Atlantic carriers fixed at fifty cents.

Forty-three cent and thirty-seven cent rates of SACAL and thirty-seven cent rates of TMT found to be "unjust and unreasonable" as violative of section 16 First of the Shipping Act, 1916.

Rates of SACAL and TMT fixed at forty-eight cents except on road scrapers.

Twenty-eight cent rates of SACAL and TMT on road scrapers not found to be "unjust or unreasonable."

Homer S. Carpenter and *Edward T. Cornell* for respondent TMT Trailer Ferry, Inc. (C. Gordon Anderson, Trustee).

John Mason for respondent South Atlantic & Caribbean Line, Inc.

John Mason and *Harvey Flitter* for respondent Seatrain Lines, Inc.

Robert Kharasch and *Amy Scupi* for respondent American Union Transport, Inc.

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

Sidney Goldstein, *F. A. Mulhern*, *Arthur L. Winn, Jr.*, *Samuel H. Moerman*, *J. Raymond Clark* and *James M. Henderson* for intervener Port of New York Authority.

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

REPORT

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

Docket No. 1187 is an investigation into the lawfulness under the Shipping Act, 1916 (the Act), and the Intercoastal Shipping Act, 1933 (the 1933 Act), of reduced rates on heavy machinery moving from United States North Atlantic and South Atlantic ports to ports in Puerto Rico. Also under investigation is the question of whether any rate differentials between carriers in the trade should be established.

There are two classes of respondents involved: (1) those operating from North Atlantic ports to Puerto Rico which includes Sea-Land Service, Inc., Puerto Rican Division (Sea-Land), American Union Transport, Inc. (AUT), Seatrain Lines, Inc. (Seatrain), and Motorships of Puerto Rico (Motorships); and (2) those operating from South Atlantic ports to Puerto Rico which includes TMT Trailer Ferry, Inc., C. Gordon Anderson, Trustee (TMT), and South Atlantic & Caribbean Lines, Inc. (SACAL). The Port of New York Authority (New York) intervened.

Subsequent to the institution of Docket No. 1187, SACAL filed a further rate reduction which was allowed to go into effect and placed under investigation in Docket No. 1187 (Sub. 1).

Hearings in both proceedings were held before Examiner Herbert K. Greer who issued separate Initial Decisions to which exceptions and replies were filed. Oral argument was heard in 1187. None was requested or held in 1187 (Sub. 1).

Because, as shall be developed below, the lawfulness of SACAL's further reduction is inextricably related to the rates of the other carriers in the U.S./Puerto Rico heavy machinery trade, Dockets 1187 and 1187 (Sub. 1) are here consolidated for decision.

The Rate Background

The rates on heavy machinery from Atlantic ports to Puerto Rico had, with some exceptions, remained stable for a period of years. On April 9, 1964, Sea-Land filed a reduced rate. This action triggered a series of rate reductions by the other respondents. The first round of reductions was as follows:

Carrier	Existing rate	Reduction filed	Reduced rate	Terminal charges	Effective date	Total after reduction
	Cents		*Cents*	*Cents*		*Cents*
Sea-Land	55	Apr. 9, 1964	48	2	May 27, 1964	50
Seatrain	55	Apr. 21, 1964	48	2	June 17, 1964	50
AUT	55	Apr. 27, 1964	48	2	May 28, 1964	50
Motorships	55	June 16, 1964	48	2	July 16, 1964	50
TMT	50	Apr. 29, 1964	43	0	May 29, 1964	43
SACAL	50	May 11, 1964	43	0	June 10, 1964	43

The South Atlantic carriers did not require heavy lift charges because of their roll-on/roll-off service, and to counter this advantage North Atlantic carriers modified their heavy lift charges to exempt most of the commodities here in question effective April–May 1964.

Sea-Land, in a further attempt to eliminate the rate differential of approximately 7 cents in favor of South Atlantic carriers, filed a second reduction to 41 cents plus 2 cents terminal charges and insurance, effective July 21, 1964. Other North Atlantic carriers did not meet this reduction. TMT, however, filed a further reduction to 37 cents per cubic foot to maintain the differential. SACAL also filed a reduction to 37 cents per cubic foot, later withdrew the reduction, subsequently republishing it, at which time it was placed under investigation in Docket 1187 (Sub. 1).

To prevent a possible rate war, the Commission suspended the TMT 37 cents rate until December 5, 1964, and the Sea-Land rate of 41 cents until November 20, 1964, which suspense dates both Sea-Land and TMT agreed to extend 24 days. At the close of the hearing in 1187 (Sub. 1) and at the present time, the North Atlantic carriers charge 48 cents per cubic foot plus 2 cents terminal charges (arrimo), not including insurance; and the South Atlantic carriers charge 37 cents per cubic foot, including terminal charges and insurance.

The respondents have filed and defend the lawfulness of rates on heavy machinery (except road scrapers) at the following levels:

TMT	37 cents per cubic foot, *including* arrimo and insurance.
SACAL	43 cents per cubic foot, *including* arrimo and insurance. 37 cents in 1187 (Sub. 1).
Sea-Land	41 cents per cubic foot, *plus* arrimo (2 cents) and insurance.
AUT	48 cents per cubic foot, *plus* arrimo (2 cents) and insurance.
Seatrain	48 cents per cubic foot, *plus* arrimo (2 cents) and insurance.
Motorships	48 cents per cubic foot, *plus* arrimo (2 cents) and insurance.*

*Motorships did not appear to defend the rate.

TMT and SACAL have filed and defend specific commodity rates on road scrapers of 28 cents per cubic foot.

The Competitive Situation

The Atlantic-Puerto Rican trade is overtonnaged.

All respondents have equipment capable of handling and transporting heavy machinery, although some limitations on size and weight of cargo restricts North Atlantic carriers in handling the largest and heaviest items.

The Puerto Rican trade in heavy machinery has increased during past years.

For the year 1963, carriage of heavy machinery by respondents was as follows:

	Tons	Total revenue
TMT:		
From Jacksonville	12,639.9	
From Miami	1,253.0	$258,712.95
SACAL:		
From Jacksonville	216.7	
From Miami	5,378.1	103,628.32
From North Atlantic ports:		
AUT	681.0	15,526.80
Seatrain	139.5	6,223.28
Sea-Land	0	0
Motorships (not shown)		

Most of the heavy machinery carried by respondents other than TMT was used equipment originating near the port.

During 1963, TMT carried heavy machinery and received revenue therefor from points of origin where rail rates were:

(a) Favorable to New York $23,167.27 (9 percent).
(b) Equal, New York or Jacksonville ["equalization territory"]. 150,628.98 (60 percent).
(c) Favorable to Jacksonville 67,956.09[1] (27 percent).

[1] Includes cargo originating in the Miami area.

The port of origin of the remainder of the heavy machinery was not determined.

AUT operates a weekly break-bulk service with two C1-B vessels on a fortnightly turnaround. Beginning August 24, 1964, AUT has sailed from New York to Puerto Rico, calling at Baltimore and Philadelphia northbound. During 1964, AUT experienced an increase in carriage of heavy machinery which it attributed to modification of heavy lift charges and reduction in rates from 55 to 48 cents a cubic foot.

Seatrain operates vessels designed to carry railroad cars, trailers and other containers, lifted to and from the vessels by specifically installed shore-based cranes having a lifting capacity of 125 tons. The Puerto Rican installation, although completed in June 1964, cannot be fully utilized because of inadequate electric power and the nonavailability of such equipment has an effect on Seatrain's loading and unloading costs at San Juan. Seatrain's vessels have a service speed of 16.5 knots and make the passage from Edgewater, New Jersey, to San Juan, Puerto Rico, in 4 days. A weekly sailing in each direction is maintained. Noncontainerized traffic, including that similar to heavy machinery, is usually carried in "broken stowage" space resulting from irregular lengths of rail cars, trailers, and other containers.

Sea-Land has a separate Carcarrier Division specializing in the handling and transporting of vehicles and large equipment on a vessel adapted to that type of cargo at substantial cost. It operates one vessel, SS *Detroit*, sailing between Port of New York and San Juan, Puerto Rico, on a 9- 9- 10-day sailing frequency. The *Detroit* has operated with substantial free space, and on 80 percent of the 1963 voyages free space averaging approximately 35 percent of total space southbound.

TMT operates a roll-on/roll-off tug and barge service, the tugs towing converted LSTs. The tugs are not owned by TMT but used under a contract with the Florida Towing Corporation at a cost of $17,500 per round voyage tow for tugs with a rated horsepower of 1,600, and $16,500 for tugs of lesser horsepower. During 1963, TMT operated four barges with a sailing every 5 days from Jacksonville to San Juan, thence to Miami, and returning to Jacksonville. During 1964, an additional tug was added to determine the possible economic operation of a direct service from Jacksonville to Puerto Rico and from Miami to Puerto Rico, with one weekly sailing from each Florida port. TMT's equipment is not new but is capable of performing the job to which it is assigned. In the tug and barge operation, occasional breakdowns occur and rough weather causes a reduced speed. Shippers have complained when shipments were delayed. Average speed is approximately 7 knots.

SACAL operates the MS *Floridian* in a weekly common carrier service between Miami, Florida, and San Juan, Puerto Rico, departing from Miami each Friday, arriving at and departing from San Juan the following Monday, and arriving at Miami on the return voyage each Thursday.

The MS *Floridian* is a roll-on/roll-off vessel having one cargo hold with access through the stern. She is twin-diesel powered, 360 feet long with a 52-foot beam and gross tonnage of 4,684 tons. Speed is 16.5 knots. Cargo carried on deck is lifted on and off by a shore crane. The ramp used to load and unload the hold is provided at each port at the expense of respondent.

SACAL obtains its vessel under a charter agreement with Containerships pursuant to which Containerships shares in profits realized by respondent's operation of the vessel, if any profit is realized.

SACAL's vessel capacity is as follows:

SACAL vessel capacity

[In measurement tons]

	Revised by TMT to reflect actual consist of trailer cargo
In trailers (32 at 1,900 cubic feet)	----
13 reefers at 1,500 cubic feet	487. 5
19 dry at 1,900 cubic feet	902. 5
In small boxes (32 at 66 cubic feet)	47. 5
Underdeck racks (7 racks) : 1 rack	22. 5
Breakbulk space	261. 8
Automobile deckload (no broken stowage)	1, 325. 0
Total	3, 046. 8

The tug and barge service of TMT is directly competitive with SACAL's service between Miami and San Juan. SACAL's rate is used from Jacksonville as well as Miami; however, a substituted service is used from Jacksonville to Miami. SACAL does not now compete with the North Atlantic carriers for the carriage of heavy machinery. Virtually all of its heavy machinery originates in Southern Florida.

SACAL is a member of a corporate complex controlled by the China International Foundation, a charitable organization. Within the corporate complex is the United Tankers Group composed of United Tanker Corporation, parent of five subsidiary corporations, and the United Tanker, Limited, parent of six subsidiary corporations. One of the subsidiary corporations, United Maritime Corporation, serves all associated organizations as the "overhead" corporation handling major payrolls, except ships' payrolls, the rent for the New York office, basic light, heat, power and telephone expense and group insurance and pensions. Among the employees of the United Maritime Corporation are persons devoting full time to SACAL's affairs. The salaries of these individuals are billed direct to SACAL, which also bears its own professional and auditing fees, direct communications expense both at the New York office and as incurred by its agents, the salary of its San Juan freight solicitor and his office expenses, and miscellaneous other items directly attributable to SACAL's operation. In addition to direct expense, SACAL shares other expenses with affiliated companies based on a formula of longstanding and which considers gross assets, annual revenues, and time devoted to the affairs of the particular company by the executives or other employees. These factors are weighed respectively, 15, 25, and 60 percent. The method of allocation is used by all affiliates and for all corporate purposes, including income tax. It has been used in a proceeding before the Renegotiation Board and an independent auditor has not questioned it.

In the heavy machinery traffic direct from Miami to San Juan, SACAL outcarried TMT by almost four to one. However, TMT is the predominant carrier due to inland freight differences favoring Jacksonville.

Shippers select the carrier for transportation of heavy machinery primarily, but not exclusively, on the basis of total cost of transportation from point of origin to destination.

Puerto Rican distributors for International Harvester Company, producers of heavy machinery, would change from TMT to a North Atlantic carrier if transportation costs were equal because self-propelled vessels are faster and more dependable.

West India Machinery and Supply Company, distributors of heavy machinery in Puerto Rico, would select North Atlantic carriers if transportation costs were equal preferring the "separate vessels" over a tug and barge operation.

Caterpillar Americanus, a shipper of heavy machinery, provided approximately 38 percent of TMT's revenue for carriage of heavy machinery during 1963. In addition to lower transportation costs, this shipper finds it advantageous to use the TMT roll-on/roll-off service because of savings in cost of preparation for shipment and reassembling the parts at destination. This shipper would remain with TMT if total transportation costs were equal in appreciation to TMT for initiating the roll-on/roll-off service in the trade, but would use another carrier if it offered a positive improvement in overall transportation or if customers preferred another service.

The rate of 28 cents per cubic foot for road scrapers, a reduction for that commodity not applied to other heavy machinery, was first established by TMT because at a rate of 50 cents per cubic foot, a disproportionate cost fell on road scrapers. The cubic measurement of the item was extremely high as compared with other heavy machinery, while the cost of handling was the same. SACAL reduced its rate on road scrapers from 50 cents per cubic foot to 28 cents per cubic foot to remain competitive with TMT, after an important shipper of that item had threatened to take its business to TMT unless the reduction was made. This reduction was effective March 28, 1964. On North Atlantic carriers, road scrapers are shipped in compact packages which greatly reduce their cube.

Costs of the Carriers

Seatrain presented no cost data, and there is no evidence relating to the rate filed by Motorships.

Sea-Land, Carcarrier Division, shows a net profit of $75,428 for 1963. No heavy machinery was carried during this period.

AUT operated at a loss during 1963. Total expenses were $5,917,642 and 287,718 revenue tons were carried. Fully distributed cost for a revenue ton was $20.55. Out-of-pocket cost for heavy machinery was $7.07 per ton or approximately 18 cents per cubic foot.

TMT's total expenses for 1963 amount to $3,952,809, and it handled 266,416 revenue tons of cargo, realizing a profit of $403,126.51. Average fully distributed cost as found by the Examiner for carrying a measurement ton is $14.15 or 35⅓ cents per cubic foot.[2] Fully distributed cost as found by the Examiner for handling heavy machinery is $11.56 per measurement ton (29 cents per cubic foot).[3] This is lower than the average cost as heavy machinery consists of large wheeled units and lends itself to faster and less expensive handling than other cargo in a roll-on/roll-off operation.

For the calendar year 1963, SACAL suffered a loss of $192,216. SACAL's loss is not attributable to carriage of heavy machinery. During the calendar year 1963, SACAL received a gross revenue from the carriage of this commodity of $103,628.32, approximately 4 percent of its total operating revenue. General and Administrative (G. & A.) expense totaled $261,278, interest $23,644 and doubtful notes $1,934. During the fiscal period July 1, 1963, to June 30, 1964, SACAL realized a profit of $137,152 with G. & A. expense reported at $183,035, depreciation $25,447 and interest $20,101. During the calendar year 1964, profit was $99,426 (exclusive of supplemental charter hire of $30,000 paid under agreement with Containerships, due for the first time as respondent showed a calendar year profit). G. & A. expense for the calendar year 1964 increased to $239,316.

SACAL's fully distributed cost for handling all cargo in 1963 was approximately 40 cents per cubic foot but for the period July 1, 1963, to June 30, 1964, it was reduced to approximately 36 cents per cubic foot.

At the rate of 37 cents per cubic foot, heavy machinery will produce a revenue of $14.80 per measurement ton (40 cubic feet to 1 measurement ton). SACAL computes its July 1, 1963, to June 30, 1964, fully distributed cost for transporting 1 ton of heavy machinery in the following manner:

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[2] SACAL contends this should be at least $14.51 or 36 cents per cubic foot.

[3] SACAL contends this should be 30 cents per cubic foot.

	Miami	San Juan	General	Total
Wharfage	$0.10	$0.20		$0.30
Handling	1.35			1.35
Stevedoring	.07	.06		.13
Agency	.59	.37		.96
Miami clerical overtime	.02			.02
Vessel expense			$6.96	6.96
Other port expense			.14	.14
Dockage			.11	.11
G. & A.: Interest			1.32	1.32
Depreciation			.03	.03
Agency fee and brokerage			.16	.16
Marine insurance, cargo			.11	.11
Total	2.13	.63	8.83	11.59

In determining costs allocable to heavy machinery SACAL allocated 5.7 percent on a revenue pro-rate basis to inbound traffic, 34.5 percent to outbound automobile traffic (maximum available automobile space related to total available space), and the remaining 59.8 percent to general cargo, including heavy machinery.

During the period used by SACAL for a cost basis, and after exclusion of the automobile traffic, its vessel operated outbound at nearly full capacity, carrying about 155,000 measurement tons on 51 voyages.

SACAL's 37 cents per cubic foot rate here at issue includes:

a. Wharfage at Miami, assessed by the port, of 30 cents per 2,000 pounds. SACAL's experience during 1963 showed a ratio of 4,676.7 measurement tons to 1,605.3 net tons or 2.9 to 1, the wharfage charge on 1 measurement ton being computed at 10 cents.

b. Wharfage at San Juan, assesed by the Port Authority pursuant to its tariff, or 1 cent per cubic foot or 2 cents per hundred pounds, subject to a reduction of 50 percent on cargo rolled from the ship to open areas and delivered to the consignee, a reduction usually applying to heavy machinery.

c. Handling charge at Miami of $1.35 per measurement ton per 2,000 pounds, as freighted.

SACAL has an agency cost at Miami of 4 percent of the outward revenue and at San Juan 2½ percent of that revenue. Additional fees of $100 per voyage at San Juan and $150 at Miami are paid for entering and clearing. In operating the *Floridian*, SACAL incurs mooring or docking expense at Miami of 3 cents per gross vessel ton per day and at San Juan of 1 cent per gross vessel ton per day, or $327.60 per voyage.

Fully distributed costs for handling heavy machinery are less than the average cost of handling all types of cargo as heavy machinery is loaded and unloaded by SACAL by the roll-on/roll-off method and the commodity consists of large, wheeled units which lend themselves to faster and less expensive handling than other cargo.

THE EXAMINER'S DECISION

In Docket No. 1187, the Examiner treated separately those rates which had been suspended and those rates which were allowed to remain in effect pending hearing. He noted that under the provisions of section 3 of the 1933 Act, a carrier has the burden of proving that a suspended rate is just and reasonable.

Examining the suspended rates of 37 cents (including arrimo and insurance) of TMT and 43 cent of Sea-Land (including arrimo), he found the former to be just and reasonable and the latter unlawful as its proponent had failed to prove that it was just and reasonable.

The Examiner found TMT will realize a substantial profit on heavy machinery at its reduced rate, and that although the rate is considerably below those rates of its competition, it is not so low as to drive any carrier from the trade and is supported by TMT's lower costs of operation and to some extent by its inferior service.

On the other hand, the Examiner ruled that Sea-Land had failed to support its proposed 43 cents rate with adequate and appropriate cost data, and further failed in establishing any justification for its maintaining a rate 7 cents below that of the other North Atlantic carriers.

The Examiner found that the remaining respondents (AUT, Seatrain and Motorships, which had 50 cents rates and SACAL, which had a 43-cent rate) had not been shown to be unable to operate profitably at those rates. He refused to order these rates altered for the purpose of improving or equalizing competitive positions in the absence of a showing that they were unjust or unreasonable.

The Examiner found the separate 28-cent-per-cubic-foot rate on scrapers published by TMT and SACAL had not been shown to be unjust or unreasonable and was supported by the fact that the cubic measurement of road scrapers is extremely high as compared with other heavy machinery and, thus, as the cost of handling is substantially the same, charging the same rate as for other heavy machinery would burden road scrapers with a disproportionate cost. To summarize, the Examiner in Docket No. 1187 made the following conclusions:

1. The suspended Sea-Land rate of 43-cents is not shown to be just and reasonable and must be cancelled.

2. The suspended TMT 37-cent rate is just and reasonable.

3. The SACAL 43-cent rate is just and reasonable.

4. The AUT, Sea-Land, Seatrain and Motorships 50-cent rates are just and reasonable.

5. The TMT and SACAL 28-cent road scraper rates are just and reasonable.

In Docket No. 1187 (Sub. 1), the Examiner found SACAL's 37-cent rate to be lawful because he found it to be:

(1) Compensatory in exceeding fully distributed costs for both all cargo and heavy machinery;

(2) Not unreasonably wasteful of revenue because SACAL's management reasonably felt it was necessary to meet TMT's competition; and

(3) Not competitively destructive because the rate had not been shown to be likely to drive TMT from the heavy machinery trade, much less the Puerto Rican trade, and was reasonably related to SACAL's costs.

DISCUSSION AND CONCLUSIONS

The 43-cent Rate of Sea-Land

Sea-Land maintains that the Examiner erred in not finding its 43-cent rate just and reasonable, alleging that such a failure is inconsistent with the facts that Sea-Land had not carried heavy machinery and had 35 percent free space on 80 percent of its southbound voyages. It further maintains that costs of loading and unloading heavy machinery are similar to those for automobiles which are substantially under 43 cents.

We agree with the Examiner's conclusion that Sea-Land has not maintained its statutory burden of proving the justness and reasonableness of its suspended 43-cent rate and find the rate unlawful. There has been no showing of how and to what degree heavy machinery could be loaded on Sea-Land's vessels. As it has not carried such machinery in the past, this much would of necessity be essential to support a proposed machinery rate 7 cents lower than that of the other North Atlantic carriers. Sea-Land's attempt to support the 43-cent rate on the ground that the costs of loading and unloading heavy machinery are similar to those for automobiles, which are substantially below 43 cents, must likewise fail as the record contains no comparison of the transportation characteristics of road building machinery with those of unboxed automobiles.

The 50-cent Rates of AUT, Sea-Land, Seatrain, and Motorships

No party attacked the finding of the Examiner that the 50-cent rates of the North Atlantic carriers are just and reasonable. The cost evidence of record shows that while AUT's overall operations in 1963 were not profitable, it will make a profit at the 50-cent rate over its out-of-pocket costs for carrying heavy machinery, which carriage is increasing since the rate reduction and the modification of heavy lift charges. Seatrain and Sea-Land, as new carriers of this commodity, should be allowed a reasonable opportunity to develop their services, particularly at similar rates, even though Seatrain's present overall operation may not be profitable (*Freight Rates and Practices in the Florida/Puerto Rico Trade*, 7 F.M.C. 686 (1964)). There is no evidence of record relating to Motorships' 50-cent rate. Moreover, the rates are not competitively destructive vis-a-vis the South Atlantic carriers, being considerably higher than the latters' rates. Accordingly, we find that the 50-cent rates of AUT, Sea-Land, Seatrain, and Motorships have not been shown to be unjust or unreasonable and are lawful.

In the light of the evidence of record, however, that several of the carriers may not be operating at fully profitable levels at 50-cent rates, we will fix the *minimum rates* for the carriage of heavy machinery for AUT, Sealand, Seatrain, and Motorships at the 50-cent level (*Intercoastal Rate Structure*, 2 U.S.M.C. 285, 301–303 (1940)).

The 37-cent Rate of TMT

All parties to the proceeding other than TMT allege that the Examiner erred in finding the 37-cent rate of TMT just and reasonable. We agree that the Examiner so erred.

The Examiner properly found that at the 37-cent rate TMT could operate profitably, both with respect to its carriage of heavy machinery and its overall operation. TMT's operations are profitable with respect to both overall and machinery carriage even if the figures for its average fully distributed costs and fully distributed costs for heavy machinery suggested by its competitor SACAL are used. The Examiner also properly found that the 37-cent rate would not drive any of the respondents out of the business, particularly in light of the fact that the North Atlantic carriers had carried only about 5.5 percent of the heavy machinery traffic.

Having made these findings, the Examiner concluded that the 37-cent rate was lawful.

The Examiner properly recognized that the lawfulness of a rate does not depend upon cost factors alone. He understood that a carrier cannot utilize a compensatory rate to drive other carriers from a trade. However, removal from a trade is not the only evil of cost justified rates which is outlawed by our statutes. We must also strike down all rates which are unduly or unreasonably prejudicial or disadvantageous to any person, locality, or description of traffic in any respect whatsoever (the Act, sec. 16, First).

As the Examiner correctly found, "the right of a port, or carrier serving that port, to cargo from naturally tributary areas is fundamental and must be recognized * * *." This right is codified in section 8 of the Merchant Marine Act, 1920, which, as a statement of Congressional policy, although not one specifically appearing in the statutes we administer, should be, and has been, followed by this Commission wherever possible. As we stated in *City of Portland* v. *Pacific Westbound Conference*, 4 F.M.B. 664, 679 (1955):

> That section requires, all other factors being substantially equal, that a given geographical area and its ports should receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area.

It is true that in this case "all other factors" are not "substantially equal" as the South Atlantic ports are closer to Puerto Rico than the North Atlantic ports, and it is black letter transportation law that a carrier should be able to utilize its "natural advantage" of a closer location to port of discharge to charge lower rates than more distantly situated carriers.

The degree by which such rates may be lower than those from more distant localities is not open to speculation, however. As was stated by the Supreme Court in *United States* v. *Illinois Cent. R.R.* (263 U.S. 515, 524 (1924)), the mere fact that a "rate is inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice." The difference must be "justified by the cost of the respective services, by their values, or by other transportation conditions."

Hearing Counsel have shown on the basis of 1963 carryings that at 48 cents TMT would earn revenue comparable to the revenue it would earn at 43 cents, even though it lost the traffic "naturally tributary" to New York. Such "wastefulnes of revenue" should be discontinued. It is a clear indication that there is no "cost" justification for the diversionary rate in order to maintain a certain revenue level.

Further, in the absence of shipper testimony arguing in favor of the need for a lower rate, we are unable to conclude that the heavy machinery carriage is of so little "value" to such shippers that a higher rate might not be justified.

As will be pointed out below, the actual volume of a commodity in a trade or the relative amount of that volume transported by any particular carrier is irrelevant if area differentials not supported by transportation conditions have been shown to exist, as is the case here. In the absence of differentials supported by such conditions, a carrier cannot be allowed to utilize its "natural advantage" to the extent that even 9 percent of the cargo which would naturally move through a certain port because of lower inland freight rates to that port is diverted to another port to which the inland freight rates are higher.

To do this would be to deprive the port to which inland rates are lower of *its* "natural advantage."

It would appear to be the proper solution here to fix the rates of the North Atlantic carriers, including arrimo, at 50 cents, which rate has not been shown to be unlawful, and the rate of TMT at 48 cents, including arrimo, which rate will allow it to utilize its "natural distance advantage" by retaining all of the cargo from the territory naturally tributary to it as well as, in the absence of unforeseen circumstances, all of the Caterpillar Americanus traffic from the equalization territory, while at the same time preventing it from diverting cargo from North Atlantic ports where such diversion is not justified by transportation conditions.

TMT presents various arguments in its reply to exceptions as justifications for the 37-cent rate. It maintains, in addition to the "cost" justification rejected above, that the 37-cent rate does not discriminate against anyone as TMT only serves Florida ports and charges the same rate for all heavy machinery regardless of origin. It also argues that it labors under a "service disability" vis-a-vis the other carriers which entitles it to a differential.

The Interstate Commerce Commission has been upheld by the courts in its fixing of minimum rates under a provision similar to section [4] of

[4] Section 4 of the 1933 Act provides in pertinent part:

"Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice demanded, charged, 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, fare, or charge, or a just and reasonable classification, tariff, regulation or practice: * * *."

Section 15(1) of Part I of the Interstate Commerce Act reads:

"Whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

the 1933 Act, upon a finding of a violation of a provision similar to section 16 First of the Shipping Act, 1916.[5]

In a case similar to the instant one (*New York* v. *United States*, 331 U.S. 284 (1947)), the Supreme Court approved the action of the Interstate Commerce Commission in establishing certain rates for several carriers upon a finding of a violation of 3(1) of Part I of the Interstate Commerce Act, even though, as here, there had been no showing that the existing rates of some carriers were noncompensatory or that any carrier would be driven out of business. The Court stated, at page 346:

> [T]he power granted the Commission under § 15(1) includes the power to prescribe rates which will substitute lawful for discriminatory rate structures. If the Commission were powerless to increase rates to a reasonable minimum in order to eliminate an unlawful discrimination, unless existing rates were shown to be noncompensatory or unless ruinous competition would result, it would be powerless to prescribe the remedy for unlawful practices.[6]

Some cases of our predecessors suggest that "[u]ndue prejudice under section 16 is not shown when the carriers serving the alleged preferred point do not serve or participate in routes from the alleged prejudiced point for the movement of the traffic involved."[7] This suggestion is contrary to the *New York* case, and we will not follow it. As was observed in the *New York* case, supra, at pages 342–343:

> If the hands of the Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are controlled by the same carriers, then * * * § 3(1) fell far short of its goal. We do not believe Congress left the Commission so impotent.

Nor, under the rationale of the *New York* case, need the facts that only a small amount of carriage in the trade is of heavy machinery and the North Atlantic carriers carry little of this traffic prevent us from setting differentials. In the *New York* case, less than 6 percent of the total traffic of all carriers traveled under the contested rates and the evidence of the inhibiting effect of the relatively higher rates upon particular shippers was deemed unimportant. As the Supreme Court said, "We assume that a case of unlawful discrimination against

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[5] Section 3(1) of the Interstate Commerce Act reads:

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice of disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic or any other carrier of whatever description."

[6] To the same effect, see *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 594 (1949).

[7] *California Packing Corp.* v. *States Steamship Company*, 1 U.S.S.B.B. 546, 547 (1936); see also *American Peanut Corp.* v. *M & M Transpt. Co., et al.*, 1 U.S.S.B. 78 (1925).

shippers by reason of their geographical location would be an unlawful discrimination against the regions where the shipments originate. But an unlawful discrimination against regions or territories is not dependent on such a showing." (*New York* v. *United States*, *supra*, at 308.)

The existence of a "service disability" alone would not be sufficient to justify a differential of TMT's rates below those of the other carriers.[8] Moreover, the record does not show that such an alleged disability exists.

Although some shippers complained when TMT's shipments were delayed during rough weather because of its tug and barge form of operation, there is no real showing that transit time is important to shippers and receivers of the subject commodities. In fact, one of the main shippers of the commodity here in question, Caterpillar Americanus, which provided approximately 38 percent of TMT's revenue for carriage of heavy machinery, stated it preferred TMT's service to that of the North Atlantic carriers even at equal rates.

TMT's rate is therefore not just and reasonable under section 4 of the 1933 Act as it is "unreasonably prejudicial" to the North Atlantic ports under section 16 First of the Shipping Act, 1916. It diverts cargo from naturally tributary areas without sufficient transportation justifications. The minimum rate of TMT for the carriage of heavy machinery (except road scrapers) is fixed at 48 cents, including arrimo.

There is another consideration which supports the requirement that TMT raise its rate from 37 to 48 cents, even though the 37-cent rate appears to be fully compensatory. The Commission has recently adopted in Docket Nos. 1145, 1167—*Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico; Reduced Rates on Automobiles—Atlantic Coast Ports to Puerto Rico*, the ratemaking principle long recognized by the courts that some commodities be required, because of the public interest, to bear more than their full share of allocated costs.[9] The needs of the Puerto Rican economy and its dependence upon the Continental United States have been detailed in Docket Nos. 1145, 1167. As the Commonwealth there testified, it was aware that additional cost burdens might be placed upon certain cargo by the requirement that rates for high-valued commodities "should be such as not only to cover the cost of the movement * * * , but sufficient also to support some share of the costs of the movement of basic commodities * * *." It further stated that it believed "such ratemaking practices are necessary for the overall growth and health of the economy of Puerto Rico" (Docket 1145, 1167). Although

[8] See Report on Remand, Docket No. 1167, *Reduced Rates on Automobiles—Atlantic Coast Ports to Puerto Rico,* served Nov. 16, 1965.

[9] *B. & O. R. Co.* v. *United States,* 345 U.S. 146 (1953) ; *Government of Guam* v. *Federal Maritime Commission,* 329 F. 2d 251, 254 (D.C. Cir. 1964).

the Commonwealth did not actively participate in this proceeding, it has often brought to the Commission's attention the necessity of the carriage of low-value commodities at low rates for the general welfare of the economy of Puerto Rico, and that a rate adjustment requiring the carriage at such low rates has legal support has been amply demonstrated.

The raising of TMT's rate for heavy machinery will have the beneficial effect of requiring such machinery to subsidize the carriage of goods essential to the Commonwealth's needs.

The ocean freight at the 37-cent rate is less than 1 percent of the list price plus marine insurance of heavy machinery. The ocean freight need not and should not be so low. Machinery has historically paid higher rates which yield revenue needed by carriers to support cargoes which are not fully compensatory. Shippers in the past have not protested such higher rates, nor, as noted above, have they done so in this proceeding. There has been no indication that traffic carried by TMT will in any way be reduced by requiring its rate to be raised to 48 cents other than to allow North Atlantic cargo to travel through naturally tributary ports.

Thus, we must also declare TMT's 37-cent rate unlawful as unjust and unreasonable within the meaning of section 4 of the Intercoastal Act because it involves a service of great value to the shipper for which the shipper could and would pay higher rates. The 37-cent rate attracts to TMT virtually all of this high value, historically high-rated cargo which otherwise could help support low-rated freight which moves via other carriers in the Puerto Rico trade. As noted on page 15, *supra*, TMT will lose no revenues at a higher rate. In fact, TMT will in no way be injured by such higher rate other than by the loss of some traffic naturally tributary to North Atlantic ports to which, under the evidence on this record relating to costs, value of service and other transportation considerations, it is not lawfully entitled.

The SACAL 43- and 37-cent Rates

We find that both the 43- and 37-cent rates of SACAL for the carriage of heavy machinery are compensatory. TMT, although not excepting to SACAL's 43-cent rate, excepts to the Examiner's finding that SACAL's 37-cent rate is compensatory. It alleges that the Examiner erred in treating SACAL's cost as based upon a reasonable use figure of 80 percent, in applying the cost of TMT's stevedoring expenses to SACAL's operation, and in accepting SACAL's allocation of general and administrative expenses. TMT argues that the computations were actually improperly based upon maximum capacity of SACAL's vessel; that as SACAL's stevedoring is performed under a special contract with its agents, TMT's stevedoring cost experience cannot be applied to SACAL's operation; and that since SACAL's allocation of general and administrative expenses results in a much smaller percentage of total vessel operating expense than that made by itself, AUT and Sea-Land, it requires justification.

We find these allegations to be without merit. The 37-cent rate is compensatory even if the highest stevedoring cost of record is used ($3.22 per measurement ton, excluding automobiles). SACAL's allocation of administrative expense is proper because of its peculiar type of operations and is in line with that of other carriers. The Examiner's "costing" of SACAL's traffic at full vessel utilization was proper as SACAL enjoys virtually maximum utilization on its southbound leg.

However, we find both the 43- and 37-cent rates of SACAL to be "unjust and unreasonable" under section 4 of the 1933 Act. There is no justification of such rates in terms of "cost" or "value of service." In fact, as there is no showing of the likelihood of the generation of additional cargo at such reduced rates, the reduction would result only in a loss of revenue to SACAL.

Therefore, we find the 43- and 37-cent rates of SACAL for the carriage of heavy machinery to be violative of section 16 First and fix the minimum rate for SACAL for the carriage of heavy machinery (except road scrapers) at 48 cents, including arrimo.

SACAL, unlike TMT, does carry substantial amounts of general cargo. The necessity of requiring the raising of the South Atlantic heavy machinery rates to facilitate the carriage of commodities essential to the welfare of the Commonwealth of Puerto Rico also applies to SACAL's 43- and 37-cent rates, however, because, as we observed with respect to TMT, the carriage of heavy machinery is a service of great value to the shipper for which the shipper could and would pay higher rates. The public interest requires that this be done.

For this additional reason the SACAL 37- and 43-cent rates must be declared unjust and unreasonable within the meaning of section 4 of the 1933 Act and the rate of SACAL for the carriage of heavy machinery (except road scrapers) set at 48 cents, including arrimo.

The 28-cent TMT and SACAL Rates for Road Scrapers

As noted above, TMT and SACAL publish a special 28-cent rate on road scrapers, because the cubic measurement of the item is extremely high as compared with other heavy machinery, while the cost of handling is the same; thus, at a rate of 50 cents per cubic foot, a disproportionate cost falls on road scrapers. Such rate is further justified because on the North Atlantic carriers road scrapers are crated in a compact package which greatly reduces their total cube, so much so, in fact, that if the 28-cent rate is multiplied by the uncrated cube and the 50-cent rate by the crated cube, the results are approximately equal. We find that the 28-cent rates on road scrapers of SACAL and TMT have not been shown to be "unjust or unreasonable."

An appropriate order will be entered.

Vice Chairman JOHN S. PATTERSON, dissenting:

The proceeding in Docket No. 1187 was initiated by an order dated May 26, 1964, supplemented by orders served July 1, 1964, July 22, 1964, August 3, 1964, and August 10, 1964, ordering an investigation to be instituted concerning the lawfulness of reduced rates on the following items of heavy machinery filed by six common carriers by water in interstate commerce between Atlantic Coast ports of the United States and Puerto Rico:

Machinery or Machines, Viz:
Earth moving
Land clearing
Road making, grading and parts, N.O.S., viz:

Angledozers	Road rollers
Brush cutters	Road scrapers
Brush rakes	Root cutters
Bulldozers	Rooters
Carry cranes	Side dozers
Cranes, excavating	Stump splitters
Force feed loaders	Tampling rollers
Mobile loaders	Trail builders
Power shovels	Traxcavators
Road graders	Treedozers
Road rippers	

Tractor, other than truck
Power units

Road scrapers added by "Second Supplemental Order" served July 22, 1964.
(The above items are referred to herein generally as "heavy machinery".)

The ordering clause was preceded by an identification of the tariff pages, filed with the Commission, of each carrier, the proposed rates, and a statement of the purpose of the investigation. The purpose was (a) "to determine whether they [the rates] are unjust, unreasonable, or otherwise unlawful" under the Shipping Act, 1916 (Act) or the Intercoastal Shipping Act, 1933 (Intercoastal Act), and (b) to "include the issue of whether there should be a differential between the machinery rates of the respondent carriers." The carriers identified in the heading, as well as Containerships, Inc., were named respondents, but Containerships, Inc., was later dismissed as a respondent. The order served August 3, 1964, suspended Sea-Land's rates, and the order served August 10, 1964, suspended TMT's rates.

The proceeding in Docket No. 1187 (Sub. 1) was initiated by an order dated December 29, 1964, ordering an investigation to be instituted concerning the lawfulness of further reduced rates on machinery and tractors by AUT between New York and Puerto Rico of 41 cents per cubic foot or $1.25 per 100 pounds. An amendment served January 13, 1965, expanded the proceeding to include a hearing concerning the lawfulness of further reduced rates by SACL between Miami and Puerto Rico of 37 cents per cubic foot or $1.20 per 100 pounds. The AUT rate was canceled and AUT was dismissed as a respondent in Docket No. 1187 (Sub. 1). The ordering clause was likewise preceded by a statement of purpose to determine whether the rates are "unjust, unreasonable, or otherwise unlawful." Section (18)a of the Act and section 3 of the Intercoastal Act authorize the Commission to adjudicate the justness, reasonableness, and lawfulness of the rates contained in the tariff pages filed.

The Examiner's decisions in both Dockets No. 1187 and No. 1187 (Sub. 1) disregarded and did not interpret the "otherwise unlawful" language of the initiating orders to cover issues under section 16 of the Act, and neither does my report. Section 16 provides that whoever violates any provision is guilty of a misdemeanor punishable by a fine of not more than $5,000. It is considered that for such a serious penalty a more specific notice than the "otherwise unlawful" language in the Notice of Investigation is required to conform to section 5(a) of the Administrative Procedure Act that persons "entitled to notice of an agency hearing shall be timely informed * * * of the matters of * * * law asserted." Respondents did not have enough notice of the matters of law in section 16. The Examiner was correct in his decision to disregard. The Examiner also treats as relevant and interprets section 8 of the Merchant Marine Act, 1920, in the decision in Docket No. 1187. Interpretation of section 8 is considered to be a function of the Secretary of Commerce under Reorganization Plan No. 7 of 1961. Neither section 16 of the Act nor section 8 of the Merchant Marine Act, 1920, will be considered herein.

The facts showing the various methods of transportation by respondents are set out in Appendix B to my report in Docket Nos. 1145 and 1167, appearing in 8 F.M.C. 404 at page 432, except for Containerships which no longer operates and was dismissed as a respondent herein. In other respects the facts of operation stated in the majority's report are accepted as accurate. The facts as to the fiscal data supplied are stated in Appendix A of this report and in the majority's report. This history of rate changes is also recounted in the majority's report, and in tabular form as follows:

[Rates in terms of per cubic foot]

Carrier	Previous rate	Reduction filed	Reduced rate	Terminal charges [1]	Effective date	Total after reduction
	Cents		*Cents*	*Cents*		*Cents*
Sea-Land	55	Apr. 9, 1964	48	2	May 27, 1964	50
Do	50	July 21, 1964	41	2	Dec. 18, 1964	43
Seatrain	55	Apr. 21, 1964	48	2	June 17, 1964	50
AUT	55	Apr. 27, 1964	48	2	May 28, 1964	50
Motorships	55	June 16, 1964	48	2	July 16, 1964	50
TMT	50	Apr. 29, 1964	43	0	May 29, 1964	43
TMT	43		37	0	Dec. 29, 1964	[2] 37
SACL	50	May 11, 1964	43	0	June 10, 1964	[2] 43
SACL	43	Nov. 9, 1964	37	0	Dec. 30, 1964	[2] [3] 37

[1] "Arrimo" and insurance.
[2] 28 cents for road scrapers.
[3] Docket No. 1187 (Sub. 1).

All the facts show that besides the various rate changes substantially the only things that have happened are:

(1) TMT introduced a tug and barge service, which no one else provides, with heavy machinery vehicles rolled on and off, and SACL loads and unloads the same way but uses a self-propelled ship. All the other respondents lift cargo on and off self-propelled ships.

(2) SACL and TMT reduced rates on only one class of commodities, heavy machinery.

Item (1) has existed for some time (see Dockets Nos. 1145 and 1167), and the economies and conveniences of the new type of service made reductions in item (2) possible.

In essence, we have an effort to prove that item (2) violates section 18(a) of the Act and section 3 of the Intercoastal Act.

Based on the record before me in this proceeding, my conclusions and the reasons for my dissent are as follows:

1. The Examiner was correct in deciding all of the rates, except those of Sea-Land, were just, reasonable, and lawful, and the exceptions to his decision should be overruled.

2. The Commission is not authorized to determine, prescribe, and order enforced minimum rates for AUT, Motorships, Sea-Land, and Seatrain until it first finds that the existing rates are unjust or unreasonable, and this finding has not been made except as to Sea-Land. The finding as to Sea-Land is supported because of Sea-Land's failure to conform to the requirements of section 3 of the Intercoastal Act.

3. The rates of SACL and TMT are not unjust and unreasonable for the reasons as stated by the majority that—

a. the higher minimum rates have "the beneficial effect of requiring" specified items of property "subsidize the carriage of goods" essential to the needs of Puerto Rico;

b. "the carriage of heavy machinery is a service of great value to the shipper for which shipper could and would pay higher rates" and "public interest requires that this be done."

As regards my conclusions, the reasons in support of them and my dissent are advanced as follows:

1. *The exceptions should be overruled.*—For purposes of this report the exceptions have been summarized to cover four broad categories of issues to show their effect on conclusions as to justness and reasonableness of rates. (The itemized exceptions of the parties are restated in Appendix B of this report.)

Summarized, the exceptions are:

a. The correctness of the conclusions that the differentials between the low and the high rates approved is a relevant issue, and each individual rate is just and reasonable. (Refers to exceptions in Appendix B: A. 1; C. 2, 3, 5; D. 1–3, 9, 21–23; E. 1; F. 6, 7.)

b. The correctness of the findings as to respondents' costs, the comparability of cost items, and of the conclusion resulting therefrom. (Refers to exceptions in Appendix B: A. 2; B. 1, 2; D. 4–8; F. 4, 5.)

c. The right of carriers to be protected from diversion of cargo or revenue caused by another carrier's rates. (Refers to exceptions in Appendix B: B. 7; C. 1, 4, 6; D. 10–14, 18–20; E. 2.)

d. The proven differences in service provided by the respondents and the right to reflect the differences in rates. (Refers to exceptions in Appendix B: B. 3–5; D. 15–17; E. 3; F. 2, 3.)

It was not possible to classify Hearing Counsel's exception dealing with TMT motives for its decision to reduce its rate (F. 1), but to the extent mental study was given to costs and the effect on the retention of traffic the exception is irrelevant to rate reasonableness. External or objective tests must be applied rather than motives or speculations about officers' judgment, so the exception will not be discussed.

Underlying the issues of differentials and cargo diversion (items a and c) are questions as to whether there are such things as fair shares of cargo to which carriers in various localities are entitled to as a matter of right, whether a rate differential is lawful which alters any such fair shares and prevents competition on fair terms, whether shippers are deprived of inland rate economies by an ocean rate differential, and whether ports or localities have rights to receive cargo naturally tributary or inherently belonging to them.

Instead of answering these issues, there seems to be disclosed a feeling there is something wrong about (1) reducing rates, as reflected in the statements that the Commission acted to "prevent a possible rate war" and that requests for rate reductions by shippers were accompanied by threats; and (2) leaving further ratemaking decisions to the respondents, as reflected in the statement of a need to fix minimum rates because "several of the carriers may not be operating at fully profitable levels." I do not believe these considerations are either policy tests of justness and reasonableness nor sources of authority for ordering enforced rates. The injection of these feelings of wrong also seems to imply there is something wrong with the private economic system and that competition is not to be trusted. The implication is that the respondents need a champion who will support giving "new carriers * * * a reasonable opportunity to develop their services." If there is to be any stability and opportunity for developments, a government agency must supply it, the reasoning seemingly asserts. No doubt our private decisionmaking system does not work perfectly, but without the free rate fluctuation that exists it would not work at all. It is control-prone interference that leads to worse distortions. Where, as here, respondents are shown to be compensated and most have some profit, a Commission order enforcing higher rates distorts by diminishing incentives to introduce competing technical innovations, and by denying the public economies in total transportation costs. I do not espouse the doctrine that there ought to be more protection of carriers through regulation of minimum rates in the context of the highly competitive situation shown by this record, and in the context of innovations in the methods used to transport the property involved in this record.

Whatever the feelings or doctrines, we have four specific issues and conclusions to support rulings and established tests to apply.

a. The rate differentials:

The stated purpose of this investigation is to determine whether there should be a differential between the heavy machinery rates of respondent carriers. The Examiner held differences have no independent significance as tests of justness and reasonableness and the issue involves only differences in rates for which justness and reasonableness is each independently determined. Differences are simply a byproduct of otherwise lawful rates from different ports or by carriers with different services. The argument against this position, apart from natural or inherent rights and cost and service justifications, seems to be that if the lower rate is successful in attracting or diverting heavy machinery away from others the test is proven and the difference must be unreasonable. There is no doubt on the facts of this record that cargo is diverted to SACAL and TMT which otherwise would go to the respondents operating out of New York if the differential were what the New York carriers want it to be. SACAL may equally divert road scrapers from TMT with a 28-cent-per-cubic-foot rate. Obviously a lower rate for adequate service is going to attract cargo. If proof of diversion or loss by one group of carriers or by a locality to another group and locality is all that is needed to prove unjust or unreasonable rates, this proceeding would end right here. The facts of diversion were proven. There is no supplementary proof that the rate-caused diversion will cause the elimination of competitive conditions or monopoly of all commodity transportation. The question is solely whether we must prevent the diversion of heavy machinery through rate orders.

Conversion of such facts and diversion into law violation is premised on a right to the preservation of the status quo in business relations which may not be disturbed by a lower rate causing too great a disparity with higher competing rates. There is no known right to repose in business relations nor has any authority been cited establishing the right. Established business relations are entitled, absent deceptive conduct, to no protection from diversion by the man with service at a lower rate, and this is what SACL and TMT are providing. There is no unfair conduct alleged other than that sought to be inferred from rate reduction. If the reductions are below remunerative levels to drive competing carriers out of business or otherwise injure them, section 19 of the Act provides a remedy. Facts showing cargo diversion or loss of revenue or what might have happened in 1963 under an equal rate structure rather than one with differentials do not automatically show invasion of rights creating unjust or unreasonable rates. The fallacy of the position is belief that economic adjustment must not be accompanied by loss to anyone.

Neither has authority been cited to support the argument on this record that the Commission must prescribe ocean rate relationships which preserve the integrity of origin territories naturally tributary to named places, as argued, and assuming we know what "integrity" and "naturally tributary" concepts involve. Likewise, no authority has been cited to support the argument that on comparable facts of this record rate differentials should be ordered enforced which produce a measure of competitive equality from origin territories. *Proportional Commodity Rates on Cigarettes and Tobacco* (6 FMB 48 (1960)) involved a tariff fixing the same tariff rates by one carrier from all ports in the United States to Puerto Rico, but subject to deductions from the rate depending on the origin of the commodities shipped. The deductions applied only to cigarettes and tobacco products and not to other commodities having the same shipping characteristics. The deductions had nothing to do with ocean transportation costs. The board correctly held that because the "proposed rates would establish varying charges for identical services" (p. 55) they were discriminatory. Here we have fixed rates and no deductions, depending on commodity origins and no varying charges, and a specialized property having different handling characteristics by being on wheels or rolling tracks. *City of Portland* v. *Pacific Westbound Conference* (4 FMB 664 (1955)) involved a conference tariff fixing the tariff rates on all commodities from all Pacific Coast ports to foreign destinations, but instead of a deduction the difference between lower inland transportation costs to one port and higher costs to the chosen port was refunded to the shipper or "absorbed" by the carrier. The investigation was based on section 15 of the Act and section 8 of the Merchant Marine Act, 1920. No such choices, computations, refunds, and statutory provisions are involved here.

City of Mobile v. *Baltimore Insular Line, Inc.* (2 USMC 474 (1941)) is not authority because the ocean rates established by several defendant carriers serving many ports were not a fixed amount but were adjusted so that the lowest combination via any United States port served by the several carriers will apply via any other port from which they maintain service. Deductions on specified commodities were published independently. The case involved equalization issues. SACL and TMT by comparison make no distinction in rates by reference to inland points of origin or destination, have fixed rates subject to no adjustment, and there is no equalization. Any shipper presenting property classified in the tariff is entitled to the stated rate, with no adjustment.

New York v. *United States* (331 U.S. 284 (1947)) is not authority because it dealt with a "class-freight-rate structure" of one region against another involving many of the country's largest railroads. The decision originated with an ICC investigation begun in 1939 inquiring into the lawfulness of "most of the then existing ratemaking standards for interstate railroad class freight rates in the United States." The court held that once an unjust or unreasonable or unjustly discriminatory classification was found favoring "Official Territory" over other territories the ICC might then determine and prescribe what classification would be just and fair. The economic development of entire regions was shown to be at stake in the proceeding. In this vast interterritorial rate case it was not possible for the ICC to deal with the evidence with the precision possible here.

The essential premise of an unreasonable or unjust rate is at issue and not proven in our proceeding, and the facts are not comparable because we are concerned only with one rate by two competing carriers from one or two ports and a single classification of property having the same special mobility characteristics. Other cases could be similarly distinguished.

No authoritative interpretation of justness and reasonableness of rates has imposed the qualification that rates inducing changed choices by shippers or carriers and changed ports to be used because of advantages to shippers are converted from just to unjust or reasonable to unreasonable. Refunds, adjustments, and other practices may be unlawful acts, but the problem at this point is solely the reasonableness of a rate by virtue of its amount alone. The Examiner was correct in deciding that the issue of rate differentials is incidental and other issues such as cost of service and other effects of the rate provide the tests as to justness and reasonableness. Once lawfulness is found rate by rate, there is no need for further inquiry.

The precedents equally stand for the proposition, though not stated, that a carrier may not control traffic from a port it does not serve. Such control enforced through rate differentials is what the North Atlantic carriers seek to accomplish. The precedents seen in this light cancel out their arguments.

b. The cost findings:

The correctness of the findings as to carriers' costs and the validity of comparisons has been challenged. If the diversionary effect of rates is rejected as a test, the rates may still be unreasonable if they do not supply enough revenue to meet costs of operation. However, the issue of cost justification fails because the rate of each respondent either was found compensatory even after all adjustments or was not found conclusively noncompensatory as a result of the majority's statement that several carriers "may" not be operating at fully profitable levels and there was no evidence as to Motorships.

The cost data of SACL and TMT were not directly comparable because of the differences between self-propelled and tug and barge operations. Nevertheless, TMT's audited calendar year 1963 operations assembled in the same format as a SACL report permitted some comparison of overall operational data. The staff advised, and I do not question, that the 37-cent-per-cubic-foot rate was compensatory of out-of-pocket or direct costs of operation based largely on the fact that the heavy equipment can be expeditiously loaded and unloaded. Sea-Land's data could not be related to the reports required by our General Order No. 11, but the company had not carried any heavy equipment described in the record and submitted no data as to what its costs would be. Its data accordingly would not affect the outcome of this case as far as other respondents are concerned. AUT showed a loss for the year 1963 and at existing rates could not cover fully distributed costs under its methods of operation. The Examiner decided no further inquiry into differentials is needed if a rate is cost-justified. Several exceptions point out serious deficiencies and inaccuracies in the Examiner's choice of figures and calculations. The fiscal data was generally so meager, so lacking in comparability, and at this point about 3 years behind the present situation as to be of little use. Except for AUT and SACL, no data was furnished permitting allocation of revenue and expense to the services under review. Use of nonrecord information through resort to policy and generalized economic considerations for a reasoned decision is an alternative which I have taken in this report.

The underlying issues in regard to the cost figures are the same as with respect to rate differentials, namely, that because of certain rights to the preservation of an existing status in business relations operating costs are not controlling in this proceeding. Cost considerations are subordinate to superior statutory requirements. The issue as to these rights is the next one.

c. The right to protection from cargo or revenue diversion:

The right to be protected from diversion of cargo or revenue caused by a carrier's rates does not exist as a test as noted under topic a, and the deficient test is not supplied by this record's cost figures and noted in topic b. The right to protection is next sought by creating geographic areas called "naturally tributary"—an expression derived from section 8 of the Merchant Marine Act, 1920, referring to the "natural direction of the flow of commerce" and to "freight which would naturally pass through" ports—to the ports served by the aggrieved carriers and by referring to carriers as being "geographically entitled" to certain cargoes, and by creating a class of cargo inherently and geographically belonging to a port.

If diversion by rates and cost-supported operations fail as tests, then rights to have cargo come to certain ports are tests, according to the argument. Naturally tributary applies to the land side of a voyage, not to the ocean. It is thought to be wrong to let cargo go somewhere else "without sufficient transportation justifications." The rights are based on the claims of lower inland transportation rates to a port. Emphasis on inland factors requires disregard of a shorter water journey from Florida to Puerto Rico and lower rates which ought to have an equal claim in our reasonings. As far as Puerto Rico is concerned, "naturally tributary" areas are the seas between Jacksonville and Miami and Puerto Rico ports. It all depends on where you start measuring natural flows. The two claims cancel out each other. Other tests must be used. Cargo undoubtedly goes elsewhere if any economic advantage of lower inland transportation costs are lost as the result of enforced use of higher ocean transportation rates from another port to the shipper's ultimate destination. Traffic is always being "diverted" somewhere else as shippers constantly seek more advantageous rates. This is a normal process, not to be converted into an unlawful one. The difficulty with the claims is that they require disregard of rights of shippers to consider their entire transportation costs in making choices of how to ship and of rights of ports to be the origin of lower cost ocean transportation. Apparently, ports may only be the destination of lower cost inland transportation and have no other rights if the claims are valid, but the effect on shippers from other localities and other carriers must be considered too. The record showed that shippers are concerned with their total transportation costs and with the particular type of service offered. Localities are concerned with developing as large a use of their ports as possible.

We ought not to penalize Jacksonville or Miami to avoid penalizing New York, if the former have something better to offer. Carriers are concerned with receiving the full benefit of innovating efforts and economies they are able to offer shippers. We ought not to penalize SACL and TMT to avoid penalizing AUT, Motorships, Sea-Land, or Seatrain. Everyone can claim some kind of "inherent" advantage offsetting inland transportation costs. I would reject any principle which has the effect of giving superior rights to the use of carriers at ports where the inland transportation costs are less than to any other port, regardless of ocean freight costs. Total costs and conveniences to shippers are also transportation justifications.

A further difficulty with the tributary-territory-rights arguments is that acknowledgment of merit compels an impossible solution. We should consider ourselves totally ill equipped to draw the necessary lines on a map to fix the places where any law of nature implied by naturally tributary characteristics dictates shipments should not be diverted from one port or carrier rather than another because of inland rates and should consider shippers are much better equipped to make the choices. Apart from any supposed natural law, we are equally ill equipped to study constantly shifting inland transportation rates from various inland points to ports.

Neither carriers nor localities have any preordained right by virtue of such a principle to have cargo come to them and nowhere else based on inland costs or any other less tangible factor. Shipper choices and port and carrier benefits depend on savings to shippers, not on rights to business protected against diversion when someone has something better to offer.

d. The differences in the respondents' services:

The differences in service provided by the carriers show that two of them, from the shippers' points of view, have something better to offer for transporting heavy machinery, and of these one has a slower tug and barge service which is no disadvantage to the principal shipper. The most significant single fact in this record is the difference in the type of ships used by TMT and to some extent SACL in comparison with the other respondents. Both roll the vehicles on and off, except when SACL uses the top deck a mobile shore crane is used. Both are innovators using new methods. The roll-on/roll-off method and the tug-and-barge combination used by TMT offer heavy machinery shippers a variety of economies and conveniences shown in the record.

The road scrapers transported were permitted by the shipper to be rolled on and off in a unit only. When lifted on and off, road scrapers were disassembled and crated at a greatly increased handling cost. Ignoring these economies and conveniences causes disregard of applicable principles which will only lead to misallocation of traffic among carriers suited to handle particular property and to higher than necessary costs of transportation as evidenced by the ordered increases above compensatory levels. Promotion of different transportation methods as a worthwhile objective of government regulatory agency orders may be an arguable proposition, but economy and cheapness of service is not arguable. Nevertheless, economy and cheap service has been treated as though it were arguable; otherwise, a redress in the form of higher fixed rates is not needed to prevent the innovator from diverting too much heavy machinery to himself. What is accomplished by intrusion is the imposition of penalties for not using self-propelled break-bulk carriers for heavy machinery on wheels or tracks. Geography and enforced rate differentials replace technical improvement as an influence on shipper choices. There is nothing just or reasonable in a rate that substitutes geography for technical characteristics and economies in the service.

Reference is made in argument to the protection of TMT's "monopoly" on roadmaking machinery accorded by the Examiner and to the consideration that tug and barge service in the merchant marine is not exclusive. Of course TMT is not entitled to protection, nor is its service exclusive. Neither are other carriers entitled to protection. The achievement of any presently exclusive role is temporary. Its permanent role was far from proven on this record and was only assumed from an ability to charge low rates on one class of property. Even if the exclusive role continues, one need not recoil from the prospect that tug and barge service might well achieve an exclusive place if it pays for itself under competitive conditions by providing service to shippers and if no one else wants to provide the service. Regulation is not required to preserve in the name of lawful rates anyone's vested rights to continue as he has traditionally after his economic justification disappears as a result of technical innovation in the art of transportation.

SACL to some extent and TMT justify lower rates made possible by technical innovation, and SACL refers to TMT as having "inferior" service, claimed to be TMT's by choice. There is no need to argue superiority versus inferiority, or whose choice is involved. TMT's choice of any "self-imposed" inferiority is not significant. The significant fact is what exists, and, assuming no malpractices, regardless of how it got there. The significant choice is the shipper's choice to use the service in spite of its quality. In a free economy and in an unfranchised trade it is the shipper's choice that dictates use of what he finds, and it is the carrier's choice that decides on how good or bad his service is to be and the price he will assign to it. For such reasons it is believed to be poor policy to intrude Commission judgments which have the effect of assuring carriers business they can't get without competitive rates.

2. *There is no authority to order minimum rates for AUT, Motorships, or Seatrain.*—The proposed rates of AUT, Motorships, and Seatrain "have not been shown to be unjust or unreasonable and are lawful", according to the majority's report. Section 4 of the Intercoastal Act provides that "whenever the Commission finds that any rate * * * charged * * * is unjust or unreasonable, it may determine, prescribe and order enforced a just and reasonable * * * minimum rate * * *". The word "whenever" means that authority may be exercised to order enforced a minimum rate when and after the preliminary finding of an unjust or unreasonable rate charged is made, and not before then. The finding has not been made, but expressly contradicted. Therefore, the order enforcing a minimum rate for AUT, Motorships, and Seatrain is not authorized. Sea-Land did not furnish any relevant information on which a decision might be based. Sea-Land's rate was suspended and under section 3 of the Intercoastal Act a carrier whose rate is suspended has the "burden of proof to show that the rate * * * is just and reasonable * * *". Sea-Land had an obligation to furnish information to meet the burden of proof, and its failure to furnish is equivalent to a failure to prove justness and reasonableness. Unjustness and unreasonableness are established solely by the act of suspension, followed by a failure to meet the burden of proof required by law.

Accordingly, AUT, Motorships, and Seatrain have the right to change the established minimum rate of 50 cents per cubic foot, including arrimo, in spite of the Commission's order.

3. *The rates of SACL, and TMT are not unjust and unreasonable.*—Having found the rates of SACL and TMT unjust and unreasonable, the statutory formula for ordering enforced a minimum rate has been observed in the majority's report. My proposed rulings on the exceptions herein establish, to the contrary, that the rates are just and reasonable for the reasons given and that the formula prerequisites do not exist.

To meet the requirements of the formula for the SACL and TMT rates without using cost or rate-of-return tests (no balance sheets nor allocated income and expense accounts were furnished to permit findings on this subject) of justness and reasonableness, other actions and results have been used. The rates are thought to have unlawful consequences.

The majority avoids the need to conform with the usual rate-reasonableness tests by finding the SACL and TMT rates result in a violation of section 16 of the Act because the rates are unreasonably prejudicial to North Atlantic ports. The prejudice is said to be proven by the fact of diversion of what belongs to others. Shipper decisions to use otherwise just and reasonable rates in effect cause SACL and TMT unreasonably to prejudice a port not served. Prejudice may be caused by a diversion of traffic, but the prejudice does not become unreasonable if the rates are otherwise reasonable; and the fact of diversion alone, a normal economic consequence of lower rates, does not qualify the prejudice as "unreasonable" or "undue" either.

Two added reasons regarding subsidization for Puerto Ricans (by high heavy machinery rates) of more essential goods and the value of the service to shippers are adduced. Heavy machinery is now added to automobiles as having economic responsibilities beyond the cost of carriage. (See Dockets Nos. 1145 and 1167.) The argument applicable to automobiles is equally applicable and was answered in general in my dissent in Dockets Nos. 1145 and 1167. A further negativing consideration here is that TMT for 1963 carried 13,692.7 payable tons (exhibit 20); AUT carried 681 measurement tons (exhibit11); and SACL carried 4,603 measurement tons of heavy machinery (exhibit 28). AUT carried 5 units in the first 3 months of 1965. Sea-Land and Seatrain carried little if any heavy machinery in 1963. TMT carries little general cargo to benefit from higher rates, and the other respondents carry small amounts of heavy equipment to provide any great benefit to general cargo. The economic responsibility argument has little practical effect in view of this record.

The value of the service may well be worth a lot more and in the public interest to pay, but under the Administrative Procedure Act evidence and reasons connecting the evidence of value with the conclusion of public interest in payment must be, but has not been, supplied. The argument is not conclusive.

To sum up:

If there is any single point of difference causing me to vote one way and the majority the other way, it is the one simple difference of operations between the New York and the Florida respondents. As far as the majority is concerned, the difference has no effect and all ships are to be treated alike; ocean transportation rates are to be the same no matter what differences in operations are disclosed by the facts. Ignoring such facts has significant consequences both on the decision and on future conditions in the transportation industry at variance with expressed national policy.

The consequence to the decision is that rates ordered enforced by Government agency are substituted for rates chosen by private carriers. It is hoped I have shown Government agency rates are wrong as a practical matter and therefore unjust and unreasonable, contrary to a policy of heavier reliance on competition in transportation, and contrary to authority with regard to three respondents. Economic and operational difficulties develop when regulatory agencies play guessing games by trying to steer these respondents through the workings of shipper choices and carrier services by making decisions for them when no threat to the workings of competition is shown and the carrier-chosen rates are compensatory. As bad off as these respondents may be thought to be in not operating at "fully profitable" levels, they could hardly do worse than the misallocation of traffic that will occur by the ordering of minimum rates. Profitability levels will simply shift among the carriers. At least before the Government order, respondents had themselves to blame for anything that might happen. With the meager financial data in this record, it takes more courage than I have to assume responsibility for such a serious business decision when the real parties in interest—shippers and carriers—have already done the job on the basis of mutual self-interest.

The consequences to the future of sea transportation are distortions preventing realization of the policy that users of transport facilities should be provided with incentives to use whatever form of transportation provides them with the service they desire at the lowest total cost. If we are to provide incentives to pattern rate structures more closely on the cost of providing services, and to encourage reliance on competition—two keystones to regulating transportation under present national policies—we should avoid ratefixing orders. When carriers are prevented by Commission orders from reducing rates on special categories of property made possible by special ship design and method of handling property, there can be no effective competition between the different types of carriers. Without such competition and rates that reflect the differences in costs, greater use of a desired type of transportation service at lowest cost, more efficiency and greater competition will remain elusive goals. This is commonsense, and no legislation dealing with "modes" of transportation is needed for validation.

If there is overtonnaging and if this is bad, the best thing the Commission can do is create conditions which will correct the situation, not perpetuate it by ordering service at higher rates than rates at which all can get along with by a little redistribution of cargo shares. Someone is going to have to be hurt to the point of seeing his self-interest lies in either getting rid of tonnage or in using more efficient competitive types of tonnage. Fixing rates only postpones the inevitable decision. We may not make service decisions and order the tonnage out of existence or replaced, but we can do the next best thing, which is to create a condition leading to the same decision as soon as possible by a carrier having the most to gain by more efficient operations. Shipper choice based on necessity rather than our courage will be the best adjudicator of economic issues where competition operates.

The underlying fallacy is that adjustments must not be accompanied by loss of fully profitable levels by anyone, and we have some kind of protective function to prevent this result, based on authority to prevent unfair rates or unfair preference and prejudice. The fallacy prevents adjustment, which in my opinion is a far greater corruption of fairness than any sacrifice of profitable levels caused by a need to adjust.

In these summary remarks a qualification is made as to situations where competition exists. Regulation is a proper objective of Commission orders when private action endangers the unrestrained flow of commerce under competitive conditions. At this point there is a detriment to commerce. The danger, however, is not diminished when we establish rates ourselves. The danger remains the same with the added element of government intrusion without control over cost or service. The action becomes abusive as well as useless when we exceed our authority as far as Congressional directions are concerned. Statutes confine our authority to orders *after* the danger point has been reached. Arguments that this is too late must be addressed to Congress.

It is concluded that the rates filed for heavy machinery by all the respondents except Sea-Land should be found to be just, reasonable, and lawful, and the proceeding should be dismissed.

Commissioner GEORGE H. HEARN, dissenting:

While I concur in the majority's view that the 28 cents rate on road scrapers proposed by both SACAL and TMT is not "unjust or unreasonable" and is, therefore, lawful, I cannot agree with the majority respecting their conclusions as to the rates on heavy machinery. By the fixing of minimum or "floor" rates, the majority, in my view, have evinced here as they have in *Reduced Rates on Autos—North Atlantic Coast to Puerto Rico* (8 FMC 404 (1965) (hereafter Docket Nos. 1145 and 1167)), an unwarranted concern that carriers in this trade may not be earning profits as great as they might.

I interpret this record as did the examiner, with the exception that I would permit Sea-Land to move machinery in the trade at its 43 cents rate per cubic foot, which I shall refer to later.

The majority opinion notes that the trade is overtonnaged I submit that rates should not be pegged at minimum levels to protect uneconomic carriers. To do so does no real service to the public—shipper, consignee, or economical carrier—and flies in the teeth of one of the main goals of Federal regulatory agencies, i.e., "speeding the response to new technical opportunities." [1] Minimum rates, in overtonnaged trades, have the effect of granting windfalls to the economic operators and subsidies to the inefficient operators paid, unnecessarily by the shipping public. As the examiner noted, there is a difference between a rate war and healthy competition; and the Commission should not inhibit the competitive practice of reducing rates where such rates are just and reasonable.

I believe that in the instant case, the majority have given mere lip-service to their avowed support of "Operation Bootstrap" in failing to distinguish between automobiles and machinery. [2] While it may be argued that automobiles are not of vital importance to the economic growth of the Commonwealth, it hardly can be said that machinery

[1] The Economic Report of the President to the Congress, January 1966, at p. 126.

[2] In Nos. 1145 and 1167, the majority, cognizant of Puerto Rico's "Operation Bootstrap," stated that "Puerto Rico must have ocean rates maintained at the lowest reasonable levels," and seemed to justify higher than compensatory rates on some commodities, to support nonfully compensatory rates on "beans, potatoes, and onions * * *." I assume that the majority's reason in the instant case for fixing rates at 50 cents for the North Atlantic carriers and 48 cents for the South Atlantic carriers, reflects its earlier philosophy of aiding "Operation Bootstrap." On the very date that the majority opinion in this case was served, the majority permitted American Union Transport, a respondent here, to increase its southbound rate on beans by an astounding 31 percent. Moreover, the bean movement for 1964, represented AUT's fourth heaviest moving commodity and its sixth most important revenue producer.

and tractors fall into the category of luxuries. Machinery and tractors, indeed, are capital items; and low rates on such items, particularly where they are shown to be compensatory, accord with the philosophy which the majority enunciated in Nos. 1145 and 1167 and reiterate here: that the rates on some items should be sufficiently high as to support some share of the costs of the movement of goods on the ground that "such ratemaking practices are necessary for the overall growth and health of the economy of Puerto Rico." The requirement that a consignee of capital goods be required to import them at several cents per cubic foot more than the carrier is willing to carry them for, especially when the lower rates are fully compensatory, in my opinion, is inimical to the goals of "Operation Bootstrap." Further, the absence of shippers testifying in favor of the lower rates, in my opinion, is inconsequential. It should be presumed that shippers favor lower rates and superior service. In any event, the obligation to determine the lawfulness of rates rests upon the Commission, the statutory guardian of the public interest, and not on the diligence of interested shippers.

With regard to the machinery rates of the two South Atlantic carriers, SACAL and TMT, the majority found that the 37-cent rate was compensatory. It is queer, indeed, to order a compensatory rate of 37 cents raised to 48 cents because they offer a "service of great value to the shipper for which the shipper could and would pay higher rates." I cannot associate myself with a rate philosophy which measures "reasonableness" by what the traffic will bear. I do not believe, as I stated in my dissent in Dockets 1145 and 1167, that TMT is entitled to any rate differential because of its less attractive service. On this record, particularly with respect to the commodities under consideration, it does not appear that TMT's service is an inferior one. Transit time does not appear to be a controlling factor; and Caterpillar Americanus, the source of almost 40 percent of TMT's tractor and heavy machinery business, finds TMT's roll-on/roll-off service peculiarly suited for its shipments.

In any event where TMT's rate is compensatory, it should be entitled to offer that rate. As some justification of its order that these rates be raised, the majority states that "as there is no showing of the likelihood of the generation of additional cargo at such reduced rates, the reduction would result only in the loss of revenue * * *." In my view the standard of generating additional cargo for determining the legality of a compensatory rate is one which militates against the public interest. It is certainly one which gives scant protection to shipper, consignor, or consumer, and is hardly attuned to our continuing efforts to stifle inflationary pressures.

Regarding the machinery rates of the North Atlantic carriers, Sea-Land, AUT, Seatrain, and Motorships, only Sea-Land has proposed a 43-cent rate while the others defended a 50-cent rate. While I agree that the record does not show the 50-cent rate to be unjust or unreasonable, and therefore lawful, I would not fix the rate at that figure, but would permit them to meet, if they chose, Sea-Land's competition at the 43-cent rate.

The record, I submit, permits the Commission to find Sea-Land's 43-cent rate on machinery and tractors as just and reasonable. The record, of course, reflects that Sea-Land has not carried any machinery during the period of record. But the record does establish that Sea-Land maintain a Carcarrier Division, which operates the SS *Detroit.* This vessel has been especially converted to handle vehicles and machinery, and it can accommodate a 25-ton machine as readily as it can a 2-ton automobile. The record further reflects that the Carcarrier Division has operated at a profit, and that on 80 percent of its southbound voyages the *Detroit* has averaged 35 percent free space. The nature of Sea-Land's operation and the evidence of record, I believe, support the conclusion that its costs of loading, carrying, and unloading machinery would not vary, materially, from the costs attendant upon its automobile and truck business. The majority, in Dockets No. 1145 and 1167, authorized Sea-Land to carry automobiles at a 39-cent rate. The similarity of commodities (autos and machinery), the peculiarities of Sea-Land operation, the fact that Sea-Land's Carcarrier Divison is profitable, and the amount of free space the *Detroit* has experienced, all lead me to conclude that Sea-Land has shown that its all inclusive 43-cent rate is just and reasonable and therefore lawful.

APPENDIX A

Fiscal Data Supplied

(*Commissioner* Patterson's dissent)

Sea-Land furnished a profit-and-loss statement for the year ended December 28, 1963, for Sea-Land Service, Inc. (exhibit 7) and for its Carcarrier Division (exhibit 8). AUT furnished a Schedule 3002 Vessel Operating Statement for the period 1963 for New York-Puerto Rico and New York/Puerto Rico/Bermuda Services 1963, covering 45 voyages indicating only "direct profit from vessel operations" (exhibit 9), supplemented by allocated administrative and general expenses, reserve for depreciation, interest, inactive vessel expense and costs of cargo figures.

TMT and subsidiaries furnished a Schedule 3002 Vessel Operating Statement for the period January 1, 1963, through December 31, 1963, covering 76 voyages (exhibit 18), supplemented by a statement of costs per measurement ton on earthmoving and allied equipment (exhibit 21).

SACL furnished a Schedule 3002 Vessel Operating Statement for the period ending December 31, 1963 (exhibit 41, p. 2), covering 71 voyages supplemented by individual summaries of expenses for individual ships for specified voyages (exhibit 42).

Seatrain furnished no comparable fiscal data. None of the respondents furnished balance sheets, nor allocated figures to the property covered by the tariff rates at issue.

APPENDIX B

Exceptions of the Parties

(*Commissioner* Patterson's dissent)

The exceptions were as follows:*

A. TMT excepts:

1. To the finding that the SACL 28-cent-per-cubic-foot-rate for transporting road scrapers has not been shown to be unjust or unreasonable or unlawful.
2. To the finding that the cost to SACL of transporting machinery is 40 cents per cubic foot.

B. SACL excepts:

1. To the finding as to TMT's costs of handling heavy machinery and the average fully distributed costs (includes Exceptions 1, 2, and 4).
2. To the findings as to SACL's costs (Exception 3).

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*The statements paraphrase the parties own exceptions, and to the extent of any variance thought to affect anyone's rights, reference should be to the parties' own words.

3. To the failure to find that 46.4 percent of TMT's voyages were with low-horsepower tugs causing irregularity of service and adequately powered tugs will diminish the irregularity (includes Exceptions 5 and 6).

4. To the failure to find TMT improved its Miami-San Juan competitive position by direct service (Exception 7).

5. To the finding rough-weather delays are the cause of any significant inferiority in TMT service (Exception 8).

6. To the failure to find TMT's inferior service is caused by matters within its control and is not a competitive disadvantage (Exception 9).

7. To the failure to give effect to the Merchant Marine Act, 1920, transportation policy in concluding that naturally tributary rights are subservient to costs.

C. Port of New York Authority excepts:

1. To the Examiner's application of standards for intermodal ratemaking under the Interstate Commerce Act and to their erroneous application.

2. To the conclusion that the issue of rate differentials is subservient to other (cost) issues and has been avoided and absurd results reached.

3. To the findings and conclusions regarding the need for a rate differential to offset TMT's inferior service because it is contrary to the evidence and is not shown to be necessary.

4. To the refusal to consider the diversion of traffic from origins naturally tributary to New York in determining whether a differential is justified.

5. To the finding TMT's rate of 37 cents per cubic foot is just and reasonable and not unlawful.

6. To the conclusion that no unjust, undue, or unreasonable prejudice has been shown against New York.

D. AUT presents 23 exceptions to failures to make findings with regard to rates on roadmaking machinery and tractors:

1. A 13-cent-per-cubic-foot differential between AUT and TMT is unjust and unreasonable.

2. A 7-cent-per-cubic-foot differential between AUT and TMT is just and reasonable.

3. A 50-cent-per-cubic-foot rate between the Atlantic Coast and Puerto Rico would be just and reasonable.

4. AUT's costs for handling general cargo were something other than $21.34 per ton.

5. Costs of general cargo handling are not comparable with costs for handling road machinery.

6. AUT's fully distributed costs for handling road machinery were $16.84 per ton or 42 cents per cubic foot.

7. Fully distributed costs depend on the number of tons carried and number of tons attracted by a differentially lower rate.

8. AUT may establish a rate above out-of-pocket cost but below fully distributed cost.

9. TMT's rate may be condemned for diverting cargo even if it is compensatory.

10. More than $23,000 and approximately $73,000 in revenue is diverted from the Port of New York by virtue of TMT's rates.

11. The revenue diversion harms New York.

12. TMT's rate is unlawful in that it diverts cargo from New York.

13. Any device which divert's "naturally tributary" cargo is unlawful.

14. Compensatory rates may be changed by the Commission if they divert cargo which is "naturally tributary".

15. TMT has no service disability.

16. The reason that the largest shipper of roadmaking machinery (Caterpillar) would continue to ship via TMT with equal rates is not in appreciation for TMT's pioneering service.

17. The reason the largest shipper of road machinery would ship via TMT is that the roll-on/roll-off service and transit time is not a disability.

18. If rates in 1963 had been equal among all respondents, three-fourths of cargo would have been carried by TMT and SACL and half of such cargo by TMT alone.

19. Equal rates would assure to each coast cargo inherently belonging to such coast and a fair proportion of the entire traffic.

20. Under equal rates carriers would have equal opportunity to compete.

21. A rate differential unfairly discriminates against northern shippers and prefers southern competitors.

22. Differential rates will cause instability in trade.

23 Differential has caused TMT and SACL to carry 95.4 percent of cargoes although without differential 25 percent would go via North Atlantic carriers.

E. Sea-Land states that the Examiner erred:

1. In finding Sea-Land failed to meet its burden of proof and in concluding the 41-cent-per-cubic-foot rate should be canceled.

2. In concluding the naturally tributary-rights issue is subservient to competitive cost factors.

3. In concluding TMT's service is inferior and entitled to a differential under its competitors.

F. Hearing Counsel states that the Examiner erred:

1. In failing to find TMT reduced its rate without considering whether it might retain traffic without the reduction and was motivated by a desire to retain a differential.

2. In finding transit time is a major factor in shippers' routing decisions.

3. In findings related to the acquisition of an additional tugboat and barge.

4. In using average fully distributed cost figures and in comparing unlike factors.

5. In concluding TMT was the low-cost operator because of certain heavy lift charges by other carriers.

6. In not concluding that no shipper would be burdened by establishing a minimum rate at 48 cents per cubic foot.

7. In concluding TMT's rate is not unnecessarily wasteful of revenue.

FEDERAL MARITIME COMMISSION

Docket No. 1187

REDUCED RATES ON MACHINERY AND TRACTORS FROM UNITED STATES ATLANTIC PORTS TO PORTS IN PUERTO RICO

Docket No. 1187 (Sub. 1)

FURTHER REDUCTION IN RATES ON MACHINERY AND TRACTORS FROM UNITED STATES PORTS TO PORTS IN PUERTO RICO

ORDER

These proceedings 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 heavy machinery of respondent carriers in the trades from United States Atlantic ports 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:

Therefore, it is ordered that:

(1) A minimum rate of 50 cents inclusive of arrimo is established for the North Atlantic carrier respondents. In lieu of the above, those carriers may publish a 48-cent rate exclusive of arrimo;

(2) The minimum rates for TMT and SACAL operating from Florida ports shall be 48 cents, not subject to additional charges for arrimo, for heavy machinery except road scrapers.

(3) TMT and SACAL 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.

[SEAL]

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1153

TRUCK AND LIGHTER LOADING AND UNLOADING PRACTICES AT NEW YORK HARBOR

Decided May 12, 1966

Respondents' tariff provisions imposing direct transfer loading and unloading charges on truckers and lightermen found to be contrary to section 17 of the Shipping Act, 1916.

Failure of respondents to establish and adhere to reasonable lighter and truck detention rules found to be in violation of section 16 First and an unreasonable practice under section 17 of the Shipping Act, 1916.

Failure of respondents to include in their tariff No. 2 rates assessed against lighters loaded and unloaded to piers found to be an unreasonable practice under section 17 of the Shipping Act, 1916.

Certain rules and regulations contained in respondents' tariffs No. 2 and No. 6 found to be in violation of section 16 First and contrary to section 17 of the Shipping Act, 1916.

Mark P. Schlefer, *John Cunningham*, *Richard J. Gage* and *Robert J. Nolan* for respondents.

Herbert Burstein, *Samuel B. Zinder*, and *Arthur Liberstein* for intervener Empire State Highway Transportation Association, Inc.

Arthur Liberstein and *Charles Landesman* for intervener Wm. Spencer & Son Corporation.

Christopher E. Heckman for interveners Harbor Carriers of the Port of New York, James Hughes, Inc., Henry Gillen Sons' Lighterage, Inc., McAllister Lighterage Line, Inc., and Petterson Lighterage & Towing Corporation.

Thomas M. Knebel for intervener Middle Atlantic Conference.

James M. Henderson, *Douglas W. Binns*, and *Jacob P. Billig* for interveners Port of New York Authority and Export Packers Association of New York, Inc.

D. J. Speert for intervener Brooklyn Chamber of Commerce.

Leo A. Larkin, and *Samuel Mandell* for intervener The City of New York.

Thomas R. Matias, *David N. Nissenberg*, *Robert J. Blackwell*, *Donald J. Brunner* and *Roger A. McShea, III*, as Hearing Counsel.

REPORT

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

This is an investigation instituted on our own motion, into certain practices of the New York Terminal Conference (respondent), in regard to the loading and unloading services its members provide for trucks and lighters at the various terminals in the port of New York.

All interested parties have been heard and the proceeding is now before us upon exceptions to the Initial Decision of Examiner A. L. Jordan.

The parties are identified in the appearances.

FACTS

The New York Terminal Conference is an association of 22 steamship companies and terminal operators (all named individual respondents in this proceeding) who are engaged in or concerned with the loading and unloading of waterborne freight onto or from trucks and lighters at marine terminals in the port of Greater New York and vicinity.

The Conference operates under approved FMC Agreement No. 8005 which in Article 1 provides:

> That they [respondents] shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to the services of loading and unloading of waterborne freight onto and from trucks, lighters and barges, and the service of storage of waterborne import freight on the pier (including the fixing of free time period), as aforesaid; . . . .

Respondents have filed tariffs with the Commission relating to lighter and truck loading and unloading. This proceeding is concerned with whether the terms and conditions of these tariffs meet the requirements of the agreement itself and whether they are valid under the Shipping Act, 1916.

Lighters: There is a substantial amount of lighter traffic at the port of New York. Lighters are worked in two basic ways—to the pier and over-the-side. When worked to the pier, cargo is loaded to or unloaded from [1] the lighter with the pier as the place of immediate

[1] Hereafter "load," "loading" or "loaded" includes "unload," "unloading" and "unloaded" unless the context requires otherwise.

origin or destination of cargo. Over-the-side or direct transfer refers to the practice of mooring the lighter alongside the vessel with cargo passing directly between the two and never coming in contact with the pier.

Respondents' Lighterage Tariff No. 2 contains the rates, rules, and regulations applicable to loading lighters and barges alongside vessels moored at piers operated by respondents. This tariff covers only the above-mentioned over-the-side type of service and does not cover service to the pier. Respondents have no tariff for loading to the pier, and they rarely, provide loading services at the pier. Usually, when a lighter is to be worked at the pier, the service is performed by Wm. Spencer & Son (Spencer). Spencer is not a terminal operator, but is a stevedoring company specializing in handling lighter freight in New York Harbor. The vast bulk of the lighter-pier work in New York Harbor is done through Spencer. Spencer does not work under a tariff, all rates being negotiated.

The lighterman may not, on arrival at the pier, demand to be worked in a certain manner. The terminal operator decides for his own convenience and necessities whether a particular shipment will be handled from the pier or over the side.

The lighters' access to the piers is controlled by the steamship companies which issue permits giving a range of two dates within which the lighters may arrive at the piers. This permit does not say whether the cargo will be handled over-the-side or to the pier because the order in which parcels of cargo are placed aboard the ship depends upon the time of arrival of the cargo at the terminal and the place of the particular parcel's port of discharge on the ship's itinerary. It has to be dealt with from time to time based on the ability of the vessel to receive the cargo into her holds. Under the permit issued by the ship, the terminal operator has complete control of the specific arrival time of the lighter and the actual time of loading.

Sometimes the terminal operator, for his own convenience, works a lighter over-the-side at night. This practice requires that lightermen pay overtime wages to the lighter captain and the lighterman's foreman who checks the cargo count with the terminal's checker. When a lighter is delayed for an indeterminable period, and the lighterman has to hire a lighter for another job in the place of a delayed one, reasonable rates are shown to be $80 per day each for scows and covered barges and $90 per day for stick lighters.

The size of the average lighter's cargo deck is 85–90 feet long by 30–35 feet wide. When working cargo over-the-side, if the terminal operator places the lighter alongside the ship's hatch so that the ship's hook lands in the center of the lighter's length, the drafts of cargo need be moved on the lighter's deck not more than 45 feet, and as the loading progresses that distance is shortened. Likewise, in an unloading process the distance cargo is moved grows from a few inches to not more than 45 feet. If, to speed its operations, the terminal operator decides to work cargo from two lighters into the same hatch, the ship's hook may fall at one end of each lighter. In that event, the greatest distance to be traveled on the lighter's deck is 90 feet with shortening of the distance in the same proportion as described in the first mentioned example.

When the terminal operator elects to receive the lighter's cargo on the pier, delivery is seldom accomplished at the point where it may be lifted directly from the pier into the ship's hold. In such cases, therefore, after discharge to the pier the cargo must be moved from the point of rest on the pier to a point of rest on the ship's hold into which it is to be lifted.

Respondent's Lighterage Tariff No. 2, which provides the rates applicable to direct or over-the-side transfer, also contains the following provisions:

(a) The service of loading lighters shall include stowage of cargo aboard lighters in a safe, reasonably efficient manner consistent with the custom and practice in the port of New York.

(b) The service of unloading lighters shall include whatever movement is necessary aboard the lighter to make cargo accessible to the ocean vessel's loading gear, and the affixing of cargo to said loading gear.

(c) The terminal operator shall supply all labor and equipment necessary to properly load or unload the lighter.

(d) Nothing contained herein shall be construed as affecting whatever rights lighter operators have with regard to collection of lighterage detention charges from steamship companies.

(e) There shall be no charge for the loading or unloading of single pieces of cargo weighing 6 tons to 35 tons, inclusive, providing said cargo is received from or destined to a railroad.

Trucks: In 1962, the Port of New York handled 13,901,942 long tons of general cargo, approximately 85 percent of which was moved to and from the piers by motor carriers. The remainder was moved by lighters and railroad cars. Consignors and consignees of the cargo dispatch trucks to the piers in order to deliver or receive their shipments.

Import freight is discharged from a vessel by stevedores (who generally are the respondents) and, thereafter, it is sorted and stacked at a point of rest on the pier and then moved to a vehicle and placed thereon by the respondents. In the case of export freight, the same operation is performed prior to loading aboard a ship, except that the motor carrier has the option to unload the vehicle.

Generally speaking, upon arriving at a pier, the driver first receives a gate pass and thereafter his papers are checked. If found in good order, his vehicle will be placed on the pier in order to receive or deliver the cargo.

The record shows that there is congestion and excessive delay in truck loading at the piers, that normal delays run from 1 to several hours, and that the trucks begin arriving at the piers more than one hour before they open in order to offset the delay they will experience. One trucker offered the following example: He arrived at a pier at about 7 a.m. for a load of hams (1,480 cases); was routed at about 8 a.m.; started work at about 9:30 a.m.; at about 4:30 p.m. when still not loaded was told that all were going home; and about 5:30 p.m. the terminal decided to finish loading, which it did; and the truck got off the pier at about 9 p.m.

Delay is perhaps the greatest single problem involving truck traffic. Witness after witness testified to the inconvenience and expense to motor carriers resulting from the chronic delay of vehicles at the piers. These delays are a serious problem to the motor carriers because the inefficient use of equipment and labor tend to increase operating costs, thus affecting their ability to compete with other modes of transportation. They are a problem to shippers and receivers because the increased costs are necessarily passed on to them in the form of higher rates.

The Conference has on file Truck Loading and Unloading Tariff No. 6, F.M.C.–T. No. 7 (Tariff No. 6) naming rates, rules and regulations for loading and unloading trucks at piers operated by the Conference members. On July 19, 1963, the Conference issued a First Revised Page 3 to Tariff No. 6, Item 3, 2, A, effective August 19, 1963, which amended the definition of truck unloading to provide that such service "shall mean the service of removing cargo from the body of the truck to the dock, vessel or other terminal facility designated by the Terminal Operator . . . ." By this amendment the tariff provision for truck unloading was modified to delete reference to the place of rest and to expressly include the vessel as the place of immediate destination. The purpose of the amendment is to permit respondents to assess truck unloading charges on direct movement of cargo between truck and vessel. Truckers have protested the practice on the ground that such movement is not properly "truck unloading," since "place of rest" cannot be construed as the vessel itself. Other provisions of Tariff No. 6 at issue here are:

1. *Item 16.* The Terminal Operator assumes no responsibility for delay to motor vehicles and no claims for such delay will be honored.

2. *Item 3, 1, B.* The loading and stowing of cargo in the truck shall be with the assistance of, and under the supervision of, the driver of the truck.

3. *Item 10.* A truck in line to receive or discharge cargo by 3 p.m. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, and is in all respects ready to be loaded or unloaded, is entitled to be serviced until completion of the straight-time tariff rates. This rule shall not apply to trucks unloaded without the services of the terminal operator (3 o'clock rule).

4. *Item 11.* When trucks are unloaded without the services of the Terminal Operator's employees, unloading shall proceed at a rate of 5 tons (10,000 pounds) per hour. When this rate is not maintained, a penalty charge of $1 for each quarter hour or fraction thereof shall be assessed for the excessive time (10,000-pound rule).

Discussion

The primary issues to be resolved here are: (1) whether the imposition of a charge (as contained in Lighterage Tariff No. 2 and Truck Tariff No. 6) for direct or over-the-side transfer service is sanctioned by the conference agreement, and (2) whether the imposition of such a charge is an unjust or unreasonable practice under section 17 of the Shipping Act (Act).[2]

The Examiner found that the assessment of such charges was not authorized by the conference agreement and further that since the direct transfer service is entirely a stevedoring function, which is paid for by the vessel, the imposition of another charge on the lighter or truck would result in the payment of a double charge for the same service rendering the practice unjust and unreasonable under section 17 of the Act.

Respondents except to each of the Examiner's findings regarding the direct transfer charges contained in Lighterage Tariff No. 2. The exceptions are:

1. The natural meaning of the words employed in Agreement 8005[3] is that it covers the loading and unloading of cargo onto and from lighters wherever located. The Examiner states nothing to support his finding to the contrary.

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[2] Sec. 17 provides:

"... 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."

[3] Article 1 of Agreement 8005 provides:

"That they [respondents] shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to the services of loading and unloading of waterborne freight onto and from trucks, lighters and barges, and the service of storage of waterborne import freight on the pier (including the fixing of free time period), as aforesaid; ...."

2. Since it can be shown that the direct transfer charge does not result in a double charge, there is no unjust or unreasonable practice and the Examiner's finding to the contrary should be rejected.

Respondents' first exception is well taken. The Agreement provision authorizes conference ratemaking "with respect to the services of loading and unloading waterborne freight onto and from . . . lighters and barges . . . ." This provision is silent concerning the location of such lighters and barges. While the Examiner found that the Agreement referred only to services "on the pier," the words "on the pier" do appear in Article 1 of the Agreement, but by their context clearly refer only to the provision dealing with storage and not to the provision covering loading or unloading lighters.[4] We must disagree with the Examiner's conclusion here since the natural meaning of the words employed is that the agreement covers the loading and unloading of cargo onto and from lighters, wherever located. We therefore find that Article 1 of Agreement 8005 does authorize a charge for direct transfer service from lighter to vessel.

There remains the question of whether the imposition of such a charge, although not prohibited by the conference agreement, is nevertheless an unjust and unreasonable practice under section 17 of the Act. The Examiner so found and we agree.

Respondents contend that the direct transfer charge is necessitated by the added expense entailed in such services. Some of the added expenses in direct loading of lighters, as against working cargo to or from the pier, stated by respondents are: lower productivity, less working space, necessity to break cargo out of stow on the lighter resulting in slow operations, less utility of mechanical equipment, rerigging of gear for working over-the-side (some $80) not compensated in the stevedoring rate, idle gang time while uncovering the hatch on hatch lighters, and shifting lighters.

Respondents also attack the Examiner's finding that the direct transfer charge results in double compensation for the same service. In finding that it did, the Examiner reasoned that the loading and unloading services upon which the charge is imposed were stevedoring functions performed by the terminal operators, which were paid for by the ocean carrier.

The Examiner would define stevedoring, in the case of import cargo, as one process of breaking cargo out of stow in the ship's hold, lifting the cargo from the vessel and depositing it on the pier's stringpiece and then carting it by hilos to the place of rest designated by the steve-

[4] ". . . with respect to . . . the service of storage of waterborne import freight on the pier . . . ."

dore. In the case of export cargo the process is reversed beginning at place of rest and ending in vessel's hold.

By custom of the Port, the ship assumes the responsibility for the performance of this stevedoring function. The actual work may be accomplished by the carrier itself but in New York it is usually done for them by terminal operators (respondents) who lease the piers. When respondents do perform stevedoring functions, they are paid for by the ship. On this basis the Examiner concluded that any charge to the lighterman for the same service would be unjust and unreasonable since it results in a double charge.

We think the Examiner's conclusion here was correct. In direct transfer, the lighter deck replaces the pier as the place of rest. The service involved is the movement of cargo between lighter deck and vessel or between place of rest and vessel. This is clearly a stevedoring service which is performed by the respondents but paid for by the ship.

Stevedoring is done for the account of the steamship company and the stevedore is paid for this service by the ship. Traditionally, the ship has the responsibility of moving export cargo between the place of rest on the dock to the ship's tackle and vice versa when import cargo is transferred. In the absence of a special handling charge, the freight rate will include the stevedoring charge.[5] Since respondents' costs or expenses of direct transfer are paid for by the ship, any charge for the direct transfer service under Lighterage Tariff No. 2 results in collecting twice for the performance of a single service—the imposition of a double charge.

Respondents attempt to justify the loading and unloading charges on the basis of additional expenses allegedly incurred by them for such direct transfer services. The record does not support the contention that such additional expenses do in fact exist. Respondents' supporting exhibit included a cost analysis which involved a strike period and, accordingly, is unsatisfactory. The exhibit also shows that certain of the costs are pure estimates without any proper foundation for them. Lightermen interveners also showed that several of the alleged extra expenses are in fact compensated for and included in the charge made to the steamship company.

Respondents rely on *J. G. Boswell Co.* v. *American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95 (1939) as support for their argument that a separate charge for movement between place of rest and ship's hook is proper. The *Boswell* case stands for the principle that a separate charge for such movement can be assessed by vessel against cargo when ". . . it is not shown that the published tackle-to-tackle rates included any

[5] See *Sun-Maid Raisin Growers Ass'n* v. *United States*, 33 F. Supp. 959, 961 (N.D. Cal. 1940), *aff'd* 312 U.S. 667 (1940).

compensation for that service. . . ." 2 U.S.M.C. at 101. The issue before us is not whether the vessel can assess such a separate charge, but is whether the terminal can separately charge the lighter for a service which is included in the stevedoring service provided by terminal to vessel. The two situations are totally distinguishable and accordingly *Boswell* is inapplicable here.

Respondents do not except to the Examiner's findings regarding truck unloading charges contained in Truck Tariff No. 6. Such direct transfer charge resulted from an amendment of the tariff's truck unloading definition to include "vessel" as place of immediate destination in the unloading process. The Examiner applied the same arguments concerning division of responsibilities between vessel and cargo and concluded that direct transfer unloading was a stevedoring function paid for by the vessel and a double charge would result if the trucker were also charged for this same service. Accordingly, the Examiner ruled that the use of the term "vessel" should be deleted from the tariff, thereby eliminating the charge to the trucker for direct transfer. Respondents have not excepted to this finding and have in fact made the suggested deletion in a new tariff filed with the Commission (Truck Loading and Unloading Tariff No. 7).

Detention. Respondents' exceptions also raise the issues of whether the respondents' failure to include detention rules in their truck and lighter tariffs is unjust and unreasonable and whether respondents presently give an unreasonable preference to lighter traffic over motor vehicle traffic in regard to detention payments in violation of section 16 First of the Act.

As before stated, the record indicates many instances regarding both lighter and truck detention. In the case of lighters, delay can usually be attributed to the terminal operators in that they determine in what manner and with what priority a certain lighter will be loaded or unloaded.

Vessels are worked by a plan in which stowage, itinerary, vessel trim or balance and other such matters are a factor. Thus, vessel loading and discharging are in such order and in such amounts as suits the convenience of the vessel and the stevedore working the vessels. For the lighterman whose lighter is being worked over-the-side, the selection process is important as his equipment and his employees must stand by for the time it takes to complete the work, usually to his cost detriment.

Respondents argue that lighter detention is often caused by the steamship company and it is proper to look to them for detention payments. The record shows that the lightermen do have detention agreements with some steamship companies, but that collection has been unsatisfactory.

Hearing Counsel is of the opinion that it is the terminal who assesses charges against the lighterman, and it is the terminal with whom and through whom the lighterman works during the entire transfer process; that for stevedoring purposes, the terminal stands in the place of the ocean carrier by assuming the carrier's traditional obligation of loading and unloading; that even if detention is caused by the carrier, it is only natural to look to the terminal for redress; that the lighterman cannot be expected to seek out fault—this being a matter between the carrier and its contractor the terminal; that the terminal is the proper party to assume responsibility for detention; and that the problem could easily be handled through the adoption of a suitable detention rule in the lighterage tariff.

Inasmuch as the lighterman experiences detention of his craft for reasons residing entirely within the stevedoring process, it is only proper that he be compensated for any extraordinary costs which result from unusual delay. We agree with the Examiner's conclusion that it is unjust and unreasonable for respondents to fail to adopt a just and reasonable lighter detention rule or regulation in their lighterage tariff, and failure to do so for the future will be, as it has been in the past, contrary to section 17 of the Act. The assumption by the terminal operator of the carrier's traditional obligation of loading and unloading of necessity carries with it the responsibility for ensuring that just and reasonable rules govern the performance of the obligation.

Truck detention is a more complex problem. It is virtually impossible to determine responsibility for truck delay because of the many and varied factors which may or do contribute toward a particular instance of delay.

The truckers attribute delay primarily to the terminal operators because of insufficient labor and/or equipment, and inadequate control of labor.

Hearing Counsel feel that the terminal operators can be held responsible to some extent for condition of piers and congestion resulting therefrom. Hearing Counsel also recognize other factors causing delay, e.g., the insistence of shippers to wait until the day of sailing to deliver export cargo; the tendency of shippers to wait until the last day of free time to pick up import cargo; presentation by shippers of improper documentations at piers; and failure of truckers to be with their trucks when they are called for service.

Respondents assert still other reasons for delay: not all piers are built to handle peak loads, inevitable factors such as strikes, slowdowns or refusals to work overtime, and bad weather conditions.

The Examiner concluded that irrespective of the causes of delay the "truckmen have a right to expect handling as expeditiously as possible, and they have a right to get better handling than they have had in many specific cases."

The Examiner then adopted Hearing Counsel's suggestion that respondents be required to include a reasonable detention rule in their Tariff No. 6, with the reservation that because of the many reasons for delay and because delays occur for which the respondents are not at fault, though most of the delays are within the control of respondents, a reasonable detention rule for trucks must acknowledge causation and exonerate the terminal for delays which it cannot control. The Examiner concluded that respondents' failure to adopt such a detention rule would be an unreasonable practice under section 17 of the Act.

We agree with the Examiner. It is neither just nor reasonable for respondents to disclaim liability for all delays and their attempt to do so was invalid under section 17. Whatever may be the difficulties in drafting a detention rule which takes into account those causes of delay which are beyond respondents' control, the truckers have a right to the rule, and section 17 demands it.

While we look with favor on the attempts of the parties to iron out their differences amicably, we cannot agree with respondents that their attempts to work out an "appointment system" with the truckers obviate the need for the rule. Even if respondents are correct in their assertion that an "appointment system" will solve practically all of the problems of delay, the need for the rule remains. The issue here is what the trucker may reasonably expect as redress when delays occur, not what may be done to remove the causes of delay. The latter is another problem entirely and while we are vitally interested in any attempts to eliminate or reduce delay, the validity of these attempts is not at issue here. Moreover, the establishment of the system alone does not deal with the problem of what the rights of the respective parties are if the system proves unworkable or when it breaks down.

Accordingly, we adopt as our own the Examiner's finding that respondents should delete Item 16 (which relieves them of all liability for detention) from Tariff No. 6 and insert a reasonable detention rule therein which will compensate the truckers for unusual truck delays caused by or under the control of the terminals. Respondents' disclaimer of all liability for delay and its failure to establish and apply such truck detention rule constitute unjust and unreasonable practices under section 17 of the Act.

We also agree with the Examiner's finding that respondents presently give an unreasonable preference to lighter traffic over motor vehicle traffic in regard to detention payments, in violation of section 16 First of the Act.[6]

A comparison of the detention provisions of Tariff No. 6 and Tariff No. 2 reveals the preference given lighter traffic in this respect. Item 16 of Tariff No. 6 provides:

Item 16. Delay to Motor Vehicles

The Terminal Operator assumes no responsibility for delay to motor vehicles and no claims for such delay will be honored.

Tariff No. 2 contains a provision reading:

Nothing contained herein shall be construed as affecting whatever rights lighter operators have with regard collection of lighterage detention charges from steamship companies.

On exception to the Examiner's finding, respondents point out that the provision in Tariff No. 2 does not refer to detention payments by terminal operators, but refers only to payments by steamship companies. Respondents feel that this removes the basis for any finding of preference since it is true that respondents do not pay detention to lighters and accordingly they cannot be accused of preferring lighters over trucks.

Respondents fail to recognize that the preference and prejudice need not arise from the actual payment to one as opposed to the other, but such preference and prejudice arise from the mere presence of the varying provisions in the two tariffs. The Tariff No. 6 provision flatly states respondents will have no responsibility for detention payments for trucks. The Tariff No. 2 provision negatively states that respondents will not interfer with any claims for detention lightermen may hold against the steamship company. It is conceivable that truckers would also have detention claims against the steamship company, especially in the case of direct transfer when the terminal operator is acting as agent for the steamship company. By failing to recognize the right for truckers to collect detention and by expressly recognizing such rights for lightermen, respondents' tariffs give unreasonable pre-

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[6] Sec. 16 provides:

"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."

ference to lighter traffic over truck traffic in violation of section 16 First of the Act.

Lighter to Pier Operations. The Examiner finds respondents' failure to include in their Tariff No. 2 rates assessed against lighters loaded and unloaded to piers (as distinguished from alongside vessels) to be a violation of sections 15 and 17 of the Act and of Article 4 of Agreement No. 8005, as amended.

Respondents admit that they do not include such rates in their tariff, but except to the Examiner's finding by asserting that they do not perform such services and therefore cannot be expected to have a tariff covering such services.

As noted above, if a lighter is to be loaded at the pier, the service is usually provided by Spencer who performs such service on negotiated rates. Spencer also excepts to the Examiner's decision which imposes upon respondents the duty to file such a tariff. Spencer is afraid that respondents will set their loading and unloading rates at such a low level so as to force Spencer out of business.

Our review of the record indicates that respondents have in the past and still do on some occasions perform such services. The president of International Terminal Operating Company (a respondent) testified that "we do not handle lighters to the dock *as a general rule*. In fact *hardly* any instance of that occurs." [7] His statements leave the inference that there are occasions on which such services are performed. Respondents perform such services on negotiated rates, since they have no tariff covering them.

We conclude that to the extent such services are performed respondents are required to have a published tariff to inform the potential recipients of such services of the exact charges to be expected. Negotiated rates are unsatisfactory and the Examiner so found, relying on our decision in Docket 800, where we dealt with a tariff provision for negotiated rates:

> The provisions of respondents' tariff should be reasonably clear and precise in order that its application will be understood by the terminals, the truckers, and the general public, and so that charges will be uniform as between shippers similarly situated. We consider a tariff provision such as this one, under which it is impossible to know what a charge will be or how it will be determined, to be an unjust and unreasonable practice in violation of section 17 of the Act. We will insist that this provision be modified by the inclusion of reasonable standards by which the individual terminals will determine this extra handling charge uniformly.[8]

Concerning Spencer's exception, we cannot anticipate that the terminal operators will attempt to drive Spencer from the market by

[7] Hearing Transcript, p. 300, emphasis supplied.

[8] *Empire State H'w'y Transp. Ass'n* v. *American Export Lines*, 5 F.M.B. 565 (1959) at p. 590.

establishing extremely low rates. Spencer's position has no effect on the mandates of the Shipping Act which requires respondents to make clear in their tariff what the uniform charge for the service will be. Accordingly, we find the failure of respondents to establish and publish in their tariffs the rates at which they will perform lighter to pier service constitutes an unjust and unreasonable practice under section 17.

RAILROAD HEAVY-LIFT FREIGHT RULES

Respondents' Tariff No. 2 contains a provision to the effect that there will be no charge for the loading and unloading of heavy lift freight received from or destined to a railroad.[9] The Examiner found that selective treatment is given heavy lift cargo originating with or destined to railroad lighters and results in discrimination against private lighter traffic in violation of sections 16 First, and 17 of the Act.

Respondents except to this finding and claim that it should be rejected since no evidence was adduced on the point and because the private lightermen evince indifference.

Neither contention of respondents is valid. The evidence shows that respondents have performed free heavy lift services for railroads. This was admitted by respondents' witness. The evidence further shows that respondents perform no similar free services for private lightermen. The lightermen do not evince indifference as is evidenced from their briefs and from their statements at oral argument. Moreover, the degree of concern of the lightermen is not determinative of the validity of the practice. The Examiner's finding should be upheld.

THREE O'CLOCK RULE

Item 10 of Tariff No. 6 provides:

A truck in line to receive or discharge cargo by 3 p.m. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, and is in all respects ready to be loaded or unloaded, is entitled to be serviced until completion at the straight-time tariff rates. This rule shall not apply to trucks unloaded without the services of the terminal operator.

The Examiner found that this rule was an unreasonable practice under section 17 of the Act. His finding was based on the fact that the last sentence of the rule would exclude truckers from the guarantees of the rule if they elected to perform their own unloading.

Respondents do not except to this finding, but propose to delete the rule, upon the institution of an appointment system.

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[9] See par. (e), p. 4 for full text of this provision.

The Examiner correctly found the rule to be unreasonable. The present rule does not guarantee a trucker who performs his own unloading that he will be serviced (furnished a checker and hilo) to completion. Thus, the rule can be used as a means to compel the trucker to use the unloading services of the terminal for which a charge would be assessed. The tariff purports to allow the trucker to perform unloading himself. This cannot practically be accomplished under the present 3 o'clock rule. The rule constitutes an unjust and unreasonable practice under section 17 of the Act and should be amended to extend application thereof to cases where the trucker unloads his own truck.

TEN-THOUSAND-POUND RULE

Item 11 of Tariff No. 6 provides:

When trucks are unloaded without the services of the Terminal Operator's employees, unloading shall proceed at a rate of five tons (10,000 pounds) per hour. When this rate is not maintained a penalty charge of $1.00 for each quarter hour or fraction thereof shall be assessed for the excessive time.

The Examiner would require the deletion of this rule because in many cases it is not being applied by respondents, and because it is meant to be applied only when trucks are unloaded without the services of the terminal operator.

We would further condemn the rule because it is incapable of uniform application to all types of commodities. Respondents admitted that 10,000 pounds per hour is much too much to ask on some commodities. Different loading characteristics of varying types of cargo make uniform application impossible. For this reason and for those of the Examiner, stated above, the rule is unreasonable under section 17 of the Act and should be deleted from the tariff.

No party has taken exception to the Examiner's finding on this subject. Respondents propose to establish a new rule in this respect upon the institution of an appointment system. It would be premature to comment on any such proposal in this report.

SHIPPERS' REQUESTS AND COMPLAINTS

Respondents except to the Examiner's finding that they have failed to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints as required by section 15. At the time of the Examiner's decision, respondents had not adopted such procedures. We will take official notice, however, that subsequent to the Examiner's decision respondents have instituted such procedures and filed a description thereof with the Commission. These procedures are set forth at pages 12 and 13 of respondents' truck loading and unloading tariff No. 7 (FMC–T No. 8), and are as follows:

Item 20. Disposition of Requests and Complaints

A. Shippers' requests and complaints (as said phrase is defined by the Federal Maritime Commission) may be made by any shipper by filing a statement thereof with the New York Terminal Conference, 17 Battery Place, New York, New York 10004. The said statement shall be submitted promptly to Tariff Committee and to each member of the Conference.

B. Said statements shall be considered by the Tariff Committee at its next meeting. Action need not be restricted to the exact scope of such statement of request or complaint but may include other points or recommendations varying from, but directly or indirectly related thereto.

C. Prompt written notice shall be given to the proponent or complainant of the docketing of his statement and of the date of the meeting of the Tariff Committee at which it will be considered. If such proponent or complainant desires to be heard at said meeting, he shall make request upon the Conference in advance of the meeting.

D. The decision of the Tariff Committee shall be announced promptly, in writing, to the proponent or complainant, and members of the Conference. The decision of the Tariff Committee shall be final subject to appeal to the entire Conference membership within sixty (60) days after notification of the decision.

E. If an appeal is taken to the Conference, the Conference shall hear the appeal promptly and shall advise promptly, in writing, the proponent or complainant of the decision.

Accordingly, we find that respondents have conformed with the requirements of section 15 in this respect.

TRUCKER'S EXCEPTIONS

Intervener, Empire State Highway Transportation Association Inc. (Empire), has excepted to the Initial Decision in the following respects:

1. The Examiner having found violations of the Act failed to recommend that the Commission withdraw approval of the Agreement or that the Commission grant other effective relief.
2. The Examiner improperly concluded that this was not a rate case.
3. The Examiner failed to conclude that the cost of truck loading and unloading should be borne by the steamship companies.
4. The Examiner erroneously concluded that certain rules and regulations of Tariff No. 6 and practices thereunder did not violate the Act as contended by Empire.

The violation of the Act to which Empire refers in its first exception is respondents' failure to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints. Since respondents have complied with the requirements, Empire's plea for disapproval of the conference agreement is rejected.

Empire's exception to the Examiner's failure to consider the level of rates in this case is rejected. Empire contends this is a "rate case" because of the references to rates and charges which are contained in paragraphs (5) and (7) of the Order initiating this proceeding. These paragraphs read as follows:

(5) Whether any of the rates, charges, rules or regulations contained in the tariffs filed with the Commission by the parties to Agreement No. 8005 result in any undue or unreasonable preference or advantage or any undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Act.

(7) Whether any of the rates, rules, regulations or practices of the respondents are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States, or are contrary to the public interest, or in any manner violate the Shipping Act, 1916.

Paragraph (5) raises no issue of reasonableness of rates. This paragraph is limited to section 16 First questions of unlawful preference or prejudice.

Paragraph (7) poses the question whether respondents' rates operate to the detriment of the commerce of the United States, but this is not the normal and usual "reasonableness" criterion used when considering levels of rates.

Hearing Counsel accurately point out that in Docket 65–39 Empire by its own complaint has initiated proceedings on this very issue against these same respondents.

A determination of the rate question is properly before us in Docket 65–39 and is not a part of this proceeding.

Empire's third exception is also rejected. Empire would have the steamship companies pay the charges for truck loading and unloading. Currently such charges are paid by the truckers. Empire reasons that if the steamship companies were required to bear these charges they would develop a direct interest in the loading and unloading services and accordingly they would proceed to remedy the deplorable conditions at the Port of New York which impair efficient and economical truck loading and unloading services. Empire also contends that truck loading and unloading is but an incidental fact of the continuous operation for the transfer of cargo from the ship to the shore, and that this "terminal" function of transferring cargo from place of rest to the truck should not be separated from the "stevedoring" process paid for by the vessel.

Middle Atlantic Conference, another trucker intervenor, also excepts to the Examiner's finding on this point. Middle Atlantic is of the opinion that the decision on this issue should have been deferred until the litigation to obtain enforcement of subpoenas against respondents is settled. Middle Atlantic feels that until such contracts are produced it is impossible to decide which services are being performed by respondents for the account of the steamship companies and which are being rendered on behalf of the shipper.[10]

We agree with the Examiner that the record does not adequately support or justify a requirement that the cost of truck loading and unloading be borne by the steamship companies.

To hold that the steamship company must absorb this charge would revolutionize the way of doing business in the Port of New York. We see no reason to overturn such a long established custom in the absence of a showing that the present custom operates in some way that violates the Act, or is detrimental to commerce or is contrary to our public interest. No such showing has been made. Nevertheless, the proposal does augur possible lower total costs, possible increased efficiency (by reason of the fact that carriers might more carefully oversee the operation), and make available to American exporters a predeterminable assessment of their export costs through an inspection of steamship tariffs. We will therefore have our staff informally investigate the ramifications of this proposal.

Moreover, such a result would disregard the division of responsibilities between vessel and cargo already discussed in connection with the direct transfer charge, *supra*. The opinion of the Court of Appeals for the District of Columbia Circuit in *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F. 2d 887 (1962), further supports this conclusion and indicates that the common law duty of a common carrier does not extend beyond placing the goods at a place of rest on the pier accessible to the consignee. The court stated at page 888:

> The work of unloading and putting the cargo on the dock is done on behalf of the carrier by longshoremen, who are laborers skilled in this sort of thing, or by

[10] At the hearing Empire subpoenaed the respondents to produce certain terminal and stevedoring contracts. The subpoena has not yet been complied with but is now before the courts for enforcement on request of the Commission. The Examiner found that the only issue to which the subpoenaed contracts relate is the question of wether the terminal operators have any agreements with the ocean carriers whereby part of the revenue collected from lighter operators is to be refunded to the carriers. The Examiner reserved disposition of this issue for a later decision subsequent to respondents' compliance with the subpoenas. We similarly reserve disposition of the refund of revenue issue but find no necessity to reserve decision on the question of who should bear the cost of truck loading and unloading.

stevedoring companies under contract with the carriers, these stevedores employing longshoremen. There is not now, and does not appear ever to have been, absent a special contract, any obligation on the part of the carriers to put such cargo actually into the hands of consignees, as by putting it into trucks and hauling it to the consignees' places of business.

Finally, the steamship companies who would be adversely affected by such a result are not parties to this proceeding and have not had an opportunity to be heard.

Empire's final exception takes the Examiner to task for failing to make findings on the subjects of safety, minimum charges, overtime charges, palletizing of cargo, weighing of cargo, and credit arrangements. Tariff No. 6 contains provisions relating to each of these points.

Empire has offered no additional enlightenment on these points, and a review of the record confirms the Examiner's finding that the evidence is inadequate for making any findings or conclusions on these matters.

Empire sought also to persuade the Commission to require the institution of an independent Port Coordinator's Office in the Port of New York. Empire envisions a Port Coordinator which would supervise the movement of freight in the Port of New York, and which would act as a forum for all parties to seek redress of their complaints, and hopefully remedy many of the present problems.

Assuming that the Commission has the authority to direct the establishment of such an office, we still are unable to determine, from this record, whether such an office would be either helpful or necessary. Accordingly, we cannot order the establishment of a Port Coordinator's Office.

An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

No. 1153

TRUCK AND LIGHTER LOADING AND UNLOADING PRACTICES AT NEW YORK HARBOR

ORDER

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That respondents be, and they are hereby, notified and required to cease and desist from engaging in the violations of section 16 First and section 17 of the Shipping Act, 1916 (46 U.S.C. 815, 816), herein found to have been committed by respondents; and

It is further ordered, That respondents be, and they are hereby required, within 45 days after the date of service of this order to modify the provisions of their Lighterage Tariff No. 2 and their Truck Tariff No. 6, in a manner consistent with our report herein; and

It is further ordered, That the proceedings in Docket 1153 are hereby discontinued except for that portion thereof upon which the Examiner reserved decision pending resolution of a related subpoena enforcement proceeding currently before the courts.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1217

INVESTIGATION OF FREE TIME PRACTICES—
PORT OF SAN DIEGO

Decided May 24, 1966

Ten days for outbound and seven days for inbound cargo, exclusive of Saturdays, Sundays and holidays in the foreign and offshore trades, found to be a reasonable amount of free time necessary for the assembly or the removal of a shipper's goods and for the ship to load or discharge at San Diego.

Aaron W. Reese, attorney for Port of San Diego, respondent.

Arthur W. Norstrom and *Walter C. Foster*, attorneys for City of Los Angeles; *J. Richard Townsend* and *Walter H. Meryman*, attorneys for Stockton Port District; *John E. Nolan* and *J. Kerwin Rooney*, attorneys for Port of Oakland; *Clarence Morse* and *John Hamlyn, Jr.*, attorneys for Sacramento-Yolo Port District; *Leslie E. Still, Jr.*, attorney for the City of Long Beach; *Miriam E. Wolff*, attorney for San Francisco Port Authority; *Edward D. Ransom*, attorney for Encinal Terminals.

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

REPORT

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

We instituted this investigation to determine whether the practice of respondent Port (San Diego) in allowing 30 calendar days' free time is contrary to the provisions of section 16 First or section 17 of the Shipping Act, 1916 (46 U.S.C. 815, 816).

Encinal Terminals, Sacramento-Yolo Port District, Stockton Port District, San Francisco Port Authority, City of Los Angeles, City of Long Beach, and the City of Oakland intervened, and Hearing Counsel also participated in the proceeding.

Examiner Benjamin A. Theeman has issued an Initial Decision to which exceptions were taken.

The findings of fact set forth below are those made by the Examiner except for the addition of certain findings as to San Diego's storage practices which the Examiner concluded were unnecessary to his disposition of the case.

A. Background of the Proceedings

1. In February 1957, San Diego published Item 495 of Tariff No. 1–B which provided (*a*) 10 days' free time, exclusive of Saturdays, Sundays and legal holidays on inbound and outbound foreign and offshore cargo; and (*b*) authority to the Port Director to lengthen free time "if in his judgment, it is for the best interest of the Port." At all times since, San Diego under this provision has allowed 30 days' free time to all its customers.

2. In September 1960, the Commission requested all west coast ports to suspend any excessive free time practices. Because Item 495 could be interpreted to permit the extension of free time for a period of years, San Diego amended its tariff by publication of Item 495–A, effective October 24, 1960. This item continued the 10 days' free time but authorized the Port Director to lengthen free time for a period not to exceed 30 calendar days. Under this item, San Diego continued to give 30 days' free time to all its customers.

3. In June 1964, San Diego submitted for Commission approval two section 15 agreements, between it and certain stevedoring companies which operate and perform terminal services at the San Diego facilities. On July 27, 1964, Long Beach protested the agreements. Because it appeared that the protest was more against San Diego's tariff than against the agreements, San Diego agreed to reissue the tariff without the discretionary language of Item 495–A.

4. On November 1, 1964, San Diego published Item 455, Tariff 1–D and Item 110, Cotton Tariff No. 3–C, effective December 1, 1964, calling for a free time allowance of 30 calendar days for loading and unloading of all merchandise (except bulk cargo, and lumber and forest products unloaded in the coastwise trade) and cotton. These tariff items are the subject of this proceeding and read as follows:

Tariff: No. 1–D, Item 455:

"Thirty (30) calendar days free time shall be allowed, except as follows: (a) Lumber and forest products as described in Sub-item 14 of Item 440 moving in the coastwise trade—five (5) days free time, exclusive of Saturdays, Sundays, Holidays and days upon which unloading operations are being conducted, shall be allowed. . . . Transshipped merchandise shall be allowed one (1) free time period only."

Cotton Tariff No. 3–C, Item 110:

"Exclusive of days on which loading or unloading operations are being conducted, thirty (30) calendar days free time shall be allowed. . . . Transshipped cotton shall be allowed one (1) free time period only."

5. Since 1944 the tariff of each intervener and some other California terminals provided for a free time allowance in the foreign and offshore trade of 10 days on outbound cargo and 7 days on inbound cargo, both exclusive of Saturdays,[1] Sundays, and holidays. These free time periods were set by Commission in *Practices, etc., of San Francisco Bay Area Terminals*, 2 USMC 588 (1941) and 709 (1944). Therein, the Commission established the 10- and 7-day periods as reasonable free time practices for the San Francisco Bay Terminals, and ordered the enforcement of a regulation providing for no greater free time allowances on such cargoes. Los Angeles and Long Beach, though not respondents in *Practices, etc., of San Francisco Bay Area Terminals*, *supra*, adopted and used the 10- and 7-day periods.[2]

6. San Francisco, Oakland, Sacramento, and Encinal Terminals protested the 30-day free time period contained in the San Diego tariff and this proceeding followed. In addition to the protestants, Los Angeles, Long Beach, and Stockton were permitted to intervene. As provided in the order of investigation, San Diego appeared herein as respondent. Hearing Counsel was also a party.

B. The Facilities at San Diego

1. The subject free time provisions apply to cargo moving through the following marine terminals at San Diego: The Broadway Pier, the B Street Pier, and the Tenth Avenue Marine Terminal.

2. The Broadway and B Street Piers built about 35 and 40 years ago, respectively, are finger-type structures consisting of a wharf and transit shed adjacent to each other. The interior area of the Broadway shed is about 94,000 square feet, and the interior area of the B Street Pier with two transit sheds is about 310,000 square feet. The Broadway Pier has vertical pillars throughout its interior spaced on 13-foot centers. For the past 7 or 8 years it has been considered obsolete. Its use has been restricted mainly to the handling of newsprint in the coastwise trade. The B Street Pier has some internal pillars. It is more modern than Broadway and is still used as a general cargo terminal. In addition to the receipt of newsprint, B Street is used in the European inbound service for the receipt and storage of

[1] Saturdays were excluded when they became a non-work day.

[2] Generally, the tariffs of the ports listed provided 5 days' free time inbound and outbound in the coastwise trade, 5 days inbound, 10 days outbound in the intercoastal trade and for those ports whose tariff listed free time for inland waterways, 5 days inbound and outbound.

cargo. Practically no outbound cargo passes over these piers. Together, the piers have berthing accommodations for six vessels.

3. Despite their limited use Broadway and B Street as late as February 1965, "were literally taxed to their capacity" even though the Tenth Avenue Terminal handles the major portion of San Diego's terminal business.

4. The Tenth Avenue Terminal and its cargo handling equipment are as efficient and modern as any in the United States [3] and reportedly have a high rating among shippers and carriers. As planned and constructed, Tenth Avenue contains few interior stanchions or vertical supports which allow for extreme maneuverability of cargo handling equipment and permits trucks to back directly into each of the transit sheds and Warehouses B and C for direct loading and unloading at floor height. The terminal consists of five separate structures and a backup area of about 96 acres. Transit Sheds 1 and 2 each with a storage capacity of 200,000 square feet are located adjacent to the wharf area. Warehouses B and C, further inshore from the transit sheds and separated by a passageway of about 350 to 400 feet, each have a storage capacity of 300,000 square feet. Warehouse A is further inland from Warehouse B and has a storage capacity of about 44,000 square feet. Warehouse A was completed in February 1955, Transit Sheds 1 and 2 in July 1958, Warehouse B in January 1962, and Warehouse C in May 1964. The wharf is of the quay type and can berth seven modern freighters simultaneously.

5. Those portions of Warehouses B and C nearer to the wharves are used as transit sheds. There is little significant difference, however, in the operations occurring either in the transit sheds or in the warehouses. During free time, cargo is stored in both places, the different designations being largely for identification purposes. An appreciable amount of cargo moves directly from vessels into the transit sheds and warehouses, eliminating handling and costs that occur if the cargo were first placed at rest in a conventional transit shed during the free time period. Certain carriers, at no extra expense to the cargo, lay the cargo at rest in the warehouses even though the distance covered may be as long as 700 feet.

6. Tenth Avenue has extremely wide aprons (65 feet in width).[4] Their width permits the maneuvering and positioning of trucks, railroad cars and equipment for direct loading or unloading of cargo

[3] The Manager of the Division of Marine Operations of San Diego testified that Tenth Avenue equipment was "as good or better than that used in most ports."

[4] The apron is the shoreward area between the berthing line and the transit sheds and warehouses.

between vessel and land carrier. The elimination of the step of placing cargo at rest in the terminal saves time and expense.

7. Cargo of all kinds including O.C.P. cargo [5] is handled at Tenth Avenue.

C. Other Noteworthy Features of the Port of San Diego

1. San Diego is one of the 10 great harbors of the world. There is sufficient depth of water so that tidal conditions do not adversely affect ingress and egress of vessels.

2. San Diego is close to airport, rail, truck and military terminals and is serviced by a modern weather-free system of freeways providing fast and economical movement of goods.

3. San Diego has rail and truck service to all areas of the United States.

4. The trucking industry is considered an integral part of the port. In 1952 there were 36 firms. The number increased to 78 in 1962 and to 93 by April 1965. These firms possess modern equipment and employ skilled personnel to handle the diverse cargoes moving through San Diego. In many instances, the trucking personnel and not longshoremen load and unload the trucks at no additional cost to the cargo.

5. San Diego's labor climate is reflected in one of the longest uninterrupted work records in the west coast port history.

6. San Diego is noted for its lack of pilferage and has an excellent record with regard to the small number of resultant claims.

7. There are approximately 21 ocean freight forwarders and customhouse brokers in San Diego. Five have offices in the Tenth Avenue Terminal and in the main are nationally known organizations.

8. San Diego is a nonoperating port. Located on the Tenth Avenue premises are three first-rate terminal service and stevedoring companies and another company acting as shipper's agents. All these companies render first class services to shippers and importers.

9. Wharfage at San Diego is 10 cents per ton lower than at other California ports. A 5½-cent truck arbitrary is paid at other California ports but not at San Diego.

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[5] O.C.P. cargo is that cargo arriving at a west coast port destined for a point generally in North Dakota, South Dakota, Nebraska, Colorado, or New Mexico and east thereof, and outbound foreign cargo originating from that area. The rates and privileges applicable to outbound cargo moving under O.C.P. ocean and inland rates are identical at every port on the West Coast. A substantial amount of plywood, china, earthenware, toys and novelties originating in the Far East enters U.S. west coast ports, including San Diego, under O.C.P. rates.

10. Tenth Avenue contains no physical limitations to prevent the performance of any marine terminal function as well as or better than it could be performed at any other terminal in California.

D. Cargo Movement at San Diego

1. Although San Diego moved some 700,000 tons of foreign imports and exports through its facilities in 1963, it handled significantly less tonnage than Long Beach, Los Angeles, San Francisco, Oakland, or Stockton. However, in the period 1954–63, San Diego's rate of increase in cargo handled exceeded that of other major ports in California.[6]

2. Cotton is the largest category of general cargo moving outbound from San Diego. The movement of American cotton through San Diego increased from 18,655 bales in 1956 to 261,525 bales in 1964. In the first 7 months of fiscal 1964–65, some 163,000 bales moved through San Diego as compared to 196,000 for Los Angeles and Long Beach combined and 81,000 for San Francisco. American cotton moving into and through San Diego's facilities for the current fiscal year up to mid-April 1965 amounted to a high 271,545 bales. Prospects as to this commodity for San Diego continue bright for the remainder of 1965.

3. Plywood is the major inbound general cargo moving through San Diego. In the 10-year period from 1955, San Diego has shown a considerable gain in attracting that cargo. The movement increased from about 53 tons in 1955 to 38,815 tons in the calendar year 1963, and 65,726 tons in fiscal year 1963–64. Plywood is also a major item of inbound cargo for the ports of Los Angeles and Long Beach. During the calendar year of 1963, these ports attracted 70,485 and 35,659 tons, respectively.

4. Other cargo moving through San Diego during the fiscal year 1963–64 included: (*a*) some 90,300 tons of inbound general cargo such as: miscellaneous cargo, including newsprint, 47,487 tons; china, earthenware, etc., 13,662 tons; toys and novelties, 11,766 tons; iron and steel, 11,084 tons; pipe, iron and steel, 6,308 tons; and (*b*) some 17,500 tons of outbound general cargo, i.e., miscellaneous, 10,150 tons and miscellaneous government,[7] 7,417 tons.

5. By late 1964 Tenth Avenue was operating above capacity, and there had been intermittent periods of congestion due to large movements of pipe and lumber and the annual movement of cotton. As

[6] These tonnage comparisons include bulk cargo on which free time is not applicable.

[7] Any type of materials shipped by the U.S. Government via commercial carrier under a shipping contract.

already stated, Broadway and B Street Piers were also loaded to capacity. Because of these factors and the anticipated expansion and development of San Diego's port activity, the construction of a new pier at 24th Street was proposed. In November 1964 a bond issue of $3,930,000 was voted by the electorate to cover costs. In February 1965, to ease conditions at the existing piers, San Diego proposed to construct four temporary transit sheds of approximately 25,000 square feet each for storage purposes. These were to be of a roof type structure to accommodate cargo susceptible to exposure and needing a roof cover. By April 1965 some easing of the demand occurred and the proposed temporary storage shed construction was reduced to two sheds, each of 24,000 square feet. The contemplated storage sheds will be used for cargo from new accounts and increased cargo from old accounts. The construction of the two sheds is to be held in reserve dependent upon future need.

6. The record does not support a conclusion that (*a*) the rate of increase from year to year of cargo handled by San Diego, (*b*) the capacity use of San Diego's terminal facilities, or (*c*) the temporary periods of congestion are attributable to San Diego's practice of giving 30 calendar days' free time.

E. Frequency of Sailings at San Diego

1. It is conceded that the greater proportion of the trade moving through San Diego inbound and outbound is with the Far East.

2. During fiscal year 1963–64 some 367 ships engaged in foreign commerce called at San Diego. Of these, 292—about 1 a day—served the Far East trade. On the basis of calls in the Far East trade made during the first 6 months of fiscal year 1964–65, calls for the full fiscal year averaged two per week outbound and three per week inbound. In other trades, calls for the full fiscal year were calculated as: Hawaii, 1 a month; North Europe, 10 outbound and 22 inbound; India, 8 outbound; British Columbia, 26 inbound; and Mexico 20, outbound.

3. It is conceded that the yearly number of vessel calls made at Long Beach, Los Angeles, San Francisco, or Oakland in all trades are significantly greater than the number of calls made at San Diego.

4. The record contains substantial evidence that there is adequate vessel service to and from the Far East at San Diego. Nor does San Diego contend to the contrary.[8]

[8] One cotton shipper called as a witness testified that San Diego had ample and sufficient service to meet his requirements. The traffic manager of San Diego testified that the port has a reasonable amount of Far East service. The Manager of Marketing Operations stated that San Diego does not lack frequency of service to and from Japan.

5. San Diego contends that it is at a disadvantage by reason of the lesser number of vessel calls at San Diego in trades other than the Far East. However, the record contains no substantial evidence to the effect that the vessel calls at San Diego in trades other than the Far East have been inadequate or that cargo in the other trades did not move through San Diego because a shipper or importer found the service inadequate.

F. San Diego's Distribution Concept

1. Early in 1962 a campaign was started to develop San Diego as a modern marine terminal. In 1963 as a result of a report from a management consultant firm, a Marketing Division was established within the Port District. The purpose of the Division was to market professionally "the product that [San Diego] had to offer: namely, service either to shippers or to carriers." The success of the port depended upon the success of the Marketing Division in carrying out this "strategic and tactical [plan] of marketing" based on a concept known as the "total cost of distribution" or "total distribution" of cargo from the supplier to the consumer.

2. The plan involved the active solicitation of prospective customers personally and by correspondence throughout the United States and abroad. Many letters were sent out describing the port and pointing up the advantages the customer may derive from using its modern facilities and services (including 30 days' free time). Typical excerpts contained in these letters follow:

> The Port of San Diego's Marketing Department is unique among ports and it is believed San Diego is the only port with a Marketing Department.
>
> Marketing operations has found that many shippers have not conducted periodic evaluations of their total cost of distribution.
>
> However, for your information the Port of San Diego offers 30 days free time on our docks to all exporters and importers. In the case of importers, this 30 days free time may be used to distribute their merchandise throughout the United States and, in fact, at this time we have several of the larger importers using our Port as the distribution center for merchandise destined for Dallas, Denver, Houston, Chicago and New York.
>
> In the case of export cargoes, the 30 days free time may be used to accumulate merchandise on our docks thereby relieving the internal storage facilities at the shipper's plant.
>
> At the completion of the 30 days free time, a nominal storage charge of 6 cents per square foot per month is assessed. Additionally, our wharfage charges are 10 cents lower than other West Coast Ports.
>
> Our facilities are the newest and most modern on the West Coast covering over 1½ million square feet of Class "A" storage facilities.
>
> Services are available at the Port for consolidation, segregation, marking, inventory and complete physical distribution of the merchandise.

Our main selling point, of course, is our reduced wharfage and the fact that we allow 30 days free time on our docks, which could be used for accumulation of your cargo.

The Port of San Diego is noted for its good labor climate—not having a work stoppage or slow down in the history of the port. Additionally, there is no congestion and as you will note in one of the pictures in our brochure the wide aprons and many dock delivery doors available. This speeds up the delivery of your cargo. Pilferage is practically nil.

When the cargo is ordered out, then the trucks can be brought directly into the terminal where they are loaded by the truck driver and helpers who are members of the teamsters union. No longshore help is used; therefore no additional charges are assessed.

3. San Diego continues to propose to shippers throughout the United States that they use the port's facilities for warehousing and storage purposes, thus saving costs and relieving their warehousing problems at interior points. The combination of 30 calendar days' free time plus low cost storage enables the shipper to create a reservoir of cargo for distribution to his customers or to himself as needed. As a result, San Diego, in addition to providing conventional terminal services to the carrier and the shipper, has become a distribution center for inbound and outbound cargo from and to points in the United States as far east as New York.

4. There is no doubt, and San Diego acknowledges, that the 30-calendar-day free time item has been an inducement to shippers to use the port and, since its inception, has been an integral part of San Diego's marketing, warehousing and distribution program.

G. Use of the San Diego Facilities by Shippers and Importers

1. San Diego in support of its position offered the testimony of one importer and two exporters. They testified without dispute as follows:

(*a*) *Plywood*

(1) Evans Products, Inc., imports plywood from the Far East and brought approximately 170,000,000 feet into the United States in the past twelve months. About 80 percent of this amount came in through San Diego because of a strike at New Orleans. Evans anticipates that the San Diego amount will be reduced to 40 percent in the immediate future.

(2) Evans maintains four regular warehouses for plywood about 100 miles from San Diego and also has plants in Indiana. The warehouses have a capacity of one month's supply of plywood. As a result, Evans maintains a three months' supply of plywood at San Diego. Plywood destined for Evans' plants in Indiana arrive in San Diego at O.C.P. rates. Evans uses San Diego for warehousing purposes and has stored O.C.P. plywood for as long as 11 months.

(3) The costs of trucking plywood from the Los Angeles area to Evans' California warehouses is less than from San Diego even though the Los Angeles rate

includes a truck arbitrary. Wharfage and storage at San Diego are cheaper than at Los Angeles.

(4) The type of terminal operation at San Diego facilitates distribution of plywood. At San Diego it is possible to unload a ship in the morning and have the material in the production line by noon. Evans has called the terminal operators at 5:00 o'clock in the afternoon to arrange for cars to be loaded the following day and to roll the following night. This was done at times when the plywood supply in Indiana was short. The shipment was loaded on cars for transportation within a few hours after arrival instead of being stored. These are not isolated instances but "happen all the time."

(5) Though Evans favors the continuation of 30 calendar days' free time, this item is not the only factor that induces the company to use San Diego. Other factors in addition to those mentioned in subparagraphs (2), (3), and (4) above are: excellent service, care of the cargo while in San Diego's custody, close and friendly relationships built up between Evans and the departments of San Diego, the terminal operators, the trucking companies, and assistance from San Diego in developing new concepts to reduce total distribution costs.

(6) The 30-day free time item was "of value on some shipments and of no [value] whatsoever on" other shipments.

(7) Taking all the above factors into consideration, Evans prefers to continue to use San Diego. This would be so even if free time were restricted in San Diego to what it is at the other California ports, i.e., seven days, exclusive of Saturdays, Sundays and holidays, and even though Evans' costs might be increased somewhat as a result.

(b) Cotton

(1) Mitsui and Company, Limited, exports all its American cotton through San Diego. For the 1964–1965 cotton season, Mitsui shipped 7,000 bales. About 50 percent moved out of the port within the free-time period. The other 50 percent remained in storage for periods up to 4 months.

(2) Mitsui uses San Diego rather than another port for the same reasons as Evans with regard to quality, economy, and efficiency of services, personnel, etc., and in addition because its practices and operating procedures are favorable to the cotton industry. The 30-day free time period relieves Mitsui of the payment of storage for 30 days at the gin yard or compressing plant,[9] and San Diego has sufficient carrier service to meet Mitsui's requirements.

(3) American cotton exportation faces competition from cotton grown in Mexico, San Salvador, Nicaragua and Brazil. The main threat lies in the final cost of delivering the cotton to its ultimate destination abroad. The margin of profit in American cotton is extremely small. Any increase in costs would cause Mitsui to set its sales price higher thus affecting the cotton's saleability and reducing export potential.

(4) Mitsui would continue to use San Diego if free time at the port were reduced to 10 days exclusive of Saturday, Sundays and holidays.

(c) Green processed hides

(1) Crockett & Company started its exporting business in San Diego about 1960. It obtains hides in San Diego County and warehouses them in National City adjacent to San Diego. It takes about 45 minutes to truck the hides from warehouse to the docks. At present it exports about 200 tons of hides per month

[9] In this respect, Mitsui would testify in favor of a 45-day free time period.

to Japan. Crockett selected San Diego because of "the availability of storing these hides at the dock with a reasonable free-time period and the lower cost of moving the hides from National City to the docks." Crockett tries to schedule its shipments to arrive on the dock about two weeks before ship arrival time. The port has assisted Crockett in developing its business in Japan.

(2) Crockett's business has never been at a point where it had to store hides at the port. It is Crockett's practice to deliver hides to the docks two weeks before ship arrival time. This movement releases space at the warehouse for the storage of other hides and also relieves the company of some costs.

(3) Even with the two-week delivery, there have been occasions where the hides were delivered from the dock to the ship in as little as one week, or as much as three weeks. Only on one occasion were hides on the dock longer than 30 days. This latter instance was caused by a cancelled sailing and the late replacement of another vessel. Admittedly this instance was an exceptional case.

(4) Crockett customarily sells its hides F.O.B. either dock or warehouse. Accordingly, storage and wharfage charges, if any, are for the account of the purchaser. This payment arrangement would continue if San Diego's 30-day free time period were reduced. Other than the one instance mentioned above there is no evidence that any purchaser was required to pay any storage charges.

(5) Up to 70 percent of Crockett's shipments could have been shipped within a 10-day period exclusive of Saturdays, Sundays and holidays. The remainder could have been stored in the company warehouse. However, instances have arisen where hides were accumulated over a greater than 10-day period because the quantity received was too small, or the variety of hides too great to make a shippable quantity.

(6) Crockett considers that the maintenance of San Diego's present costs and practices is vitally necessary to its business.

H. Free Time at San Diego Between Shipper and Terminal [10]

1. In addition to the use of "free time" shown in the testimony of Evans, Mitsui, and Crockett, the record shows that in actual operation at San Diego: (*a*) there have been infrequent instances where inbound cargo at Tenth Avenue such as plywood, pipe steel, steel products, and other forms of general cargo moved directly from ship's tackle to the dock or rail for movement beyond the port; (*b*) about 13 percent of the cotton exported was loaded across dock direct to ship; (*c*) an unspecified number of users of the port ship inbound within 7 days' free time; (*d*) some cargo, particularly "plunder" cargo,[11] was moved off the dock as soon as possible for inland transportation because of importer requirements; (*e*) an appreciable amount of plywood, earthenware, china and products of that nature moved from the pier within

[10] The record does not disclose the extent to which the customers of San Diego use "free time" either on inbound or outbound cargo or an analysis or detailed breakdown of that use or an analysis of the relationship of the 30-calendar day free time item to the costs of operating the terminal.

[11] This title (derivation not shown) is applied to general cargo originating in the Far East, usually packed in cardboard cartons of uniform dimensions, and easily handled at the terminal. Contents are fabricated items of cloth dresses, children's clothing, ceramics, pottery, toys, Christmas decorations and other similar items.

the 30-calendar day period; (*f*) some of the major importers kept general cargo on the pier the full 30-calendar day period;[12] (*g*) a percentage of the cotton and other export items remained in the terminal for the full 30 calendar days; and (*h*) there was no problem in moving lumber within the 5-day free time period provided in the tariff.

2. In addition to the foregoing, San Diego concedes that under normal circumstances cargo could move to and from the dock or pier within a period of 10 days exclusive of Saturdays, Sundays and holidays

I. Free Time at San Diego Between Vessel and Shipper

1. The San Diego Manager of Marine Operations testified as to the relationship between the vessel and the shipper concerning cargo in free time as it exists at San Diego.

2. Under the provisions of the bill of lading, the liability for the cargo that has been discharged from the vessel at San Diego remains with the carrier while the cargo is in free time status.

3. When free time ends, if the cargo remains in the terminal, a "signoff" occurs whether the cargo goes into demurrage, wharf storage or space rental. The effect of the "signoff" is that the carrier is relieved of its common carrier liability.

J. San Diego's Warehousing Program

1. San Diego's tariff contains the applicable rates and provision for wharf demurrage, wharf storage and space rental effective after the expiration of 30 calendar days' free time.

2. The charge for wharf demurrage is highest, with wharf storage and space rental following in descending order.

3. If cargo remains on the facilities longer than 30 days, its owner can pay wharf demurrage (Item 465) or elect wharf storage (Item 470) or space rental (Item 480). Because storage and space rental rates are considerably lower, wharf demurrage is seldom applied. Wharf storage is available in the transit sheds and warehouses, but space rental is available only in the warehouses. Thus, if cargo at rest in a transit shed for 30 days is elected for space rental, the owner must pay a transfer charge to move the cargo from the transit shed to a warehouse. The transfer charge is not published in San Diego's tariffs because as a non-operating port it believes that such responsibility rests with the two

[12] It is concluded that the six largest importers of general merchandise into San Diego use the full 30-calendar day period for some of their merchandise because they elect to use the space rental provision of San Diego's tariff. This election frequently is made before the ship arrives and is intended to apply to merchandise remaining after free time expires.

terminal operators who undertake, through agreements with the port, to perform all terminal and accessorial services for shippers and carriers. San Diego would assume no responsibility for the transfer service even if it were performed free. No transfer charge would apply, however, if a consignee elected space rental and the cargo was moved directly from the vessel to one of the three warehouses. The six largest importers of general merchandise into San Diego utilize the space rental provisions, and their elections, as well as those of the many others who use that provision, are made before the cargo commences free time and even before it reaches the facility. Moreover, the elections generally apply to all subsequent movements of the subject commodities moving into the port. The terminal operator and the port decide whether cargo elected for space rental is placed at rest in the transit shed or is moved directly to a warehouse. This places the terminal operator and the port in a position to decide which cargoes elected for space rental will be required to pay transfer charges and which will not. Recently, there has been an increase in the practice of moving cargo destined for space rental directly from vessel to warehouse. It is a relatively simple thing to do inasmuch as most users of space rental have elected in advance and management knows where the cargo is destined.

4. Storage rates on comparable commodities are higher under wharf storage than space rental. Indeed, most consignees would use space rental if it were not for the transfer charge. But as demonstrated, the transfer charges can be circumvented by direct movement of cargo to a warehouse. Space rental is particularly suitable to "plunder" cargo. The six largest importers of general merchandise at San Diego move that type of cargo through the port under the space rental item.

5. The rate for space rental is 6 cents per square foot per month. Although theoretically any shipper or consignee is free to utilize the space rental provisions, only two companies pay such rental to the port on a sustained basis—New York Merchandising, a large importer of general merchandise, and Leslie D. Friend, a so-called shipper's agent. Approximately 100,000 square feet of designated space in Warehouses B and C is assigned to each of these companies. Although San Diego receives compensation for this space on a square foot basis, the shipper's agent to whom it is leased is required by the port to pile cargo high so that cubic utilization is maximized. The port's Manager of Marine Operations did not believe that the so-called shipper's agent published his charges and did not know whether such charges were the same for each customer. The record does show that users of the facility were usually charged on a formula worked out on the basis of piling high under the 6 cents per square foot rule. For instance, under that

formula "plunder cargo" was charged a storage rate of 2 cents per carton per month. Moreover, the shipper's agent has adopted a sliding scale for accessorial services—the larger the movement, the lower the unit charge.

6. If cotton destined for export arrives at the facilities in San Diego and is not to be immediately loaded aboard a vessel, it enters free time status under Item 110 of San Diego Cotton Tariff No. 3 [c]. If cotton utilized the full 30 calendar days' free time and still had not been loaded aboard a vessel, it would automatically enter storage. Almost all the cotton moving through San Diego is committed to a vessel when the shipment arrives. It can be presumed that when cotton arrives at the port, the shipper knows the date it will be lifted aboard a vessel. Cotton which arrives at the facility more than 30 days prior to the time that it is scheduled for loading is also entitled to free time and storage. The only cotton exporter called as a witness by San Diego, Mitsui, testified that approximately half of his cotton shipped in 1964 moved out of the port before 30 days' free time had run. That shipper also uses San Diego as a warehousing facility inasmuch as its storage rate is considerably lower than storage rates at gin sites and compress facilities in the interior.

7. As shown by the excerpts of the letters contained in Section F and as admitted by San Diego, its free time, storage and warehousing practices are integral parts of the package deal to market San Diego's services.

8. It is generally conceded that San Diego's storage practices are highly efficient and its rates advantageously low.

Discussion and Conclusions

The issues to be resolved are whether San Diego's practice of offering 30 days' free time (1) results in undue or unreasonable preference or advantage or in any undue or unreasonable prejudice or disadvantage in any respect whatsoever within the meaning of section 16 First of the Act, or (2) constitutes an unjust or unreasonable regulation or practice related to or connected with the receiving, handling, storing, or delivering of property within the meaning of section 17 of the Act.

1. *The nature of free time*

Ships bringing transoceanic freight into port are required by their transportation obligation, absent a special contract, to unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it. *American President Lines, Ltd.*, v. *Federal Maritime Board*, 317 F. 2d 887, 888 (D.C. Cir. 1962)

This allowance by the carrier to the consignee of "a reasonable opportunity to come and get" his cargo is what is known in the industry as "free time." Free time is not a gratuity, but it is required as a necessary part of the carrier's transportation obligation which includes a duty on the carrier to "tender for delivery" all cargo carried by it absent a special contract to the contrary.[13] The reasonableness of the opportunity granted the consignee to pick up his cargo and thus the reasonableness of the free time period is fixed, broadly speaking, by determining the period necessary for the shipper to assemble or the consignee to remove his cargo prior to loading the goods on the ship or after discharge of the goods from the ship. *California* v. *United States*, 320 U.S. 577 (1944). Thus the establishment of the *minimum* amount of free time which under the law must be granted by carriers is a relatively simple proposition—the period must be realistically designed to allow the consignee sufficient time to pick up his cargo, taking into account physical limitations of the facilities, other delays, etc., *i.e.*, the so-called transportation necessities of the particular port or terminal. But the question here is whether it follows that because it it unreasonable and a breach of duty to allow less than is required by transportation necessities that it is unreasonable and a breach of duty to grant free time in excess of such periods.

It is the carrier's obligation not only to afford the necessary free time but also to provide terminal facilities adequate to render such free time meaningful and realistic. *Intercoastal Rates To and From Berkeley, Etc.*, 1 U.S.S.B.B. 365 (1935). This obligation may be fulfilled either by the carrier itself or through an agent. *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400 (1935).

The tariffs of the ocean carriers in the foreign and off-shore trades calling at San Diego make no provision for free time, nor do the carriers provide wharfs or piers at San Diego for the receipt and delivery of cargo.[14] The port of San Diego provides these facilities, and the free time in question is provided for in its tariff. Under these circumstances the port becomes in effect the agent of the carrier for the performance of these obligations of the carrier, and as agent it seems clear that the port is subject to the same limitations as the carrier. In

[13] The carrier's transportation obligation is sometimes erroneously said to include the duty to "deliver" or "make delivery" of the cargo. See, *e.g. Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89, 101 (1948). This is incorrect. An obligation to make delivery implies the duty to actually place the goods in the hands of the consignee, *e.g.* transport the goods to the consignee's place of business, etc. There is no such duty imposed upon an ocean carrier. It "tenders for delivery" and this obligation is satisfied when it puts the cargo on the dock reasonably accessible, properly segregated and marked, and leaves it there for a reasonable period to allow the consignee to pick it up, with notice of course. *American President Lines, Ltd.* case, *supra*.

[14] A fact of which we take official notice.

Penna. Motor Truck Ass'n v. *Phila. Piers, Inc.*, 4 F.M.B. 192 (1953), the Federal Maritime Board said at 197:

> Whether provided by the terminal operator or the ocean carrier itself, reasonable free time must be afforded to outbound and inbound cargo moving over the pier. In undertaking the ocean carrier's obligation to provide such facilities and in holding them out for public use, we hold that respondents have assumed the ocean carrier's responsibility of furnishing reasonable and nondiscriminatory pier services incident to the handling of truck cargoes on their piers which include an allowance of reasonable free time.

Thus, it is clear that San Diego is obligated to provide the reasonable minimum free time; but the question here is whether it is also obligated not to exceed that which is normally the established maximum for common carriers, *i.e.*, does the fact that a port or terminal provides the free time rather than the carrier effect any change in the principles governing the allowance of free time? Before dealing with this problem, however, it is necessary to establish what period, taking into account the transportation necessities at San Diego, constitutes a reasonable opportunity for the shipper to assemble and the consignee to pick up his cargo.

2. Reasonable free time at San Diego

Our review of the record here finds us in agreement with the Examiner that a reasonable free time allowance at San Diego would be 10 days on outbound cargo and 7 days on inbound cargo. The record shows that San Diego operates and maintains a modern and efficient terminal equal to and in some respects better than the other California terminals and which as planned and operated has resulted in savings in time and expense in cargo handling. The favorable weather at San Diego has proved another facilitating factor.

Responsible San Diego officials have themselves testified that in the foreign and offshore trades there is no hindrance to the handling of outbound cargo in 10 working days and that inbound cargo has been removed from the pier with no difficulty within 7 working days and further that there have been frequent instances where cargo has been transferred from ship to truck within 1 day. California ports north of San Diego, some of which have less modern facilities, have for sometime now been handling similar cargo under regulations restricting free time to 10 days outbound and 7 days inbound. *Practices, Etc., San Francisco Bay Area Terminals, supra.* Respondent's officials admitted that 30 days' free time was not an operational necessity. Despite this, however, San Diego argues that free time needs should be appraised on the basis of modern techniques and efficiencies, and not those of 20 years ago. If by this San Diego means the techniques and efficiencies represented by physical characteristics of facilities then logic would require the conclusion that less free time is required not more. But even if by it they mean modern marketing techniques and the "distribution concept" of respondent's Marketing Division, the argument affords no basis for extending free time beyond that which is required by transportation necessities. This is so because the distribution concept is based upon the commercial convenience of certain shippers, both actual and prospective, whose business practices enable them to use San Diego's facilities as a distribution center for their products. Commercial convenience cannot justify a practice which is otherwise unreasonable. *Storage of Import Property*, 1 U.S.M.C. 676 (1937); *American Paper and Pulp Asso.* v. *B. & O. R.R. Co.*, 41 I.C.C. 506, 512 (1916); *Free Time and Demurrage Charges—New York, supra; Investigation of Storage Practices*, 6 F.M.B. 301 (1961). By its own admission respondent's free time practices are primarily used as a device to induce shippers to use San Diego in preference to other ports. Accordingly, we conclude that transportation necessities at San Diego require a free time period in the foreign and offshore domestic trades of 10 days outbound and 7 days inbound, Saturdays, Sundays, and holidays excluded.

What has been said disposes of the sole exception taken to the Initial Decision, that of Hearing Counsel, who would allow 15 calendar days' free time. If by "15 calendar days" Hearing Counsel means to include Saturdays, Sundays and holidays, intervenors properly point out that such a period is inequitable. In ocean transportation a shipper or consignee is unable to deliver or receive his cargo on Saturdays, Sundays, and holidays because the terminal is closed. Thus, a "15-calendar day" period which includes Saturdays, Sundays, and holidays will yield different numbers of working days for different shippers, because the number of working days will vary from 8 to 11 dependent upon the number of Saturdays, Sundays, and holidays in the particular period. If on the other hand Hearing Counsel would exclude Saturdays, Sundays, and holidays, a 15-day free time period would result in 5 days' free storage outbound and 8 days' free storage inbound since the record demonstrates that transportation necessities at San Diego require only 10 days outbound and 7 days inbound. This is but a lesser degree of that which Hearing Counsel themselves complain of in attacking the present day free time allowance.

3. The invalidity of San Diego's tariffs

On the basis of the foregoing, we think it clear San Diego's tariff items providing for 30 days' free time as distinguished from the practice itself do not accurately reflect the precise service being offered to the shipper. San Diego's 30-day "free time" allowance in fact provides two distinct services: (1) the free time which San Diego is obligated to give as agent for the carrier, which we have found to be 10 working days outbound and 7 working days inbound; and (2) a varying period of free storage in such an amount necessary to make up the 30 days. Thus, these "free time" regulations as set forth in Item 455 of Tariff No. 1–D and Item 110 of Cotton Tariff No. 3–C are inaccurate and obscure, and certainly fail of that degree of precision necessary "to enable [other] terminal operators, the shipping public, carriers, and us [the Commission] to determine whether each service is bearing its fair share" of the costs. *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21, 23 (1948). Thus, the tariff items are unreasonable regulations within the meaning of section 17.

Moreover, the regulations confuse and obscure the rights, duties and liabilities as between shippers, carriers and the port or terminal in cases where loss or injury to the cargo occurs. Under the practice at San Diego as testified to by its Manager of Marine Operations, the liability for cargo that has been discharged from the ship remains with the carrier while the cargo is in free time status. When free time ends, if the cargo remains in the terminal, a "sign off" occurs whether the cargo goes into demurrage, wharf storage or space rental. In the view of San Diego the effect of the "sign off" is that the carrier is relieved of its common carrier liability. But by law the common carrier's liability ends with a valid "tender for delivery," and a valid tender is complete when the carrier puts the cargo on the dock reasonably accessible, properly segregated and marked, gives notice to the consignee, and leaves it there for a reasonable period to allow the consignee to pick it up. *American President Lines, Ltd.*, *supra.* We have found that the reasonable allowance of free time at San Diego is 10 days outbound, but San Diego provides 30 days. Despite assumption by the terminal of the carrier's obligation to furnish pier-services, including an allowance of reasonable free time, the carrier remains liable for proper care and custody of the cargo until the tender for delivery is complete and for loss or damage thereto caused by the carrier's negligence during this period. *Caterpillar Overseas, S.A.* v. *S.S. Expeditor*, 318 F. 2d 720 (2nd Cir. 1963), *cert. den. sub nom. American Export Lnes, Inc.* v. *Caterpillar Overseas, S.A.*, 375 U.S. 942 (1963). After the carrier has discharged its obligation to tender for delivery, its liability ceases for risk of loss not due to negligence on its part.

The record demonstrates that the importer has good reason to believe that his common carrier relationship may continue until the end of the 30-day "free time" period provided in San Diego's tariff. It is well established that in regard to ocean transportation the rights and liabilities of the parties before a valid tender for delivery are different than they are after tender, both as to degree and burden of proof.[15] Thus, as the Examiner correctly pointed out, the existence of San Diego's 30-day free time item can only tend to confuse the facts pertaining to proper "tender for delivery."[16] San Diego's tariff regulations are unreasonable within the meaning of section 17 because they obscure the rights and obligations of the carriers, the shippers and the terminal, and could tend to foster litigation. From the foregoing it is clear that nothing more is necessary to require San Diego to amend Item 455 of Tariff No. 1–D and Item 110 of Tariff No. 3–C, and such an order will be issued.

4. The "Free Time" practice as distinguished from the tariff regulations

As we read the Initial Decision, it is restricted to a determination as to the validity of only the two tariff provisions themselves, and it contains no determinations as to the validity of the practice involved. Thus, nothing would preclude any amendment of the tariff items involved from providing for the grant of the free time period prescribed herein and for a further grant of such free storage as is necessary for San Diego to continue its present practice of affording consignees a total of 30 days during which they may leave their cargo with the port without the imposition of any charge.

Hearing Counsel and intervenors clearly seek more than this. Their arguments go beyond the validity of the tariff regulations and attack the validity of the actual 30-day allowance itself whatever it may ultimately be called—be it "free time" or "storage." Thus, they argue that any allowance of time beyond that which is required by the transportation necessities at San Diego, whether in the guise of free

[15] See *Calcot Ltd.* v. *Isbrandtsen Company,* 318 F. 2d 669, 673 (1st Cir. 1963); *Caterpillar Overseas, S.A.* v. *S.S. Expeditor, supra,* at 723; *American President Lines, Ltd., supra,* at 888; *Miami Struct. Iron Corp.* v. *Cie Nationale, Etc.,* 224 F. 2d 566 (5th Cir. 1955); *North American Smelting Co.* v. *Moller S.S. Co.,* 204 F. 2d 384 (3rd Cir. 1953); *Cleveland & St. Louis Ry.* v. *Dettlebach,* 239 U.S. 588 (1916); *Southern Ry.* v. *Prescott,* 240 U.S. 632 (1916).

[16] *Calcot Ltd., supra,* at 673, where the Court citing the *North American Smelting* case, *supra,* stated "[The] issue was somewhat confused, we think, by references to the so-called five-days free time rule which prevails on this pier." See also *American President Lines, Ltd.* case, *supra,* at 889. "This case cites *Free Time and Demurrage Charges—New York, supra,* which held that certain burdens borne by the consignees do "not justify the transfer of those burdens to the carriers in the form of extended free time." 3 U.S.M.C. 89 at 104.

time or free storage, is prohibited by sections 16 and 17 of the Act. San Diego, of course, argues to the contrary.

San Diego contends that its free time practice cannot violate section 16 First because, first, it is offered to all shippers thus none can be prejudiced or preferred, and secondly, there must be a competitive relationship between the shipper or cargo allegedly preferred and the shipper or cargo allegedly prejudiced before a violation of section 16 First can be established. As to the first of San Diego's propositions, the Examiner properly points out that it was laid to rest in *Practices, Etc., of San Francisco Bay Area Terminals*, *supra*, where in the United States Maritime Commission said at 605:

> Oakland contends that there can be no discrimination since the rates are open to all shippers alike. In a sense it is true. However, the commercial practices of those shippers who supply the major portion of tonnage handled by respondents obviously do not permit of their placing their goods in storage.

The Commission then concluded that as to those shippers and consignees whose commercial practices did not permit of their placing cargo in storage, the practice (granting storage at noncompensatory rates) was unduly and unreasonably prejudicial within the meaning of section 16 First. This was so because users of storage at noncompensatory rates were not providing their proper share of essential terminal revenue and thus, "a disproportionate share of this burden [was] being shifted to users of other terminal services whose charges are [or should be] based on rates considered to be reasonable [or compensatory] . . . ." 2 U.S.M.C. at 603.

As for the necessity of establishing a competitive relationship between the cargoes or shippers preferred or prejudiced, an analysis of the cases reveals that it is not needed.

In the early case *Storage of Import Property*, *supra*, the United States Maritime Commission said at 682:

> The furnishing of valuable free storage facilities to certain shippers and consignees beyond a reasonable period results in substantial inequality of service as between different shippers of import traffic, ...

An analysis of the findings in that case reveals not one instance of a specific finding of any competitive relationship between the different shippers. At the conclusion of its report in *Storage of Import Property*, *supra*, the Commission referred to the fear of certain parties to the proceeding that the respondents would afford storage at merely nominal rates thereby in effect continuing the evil complained of. In *Storage Charges Under Agreements 6205 and 6215*, 2 U.S.M.C. 48 (1939), the Commission found that this had in fact happened on shipments of coffee from South America. The Commission said at 52:

All receivers of cargo must use the piers, and any preferred treatment, by charges or otherwise, of certain classes of cargo results in discrimination against other cargo.

Again, no finding of any competitive relationship was considered necessary, and in fact coffee was not found to be competitive with any of the other cargoes involved. Both of these cases were cited with approval in *Practices, Etc., San Francisco Bay Area Terminals, supra,* which involved, *Inter alia,* the practice of granting storage at non-compensatory rates. This case was the subject suit for review in *California* v. *United States, supra,* where the Supreme Court upheld the decision of the Commission saying at 581:

The Commission found that there was a marked lack of uniformity in the free time periods allowed by the various terminals, and that to the extent that appellants' free time allowances were greater than those recommended by the Railroad Commission they were unreasonable and led to discrimination against those persons who did not and could not use extended free time . . . . It concluded that unless those who took advantage of wharf storage supplied revenue sufficient to meet the cost of the service, the burden would be shifted to those who paid appellants for other services, such as docking of vessels, loading and unloading, and transportation privileges over and through the terminals.

Yet again there was no finding of any competitive relationship between the shippers or cargoes preferred or prejudiced. Finally, as late as 1960, the Federal Maritime Board had the following to say in *Storage Practices at Longview, Wash.,* 6 F.M.B. 178 (1960) at 183:

The respondent points out that its operations differ from those in the *San Francisco Bay Area Terminals case, supra,* because there was competition between terminals in that case whereas there is only one terminal in the present proceeding. The respondent contends that a mere preference or discrimination between shippers, carriers, terminal operators, ports, or localities is not of itself unlawful, and that it is only when such preference or discrimination is unjust or unreasonable and results in injury or damage to a particular person or class of persons or advantage to another particular person or class of persons that the same is prohibited by the Act. Respondent cites cases holding that ordinarily there must be a competitive relation between the shippers or between the types of traffic and that there must be a showing of injurious effect upon the traffic to justify findings of undue preference or prejudice. For example, see *Phila. Ocean Traffic Bureau* v. *Export SS. Corp.,* 1 U.S.S.B. 538, 541. The citations largely relate to section 16 of the Act and to matters of preference and prejudice, rather than to whether the practices are undue or unreasonable under section 17 of the Act.

While the Board seemed to be heading for a conclusion that the practice in question ran afoul of section 17 notwithstanding the absence or presence of a violation of section 16, it nevertheless found the practices at Longview to be the same or similar to those in *Practices, Etc., San Francisco Bay Area Terminals, supra,* and after quoting at length from that decision concluded at 184:

The failure of respondent to abide by the provisions of its tariff, the manner in which respondent's free time or free storage and storage rules are applied, and the opportunity thereby afforded respondent to provide unequal treatment of shippers and preferred treatment of certain classes of cargo, *clearly are practices unduly prejudicial and preferential, in violation of section 16 of the Act,* and are unjust and unreasonable practices related to the receiving, handling, storing, and delivering of property, in violation of section 17. (Italic supplied.)

Here again, although the implication is clear, the statement falls somewhat short of an explicit conclusion that no competitive relationship is needed.[17] Moreover, none of the cases reviewed deal with the question of why such a relationship should or should not be shown. The needed rationale was enunciated recently by the Second Circuit Court of Appeals in *New York Foreign Frgt. F. & B. Ass'n* v. *Federal Maritime Com'n*, 337 F. 2d 289 (1964) at 299:

The forwarders argue that a Section 16 (First) violation is shown only when (1) two shippers are given unequal treatment, (2) the shippers are competitors, and (3) the preference to one or disadvantage to the other is the proximate cause of an injury; these prerequisites, they urge, are not supported by the Commission's record. We hold, however, that the substantial evidence that forwarders, in random fashion, charge shippers disguised markups of widely varying amounts, for no apparent reason, suffices to establish discrimination in violation of Section 16 (First). In urging that all three prerequisites must be met, the forwarders rely upon cases involving alleged discrimination in transportation or wharfage charges. See, e.g., Agreement 8765-Gulf/Mediterranean Trade, 7 F.M.C. 495 (1963); Wharfage Charges and Practices at Boston, Mass., 2 U.S.M.C. 245 (1940). We find those cases not apposite. Transportation or wharfage charges are dependent upon the particular commodity involved; the cost for shipping or storing bananas, for example, bears no relation to the fees levied for heavy industrial equipment. To find an unlawful discrimination in transportation charges thus quite properly requires a showing of competitive relationship between two shippers who are charged different prices. But forwarders render substantially the same service to all shippers in procuring insurance or arranging for cartage; the commodity being shipped has little or nothing to do with the reasonableness of the fee exacted for the forwarder's service. The very practice of charging shippers disguised markups of widely varying amounts on substantially identical services, without justification, seems to us to be prima facie discriminatory in a regulated industry.

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[17] As would always seem the case, explicitness is not lacking in those relatively rare cases which despite all that had gone before conclude that a competitive relationship is needed. For example, in *Lopez Trucking Inc., et al.,* v. *Wiggin Terminals Inc.,* 5 F.M.B. 3 (1956) decided by the Board four years before its decision in the *Storage Practices at Longview, Wash.* case, the question presented was whether a proposed regulation applicable only to lumber could prejudice or prefer other commodities, i.e., general cargo. The Board said at 15: "The proposed regulation will not unduly prefer commodities other than lumber, in violation of section 16 of the Act. Neither injury to such cargoes nor an existing and effective competitive relationship between lumber and other commodities has been shown, as is required before such a violation may be established. *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.,* 1 U.S.S.B.B. 538 (1936)." But compare the language of the *Longview* case quoted above which was decided some four years after *Lopez.*

Thus, whatever the justification for requiring a competitive relationship when determining the existence of preference or prejudice in ocean freight rates, such a requirement cannot be justified when determining whether preference or prejudice results from free time or free storage practices; for free time, like the forwarder's procurement of marine insurance, bears no relationship to the character of the cargo—it is extended to cargo on equal terms without regard to size, shape or any other characteristic inherent in the particular cargo involved. The same holds true for storage made available at a flat charge per square foot regardless of what commodity is to be stored. In such cases unequal treatment has no place in a regulated industry. The equality required in situations of this kind is absolute and is not conditioned on such things as competition, proximate cause and the like. To the extent that the other cases may read as requiring the establishment of a competitive relationship in the situation here involved, they are overruled. For reasons which will become obvious later, we shall postpone stating our conclusions as to the actual existence here of preference or prejudice within the meaning of section 16 until we have discussed section 17 and the question of reasonableness.

Section 17 requires that the practices of terminals be just and reasonable. "Reasonable" may mean or imply "just, proper," "ordinary or usual," "not immoderate or excessive," "equitable," or "fit and appropriate to the end in view." *Black's Law Dictionary*, Fourth Edition. It is by application to the particular situation or subject matter that words such as "reasonable" take on concrete and specific meaning. As used in section 17 and as applied to terminal practices, we think that "just and reasonable practice" most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.

The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination. It may cause none of these but still be unreasonable. To conclude otherwise is to make the second portion of section 17 merely redundant of other sections of the Shipping Act, a result not readily ascribed to Congress.

In a very real sense of the term, terminals are public utilities. While not always specifically franchised, they nevertheless are engaged in the business of regularly supplying the public with a service which is of public consequence and need and which carries with it the duty to serve the public and treat all persons alike. This is the essence of the public utility concept. The dependence today of ocean carriers and the shipping public, and thus of the commerce of the United

States itself, upon the terminal operator is too well established to warrant extended exposition. The commercial well being of these interests is directly related to the economy, efficiency and soundness of terminal operations. The shipper's concern with "stability" in transportation costs is not restricted to the freight rates of the carrier, but extends equally to all items in the total cost of transportation to him. It seems clear to us that the predictability which is sought in stable ocean freight rates is just as desirable and valuable in terminal and other charges for services incidental to the actual common carriage itself. This predictability of terminal charges in turn is, or should be to the extent reasonable and possible, dependent upon efficiency, economy, and soundness of operation. It should not in our view be conditioned on promotional inducements which dissipate essential revenues. For this bases competition between terminals, not upon the public terminal's efficiency and economy of operation, but upon the ability and willingness of the parent municipality to absorb or make up through taxation or other levies the dissipated revenue. While carriers and shippers must necessarily run those ordinary commercial risks inherent in just doing business, they should not be forced to run the additional risks attendant to any concept of competition by promotional inducements which provide valuable services free or at noncompensatory charges. While this principle is in a sense grounded upon a concept of competition between terminals, it does not require, in this instance, a showing of "existing and effective" competition between intervenors and San Diego. It is enough where, as here, the parties consider themselves competitive and at least one of them based its operations on this consideration. San Diego emphatically denies that the record shows any "existing and effective competition" and points to the fact that not one specific instance of diversion of cargo to San Diego was shown to have resulted from its free time practice. But in virtually the same breath, San Diego urges that its "free time" practice is an integral part of its total "distribution concept" which is designed to attract cargo to the port thereby enhancing its ability to compete with other ports. Intervenors also view themselves as competitive and have clearly indicated that were they not bound by the order of our predecessor in *Practices, Etc., of San Francisco Bay Area Terminals*, *supra*, they would compete by promotional inducement. And were San Diego allowed to so compete, we can think of nothing in reason or law which would deny the same advantage to intervenors. The consequences of such "competition" are easily foreseen—ever increasing promotional inducements and ever decreasing revenues. We think competition in a regulated industry should be on sounder ground. Thus, in principle, practices which result in the provision of services at rates or charges less than that which it cost the terminal to provide the service are unreasonable practices within the meaning of section 17. The concern with the compensatoriness of terminal rates and charges, aside from any prejudice or preference noncompensatory charges may work, is a thread running throughout terminal case law. In fact no other concept fully explains the precedents.[18]

To return to the validity of the practice in question—as we read the Examiner's decision, his findings and conclusions were restricted to the tariff items 445 of Tariff No. 1–D and 110 of Tariff No. 3–C, and he made no determination concerning the practice of granting 30 days' "free time" itself. His failure to do so appears to be grounded on one or both of the following findings: (1) That the granting of excessive free time is not unreasonable unless "accompanied by another action whereby some shipper or carrier was improperly benefitted," and there was no showing of that here; (2) that there was insufficient evidence of detailed costs in the record to make a determination as to the reasonableness of the distribution of the burden of costs among shippers using the San Diego terminal. What we have already said disposes of the former, and as for the latter, it is unnecessary to disturb the Examiner's conclusions as to the sufficiency and value of the evidence in the record. From the foregoing, we think it clear that San Diego's practice of granting 30 days' "free time" effects one of two results. It either violates section 16 First because it shifts the burden of defraying the cost of providing the service to nonusers of the service; or if the cost of providing the service is not shifted to nonusers, it is an unreasonable practice within the meaning of section 17 because the service is granted at charges less than that which it cost the terminal to provide the service thus jeopardizing the efficiency, economy and soundness of the terminal operations, and endangering stability and predictability of terminal rates and charges without any transportation justification. Since our order in this proceeding directs San Diego to amend its tariff items governing "free time," it is of no real consequence that the record in this proceeding does not clearly establish which of the two proscribed results actually is effected. As in the *Storage of Import Property* case, *supra*, any amendment filed by San Diego which is inconsistent with this opinion would violate the spirit of the order and could result in further proceedings. Consequently

[18] See for example, *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 (1948); *Terminal Rate Structure—Pacific Northwest Ports*, 5 F.M.B. 53 (1956); *Terminal Lease Agreements at Long Beach and Oakland*, 8 F.M.C. 521 (1965); and *Philippine Merchants S.S. Co., Inc.* v. *Cargill, Inc.*, Docket No. 996, served Dec. 2, 1965.

no findings as to the validity of San Diego's free time practices as distinguished from the tariff items governing them will be made.

An appropriate order will be entered.

Vice Chairman JOHN S. PATTERSON, concurring

I would adopt the initial decision of the Examiner and overrule the only exception to the Examiner's conclusion allowing respondents 10 days' free time for outbound cargo and 7 days' free time for inbound cargo, instead of allowing respondent to draft its own rule providing a free time period of approximately 15 days as proposed by Hearing Counsel.

No. 1217

INVESTIGATION OF FREE TIME PRACTICES—PORT OF SAN DIEGO

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether the practice of respondent Port of San Diego, in allowing 30 calendar days' free time, is contrary to section 16 First or section 17 of the Shipping Act, 1916 (46 U.S.C. 815, 816). The Commission has this date entered its Report stating its findings and conclusions, which Report is made a part of this Order by reference.

Therefore, it is ordered, That respondent Port of San Diego within 45 days of the date of this Order, cease and desist from applying Item 455, Tariff 1–D and Item 110, Cotton Tariff No. 3–C, and

It is further ordered, That respondent Port of San Diego, within 45 days of the date of this Order, publish and file with the Commission tariff items governing free time which provide free time of 10 days for outbound cargo and 7 days for inbound cargo exclusive of Saturdays, Sundays and holidays.

By the Commission.

[SEAL] (Signed) FRANCIS C. HURNEY,
Special Assistant to the Secretary.

FEDERAL MARITIME COMMISSION

NO. 1209

SACRAMENTO-YOLO PORT DISTRICT

v.

FRED F. NOONAN CO., INC.

Decided June 6, 1966

Bulk rice loaded from barges on offshore side of vessel moored at petitioner's wharf not subject to wharfage charges, where petitioner's definiton of wharfage restricted application thereof to cargo passed on, over, under or through the wharf.

Clarence Morse and *John Hamlyn, Jr.* for Sacramento-Yolo Port District, petitioner.

Francis L. Tetreault for Fred F. Noonan Company, Inc., respondent.

REPORT

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

Sacramento-Yolo Port District (Port), a public corporation which operates the deepwater terminal of the Port of Sacramento, California, petitioned for a declaratory order pursuant to then Rule 5(i) of the Commission's Rules of Practice and Procedure to terminate its controversy with Fred F. Noonan Co., Inc. (Noonan or respondent), a ship's agent, concerning wharfage charges. Although respondent concedes liability for all charges legally payable by the vessels and cargo here involved, it has refused to pay wharfage on several parcels of bulk rice which did not cross petitioner's wharf, but were loaded to vessels moored at the wharf from barges on the offshore side of the vessels. Petitioner alleges that at all material times its tariff, by "wording and/or practice," made wharfage applicable to cargo so loaded, and seeks an order declaring that wharfage charges lawfully accrued against and are due from respondent.

Hearings were held before and briefs submitted to Examiner Walter T. Southworth, who issued an Initial Decision to which exceptions and replies to exceptions were filed. We have heard oral argument.[1]

The new deepwater Port of Sacramento, located on a dredged turning basin and channel (completed in 1963) which connects with the Sacramento River some 25 miles to the south, was opened for business July 1, 1963. In contemplation of the opening, a tariff was prepared and filed with the Commission, effective, by its terms, June 1, 1963.

The tariff was based upon and followed the general pattern of the published tariffs of California ports which are members of the California Association of Port Authorities, which association Sacramento expected to, and subsequently did, join.

In selecting a definition of "wharfage" for its own tariff, Sacramento adopted the precise language which appeared at that time in the tariffs of the Parr-Richmond, Encinal and Howard Terminals. The following is the critical paragraph of Sacramento's tariffs:

> (a) Wharfage is the charge assessed against cargo or merchandise, vessel's stores, fuel and supplies for passage on, over, under or through any wharf, pier, or seawall structure, inward or outward, loaded or discharged while vessel is moored in any slip, basin, channel or canal.

In or about September 1963, a little more than 2 months after the new Port of Sacramento opened for business, respondent's president, Fred Noonan, was arranging for a shipment of bulk rice (not one of the shipments with which the petition is concerned) to Okinawa.. He contemplated loading this shipment at the Port of Stockton from a barge on the offshore side of the vessel, so as to save elevator charges. The barges to be used had been specially constructed to handle bulk rice, with conveyor systems and towers, self-powered to unload themselves; they were regularly used to move rice from the mill in Sacramento via the Sacramento and San Joaquin rivers to Stockton, where the rice was discharged into elevators and eventually loaded aboard ships. The planned discharge directly into a ship had not been done before, and there was some discussion about it in the trade because of its novelty. There was a question, Noonan thought, as to whether Stock-

[1] Respondent had cross-petitioned for return of "service charges" paid on the above shipments, alleging that such charges were unreasonable when applied to such shipments because excluded by the language of petitioner's tariff and excessive in amount. The Examiner rejected such contentions in his Initial Decision to which respondent filed no exceptions. Any claims as to the unlawfulness of service charges on these shipments have therefore been abandoned and respondent so stated at the oral argument. Furthermore, at all material times respondent's tariff provided for the payment of such charges, and there was no evidence of record showing such charges to be unreasonable in amount.

ton's wharfage charge would properly apply in this situation. Nothing was decided as far as Stockton was concerned, because it was eventually decided to load the rice through the Stockton elevator in the usual way to make sure that a proper certified weight certificate could be obtained.

While the Stockton offshore loading idea was under consideration, however, Noonan had a casual talk with Bergold, sales manager of the Port of Sacramento, and possibly an earlier talk with someone else from the Port, in which the question of wharfage on rice so loaded was briefly discussed. The testimony concerning such conversations is vague. Noonan says he had one talk with "some of the Port of Sacramento people," who "volunteered their opinion" that wharfage on rice loaded from offshore was not properly collectible, since the cargo did not go across the wharf. It was Noonan's "opinion," as a result of his talks with them, that the Sacramento people "felt" that if offshore barge loading were possible, they might be able to handle rice at their port before their facility for loading bulk rice was completed, there being no provision for bulk-loading rice at Sacramento at the time. Later, he testified, he "again" discussed the matter of wharfage with Mr. Bergold, whose "words were to the effect that Mr. Shore [Port Director] at Sacramento agreed with me that wharfage was not collectible on this rice so loaded from offshore barges," and that wharfage "should not apply."

Bergold remembered only casual remarks in the course of general lunchtime conversation among several people at the members' table in the back dining room of the Merchants Exchange Club, where he and Noonan met by chance; Noonan said he was going to handle some rice from barges direct to ship and "we don't think that your wharfage charge is a legitimate charge." Bergold says he replied, "Well, it is in the tariff, so we have to charge. However, you may have some company port inspector [sic] check into the possibility that this charge isn't a just charge and it could be changed, possibly." Although Bergold's recollection did not include any statement about Shore's attitude (he was not asked either to admit or deny making such a statement), he did fix the date as probably prior to October 3, "because during the course of our conversation it has been believed that we have not come to any conclusion about whether this wharfage charge should be assessed or not."

Mr. Shore's testimony confirmed that he had, in discussions with his staff, expressed the opinion that wharfage would not be assessable on rice loaded from offshore, though he himself had not talked to Noonan until early in 1964. That opinion, however, had been conveyed to Noonan either by Bergold or some other representative of the Port.

Following Noonan's talk with Bergold, Shore's traffic analyst, Craig, placed an inquiry concerning the matter on the agenda of the Traffic and Practices Committee of the California Association of Port Authorities. The association, of which Sacramento became a member July 31, 1963, operated pursuant to Agreement No. 7345, originally approved by the Commission in 1941. As amended (with Commission approval), its objects include the establishment, "as far as practicable," of uniform terminal rates, regulations and practices—providing that "uniform" . . . shall not necessarily be construed to mean identical." The parties agree (Article 2):

> * * * to assess and collect all rates and/or charges for or in connection with traffic handled by them within the scope of this agreement, strictly in accordance with the rates, charges, classifications, rules, regulations and/or practices set forth in their respective applicable tariffs; that they will not in any respect deviate from or violate any of the terms of said tariffs: and that no rates or charges assessed or collected pursuant to such tariffs shall be directly or indirectly illegally or unlawfully refunded or remitted in whole or in part in any manner or by any device.

The Committee of Tariffs and Practices, consisting of a representative of each member, is directed (Article 17) to investigate and study costs, practices and conditions in order to determine and recommend to the membership "just and reasonable rates, charges, classifications, rules, regulations and practices"; however, the recommendations of "any party or parties" are to be purely advisory and not binding on any member (Article 3).

The record does not show exactly how Sacramento's inquiry to the Committee was framed. The complete minutes of the Committee's meeting of October 3, 1963, with respect to the subject are as follows:

> Docket No. 6-40: Wharfage—Cargo handled Overside from or to Vessel (Meeting No. 37, October 3, 1963)
>
> This docket was reopened for the purpose of discussion [sic] the inquiry from our new member, the Port of Sacramento. The question involved is that of assessing wharfage on cargo loaded to or discharged from a vessel moored alongside another vessel which is moored at a dock.
>
> It was explained that in the above circumstances full wharfage charges are proper for the reason that although the cargo does not move across the dock, the pier facility is used by the vessel moored at the dock as well as the vessel which is moored alongside. Federal Maritime Board Docket No. 857—*Evans Cooperage Co., Inc.* v. *Board of Commissioners of the Port of New Orleans* was cited as additional authority for the priority of assessing wharfage when the cargo does not move [sic] the wharf.
>
> Further discussion by the Committee resulted in the decision, unanimously adopted on motion and second, that the definition of wharfage, where ever

not so provided at present, be amended to add the word "or" after the word "outward" and preceding the words "loaded or discharged."

With the "amendment" (indicated by underlining) the definition of wharfage in Sacramento's tariff would read:

> Wharfage—The charge assessed against cargo or merchandise, vessel's stores, fuel and supplies for passage on, over, under or through any wharf, pier, or seawall structure, inward or outward, *or* loaded or discharged while vessel is moored in any slip, basin, channel or canal.

The Parr-Richmond, Encinal and Howard Terminals immediately changed their tariffs effective November 15, 1963, to add the amending "or." This made their definitions correspond with the tariffs of the Port of Oakland, Port of Stockton, Diablo Seaway Terminals, and San Francisco Port Authority,[2] which had never used the definition without the "amendment," as far as the record shows. The Port of Sacramento made no change, however, notwithstanding the unanimous decision of the Committee, until April 9, 1964, when its definition was completely revised, effective May 10, 1964, to read:

> (a) Wharfage is the charge assessed against cargo or merchandise, vessel's stores, fuel and supplies for passage on, over, under or through any wharf, pier, or bank controlled by the Port of Sacramento or between vessels or overside vessels (to or from barge, lighter or water) when berthed at a wharf, pier or bank controlled by the Port of Sacramento.

The other members of the association (Port Hueneme, Long Beach, Los Angeles and San Diego) used and continued to use somewhat different definitions, which either spelled out the application to any cargo loaded while the vessel is moored to a wharf, or specifically referred to cargo loaded from overside vessels, somewhat as does Sacramento's revision of May 10, 1964.

A review of the Commission's files indicates that the tariffs of Howard and Encinal contained the form of wharfage without the word "or" at least for some time prior to June 8, 1961, when tariffs were issued containing the definition without indication that the definition was a change. Parr-Richmond's tariff contained the definition of wharfage without the word "or" since some time prior to October 23, 1959, when it filed a tariff (with such definition) indicating no change in the wharfage definition.

There is evidence in this proceeding which shows that Encinal, Howard, and Parr-Richmond assessed wharfage on cargo loaded from

[2] San Francisco's definition is clarified by the following, under "Application of Wharfage Rates":

> (e) The same Wharfage Rate will apply whether merchandise is discharged on or loaded from a wharf, or is discharged or loaded overside a vessel directly from or into another vessel, or to or from the water in any slip, channel, basin, or canal; except as otherwise provided in individual items.

barges to vessels and from vessels to barges.[3] However, this exhibit was based upon the tariff definitions and interpretations in use as of November 15, 1963.

The sole evidence of record relating to practices of the terminals prior to November 15, 1963, is contained in the testimony of Aaron H. Glickman, Executive Secretary of the California Association of Port Authorities. Mr. Glickman testified that the language of the various tariffs defining wharfage "is almost identical" and that any difference between tariffs is "negligible." The only terminal, however, of whose practice prior to November 15, 1963, there is record evidence is the Port of San Francisco, whose tariff contained the word "or" as well as the clarification noted in footnote 2. Cargo loaded from vessel to barge and from barge to vessel was said there to be "subject to full wharfage charges for a period of 25 years . . . ."

Two vessels for which Noonan was not agent loaded rice at Sacramento from offshore barges prior to May 10, 1964—the *Hastings*, on December 18–23, and the *Fairport*, early in 1964. They were charged and paid full wharfage, apparently without objection; however, Noonan did not know this, or even that they loaded rice.

Early in January 1964, Noonan negotiated a contract to transport 25,000 tons of rice from Sacramento to Japan. Under the terms of the contract, loading was included in the cost of transportation, and any terminal loading charges against cargo were for the account of Noonan or his principal.

At the time, Noonan assumed that no wharfage would be charged on rice loaded from offshore barges, which he planned to use. He also hoped to be able to use, for part of the contract, a facility then under construction by the Port to load rice delivered from the mill to the wharf by truck in bottom-dump trailers. This facility was a "truck pit," from which rice dumped from the trailers would be loaded directly to the ship by a mechanical conveyor system. Noonan planned to load simultaneously via barges and the truck pit, to provide the most expeditious schedule. There was never any question but that wharfage would be payable on rice loaded via the truck pit and conveyor system, which crossed the wharf; in addition, there would be a charge, comparable to the elevator charge at Stockton, for the use of the system. As it turned out, the system was not operative so as to be useable for any of Noonan's rice until April.

Loading of the first shipment of rice pursuant to the Japanese contract began January 7, 1964, and was completed January 23, all from the offshore barges. The second shipment, which brought the total

[3] The record does not indicate that bulk rice has in fact ever been so loaded by them.

shipped to over 25,000 tons, was loaded January 21–29, 1964. Under date of January 29, 1964, Noonan was billed for wharfage on the first two shipments at the tariff rate, applicable to bulk rice and other grain, of 50¢ per short ton. This was the first direct communication from the port to Noonan that the Port of Sacramento intended to charge wharfage on rice so loaded, although Noonan had heard that the California Association of Port Authorities felt strongly that wharfage should be charged under such circumstances. Soon after receipt of the invoices, Noonan complained to Shore. Shore told him that he felt that wharfage should be paid; that the Port's position had changed; and that the California Association of Port Authorities, of which the Port was a member, took the position that wharfage was collectible when cargo was loaded from offshore barges. Noonan refused to pay. Notwithstanding his failure to pay the Port's invoices for wharfage on so much of the rice as was loaded from offshore barges, the Port continued to handle his vessels, two in March and two in April. As noted above, the Port's tariff was amended April 9, 1964, effective May 10, 1964, to provide expressly for the assessment of wharfage on cargo loaded "overside vessels (to or from barge, lighter or water) when berthed at a wharf . . . controlled by the Port of Sacramento." Noonan loaded one vessel in June, but refused to pay wharfage on such cargo despite the tariff change. Finally, in October 1964, the Port commenced this proceeding to resolve the entire controversy.

The vessels in question and the wharfage charges assessed are shown in the following table. Only the wharfage in the "offshore" column, none of which has been paid, is in dispute.

Vessel	Loading dates (1964)	Wharfage assessed (at 50¢/ton)		Truck pit (conveyor) charges (at 55¢/ton)
		Offshore	Conveyor	
Blumenfeld	Jan. 7–23	$7,768.24		
Duffield	Jan. 21–29	4,762.23		
Northern Sunlight	Mar. 13–22	2,420.94		
Alnfield	Mar. 29–Apr. 4	5,083.10		
Baymaster	Apr. 3–4	2,300.85	$4,056.37	$4,462.23
World Felicia	Apr. 11–16	2,601.06	2,918.03	3,279.13
Alnfield	June 3–10	2,871.73	897.39	987.13
Totals		27,808.15	7,871.79	8,728.49

The Initial Decision

The Examiner found in his Initial Decision that prior to May 10, 1964, petitioner's tariff was so worded as not to allow the collection of wharfage on bulk rice loaded directly from barges on the offshore side of respondent's vessels, but that the re-wording of the tariff effective on that date made wharfage charges applicable to bulk grain so loaded.

DISCUSSION AND CONCLUSIONS

Respondent concedes the *right* of a terminal operator to assess wharfage against cargo loaded from a vessel rather than over a wharf. Such right has, moreover, specifically been recognized by our predecessor. *Evans Cooperage Co.* v. *Board of Commissioners*, 6 F.M.B. 415 (1961). The sole issue for resolution in this proceeding is: Did the tariff of petitioner at all material times provide for the payment of wharfage on cargo loaded from ship to ship rather than from wharf to ship?

Petitioner alleges that the Examiner erred in finding that prior to May 10, 1964, it did not so provide. First, it argues that the literal meaning of the tariff language shows it was to be applied to cargo loaded from barge to ship. Secondly, it argues that the tariff should be read against the background of the language in and operations under tariffs of other terminals in the Bay area. If so read, it argues, it will be seen that the other terminals had tariffs similar to and operated in a manner like that of petitioner. Finally, petitioner alleges that its conduct in assessing wharfage against vessels other than those involved here for loading from barges and its communications to Noonan prior to the first invoice on cargo here involved show that Noonan should have known petitioner intended to assess the wharfage charges.

We agree with the Examiner that prior to May 10, 1964, the effective date of the revision of Sacramento's tariff, it did not provide for the payment of wharfage on cargo loaded from ship to ship rather than from wharf to ship. It is a basic principle in the law of tariff construction that tariffs must be clear and unambiguous to avoid possible discrimination among users of tariff services. When a tariff is clear on its face, no extrinsic evidence may be used to vary its "plain meaning." Tariffs are, moreover, drawn unilaterally and must therefore be construed in the case of ambiguity against the one making and issuing the tariff, and "it is the meaning of express language employed in the tariff and not the unexpressed intention . . . which controls . . . ." *Aleutian Homes, Inc.* v. *Coastwise Line*, 5 F.M.B. 602, 608 (1959).

A reading of the language of Sacramento's tariff prior to May 10, 1964, indicates that the "plain meaning" of the words contained therein is that wharfage was not, contrary to Sacramento's contention, to apply on cargo which did not move over the wharf. The tariff described wharfage as the "charge assessed against cargo . . . for passage on, over, under or through any wharf . . . , inward or outward, loaded or discharge while vessel is moored in any slip, basin, channel or canal." Sacramento maintains that to read this provision as the Examiner did and as we have done makes the words "loaded or discharged" surplusage to the words "inward or outward." We disagree. Grammatically speaking, the words "inward or outward" modify "passage" and "loaded or discharged" modify "cargo." Thus, for a wharfage charge to be applicable under the above definition, cargo must be loaded or discharged and must pass inward or outward on, over, under or through a wharf.

If, on the other hand, an "or" were inserted between the words "outward" and "loaded," "loaded or discharged" become an alternative to "passage." Thus, cargo could be assessed wharfage for passage on, over, under or through a wharf or if it were loaded or discharged while a vessel was moored in a slip, basin, channel or canal.

Sacramento correctly contends that reference may be had in some cases to matters outside the express language of a tariff to aid in its construction. Such reference, however, is limited. It is proper only in three instances: (1) where the language of the tariff is itself vague; or (2) where the tariff contains technical words which require interpretation because their meaning is not generally known (*Aleutian Homes, Inc.* v. *Coastwise Line, supra; Thomas G. Crowe* v. *Southern S.S. Co.*, 1 U.S.S.B. 145 (1929)); or (3) there exists a custom or usage of a trade or course of dealing of the parties which, although not specified in the tariff, is such that it should be applied.

The first instance in which matters outside the express language of a tariff may be utilized is not relevant here. As we have observed, the tariff is not ambiguous.

Nor is the second instance applicable here. The difficulty in the construction of the tariff here involved does not relate to the problem of defining technical words. No contention has been made, for example, that "wharf" means "slip." It relates solely to the question of how the tariff as a whole is to be read. Therefore, the only plausible argument that wharfage was applicable under Sacramento's earlier definition is that custom, usage, or course of dealing of the parties made it so applicable.

The third instance, therefore, appears at first to be in point, but in fact it is not.

The extent to which custom, usage, or course of dealing of the parties may be used in construing a tariff is limited. As noted above, they may not be employed to vary the "plain meaning" of express language in a tariff. Their use is properly confined to a situation where it is necessary, to use the language employed in petitioner's exceptions, "to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument." [4]

Neither this Commission nor its predecessors have ever employed evidence of matters extrinsic to clear tariff language to supplement such language. Use of extrinsic evidence has been limited to the interpretation of technical words in a tariff. This does not imply that the Commission cannot use such evidence to supplement tariff provisions. Such evidence must be truly "supplementary," however. It must not be designed to cover what the clear language of the tariff itself covers. Typical cases before the Interstate Commerce Commission indicate that extrinsic evidence cannot be used to vary tariff items but is to be used only as an addition to the terms stated in tariffs. Moreover, such cases deal largely with extrinsic evidence affecting matters such as manner of delivery of cargo.[5] When, however, the applicability of the rate is the subject of the attempt to supplement by extrinsic evidence, the Interstate Commerce Commission has been reluctant to allow any supplementation: "Charges are governed by the applicable tariffs and not by the practice of the carriers." *Quaker Oats Co.* v. *Director General*, 80 I.C.C. 75 (1923), citing *Chesapeake & Ohio Coal & C. Co.* v. *Toledo & O. C. Ry. Co.*, 245 F. 917.

> The interstate commerce act [sic] provides that any matter which affects charges must be published by the carriers, and a usage or custom can not be considered in determining what such charges should be under the applicable provisions of the tariff. *Allison & Co.* v. *Norfolk Southern R. Co.*, 183 I.C.C. 309, 310.[6]

To allow parties to shipping contracts to apply, vary or supplement a tariff rate or charge on the basis of their course of dealing would be even further to undermine the requirement of rate filing and encourage the setting of different rates or charges for different shippers. This cannot be permitted.

Even assuming, however, that evidence of custom, usage or course of dealing were admissible to supplement the tariff provision here involved, neither custom, usage nor course of dealing of the parties indicates that anything other than the literal words of the wharfage definition are applicable in this case. There appears on this record

[4] Petitioner's Exceptions, page 17, quoting *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U.S. 285.

[5] See *e.g. Jarka Corporation of Baltimore* v. *Pennsylvania R. Co.*, 130 F. 2d 804, 807; *C. M. McMahen & Sons* v. *Louisville & N.R. Co.*, 16 F. 2d 698; *Gt. No. Ry.* v. *Merchants Elev. Co., supra.*

[6] To the same effect see *Standard Paint Co.* v. *S. P. Co.*, 37 I.C.C. 405, 406: "In computing charges under the provisions of this tariff defendants uniformly have allowed 7.9 pounds per gallon, and argue that this is the only feasible basis for estimating charges. This may be true, but the law does not contemplate that the terms of a tariff should be supplemented by the arbitrary practice of carriers. [cite] The tariff must be complete."

no custom or usage of the other terminals of the San Francisco Bay Area with respect to the collection of wharfage on cargo loaded from barge to ship.

We have reviewed our files in light of Sacramento's exception that the tariffs of Howard and Encinal Terminals, as well as Parr-Richmond, also contained definitions of wharfage without the word "or." This does not help petitioner, however. There is no evidence of record as to how the three terminals other than Sacramento whose tariffs did not contain the "or" operated at the time they had such provisions in force. In fact, the only evidence as to how any terminal operated with respect to the collection of wharfage prior to November 15, 1963, relates to the Port of San Francisco, whose tariff contained the word "or" and the clarification noted in footnote 2.

Nor does evidence of "course of dealing" help Sacramento. The record does indicate that Sacramento assessed wharfage against vessels other than those involved here for loading from barges and that a communication to Noonan prior to the first invoice on cargo indicated that wharfage would be collectible on Noonan's cargo. However, the record affirmatively indicates, as noted above, that Noonan did not know that the other vessels paid wharfage. As far as communications to Noonan were concerned, the only one prior to the first invoice which indicated that wharfage would be charged came from an undisclosed source and related only to the fact that the Association felt that wharfage "was collectible." All other communications to Noonan and all communications from officials of Sacramento were such as reasonably to lead him to believe that wharfage would not be assessed. Noonan was so informed by "some of the Port of Sacramento people," and was of the opinion that "Mr. Shore [Port Director] agreed." Moreover, Shore did in fact agree. When Shore at last directly communicated with Noonan after receipt of the first invoice, he informed Noonan that "the port's position had changed."

On and after May 10, 1964, however, the definition of wharfage in Sacramento's tariff was such that it applied to cargo loaded from barge to vessel. This charge was proper under the Freas formula,[7] which defined wharfage as "the charge for passing cargo over the wharf, or from vessel to vessel at wharf" (*Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57, 60 (1948)), and has been upheld in *Evans Cooperage Co.* v. *Board of Commissioners*, *supra*, which is indistinguishable from the situation under Sacramento's revised tariff.

[7] I.e., the method of segregating terminal costs and carrying charges, and of apportioning such costs and charges to the various wharfinger services.

Therefore, Upon the petition for declaratory order, it is concluded and found that:

1. Wharfage charges did not lawfully accrue against respondent and are not due from respondent to petitioner with respect to bulk rice loaded prior to May 10, 1964, at the Port of Sacramento directly from barges on the offshore side of respondent's vessels.

2. Wharfage charges lawfully accrued against respondent and are due from respondent to petitioner at the rate of 50¢ per short ton provided in petitioner's tariff on account of bulk rice loaded to respondent's vessels directly from barges on and after May 10, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1210

CONTINENTAL NUT COMPANY

v.

PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, ET AL.

Decided June 15, 1966

Agreement whereby respondent conference members added a charge of $4 per ton on the ocean freight rates applicable to Brazil nuts and paid such amount to the Brazil Nut Association, a trade association controlled by the shipper-importers, for its use in advertising and promoting the sale of Brazil nuts in the U.S. held to constitute the implementation of an agreement which was required to be filed for approval pursuant to section 15 of the Shipping Act, 1916, as amended.

The issuance of declaratory orders under section 5(d) of the Administrative Procedure Act and Rule 5(h) of the Rules of Practice and Procedure of the Federal Maritime Commission is within the sound discretion of the Commission and when such an order is issued, its scope will be limited to the determination of those questions necessary to terminate a controversy or remove uncertainty.

The discontinuance by respondents of the plan found herein to constitute an unfiled agreement obviates the necessity of issuing an order to cease and desist.

Clarence Morse, for Continental Nut Company.

Robert L. Harmon and *E. Myron Bull, Jr.*, for Pacific Coast River Plate Brazil Conference, et al.

REPORT

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

This matter comes before us on petitioner's request for a declaratory order pursuant to section 5(d) of the Administrative Procedure Act, 5 U.S.C. 1004(d), and Rule 5(i)[1] of the Commission's Rules of Practice and Procedure (46 CFR 502.69).

[1] Subsequently renumbered Rule 5(h).

The Controversy Involved

Petitioner filed suit in the U.S. District Court for the Northern District of California in 1964 (Civil Action No. 42426) alleging that certain activities of respondents (hereinafter described) constituted a violation of the antitrust laws of the United States (15 U.S.C. 1, 2, 3, 8 and 15) and praying for damages in the trebled amount of $98,457. Defendants (respondents here) moved to dismiss on the ground that the subject matter of the suit was within the exclusive primary jurisdiction of the Federal Maritime Commission in that the Shipping Act, 1916, had superseded the antitrust laws with respect to the facts as alleged in the complaint.

The Court denied defendants' motion to dismiss but stayed further proceedings in the case, "pending a final decision of the Federal Maritime Commission . . . concerning the lawfulness under the Shipping Act, 1916, as amended, of the acts alleged in the complaint."

Accordingly, on October 26, 1964, petitioner, Continental Nut Company, filed its Petition for Declaratory Order with the Commission.

The Facts

Petitioner, Continental Nut Company (Continental), is an importer of Brazil nuts. Respondents collectively constitute the Pacific Coast River Plate Brazil Conference (and are referred to herein as the Conference). The Brazil Nut Association (BNA) was a loosely organized promotional organization which was engaged solely in the institutional advertising of Brazil nuts and which derived its financial support almost entirely from a $4 per ton contribution made by the Conference members to BNA on all shipments of Brazil nuts carried on Conference vessels. This $4, in turn, was reflected in a corresponding increase in the ocean freight rate on Brazil nuts.

This plan had its inception in 1934 and came into being at the instance of the New York importers of Brazil nuts which entered into such an agreement with the North Brazil/U.S. Atlantic and Gulf Freight Conference. Some ten months later respondent Conference also became a contributor to the fund.

This arrangement lasted more or less continuously until 1963 when it was discontinued largely upon petitioner's expression of dissatisfaction to the Conference chairman, Mr. R. F. Burley. Upon discontinuance, the Conference promptly lowered its rates on Brazil nuts by $4 per ton.

Continental was not incorporated until 1944 and did not begin to import Brazil nuts directly until 1954. It paid the same rates as any other importer of Brazil nuts similarly situated and the Conference carriers made the same $4 per ton contribution to the BNA advertising fund on Continental's imports as they did on any other shipper's imports of this commodity.

Continental also shared in the benefits of the BNA advertising most of which was national in character. It utilized promotional material offered by BNA free of charge or at cost. Such local advertising as was done has apparently been apportioned to east coast and west coast newspapers in approximately the same ratio as the contributions from the east and west coast conferences.

Continental alleges that it was forced to pay an assessment of $4 per ton on its imports of Brazil nuts which, although under the guise of and appearing to be a part of ocean freight, was in reality an illegal exaction for purposes of supporting the BNA advertising fund over which Continental had no control.

Continental requested the Conference to repay the $32,819 which it claimed had been illegally collected on behalf of the BNA fund. The Conference refused and the treble damage action followed.

After the Court suspended the antitrust suit Continental filed its Petition for a Declaratory Order in which it alleged that respondents' conduct was in violation of sections 14 First, Third and Fourth, 16 First and Second, 17 and 18(b)(3) of the Shipping Act, 1916, as amended. Continental seeks an order (1) declaring the inclusion and collection of the assessment to be unlawful under the Act, (2) declaring the acts alleged in the petition to be unlawful under the Act, (3) terminating the controversies and (4) for such other relief as may seem proper.

In its reply to the Petition, to which was appended a copy of the pleadings in the antitrust suit, the Conference admits that it made payments into an advertising fund pursuant to an agreement with the Brazil Nut Association, but otherwise denies the material allegations of the Petition. The Conference urges that the sole issue for decision here is whether the Brazil nut rates were charges pursuant to an "approved or approvable section 15 agreement," and whether the alleged advertising fund agreement was a proper implementation of such section 15 agreement. Unless the section 15 questions were made or considered part of the Petition, the Conference argues, the Petition would have to be dismissed as not necessary "to terminate a controversy or to remove uncertainty." However, the reply did not seek dismissal of the Petition, but prayed (1) that the Commission consider and determine the issues raised in the pleadings, "with particular reference" to their propriety under section 15; (2) that the Commission find that all respondents have "been under section 15" and are therefore exempt from the antitrust laws; (3) that the Commission hold that it has exclusive jurisdiction over the subject matter of the antitrust complaint filed in the U.S. District Court; and (4) that the Commission issue such additional order as it deems proper.

Nevertheless, the Conference subsequently moved to dismiss the Petition on account of Continental's failure and refusal to amend its petition so as to present the section 15 issue to us. We denied this motion in an order dated April 23, 1965, concluding that the section 15 question was properly in issue in the proceeding.

Thereafter hearings were held. The parties filed their requested findings of fact and conclusions of law and Examiner Walter T. Southworth issued his Initial Decision on December 30, 1965. The Examiner made extensive findings of fact and concluded that none of the sections of the Act had been violated by respondents as alleged by petitioner. Moreover, the Examiner concluded that the collection and payment to BNA of $4 per ton on all shipments of Brazil nuts constituted authorized conduct under respondents' approved section 15 agreement No. 6400.

Limitations On Scope of Declaratory Relief

We reject the Examiner's conclusions concerning the alleged violations of sections 14, 16, 17 and 18 of the Shipping Act but in so doing express no opinion as to whether the respondents' conduct constituted violations of those sections. Our reason for deleting these findings is simply that they are unnecessary to the resolution of the "controversy" presented in Continental's petition for declaratory relief.

Petitioner's sole purpose in bringing this proceeding before the Commission is to satisfy the District Court's requirement that there be a final determination by us concerning the lawfulness under the Shipping Act, 1916, of respondents' conduct before the antitrust suit is permitted to go forward.

Clearly, there exists here a real controversy or uncertainty within the meaning of section 5(d) of the Administrative Procedure Act (5 U.S.C. 1004(d)), and former Rule 5(i) of the Commission's Rules of Practice and Procedure. Moreover, this is the kind of case which presents legal issues which are required by the Shipping Act, 1916, as amended, to be determined on the record after opportunity for an agency hearing. Finally, this case does not come within any of the six exceptions set forth in the introductory language of section 5 of the Administrative Procedure Act. It follows, therefore, that this is an appropriate matter for the issuance of a declaratory order.

The question then becomes how far we should go in deciding the various allegations and counterallegations set forth in the exceptions to the Initial Decision.

It is quite obvious from the pleadings before the Court in the antitrust case that the Court suspended proceedings in order to allow the parties to seek a determination by this Commission as to whether or not the agreement in question came within respondents' approved section 15 agreement No. 6400. If we decide that the BNA scheme *is* within the ambit of respondents' approved agreement, then it follows that the Commission has exclusive jurisdiction of the subject matter of the lawsuit and respondents are exempted from the reach of the antitrust laws. If, on the other hand, we decide that the agreement in question does *not* come within respondents' approved agreement, then it follows that respondents have violated the Shipping Act, 1916, as amended, by implementing an unfiled and unapproved agreement. The implementation of an unfiled and unapproved ratemaking agreement is subject to the antitrust laws. *Carnation Company* v. *Pacific Westbound Conference, et al.*, 383 U.S. 213 (1966).

Continental's suit in the District Court depends solely on whether respondents' conduct is a violation of the antitrust laws of the United States, which by statutory definition are confined to the Sherman Act and the Clayton Act (Act of Oct. 15, 1914, C. 323, § 1, 38 Stat. 730, 15 U.S.C. 12). Thus, even if respondents' conduct were found to have violated one or the other of the various sections of the Shipping Act, 1916, such a finding would be of no possible use to the District Court in the instant controversy.

Since there is no controversy or uncertainty in a meaningful legal sense with respect to the alleged violations of the Shipping Act by respondents (other than section 15), we decline to pass on these allegations. We also refrain from ruling on the question of whether the agreement in question might have received our approval if it had been properly filed under section 15.

The implementation of an unapproved ratemaking agreement is not "cured" by the fact that such agreement might have received our approval if it had been filed in accordance with section 15 and our rules thereunder. There is no way in which we can legally approve the agreement retroactively even if we were so inclined. *Mediterranean Pools Investigation*, Docket 1212, served January 19, 1966. We turn, therefore, to respondents' approved agreement and the BNA plan in the light of that agreement.

The Brazil Nut Advertising Agreement

The plan whereby the Conference agreed to contribute $4 per ton to the BNA advertising fund is described in various documents from the record in this case.

In the minutes of meeting No. 36 of the Pacific Coast River Plate Brazil Conference on February 26, 1935, the following resolution was recorded:

> It being understood and agreed by consignees that shipments will be confined to Conference Lines, in return for which steamship lines will contribute to the Brazil Nut advertising fund—
>
> 20¢ per 100 lbs. on nuts in the shell and 20¢ per case of 66# net on shelled nuts.

Subsequently, consignees of Brazil nuts were required to agree to make the same contribution to the Brazil nut advertising fund as the Conference carriers did whenever they received shipments of Brazil nuts via a nonconference carrier.

This agreement dated May 25, 1942, provided in pertinent part that,

> In view of the continued support of the Brazil Nut Advertising Fund during the calendar year of 1942 by member lines of the Pacific Coast River Plate Conference, the undersigned consignee of Brazil Nuts reciprocates this support and agrees that if he should receive an import shipment of Brazil Nuts via any ship other than those operated by the Conference Lines, he will make the same contribution to the Brazil Nut Advertising Fund that would have been made if the shipment had been carried by one of the Conference lines.

This agreement was renewed annually by the consignees and the Conference through 1948. Thereafter, it was considered to be in effect until terminated by one of the parties.

Mr. R. F. Burley, Conference Chairman, in a memorandum to Conference members dated March 29, 1956 (Exhibit No. 18) described the arrangement with BNA as follows:

> This Conference as well as the North Brazil United States-Canada Freight Conference have an agreement with the Brazil Nut Advertising Fund Trustees that we will contribute from our gross earnings the sum of 20¢ per case on shelled and 20¢ per 100 lbs. on unshelled nuts. At the time this agreement was reached the freight rates were increased a like amount. The usual practice is for the Conference member handling the nuts to issue a check, after arrival, in favor of the Brazil Nut Advertising Fund and send it to this office for transmittal to Mr. T. R. Schoonmaker, their Executive Secretary in New York. The industry carries on a very energetic advertising campaign annually on a relatively small budget and it has, undoubtedly, increased the importation of Nuts into the United States.
>
> Our agreement provides that, if it is intended to cancel same, notification must be given in writing to the Trustees between October 1st and December 31st. It is generally agreed that if cancellation took place we are obligated to reduce our rates the amount of the contribution. This agreement has the blessing of the Regulation Office of the Federal Maritime Board.

The Approved Agreement [2]

Respondents operate under approved Agreement No. 6400, the preamble of which provides:

WITNESSETH:

That in consideration of the benefits, advantages or privileges to be severally and collectively derived from this Agreement, the parties hereto, common carriers by water, maintaining regular services, subject to the Shipping Act, 1916, as amended, hereby associate themselves in a Conference to be known as the PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, to promote commerce between ports on the Pacific Coast of the United States and Canada and ports in Argentina, Uruguay and Brazil, and to that end they hereby severally agree among themselves as follows:

The scope of the authority granted under the agreement appears in Article 1(a) which provides:

ARTICLE 1. (a) This Agreement covers the establishment and maintenance of agreed rates, rules and charges, including divisions of rates and absorptions of transshipment expense on cargo handled on a transshipment basis, to be agreed to by the parties as hereinafter provided for or in connection with the transportation of all cargo in vessels owned and/or operated by the parties hereto in the trade covered by this Agreement, the parties hereto being bound to the maintenance as between themselves of uniform freight rates and practices in connection with the application thereof, and divisions of rates and absorptions of transshipment expense, agreed upon from time to time as shown in the Conference tariff.

Articles 3 and 4 of the Agreement further provide:

ARTICLE 3. FREIGHT CHARGES. All freight and other charges for or in connection with such transportation shall be charged and collected by the parties hereto on actual gross weight or measurement of the cargo, or value, or per package according to tariff and strictly in accordance with rates, charges, classifications, rules and/or regulations adopted by the parties and recorded in the tariff or tariffs of the Conference.

ARTICLE 4. FILINGS. All rates, charges, rules, and/or regulations, and additions thereto and changes therein, adopted pursuant to the provisions of this agreement, as well as a copy of minutes of all meetings and of all circulars and other Conference papers recording action of the parties under this agreement, shall be furnished promptly to the Governmental agency charged with the administration of section 15 of the United States Shipping Act, 1916, as amended.

Respondents' Plan Did Not Come Within Their Approved Agreement

The basic issue before us is whether or not the plan whereby respondends paid $4 per ton to BNA amounted to the implementation of an unfiled and unapproved section 15 agreement.

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[2] Other Articles of the agreement not set out herein govern such things as: Open Rates, Article 1(b); Agents, Article 2; Discrimination, Art. 5; Absorptions, Art. 6; Filing of Rules and Regulations, Art. 7; Membership, Art. 8; Admission Fee, Art. 9; Withdrawal, Art. 10; Meetings, Art. 11; Notice of Meetings, Art. 12; Quorum, Art. 13; Decisions, Art. 14; Voting Privileges, Art. 15; Officers and Duties, Art. 16; Expenses, Art. 17; Maintenance of Service, Art. 18; Breach of Agreement, Art. 19; Meetings with other conferences, Art. 20; Execution in Several Parts, Art. 23; and Brokerage, Art. 24.

In 1927, a predecessor, the U.S. Shipping Board, set down certain guide lines with respect to the meaning of the words "every agreement," etc., found in section 15. While it concluded that it would not take a "too literal interpretation of the word 'every' to include routine operations relating to current rate changes and other day-to-day transactions between carriers under conference agreements . . . ." the Board nevertheless warned that,

> In the nature of transportation by water, it is manifest that conference agreements within the purview of section 15 are those whereby the carriers propose to be governed in their conference activities as to matters specified in the first paragraph of that section. Agreements arrived at by conference carriers providing for fixing or regulating transporation rates or fares, and the *other matters specified* . . . are within the meaning of section 15. *Section 15 Inquiry,* 1 U.S.S.B. 121, 124–125 (1927).

In a footnote the report lists among the "other matters specified" the following: "Giving or receiving special rates, accommodations, or other special privileges or advantages; . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement." *Section 15 Inquiry*, *supra* at 125. As a broad statement of policy, this is as valid today as it was in 1927.

As a general principle, a conference is limited to activities which are clearly permitted under its approved agreement. Thus, if a Conference agreement permits the setting of ocean freight rates in the trade it serves, these rates may be adjusted from time to time as the normal economic forces which govern the establishment of such rates may require. These are routine, day-to-day, interstitial workings under an approved agreement. No further approval by the Commission is required to implement such changes.[3]

However, where there is a departure from the routine establishment or adjustment of rates, approval must be sought and received before such a departure is legal. Thus, where a Conference inaugurates a system of dual rates, granting lower rates to shippers in exchange for an exclusive patronage agreement, specific advance approval must be had from the Commission. *Isbrandtsen Co.* v. *United States et al.*, 211 F. 2d 51 (D.C. Cir. 1954), *cert. den. sub nom. Japan-Atlantic & Gulf Conference et al.* v. *United States et al.*, 347 U.S. 990 (1954). In that case the court said,

> Clearly, a scheme of dual rates like that involved here is an "agreement" in this [section 15] sense. It can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement. 211 F. 2d 51 at 56.

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[3] Subject, of course, to tariff filing requirements under the amendments to the Shipping Act.

Similarly, in *Trans-Pacific Frgt. Conf. of Japan* v. *Federal Maritime Com'n*, 314 F. 2d 928 (9th Cir. 1963), the Court found that the inauguration of a neutral body plan without prior approval was illegal saying,

In attempting to carry out an arrangement for a Neutral Body which was never approved by the Board, the conference was plainly in violation of § 15. 314 F. 2d 928 at 935.

In *Mitsui Steamship Co.* v. *Anglo Canadian Shipping Co.*, 5 F.M.B. 74 (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. 91–92. Similarly, plans involving port equalization are considered nonroutine. *American Export & Isbrandtsen L.* v. *Federal Maritime Com'n*, 334 F. 2d 185 (9th Cir. 1964); and in *Pacific Coast European Conf.—Payment of Brokerage*, 4 F.M.B. 696 (1955), the Board found that petitioners' attempt to implement an amendment to their tariff rule discriminating among brokers constituted a violation of section 15 saying,

. . . the authority granted in article 1 [of the basic conference agreement] does not extend, without additional approval, to the creation of new relationships which invade the areas of concerted action specified in section 15 in a manner other than as a pure regulation of intraconference competition. 4 F.M.B. 703.

We think it clear that these precedents dictate only one conclusion—that the BNA scheme does not come within the ambit of respondents' Agreement No. 6400 and was not a routine, day-to-day arrangement which is exempt from the filing requirement of section 15. As we stated in our Report in Docket 873, *Joint Agreement Between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference*, 8 F.M.C. 553,558 (1965), in language equally applicable here,

[W]e 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 inquires of the parties or an investigation by the Commission. * * * 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) 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.

In our opinion the plan in question here clearly goes beyond the scope of permissible conduct under respondents' approved Agreement No. 6400. While this Conference agreement contains the usual language of such instruments permitting the establishment of uniform rates, etc., it is silent as to any scheme whereby the Conference members will act as collection agents for the benefit of a trade association which is engaged solely in advertising Brazil nuts and which was controlled by the importers of this commodity.

Respondents' basic Agreement No. 6400 contains no provision which would allow them to implement a plan of this kind. The preamble of the Agreement speaks of promoting the "commerce between the ports of the Pacific Coast of the United States and Canada and ports in Argentina, Uruguay and Brazil . . .," but the only means authorized in the agreement to accomplish such "promotions" is through the fixing of rates for the transportation of cargo. The BNA plan, however, goes far beyond the establishment of rates in connection with the transportation of cargo. It grants a special kind of service to a particular class of shippers. It is potentially anticompetitive in effect since it gave the dominant interests among the importers of Brazil nuts a device whereby all importers of this commodity were forced to contribute to a trade promotion organization regardless of each importer's individual wishes.

A scheme such as that entered into with the BNA is as much a departure from ordinary, day-to-day rate fixing as a system of dual rates, a pooling arrangement, direct rebates, port equalization, agreements between conferences, or an expansion of the geographic scope of an approved agreement—any one of which might promote the commerce of the U.S. but all of which require prior filing with, and approval by, the Commission.

We reject respondents' contention that the furnishing of information relating to the BNA scheme to the Commission on an informal basis constituted tacit approval of any unfiled agreement and agree with the Examiner that *Kempner* v. *Federal Maritime Commission*, 313 F. 2d 586 (D.C. Cir. 1963) is completely dispositive of this issue. The fact that the events complained of occurred prior to that decision is immaterial for *Kempner* did not establish a new principle of law; it merely decided what the law is and had been.

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

Conclusion

In summary, we conclude

(1) That the issues in this case should be limited to a determination of the question of whether or not the activities complained of constituted the implementation of an unfiled agreement which was required to be filed under section 15 of the Shipping Act, 1916, as amended;

(2) That the scheme whereby respondents collected and paid over to the Brazil Nut Association an extra charge of $4 per ton on all shipments of Brazil nuts into the United States constituted the implementation of an agreement or the modification of an agreement which, within the meaning of section 15 of the Shipping Act, 1916, as amended, was required to have been filed for approval with the Federal Maritime Commission;

(3) That respondents did not file such an agreement for approval with the Commission or its predecessor agencies;

(4) That respondents did, nevertheless, between the years 1934 and 1963, carry out such an agreement;

(5) That under Section 5(d) of the Administrative Procedure Act, the consideration of an application for declaratory relief and the granting of relief thereunder is within the sound discretion of the agency involved and is limited to the determination of questions necessary to terminate a controversy or remove uncertainty;

(6) That no order to cease and desist is required in view of respondents' discontinuance of the practices complained of.

An appropriate order will be entered.

Commissioner JAMES V. DAY, concurring and dissenting:

I concur with the views of the majority as they relate to their conclusions numbered (1), (4), (5), and (6) of their opinion. I dissent otherwise.

In this particular case, the concerted action among respondents to fix the rates on Brazil nuts constituted agreements between common carriers subject to section 15 of the Act and were made pursuant to Agreement No. 6400 approved by the Commission and therefore excepted from the provisions of the antitrust laws.

Other than the rate fixing incidental to the BNA program, the BNA arrangement, having a legitimate purpose to promote commerce, did not involve a concerted activity among the respondents with any cognizable anticompetitive purpose or effect such as to require submission to the Commission for section 15 approval.

Vice Chairman JOHN S. PATTERSON, concurring and dissenting:

A. Based on the record before me in this proceeding,

1. I concur with the majority in deciding that the agreement between the Brazil Nut Association (BNA) and respondents was not a part of the performance of FMC-approved Agreement No. 6400 (exhibits 50, 51), but was in part an agreement among common carriers by water in foreign commerce regulating transportation rates, giving special privileges, and providing for a cooperative working arrangement which was not filed, contrary to the requirements of section 15 of the Shipping Act, 1916, as amended (Act).

2. I dissent from the majority's decision declining to issue a declaratory order declaring the unlawfulness, under sections 14, 16, 17, and 18(b) of the Act, of the actions alleged in the petition and terminating the controversy with respondent with respect to such unlawfulness, as prayed for in the petition.

3. I would decide that sections 15, 16, and 18(b) of the Act have been violated and that sections 14 and 17 have not been violated for the reasons stated herein.

B. In support of my dissent, it is first necessary to review what this proceeding is about and what it is not about. The purpose of this proceeding is to respond to a petition presented to us, asking us to adjudicate the consequences of certain acts, to decide whether or not the acts violate sections 14, 16, 17, and 18(b) of the Act, and then to issue an order declaring our conclusions as to the alleged violation and to terminate a controversy.

It is not the purpose of this proceeding to change the issues without notice and refuse to decide what petitioner asked, and thereafter decide something else concerning unlawfulness under section 15 of the Act. Petitioner cites Rule 5(h) of our Rules of Practice and Procedure (46 CFR § 502.68) and asks for a declaratory order "which will terminate the controversies," citing therein "the statutory authority involved." We ought not to substitute new controversies and new statutory authority for the ones petitioner presents unless we change the scope of the proceeding by notice to all parties and by new instructions to the Examiner.

This proceeding should not be about our reasons for not doing what we were petitioned to do, by expressing "no opinion" in response to an accepted petition which specifies the points of law on which an opinion is requested. Our own belief that the petitioner's "purpose . . . is to satisfy the District Court's requirement that there be a final determination by us concerning the lawfulness under the Shipping Act, 1916, of respondents' conduct . . ." is not enough. We might have rejected the petition when it was filed and restated the issues ourselves if other action was thought preferable, but this action was never taken. We accepted the petition, assigned an examiner to take evidence, and then after prehearing but before hearing ordered denied a motion to dismiss and therein vouchsafed an opinion that respondents' reply "places section 15 in this proceeding as an issue" without objection by the parties even though the petitioner expressly refused to amend his petition to ask for a declaration that section 15 alone had been violated. Other than this statement, neither petitioner nor respondents have been notified of any change in what they had to prove or disprove as defined in the petition. The fact that section 15 issues are present does not automatically shift what the petitioner asked for to an order on a subject he did not ask about. The action is justified in the majority report by referring to the pleadings before the Court as showing it is "obvious" the Court wanted "to allow the parties to seek a determination . . . whether or not the agreement in question [the agreement between Brazil nut importers and respondents] came within respondents' approved section 15 agreement No. 6400," instead of what petitioner asked about unlawfulness.

The Court's purpose is disclosed in its "order granting stay" in Civil No. 42,426 dated October 9, 1964, "pending a final decision of the Federal Maritime Commission . . . concerning the lawfulness under the Shipping Act, 1916, as amended, of the acts alleged in the Complaint; . . .". The Court's order placed in our record shows that petitioner has correctly interpreted the order, and it is not at all obvious to me that the Court's purpose was to confine violation issues to section 15 rather than general lawfulness under the Act. The Court's purpose, if anything, was to let the petitioner decide for himself what violations he might prove to us. Petitioner has all the facts and has the most to lose or gain. The Court's purpose seems quite reasonable to me.

The acts complained about are that the Brazil Nut Association and the Brazil Nut Advertising Fund Trustees (either or both being herein referred to as the BNA since there is no difference between the two (see Tr., 170)) and the respondents, several common carriers by water associated as a "conference", entered into an agreement (exhibits 3, 4, 5, 6, 7, 9, 12, 13, 16, and 20) for collecting money which would be paid to the BNA and deposited in a fund to be used to finance an advertising campaign. These actions were also claimed to prove unlawfulness under other sections of the Act.

The facts concerning the BNA and its operations, supplementing the majority's statements, were proven substantially as follows. The

BNA had no charter or bylaws and no dues nor membership meetings and "nothing in writing" (Tr., 205). The BNA was organized in May 1934 by several Brazil nut importers in New York (Tr., 207) and the members of a New York steamship conference. Six trustees were designated (Tr., 209–210). The BNA was thereafter managed by an Executive Secretary and a stenographer (Tr., 206) out of an office in New York (Tr., 172), and the Executive Secretary's functions were to carry out the instructions and policies of the trustees of the Brazil Nut Advertising Fund (Tr., 172). A written contract between the trustees and the conference provided for cash payments by the carrier members (Tr., 178, 224) to the trustees. An agreement to pay under the same conditions was made later in 1935 (Tr., 179, 204, 205) with the respondent conference (Tr., 175, 176).

The agreement was that the conference carriers would pay or "contribute" to the fund at first 20¢ per case of 66 lbs. net on shelled nuts and 20¢ per 100 lbs. outturn weight of nuts in the shell, and later 20¢ per 100 lbs. or $4 per ton on every ton of Brazil nuts transported from South America. Whoever paid the freight, shipper or consignee, paid the $4 as part of the freight charges (Tr., 227).

The Executive Secretary managed the disbursement of money to pay for advertising and his own salary and other office expenses (Tr., 173).

There were meetings of members "whenever there was something to meet about" at the call of the Executive Secretary (Tr., 211). Notices of meetings were only sent to East Coast importers (Tr., 211). Continental was a West Coast importer. The trustees were self-appointed, and the trustees themselves elected successors (Tr., 207). The BNA maintained a mailing list of importers. Continental was not one of the importer-organizers and was not a member who met with others, but was put on the mailing list later after the Executive Secretary "heard of their names from one source or another" (Tr., 208). Petitioner corresponded with the BNA about expenditures for advertising and received some of its publicity information (Tr., 232–237). Petitioner was billed for some of the publicity material (Tr., 239). Petitioner did not participate in BNA deliberations, was not called to meetings, and made no payments to the BNA other than for purchases of publicity material the same as others did, and took no steps to become a member, although the Executive Secretary considered all importers as "members" (Tr., 229–230). Petitioner was told no importer contributed to the fund (Tr., 237).

Petitioner, as an importer of Brazil nuts, had to pay the freight charges including the $4 even though he was not a BNA member (Tr., 44, 67, 68) and questioned the use of the money for other than transportation purposes (Tr., 44, 45). The agreement was between a private association not defined in the first section of the Act and a conference association of carrier. Neither is a "common carrier by water, or other person subject to this Act . . .", referred to in the first sentence of section 15. The plaintiff petitioner was dealing with both an agreement and a conference association apparently outside the terms of section 15. Therefore, petitioner had every reason to believe section 15 was not an issue as far as he was concerned.

The Commission might be concerned with other facts disclosed by petitioner's evidence bearing on lawfulness under section 15, but we ought not to shift any responsibility for presenting such facts over to the petitioner. The Commission should assume its own responsibilities rather than decide issues under section 15 to the exclusion of issues of lawfulness under section 14, 16, 17, and 18(b). The District Court may be interested in lawfulness under any section of the Act.

The first paragraph of section 15 provides that certain types of agreements shall be filed "immediately with the Commission . . .". Agreements not filed are not subject to approval and any agreement "not approved . . . shall be unlawful . . .". A finding of violations of sections 14, 16, 17, and 18(b) of the Act asserted in the petitioner's prayer for a declaratory order, caused by the unfiled agreement under review, has a direct bearing on whether the agreement also causes unlawfulness as claimed before the District Court. Unlawful agreements are not subject to the exception in the fifth paragraph of section 15 relative to the so-called antitrust laws cited therein.

Finally, I have no objection to deciding any issues under section 15 in line with our order, considering that both petitioners and respondents argued the applicability of section 15 and the subject was argued further in the exceptions. I object only to excluding all other violations of the Act by ignoring the exceptions and by acting as though the petition might be rewritten by us to cover *only* violations of section 15.

As if telling the petitioner what is best for it is not enough, the District Court is also told a finding of violation of any sections of the Act besides section 15 "would be of no possible use" to the Court. I disassociate myself from this opinion and believe the Court is fully capable of deciding for itself, on the basis of what the petitioner presents to the Court, what is meaningful and of possible use and what is not. Possibly the District Court may agree later that other violations are not relevant to the issues before it, but that is their decision and not ours to volunteer. We must respond to the petition and to the exceptions now before us.

Next, I move to what this proceeding is really about by deciding whether or not the actions are lawful under the Act, which is what the District Court Judge wants us to advise him about, by passing on the exceptions to the Examiner's decision.

C. The exceptions, my findings of fact, and rulings on exceptions as a result of the findings are as follows:

1. The exceptions are summarized to be that the Examiner erred:

a. In failing to conclude that by agreeing to act as a collection agent for the BNA, respondents had a tie-in device which stifled outside competition as effectively as a dual-rate system in violation of section 14 "Third" of the Act;

b. In concluding respondents' agreement with the BNA did not have to be filed and approval obtained from the Commission under section 15;

c. In failing to conclude that there was a prejudice and disadvantage between importers of Brazil nuts by collecting the $4 increment in freight rates from BNA members by voluntary agreement, but involuntarily, without knowledge, consent, or agreement from the petitioner in violation of section 16 First;

d. In concluding the advertising assessment and program was not an unjust and unfair device and means in violation of section 16 Second;

e. In concluding that the tariff rate and assessment of the $4 charge to petitioner's shipments and not to other commodities generally was not an unjustly discriminatory rate as between shippers in violation of section 17;

f. In concluding that the payments made by respondents to the BNA did not constitute a charge of less than the published tariff rates, or a rebate, refund, or remission of any part of the tariff rate, or an extension of a special privilege not in accordance with the published tariff, to members of the BNA in violation of section 18(b)(3).

2. The facts as stated by the majority and supplemented by my review of record information lead to the following findings of fact:

a. The BNA is an unincorporated membership trade association of importers of Brazil nuts from South America. Petitioner Continental Nut Company is not a member, but is an importer of Brazil nuts.

b. The BNA entered into an agreement with the North Brazil/U.S. Atlantic and Gulf Freight Conference members or its predecessors and with the Pacific Coast River Plate Brazil Conference members, obligating the conferences to collect out of freight charges for transporting Brazil nuts to the United States from South America $4 per ton and to pay such amount to the BNA for its use. After 1949 such amount was similarly collected and paid continuously until June 3, 1963 (exhibit 21). The payments were a refund and remission of part of the published tariff rates.

c. The $4 per ton paid to the BNA was put into a fund and used by the BNA to pay the expenses of advertising the sale, consumption, and use of Brazil nuts in the United States.

d. Respondents and the BNA informed petitioner and government officials (1) that the $4 per ton payments were contributed by the conference member common carriers by water (Tr., 68, 199), (2) that the payments were not added to the freight rates (Tr., 180, 181), and (3) that the contributions had no direct influence on freight rates (Tr., 68, 69, 70, 180). Petitioner was informed that no importer made a contribution to the fund (Tr., 238). The conference's freight rates for transporting Brazil nuts, including, but without any separate statement or rule, the $4 per ton, appeared in the tariff publications issued by the conference. The obligations to pay $4 a ton accorded to Brazil nut importers and their BNA for advertising was a privilege. The privilege accorded the Brazil nut importers was neither extended to any other importers of other commodities or to nonmembers, nor appeared in any tariff on file at the Commission and in effect from time to time during the period the obligations to pay continued.

e. Upon learning in 1963 that the conference was acting as a collection agent for the BNA, petitioner protested against the inclusion of the $4 per ton assessment in the tariff freight rate (Tr., 123). The protest was followed by discontinuance of the collection and payment, termination of the agreement, and a $4 per ton reduction in the freight rates in the tariffs covering the Brazil nut classification of commodities (Tr., 136; exhibits 46, 47).

f. During the period of the performance of the agreement, respondent made no like assessment on other commodities transported and made no like payments to any other association of importers, nor did any other association or persons finance advertising out of payments from the respondents. Petitioner at all times paid when billed the established tariff rate for its importations of Brazil nuts.

3. The findings of fact lead to the following conclusions as to the applicability of the law and to proposed rulings on the exceptions.

a. The evidence does not prove a violation of section 14, first paragraph, item "Third." There is no evidence respondents were engaged in retaliating against any shipper because the shipper has patronized any other carrier or has filed a complaint or for any other reason. Retaliation by the proscribed means and for the assigned reasons has not been shown as required by section 14. The first exception (1.a. above) concerning violation of section 14 should be overruled.

b. I agree with the majority's reasoning in concluding that the agreement between respondents and the BNA was not an authorized part of the performance of FMC-approved Agreement No. 6400. I would further conclude (1) that the obligations of the individual respondents, as common carriers by water, among each other and with BNA were to include the $4 per ton charge in the freight rates, thereby creating an agreement among common carriers by water regulating transportation rates, (2) that the obligation to pay part of the freight charges to the BNA gives special privileges, and (3) that the details of measuring and making payments provides for a cooperative working arrangement, all of which prove the existence of an agreement which should have been "filed immediately" and approval obtained pursuant to section 15. Without filing, the agreement was not approved by the Commission and the agreement was carried out by performance before approval. The second exception (1.b. above) concerning violation of section 15 should be sustained.

c. The evidence that the respondents collected and paid out of added freight charges to a particular class of importers, Brazil nut importers, and to particular members of the class, BNA members, and not to others such as petitioner, amounts for BNA-member importers' advertising expenses and required petitioner to pay for services proves that common carriers by water in conjunction with BNA as an other person indirectly, through BNA's officers, gave an unreasonable preference to the importer members of BNA as particular persons and to Brazil nuts as a description of traffic, and subjected the petitioner as another particular person to an unreasonable disadvantage in violation of the second paragraph of section 16, subparagraph "First." Petitioner may not be required to take benefits of the advertising campaign as a defense against unequal treatment between shippers. The third exception (1.c. above) concerning violation of section 16, First, should be sustained.

d. The evidence that respondents did not use the entire freight charges for transportation expenses and paid part of such charges to some importers to defray their advertising expenses as costs of the importers' business, using the BNA's officers as a conduit of funds, proves that the importers indirectly were allowed to obtain transportation of Brazil nuts, as property, at less than the regular rates enforced on the line of the carriers in violation of the second paragraph of section 16, subparagraph Second. The evidence that the amounts deducted from freight charges were not used for transportation expenses and were paid to the BNA for the advertising expenses of its importer members and were guilefully or disingenuously represented to be contributions instead of agreed obligations to pay and were collected in the guise of freight charges proves the transportation was obtained by an unfair device or means. The evidence no importer contributed according to BNA also proves unfair lack of candor. The evidence concerning the BNA organization shows it was largely a sham device or means for buying publicity with freight charges. The use of guile and sham is unfair. The fourth exception (1.d. above) concerning violation of section 16, Second, should be sustained.

e. The evidence that respondents' tariff rate for transporting Brazil nuts included therein a $4 assessment for BNA's advertising expenses when the rate on no other commodity included a comparable assessment does not prove the demand of a rate which is unjustly discriminatory between shippers or ports or perjudicial to exporters because the same rate was charged all shippers or importers of the same commodity without discrimination. All Brazil nut importers paid the same rate. There is no discrimination among rates charged Brazil nut importers and rates charged other shippers or importers of other commodities because the two classes of shippers are not related in terms of the transporting characteristics of their shipments, nor of business relationships. The two types of rates do not pay for sufficiently like services to be compared for discriminatory effects. Section 17 applies to discriminatory rates, rather than to specified deceitful practices and requires proof of the effect of the rates. The fifth exception (1.e. above) concerning violation of section 17 should be overruled.

f. The evidence that respondents paid the BNA out of freight charges previously paid by members at the rate of $4 per ton of Brazil nuts transported for the purpose of, and used for, paying a businses expense of BNA members for advertising the sale of their product proves respondents refunded and remitted part of the tariff rate to some Brazil nut importers contrary to the provision of section 18(b)(3), prohibiting a common carrier by water in foreign commerce from receiving less compensation for the transportation of property than the rates specified in its tariffs on file with the Commission and duly published and in effect at the time. The same actions involve a refund in the manner provided by the agreement with BNA of part of the charges specified in tariffs and extend each member as "any person a privilege not in accordance with the tariffs. The sixth exception (1.f. above) concerning violation of section 18(b)(3) should be sustained.

D. My conclusions are as follows:

1. Respondents have violated the provisions of section 15 of the Act that makes any agreement not approved unlawful and makes it unlawful before approval to carry out in whole or in part, directly or indirectly, any agreement. Agreements unlawful under section 15 are not excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

2. Respondents are guilty of misdemeanors in violating the provisions of the second paragraph, subparagraphs First and Second, of section 16 of the Act, making it unlawful for any common carrier by water in conjunction with another person indirectly (a) to give an unreasonable preference to particular persons and description of traffic or to subject any particular person to an unreasonable disadvantage; and (b) to allow any person to obtain transportation for property at less than the regular rates then established on the line of such carrier by an unfair means.

3. Respondents have violated the provisions of section 18(b)(3) of the Act that prohibits a common carrier by water in foreign commerce or conference of such carriers (a) from receiving a less compensation for the transportation of property than the rates which are specified in its tariffs on file with the Commission and duly published and in effect at the time, (b) from refunding or remitting in any manner any portion of the rates so specified, and (c) from extending any person a privilege except in accordance with such tariffs.

4. Respondents have not been proven to have violated sections 14 or 17 of the Act.

5. Petitioners should be issued an order declaring the foregoing conclusions and terminating the controversy with respondents in response to the prayer contained in their "Petition for a Declaratory Order" filed pursuant to Rule 5(h) of the Rules of Practice and Procedure (46 CFR § 502.68).

FEDERAL MARITIME COMMISSION

No. 1210

CONTINENTAL NUT COMPANY

v.

PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, ET AL.

ORDER

A full hearing having been had in this proceeding on petitioner's application for a declaratory order, and the Commission on this day having made and entered of record a Report stating its findings, conclusions and decisions thereon, which Report is hereby referred to and made a part hereof;

Therefore, it is ordered and declared, That the conduct of respondents whereby they added a charge of $4 per ton on the ocean freight rates applicable to Brazil Nuts and paid such amount to the Brazil Nut Association, a trade association controlled by the shipper-importers, for its use in advertising and promoting the sale of Brazil nuts in the U.S. constituted the implementation of an unapproved agreement which was required to be filed for approval pursuant to section 15 of the Shipping Act, 1916. By the Commission.

(Signed) *Thomas Lisi,*
Secretary.

supports this conclusion. The legislative history of the amendment to section 15 with respect to "reasonable and equal terms and conditions" for admission to conference membership demonstrates that Congress intended to ratify and codify the Commission's open door policy. The amendment also had as a purpose the outlawing of conditions for membership which involved rate practices in areas beyond the scope of the conference in which membership is sought to be attained or retained. Any further inroads on the open door membership policy, beyond the requirement that the applicant be operating or show intent to operate in the trade (and other routine conditions) are contrary to the essential 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. (Previous decision, 8 FMC 170, is reversed). Id. (421–425).

—Agreements not subject to Section 15

Although the literal language of section 15 is broad enough to encompass any "cooperative working arrangement" entered into by persons subject to the Shipping Act, the legislative history is clear that the statute was intended to apply only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or travelling public or their representatives. Volkswagenwerk Aktiengesellschaft *v.* Marine Terminals Corp., 77 (82).

Agreements of persons subject to the Shipping Act to pool secretarial workers or share office space may literally be "cooperative working arrangements", but they are not the type of agreements which affect competiton by the parties in vying to serve outsiders and hence are not subject to section 15. On the other hand, agreements relating to the method of fixing or determining the levels of rates, fares, charges or commissions paid to or by shippers, passengers, forwarders, brokers, agents, etc. have the type of competitive relationship to bring them within the scope of section 15. Id. (82).

An agreement between members of an association composed of carriers, terminal operators and stevedores as to the manner of assessing its own membership for the collection of mechanization and modernization fund did not fall within th confines of section 15 of the Shipping Act as, standing alone, it had no impact on outsiders. Before a section 15 agreement could be said to exist it had to be shown that there was an additional agreement by the membership to pass on all or a portion of its assessment to the carriers and shippers served by the terminal operators, and there was no evidence of such an agreement. Id. (83).

Where a port furnished wharfage and collected for wharfage and demurrage according to its tariff which contained uniform rates for all users, and a terminal operator, licensee of a pier, imposed uniform service charges for all users of its facility over which the port exercised no control, there was no agreement between the parties with respect to the charges, let alone a section 15 agreement. Philippine Merchants Steamship Co. *v.* Cargill, Inc., 155 (162).

An agreement under which a port licensed a pier to a terminal operator was not subject to section 15 because the operator had "first call" berth privilege. No "special" privilege was involved. All users of the port's facilities were free to enter into such licenses and to enter into them subject to the same tariff rates and regulations. Id. (162).

An agreement under which a port allowed a terminal operator, which was the licensee of a pier, a credit against wharfage as a means of amortizing the cost of pier improvements paid for by the operator, was not subject to section 15. The "wharfage credit" did not "prefer" the operator over other users of the port's facility; it was merely a convenient way of reimbursing the operator. Id. (163).

—Antitrust policy

Section 15 of the Shipping Act represents a clear departure from our national policy—the promotion of competition and the fostering of market rivalry as a means of insuring economic freedom. Such policy is embodied in the antitrust laws. The exemption for section 15 agreements was granted by Congress with clear recognition of the public interest in promotion of free and open competition. Congress legalized agreements otherwise in violation of the antitrust laws only because it thought even stronger monopolies would result were such agreements completely prohibited. However, the agreements were to be subjected to disapproval or cancellation if they were found to be detrimental to United States commerce or contrary to the public interest. The "public interest" within the meaning of section 15 includes the national policy embodied in the antitrust laws. Mediterranean Pools Investigation, 264 (288–289).

—Exclusive agency agreement

Conference agreement prohibiting conference members and their agents, or their subsidiaries and/or associated and/or affiliated and/or related companies, from representing nonconference carriers in the trade without conference permission, was approved. The agreement was not shown to have caused agents to be unavailable to nonconference lines or to have prevented the entrance of independents into the trade. Independent competition to the conference existed and competent agents were available to represent nonconference carriers who might desire to enter the trade. Accordingly, the agreement would not be detrimental to commerce, contrary to the public interest, or in violation of any of the standards of section 15 of the Shipping Act. Agreement No. 14–19, Etc.—Trans-Pacific Freight Conference (Hong Kong), 175 (178–179).

—Modifications of agreements—Commission authority

In passing on future agreements, it is not necessary for the Commission to find that the agreements "really will operate" to the detriment of our commerce or really be contrary to the public interest, before modifications may be ordered. The most that can be done is to draw upon past experience and expertise and make a reasoned judgment or prediction as to the probable future impact of the agreement. Mediterranean Pools Investigation, 264 (293–294).

Agreements which contain ambiguous language and inconsistencies must be modified to reflect the intent of the parties. Agreements must be complete and the language used so clear as to eliminate the necessity for interpreting the intent of the parties. Id. (294).

Where conferences contended that pooling agreements did not completely eliminate service competition because each line was free to overcarry and pay the penalty in order to increase its percentage when the pool shares were renegotiated, the conferences were required to eliminate from the agreements inconsistent provisions requiring the lines to regulate their carryings as near as possible to their shares. If the parties to the agreements now would state that they intend the lines to regulate carryings so as not to exceed their allotted shares, thus eliminating the vestige of competition, the Commission would have to reconsider its decision to approve the agreements. Id. (295).

Proposed modifications of agreements, although not included in an order of investigation and not in evidence, could be included in respondents' briefs and could be considered by the Examiner and by the Commission. The modifications raised no new issues and could not prejudice the objecting member of the conferences since they sought to remedy defects alleged by the objecting member to be present in the agreements under investigation. Moreover, the Commission has authority to modify agreements filed for approval, and could order the agreements to be modified as a condition precedent to approval. Agreement No. 150–21, Trans-Pacific Freight Conf. of Japan, Etc., 355 (360).

—Pooling agreements

The question of approval of agreements under section 15 requires (1) consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws insofar as consistent with the regulatory purpose of the Shipping Act and (2) consideration of the circumstances and conditions existing in the particular trade involved which the anticompetitive agreement seeks to remedy or prevent. The weighing of the two factors determines whether the agreement is to be approved. Since the kind of information necessary to make a judgment is in the hands of those seeking approval, it is incumbent on them to come forward with it and, in this sense, it can be said that pooling agreements are *prima facie* contrary to the public interest. Presumptively, all anticompetitive agreements run counter to the public interest in free and open competition, and those seeking exemption of anticompetitive combinations must demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act. Mediterranean Pool Investigation, 264 (290).

In view of flourishing malpractices, rate instability, and wasteful and destructive competition in the Mediterranean trades, approval of pooling agreements will be consonant with the public interest in that while the agreements run counter to that interest in the preservation and fostering of competition they are in furtherance of the regulatory purposes of the Shipping Act in that the competition to be eliminated is destructive and wasteful and in itself tends to work hardship on shippers through discriminatory rebates and the creation of rate instability. Id. (291–292).

Pooling agreements must be modified to provide for the filing of the provisional accounting statements drawn up by the secretary as well as the final statements, in order to insure the filing of statements in aid of the Commission's responsibility of continuing surveillance of operations under the agreements. Id. (296).

Provisions of pooling agreements requiring, on the one hand, that resolutions effecting changes in membership shall be filed for approval under section 15 of the Shipping Act and, on the other hand, that such resolutions shall be filed only for the information and records of the Commission must be modified to eliminate the inconsistency. Id. (296).

Pooling agreements need not be modified to provide for automatic termination of the pool concurrently with the termination of the conference within the scope of which the particular pool operates. Pool members should be allowed to apply for rate fixing authority under their pooling agreements, if and when the conference governing the trade dissolves. Id. (297).

Approval of pooling agreements without requiring a modification to exclude from their coverage all pool cargo in which open rates apply, is not to be construed as any form of implied authority to fix rates under the pooling agreements when they have been declared open. Id. (297).

Provision of pool which conditions membership in the pool upon membership in both the inbound and outbound conferences in the trade need not be modified to condition membership only upon membership in the conference governing the particular trade be it outbound or inbound. There were no one-way operators in the trade. Should such an operator enter the trade and desire to pool, the Commission would reexamine the matter. Id. (298).

Pooling agreements must be amended to make it clear that resolutions extending the duration of the agreements must be approved by the Commission before they become effective. Extensions require approval under section 15 of the Shipping Act. Id. (298).

Provision of a pooling agreement that a member who wants to resign before the end of the pool period must give three months' notice and must not participate in the traffic before the end of the pool period, the purpose of which provision is to prevent resignations for quick profit reaped from a trade built up by the pool members, is reasonable. Should the conferences seek an extension of the pool beyond the December 31, 1966 expiration date, the Commission would have to reconsider the impact of the provision. Id. (299).

Provisions of pooling agreements permitting "interstitial changes" without prior approval of the Commission, but requiring that copies of resolutions relating to the changes be filed, were approved. The filing requirement coupled with the Commission's responsibility for continued scrutiny of operations under the agreements should afford adequate protection against excesses or abuses. Id. (303–304).

—Rates

Conference agreements under which export-import rates on steel were set could not be disapproved, cancelled or modified in the absence of evidence to show that the agreements themselves had been the direct instrumentality of or used for the violation of either section 17 or section 18(b)(5) of the Shipping Act. Iron and Steel Rates, Export-Import, 180 (192).

The Commission may disapprove or modify a conference agreement under section 15, if the rates set by the conference are so unreasonably high or low as to be detrimental to the commerce of the United States. Id. (193).

An agreement between a conference and an agency of the United Arab Republic, under which the agency agreed to ship on conference lines all cargo moving from certain United States ports to UAR Mediterranean ports, with the cargo to be transported at rates below the contract rates established in the conference tariff, was not an interstitial or routine activity under the basic approved conference agreement. The agreement clearly established a new anticompetitive rate system not embodied in the original agreement introducing a "new scheme of regulation and control of competition." Respondent itself characterized the contract as a "particular and very special relationship" and admitted that the circumstances giving rise to the contract "are not comparable to ordinary rate negotiations between carriers and shippers." It could not seriously be contended that the contract was analogous to an agreement providing for a *conventional* rate change or some such routine arrangement. Contract Between the North Atlantic Mediterranean Freight Conference and the United Arab Co. for Maritime Transport (Martrans), 431 (433–435).

The Commission is empowered to disapprove or modify an agreement if the rates set by a conference are so unreasonably high or low as to be detrimental to the commerce of the United States or contrary to the public interest. If circumstances warrant the Commission can act against commodity rates under section 15. However, neither the public interest standard nor the legislative history of the Shipping Act requires absolute parity between United States-to-foreign rates and foreign-to-foreign rates. In addition to rate comparisons, there must be a showing that an agreement operates in a manner contrary to the public interest. Outbound Rates Affecting the Exportation of High-Pressure Boilers (Utility Type), Parts and Related Structural Components, 441 (453–454).

Scheme of respondents whereby they added a charge of $4 per ton on freight rates applicable to Brazil nuts imported from South America and paid such amount to an association of importers for its use in promoting and advertising the sale of Brazil nuts constitute the implementation of an unapproved agreement which was required to be filed for approval. The scheme did not come within the ambit of respondents' approved rate making agreement and was not a routine, day-to-day arrangement exempt from the filing requirements of section 15. It granted a special kind of service to a particular class of shippers and was potentially anticompetitive in effect since it gave dominant interests among importers of Brazil nuts a device whereby all importers of the commodity were forced to contribute to a trade promotion organization. Continental Nut Co. *v.* Pacific Coast River Plate Brazil Conference, 563 (571–572).

—Retroactive approval

The fact that "malpractices" were eliminated after conferences entered into and carried out, without Commission approval, pooling agreements, and that this could not be found detrimental to commerce or contrary to the public interest under section 15 of the Shipping Act, did not mean the pooling agreements were not subject to disapproval. Section 15 prohibits all conduct prior to approval of an agreement. Section 15 clearly prohibits approval of an agreement or any modification of extension thereof which bears an effective date earlier than the date of Comission approval. Mediterranean Pools Investigation, 264 (302–303).

While section 15 of the Shipping Act prohibits approval of an agreement or any modification or extension thereof which bears an effective date earlier than the date of Commission approval, where conferences relied on a consistent administrative interpretation to the contrary in entering into pooling agreements, it would not be equitable to hold them liable for activity done in reliance thereon, and the agreements will be approved. In the future such agreements will not be approved. Id. (304).

—Right of independent action

Conference carriers from Atlantic and Gulf ports to Australia and New Zealand cannot be permitted to exercise a veto power over the rates of those conference carriers which serve the trade from Great Lakes ports to Australia and New Zealand, even though the power would extend only to rates lower than those from the Atlantic and Gulf ports. Carriers best able to establish fair and equitable rates for a trade are those which are actually serving the trade. Vesting of rate making decisions in carriers which do not serve the area in whose rates they have a voice is far more dangerous to United States commerce than the existence of rate competition between two competing areas. The inclusion of two naturally competitive trades within the ambit of a single conference for administrative purposes cannot carry with it the power of carriers serving one of the trades to veto the rates of the carriers serving the other. If it did, the independent action requirement of section 15 of the 1916 Shipping Act would be a nullity. Agreement Nos. 6200–7, 6200–8 and 6200–B—U.S. Atlantic & Gulf/Australia-New Zealand Conference, 1 (6–7).

—Self-policing

The requirement of section 15 that the Commission disapprove any agreement on a finding of inadequate policing of the obligations under it cannot be permanently satisfied by the substitution of further competitive restrictions in the form of pooling revenue for an adequate system of self-policing of conference obligations. Mediterranean Pools Investigation, 264 (292).

While the defensive safeguards and techniques historically identified with constitutional due process of law are not applicable to conference self-policing systems, such systems must be fundamentally fair. The kind of notice, hearing and opportunity to answer charges which should be afforded is that found in "public agencies, labor unions, clubs and other associations". The association-type enterprise traditionally follows less rigid standards which, as long as they comport to the necessarily indefinite standard of fundamental fairness, can be almost anything to which the members agree to be bound. The self-policing system of these conferences as ultimately proposed by them meets this standard of fundamental fairness. Agreement No. 150–21, Trans-Pacific Freight Conference of Japan, Etc., 355 (361–362).

Provision in a conference agreement that upon receipt of a complaint against a member the Neutral Body would have authority to call upon the member and without prior notice inspect records, correspondence, documents and other materials deemed by the Neutral Body in its sole discretion to be relevant to the complaint, is fundamentally fair, in view of provision made for notice to the accused, after investigation, of the nature of any alleged violation and of the evidence concerning it, and for hearing before final decision. A requirement for notice prior to investigation would facilitate concealment of incriminating records and thus effectively frustrate the investigation. Id. (362–363).

Neutral Body provisions of a conference agreement which provide for non-disclosure to the accused of the name of the complainant, and for non-disclosure of actual evidence which would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information, were approved. Confrontation and cross-examination of the accuser are not required. In those instances where evidence relied on for decision should not be shown in its original form because of undesired disclosures, it would be within the basic precepts of fair play for the Neutral Body to go as far as possible to inform the accused of the substance of the evidence material to an adequate understanding of the charges and findings. The substance of the evidence relied on in reaching a finding that a breach has been committed must be disclosed to the accused in sufficient detail to give him an opportunity to show that it is untrue; otherwise the elements of fundamental fairness are missing. Id. (363–365).

Provisions of conference proposals giving the Neutral Body authority to investigate written complaints and in doing so to inspect and copy "correspondence, records, documents, signed written statements or oral information, and/or other materials" at the offices of the member lines, and for hearing with the standard being that the information developed is persuasive to the Neutral Body itself that a breach has occurred, were fundamentally fair. Id. (365–366).

A self-policing system need not provide for specific criteria for assessing fines. A provision that "notwithstanding the difficulty in assessing such damages precisely, in determining the amount of liquidated damages to be assessed the Neutral Body shall consider such mitigating circumstances as it may deem relevant", is sufficient. It cannot be anticipated that the Neutral Body will not exercise fundamental fairness. Id. (366).

In view of the fact that Neutral Body functions under conference self-policing systems are fact finding, rather than judicial; that the conclusive facts are usually obtained from the records of the accused; that accounting firms are uniquely qualified to perform this work; that the conference is the client; that fees are paid on the basis of time devoted to a case; and that unduly broad exclusions will disqualify most, if not all, of the otherwise eligible accounting firms, thereby destroying the self-policing systems, a Neutral Body should not be disqualified because of a disclosed business relationship, i.e., independent contractor for professional or business services, with a conference member line other than the accused. Any financial interest in any member line is disqualifying. Id. (367–368).

It is not required by law or necessary for a Neutral Body agreement to contain a right to appeal. Appeal would cause delays, and the Neutral Body is better qualified to decide than a panel of arbitrators. Disclosure of the identity of the complaining line would result from resort to arbitration. Some candidates for the Neutral Body position would not serve if their decisions were subject to appeal. Id. (368).

Provision for the Neutral Body to give notice of acquittal or conviction of a conference member line accused of breach of the agreement or malpractice is proper. Id. (368–369).

—Shippers' requests and complaints

Terminal operators fixing rates, etc. under a section 15 agreement were required to adopt and maintain reasonable procedures for promptly and fairly considering shippers' requests and complaints. Procedures adopted were found to comply with the requirements of section 15. Truck and Lighter Loading and Unloading Practices at New York Harbor, 505 (519–520).

—Single conference in separate trades

Administrative economies which can be effected by permitting separate trade areas to be brought under a single conference administration, thereby permitting use of one office and one staff, justify approval of a modification of conference agreement to establish a single conference in the trades from U.S. Great Lakes and St. Lawrence ports and from Atlantic and Gulf ports to Australia and New Zealand. Agreement Nos. 6200–7, 6200–8 and 6200–B—U.S. Atlantic & Gulf/Australia-New Zealand Conference, 1 (5–6).

—Voting rules

Where only three carriers were eligible for membership in the Great Lakes section of a conference, a voting rule requiring a ¾ majority for the setting of rates could not be approved. In effect, a unanimous vote would be required. A ⅔ rule would substantially reduce the danger that one carrier might exercise a veto power over the rates. Agreement Nos. 6200–7, 6200–8 and 6200–B—U.S. Atlantic & Gulf/Australia-New Zealand Conference, 1 (8).

Section 15 does not require that modifications of conference agreements be adopted by unanimous vote. It is not unreasonable for a conference to provide for modification by a stated majority provided such a provision is not applied so as to contravene the standards of section 15. A carrier in accepting conference membership binds itself to the terms of the basic agreement, and so long as it chooses to remain a member it must conform to all modifications which are regularly made and duly approved by the Commission. If in the present case, the conferences had the unanimity rule, there would be no Neutral Body system before the Commission for approval. Thus the conferences' attempts to satisfy their statutory obligations to adequately police their obligations under their agreements would be frustrated. Such a result would be contrary to public interest and detrimental to commerce within the meaning of section 15 of the Shipping Act. Agreement No. 150–21, Trans-Pacific Freight Conference of Japan, Etc., 355 (369–370).

A form of subscription executed by the conference chairman in submitting proposed modifications of an agreement to the Commission, which form states that the modifications have been authorized at a conference meeting and that a list of members is attached, is not in violation of the Shipping Act. The listing is not a representation of unanimity and is not misleading, since the Commission and individual member lines of the conference are on direct notice that provisions of the basic agreement require the affirmative vote of only two-thirds majority. Id. (370–371).

BURDEN OF PROOF. See Practice and Procedure.

COMMON CARRIERS.

—Common carrier status

The term "common carrier" in section 1 of the Shipping Act means a "common carrier at common law". The characteristic most frequently mentioned in Commission decisions is that a common carrier by a course of conduct holds himself out to accept goods from whomever offered to the extent of his ability to carry. Included in the concept of holding out are such factors as solicitation, advertising, tariff filing, and contractual limitations. Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc., 56 (62).

In order for a carrier to have common carrier status it is not necessary that the carrier hold himself out to transport all commodities for all shippers. In addition to the "holding out" criterion, multiple other factors may create or obviate common carrier status. In some instances the common carrier may advertise sailings, solicit freight, and issue bills of lading. But common carrier status is not lost by the carrier's failure to publish sailing schedules or advertise. Id. (63).

An important factor in the determination of common carrier status is the regularity of service between ports. Section 1 of the Shipping Act defines common carrier as a common carrier engaged in transportation "on regular routes from port to port." While the fixed termini test is a most important one, it is not absolutely controlling. The quoted language was also inserted to exempt from regulation tramps. Id. (63).

Common carrier status can be acquired without regular calls at ports or regular sailings and even without sailing schedules. Common carrier status may survive even if the carrier chooses not to solicit cargo. Id. (63).

The number of shippers, either per voyage or otherwise, is not determinative of common carrier status. The Commission has indicated that two shippers per voyage creates a presumption of common carriage. Other cases hold that a carrier is not common though considerably more than two shippers are served. Id. (63–64).

The carriage of cargo pursuant to special contracts is not determinative of common carrier status. Every movement of cargo is subject to some contract of transportation. Nor does a common carrier lose that status if he uses shipping contracts other than bills of lading or even if he attempts to disclaim liability for the cargo by express exemption in the bills of lading or other contracts of affreightment. Id. (64).

Under some circumstances, a common carrier may execute contracts with particular shippers for the carriage of large volumes of cargo, without losing common carrier status. The contracts are actually forward booking agreements. Id. (64).

While the Commission has expressed general guidelines for the determination of common carrier status, the question in the final analysis requires *ad hoc* resolution. A carrier's status is determined by the nature of its service offered to the public and not on its own declarations. The regulatory significance of a carrier's operation may be determined by considering a variety of factors—the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and method of establishing and charging rates. All of the factors present in each case must be considered and their combined effect determined. Id. (64–65).

A carrier of wheeled vehicles from Port Newark to San Juan or Ponce, Puerto Rico, was a common carrier in interstate commerce since it operated between fixed termini on a regular schedule, the initial and most important prerequisite of Commission jurisdiction. Limitation to solicitation of carriage of one type of commodity did not oust the Commission from jurisdiction. The carrier solicited major shippers of wheeled vehicles. The carrier held itself out as a carrier of a type of cargo for all who wished to ship. Refusal to ship for a few small shippers was inconsequential. Id. (65).

Where a carrier operated between fixed termini on a regular schedule and solicited shippers of wheeled vehicles, its self assumed status as a contract carrier was legally meaningless. Substitution of contracts of affreightment for bills of lading was no more than a transparent attempt to avoid regulation. It is the status of the carrier, common or otherwise, that dictates the ingredients of shipping documents; it is not the documentation that determines carrier status. Id. (65–66).

Forward booking contracts do not convert the regulated carrier to the unregulated. "Contracts" with shippers for carriage of wheeled vehicles which were merely contracts of intent, and which allowed both parties great flexibility in adherence to the contract terms, did not make the carrier any less a common carrier. It was free to solicit other customers to use the cargo space supposedly "contracted" to specific shippers. The carrier was a common carrier by water amenable to the 1916 and 1933 Acts and remained such after it ceased to publish tariffs and changed to "contract" with shippers. Id. (66).

—Jurisdiction of Commission

After enactment of the Transportation Act of 1940, transferring to the Interstate Commerce Commission regulatory control over rates and practices of both contract and common carriers by water in some but not all of the domestic trades, the jurisdiction in the Maritime Commission was limited to "common carriers". "Contract carrier" as a legal entity has no significance before the Commission. Activities, Practices and Carrier Status of Containerships, Inc., 56 (66–67).

In the light of the remedial purposes of the Shipping and Intercoastal Acts, the Acts must be flexibly and liberally interpreted. In the Puerto Rican trade, unregulated operations of carriers may be particularly harmful. Thus the Commission may examine its jurisdiction in terms of its statutory responsibility to regulate rates in the Puerto Rican trade. If a carrier of wheeled vehicles to Puerto Rico, soliciting only the very few major shippers, was found not to be a common carrier, the Commission's efforts to stabilize the Puerto Rican trade would be stultified. The carrier would be free to monopolize the vehicle trade at whatever price it desired to set. Loss of automobiles by the regulated carriers would have a chaotic impact on the overall Puerto Rican rate structure. To construe the Acts not to include the carrier within the definition of common carrier would frustrate the purpose of Congress. Id. (69–70).

CONTRACT CARRIERS. See Common Carriers.

DETRIMENT TO COMMERCE. See Agreements under Section 15; Dual Rates; Rates; Surcharges; Terminal Operators.

DEVICES TO DEFEAT APPLICABLE RATES. See Terminal Operators.

DISCRIMINATION. See Agreements under Section 15; Free Time; Port Equalization; Practices; Surcharges; Terminal Operators.

DUAL RATES

Extension of conference dual rate contract system, covering trade from Atlantic and Gulf ports to Australia and New Zealand, to trade from Great Lakes ports to Australia and New Zealand was not approvable under sections 14b and 15 of the 1916 Shipping Act. If a shipper elected to sign a dual rate contract from the Atlantic and Gulf, he would be compelled to be a dual rate shippers from the Lakes whether or not conference rates and service in the Lakes were satisfactory. The bargaining power of Great Lakes shippers would be effectively lessened since they would be forced to accept conference rates from the Great Lakes or conference rates from the Atlantic and Gulf although satisfactory service could otherwise be obtained in the Lakes. The extension would also hinder the development of the Great Lakes as a trading area and would contribute to the diversion of cargo from the Lakes. A shipper might be required to use unsatisfactory conference service from the Lakes or move cargo overland to the Atlantic or Gulf, even though satisfactory nonconference service might be available in the Lakes, and this would be discriminatory to Lakes ports. On the record, the extension of the dual rate contract would be detrimental to commerce, discriminatory against Great Lakes ports, and contrary to the public interest. Agreement Nos. 6200–7, 6200–8 and 6200–B—U.S. Atlantic & Gulf/Australia New Zealand Conference, 1 (8–9).

Where by the terms of the parties' dual rate contract, all shipments by complainant, Firestone International, and its affiliates were to be made on conference vessels; shipments were made on nonconference vessels, and were consigned to Firestone of the Philippines allegedly a subsidiary of International, and to Sherwin-Williams; and International prepared the documentation required on all shipments in question, appeared as shipper on all bills of lading and, along with a "department" of Firestone of Ohio, selected the carrier, the conference had just and reasonable cause to suspect that complainant had breached its contract, and any attempt by the conference to enforce its contract by the means made available therein was justified. The conference would have been delinquent in its duty had it not attempted to police its dual rate contract because of the obligation it owed to its shippers to see to it that enforcement of rates be consistent and uniform. Firestone International Corp. *v.* Far East Conference, 119 (126).

Where a conference contended that a shipper had the legal right to select the carrier under a dual rate contract and that in selecting nonconference carriers, the shipper violated the contract; and in defense the shipper asserted that the consignee had the legal right to select the carrier since the shipments involved were sold FAS seaboard and the consignee had directed nonconference shipments, the conference was justified in investigating possible violations of its dual rate contract, asserting a breach, demanding liquidated damages, and attempting to proceed to arbitration. Good faith prosecution of what was believed to be a valid claim could not be held to constitute harassment and coercion. Id. (126–127).

Where the provisions of a conference dual rate contract, with respect to the legal right to select the carrier and liquidated damages, had been amended by operation of law (Public Law 87–346) to meet the requirements of section 14b, and the contract was lawful at the time of alleged breaches by a contract shipper, the dispute between the parties was a proper matter for arbitration under the arbitration clause of the contract. Id. (127).

Arbitration provisions have a long history in both Commission approved conference agreements and dual rate contracts, and they met with Commission approval. Although cases arise where recourse to the Commission can be had notwithstanding arbitration provisions, this is the exception rather than the rule. The Commission will not nullify arbitration clauses without serious cause. Id. (128).

Proposed dual rate contract for conference serving the trade from Mediterranean ports of Israel to U.S. North Atlantic ports was approved. The contract was conceived as a means of relieving a situation wherein a diminution of service and a consequent loss of revenue was brought about by substantial diversion of tonnage to indirect routings. Israel/U.S. North Atlantic Ports W/B Freight Conference—Dual Rate Contract, 353 (354).

Clause in dual rate contract binding the merchant to ship all of its ocean shipments moving in the trade from "or via" Marseilles must be modified to eliminate the words "or via". The words do not accomplish the intended distinction between cargo transshipped at Marseilles on separate bills of lading as distinguished from through bills. If the conference desires to accomplish the purpose of including cargo transshipped on separate bills it may file a modification of the contract, accompanied by a statement of circumstances in the trade warranting the modification. Marseilles/North Atlantic U.S.A. Freight Conference—Dual Rate Contract, 400 (401).

In drafting the standard charter exclusion clause for dual rate contracts, the Commission did not intend to exclude from the operation of the contract such of the merchant's cargo as he merely *owns*, as distinct from what he grows, manufactures or produces. No restriction was placed directly or indirectly, on the type of nonbulk cargo which the merchant might carry, so long as it was of a proprietary nature. Absent an agreement or statutory expression to the contrary, ownership of or other appropriate legal interest in cargo is the basic test of what is proprietary. Pacific Westbound Conference—Amendment to Dual Rate Contract, 403 (409).

Where a conference seeks a departure from a uniform clause of a dual rate contract, it must show facts and circumstances peculiar to its trade as would warrant such departure. Departures will be allowed to suit "the reasonable commercial needs of a particular trade" upon a showing by substantial evidence that such a change is needed or warranted. Id. (409).

Amendment of Charter exclusion clause of dual rate contract to limit the privilege to proprietary cargo, defined as cargo raised, grown, manufactured or produced by the merchant, was not shown to be justified. Past instances of charters by cotton traders had represented, at the most, slightly over two percent of the total revenue tons carried by the conference of all commodities in 1964 (16 percent of the total cotton tonnage in 1964). Fears that other commodities might move on chartered vessels in the same manner were unfounded on the basis of the record. Rate instability had not developed in the trade as a result of the charters. The proposed restrictive clause would place merchant-shippers, who do not make or grow the product they sell, at an obvious disadvantage vis-à-vis those who do, a result not justified by the record. Consequently the proposed limitation was unjustly discriminatory and unfair as between shippers in violation of section 14b of the Shipping Act. Id. (409–411).

The record would not support amendment of the charter exclusion clause of a dual rate contract to provide that the charter exclusion right should not be available for shipments of raw, baled cotton. Id. (411).

EQUALIZATION. See Port Equalization.

EVIDENCE. See Practice and Procedure.

FREAS FORMULA. See Wharfage.

FREE TIME.

Free time is not a gratuity, but is required as a necessary part of the carrier's obligation which includes a duty to "tender for delivery" all cargo carried by it absent a special contract to the contrary. The carrier does not have the duty to "deliver" or "make delivery". Free Time Practices—Port of San Diego, 525 (539).

The reasonableness of the free time period is fixed broadly speaking, by determining the period necessary for the shipper to assemble or the consignee to remove his cargo prior to loading the goods on the ship or after discharge of the goods from the ship. The establishment of the *minimum* amount of free time which must be granted by carriers is relatively simple—the period must be realistically designed to allow the consignee sufficient time to pick up his cargo, taking into consideration the so-called transportation necessities of the particular port or terminal. Id. (539).

The carrier must afford not only the necessary free time but also provide terminal facilities adequate to render such free time meaningful and realistic. This obligation may be fulfilled either by the carrier itself or through an agent. Id. (539).

In view of the record showing that San Diego operates a modern and efficient terminal; favorable weather conditions; no hindrance to handling of outbound cargo within 10 working days and inbound cargo within 7 working days; other California ports were handling similar cargo under regulations restricting free time to 10 days outbound and 7 days inbound; and that 30 days free time was being used at San Diego to induce shippers to use that port in preference to other ports, a reasonable free time period at San Diego was 10 days outbound and 7 days inbound, Saturday, Sundays, and holidays excluded. Transportation necessities not commercial convenience of shippers governs. A "15 calendar day" period would be inequitable if it included Saturdays, Sundays and holidays; if it did not, it would result in free storage time which was not required. Id. (540–541).

A tariff item providing for 30 days free time at San Diego was an unreasonable practice in violation of section 17. The item did not accurately reflect the free time situation, since it provided in fact for an obligatory free time plus a varying period of free storage, and was not precise enough to enable other terminal operators, shippers, carriers, and the Commission to determine whether each service was bearing its fair share of the costs. It obscured the rights, duties and liabilities among the carriers, shippers, and the port with respect to loss or injury to cargo occurring after the end of the reasonable free time; and it could tend to foster litigation. Id. (542–543).

A 30–day free time practice may be prejudicial or preferential within the meaning of section 16 First, even though it is offered to all shippers, if it shifts the burden of defraying the cost of providing the service to nonusers of the service. Id. (544).

It is not necessary to show a competitive relationship between the cargoes or shippers preferred or prejudiced in order to establish that a 30-day free time practice violates section 16 First. Whatever the justification for requiring a competitive relationship when determining the existence of preference or prejudice in ocean freight rates, such a requirement cannot be justified when determining whether preference or prejudice results from free time or free storage practices. Free time bears no relationship to the character of the cargo. The equality required is absolute. Prior cases to the extent contrary are overruled. Id. (544–547).

As used in section 17 and as applied to terminal practices, "just and reasonable practice" most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view. The justness or reasonableness of a practice is not necessarily dependent on the existence of actual preference, prejudice or discrimination. It may cause none of these but still be unreasonable. To conclude otherwise it to make the second portion of section 17 merely redundant of other sections of the Shipping Act. Id. (547).

The predictability which is sought in stable ocean freight rates is just as desirable and valuable in terminal and other charges incidental to actual common carriage itself. Predictability of terminal charges is, or should be to the extent reasonable and possible, dependent upon efficiency, economy, and soundness of operation. It should not be conditioned on promotional inducements which dissipate essential revenues (as in the case of San Diego's 30-day free time practice). This would base competition between terminals on the ability and willingness of the parent municipality to absorb or make up through taxation or other levies the dissipated revenues. The principle does not require a showing of "existing and effective" competition between the terminal providing the promotional inducements and protesting terminals. It is enough that the parties consider themselves competitive. If San Diego were allowed to compete by promotional inducement, others could do so, and the result would be ever increasing inducements and ever decreasing revenues. Thus, in principle, practices which result in providing services at rates less than cost are unreasonable practices in violation of section 17. Id. (548–549).

San Diego's practice of granting 30 days "free time" either violated section 16 First because it shifted the burden of defraying the cost of providing the service to nonusers, or if the cost of providing service was not shifted to nonusers, it was an unreasonable practice with the meaning of section 17 because the service was granted at charges less than that which it cost the terminal to provide the service thus jeopardizing the efficiency, economy, and soundness of terminal rates and charges without any transportation justification. Since San Diego was being ordered to amend its tariff items governing "free time", and since any amendment filed which was inconsistent with the Commission's decision would violate the spirit of the order and could result in further proceedings, no findings as to the validity of the free time practice would be made. Id. (549–550).

FREIGHT FORWARDERS.

An applicant for a freight forwarder license whose sole owner was employed full-time by a shipper in United States foreign commerce did not qualify as an independent freight forwarder, where the shipper's office and equipment was utilized for the applicant's forwarding activities; the employee performed forwarding services for his employer; the employee was subject to complete control by his employer; the employee received forwarding business from clients of his employer; the employee was completely dependent on his employer for his main livelihood; the employee operated his freight forwarding business on a part-time basis; and the applicant was able to operate only through the continued generosity of his employer. The freight forwarder law does not exempt from the ban on licensing shipper-controlled forwarders who do not forward shipments for their shipper-employers or where the control is present but not as yet exercised. York Shipping Corp.—Freight Forwarding License Application. 72 (74–75).

The definition of freight forwarder in section 1 of the Shipping Act does not mean that a shipper must actively exercise control over the operations of a freight forwarder to disqualify the latter from being licensed. The present intention of an applicant to cease forwarding for his employer-shipper does not qualify the applicant for a license. Id. (75).

Public Law 87–254 (freight forwarder law) is aimed at preventing payment of "compensation" in the form of brokerage in situations where it may amount to rebating. The Congressional aim was that no forwarder be licensed who is subject to control of a shipper in foreign commerce. There is no proviso in the law exempting from the ban on licensing shipper-controlled forwarders who do not forward shipments for their shipper-employers or where the control is present but not as yet exercised. Id. (75–76).

INTERSTATE COMMERCE COMMISSION. See Common Carriers.

JURISDICTION. See also Agreements under Section 15; Common Carriers.

The Commission did not lack jurisdiction, by reason of sovereign immunity, over an agreement between a conference and an agency of a foreign government, under which the agency agreed to ship on conference lines all cargo moving from certain United States ports to certain ports of the foreign country. The Commission had only asserted jurisdiction over an agreement between common carriers by water in foreign commerce clearly made subject to the Shipping Act by section 1 thereof. Disapproval or approval of the agreement was not dependent on subjecting the foreign government or its agent to Commission jurisdiction. Contract Between the North Atlantic Mediterranean Freight Conference and the United Arab Co. for Maritime Transport (Martrans), 431 (437–438).

LOADING AND UNLOADING. See Practices.

POOLING AGREEMENTS. See Agreements under Section 15.

PORT EQUALIZATION.

Port equalization is not unlawful in principle. Equalization may be unlawful, however, if it draws from ports traffic which originates in areas naturally tributary to those ports, and if the port losing the diverted traffic can offer adequate service to shippers diverting to the favored port. Equalization may also be unlawful if it is practiced between ports located in different or separate harbors or geographic areas. Stockton Port District *v.* Pacific Westbound Conference, 12 (20).

Port equalization rules and practices of conferences had nothing to do with the receiving, handling, storing or delivery of property. Id. (20).

Stockton and San Francisco do not represent separate and distinct geographical areas. They are both "bay area" ports. Stockton could not rely solely on its physical separation from San Francisco Bay (84 mi.) to bring itself within the protection of section 8 of the 1920 Act, in opposing port equalization as between itself and San Francisco. Other factors of "economies of transportation" and the "natural flow of commerce" were relevant. For almost 100 years before Stockton was made accessible to oceangoing vessels, San Francisco was the principal port through which freight from the San Joaquin Valley passed. San

Francisco did not cease to be such a port merely upon creation of an additional port at Stockton. Id. (21–22).

Port equalization as between Stockton and San Francisco was not unlawful in violation of sections 16 or 17 of the 1916 Act, on the ground that traffic was drawn from Stockton which was naturally tributary to it. The discrimination and prejudice prohibited by sections 16 and 17 is that which is unjust and unreasonable. There was ample economic and cost justification for the discrimination such as it was. The territory which is naturally tributary to Stockton is also naturally tributary to San Francisco. A "constructive mileage" theory (actual mileage weighted by such factors as number of traffic lights and bridges, terrain, condition of highways and other factors affecting truck traffic) for determining "naturally tributary territory" must be rejected in view of governmental studies designating Stockton territory as wholly within San Francisco territory. Territory naturally tributary to Stockton should properly be considered naturally tributary to San Francisco and other San Francisco Bay area ports. Id. (22–24).

Port equalization rule, under which actual amounts to be absorbed could not be determined without recourse to overland tariffs, was not in violation of the requirement of section 18(b)(1) of the 1916 Act that a tariff must state "rules or regulations" which affect rates. Shippers would have to go to overland tariffs whether or not an equalization rule existed. A requirement that each and every possible absorption be published would render a tariff impossibly voluminous. Id. (24–25).

Port equalization rule was not unlawful on the theory that the determination of equalization payments was, as a practical matter, impossible, and therefore the rule permitted undue preference and prejudice between shippers in violation of section 16 First, constituted improper tariff publication in violation of section 18(b)(1), and was contrary to the public interest, detrimental to commerce and unjustly discriminatory between shippers and exporters in violation of section 15 of the 1916 Act. The rule had been operated fairly, and with the exception of one improper practice which had been discontinued, there was no evidence of any differences or possible preferences in the treatment of shippers similarly situated. Id. (25–27).

Port equalization as between San Francisco and Stockton did not result in discrimination between shippers, or undue or unreasonable preference or advantage to any particular person, in violation of sections 15 and 16 First, because varying equalization payments resulted in different charges for the same ocean transportation, in that carriers ultimately collected varying amounts for transporting the same commodity between the same ports, depending on the inland transportation charges. Discrimination against a shipper is necessarily measured by what the shipper pays, not by what the carrier ultimately collects. Shippers who receive equalization allowances pay the same amount for through transportation, whether they ship via Stockton or San Francisco. No shipper complained of discrimination and there was no evidence of any differentiation among shippers similarly situated. Any *prima facie* discrimination based on ocean carriage alone, as between, for example, a shipper located at San Francisco who received no equalization allowance and one located at Fresno who received equalization against Stockton when he shipped via San Francisco, was justified. To eliminate equalization would be beneficial to Stockton but the public interest was much larger than the needs or desires in the Stockton area. The equalization reflected an overall economic good, tangible benefit to the public at large, and an important transportation justification. Id. (27–28).

Port equalization as between San Francisco and Stockton was not contrary to the public interest and detrimental to commerce in violation of section 15 of the

1916 Act because of alleged dissipation of revenues. The evidence demonstrated that it was not always more economical to load equalized cargo aboard a vessel at Stockton which was there to load other cargo. Cargo was frequently transshipped by truck to San Francisco at the carrier's expense, because it was cheaper than to move a vessel from a bulk cargo berth to another berth at Stockton. Transhipment cost the carrier a great deal more than equalization. For the carrier that actually equalizes, there is no dissipation of revenue through equalizing as against sending a ship to Stockton. If there was sufficient cargo available to a carrier to make it more economical to call at Stockton, the carrier would normally do so rather than equalize. Equalization was financially beneficial to the equalizing carrier. Even with equalization, Stockton's growth since 1957 had put it ahead of San Francisco, Oakland and Alameda combined, in export tonnage. Id. (28–29).

Port equalization rules as applied (with the elimination of the phrase purporting to restrict operation to cargo "which would normally move" from a given point) between San Francisco, Stockton and Bay Area ports did not violate section 205 of the 1936 Act which makes it unlawful for a common carrier to prevent another from serving any port designed for the accommodation of ocean-going vessels, located on an improvement authorized by Congress (such as Stockton), at the same rates which it charges at the nearest port already regularly served by it. The rules permitted equalization in favor of Stockton to the same extents as against it. The carriers served Stockton at the same rates which they charged at the nearest port regularly served by them, since rates were the same for all Bay Area terminal ports. If equalization were considered to change the base rates from any such port, the law was complied with because the same equalization was offered to shippers who wished to load at Stockton. Id. (29–30).

Practice of carriers to allow an "equalization" payment of 15 cents per carton on citrus fruit shipped from San Francisco if it originated in "southern California", based on the difference between the price quoted by exporters for fruit delivered f.a.s. San Francisco as against f.a.s. Los Angeles, was not in accord with the carriers' equalization rules under which equalization was the absorption by the carrier of the shipper's excess cost of delivery to the loading port. Thus the carriers had failed to comply with section 18(b) (1) and (3) of the 1916 Act, in that they had not filed a rule or regulation which affected a port or the aggregate of their filed rates, and had charged a different compensation for transportation from their rates and charges on file. The absorption of an arbitrary based on a differential in delivered "price" of a commodity is unjustly discriminatory between ports within the meaning of section 15, since the amount absorbed had no transportation basis or justification. However, such practices had not diverted cargo from, and did not affect, the port of Stockton. Id. (30–32).

Port equalization rules, to the extent that they provided for equalization of inland transportation from shipper's point of origin to any terminal port located in the San Francisco Bay Area (including Stockton), on cargo loaded at Los Angeles or Long Beach, were violative of section 15 of the 1916 Act, as unjustly discriminatory between ports. If the absorption of inland rate differentials destroys the rights of ports to traffic originating in the areas tributary to them, the absorption is unduly prejudicial to such ports where service from the port equalized against is adequate. Shipments were equalized against Stockton where the cargo actually moved from Los Angeles and Long Beach, and service was adequate at Stockton and other Bay Area ports. Equalization of cargo via southern California ports destroys the right of Bay Area ports to traffic originating in the area naturally tributary to them. The test of equalization would not be qualified to take into consideration which of the Bay Area ports had adequate service. Id. (32–34).

A substituted service rule which provides that a carrier may ship or absorb the cost of shipping by rail or truck from Jacksonville, where the carrier has a terminal but never calls a vessel, to Miami where a vessel loads cargo for Puerto Rico, is port equalization in the general sense and, therefore, it is appropriate to measure the rule under section 16 First of the Shipping Act. Sea-Land Service, Inc. v. South Atlantic & Caribbean Line, Inc., 338 (344).

Port equalization violates section 16 of the Shipping Act where it (1) diverts traffic from a port to which the area of origin is tributary, to a port to which the area is not naturally tributary, and (2) is not justified, in the shipper's interest, by lack of adequate service out of the port from which traffic is so diverted. Id. (344).

"Equalization", "proportional rates", and "transshipment" are forms of port equalization. In "equalization", the carrier pays the shipper, or the inland carrier directly, the amount by which the cost to the shipper of overland transportation to the port of loading exceeds the cost of overland transportation from the same point of origin to the nearest port. "Proportional rates" are accomplished through deduction of specified differentials from ocean tariffs where shipments originate at certain points defined in the tariff. In transshipment, cargo moves usually by land carrier in the water carrier's name and at its expense, from a dock or terminal at the port where it is originally delivered by the shipper to the water carrier, to the dock or terminal at another port where it is loaded aboard a vessel of the water carrier. Condemnation of unjustified equalization cannot be thwarted by transshipment. Diversion of cargo from a port through which it would normally move would be unjustly discriminatory and unfair between ports "if accomplished by transshipment to the same extent as if accomplished by equalization". Id. (345–346).

Carrier's substituted service rule, under which it absorbed the cost of shipping cargo by rail or truck from Jacksonville to Miami where its vessel loaded cargo for Puerto Rico, either by means of "equalization" or "transshipment" resulted in diverting, from the port of Jacksonville traffic tributary thereto and not tributary to the port of Miami. Such diversion was not justified by inadequacy of direct-call service at Jacksonville, or by emergency or exigent conditions affecting the carrier's operations as a common carrier by water, and unduly preferred Miami and was unjustly prejudicial to Jacksonville, in violation of section 16 First. *Puget Sound* (7 FMC 550) held only that a substituted service rate could be filed under section 2 of the Intercoastal Act and did not decide the legality of the practice, in operation, under section 16. Id. (346–348).

Carrier's substituted service, under which it absorbed the cost of shipping cargo by rail or truck from Jacksonville to Miami where its vessel loaded cargo for Puerto Rico, resulted in unwarranted diversion of traffic from Jacksonville. it was immaterial to such a finding whether Jacksonville was a point on the carrier's route. Id. (348).

The fact that the impact on the port of Jacksonville of diversion of cargo to port of Miami was limited because the carrier maintained a terminal at Jacksonville, and paid wharfage and handling on cargo moving under substituted service, did not mean that there was no violation of section 16 First. The port and the carriers serving the port had lost traffic. There was an absolute loss to the carriers providing service at Jacksonville. A port and its transportation services are indissolubly linked together and a practice harmful to one injures the other. Id. (348–349).

The fact that a particular shipper must or wishes to use a certain port does not justify an across-the-board absorption practice. Cargo should move in the direction determined by the myriad costs and requirements facing shippers, not by artificial tariff concessions. Id. (349).

If equalization destroys the right of a port to traffic naturally tributary to the port, the equalization is unduly prejudicial to the port where service from the port is adequate. Cargo tributary to a port need not move there, nor must service be adequate to accept all cargo. A carrier cannot utilize a substituted service rule to siphon off cargo some of which would otherwise move through the naturally tributary port. Id. (349).

A carrier complaining that respondent carrier's substituted service rule had unlawfully diverted cargo from Jacksonville to Miami was not required to prove that the cargo would have moved through Jacksonville *but for* the substituted service. Insofar as *Phila. Ocean Traffic Bureau* (1 USSBB 538) is to the contrary, it is overruled. Id. (350).

PORTS. See Free Time; Port Equalization; Surcharges; Terminal Operators.

PRACTICE AND PROCEDURE.

—Complaints

In considering a complaint against port equalization rules, alleged to discriminate against Stockton in favor of San Francisco Bay Area ports, the Commission could also investigate and make a decision on the question of whether the rules resulted in unjust discrimination against Bay Area ports in favor of Los Angeles and Long Beach. After a complaint is filed the Commission has the duty to investigate and take proper action on its own motion, and is not restricted by the issues raised in the complaint, provided the respondent has full opportunity to defend. Stockton Port District *v.* Pacific Westbound Conference, 12 (33).

—Cross-examination

Where a conference had had an opportunity in an earlier proceeding to contest the facts with respect to alleged violations of the Shipping Act, the Commission could use the findings in that proceeding as a basis for an order against the conference in a later show cause proceeding, without affording the conference an opportunity for cross-examination. The Administrative Procedure Act does not require a full evidentiary hearing with full opportunity for cross-examination. The right of cross-examination should be granted where necessary for full disclosure of the facts. Hearing may be by trial or argument. Surcharge by the Far East Conference at Searsport, Maine, 129 (139–140).

—Declaratory orders

Where a federal district court stayed an action by petitioner alleging that certain activities of respondents constituted a violation of the antitrust laws, in order to permit the parties to seek a determination by the Commission as to whether respondents' conduct was lawful under the Shipping Act, 1916, the controversy was an appropriate matter for issuance of a declaratory order. Continental Nut Co. *v.* Pacific Coast River Plate Brazil Conference, 563 (566).

—Initial decisions

A letter requesting that the Commission accept a brief before the Examiner in lieu of exceptions does not comport with the requirements of Rule 13(h) of the Commission's Rules of Practice and Procedure which requires that exceptions "shall indicate with particularity alleged errors", and was rejected as an exception to the Initial Decision. However, the position of the party as expressed in its brief was considered by the Commission in the determination of the proceeding. Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade, 220 (221).

Section 8(b) of the Administrative Procedure Act does not require that a separate finding be made on each exception to an Examiner's decision where the agency's decision unmistakably informs respondent of its rulings on all exceptions. By the same token, an Examiner need not make a separate finding on each proposed finding submitted by a party. An Examiner did not err in rejecting Hearing Counsel's proposed findings with the statement that "to the extent that they are not substantially included herein all proposed findings and conclusions are rejected as irrelevant, not supported by substantial evidence, or not required for full consideration and complete disposition of the case". Mediterranean Pools Investigation, 264 (267).

—Show cause orders

The notice requirements of the Administrative Procedure Act are met if the notice amounts to a general summary of the matters in issue. Where an order to show cause why a conference agreement should not be amended contained a summary of the development of the problem in an earlier proceeding to which the conference was a party, the conference had adequate notice of the matters involved so that it could prepare its own position. All that is required in a pleading instituting an agency action is a statement of the things claimed to constitute the offense charged so that respondent may put on his defense. Surcharge by the Far East Conference at Searsport, Maine, 129 (140–141).

Where the Commission in an earlier decision made a finding of unjust discrimination and had ordered a conference member to remove a surcharge at a port to eliminate the discrimination, and, in a later show cause proceeding against the conference, the Commission had evidence that the conference had prohibited the member from complying with the order in the earlier proceeding, the Commission had fulfilled its burden to establish the facts. There was involved not so much a question of burden of proof as a question of whether the facts already before the Commission had any legal effect. The Commission decision rested on the record, not on the basis of whether one side or the other had met its burden of proof. Id. (141).

The Commission may proceed by means of a show cause order, and the burden of proof in such a proceeding is on the proponent of the order. The Rule 11 "shortened procedure", which requires consent of the parties, applies only to a complaint proceeding. Admission to Conference Membership—Pacific Coast European Conference, 241 (251–252).

Failure to respond to an order to show cause to determine whether approval of an agreement should be continued or the agreement cancelled would warrant summary disapproval of the agreement. However, in view of the duty of the Commission to the entire regulated industry to afford guidelines for future conduct, wherever possible, the Commission would set forth its reasons for cancellation. Agreement 8765—Order to Show Cause, 333 (335).

The Commission's show cause procedure is valid beyond dispute. Section 22 empowers the Commission within the limits of due process to conduct whatever type of proceeding is best suited to the discharge of its responsibilities under the Shipping Act. Rule 5(f) of the Commission's Rules of Practice and Procedure clearly outline the requirements of the show cause procedure. Id. (335).

PRACTICES. See also Free Time; Port Equalization; Surcharges; Terminal Operators.

The action of respondent stevedores in including in their stevedoring rate for automobiles an amount equal to a charge assessed, on a measurement tonnage basis, against them by an association of which they were members to raise a mechanization fund, rather than making the assessment on a weight or unit basis (which would have resulted in a much lower assessment), was not an unreasonable practice in violation of section 17 of the Shipping Act. While there was little likelihood of mechanical improvement in the method of unloading automobiles and auto shippers would probably receive only general benefits, such as freedom from strikes or slowdown, there was no statutory requirement that all users of a facility be assessed equally. As long as "substantial benefits" were provided for one against whom a charge is levied, the Commission would not declare the charge unlawful. The assessment involved was levied because it was necessary in the business judgment of respondents to do so. The reasonableness of respondents' activities was attested to by the additional facts that respondents sought to change the method of fund assessment on automobiles, offered to pass on only a part of the assessment, and levied a part of their dues assessment against complainant for several years on the same measurement basis without protest. Volkswagenwerk Aktiengesellschaft *v.* Marine Terminals Corp., 77 (84).

A terminal conference agreement providing for the establishment of rates for loading and unloading of cargo into and from lighters, and the service of storage of import freight on the pier, authorizes a charge for direct transfer service from lighter to vessel. Nevertheless, the imposition of such a charge is an unjust and unreasonable practice under section 17. The service involved is the movement of cargo between lighter deck and vessel or between place of rest and vessel, which is a stevedoring service performed by the terminal but paid for by the ship. Any charge for the direct transfer service under the terminal tariff results in collecting twice for the performance of a single service. The record did not support the contention that additional expenses were involved. Truck and Lighter Loading and Unloading Practices at New York Harbor, 505 (511–512).

A separate charge for direct transfer service from lighter to vessel was not justified on the basis of the *Boswell* case, 2 USMC 95. That case stood for the principle that a separate charge for movement between place of rest and ship's hook could be assessed by vessel against cargo when "it is not shown that the published tackle-to-tackle rates included any compensation for that service". The issue in the present case was not whether the vessel could assess a separate charge, but whether the terminal could separately charge the lighter for a service included in the stevedoring service provided by terminal to vessel. Id. (512–513).

Since lighter detention was for reasons residing entirely within the stevedoring process performed by the terminal, it is proper that the lighterman be compensated for any extraordinary costs which results from unusual delay. It is unjust and unreasonable for terminals to fail to adopt a just and reasonable lighter detention rule or regulation in their lighterage tariff, and failure to do so for the future will be, as it has been in the past, contrary to section 17. The assumption by the terminal operator of the carrier's traditional obligation of loading and unloading of necessity carries with it the responsibility for ensuring that just and reasonable rules govern the performance of the obligation. Id. (514).

Terminals must include in their tariffs a reasonable detention rule which will compensate truckers for unusual truck delays caused by or under the control of the terminals. Disclaimer of all liability for delay and failure of the terminals to establish and apply such truck detention rule constitute unjust and unreasonable practices under section 17. Attempts of the terminals to work out an "appointment system" with the truckers did not obviate the need for the rule. The issue was what the trucker might reasonably expect as redress for delays, not what might be done to remove the causes of delay. Id. (515).

The fact that one terminal tariff provides that lighter operators may collect detention charges from steamship companies, while another tariff provides that no claim for delay to motor vehicles will be honored, results in unreasonable preference to lighter traffic and unreasonable prejudice to motor vehicle traffic in violation of section 16 First. The preference and prejudice did not arise from the actual payment to one as opposed to the other, but arose from the mere presence of the varying provisions in the tariffs. The tariff item motor vehicle detention failed to recognize the right for truckers to collect detention. Id. (516).

Failure of terminals to establish and publish in their tariffs the rates assessed against lighters loaded and unloaded to piers (as distinguished from alongside vessels) constitutes an unjust and unreasonable practice under section 17. Terminals occasionally performed such services at negotiated rates, but this is unsatisfactory. The tariff must show what the uniform charge for the service will be. It could not be anticipated that the terminals would attempt to drive a stevedore from the market by establishing extremely low rates. The stevedore's position had no effect on the mandates of the Shipping Act. Id. (517–518).

Where terminals made no charge for loading and unloading heavy lift freight received from or destined to a railroad, while providing no similar free services for private lightermen, the result was discrimination against private lighter traffic in violation of sections 16 First and 17. Id. (518).

Terminal operators' three o'clock rule which excluded trucks unloaded without the services of the operators was unjust and unreasonable under section 17. The rule could be used as a means to compel the trucker to use the unloading services of the terminal for which a charge would be assessed. Id. (518–519).

A tariff rule which provides for truck unloading at a rate of 10,000 pounds per hour, with a penalty for excess time, when the truck is unloaded without the services of the terminal operator's employees, is unreasonable under section 17 because it is not applied in many cases; because it is meant to be applied only when trucks are unloaded without the services of the terminal operator; and because it is incapable of uniform application to all types of commodities. Id. (519).

It was not error for the Examiner to fail to consider the level of rates in an investigation into truck and lighter practices. The order of investigation, insofar as it referred to rates in possible violation of section 16 First, raised no issue of reasonableness of rates; insofar as it referred to rates operating to the detriment of the United States, this was not the normal and usual "reasonableness" criterion used when considering levels of rates. Id. (521).

While the record failed to support or justify a requirement that the cost of truck loading and unloading be borne by the steamship companies, as proposed by truckers, the proposal augured possible lower total costs, possible increased efficiency, and other benefits, and would be informally investigated. Id. (522).

PREFERENCE AND PREJUDICE. See also Free Time; Port Equalization; Rate Making; Terminal Operators.

The action of respondents in including in their stevedoring rate for complainant's automobiles a measurement tonnage assessment for a mechanization fund was not in violation of section 16 of the Shipping Act, since complainant's automobiles had not been subjected to prejudice or disadvantage as compared to other automobiles and there was no other cargo classification in competition with automobiles. Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corp., 77 (83–84).

PUBLIC INTEREST. See Agreements under Section 15; Dual Rates; Port Equalization; Surcharges; Terminal Operators.

RATE MAKING.

—Differentials

The Commission has no authority under the Intercoastal Shipping Act to set rate differentials based solely on differences in the quality of service rendered by carriers. The Act does not explicitly authorize such rate differentials and the legislative history evidences an intent to withhold that power. Thus the Commission has no authority to set a rate differential between two carriers operating from Miami to San Juan, Puerto Rico, because of the slower transit time of one of the carriers. Previous order setting a rate diffeerntial is vacated. Reduced Rates on Automobiles—Atlantic Coast Ports to Puerto Rico, 147 (148–149).

While a carrier should be able to utilize its "natural advantage" of a closer location to port of discharge to charge lower rates than more distantly situated carriers, the degree by which such rates may be lower is not open to speculation. The mere fact that a "rate is inherently reasonable, and that the rate from competing ports is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie in the zone of reasonableness and yet result in undue prejudice". The difference must be "justified by the cost of the respective services, by their values, or by other transportation conditions". Reduced Rates on Machinery and Tractors from United States Atlantic Ports to Ports in Puerto Rico, 465 (477).

Where a carrier of heavy machinery from South Atlantic ports to Puerto Rico would earn revenue, at a 48 cent rate, comparable to the revenue it would earn at a 43 cent rate, even though it lost traffic "naturally tributary" to New York, such "wastefulness of revenue" should be discontinued. It was a clear indication that there was no "cost" justification for the diversionary rate in order to maintain a certain revenue level. Id. (477).

The actual volume of a commodity in a trade or the relative amount of that volume transported by any particular carrier is irrelevant if area differentials not supported by transportation conditions have been shown to exist. In the absence of differentials supported by such conditions, a carrier cannot be allowed to utilize its "natural advantage" of a closer location to port of discharge to the extent that even 9 percent of the cargo which would naturally move through a certain port because of lower inland freight rates to that port is diverted to another port to which the inland freight rates are higher. Id. (477).

Where the question was whether a carrier's rate on heavy machinery from South Atlantic ports to Puerto Rico prejudiced North Atlantic ports from which a higher rate prevailed, the Commission would not follow the cases of its predecessors which suggested that undue prejudice under section 16 is not shown when the carriers serving the alleged preferred point do not serve or participate in routes from the alleged prejudiced point for the movement of the traffic involved. Id. (479).

The Commission was not prevented from setting differentials on rates on heavy machinery from North Atlantic and South Atlantic ports to Puerto Rico by the facts that only a small amount of carriage in the trade was of heavy machinery and the North Atlantic carriers carried little of this traffic. Id. (479).

Existence of a "service disability" alone would not be sufficient to justify a differential of a carrier's rates on heavy machinery from South Atlantic ports to Puerto Rico below those of carriers carrying heavy mahinery from North Atlantic ports to Puerto Rico. The record, moreover, did not show that such disability existed. There was no real showing that transit time was important to shippers and receivers, and one main shipper stated it preferred the South Atlantic carrier's service to that of North Atlantic carriers even at equal rates. Id. (480).

—Justness and reasonableness

Proposed rates for lighterage and coastal barge service in the Northwest-Bering Sea area of Alaska would be just and reasonable and otherwise lawful. The result of the rates would be to reduce respondent's net loss on its lighterage operations. Lomen Commercial Co.—Increased Rates on the Northwest-Bering Sea Area of Alaska, 460.

Carrier did not meet its burden of proving that it suspended reduced rate on heavy machinery (43 cents per cubic foot) from North Atlantic ports to Puerto Rico was just and reasonable, where it failed to show how and to what degree heavy machinery could be loaded on its vessels, which, as it had not carried such machinery in the past, was essential to support a rate 7 cents lower than that of the other North Atlantic carriers. Attempt to support the rate on the grounds that the costs of loading and unloading heavy machinery were similar to those for automobiles, which were substantially below 43 cents, had to fail as the record contained no comparison of the transportation characteristics of road building machinery with those of unboxed automobiles. Reduced Rates on Machinery and Tractors from United States Atlantic Ports to Ports in Puerto Rico, 465 (475).

Carrier's rates on heavy machinery (50 cents per cubic foot) from North Atlantic ports to Puerto Rico were just and reasonable in view of the fact that, while the carrier's overall operations had not been profitable, it would make a profit at the rate over its out-of-pocket costs for carrying heavy machinery. New carriers of heavy machinery should be allowed a reasonable opportunity to develop their services at similar rates. Since the record showed that several of the North Atlantic carriers might not be operating at fully profitable levels at 50 cent rates, *minimum rates* at the 50-cent level were fixed for all the North Atlantic cariers. Id. (475–476).

A tug and barge carrier's reduced rate on heavy machinery (37 cents per cubic foot) from South Atlantic ports to Puerto Rico was unjust and unreasonable under section 4 of the Intercoastal Act where, although the rate was compensatory and would not drive other carriers out of the business, the rate resulted in diversion of cargo from North Atlantic ports to which ports it was naturally tributary, in violation of section 16 First. The right of a port to cargo from naturally tributary area is codified in section 8 of the Merchant Marine Act of 1920 which, as a statement of Congressional policy, should be, and has been followed by the Commission wherever possible. At 48 cents the carrier would earn revenue comparable to the revenue it would earn at 43 cents, even though it lost the traffic naturally tributary to New York. The solution was to fix the rates of the

North Atlantic carriers at 50 cents and the rate of the South Atlantic carrier at 48 cents which rate would allow it to retain cargo from the territory naturally tributary to it, while preventing diversion of cargo from North Atlantic ports where such diversion was not justified by transportation conditions. The 37-cent rate was also unlawful because it involved a service of great value to the shipper for which the shipper could and would pay higher rates. Id. (476–478, 480).

The requirement that a carrier raise its rate from 37 to 48 cents on heavy machinery from South Atlantic ports to Puerto Rico, even though the 37-cent rate was fully compensatory, was supported by the principle that some commodities should be required, in the public interest, to bear more than their full share of allocated costs. Raising the rate for heavy machinery would have the beneficial effect of requiring such machinery to subsidize the carriage of goods essential to the needs of Puerto Rico. Id. (480–481).

A carrier's rate of 37 cents on heavy machinery from South Atlantic ports to Puerto Rico must be declared unlawful as unjust and unreasonable within the meaning of section 4 of the Intercoastal Act because it involved a service of great value to the shipper for which the shipper could and would pay higher rates. The 37-cent rate attracted to the carrier virtually all of the high value cargo which otherwise could help to support low-rated freight which moved via other carriers in the trade. Id. (481).

The 43- and 37-cent rates on heavy machinery of a carrier from South Atlantic ports to Puerto Rico, although compensatory, were "unjust and unreasonable" under section 4 of the Intercoastal Act. There was no justification for the rates in terms of "cost" or "value of service". The rates were violative of section 16 First (prejudicial to North Atlantic ports) and a minimum rate of 48 cents was fixed (except on road scrapers), including arrimo. The lower rates were also unjust and unreasonable because the carriage of heavy machinery was a service of great value to the shipper for which the shipper could and would pay more. Id. (482).

Rates of carriers on road scrapers (28 cents per cubic foot) from South Atlantic ports to Puerto Rico were not shown to be unjust or unreasonable, where the cubic measurement of the item was extremely high as compared with other heavy machinery, while the cost of handling was the same; and consequently at the higher (50¢) heavy machinery rate, a disproportionate cost would fall on road scrapers. The 28-cent rate was further justified because on the North Atlantic carriers road scrapers were crated in a compact package, so that if the 28 cent rate was multiplied by the uncrated cube and the 50 cent rate by the crated cube, the results were approximately equal. Id. (482–483).

—Rate of return

The "operating ratio" theory of return would not be used for a carrier's regulated service to Puerto Rico. In addition to producing a rate of return of 62 percent on the rate base, the formula failed to take into consideration the fact the real test of adequacy of investment is the return on capital commitment, in light of all risks. The formula concerns itself solely with revenues and expenses, gives no clue to the supply price of capital, and encourages constant rate increases. The "operating ratio" theory should not be applied where, as in the instant case, the low rate base is due to the carrier's choice of continuing to use its vessels without replacement. Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade, 220 (237–238).

The measure of a carrier's reasonable rate of return is that amount which is required to meet all allowable expenses of providing service, including the cost of acquiring or retaining the capital needed to provide service. The level of earnings needed to pay interest on the carrier's notes and to pay dividends adequate to give stockholders a return comparable with other investments having a comparable risk should be allowed. A rate of return of 15 percent in the trade to Puerto Rico is unreasonably high. A rate of return not in excess of 10 percent is reasonable. Id. (238–239).

—Vessel expense and depreciation

The ton-mile method of allocating vessel expense and vessel depreciation, rather than the vessel-day method, is proper in the case of a carrier operating a common carrier service to Puerto Rico and backhauling its contract cargo, as the fairer of the methods. The ton-mile method also applies to overhead (administrative and general expense). Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade, 220 (231, 233).

Costs of operating vessels between points are mainly "joint costs" or costs which should be borne proportionately by the users of the services in both directions. Although the joint cost concept may be less accurate when applied to an operation like that of a carrier operating a regulated service to Puerto Rico and backhauling contract cargo, where the two services differ as to cargo types, port time and vessel utilization, if the carrier did not operate its common carrier service to Puerto Rico its vessels would not be available there to haul its contract cargo back to the mainland. The burdens of expenses such as strikes and idle days should, in the absence of a showing that they should otherwise be borne, be allocated on the basis of tonnages times miles carried. The same is true as to dry dock and repair days. Id. (232).

Where a carrier operated a regulated common carrier service to Puerto Rico and backhauled contract cargo, ballast and positioning leg days were to be allocated on the ton-mile basis. In the light of the possibility of arbitrary and inconsistent allocation and the strong argument that such expenses should always be allocated to the use which has caused the diversion of the vessel (from a direct return for the purpose of carrying contract cargo), the vessel-day method cannot be accepted. Id. (232).

Depreciation is an accounting means of reflecting the wearing out of fixed assets employed and should be spread over the units produced or in the case of water transportation the ton-miles produced. The reasonableness of allocating these costs on a ton-mile basis is manifest. These costs are truly "joint"; ships depreciate all the time, not only during the days when ships are used in a particular segment of a trade. Id. (233).

Where a carrier operated a regulated common carrier service to Puerto Rico and backhauled contract cargo, use of the vessel-day method of allocating vessel operating expenses, rather than the ton-mile method, was not justified because some of the carrier's expenses, such as seamen's wages, varied directly with time; the ton-mile method failed to distinguish between port days and sea days; the ton-mile method overstated the expense of the contract leg which required less port time; and the ton-mile method destroyed the "venture theory" of accounting. As to expenses like seamen's wages, the "mile portion" of the ton-mile formula recognized the fact that there were time related expenses and gave weight to them. As to port time vis-à-vis sea days, an accurate allocation of port time to cargo carried was practically impossible due to the presence in port of a considerable amount of inactive time. The various vessel expenses in port were such as should be borne in relation to cargo carried. Far from destroying the "venture theory" of accounting, the ton-mile method gave it full effect. The vessel-day method destroyed this theory. Id (233–234).

The ton-mile method of allocating vessel operating expenses as between the regulated and unregulated portions of a trade has never been rejected by the Commission or its predecessors and has been used more often than any other allocation method. In the only case in which the vessel-day method was used, no party to the proceeding objected. Id. (235).

Use of the ton-mile formula for allocating a carrier's total vessel expense, other voyage expense, overhead and depreciation to its domestic service was proper in determining the reasonableness of a rate on refined bag sugar in the Atlantic/Gulf—Puerto Rico trade. Under the formula, the rate was noncompensatory, and a rough calculation showed it would still be noncompensatory if "corrections" of the formula were used as suggested by intervenors, sugar producers and refiners in Puerto Rico. All voyages of the carrier were inseparably in the domestic and foreign services and the costs were not directly assignable. A finding as to whether intervenors would be damaged by the challenged rate was not necessary since the rate was noncompensatory, and there was no evidence showing that the rate was unreasonably high or otherwise unlawful. Increased Sugar Rate—Atlantic/Gulf Puerto Rico Trade, 326 (330–331).

—Vessel valuation

For purposes of determining the rate base, a carrier's vessels should be valued in accordance with the prudent investment standard, rather than at market value. Valuations based on market value are subject to the opinion on which such value is based which may be totally unrelated to the utilization of the property involved, the basis on which assets must be valued. The evil of the use of market value is shown when it is realized that logically these non-utilization related factors would lead to an increase or decrease in rates as the market values rise or fall, thus placing the general public at the mercy of these unpredictable fluctuations. Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade, 220 (235–236).

—Working capital

For the purpose of a rate base, the amount allocated to working capital should be equal to one round voyage expense for each ship in the service, rather than equal to a "buffer fund" of one month's average expense plus the difference between average monthly expense and average collections on current bills. Though the carrier's tariff allowed 15-days' credit and there was a possibility of lag between expenses and revenues, working capital allowed was ample. Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade, 220 (236–237).

RATE OF RETURN. See Rate Making.

RATES. See Agreements under Section 15; Common Carriers; Dual Rates; Port Equalization; Practices; Preference and Prejudice; Rate Making; Reparation; Surcharges.

Under section 18(b)(5) of the Shipping Act, when a rate disparity in reciprocal trades, on similar commodities, appears and, when movement of goods under the higher rates has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable. Iron and Steel Rates, Export-Import, 180 (181, 191).

Inbound and outbound rates on iron and steel products in the trades involved are not contrary to sections 15, 17, and 18(b)(5) of the Shipping Act. Id. (187, 193).

The existance of a rate disparity in reciprocal trades, on similar commodities, has no conclusive legal significance in and of itself. Only with reference to other facts can it be determined whether either rate is harmful. The language of section 18(b) (5) of the Shipping Act, "unreasonably high", must be given some meaning. It does not refer to the level of profit earned by a carrier, since the Commission has not been charged with fixing a reasonable rate of return for carriers in our foreign commerce. Under section 18(b) (5), as in any rate proceeding, rate comparisons including comparison of rates in reciprocal trades, are proper and, in a rate disparity situation, necessary. Congress intended the Commission, in making judgments under section 18(b) (5), to compare, among others, an outbound rate with the reciprocal inbound rate. When that comparison is made, the Commission may find that the outbound rate is high in relation to the inbound rate. Id. (191).

Unless section 18(b) (5) of the Shipping Act is interpreted to mean that when a rate disparity in reciprocal trades, on similar commodities appears, and when movement of goods under the higher rates has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable, section 18 (b) (5) becomes a nullity and the Commission will not impute to the Congress the enactment of a meaningless statute. Id. (191).

The mere existence of a rate disparity in reciprocal trades, on similar commodities, does not necessarily mean that the higher rate is "detrimental to the commerce of the United States". The Commission would still have the burden of proving that the rate has had a detrimental effect on commerce. The carrier would be required to justify the level of the rate by showing that the attendant transportation circumstances require that the rate be set at the level. Subjects of justification may include many factors, such as competition, volume of the movement, stowage, and stevedoring costs. Id. (191–192).

In considering whether disparities of rates on commodities exported from the United States and in the same commodities in foreign-to-foreign trade were unlawful, it was proper to compare project rates from the United States with foreign-to-foreign tariff rates, since the only rates under which the commodities involved moved from the United States were project rates. The Commission is interested in the real, not hypothetical impact of rates on exporters in the United States. Outbound Rates Affecting the Exportation of High-Pressure Boilers (Utility Type), Parts and Related Structural Components, 441 (454).

Project rates on boiler parts from United States to foreign destinations were not contrary to the public interest, where rates on boiler parts from foreign ports to the same foreign destinations were lower, but the distances involved were not the same, or foreign-to-foreign rates were depressed for reasons other than competition between United States and foreign exporters, or there was no showing that the disparities had any tangible impact on the shipping public. As to utility boilers in the Japanese trade, where inbound-outbound rates were to be compared, there was a slight disparity in favor of the inbound shipment, but there was no evidence that a boiler ever moved inbound or that the outbound rate had been harmful to exporters or otherwise harmful to the public. Id. (454–455).

While conferences, in fixing rates, are answerable for the level of such rates under section 15, the paramount issue in a situation where the rate from the United States to a particular foreign destination is significantly higher than the rate from a foreign port to the same destination arises under section 17. In order to sustain a finding that a rate is "unjustly prejudicial to exporters of the United States as compared with their foreign competitors", the Commission must find generally that the U.S. exporter and the foreign exporter are competitors, that the U.S. exporter is charged a higher ocean freight rate than his foreign competitor under comparable conditions, that the rate charged to the U.S. exporter is harmful to him, and that the carrier has demanded, charged, or collected a rate which is unjust. Id. (455–456).

While it may be excusable for rates in U.S. foreign commerce to exceed rates in foreign-to-foreign trades there is no reason why a comparison of the rates cannot be meaningful. If carriers in two separate trades have noticeably different levels of rates on the same item, and no obvious differences in transportation circumstances appear, the Commission will assume that the trades enjoy similar conditions. As to whether the rate disparity is harmful to the U.S. exporter, proof of detriment might run from a showing of loss of a market or of a particular sale to some intangible limitation of the ability to participate profitably in a market. Assuming that a rate offered to an American exporter is significantly higher than the rate offered to a foreign competitor and the American exporter is shown to be harmed in some way, the rate still must be found to be unjust in order to find a violation of section 17. If the rate is significantly higher than a rate on a similar product in another trade under comparable transportation circumstances, and some harm is shown to the American exporter, the rate may be presumed to be unjust subject to refutation of one of these elements or to proof by the carrier that the rate is justified on the basis of cost or other transportation circumstances. Id. (456–457).

Where inbound rates on certain products were lower than outbound rates but the products did not move inbound and there was no impairment of the movement of the products under the higher rate, no showing was made which would require the carriers to justify the higher rates. Triangular disparities should be measured in a similar fashion. Where a rate disparity is shown between a rate from the United States and a rate from a foreign port to the same destination on similar commodities, and the movement of goods under the higher rate has been impaired, the carrier quoting the rate from the United States should demonstrate the reasonableness of the rate by showing that transportation conditions in the trades are not the same in material respects or that attendant transportation circumstances require that the rate be set at that level. Where higher rates from the United States were not shown to have impaired the movement of the products involved, the rates were not so unreasonably high as to be detrimental to the commerce of the United States. Id. (457–458).

REPARATION.

The Commission has no authority to grant special docket relief permitting deviations from foreign trade rates on file. Waivers of collections of undercharges cannot be granted and authorizations to refund overcharges are unnecessary. The law forbids the former and directs the latter. Tilton Textile Corp. *v.* Thai Lines, Ltd., 145 (146).

The finding that the application of a rate other than the one legally on file was the result of a misunderstanding or a misconception of the carrier does not provide sufficient bases upon which to grant relief in a special docket application. East Asiatic Co., Inc.—Collection of Undercharges, 169 (172).

Since section 18(a) of the Shipping Act provides that the Commission may prescribe a just and reasonable maximum rate when it finds a rate to be unreasonable, and section 4 of the Intercoastal Act authorizes the Commission to prescribe a just and reasonable maximum or minimum rate when it finds a rate to be unjust or unreasonable, the special docket technique requies that all considerations of intention, error, misunderstandings, and like, be discounted as irrelevant. The question is not one of inequity or injustice, but rather one of fact, namely the "reasonableness" or "unreasonableness" of the rates in question. Thus, where a carrier violated section 2 of the 1933 Act by charging a lower rate than that contained in its tariff on file with the Commission, the only basis for granting permission to waive collection of undercharges would be to find that the legally applicable rate was unreasonable and that the rate actually charged was a reasonable one. In the absence of any evidence on which to base such findings, the carrier was denied permission to waive collection of undercharges. Id. (172–173).

Where a carrier charged a higher rate for a shipment in foreign commerce than the rate on file in its tariff properly applicable at the time, the carrier violated section 18(b)(3) of the Shipping Act, and full reparation represented the difference between the rate that should have been paid and the rate actually paid. Ocean Freight Consultants, Inc. *v.* Bank Line, Ltd., 211 (215).

The assignee of a claim for reparation was not barred from collection because the freight charges were not paid by it, nor ultimately by the assignor-shipper, but rather by the consignee of the goods. Id. (215).

The fact that assignment of a reparation claim may have violated state law did not bar the assignee's claim before the Commission. The Commission is entrusted with the duty to protect the public interest in connection with ocean transportation, and there was no showing that the reparation proceeding was detrimental to the public interest, nor that consequences contrary to the public interest were anticipated. Id. (216).

The Commission has no authority to grant special docket relief permitting deviations from foreign trade rates on file. Where the applicable tariff for a commodity moving in foreign commerce contained no commodity rate for the commodity involved, the lawful rate was the N.O.S. rate, and a subsequently restored commodity rate could not be applied. The law cannot be avoided by presuming to give retroactive effect to a subsequent tariff change. Haras & Co., Inc., *v.* Boise Griffin Steamship Co., Inc., 413 (414).

Application to refund overcharges on shipments in foreign commerce, based on inadvertent failure of carrier to file a tariff change, was denied. The Commission has no authority to permit deviations from foreign trade rates on file. Waterman Steamship Corp. *v.* Chrysler International S.A., 428 (429).

SELF-POLICING. See Agreements under Section 15.

SHIPPERS' REQUESTS AND COMPLAINTS. See Agreements under Section 15.

STEVEDORING. See also Practices; Terminal Operators.

Whether or not one who provides only stevedoring services furnishes terminal facilities within the meaning of section 1 of the 1916 Act, a stevedore which operated equipment rented from a terminal operator, by means of which copra was removed from vessel hold, was furnishing terminal facilities. One who operates an important link in the chain of transference of goods "furnishes" a terminal facility whether or not he owns that link. Philippine Merchants Steamship Co. *v.* Cargill, Inc., 155 (163).

Where an agreement between a terminal operator and a stevedore which rented equipment from the operator, by means of which cargo was removed from vessel hold, provided for payment to the operator by the stevedore of a portion of the net profits realized by the latter through the furnishing of its services, there was a "cooperative working arrangement" for the "apportionment of earnings" within the meaning of section 15. Id. (164).

SURCHARGES.

Under the authority of sections 15 and 22 of the Shipping Act, a conference which was the direct cause of discrimination against a Maine port because of a surcharge on newsprint at the port and no surcharge at a Canadian port, and which refused to amend its tariff, was directed to open the rate on newsprint at the Maine port. Conference carriers were directed to set rates on newsprint independently at the port. Surcharge by the Far East Conference at Searsport, Maine, 129 (132, 138).

Where a conference, serving a trade from United States ports to the Orient, refused to eliminate a surcharge on newsprint to Manila from a Maine port, which was competitive with a Canadian port, so as to permit conference members to establish rate parity between the ports, the conference agreement had operated in a manner unjustly discriminatory between ports and between United States exporters of newsprint and their foreign competitors. The fact that the conference member which had imposed the surcharge, and which served the Canadian port, no longer served the Maine port, did not obviate the previously found section 17 violation. The Maine port remained at a disadvantage because the conference refused to alleviate the discrimination. Id. (133–135).

Refusal of a conference to eliminate a surcharge on newsprint to Manila from a Maine port, which was competitive with a Canadian port, resulting in refusal of a conference member to serve the Maine port, would be sufficient to justify a holding that the conference had acted to the detriment of commerce. This, coupled with harm to a United States exporter of newsprint, was the essence of detriment to comerce. Thus, the conference agreement had operated in a manner which was detrimental to United States commerce. Id. (135).

A conference agreement, under which the conference refused to eliminate a surcharge on newsprint to Manila from a Maine port, which was competitive with a Canadian port, was operating in a manner which was contrary to the public interest. Under the public interest criterion of section 15, conferences must not only cooperate fully to eliminate discrimination, but must take the lead to such end. While carriers wish to group together in rate making conferences for private commercial reasons, in exchange for this privilege, the Commission insists that the arrangements contribute in some manner toward the public interest. The pervasive regulatory scheme of the Shipping Act cannot be avoided by carriers hiding behind section 15 agreements. Id. (135–136).

Where, pursuant to an order to show cause why a conference agreement should not be amended to remove a Maine port from the trading range of the conference, the Commission found that the agreement had operated in an unlawful manner because of imposition of a surcharge on newsprint at the port, the Commission had the power under sections 15 and 22 to remove the port, and to take the lesser action of opening the newsprint rate at the port. The Commission may act under section 15 not merely against the terms of section 15 agreements but against rates fixed in concert as well. Prior Commission decisions stand for the proposition that the Commission may either cancel or modify the agreement or act against the offending rate. Id. (136–137).

The Commission was not precluded from ordering a conference to eliminate a Maine port from the conference range (or to act against the offending rate at the port) on the ground that no finding was or could be made that the conference itself violated section 17, where a conference member had violated the section by

imposing a surcharge on a commodity from the port, while not imposing a surcharge from a competitive Canadian port. The Commission was not powerless to act against a situation which had a harmful impact on United States commerce, a United States port and a United States exporter simply because the conference trading range did not include Canada. Section 17 does not explicitly contain a requirement that a finding thereunder be made only against a carrier which prefers one port or exporter and prejudices another port or exporter by serving both. Discrimination existed and would continue. Since the conference did not have control over Canadian rates, the Commission would suspend conference control over the rate at the Maine port by ordering the rate opened. Id. (138–139).

TARIFFS. See Port Equalization; Reparation; Wharfage.

TERMINAL OPERATORS. See also Agreements under Section 15; Free Time; Practices; Stevedoring; Wharfage.

Agreement between a terminal operator and a stevedore which rented equipment from the operator, by means of which cargo was removed from vessel hold, which agreement provided for payment to the operator by the stevedore of a portion of net profits realized by the latter through the furnishing of its services, was not shown to violate sections 16 or 17 of the Shipping Act. It was not shown that the pier involved was closed to other stevedores, the terminal operator controlled the stevedore's charges for its services, or that the rates were unreasonable. Philippine Merchants Steamship Co. *v.* Cargill, Inc., 155 (164).

Imposition by a terminal operator of a service charge against a carrier of cargo consigned to itself was not a violation of section 16. There was no showing that competitive shippers were disadvantaged. Nor was there any showing that the charge was used by the terminal operator as consignee to obtain or as terminal operator to allow itself to obtain transportation by water at less than the rates which would otherwise be applicable. Any charges levied by a shipper or consignee against a carrier of its cargo could be termed offsetting charges, but so long as the charges were reasonably related to the cost of service they were proper in amount and could not violate section 16. Moreover, the essential element of an "unfair device or means" was missing. To support a violation of section 16, first paragraph, or section 16 Second, it must be shown that one did something or attempted to do something which he knew or should have known was unlawful. The fact that terminal consignee competitors assessed a similar service charge suggested that the operator involved had every reason to believe it was proper. Id. (165–166).

Where the obligation to pay the cost of weighing copra rested on the buyer-consignee, it was an unreasonable practice in violation of section 17 for a terminal operator to impose the weighing portion of a service charge against the vessel. Although determination of the correct weight was necessary for the assessment of the proper freight rate, and thus the carrier could be said to "benefit" from the weighing service, such benefit was not the kind that would justify imposition of the charge against the carrier. The ruling allowing a terminal to assess a charge which was ultimately to be borne by the cargo against the ship in the first instance, was not applicable, since the terminal operator was a party to the contracts of sale and affreightment. There is no rule that a terminal operator may not impose a service charge when it is also the consignee of the cargo. Id. (166).

Terminal lease granting preferential use of piers and adjacent areas at yearly minimum-maximum rentals, in lieu of otherwise applicable tariff charges, was not shown to be unlawfully discriminatory or prejudical against any carrier,

shipper, port or terminal. The lessor was willing to assign other properties in the same manner. No cargo would be diverted from any port or terminal and no carrier, other than the lessee would shift its operations to a different port or terminal. Agreement No. T-1768—Terminal Lease Agreement, 202 (205).

An agreement for the use of terminal facilities at a rental which deviates from the terminal's tariff provisions is not unlawful or unreasonable per se. However, it must be scrutinized for any illegal discrimination or prejudice that might result. Id. (205).

Method used to determine the reasonableness and fairness of compensation to be paid to a terminal under an agreement for lease of piers and adjacent areas was proper. The method was designed to assign all costs and expenses of the specific terminal property involved, including allocations of all general terminal expenses, to the specific areas covered by the agreement. Id. (205).

Mere speculation as to the possibility of dire consequences was not a reason to disapprove a terminal lease agreement, providing for compensation in lieu of terminal charges, as contrary to the public interest and detrimental to the commerce of the United States. Id. (205–206).

Contention that a terminal lease agreement in fact gave an exclusive rather than the preferential use provided for by its terms was without merit. The record showed that the lessee's sailing schedule and short in-port time of its vessels would allow for a secondary berthing, and the lessor's officials stated that every endeavor would be made to use the secondary berthing rights. Id. (206).

Approval of minimum-maximum rental agreement for use of certain terminal facilities was not contrary to prior Commission decision (8 FMC 653), where it was held that the Department of Agriculture was required to pay wharfage for its cargo over respondents' wharves, because such cargo used the wharves. The level of the wharfage charge was not in issue. The Commission explicitly noted that grain terminals are special facilities, costs of such operations should be separately determined, and "a like course should be followed in connection with the handling of any other commodity that moves in large quantities under circumstances that are unique." This was the situation at the facility covered by the agreement on the present case: containerized cargo moved in large quantities over special facilities under unique circumstances. The lessee paid all charges, including wharfage, up to the minimum and, there is no requirement, in the absence of a showing of illegality, that all users must pay wharfage computed on the same basis. Id. (206).

While "injury", in the sense of monetary loss, need not be shown for a violation of sections 16 or 17 of the Shipping Act, where compensation for the use of terminal facilities in a minimum-maximum rather than straight tariff form is not in itself unlawful, there must be some showing of an unreasonable disadvantage among the users of the facilities on these different bases before a minimum-maximum compensation can be declared contrary to section 17, and section 16 itself requires a showing of such unreasonable disadvantage. Id. (207).

The Commission had no grounds to dispute the judgment of a terminal operator that compensation for the use of certain terminal facilities under a minimum-maximum rental agreement was proper. The cost and expenses of the specific facilities involved, including allocations of all general terminal expenses to the areas covered by the agreement, were considered. Under the minimum compensation, the terminal would more than recover its investment and would receive a rate of return of about 4.6 percent on the value of land and improvements. The maximum figure would yield a 7 percent return on the value of the

land and on the depreciated reconstruction cost of the terminal facility, and a 6 percent capital recovery on the cranes during the 20-year period of the lease. Both minimum and maximum compensations were fair and reasonable. Id. (207).

Where a terminal lease provided for a minimum-maximum yearly rental for the use of certain faciilties, and further provided for removal of a part of the facilities from the scope of the lease upon approval of another lease covering use of such part on a flat annual rental basis (which lease had been approved), modification of the minimum-maximum lease to remove reference to the other lease and cancellation of the latter lease were required. The parties did not intend that the two leases operate in a manner whereby the leased area could be used as a whole until the minimum had been reached, with subsequent use restricted to the area for which the flat rental was applicable. Thus modification and cancellation were necessary to meet the requirement of section 15 of the Shipping Act that true copies of agreements be filed. Id. (207–208).

TRANSPORTATION ACT OF 1940. See Common Carriers.

UNDERCHARGES. See Reparation.

UNFAIR DEVICE OR MEANS. See Terminal Operators.

VESSEL VALUES. See Rate Making.

WHARFAGE. See also Terminal Operators.

Where a terminal tariff described wharfage as the "charge assessed against cargo . . . for passage on, over, under or through any wharf . . ., inward or outward, loaded or discharged while vessel is moored in any slip, basin, channel or canal", bulk rice loaded from barges on the offshore side of a vessel moored at the wharf was not subject to wharfage charges. The cargo would be subject to such charges if the word "or" were inserted between the words "outward" and "loaded." Reference to matters outside the express language of a tariff to aid in its construction is proper only where the language of the tariff is ambiguous, or the tariff contains technical words requiring interpretation, or there exists a custom or usage of a trade or course of dealing of the parties which, although not specified in the tariff, is such that it should be applied. The first two instances were not applicable. As to the third, extrinsic evidence could be used to supplement, but not to vary, the "plain meaning" of express language in tariff provisions. However, parties to a shipping contract cannot be permitted to vary or supplement a tariff rate or charge on the basis of course of dealing. In any event, no custom or usage or course of dealing was shown to indicate the applicability of anything other than the literal words of the wharfage definition. Sacramento-Yolo Port District *v.* Fred F. Noonan Co., Inc., 551 (558–561).

A definition of wharfage to make it applicable to cargo loaded from barge to vessel, as well as to cargo passing on, over, under or through any wharf, was proper under the Freas formula which defined wharfage as "the charge for passing cargo over the wharf, or from vessel to vessel at wharf". Id. (561).

WORKING CAPITAL. See Rate Making.

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