

**DECISIONS OF THE
FEDERAL MARITIME COMMISSION**

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DECISIONS OF THE
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

No. 1166

IN THE MATTER OF AGREEMENT NOS. 6200-7, 6200-8 AND 6200-B—U.S.
ATLANTIC & GULF/AUSTRALIA-NEW ZEALAND CONFERENCE

Decided August 26, 1965

Agreements modifying outbound conference agreement (1) to add U.S. Great Lakes and St. Lawrence River ports to trade from Atlantic and Gulf ports to Australia and New Zealand, with separate section to fix rates from the Great Lakes, and (2) to change voting requirement in ordinary conference actions from unanimity to two-thirds, approved pursuant to section 15 of the Shipping Act, 1916.

Agreement providing for veto by Atlantic and Gulf section of conference of rates set by Great Lakes section below those from the Atlantic and Gulf, disapproved pursuant to section 15 of the Shipping Act, 1916.

Permission to extend use of conference's approved dual rate contract to entire trade covered by conference agreement as expanded by approved amendment, denied pursuant to section 14b of the Shipping Act, 1916.

Elmer C. Maddy, Paul F. McGuire, and Baldwin Einarson for U.S. Atlantic & Gulf/Australia-New Zealand Conference, respondent.

Jerome H. Heckman, Robert Tiernan, and Vincent D. Simmons for the Dow Chemical Company and Dow Chemical International S.A., interveners.

James M. Henderson, Arthur L. Winn, Jr., Samuel H. Moerman, and J. Raymond Clark for the Port of New York Authority and North Atlantic Ports Association, interveners (with *Sidney Goldstein*, General Council, and *F. A. Mulhern*, Attorney, for the Port of New York Authority).

Warren A. Jackman, Stuart B. Bradley, and Daniel K. Schlorf for Federal Commerce and Navigation Company Limited and Federal Commonwealth Line, interveners.

Robert Jorgensen for International Association of Great Lakes Ports, intervener, and *Ronald Parizek* for Port of Chicago, a member of said association.

J. Scot Provan and *Robert J. Blackwell*, Hearing Counsel.

Walter T. Southworth, Hearing Examiner.

REPORT

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

The Commission instituted this investigation to determine (1) whether three proposed amendments to Agreement No. 6200, the organic agreement of the U.S. Atlantic and Gulf/Australia-New Zealand Conference, should be approved under section 15 of the Shipping Act, 1916, and (2) whether the Conference should be permitted, pursuant to section 14b of the Shipping Act, to extend the coverage of its dual rate contract to include Great Lakes ports.

Agreement No. 6200 presently covers the establishment of agreed rates, charges, and practices for the carriage of cargo from Atlantic and Gulf ports of the United States to ports in Australia, New Zealand, and certain South Pacific Islands. The proposed amendments now before us would: ¹

1. Add Great Lakes and St. Lawrence River ports of the United States to the trade covered by the conference. Along with the request to extend the scope of the agreement, the conference requests permission to have its approved dual rate contract apply to shipments from these ports (Agreement No. 6200-8, par. 1);
2. Establish a separate "Great Lakes section" of the conference, composed of member lines operating regular services from Great Lakes ports, which would establish rates and conditions applicable to carriage from Great Lakes ports, subject to the consent of two-thirds of all conference members to any rate lower than the corresponding rate from any other conference area. A carrier would be eligible to participate in the Great Lakes section upon demonstrating satisfactory evidence of its intent to operate in the Great Lakes ² (Agreement No. 6200-8, par. 2); and
3. Change the present requirement of unanimous assent to any action under the agreement to two-thirds assent, except as otherwise specifically provided and except that any modification of the basic agreement would require unanimous consent (Agreement No. 6200-7, par. 2).

¹ By order served December 28, 1964, in this proceeding, the Commission remanded the issues raised by Agreement 6200-7 (par. 1) to the Examiner for further hearings. Agreement 6200-B, also subject to the order of investigation in this proceeding has been withdrawn.

² As originally submitted, the consent of three-fourths of the conference members was required. The Examiner, however, while approving this provision in principle saw no reason for requiring a greater majority to ratify a lower rate from the Lakes than for ordinary conference action. Accordingly, his recommended approval was subject to the conference's modifying their agreement to require approval only by a two-thirds majority. The conference has indicated their assent to this modification.

In his initial decision, the presiding examiner recommended approval of the proposed modifications. Dow Chemical Company, a large producer of chemicals with a major plant in the Great Lakes area at Midland, Michigan, and Dow Chemical International, S.A., its export sales subsidiary; Federal Commerce and Navigation Company, limited, a Montreal-based corporation which proposed to operate a service between Australia and U.S. Great Lakes ports through its newly established Federal Commonwealth Line; and Hearing Counsel filed exceptions to the initial decision.

In substance these parties contend:

1. That the Examiner erred in approving the establishment of a separate Great Lakes section of the conference which was subject to the power of the conference as a whole to veto a rate established by the Great Lakes section below the corresponding rate from Atlantic and Gulf ports.

2. That the Examiner erred in approving the provision that membership in the Great Lakes section can be retained as long as a carrier produces satisfactory evidence of its intention and ability to operate a regular service from Lakes ports.

3. That the Examiner erred in approving the extension of the conference's dual rate contract from Atlantic and Gulf ports to the Great Lakes area.

4. That the Examiner erred in finding that the imposition by the conference of a \$5-\$6 per ton arbitrary or differential on shipments from Great Lakes ports, over corresponding rates from Atlantic and Gulf ports, was not unlawful.³

The conference, intervener Port of New York Authority, and intervener North Atlantic Ports Association replied to these exceptions.

FACTS

In the past, Great Lakes ports of the United States were a relatively unimportant shipping area because of adverse conditions inherent in the Lakes—inadequate port facilities, a short navigation season, and limited common carrier service. With the opening of the St. Lawrence Seaway in 1959, however, the Lakes became the fourth sea coast of the United States. Since the opening of the Seaway, the movement of cargo has steadily increased.

At present the Great Lakes are competitive with Atlantic and Gulf ports, and many shippers move their goods from both areas. Nevertheless, certain inherent disadvantages limit the ability of Lakes ports to attract cargo. Goods can move from Lakes ports only during a 6-7 month sailing season. Consequently when the Lakes are closed to navigation, all shippers, regardless of their loyalty to or preference for Lakes ports, must look to the Atlantic or Gulf for service. In

³ Only Dow raises this exception.

addition, transit time from Atlantic ports to Australia and New Zealand varies, depending upon the ports involved, from 25 to 35 days, while transit time from Chicago to the first port in Australia is about 54 days, and from Detroit it is about 43 days. And the length of voyages from the Lakes may be increased by congestion in the locks. Where speed is essential, therefore, shippers must rely on the Atlantic or Gulf.

Despite these difficulties, however, Lakes ports have certain advantages over the Atlantic and Gulf. Shippers with plants on or near the Lakes find that common carrier service at their doorstep saves the cost of inland transportation to Atlantic or Gulf ports, a factor which is a strong inducement to ship from the Lakes despite the lengthy transit time and limited service.

At the close of the record in this proceeding, the conference had six members. Three of these—A/B Atlantrafik, American and Australian Steamship Line-Joint Service (A. & A.), and Port and Associated Lines-Joint Service (Port)—would be eligible for membership in the proposed Great Lakes section according to the eligibility requirements set forth in Agreement 6200-8. The individual tariffs filed by these lines for transportation of cargo from the Lakes to Australia and New Zealand generally provide for a differential or arbitrary over conference rates applicable at Atlantic and Gulf ports of \$5.00 per ton for ports in the Detroit-Toledo range and \$6.00 for ports in the Chicago-Milwaukee range. If the conference is extended to the Lakes, the members will maintain some differential over Atlantic and Gulf rates to compensate for the additional steaming time and other costs incurred in serving the Lakes.

Of the three conference lines who have expressed an intent to serve the Lakes, only Atlantrafik has actually made a sailing. During 1963, it made 11 sailings out the the Great Lakes port of Detroit. Of these, 8 also called at Chicago. Atlantrafik, however, has not attracted sufficient cargo to fill its vessels from Lakes ports alone, and it has found it necessary to call at Montreal, other St. Lawrence River ports, and U.S. Atlantic Coast ports.

A. & A. and Port collectively propose to provide monthly service from the Lakes through a sailing arrangement pursuant to F.M.C. Agreement No. 7996-3.⁴ In conjunction with this proposed Lakes service, A. & A. and Port will call at Montreal and Canadian ports east thereof but will not call at U.S. Atlantic or Gulf ports. A. & A. and Port would continue their present separate service from U.S. Atlantic and Gulf ports.

⁴ This agreement provides for A. & A. and Port to alternate sailings from Lakes ports.

Although A. & A. and Port have filed tariffs covering the Great Lakes, and have solicited cargo, they have not as yet secured cargo sufficient to justify a sailing from the Lakes. Most of their solicitation has been directed to automobile shippers who account for about 70 percent of the revenue in the Great Lakes trade. Competition for this cargo is keen. A. & A. actually had a booking from Chrysler, a major shipper of automobiles, but Chrysler cancelled this booking when it determined that faster service from the Atlantic was needed. The loss of this booking forced A. & A. to cancel its scheduled sailing. A second vessel was offered by A. & A. to American Motors, but the cargo was shipped via Atlantrafik.

Port Line has solicited Chrysler, American Motors, Willys, and Dow, but has not been successful in attracting cargo. Chrysler offered Port its entire 1964 shipments from the Lakes to Australia if it would reduce its rate from \$36.50, the same rate offered by the conference from the Atlantic and Gulf, to \$33.50 plus 5 percent. Port, feeling that such a reduction would disrupt the conference rate structure, declined and lost the cargo.

Much of the vigorous competition in the Lakes has come from independent carriers. In 1961, O.S.K. Line took a cargo away from Atlantrafik by offering a cut rate to Chrysler, and in 1962 Orient Mid-East Lines did the same, forcing Atlantrafik to cut its rate by eliminating the differential over the Atlantic Coast rate. Neither O.S.K. nor Orient Mid-East Lines has since reentered the Lakes trade. In 1964, Federal Commerce, which had never been in the trade before, took away Atlantrafik's principal booking for its first sailing of the season by cutting rates on automobiles from Kenosha (American Motors). As a result, Atlantrafik cancelled the sailing. Apparently Federal Commerce took the business at \$33.50 per ton, against Atlantrafik's rate of \$36.50. The conference considered the \$33.50 rate to be noncompensatory.

DISCUSSION

The Commission has recognized in the past that certain administrative economies can be effected by permitting separate trade areas to be brought under a single conference administration, thereby permitting the use of one office and one staff where several might otherwise be required.⁵ We believe that the establishment of a single administration within the U.S. Atlantic and Gulf/Australia-New Zealand Conference to handle the Atlantic and Gulf trade and the Great Lakes trade is justified on the basis of savings in the cost of

⁵ *The Dual Rate Cases*, dated Mar. 27, 1964, pp. 43-45.

conference administration. However, Agreement 6200-8 would go further and allow the Atlantic and Gulf section of the conference to exercise veto power over rates set by the Great Lakes section, albeit the power is a limited one and extends only to rates which are lower than those from the Atlantic and Gulf coasts.

The considerations which move us to permit the establishment of a single conference in these two trades for administrative purposes do not in our view justify the exercise of the proposed veto power over Great Lakes rates by the Atlantic and Gulf carriers.

It seems elemental that the carriers best able to establish fair and equitable rates for a given trade are those carriers which are actually serving the trade. It would seem equally clear that these carriers should be able to fix their rates free from any veto power vested in carriers whose primary purpose and motivation is the protection of their carryings in a competitive trade. We recognize that the increased expenses involved in carrying cargo out of Great Lakes ports would make the instance of a Lakes rate which is lower than an Atlantic or Gulf rate a relatively rare one. But if the carriers serving the Lakes feel that such a rate is needed they should be free to set it.

The conference fears that unlimited power in the Great Lakes section to set rates below those from the Atlantic and Gulf would lead to destructive rate competition between the two competing trades. However, we believe the vesting of rate-making decisions in carriers who do not serve the area in whose rates they have a voice to be far more dangerous to the commerce of the United States than the existence of rate competition between two competing areas. Moreover, we think that section 15 clearly requires that the carriers in the Great Lakes section be free to establish their rates independently.

Section 15 provides in relevant part:

No . . . agreement shall be approved, nor, shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference retains the right of independent action.⁶

⁶ In discussing this provision, the House Committee on Merchant Marine and Fisheries stated:

" . . . One reason for the insertion of this provision is the present situation existing in the operation of the joint agreement between the Pacific Westbound and Far East Conference whereby each conference exercises, in effect, a veto power over action by the other conference on specific rate applications by shippers.

"This joint agreement has operated to the detriment of shippers by transferring the ultimate decision with respect to their rates from the carriers immediately serving them to the carriers on the other coasts who have no knowledge of or necessarily any interest in the welfare of the particular shipper. . . ." (House Report 498, 87th Cong., 1st sess. pp. 9-10.)

Although it is true that section 15 does not require the right of independent action on the part of the individual carriers within a single conference, the arrangement contemplated by Agreement 6200-8 is the same, in practice, as that which Congress sought to prohibit. 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. For if it did the independent action requirement of section 15 would be a nullity.

We turn now to the question of eligibility for membership in the Great Lakes section. Agreement No. 6200-8 provides that a line is eligible for membership in the Lakes section if it maintains regular service from the Lakes. Regular service is defined as a minimum of two sailings during a navigation season. The controversial part of the membership requirement is as follows:

If a line fails to have a minimum of two sailings during a navigation season, it shall cease to have a vote in such Great Lakes conference section until it shall give a satisfactory evidence of its intention and ability to operate a regular service from United States Great Lakes ports.

In short, Agreement 6200-8 permits a carrier to retain its vote in the Great Lakes section despite the fact that it has not made a sailing during a season, as long as it maintains "satisfactory evidence" of its intention to serve the Lakes during the next season. Satisfactory evidence, according to the conference, would consist of the filing of tariffs, advertising a sailing, and similar activities which normally precede a sailing.

Hearing Counsel and Dow call attention to the experience of A. & A. and Port who presented what would be considered sufficient evidence under this standard, yet failed to sail from the Lakes. They fear that these liberal requirements for admission into the Lakes section will be used by lines who have no real intention of serving the Lakes, merely "to have a finger in the rate-making pie."

Although it is true that A. & A. and Port manifested their intention to serve, but were unable to carry out this intention, it appears from the record that their attempts were made in good faith, and not merely to influence rates from the Great Lakes.

Although a theoretical possibility exists that the liberal requirements for membership in the Great Lakes section could be abused by Atlantic and Gulf carriers who may desire to vote on Great Lakes rates without serving the Lakes, we believe the greater risk is in the possible harm to a carrier which has been unable to carry out its planned sailings, and must thereby be deprived of a voice in determining its rates for the

following season, although it intended in good faith to provide service. Should abuses occur, it is in the interests of those carriers providing regular service from the Lakes to bring them to our attention. Our power of continuing supervision over section 15 agreements would permit us at that time to take appropriate action.

The membership criteria of Agreement 6200-8 for the Great Lakes section are consistent with the Commission's General Order No. 9,⁷ governing "Admission, Withdrawal, And Expulsion Provisions of Steamship Conference Agreements." The general order requires all conference agreements to contain a provision substantially as follows:

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.

We, therefore, approve the membership clause of Agreement No. 6200-8.

Under the provisions of Agreement 6200-7 (par. 2), conference action, including the setting of rates, requires the assent of two-thirds of the conference members. Agreement 6200-8, however, requires that the members of the Great Lakes section must set their rates by a three-fourths vote of the members of that section.

At the close of the record, three carriers were eligible for membership in the Great Lakes section. Thus, any rate from the Lakes would require the unanimous assent of these three carriers. This voting procedure permits one carrier to exercise a practical veto over the ratemaking decisions of that section. We cannot approve such an arrangement. By modifying Agreement 6200-8 to require the same two-thirds majority in the setting of rates as is proposed from the Atlantic and Gulf, this danger would be substantially reduced.

We turn now to the issue of whether the approved dual rate contract system of the Atlantic and Gulf/Australia-New Zealand Conference should be extended to cover Great Lakes ports. Should we approve the extension of the system to the Lakes, a signatory to the extended dual rate contract would be obligated to ship on conference vessels not only from Atlantic and Gulf ports but from Great Lakes ports as well.

In urging approval of this extension the conference claims that the prevalence of nonconference competition in the Lakes justifies the extension of dual rates in order to combat nonconference rate competi-

⁷ 29 Fed. Reg. 5797 (1964).

tion. Furthermore, they contend that the extension of the system will prevent signatories of the Atlantic and Gulf contract from avoiding their contract obligations by shipping from the Lakes.

We do not believe that the extension of the dual rate system to the Lakes is approvable under sections 14b and 15. Since the Great Lakes are closed to navigation during a five- or six-month period, it is rare that a shipper in that area can rely upon carriers from the Lakes for all his shipping requirements. At some time during the year, he will have no choice but to ship out of the Atlantic or Gulf. Therefore, a shipper in the Lakes area may elect to sign a dual rate contract from the Atlantic and Gulf range. If the shipper elects to sign a dual rate contract from the Atlantic and Gulf, he would be compelled, under the conference proposal, to be a dual rate shipper from the Lakes whether or not conference rates and service in the Lakes are satisfactory to him. One dual rate contract covering both the Atlantic and Gulf as well as the Lakes would also effectively lessen the bargaining power of Great Lakes shippers since they would be forced to accept conference rates from the Lakes or conference rates from the Atlantic and Gulf although satisfactory service could otherwise be obtained in the Lakes. This situation is harmful not only to the shipper, but to the development of the Great Lakes as a trading area. The extension would hinder Lakes development and would in fact contribute to the diversion of cargo from the Lakes. For example, 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. This is discriminatory to Lakes ports.

On this record we find that the extension to the Lakes of the same dual rate contract applicable at Atlantic and Gulf ports will be detrimental to the commerce of the United States, discriminatory against Great Lakes ports in favor of Atlantic and Gulf ports, and contrary to the public interest, in violation of sections 14b and 15 of the Act. In *The Dual Rate Cases, supra*, we disapproved a similar provision. Consequently, this provision is disapproved.

We recognize that one of the fundamental purposes of the dual rate law was to allow the steamship conference to compete effectively with the independent carrier. We think this end can be accomplished by the institution of a separate dual rate contract for the Great Lakes section, independent of the dual rate contract from the Atlantic and Gulf.

CONCLUSIONS

For the foregoing reasons, we find Agreement 6200-8 as submitted by the conference to be detrimental to the commerce of the United States and discriminatory as between ports, in violation of sections 14b and 15 of the Act. It is disapproved. The conference may submit a revised agreement, however, not inconsistent with the terms of this report, for our consideration.

As to Agreement 6200-7 (par. 2) nothing appears in the record to indicate that this agreement would be discriminatory, detrimental to the commerce of the United States, contrary to the public interest, or otherwise contrary to the Act. It is approved.

Commissioner JOHN S. PATTERSON, concurring and dissenting separately

In my opinion, Agreement No. 6200-7 should be approved for the reason that the agreement has not been found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Shipping Act, 1916, as amended.

I agree that we should not approve Agreement No. 6200-8 insofar as it requires a tie-in of the Great Lakes dual rate contract with the Atlantic and Gulf dual rate contract.

I dissent from the refusal to approve the provisions of Agreement No. 6200-8 obligating the Great Lakes section members to establish rates and conditions by three-fourths vote of such members.

I would permit the use of a separate contract which is available to all consignees and shippers in the Great Lakes area on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or a fixed portion of his patronage to the Conference carriers pursuant to Sec. 14b of the Act.

Commissioner GEORGE H. HEARN dissenting in part

I believe that the Conference proposal for a single Dual Rate Contract covering Great Lakes ports as well as the Atlantic and Gulf should be approved. As the majority has noted the Lakes are closed to navigation during a five or six month period. The record also shows that some shippers in the area of the Lakes do, even during the Lakes' navigational season, ship out of Atlantic or Gulf ports particularly when time is of the essence. This indicates that a single

Dual Rate Contract for all three Coasts is not only desirable but, in this case, enhances the purposes and policy of the Shipping Act.

Unlike my colleagues, I do not find that the tie-in of the Lakes with the Atlantic and Gulf coasts in one Dual Rate Contract would be detrimental to shippers or to the development of the Great Lakes as a trading area. On the contrary, it is my view that established lines which have for years devoted themselves to the trade and who are now and have been pioneering the trade from the Great Lakes area are entitled to a fair share of the cargoes offered from the Lakes during the navigational season.

Under the spirit of loyalty it should not be too much to expect contract shippers in the Great Lakes area to use Conference vessels offered at their own door steps, particularly when the conference carriers provide year round service to these shippers at Atlantic and Gulf ports.

Finally I believe that these Conference carriers who offer services throughout the full range of ports should not be prejudiced with respect to Lakes' cargo which they have helped to develop and which they stand ready to carry twelve months a year.

DOCKET NO. 1166

IN THE MATTER OF AGREEMENT NOS. 6200-7, 6200-8, AND 6200-B
U.S. ATLANTIC & GULF/AUSTRALIA-NEW ZEALAND CONFERENCE

ORDER OF DISCONTINUANCE

Hearing Counsel have moved to dismiss this proceeding on the grounds that the issues remaining for decision are moot. Respondents agree.

Consequently, this proceeding is hereby discontinued. However, the conference is notified that contrary to their assumption, the Commission reserves the right to institute an investigation of all pending modifications to Agreement 6200 or related section 15 agreements as it may deem proper.

By the Commission.

S/(Signed) FRANCIS C. HURNEY
Special Assistant to the Secretary.

FEDERAL MARITIME COMMISSION

No. 1086

STOCKTON PORT DISTRICT

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

Decided September 28, 1965

Respondents' equalization rules, and practices in accordance therewith, found to be unjustly discriminatory and unfair to terminal ports of the San Francisco Bay area (which include Stockton), within the meaning of section 15 of the Shipping Act, 1916, to the extent that they provide for equalization of inland transportation against such ports on cargo loaded at Los Angeles and Long Beach, Calif.

Filed equalization rules of respondents operating under approved conference agreements, and practices in accordance therewith, to the extent that they provide for equalization of inland transportation charges between San Francisco Bay area ports (which include Stockton), found not to be in violation of sections 15, 16 first, 17 or 18(b) of the Shipping Act, 1916, or to be unjustly discriminatory or unfair, detrimental to the commerce of the United States, or contrary to the public interest, within the meaning of section 15 of said act, if clarified as required; found not to violate the principles and policies of section 8 of the Merchant Marine Act, 1920; and not shown to be in violation of section 205 of the Merchant Marine Act, 1936.

Respondent Pacific Westbound Conference and its members found not to be in compliance with section 18(b) of the Shipping Act, 1916, by reason of so-called equalization on citrus fruit originating in southern California and shipped from San Francisco, which is not in accordance with or pursuant to filed equalization rule.

J. Richard Townsend and *Walter H. Meryman* for Stockton Port District, complainant.

Edward D. Ranson and *Gordon L. Poole* for Pacific Westbound Conference and members, respondents.

Leonard G. James, *Robert L. Harmon* and *F. Conger Fawcett* for Pacific Straits Conference, Pacific/Indonesian Conference, and their members, respondents.

Stanley Mosk and *Miriam E. Wolff* for San Francisco Port Authority intervener.

William Jarrel Smith, Jr. and *Robert J. Blackwell* for Hearing Counsel, intervener.

REPORT

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

This proceeding arose upon the complaint of Stockton Port District against the Pacific Westbound Conference, the Pacific Straits Conference, and the Pacific/Indonesian Conference. The complaint alleges, in general, that the agreements of these conferences and the conference tariffs, which permit port equalization, are prejudicial to the port of Stockton and contrary to various statutory provisions. Stockton urges the Commission to order the respondent conferences to delete the port equalization rules from the conference tariffs and to cease and desist from the practice of port equalization.

Port equalization, under the respondent conferences' tariffs, permits conference carriers to equalize inland transportation costs between terminal ports. Thus, under the tariff rules, a carrier may reimburse a shipper for the difference between the shipper's inland transportation costs to the nearest terminal port and the shipper's inland transportation costs to the terminal port of loading. For example, if from the point of origin of the cargo it will cost the shipper 34 cents per hundred pounds to ship overland by common carrier to the port of Stockton and 42 cents per hundred pounds to ship overland by common carrier to the port of San Francisco, the ocean carrier may take the shipment at San Francisco and "equalize" the added inland cost by reimbursing the shipper for the excess of 8 cents per hundred pounds which it has cost him to ship via San Francisco instead of Stockton.

Stockton alleges that the port equalization rule results in diversion of volumes of cargo normally tributary to Stockton. This is allegedly contrary to the purposes and policies of section 8, Merchant Marine Act, 1920, and section 205, Merchant Marine Act, 1936. Furthermore, Stockton asserts that the rule and its implementation are agreements unapprovable under section 15, Shipping Act, 1916; that the rule is discriminatory and unreasonable in violation of sections 16 and 17 of the Shipping Act; and Stockton urges that the conferences have violated section 18(b) of the Shipping Act by departing from their conference tariffs.

FACTS

The conference and the port equalization rule

The Pacific Westbound Conference (PWC), organized in 1923, has at present a membership of 28 common carriers. PWC serves the

trade outbound from the Pacific coast of the United States to destinations in the Orient, principally Japan, the Philippines, and Hong Kong. In 1962, PWC members made 1,240 sailings, each representing a vessel calling at one or more Pacific coast ports and clearing for a destination in the Orient.

The Pacific Straits Conference operates from Pacific coast ports to Singapore, Malaya, Sarawak, North Borneo, and Brunei. The Pacific/Indonesian Conference operates from Pacific coast ports to Indonesia.

PWC sets ocean rates which apply without reservation from terminal ports. Terminal ports are those at which PWC members accept cargo for loading at the base rates named in the PWC tariff. Terminal ports in California are Stockton, Richmond, Oakland, Alameda, San Francisco, Los Angeles, Long Beach, San Diego, and Sacramento.¹

The port equalization rules apply to terminal ports only and the rules presently in effect for respondents are set forth in the attached appendix.

Whenever cargo is equalized, the shipper must submit to the member booking the cargo the transportation bill covering the movement from point of origin. In turn, the carrier must submit the information to the conference for certification of the basis for the equalization. Although the tariff requires use of an approved form, only one of the PWC members uses the form at present; the others provide the actual source documents. The documents include information sufficient to disclose the point of origin, date of shipment, commodity, nearest terminal port, port of loading, information regarding the inland freight rates, and the inland freight bill. The conference office endeavors to check the rates contained in the source documents. This check is particularly necessary on the constructive leg of the equalization; i.e., the rate from the point of origin to the nearest terminal port. For the actual leg of the equalization, the conference uses the inland transportation bill for the actual routing of the cargo.

The conference is familiar with the rates involved in the equalization of the more important cargoes and it checks to see if the rates and equalization are reasonable. Upon encountering a questionable item, the conference refers to an inland freight tariff or telephones a trucking company or railroad. The conference is aware of the trucking company that actually carried the cargo, and they use the actual transportation costs.

¹ Sacramento is not a terminal port in the Pacific Straits or Pacific/Indonesian Conferences. Service at Sacramento in these conferences is subject to a tonnage restriction of a minimum of 500 tons from 1 shipper.

For the constructive leg of the equalization, the conference uses the lowest common carrier rates to the nearest loading port. In this context, nearest means cheapest.

The claims for equalization and the supporting documents are generally submitted to the conference fairly soon after the vessel has sailed, but certain of the conference members may accumulate equalization claims for a week to 2 weeks. There is no conference rule regarding the time within which claims must be presented. Equalization cannot be paid until approved by the conference.

In addition to the privilege to equalize, the PWC tariff permits transshipment. Under transshipment, the shipper delivers the cargo to Stockton, the carrier accepts the cargo and issues a negotiable document, and thereafter for its convenience and at its own expense the carrier may move the cargo to San Francisco for loading on the vessel. The cargo may be handled by truck, rail, or barge; however, it is predominantly moved via truck. Generally, only commercial general cargo is transshipped from Stockton. In the case of transshipment the steamship carrier is obliged to pay the inland freight as well as the terminal charges at both Stockton and San Francisco. Usually transshipment is limited to smaller tonnages, particularly where there is insufficient cargo at Stockton to justify a call, or some operational reasons make it impossible to make an intended call. There is no cost to the shipper for transshipment.

The port of Stockton

The Stockton Port District is a public corporation formed pursuant to the Harbors and Navigation Code of California. The port district operates terminal facilities owned by the port district or the city of Stockton. The port consists of 10 general cargo berths, one of which is open with two 30-ton gantry cranes, two bulk docks, and one bulk grain dock. The general cargo berths are marginal-type wharves on concrete pilings with corrugated steel transit sheds. Adjoining the transit shed area, are warehouse facilities, a cotton compress, cotton warehouse, a bulk wine terminal, and a grain elevator. Stockton also leases from the Navy two berths and one transit shed on Rough and Ready Island. In the immediate area is a basin in which vessels calling at Stockton turnaround, after discharging or loading cargo, to proceed downstream. At the beginning of 1964, a total of \$23 million had been invested in the Stockton facilities. The port of Stockton is reached via the Stockton ship channel, a journey of some 75 nautical miles (or 84 statute miles) from the Golden Gate. The channel, a congressional project, was approved August 26, 1937. The average transit time from San Francisco Bay to Stockton via the channel is

7½ to 8 hours not taking into account delays due to fog or bridge liftings. The channel is at least 30 feet deep at mean low water. Although there are occasional groundings and delays due to fog, the conditions of the channel are satisfactory and not a serious factor in preventing a vessel from calling at Stockton. The largest cargo vessels of PWC can call at Stockton without unusual difficulty.

On August 1, 1957, PWC made Stockton a full terminal port, and since this time Stockton has had a phenomenal growth. Equalization did not affect Stockton until it became a full terminal port.

Impact of equalization on Stockton

Stockton claims a loss of revenue to the port by virtue of equalization during 1962 of \$232,000. The port lost revenue from its terminal charges—service and facilities charge, wharfage, truck unloading, dockage, and prepalletization. Very little additional labor would be needed to accommodate this cargo insofar as wharfage and dockage are concerned, but the service and facilities charge has a considerable amount of labor. Most of the charge for truck unloading, line handling, and prepalletization is labor costs.

Service at Stockton

During 1962, 85 vessels of respondent conferences made actual calls at Stockton and many of these lifted general cargo. In contrast, vessels of members of the Pacific Coast European Conference made 227 calls at Stockton in 1962 and lifted 260,000 tons of cargo. Of the lines calling at Stockton, only OSK makes Stockton its last port of loading outbound. "K" Line made its first call at Stockton in June 1962 and made fairly regular calls thereafter. Pacific Far East Line (PFEL) operates nine vessels in the PWC trade and practically all sailings have Stockton calls. PFEL discharges cargo at Stockton on all voyages, but export cargo is ordinarily not available at the time of the inbound call. About one-half of PFEL's outbound vessels call at Stockton, principally for bulk bottom cargoes in parcel lots. These bulk cargoes are at least 75 percent safflower seed, but from time to time include wheat and barley. They are loaded at Stockton elevators. When the vessel calls for bulk, if there is sufficient general cargo available, the vessel will shift to a general cargo berth to load. PFEL made 30 calls at Stockton in 1962; however, Stockton is not the final port of loading in the PWC trade for PFEL. PFEL does consider itself to have a regular outward service at Stockton.

American President Lines (APL) had 24 calls at Stockton in 1962, 5 discharged cargo only and 12 loaded bulk only. In the first half of 1963, APL guaranteed shippers that vessels would call at Stockton regardless of the amount of cargo offered, but the plan proved to be

uneconomical and was dropped. APL's service at Stockton definitely depends upon the availability of bottom cargoes, and Stockton is not the last loading port for APL vessels.

NYK Line provides no regular service at Stockton. Diado Line had four calls at Stockton in 1962 and United Philippine Lines had none. States Steamship Co. had four calls in 1963 which loaded bulk rice and some general cargo.

Of the PWC members, 15 made at least 1 call at Stockton during 1962; 13 made no calls. PWC made a total of 133 calls, but of those no commercial general cargo² was loaded on 90 calls.

Vessels loading at Stockton generally can load commercial and military cargo at the same berth, but vessels loading bulk must shift to a different facility to load other cargo. The shift costs about \$300 for pilot and tug.

Steamship costs and operational factors pertaining to calls at Stockton

As noted above, it is an 8-hour trip in each direction to reach Stockton from the bay area. Thus, a carrier incurs additional expenses in steaming to Stockton, including transiting time, pilotage, tugs, and other incidental expenses. Estimates of the total of these costs range from \$3,000 to \$4,000.

There may be insufficient cargo to justify a call, and that cargo, for operational reasons, would be equalized or transshipped. It depends on the commodity as well as the volume to determine whether a Stockton call is justifiable. Amounts ranging from 250 to 750 tons might justify a call dependent on the nature of the cargo.

It is also not operationally feasible to call at every terminal port. This is particularly so of lines that have European or east coast cargo aboard and merely top-off on the west coast before proceeding to the Orient. Such lines would usually call at one terminal for relatively small amounts of cargo. There is an operational saving by consolidating cargo at one terminal.

Equalization gives the vessel latitude in loading and scheduling and the flexibility to avoid uneconomical calls. Equalization rather than transshipment is the better way to achieve this latitude and flexibility. Equalization, which averages about \$2 to \$2.50 per ton, is substantially cheaper than transshipment. Transshipment is roughly three times more expensive.

Impact of equalization on carriers and shippers

In spite of the operational factors encouraging equalization, certain carriers and shippers are opposed to the rule as presently practiced.

² In this context, commercial general cargo means packaged, high-rated items, not bagged fertilizer and other low-rated items.

PFEL feels the rule is detrimental to its interest since it is one of the few PWC members calling regularly at Stockton, and equalization dilutes cargo tributary to Stockton. Without equalization much of the cargo would move through Stockton and, of course, PFEL would have vessels available. PFEL feels that equalization should only expedite vessel operations, but a carrier with no intention of calling at Stockton should not be permitted to equalize. If a carrier does not call regularly at Stockton and has no intention of serving the port, then PFEL feels it should not be able to equalize. Although equalization is optional under the tariff, carriers find that competition compels them to equalize.

Some shippers also wish to have the port of Stockton continue with adequate service. Some shippers believe that if they can ship cheaper via Stockton, then they should be permitted to do so, and feel that without equalization there would likely be enough cargo to generate sufficient service. Certain shippers also feel if the steamship companies were not burdened with equalization expenses, they might adjust the rates. At any rate, shippers like to have Stockton available for use if convenient. Some shippers apparently experience some difficulty with equalization by virtue of delay in being paid and by additional clerical expense.

Other shippers, however, for several reasons, strongly favor port equalization. To them regularity of service is highly important as is the intransit time of the shipment, and these shippers prefer to put their cargo aboard at the last loading port. The shorter the intransit time, the quicker the shipper is paid by his customer. Minimum intransit time is also critical when the commodity is perishable.³ By equalizing, shippers have access to more frequent service at no additional expense. Of course, some shippers do not care whether Stockton is the last loading port.

Service is unquestionably adequate at San Francisco. However, adequacy of service at Stockton is dependent upon the needs of particular shippers. Some shippers consider the Stockton service inadequate to meet overseas commitments.

Transshipment, from a shipper's point of view, is no substitute for equalization because of delay and damage occasioned by rehandling.

Shippers in the PWC are confronted with one reality: the Japanese are insistent upon nominating vessels upon which many consignments are to be shipped and, thus, if the nominated vessel is not calling at Stockton, then the shipment is equalized against Stockton and ex-

³ If there were no equalization, many perishable commodities would still move through San Francisco rather than Stockton.

ported through some other terminal port. One raisin supplier indicated that service at Stockton was adequate and that many shipments would move from Stockton but for the foreign nomination of vessels.

PWC fidelity to the equalization rule

The record discloses a number of departures from strict adherence to the equalization rule. However, the only substantial disregard for the rule involves equalization on citrus fruit. On citrus fruit the conference approves equalization of \$0.15 per carton irrespective of the point of origin, the nearest terminal port, or the inland transportation costs. The \$0.15 per carton equalization is the excess of the quoted base price at the dock in San Francisco over the dockside price in Los Angeles. This is not in accord with the PWC tariff.

Citrus fruit originates in central and southern California. Some of the citrus originates in areas tributary to Stockton on the basis of inland transportation costs. However, no citrus is equalized against Stockton, although the \$0.15 payment is made on shipments originating in an area tributary to Stockton.

DISCUSSION AND CONCLUSIONS

Examiner Walter T. Southworth concluded that equalization as practiced by respondents against Stockton was lawful under the Shipping Act, 1916, but that respondents' equalization on cargo loaded at Long Beach and Los Angeles was unjustly discriminatory and unfair to terminal ports in the San Francisco Bay area (including Stockton). The Examiner further found that the so-called equalization on citrus fruit failed to comply with the requirements of section 18(b) of the act. The proceeding is before us on exceptions to the Initial Decision.

Stockton contends that insofar as the Examiner found respondents' equalization against the port of Stockton lawful he was in error. Exception is taken to each and every finding and conclusion upon which this portion of the Initial Decision is based and, in actuality, Stockton's exceptions on this issue constitute nothing less than a reargument of its position before the Examiner. For the reasons set forth herein we agree with the conclusions of the Examiner and, in stating those reasons we fail to treat any "specific exception," it has nevertheless been considered and found not justified.

The equalization here in question is said to (1) discourage the use of the port of Stockton in violation of the principles and policies of

section 8 of the Merchant Marine Act, 1920,⁴ with resultant violations of sections 15 and 17 of the Shipping Act,⁵ (2) result in unjust discrimination and undue prejudice against Stockton, and grant undue preference to the ports where cargo is loaded (particularly San Francisco, Wilmington, and Long Beach) in violation of sections 15, 16, and 17 of the Shipping Act. In addition, Stockton urges so-called other grounds of unlawfulness. These "other grounds" will be treated after disposal of what we consider to be the principal issues.

The Examiner concluded (1) that the ports of San Francisco and Stockton were of the same harbor complex or geographical area and that equalization between ports in the same geographical area was not contrary to the principles and policies of section 8 of the 1920 act, thus no violation of sections 15 and 17 of the Shipping Act resulted therefrom, and (2) that the territory which was naturally tributary to Stockton was also naturally tributary to San Francisco, and that under the applicable precedents the absorption of inland freight differentials is unlawful only if it destroys the rights of ports to traffic originating in the areas naturally tributary to them, and (3) that respondents' equalization as practiced against Stockton was lawful under the applicable precedents. Stockton argues that the Examiner was wrong on all three counts.

Port equalization is not unlawful in principle. *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500, 504 (1941). Equalization may be unlawful, however, if it draws from ports traffic which originates in areas naturally tributary to those ports, *City of Mobile v. Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474, 486-487 (1941); *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 FMB 48, 55, 56 (1960), and if the port losing the diverted traffic can offer adequate service to shippers diverting to the favored port, *City of Portland v. Pacific Westbound Conference*, 4 FMB 664, 679 (1955). Equalization may also be unlawful if it is practiced between ports located in different or separate harbors or geographic areas. *Beau-*

⁴ Section 8 of the 1920 act directs the Secretary of Commerce in conjunction with the Secretary of the Army—

"... with the object of promoting, encouraging and developing ports and transportation facilities in connection with water commerce . . . to investigate territories, regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water and highway and the natural flow of commerce, and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally flow through such ports."

⁵ Stockton has apparently abandoned its contention that respondents' equalization constituted an unjust and unreasonable regulation and practice related to or connected with the receiving, handling, storing or delivery of property within the meaning of section 17. In any event, as the Examiner correctly pointed out, respondents' equalization rules and practices had nothing to do with the receiving, handling, storing or delivering of property. *Beaumont Port Commission v. Seatrain Lines*, 3 FMB 556 (1951).

mont Port Commission v. Seatrain Lines, Inc., 2 U.S.M.C. 699, 703 (1943).

With these principles in mind, we can now examine more closely the Examiner's findings and conclusions.

The Examiner treated Stockton as an integral part of the San Francisco Bay "harbor complex" and thus as being within the same "geographical area" which has access to the open sea through the Golden Gate. Stockton contends that the Examiner erred because Stockton is not on the San Francisco Bay and it is 84 miles and 5 waterways removed from San Francisco Bay. Secondly, the Examiner concluded that the areas naturally tributary to Stockton were equally so to San Francisco. Stockton argues that here again the Examiner fell into error because inland rates from the relevant area are lower to Stockton than they are to San Francisco. It is in this latter contention that we find the essential ingredient in Stockton's attack on respondents' equalization. In Stockton's view naturally tributary territory means simply "the area from which the inland transportation rates and mileages are less to a particular port than to any other port."

We agree with the Examiner's conclusion that the ports of Stockton and San Francisco do not represent separate and distinct geographical areas. They are both "bay area" ports and have been uniformly treated as such for a variety of purposes. Thus, the California Legislature in a comprehensive report on the San Francisco ports issued in 1951 consistently referred to Stockton as a bay area port. In setting up the bay area protection and promotion program, now contained in Harbors and Navigation Code, section 1980, et seq., the San Francisco Bay area is defined by the California Legislature as—

... that region served by commercial shipping and transportation passing through the Golden Gate, including tributary areas of central and northern California. . . .

In seeking to bring itself within the protection of section 8 of the 1920 act, Stockton relies on its physical separation from San Francisco Bay proper. But other factors must be considered in making determinations under section 8. Thus, the "economies of transportation" and the "natural flow of commerce" are relevant:

... section [8] requires, all other factors being substantially equal, that a given geographical area and its ports receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area. (*City of Portland v. Pacific Westbound*, 4 FMB 664.)

The delineation of a "given geographical area" will almost always of necessity involve the inclusion of ports whose location from specified inland points will vary in distance or mileage. Thus, mileage alone

is not the determinative factor. In *Beaumont Port Commission v. Seatrains Lines, Inc.*, 2 U.S.M.C. 699 (1943) our predecessor permitted a carrier to equalize Texas City with Houston and Galveston, but not with Beaumont, Tex., where the geographical situation was quite similar to the one under consideration in this case—the geographical relation of Texas City, Houston and Galveston is comparable to that of San Francisco, Stockton and other bay area ports, and the position of Los Angeles is comparable to that of Beaumont:

The geographical relationship of the ports involved, together with the peculiar characteristics of Seatrain's operation were emphasized at the further hearing. Texas City and Galveston are situated on Galveston Bay which is also the approach to Houston. Entrance to the bay from the gulf is through Galveston Harbor which is connected by ship channels with Texas City and Houston. In a geographical sense, the three ports may be described as Galveston Bay ports. Rail distances from Texas City to Galveston and Houston are 14.2 and 42.2 miles respectively. Rail rates on long haul export traffic are the same for the three ports which in Rate Structure Investigation, part 3, Cotton, 165 ICC 595, 660, were described as "one terminal district or port." Beaumont is an inland port situated on the Neches River and having access to the gulf several miles east of the Galveston Bay ports. It is approximately 126 miles by rail from Texas City. (2 U.S.M.C. at 701.)

The natural direction of the flow of traffic from the San Joaquin Valley, which Stockton seeks to have declared its exclusive preserve, is through the Golden Gate to the Pacific Ocean. For almost a hundred years before Stockton was made accessible to oceangoing vessels, San Francisco was the principal port through which freight from the San Joaquin Valley would and did pass. It did not cease to be such a port merely upon the creation of an additional port at Stockton.

As we have already noted, equalization, while lawful in principle, may be unlawful in practice if the effect of the equalization is to draw from ports traffic which originates in areas naturally tributary to those ports. *City of Mobile v. Baltimore Insular Lines Inc.*, 2 U.S.M.C. 474 (1941; *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 FMB 48 (1960)). The Examiner concluded that respondents' equalization practices did not violate sections 16 and 17 on this ground because the territory which is naturally tributary to Stockton is also naturally tributary to San Francisco. It should be kept in mind that the discrimination and prejudice which is prohibited by sections 16 and 17 is that which is unjust and unreasonable. *West Indies Fruit Company et al. v. Flota Mercante Gran-colombiana S.A.*, 7 FMC 66 (1962).

Stockton claims to have lost \$232,000 in potential revenue on equalized cargo on the theory that all the equalized cargo would have moved through Stockton and that 50 additional ships would have called at

Stockton to pick up 800 tons each. Stockton concedes that it would have had additional labor costs, but says that they would not have exceeded \$35,000. Actually these lost revenue figures are not valid because, as Stockton argues elsewhere, not all the equalized cargo would have gone to Stockton but for equalization, and the number of additional vessels which would have gone to Stockton is highly speculative.

On the other hand, at an average additional cost of \$3,600 to send a vessel to Stockton it would have cost respondents some \$180,000 to send 50 ships to Stockton, or about \$67,000 more than the \$113,030 it cost them to equalize. Thus, there is ample economic and cost justification for the discrimination against Stockton such as it is. But even this would not save respondents' equalization under the applicable precedents were it established that the practice drew cargo away from territory which was exclusively and naturally tributary to Stockton.

Stockton's argument for recognition of most of central California, including the great San Joaquin Valley, as its naturally tributary territory is based entirely upon minimum trucking rates to Stockton, which in turn are based upon the "constructive mileage" between points of origin and Stockton.⁶ Stockton contends that the Examiner misconstrued the applicable precedents in finding that Stockton's tributary territory was also San Francisco's. As Stockton reads the cases "tributary territory" is that area from which the inland transportation rates and mileages are less to a particular port than some other port. But Stockton's theory is only deceptively simple and does not comport with the principles laid down in prior cases. Under this "constructive mileage" theory the naturally tributary territory expands and contracts with every new highway innovation because constructive mileage changes with new bridges, traffic lights and the like. Under Stockton's theory the territory is dependent upon which ports are named "terminal ports" by the carriers practicing the equalization. Thus, when the respondent Pacific Westbound Conference, but not the Straits or Indonesian Conferences, named Sacramento as a terminal port, Stockton's own witness, Mr. Phelps, stated that Stockton's tributary territory for the Pacific Westbound Conference was thereupon cut in half because "that is the way the arithmetic comes out."

In the *Beaumont* decision, *supra*, when it permitted Seatrain to absorb the difference between the cost of delivering cargo to Texas City and the cost of delivering to Houston and Galveston, the Board said at page 703:

⁶ "Constructive mileage" is actual mileage weighed by such factors as the number of traffic lights and bridges, the presence or absence of mountainous terrain, the condition of the highways and other factors affecting truck traffic.

Our decision in the previous report condemned practices which permit a carrier to attract to its line traffic which is not naturally tributary to the port it serves, thus depriving other ports of their local tributary traffic. The testimony and argument on further hearing emphasize the question which we think is decisive in this case, whether the traffic in question can be considered as tributary to Seatrain (at Texas City) as well as to the break-bulk lines involved. Upon the facts stated in three above, we conclude that the area comprising the ports of Galveston, Houston, and the surrounding territory is centrally served by Seatrain's facilities at Texas City. No reason appears therefore why that carrier may not effectively compete for the traffic through such ports. Beaumont is not within the Galveston Bay group and the traffic through such port is not naturally tributary to Texas City.

Although Stockton urges that the Examiner's reliance on the *Beaumont* decision is misplaced we think it reasonable, well founded and proper. Moreover, the Maritime Administration, Department of Commerce, and the Corps of Engineers, Department of the Army, the governmental agencies charged with administering section 8, in their joint publication⁷ covering the port of San Francisco, describe San Francisco as "one of the most important ports for the vast inland territory of the central and Pacific coast area and the intermountain States," under the heading "tributary territory." In their publication covering Stockton, the "tributary territory" designated as that of Stockton is wholly within the territory attributed to San Francisco, and largely within the territory attributed to Oakland-Alameda in the publication covering those ports. It is obvious that these studies dictate a rejection of any "constructive mileage" theory for determining "naturally tributary territory."

We conclude, that for the purposes of this proceeding, the territory naturally tributary to Stockton should properly be considered naturally tributary to San Francisco and other San Francisco Bay area ports. To paraphrase the *Beaumont* decision, *supra*, the territory surrounding Stockton and the entire bay area is centrally, economically and naturally served by the conference facilities at San Francisco.

Stockton further urges that respondents' equalization rule is unlawful, because the actual amounts to be absorbed under it cannot be determined from respondents' tariffs, but requires access to an examination of the overland tariffs. Stockton cites several cases construing the provisions of section 2 of the Intercoastal Shipping Act, 1933.⁸ Section 18(b) (1) expressly provides for the inclusion in tariffs filed by

⁷ "The Ports of San Francisco and Redwood City, Calif." Port Series, No. 30, Rev. 1951.

⁸ Cases cited by Stockton are *Intercoastal Rates of Nelson Steamship Co.* 1 U.S.S.B. 326 (1934); *Intercoastal Investigation, 1935*, 1 U.S.S.B. 400 (1935); *Puerto Rican Rates*, 2 U.S.M.C. 117 (1939); *City of Mobile v. Baltimore Insular Line, Inc.* 2 U.S.M.C. 474 (1941); and *Matson Navigation Co.—Container Freight Tariffs*, 7 FMC 480 (1963).

the Commission of "rules and regulations" which change or affect the aggregate filed rate:

Such tariffs . . . shall also state separately such terminal or other charge, privilege, or facility under the control of the carriers which is granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates or charges, . . .

The basic philosophy behind the tariff filing requirements of both the Intercoastal Act and the Shipping Act is that the shipper can assure himself of the actual cost of transportation to not only himself but to his competitor as well, *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C. 480 (1963). We do not think respondents' tariffs run counter to this proposition. As the examiner stated, "the present rule, in practice, neither adds to nor detracts from the shippers ability to 'see for himself the exact price of transportation.'"

The ocean rate is, of course, specified in the respondents' tariffs. What the respondents' tariffs do not show is the difference between the cost of overland transportation from the shipper's point of origin to Stockton versus San Francisco. For that the shipper (or his competitor) has to go to the tariffs of inland carriers. But he would have to do so whether or not the equalization rule existed. With the equalization rule, his problem is really simplified; he need only ascertain the common carrier rate to Stockton, and he is assured by the ocean carrier's rule that he may ship via San Francisco for the same amount, with the carrier absorbing any excess. If he wants to get into further refinements, such as the comparative cost of shipping by common carrier versus his own truck or contract carrier, his problem is no more complicated than it would be if there were no equalization rule.

Stockton argues that the failure to set forth the actual amounts absorbed makes the equalization rule unlawful under section 18(b)(1) and detrimental to commerce and contrary to the public interest under section 15. But consider the form respondents' tariff would take if the actual amounts absorbed were included. The record does not contain even an estimate as to the number of "points of origin" for which equalization is made nor does it contain the number of commodities covered by equalization. But it is not difficult to imagine that requirement that each and every possible absorption be published would soon render the tariff impossibly voluminous.

We are of the view that respondents' equalization rules are not unlawful under the "rules and regulations" portion of 18(b)(1).

Stockton contends that the determination of equalization payments under respondents' rules is, as a practical matter, impossible; and that therefore the rules (1) permit undue preference and prejudice between

shippers, in violation of section 16 first, (2) constitute improper tariff publication, in violation of section 18(b) (1), and (3) violate section 15 of the act, in that they are contrary to the public interest, detrimental to U.S. commerce, and unjustly discriminatory between shippers and exporters.

The Pacific Westbound Conference equalization rule provides that "equalization shall only be paid on the basis of the lowest applicable common carrier or contract carrier rates." The rules of the Pacific Straits and Pacific/Indonesian Conferences are substantially the same—that "equalization shall only be paid on the basis of the lowest applicable rates."

In practice, the freight bill showing the amount actually paid by the shipper to an overland carrier to transport the shipment from point of origin to San Francisco (or other port of loading) is used in determining the amount of equalization to be paid; however, the bill is checked against carriers' tariffs to make sure it is the lowest rate. From this amount is deducted the "constructive" cost of transportation of the same shipment from point of origin to Stockton (or other port equalized "against"), determined from the same tariff. The difference is the amount of the equalization payment. The result is that the shipper pays, for overland transportation, a net amount equal to the cost of carriage at the lowest common carrier rate from point of origin to Stockton. As noted above there are exceptions where the shipper uses a contract carrier or his own truck. If the contract carrier's rate cannot be ascertained and in the case where a shipper uses his own truck the lowest common carrier rate is used.

Respondents submitted to complainant schedules showing details of all shipments in 1962 on which there was equalization against Stockton. These were examined by a tariff expert in Stockton's employ, over a period of about 9 months in which he spent an estimated 5 to 6 months in preparing exhibits based on the data. According to his research on the PWC figures, out of 1,116 shipments involving a total of \$107,272 in equalization payments, there were 314 instances of overpayment for a total of \$8,254, and 322 instances of underpayment for a total of \$2,810.

A substantial part of the \$8,254 in alleged overpayments arose out of a practice, discontinued during 1962, of allowing the principal shipper of raisins to equalize on the basis of the rate for his less-than-truck-load shipments to San Francisco against the rate for truckload shipments to Stockton. This was done on the theory that if the shipper had shipped via Stockton, the LTL shipments would have been consolidated with shipments destined for Europe, to form truckload shipments at a substantially lower rate. The shipper complained of the

cessation of this palpably improper practice and testified on behalf of complainant as the sole malcontent shipper.

The Examiner concluded that:

The inland rate situation was indeed shown to be complicated. The inland transportation industry manages to operate under it, however, and the conferences appear to have mastered its mysteries so as to operate their equalization rule fairly as a matter of practical procedure. With the single exception mentioned above—which was concerned with a well-defined dispute, with the conference ultimately taking the proper course—no shipper testified to any dissatisfaction with the theory or practice of calculating equalization under respondents' rule. There is no other evidence of any differences or possible preferences in the treatment of shippers similarly situated. Had there been any such pattern it may safely be assumed that complainant's expert, in the course of his meticulous examination, would have found it.

Stockton's exceptions to this conclusion amount to nothing more than a reargument of the contentions urged before the Examiner and we find his conclusion well founded and proper.

Stockton further argues that respondents' equalization practices result in unjust discrimination between shippers, in violation of sections 15 and 16 first of the 1916 act, because varying equalization payments under the rules result in different charges for the same ocean transportation, because respondents ultimately collect varying amounts for transporting the same commodity between the same ports, depending on the inland transportation charges, which determine the amount of the equalization payment. Varying charges for identical services are prima facie discriminatory and thus unreasonable unless justified. *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 FMB 48, 55 (1960).

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 has complained of discrimination, and there is no evidence of any differentiation among shippers similarly situated. Under similar circumstances, no evidence of discrimination against shippers was found in *Beaumont Port Commission v. Seatrains Lines*, 2 U.S.M.C. 693, 703, where, as we have already noted, Houston, Galveston, and Texas City may be considered the respective equivalents of Stockton, San Francisco and Oakland-Alameda, and Havana the equivalent of conference destinations in the Far East:

Complainants' contention that Seatrains' practice unjustly discriminates against Galveston and Houston will not bear analysis. The port-to-port rates to Havana from these ports and Texas City are the same. The shippers served by Seatrains pay the same through transportation charges, whether they ship from

Galveston, Houston or Texas City. There is no complaint of, or evidence to show, discrimination against shippers by Seatrain.

Moreover, any prima facie discrimination based upon ocean carriage alone—as between, say, a shipper located at San Francisco who receives no equalization allowance and one located at Fresno who receives equalization against Stockton when he ships via San Francisco—is justified by the facts of record. The record is clear that the fewer loading ports in the normal itinerary, the better operating results the carrier will have. To eliminate equalization, thereby requiring carriers either to call at Stockton or abandon some of the cargo in that area, would be beneficial to the port of Stockton and perhaps some of the shippers in that area. But the public interest is much larger than the needs or desires in the Stockton area. The equalization under consideration here reflects an overall economic good, tangible benefit to the public at large, and an important transportation justification.

We conclude that no unjust discrimination between shippers, or undue or unreasonable preference or advantage to any particular person, within the meaning of sections 15 and 16 first of the 1916 act, may be found in respondents' equalization rules or their practices pursuant thereto.

Stockton also argues that the respondents unnecessarily dissipate their revenues through their equalization allowances, since (1) the most economical way to move cargo is to load it aboard a vessel which is at Stockton, and (2) in some cases cargo which is equalized against Stockton would be shipped via San Francisco anyway. Such dissipation is alleged to be contrary to the public interest and detrimental to the commerce of the United States, in violation of section 15 of the 1916 act.

The record does not support Stockton's contentions. The most economical way to move cargo was shown not always to be to load equalized cargo aboard a vessel at Stockton which was there to load other cargo. PFEL frequently transships cargo by truck (at its own expense) to San Francisco for loading aboard a vessel which has called at Stockton, because it is cheaper to do that than to move the vessel, at a cost of some \$300, from a bulk cargo berth to another berth at Stockton. Transshipment costs the carrier a great deal more than equalization, since it not only pays the full cost of truck transportation from Stockton to San Francisco, but also pays handling and loading charges to both ports.

Even if it is more economical for a carrier whose vessel is already at Stockton to load there rather than equalize, it does not follow that it

will be cheaper for a competitor that does not have a ship at Stockton and does not have bulk cargo contracts which make it economical to send a ship there.⁹ For the carrier that actually equalizes, there is no dissipation of revenue through equalizing as against sending a ship to Stockton. In this respect, equalization is self-correcting. If there is sufficient cargo available to a carrier to make it more economical to call at Stockton, the carrier will normally do so rather than equalize.

There is no evidence that equalization is not profitable, overall, to any carrier that equalizes, nor is there any evidence that the public interest or commerce of the United States has been adversely affected by any dissipation of carriers' revenues. The evidence indicates, rather, that equalization is financially beneficial to the equalizing carrier.

Moreover, it should be noted that even with equalization, Stockton's growth since 1957 has put it ahead of the ports of San Francisco, Oakland, and Alameda combined, in export tonnage. General cargo (via conference and nonconference vessels) to conference destinations increased by over 50 percent in 1962 over 1961, although total cargo to conference destinations declined from 1,308,558 to 1,108,726 tons. Thus, equalization has not seriously affected Stockton's competitive position. Stockton also argues that there is a violation of section 205 of the Merchant Marine Act, 1936, which provides:

SEC. 205. Without limiting the power and authority otherwise vested in the [U.S. Maritime] Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of oceangoing vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it.

No functions with respect to this section of the 1936 act were transferred to the Federal Maritime Commission by Reorganization Plan No. 7 of 1961, which established the Commission. However, complainant suggests that section 205 remains the law of the land, and must be considered by the Commission in exercising its delegated functions. Stockton is a port designed for the accommodation of oceangoing vessels, located on an improvement authorized by the Congress, and is therefore entitled to the protection of section 205, as our pred-

⁹ Respondent PFEL, the only carrier that was critical of equalization against Stockton, frankly considers its position to be "more advantageous than others insofar as calling at the port of Stockton . . . we have contracts for bulk cargoes for justification to put us up to the port of Stockton which other lines do not have." Thus PFEL feels it could get "the lion's share" of any additional tonnage going through Stockton. Still, PFEL now transships cargo from Stockton by truck and also equalizes against Stockton.

ecessor said of the port of Stockton and other bay area ports in *Encinal Terminals v. Pacific Westbound Conference*, 5 FMB 316, 320 (1957). But section 205 is not violated by respondents' equalization rules as observed in practice; i.e., with the elimination from the rules of the phrase purporting to restrict its operation to cargo "which would normally move" from a given point. This apparent restriction has no practical relation to the theory or operation of the rule. Perhaps it was originally intended to make it clear that cargo may be equalized even though it might "normally" move from another port, thus anticipating any objection on that ground. The rule should be drafted to exclude what is clearly not intended as a restriction. The rules, as applied, permit equalization in favor of Stockton to exactly the same extent as against it. Respondents comply literally with the statute by serving Stockton at the same rates which they charge at the nearest port regularly served by them, since rates are the same for all bay area terminal ports. If equalization is considered to change the base rates from any such port, respondents are in compliance with the statute because they offer the same equalization to shippers who wish to load at Stockton.

Finally, Stockton argues that equalization "serves as a cloak for malpractice." In support of this proposition PFEL's representative referred to one case of unidentified "malpractice" which he said had resulted in a Commission investigation. The representative further testified that upon two occasions PFEL had been offered a shipment if it would equalize on the basis of a trucker's bill of lading showing a point of origin more remote from the loading port than the actual point of origin. As respondents suggest, it would appear that if a shipper and carrier conspire to engage in crime, they can find simpler and safer methods than getting a third party to produce a false bill of lading. Giving full credence to PFEL's testimony, however, it cannot be concluded that respondents' equalization rules and practices offer such a peculiar temptation or facility for malpractice as to make it desirable to eradicate equalization completely. There was no evidence in the record of any malpractice affecting Stockton.

Stockton also points to a practice of the PWC respondents with respect to citrus fruit, allegedly affecting Stockton. For a number of years it has been the practice of respondent PWC and its members to allow an "equalization" payment of 15 cents per carton on citrus fruit shipped from San Francisco if it originated in "southern California." Southern California is defined as the territory south of a line drawn east from Santa Barbara, south of the area in which constructive mileage, and carrier rates, are lower to Stockton than to San Fran-

cisco. This 15-cent allowance is not based upon any excess overland transportation cost as such, but rather on the fact that citrus shippers located south of the Santa Barbara line quote exporters a price delivered to a dock in "northern California"—particularly San Francisco—which is 15 cents per carton higher than their price delivered to dock in Los Angeles Harbor. For reasons not apparent from the record the ocean carrier allows the exporter (the shipper from the standpoint of ocean carriage) an amount equal to this difference in the price of fruit delivered f.a.s. San Francisco as against f.a.s. Los Angeles. There is in practice no other equalization with respect to citrus fruits. The conference is not asked to equalize against Stockton or otherwise on fruit originating north of the Santa Barbara line, and in practice citrus fruit is never shipped from Stockton.

Thus, there is an allowance against ocean freight on citrus fruit shipped from "northern California" ports as against shipments from "southern California" ports at the rate of 15 cents per carton, based upon an arbitrary price differential of 15 cents, with respect to fruit originating south of the Santa Barbara line.

The PWC chairman necessarily conceded that this "equalization" is not found in the PWC equalization rule, but PWC argues that it accords with the principle of equalization, which it contends is the absorption by the carrier of the difference between the shipper's cost at the nearest terminal port and the loading port. But this is too loose and inaccurate a definition. As the rule itself states, equalization is the absorption by the carrier of the shipper's excess cost of delivery to the loading port. That is quite different from absorbing a differential in the shipper's (exporter's) purchase price, resulting from a sort of basing-point system used by the grower-seller. The exporter, who is the shipper as far as the ocean carrier is concerned and the one who bills the conference for equalization, in fact has no cost of delivery to ship's tackle; he buys at a flat price f.a.s.

The conference has reported to the Commission data with respect to citrus fruit equalization, purportedly as equalization under its tariff rule, showing point of origin as "southern California" and rate of equalization at 15 cents per carton. This does not validate the practice, but neither does it invalidate respondents' published rule, nor contaminate the rule so as to require its disapproval.

However, this so-called equalization on citrus fruit is not in accordance with or pursuant to respondents' filed tariff. Thus, respondents PWC and its members have failed to comply with paragraphs (1) and (3) of section 18(b) of the 1916 act, in that they have not filed a rule or regulation which affects a part or the aggregate of their filed rates,

and have charged a different compensation for transportation from their rates and charges on file. Moreover, in our view, the absorption of an arbitrary amount based upon a differential in delivered "price" of a commodity is unjustly discriminatory between ports within the meaning of section 15, since the amount absorbed has no transportation basis or justification. It is further found, however, that such practices have not diverted cargo from, and do not affect, the port of Stockton.

While the Examiner concluded that the rules and practices with respect to equalization between terminal ports within the San Francisco Bay area were not unlawful, he found that:

. . . to the extent that they permit general equalization upon cargo loaded at the ports of Los Angeles and Long Beach, Calif., based upon the excess cost of inland transportation from point of origin to such ports over such cost to San Francisco, Stockton or any other port within the San Francisco Bay harbor complex, are unjustly discriminatory and unfair between ports, within the meaning of section 15 of the 1916 act; and to such extent the said rules, and practices pursuant thereto, are disapproved.

PWC excepts to this holding on the grounds that the Examiner made no findings to support this conclusion contrary to the requirements of section 8(a) of the Administrative Procedure Act (5 U.S.C. 1007) and that there is no evidence in the record, not to say substantial evidence, on which this finding could be premised.

We hold that the Examiner decided this issue correctly and on the basis of adequate proof. The Initial Decision correctly set forth the legal test to be used: If the absorption of inland rate differentials destroys the right of ports to traffic originating in the areas naturally tributary to them, the absorption is unduly prejudicial to such ports where service from the port equalized against is adequate. The Examiner noted that the number of shipments equalized against Stockton in favor of southern California ports in 1962 was small, but of substantial tonnage. The Examiner found that the Golden Gate is 423 statute miles north of Los Angeles and that the territory tributary to the southern California area is not tributary to San Francisco Bay area ports. He further found that service from bay area ports was adequate.

The record shows details of shipments equalized against Stockton where the cargo actually moved from Los Angeles and Long Beach. The record also shows details of inland transportation costs between interior points and terminal ports, including Los Angeles and Long Beach, and the adequacy of service at Stockton and other bay area ports.

Therefore, we agree with the Examiner that equalization of cargo via southern California ports destroys the right of bay area ports to traffic originating in the area naturally tributary to them. It is obvious that this type of equalization diverts traffic away from the natural direction of the flow of traffic. This situation is, as found by the Examiner, contrary to our decisions in *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 FMB 48 (1960), and *City of Portland v. Pacific Westbound Conference*, 4 FMB 664 and 5 FMB 118 (1956).

The Examiner made those findings, supported by evidence, which are prerequisite to the application of the legal test of equalization. We, therefore, reject this exception of PWC.

PWC contends further that the equalization against bay area ports where cargo moved through a southern California port is not pertinent to the issues in this proceeding. We reject this argument. We will not ignore unjust discrimination even though it was not raised with respect to bay area ports other than Stockton in the complaint. We disposed of a similar argument in *City of Portland v. Pacific Westbound Conference*, 5 FMB 118, 129 (1956), where we stated:

PFEL's view appears to require a conclusion that we are rigidly limited in our findings and conclusions by the precise language of a complaint or order of remand, regardless of the facts which may be developed and argued by the parties to the proceeding.

We do not share this view of our duties under the Shipping Act, 1916 (the act). In our view, we would be remiss in our duties if, assuming actual direct service by Java Pacific, we did not, acting on this record, prevent continued unlimited equalization on dynamite by PFEL. As stated in *Chesapeake & O. Ry. Co. v. United States*, 11 F. Supp. 588, 592 (1935), in discussing an Interstate Commerce Act provision similar to our section 22:

. . . after a complaint is filed before the Commission, it becomes the duty of the Commission, to investigate the complaint and take proper action upon its own motion . . . its power is not restricted by the issues raised on the complaint, provided . . . that the (respondent) . . . had full opportunity to make (its) defense.

It is the duty of the Commission to look to the substance of the complaint rather than its form and it is not limited in its action by the strict rules of pleading and practice which govern courts of law.

This Board, like other administrative agencies, has an affirmative duty to investigate as well as to decide, in consonance with its position as trustee of the public interest in matters within its jurisdiction.

The conference further argues that the Examiner's finding in this respect should be qualified to take into consideration which of the San Francisco Bay area ports have adequate service. In fact, PWC contends that equalization should be proper where service at San Francisco Bay area ports is unsatisfactory in any respect. We reject this

test of equalization in favor of that previously expounded—that equalization is unlawful if it destroys the right of ports to traffic originating in the area naturally tributary to them where service from the San Francisco Bay area is adequate. And the likelihood of inadequacy at San Francisco Bay area ports is remote indeed. We, therefore, will not qualify the Examiner's holding.

We reaffirm that respondents' equalization rules to the extent that they permit equalization upon cargo loaded at the ports of Los Angeles and Long Beach, Calif., based upon the excess costs of inland transportation from point of origin to such ports over the cost of inland transportation to bay area ports, are unjustly discriminatory and unfair between ports within the meaning of section 15. We will disapprove the equalization rules to this extent.

An appropriate order will be entered.

REPORT OF COMMISSIONER JOHN S. PATTERSON:

The reasons for a separate report of my decision are that the majority, in my opinion:

(1) Has gone beyond the Commission's functions assigned under section 103 of Reorganization Plan No. 7 of 1961 by interpreting section 8 of the Merchant Marine Act, 1920, and section 205 of the Merchant Marine Act, 1936; and

(2) Did not make the record show the ruling on each exception presented.

Functions relative to the authorizations in sections 8 and 205 were not transferred to us by the President with the approval of Congress pursuant to the Reorganization Act of 1949 but were vested in the Secretary of Commerce. The Secretary of Commerce is the federal official responsible for deciding what these sections mean under various circumstances, and we should not, in my opinion, prejudice his decisions nor create the possibility of unwarranted conflicting decisions among Government agencies.

Section 8(b) of the Administrative Procedure Act directs agencies to make their records show the ruling upon each exception presented prior to decisions upon agency review. The subsequent decisions must also include a statement of the reasons or basis for all conclusions upon all the material issues of fact, law, or discretion presented on the record. This report of my decision is believed to comply with these mandates. My colleagues' report states: "If in stating those reasons we fail to treat any 'specific exception,' it has nevertheless been considered and found not justified." It seems to me an adjudicator should not relieve himself of a responsibility to pass on complainant's well-thought-out exceptions with such general statements.

The statements are only unsupported assertions without basis or reason.

The facts stated in the majority report are accepted for the purposes of this report.

Complainant Stockton made eight requested findings and conclusions with respect to sections 15, 16, 17, and 18(b) of the act. The findings are summarized in the next paragraph as items 1 through 8, and the conclusions of Stockton are stated with respect to each section as noted.

Section 15. The equalization rules require disapproval as agreements because:

1. The amount of the payment cannot be determined by examination of the tariff in detriment to the commerce and contrary to the public interest.

2. The determination of the correct payment is impossible, also involving unjust discrimination between shippers and exporters.

3. Use of the port of Stockton for freight "which would naturally pass through that port" is discouraged and decreased in detriment to the commerce and in conflict with public interest.

4. The rules result in discrimination and prejudice to the port of Stockton and preference to other California ports.

5. Different shippers are treated differently in making equalization payments, causing detriment to the commerce and contrariety with public interest.

6. Carriers' revenues are unnecessarily dissipated in detriment to the commerce and contrary to the public interest.

7. Carriers serving Stockton are deprived of cargo against the public interest and in detriment to the commerce.

8. Improper equalization practices are concealed, contrary to the public interest and in detriment to the commerce.

Section 16. The equalization rules are unlawful because the same acts enumerated with respect to section 15 in items 2, 5, and 8 above also permit undue preference and prejudice or unjust "discrimination" (section 16 does not use the word) between shippers; and in item 4 result in undue prejudice to Stockton and undue preference to other California ports in violation of section 16, second paragraph, subparagraph "first".

Section 17. The equalization rules are prohibited because the same actions enumerated with respect to section 15 in items 1, 2, 3, 5, 6, 7, and 8 above constitute unjust and unreasonable regulations connected with the receiving, handling, and storing or delivering of property.

Section 18. The equalization rules violate subsection (b)(1) be-

cause the same actions with respect to section 15 in item 1 fail to meet the tariff filing requirements, and in item 2 above constitute an improper tariff publication.

For the reason that the Commission has no authority to administer sections 8 and 205, these laws are not discussed.

The Examiner made a decision on each request, found none of the claims proven, and rejected all of the requested findings and conclusions. Exceptions followed.

The exceptions of A. Stockton Port District and B. Pacific West-bound to which we must address ourselves are as follows:

A. Stockton Port District. Complainant excepts:

1. To all of the Examiner's ultimate findings and conclusions contained in the second paragraph on page 31 of the Initial Decision. The Examiner's ultimate conclusions and findings require subdivision for the purpose of rational discussion about the distinct provisions of law which he finds not to be violated, so the exception becomes one to the conclusion that the equalization rules and practices pursuant thereto:

- a. Are not in violation of section 15;
- b. Are not in violation of section 16, second paragraph, subparagraph first;
- c. Are not in violation of section 17; and
- d. Are not in violation of section 18(b).

For the reasons noted above, references to section 8 of the Merchant Marine Act, 1920, and section 205 of the Merchant Marine Act, 1936, also referred to by the Examiner, are disregarded as not within our functions.

2. To statements regarding the geographical location of the ports of Stockton and San Francisco.

3. To statements regarding the geographical relationship of Texas City, Houston, and Galveston, Tex., in comparison with San Francisco, Stockton, and other bay ports, and to the position of Beaumont, Tex., in relation to that of Los Angeles, Calif.

4. To a statement regarding the territory naturally tributary to Stockton.

5. To a statement that under existing decisions the conclusions regarding naturally tributary territory are determinative of the question as to whether equalization as between Stockton and other San Francisco Bay ports should be disapproved.

6. To the conclusion that the filed equalization rules comply with section 18(b) (1) without filing any inland carrier rates.

7. To the conclusion that the record does not support a finding and conclusion that as a practical matter the determination of payments is impossible.

8. To the statement that the rules as applied do not discourage or decrease the aggregate use of Stockton and other bay area ports or divert traffic from its natural direction of flow.

9. To the statement that Stockton does not provide adequate service for general cargo shipments to which equalization is applicable.

10. To the statement that the rules and practices are not found to be unjustly discriminatory or unfair between ports.

11. To the statement that there is no unjust discrimination between shippers or undue or unreasonable preference or advantage to any particular person under sections 15 and 16 (first) of the Act.

12. To the statement that there is no evidence equalization is not profitable to any equalizing carrier, nor any evidence that the public interest or commerce of the United States has been adversely affected by any dissipation of carriers' revenues.

13. To the statement it can not be concluded that the rules are a facility for malpractice.

14. To the findings and conclusions with respect to citrus fruit insofar as they approve equalization practices with respect to such commodity if a rule is put in the tariff.

An exception as to the violation of section 205 has been disregarded.

B. Pacific Westbound Conference. Respondent excepts to the conclusion that the rules, to the extent that they permit general equalization upon cargo loaded at the ports of Los Angeles and Long Beach based upon the excess cost of inland transportation from point of origin to such ports over such cost to San Francisco, Stockton, "or any other port within the San Francisco Bay harbor complex," are unjustly discriminatory and unfair between ports under section 15 and to such extent the rules and practices are disapproved.

The Examiner's ultimate findings and conclusions "contained in paragraph 2 on page 31 of the Initial Decision" are that no provision of the Act has been violated by respondents as a result of the facts summarized in the eight requested findings and conclusions in complainant's opening brief. The generalized nature of Stockton's first exception requires going back over complainant's eight requested findings, particularly in response to Stockton's further request that "our opening brief and our reply be considered in connection with our argument in support of our exceptions."

My rulings would be as follows:

The rules and practices are authorized by agreements filed pursuant

to section 15. These agreements have heretofore been approved as a result of the approval of agreements Nos. 57, 5680, and 6060. The authorized rules and practices are those in rule No. 2 in Tariff No. 1-X of Pacific Westbound; rule No. 1(b) in Tariff No. 6 of Pacific Straits; and rule No. 1 in Tariff No. 7 of Pacific Indonesia. There is no issue that the agreements relate to the subjects listed in the first paragraph of section 15. We have held that an equalization rule is one of such subjects and must be filed unless the practice set forth in the rule is authorized by the basic conference agreements. *Pacific Coast Port Equalization Rule*, 7 FMC 623 (1963) (see pages 630, 631). Our order was affirmed and found valid in *American Export & Isbrandtsen Lines et al v. Federal Maritime Commission et al*, 336 F. 2d, 650 (C.A. 9th 1964). The tariff rules are an implementation of the filed agreements Nos. 57, 5680, and 6060 provisions forbidding payment in respect of freight and absorption at loading ports of rail freights or other charges except as "agreed to by two-thirds of the parties" and thereafter shown in tariffs. Two-thirds of the members have bound all the members to perform the equalization absorption rules.

The issues are whether (i) past approval should be withdrawn and disapproval substituted as authorized by section 15 because of the eight reasons presented, (ii) misdemeanors should be found for violation of section 16, or (iii) unlawful acts halted for violation of section 17, or (iv) penalties imposed for violation of section 18(b).

A. Stockton's exceptions:

1. The ultimate conclusions and findings.

(a) Exceptions related to approval of agreements under section 15.

(1) The amount to be absorbed by a carrier through payments equalizing inland shipping costs to Stockton and San Francisco is as determinable as any general rule can make it in view of the various situations to be covered. The amount is measured "on the basis of the lowest applicable" rates, must be substantiated by "a copy of transportation bill covering movement from point of origin," and by a statement of "applicable interior rates and/or the basis of equalization". These requirements are preceded by a definition of what equalization is, such as the definition in rule 2 appended to the Examiner's decision. In other respects, pages 7 and 8 of the Examiner's decision explain adequately how the absorption is a separate transaction after the established ocean freight is paid, and is computed on the basis of tariff-established inland transportation costs. This agency's precedents cited in opposition all concerned cases where the ocean freight rate was subject to adjustment depending on inland costs. Here there is a separate payment in response to shipper application after objectively establishing inland costs and a public record is kept of all

payments. The rule and computation of all amounts are known to everyone. No detriment to commerce nor contrariety with public interest has been proven.

(2) For the reasons given above showing the amount is ascertainable and known, the payments pursuant to the rule are equally easy to establish "on the basis of the lowest applicable common carrier or contract carrier rates" (or "lowest applicable rates" under the Pacific/Indonesia rule) and may not exceed "35 percent of the ocean freight." An established trade practice was shown involving inspection of the shipper's freight bill showing the amount actually paid to the inland carrier. From such amount the calculated cost of shipment to Stockton is subtracted and the difference is paid. Variations are reflected in appropriate revisions, as described by the Examiner. The determination of the "lowest" amount was shown in some cases to be difficult, or complicated, but not impossible. Complainant illustrated these circumstances, but never showed exactly how discrimination between shippers and exporters resulted from the difficulties or complexities, and no discrimination is discerned from inspecting the record. Detriment to commerce or contrariety with public interest are not proven by the fact of difficulty or complexity alone.

(3) The freight that would "naturally" pass through Stockton mostly would be freight that exporters could send to Stockton cheaper than to any other port since ocean freight rates are the same as from San Francisco; consequently, "naturally" is taken to be a euphemism for more cheaply or at less cost. Use of Stockton is unquestionably discouraged or decreased if any economic advantages in using Stockton are canceled by paying shippers their added expenses of shipping somewhere else. If the issue were the effect of equalization payments on Stockton alone, the case would end right here, but the effect on shippers and carriers must be considered too. The record showed that the effect of the expenses absorbed by the carriers and payments to shippers pursuant to the rule were for their mutual economic advantage. Shippers benefit from access to frequent, regular, and reliable service at San Francisco. Many are put on competitively more equal terms with shippers of similar products who are closer to San Francisco. Necessary services such as government inspections required for export are available at San Francisco but not at Stockton. Inspections by the Department of Agriculture related to the Public Law 480 program involving primarily bulk cargoes are undertaken, however. For 1961, for example, 200,357 tons of commercial bulk cargo were loaded to or transshipped for conference ships as compared with 51,045 tons of commercial general cargo. Carriers benefit by not

having to make the extra 75 nautical mile journey to Stockton for amounts of cargo insufficient to support regular berth service. The trip costs from \$3,200 to \$5,000 a round trip. The journey is to some extent hazardous, involving delays for bridge lifting at several points, fogs, turns in the river impeding radar perception, and there have been through September 1961 a total of 110 groundings since the opening of the channel, of which 44 have occurred since December 1947. Stevedoring is more efficient at San Francisco. Stockton is principally a bulk-cargo port, and ships loading parcel cargoes in some cases must move from a bulk loading berth to a general cargo loading berth at extra expense. (Note: The illustration accompanying my dissent in Docket No. 1084 makes clear how such ship movement is made necessary.) The Examiner correctly analyzed this evidence as establishing, on balance between Stockton's interests and those of carriers and shippers, no detriments to commerce or conflict with public interest.

(4) Undue, unjust or unreasonable discrimination, prejudice, and preference involve choices creating inequality of treatment of similarly situated persons for no reason. There are legitimate economic reasons for the carriers' rule based on the different situations at the two ports. The carriers' choice of making equalization payments to avoid a trip to Stockton and the shippers' choices in sending merchandise to San Francisco and having part of the inland transportation costs paid by the carriers involve legitimate business advantage to each. The advantages and disadvantages are described in (3) above. The rights of Stockton to be used as a port do not transcend these mutual advantages. Invalidation of the rule to advantage Stockton would leave the carriers three other choices: (i) to go to Stockton and load available cargo regardless of expense, (ii) transship from Stockton by land or intermediate water transportation and pay the entire cost including terminal and handling costs, or (iii) give up the cargo and not serve Stockton. The first two would not disadvantage the shipper but would cause the carrier expenses which would have to be recovered in higher rates. The third choice would harm shippers who could transport overland more cheaply to Stockton than to San Francisco. The situations of the parties are in no respects comparable. As long as the purpose and effect of the rule are mutual economic advantage of the carriers and shippers, ports and localities are not unreasonably disadvantaged. If the rule diverted traffic from Stockton with no advantage to shippers or carriers, the situation would be different from what this record shows. This record shows economies in carrier operations and more efficient service as a result of equalization. I concur in the Examiner's discussion of this evidence.

(5) There was no evidence that the rule inevitably causes different shippers to be treated differently in making equalization payments. The point is made largely by argument that variations in payments were inevitable because of variations in the inland transportation charges caused by variations in weight and origin of shipments. It was also shown that raisin growers do not receive payments equal to the different costs to ports, because of the application of less-than-truckload rates or of regular truck tariff rates where the shipper uses his own truck, and citrus fruit is not dealt with under the rule. These facts do not invalidate the rule, but may show violation of the law in the administration of the rule. If there is cheating by discriminatory administration of the rule or by disregard of the rule for favored shippers, another case is presented not capable of resolution on this record. The rule itself is not at fault in such a case, but rather the conduct of carrier officials.

(6) Dissipation of carrier revenues is not evidence of illegal conduct. Those carriers which spend more money to serve Stockton do so for reasons of self-interest, but voluntary expenditures do not invalidate the rule merely by describing them by the pejorative "dissipation". On the whole, the record showed that for most of the carriers it was less expensive to absorb part of the inland shipper costs than to make the trip to Stockton. No detriment to commerce or contrariety with public interest is shown by these facts.

(7) Carriers serving Stockton are deprived of Stockton cargo as a result of the absorption of the excess inland freight to San Francisco over Stockton, but, equally, carriers serving San Francisco would be deprived of cargo under any other arrangement, and Stockton has not established any superior right to offset the conveniences of the shipping public and carriers. No detriment to commerce or contrariety with public interest is shown by these facts.

(8) Concealment of improper practices by the rule presupposes the existence of improper practices being concealed, but none was proven. All that was produced were speculative possibilities and testimony of what one witness called "improper practices". Opinions are not proof. There has been no adjudication of the illegality asserted by the opinions, even assuming the rule itself were proven inevitably to cause illegal conduct. If conduct is shown to be illegal, it will have to be punished by some other means than invalidation of the rule which will harm all carriers following the rule, but leave the guilty party unpunished.

The exceptions related to section 15 should be overruled.

(b) Exceptions related to violations of section 16.

(1) The determination of the correct amount of the equalization payment under the rules was found as a practical matter to be possible and no individual carrier's guilt in cheating on computations was proven. Complainant, by inference and argument, has only sought to prove that "it leaves the door open to undue preference and prejudice between shippers" and has argued that the possibility is inevitable. Complainant treats the rules themselves as the malefactor. (See par. XIII, subparagraphs 3 and 4, Complaint.) Section 16 applies to common carriers either alone or in conjunction with any other person directly or indirectly, and the prohibited acts in specific instances by named persons must be proven to establish a misdemeanor. No such acts have been linked up with any respondent on this record. If the instances involving the raisin growers, or truckers using their own trucks, or citrus fruit shippers are thought to prove misdemeanors, the testimony without documentary proof in this record is inadequate. We should have exhibits showing similar transactions and disparate treatment deviating from what the rule purports to do.

(2) For the same reasons the testimony regarding different treatment of shippers was inadequate because not connected with any instances of specific wrongdoing.

(3) The charges that improper equalization practices are "concealed" or that the rule serves as a "cloak" for improper practices are innuendoes and equally faulty as substitutes for proof of misdemeanors.

No violation of any provision of section 16 has been proven, and the exceptions related thereto should be overruled.

(c) Exceptions related to violations of section 17.

Under the first paragraph of section 17, complainant, after stating it is "in competition as a port and a terminal with San Francisco . . ." (Complaint, par. XII), alleges the rule causes "charging and collecting . . . rates and charges that are unjustly discriminatory between shippers and ports . . ." (Complaint, par. XII (5)).

The preceding report answers, first, on precedent such payments were authorized in *Beaumont Port Commission v. Seatrain Lines*, 2 U.S.M.C. 699 (1943) and, second, on definition the "natural" flow of overseas traffic from the San Joaquin Valley has always been through the Golden Gate. Neither precedent nor definition, however, explains why the standards of the statute are not disregarded by charging the same ocean transportation rates from both ports, and then by paying those shippers who might otherwise choose Stockton a part of their inland transportation cost as an inducement to choose San Francisco instead. There is no doubt Stockton is going to be discriminated

against by this practice and is entitled to a reasonable explanation of why any discrimination is or is not unjust other than that the act has been done before in Texas or that, before Stockton spent its money for a port, traffic went through the Golden Gate anyway, and that traffic is just as "naturally tributary" to San Francisco as to Stockton.

Stockton makes the very reasonable and compelling argument that if a port invests millions of dollars in development largely with public money, it is entitled to all the cargo that may be sent to the port cheaper than to any other port. Certain formulas using constructive mileages to delineate areas are used to establish inland transportation costs. The cargo that may be sent to the port easier than to any other port is then called local tributary traffic, as I understand the argument. Stockton says other ports may not take away this local tributary traffic, nor take away the advantages of getting cargo to Stockton by equalization payments to shippers. My answer is Stockton has no such rights by virtue of expenditures or the existence of a "natural" flow or local tributary traffic and, absent such rights, the discrimination induced by the carriers' refunds and exercised by shippers is not unjust.

The justification for public investment in port construction comes before, not after, the investment. The investment depends on commercial potentialities, not on future rights. Once made, the investment does not thereafter create legal rights to a flow of business or entitle anyone to anything, but only creates opportunities to exploit. The only creator of opportunity or business values now claimed by Stockton as a matter of right or entitlement is the peculiarity of the same ocean freight rates from Stockton as from San Francisco in spite of longer travel time and distances. The peculiarity of such rates from Stockton was created by the carriers, not by Stockton. It is not unjust that the rate equality is eliminated by the absorption of partial inland transporting costs because the carriers have only eliminated what they created in the first place. Nothing is taken away that Stockton was entitled to, such as values it created. The consequences to public investment in ports are the consequences of past decisions to locate a port where business potentialities may never be fully realized rather than by denial of rights resulting in unjust discrimination.

Natural flow of traffic and local tributary traffic arguments are equally unfounded, being based on a supposition of vested rights to traffic based on mileages to ports regardless of economic considerations. Such rights have no relation to commerce which, as I see it, may not exclude monetary factors. Shipper choices and port and carrier benefits depend on savings to shippers. There is no such thing as a local tributary measure based on mileage formulas alone translated into

rights to certain business regardless of cost. A local tributary measure must be related to transportation costs and there is no unjustness in offering shippers a saving in choosing one port over another, the geography of this case being what it is, as long as all are treated equally.

There is no unjust discrimination between shippers and ports, and the exception as to a violation of the first paragraph of section 17 should be overruled.

No consequence of the rule on the absorption of part of inland freight costs relates to a regulation or practice connected with the receiving, handling, storing, or delivering of property within the meaning of the second paragraph of section 17. *Beaumont Port Com'n v. Seatrain Lines*, 3 FMB 556 (1951). Neither the payment to the shipper measured by inland freight nor a reduction in rates involves receiving, handling, or storing of property, but involves transportation. The exception as to a violation of the second paragraph of section 17 should be overruled.

(d) Exceptions related to violations of section 18(b) (1).

(1) The amount of the payment was found above to be determinable from a reading of the rule and this is all that section 18(b)(1) requires. Section 18(b)(1) requires filing only of "rates and charges . . . for transportation to and from U.S. ports and foreign ports and between all points on its own route . . .".

(2) Determination of payments, while difficult, is possible. The objective of the rule and the guiding measures are stated and testimony disclosed precisely how payments were calculated in given instances. The unworkability of the rule was not proven. Three situations were alleged where payments may not have followed the rule, but there was no specific evidence. As noted earlier, if specific instances of discriminatory treatment or dishonesty in the application of the rule are shown, adjudication and punishment, if guilt is found, may be undertaken in separate proceedings.

The exceptions related to section 18(b) (1) should be overruled.

2. The statements regarding geographical location.

The Examiner's statements regarding the geographical location of Stockton and San Francisco are that we are dealing "with a single port as against another port in the same geographical area—in fact in the same harbor complex" and that ". . . both ports . . . may be described as San Francisco Bay ports . . .". Stockton is up the Sacramento River and a long way from San Francisco Bay. The statement may be inaccurate, but the entire statement concluding with "Stockton simply does not exist as an ocean port separate from the Golden Gate" serves the useful purpose of highlighting the dominating

geographical fact of this case, and of recognizing the geographical fact which prevents Stockton from having superior rights over San Francisco. The fact is that, to serve Stockton once, a carrier must go through the Golden Gate and pass San Francisco at least twice. If Stockton is served, so inevitably is San Francisco. Both carrier and shipper efficiency result by one stop and a shorter ocean journey. The total journey by land and sea is the same for the shipper in either case. The port in this journey at which commerce is best served on the facts of this case is, partly at least, where there is a concentration of services, particularly if it is a large port that has to be passed in any event. Arguments about "natural" flow of commerce or tributary territory prove little because success of the arguments depends on from where you measure the flow. I understand the Examiner to be saying in effect that detriments to commerce have to take this dominating fact into consideration, and the measuring point for territory "naturally" tributary or the point where the "natural" flow ends is not Stockton, but the Golden Gate. Unless carriers and shippers can avoid San Francisco by going to Los Angeles or somewhere else on the Pacific coast, they should be able to make the most efficient arrangements possible to get cargo past the Golden Gate. Any inaccuracy in the statement does not negative the correctness of the essential point. The second exception should be overruled.

3. The statements regarding geographical relationships.

The statement regarding Texas City, Houston, Galveston, and Beaumont, Tex., is appropriate because ships serving Texas City and Houston must pass Galveston coming in or going out to sea or may avoid Galveston by going to Beaumont north up the Gulf coast to obtain inland shipments. The comparison with San Francisco and Galveston and Beaumont and Los Angeles is accurate. The third exception should be overruled.

4. The statement regarding naturally tributary territory.

The fourth exception should be overruled for the reasons given in 2 above.

5. The statement that existing decisions determine disapproval.

The existing decisions held that Beaumont, Tex., not being "within the Galveston Bay group" and Texas City being in such group, a carrier might compete for traffic by means of an absorption of inland freight without violating the law because traffic through Beaumont was not "naturally tributary to Texas City" which was served by the absorbing carrier. *Beaumont Port Commission v. Seatrains Lines, Inc.*, 2 U.S.M.C. 699 (1943). The precedent is applicable and supports the ruling in 3 above. The fifth exception should be overruled.

6. The conclusion that the rules comply without filing inland rates.

The conclusion that the filed equalization rules comply with section 18(b)(1) without filing any inland carrier rates is supported by the reasoning that the amount of the payment is determinable from a reading of the rule. Section 18(b)(1) applies to "the rates and charges" of a carrier "for transportation to and from U.S. ports and foreign ports." Respondents fixed their ocean rates and the same rate applies from every terminal port. The equalization is another transaction involving a payment based on inland costs pursuant to a prescribed formula. The sixth exception should be overruled.

7. The conclusion that the record does not support findings.

For the foregoing reasons the record supports a finding and conclusion that as a practical matter the determination of payments is possible. The seventh exception should be overruled.

8. The statement that the rules do not discourage use of Stockton.

The Examiner's statements that the application of the equalization rules does not discourage use of Stockton or divert traffic from its natural flow are not determinative of the issues. The rules undoubtedly discourage use of Stockton by those nearer Stockton who have lower inland transportation costs to a port, but can ship just as cheaply from San Francisco as a result of the rule. Such discouragement, however, does not establish violation of any laws giving Stockton any protected rights to be used instead of San Francisco. Diversion of traffic from "natural flow" supposes a predetermined natural flow which does not exist. The direction of traffic is determined from moment to moment and operates in the future as each shipper decides where his self-interest is best served. The so-called natural flow is something only seen in retrospect as the collective results of decisions, not a preordained condition that dictates rights to have business. Complainant's reliance on diversion of a natural flow as a violation of rights apart from other malpractices is misplaced on the facts of this case, regardless of the Examiner's statements. The eighth exception should be overruled.

9. The statement that Stockton does not provide adequate service.

The facts showed that at Stockton certain general cargo operations were inconvenient and involved added expense, transit and berthing difficulties exist, and government inspections required for export were not available, substantiating the statement that Stockton does not provide adequate service for some general cargo shipments. The uneconomic nature of cargo available at Stockton is shown by the fact that the commodities affected by equalization rules average 40 tons per shipment, and in 1961 71 percent of all Trans-Pacific Conference ships calling at Stockton loaded as little as from 0 to 50 tons of general cargo per departure (Exhibit 52). The commodities

concerned are largely condensed milk, raisins, instant coffee, hides, and lumber (Exhibit 11). Witnesses agreed there was not enough cargo to support regular berth service.

The ninth exception should be overruled.

10. The statement that the rules are not discriminatory.

The statement that the rules and practices are not discriminatory is substantiated by the reasoning in support of the conclusion there has been no violation of section 16. The 10th exception should be overruled.

11. The statement that there is no discrimination between shippers.

The 11th exception concerning unjust discrimination should be overruled for the reasons given in 10 preceding.

12. The statements regarding the profitability of equalization.

The statements regarding the profitability of equalization are not determinative of any issues. The claims regarding "dissipation" of carrier revenues as having an adverse effect on commerce were not substantiated by fact any more than the Examiner's statement.

The 12th exception should be overruled.

13. The statement that the rules do not facilitate malpractices.

Each malpractice occurring as a result of the rules must be adjudicated by proof of specific acts with guilt individually assessed. Any malpractices are the results of actions by people, not the rules. The rules equally permit legitimate practices. If the rules facilitate malpractices, the perpetrators of the malpractice, not the enactors of the rule, must be blamed. The diversion-of-cargo part of the statement excepted to has been discussed above and ruled not controlling.

The 13th exception should be overruled.

14. The findings and conclusions with respect to citrus fruit.

The Examiner's findings and conclusions with respect to citrus fruit are that certain allowances are made at the rate of 15 cents per carton for fruit originating in "southern California" and shipped from San Francisco. This allowance has nothing to do with Stockton and is not pursuant to the rule, but is simply a practice which is not in accordance with or pursuant to the tariff. The Examiner correctly found section 18(b) of the Act was being violated, but the violation is outside the scope of the complaint. Neither the Examiner's nor the majority's report herein contains any express recognition of the provision of law that whoever violates any provision of section 18(b) shall be liable to a penalty for each day a violation continues. The omission, however, does not mean that there is approval of the "equalization practice" with respect to such commodity even if a rule is put in the tariff. The finding of law violation is enough. The issue of

future validity will still have to be passed on, but in the meantime past lawbreaking is not validated. The 14th exception should be overruled.

B. Pacific Westbound's exception :

The basis of the respondent's exception is that the Examiner made no findings to support his conclusion as he is required to do under section 8(b) of the Administrative Procedure Act, and there is no evidence on which to base the conclusion. Other than a factual statement that the number of shipments was small but the tonnage substantial and that the Golden Gate is 423 miles north of Los Angeles, there are no findings. These particular facts are neither analyzed as findings nor connected by any reasoning whatever with the abrupt conclusion that the record does not support a conclusion the territory tributary to Los Angeles (Wilmington and Long Beach) overlaps "that of the San Francisco Bay area ports". It does not "follow", nor do the findings support the announced conclusion. Statements of fact followed by the announcement of conclusions are not enough. Reasoning is needed to connect the two. Accordingly, the exception might have been sustained. My colleagues, however, supplied the reasoning by stating that (a) where the "absorption destroys the right of ports to traffic originating in naturally tributary areas," (b) where service at the ports equalized against is adequate, and (c) where the record shows the substantiating details, there is an unlawful diversion. Neither this reasoning nor the factors in (b) and (c) were in the Examiner's decision, and it is not supplied by any correct setting forth of "the legal test." Accordingly, the deficiency is adequately remedied and the exception may be ruled no longer material to the decision.

Based on the foregoing rulings, I would conclude on the issues :

1. Past approval of agreements filed by respondents should not be withdrawn and disapproval substituted pursuant to section 15. The agreements should remain approved.
2. No misdemeanors should be found for violation of section 16 because of lack of proof.
3. No violation of section 17 has been proven.
4. No violation of section 18(b), as charged in the complaint herein, has been proven.

COMMISSIONER HEARN dissenting :

I agree with the majority opinion in that the implementation of respondents' equalization rules in favor of Los Angeles and Long Beach are unjustly discriminatory and unfair. I find the discrimination so far as it relates to cargo which is naturally tributary to

Stockton to be a discrimination against Stockton only, which for reasons given below can in no way be considered a San Francisco Bay area port.

I disagree, however, with the results reached by the majority and am convinced that the subject equalization rules against Stockton¹⁰ are violative of section 16 first of the Shipping Act, contrary to the public interest standard of section 15, and in contravention of the principles and policies of section 8 of the Merchant Marine Act, 1920, and section 205 of the Merchant Marine Act, 1936.

I read the majority's action today as (1) frustrating the will of Congress in developing new and modern ports and (2) turning over to conference carriers, the right to determine which of our ports shall prosper and which shall suffer. Further, the establishment of Stockton as a "terminal port" by all of the conferences, in 1957 by the Pacific Westbound Conference, becomes insofar as the port of Stockton is concerned, a meaningless gesture.¹¹ The majority has recognized that the port of Stockton "has had phenomenal growth" since the port of Stockton attained "terminal port" status. I fear that the majority decision here will seriously impair that growth. Millions of dollars, both public and private, have been invested in the port.¹²

At least one conference carrier has provided substantial scheduled service at the port of Stockton. The majority's action today will bless the efforts of those carriers who have no intention of giving direct service to the port, and those carriers who have traditionally bypassed the port, with the opportunity to drain its general cargo. As the Commission stated recently "*In the Matter of Agreement Nos. 6200-7 etc.*," Docket 1166 (served June 24, 1965) :

"It seems elemental that the carriers best able to establish fair and equitable rates for a given trade are those carriers which are actually serving the trade . . . we believe the vesting of ratemaking decisions in carriers who do not serve the area in whose rates they have a voice to be far more dangerous to the commerce of the United States than the existence of rate competition between two competing areas."

The majority notes at page 8, reasons why shippers favor equalization; regularity of service and shorter intransit time. It goes without

¹⁰ The statement at page 23 of the majority opinion that "the rules, as applied, permit equalization in favor of Stockton to exactly the same extent as against it" betrays a certain naivete in coming to grips with the issue. While the word "permit" lends authenticity to the statement, in the nature of things, the equalization must always work against Stockton vis-a-vis San Francisco Bay area ports.

¹¹ This status was accorded as a result of *Encinal Terminals v. Pacific Westbound Conference*, 5 FMB 316 (1957).

¹² At the beginning of 1964 the capital outlay in the port of Stockton was \$23 million. This investment included \$9,800,000 by the port district; \$3,200,000 by the city of Stockton; \$3,800,000 by the Federal Government; \$500,000 by the State of California; and \$5,700,000 by private investors.

saying, I think, that shippers universally favor superior service and shorter transit time where these benefits can be secured without additional cost to them.¹³

In my view, the majority's reference that:

"For almost a hundred years before Stockton was made accessible to ocean-going vessels, San Francisco was the principal port through which freight from the San Joaquin Valley would and did pass. It did not cease to be such a port merely upon the creation of an additional port at Stockton."

believes an unconscious adherence to the "fundamentally entitled" theory which has ceased to have any value since *Pacific Far East Lines, Inc. v. Federal Maritime Board*, 275 F. 2d 184 (1960).

My dissent, however, need not be placed upon such broad generalities.

The central point here is conference tariff rules which "permit" carriers to equalize against Stockton. The majority has correctly assessed the thrust of the "permissiveness" of these rules: ". . . carriers find that competition compels them to equalize." Thus a conference carrier is not free to serve or not serve Stockton as its sound managerial judgment dictates; consequently the effect of the equalization rules is to restrict competition between the ports.

In reaching its ultimate conclusion, the majority found that (1) the port of Stockton is a port in the San Francisco Bay area, and (2) cargoes naturally tributary to Stockton are also naturally tributary to San Francisco. While I think neither of these findings is correct, I believe they skirt and confuse the central issue, which is: Do these tariff rules result in an unjust discrimination to the port of Stockton? The findings, moreover, are not supported by the facts, and have no valid basis in law.

First, the port of Stockton is not a San Francisco Bay port within the meaning of any statute administered by this Commission, and the cited "comprehensive report" of the California Legislature in 1951 referring to Stockton as a bay area port certainly is not controlling here, if indeed it has any relevance at all. The incontrovertible facts are that Stockton is some 107 constructive miles and several distinct waterways removed from San Francisco Bay. It is unthinkable that the port of Stockton should be considered as juxtaposed to San Fran-

¹³ A curious statement appears on page 8: "If there were no equalization many perishable commodities would still move through San Francisco rather than Stockton" The majority, of course, do not state why any of the overland costs to San Francisco on commodities shipped through San Francisco for the convenience of the cargo should be absorbed by the carriers. This particular instance reveals the chink in the majority's decision: equalization is permitted against Stockton, as an economy to the carrier where the cargo would be shipped ex-Stockton, and having permitted this, a rebate measured by the difference by the overland cost to Stockton and overland cost to San Francisco on cargoes ordinarily and traditionally shipped ex-San Francisco follows because the cargoes intended for the different terminal ports cannot be separated.

cisco, Oakland, Alameda, and Richmond. The finding that Stockton should be treated as a San Francisco Bay port must hang as an unwarranted fiction upon which no legal conclusion can be based.

Secondly, to say, as does the majority, that the "natural direction of the flow of traffic from the San Joaquin Valley . . . is through the Golden Gate to the Pacific Ocean" begs the question. The point at issue is whether the "natural direction of the flow of traffic from the San Joaquin Valley . . . through the Golden Gate . . ." is through San Francisco or through Stockton. I hold to the belief that this natural flow is through Stockton, and succinctly stated, but for the equalization, an admittedly artificial device, San Joaquin exports would normally flow through the Golden Gate via Stockton, except where, for the convenience of the cargo, shippers are not only willing to but should pay their fair share of costs of the premium service offered at San Francisco.

The majority places some reliance upon 1951 Port Series¹⁴ reports to show that the San Joaquin cargoes are as "naturally" tributary to San Francisco as they are "naturally" tributary to Stockton. A perusal of the cited works fails to uncover the adverb "naturally". Hence the "obviousness" that "these studies dictate a rejection of any 'constructive mileage' theory for determining 'naturally tributary territory'" is indeed wanting.

The only valid test, in this case, for determining whether or not the effectuation of the equalization rule, and consequently for determining whether respondents are giving "any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic" or subjecting "any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage" in violation of section 16 first, is whether the traffic would move via San Francisco but for the equalization. Here, certainly, most of it would not and to the extent that the artificial device draws traffic from Stockton it is unlawful.¹⁵

In this vein, I am convinced that the precedents support my view. There can be no doubt here that the equalized cargoes originate in areas "naturally and geographically tributary [to Stockton] because of inland transportation rates favorable to [Stockton] as well as through closer proximity." *City of Portland v. Pacific Westbound*

¹⁴ "The Ports of San Francisco and Redwood City, Calif." Port Series No. 30, Rev. 1951, and a similar study covering Stockton, also in 1951, prepared by the Corps of Engineers and the Maritime Administration.

¹⁵ An unforeseen consequence, perhaps, of the majority's decision, as I read it, would permit respondents to later equalize against Oakland, Alameda, Richmond, and Redwood City in favor of San Francisco: They are all within the same "geographical area"; their traffic must move through the Golden Gate; carrier economies would be established; and, since the user shippers do not pay for it, directly, they would be satisfied.

Conference, 4 FMB 664 (1955). Similarly, what was said in *City of Mobile v. Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474 (1941), is appropriate here:

To permit continuation of unrestricted solicitation by carriers for business through condonation of a practice whereby unfavorable inland rates are overcome would wholly ignore the right of a port to traffic which it may be entitled by reason of its geographical location. Such right appears fundamental under statutes designed to establish and maintain ports.¹⁰

Again, in the *Portland* case, *supra*, our predecessors interpreted section 8 of the Merchant Marine Act, 1920, as requiring:

"... 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."

Moreover, the second *Beaumont* case at 2 U.S.M.C. 699 (1943), so heavily relied upon by the majority, is inappropriate here. As complainant aptly pointed out, the second *Beaumont* case turned, in large measure, on the peculiar characteristics of the equalizing carrier's operation. There the carrier, Seatrain, required, in addition to railroad tracks on the pier, "a supporting yard for sorting and holding cars, and car lifting facilities for transferring cars from the pier tracks to its vessels" which were not available at the ports equalized against. Such is not the case here. Stockton, the record shows, can accommodate all of the vessels of respondent conferences.

The striking down of the instant equalization rules, I am convinced, would be in furtherance of the will of Congress expressed by the Shipping Acts, section 205 of the Merchant Marine Act, 1936, and its several enactments respecting the port of Stockton itself. The absence of the equalization rules, moreover, would leave carriers free to serve or not serve Stockton as they desire, unencumbered by artificial devices designed to frustrate the growth of the port and calculated to checkmate the establishment of any carrier giving Stockton regular scheduled service.

AMENDED ORDER

This amended order is to be attached to the report in this proceeding in lieu of the order served September 24, 1965, in this proceeding.

Full investigation of the matters and things involved in this proceeding has been had, and the Commission on September 24, 1965, has made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof. The Commission found in said report, *inter alia*:

¹⁰ Cited favorably as recently as 1960 in *Proportional Rates on Cigarettes and Tobacco*, 6 FMB 48 (1960).

1. That the equalization rules of the respondents (Pacific Westbound Conference, Pacific Straits Conference and Pacific/Indonesian Conference, and the members of these conferences), to the extent that they provide for or permit equalization of inland transportation from shipper's point of origin to any terminal port located on the harbor of San Francisco Bay and its connecting waters (the existing ports so designated and described being the ports of San Francisco, Oakland, Alameda, Richmond, Stockton, Sacramento), on cargo loaded at Los Angeles or Long Beach, Calif., are violative of section 15 of the Shipping Act, 1916;

2. That the equalization rules of the above conferences and their members providing for or permitting equalization of inland transportation from shipper's point of origin to any of the said terminal ports located in the harbor of San Francisco Bay and its connecting waters on cargo loaded at any other of said terminal ports are unclear in their references to cargo "which would normally move"; and

3. That Pacific Westbound Conference and its member lines have engaged in practices with respect to payment of purported "equalization" in connection with citrus fruit not provided for in their tariff in violation of section 18b) of the Shipping Act, 1916.

Therefore, it is ordered:

1. That the respondents cease and desist from applying their equalization rules to cargo loaded at Los Angeles or Long Beach, and that modifications of their equalization rules to exclude their application to cargo loaded at such ports be filed within 30 days of service of this order;

2. That the respondents, in so modifying their rules, omit the characterization of cargo as that "which would normally move" from certain ports; and

3. That respondent, Pacific Westbound Conference and its member lines cease and desist from their present practices with respect to payment of purported "equalization" in connection with citrus fruit in violation of their tariff.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX A

Rule No. 2 of Pacific Westbound Conference

(The "equalization rule," so far as it relates particularly to the port of Stockton, is *italicized*.)

Subject to rules 5, 7, and 9, rates are based on direct loading at conference terminal loading ports or docks. However, individual member lines may, in lieu of a direct call, absorb the cost of transshipment between terminal ports; or between terminal ports and nonterminal ports; also between nonterminal ports. Reference to nonterminal port absorption applies only if the nonterminal ports have the required minimum tonnage as specified in rule No. 9, or elsewhere in this tariff. *Carriers may equalize between terminal ports only from point of origin, as provided and subject to the limitations set forth herein.¹⁷ Equalization is the absorption by the carrier of the difference between shipper's cost of delivery to ship's tackle at terminal dock at nearest conference terminal port and the cost of delivery to ship's tackle at terminal dock and port of equalizing line. Conference terminal ports and docks are those named in rule No. 5. Conditions and limitations as to equalization follow:*

(a) *Equalization shall not exceed an absorption in excess of 35 percent of the ocean freight, including handling charges and wharfage.*

(b) A carrier may not equalize between terminal ports and nonterminal ports, or between nonterminal ports or between docks within a port.

(c) When the inland cost of transportation from point of origin is lower to terminal ports in Oregon, Washington, or British Columbia than via California terminal ports, equalization may be applied via California terminal ports only on shipments of deciduous fruits and dairy products (see note below covering explosives) and such equalization shall be permitted only so long as there is not adequate service from the terminal port in Oregon, Washington, or British Columbia,

¹⁷ In the Pacific Straits Conference rule and the Pacific/Indonesian Conference rule, the following appears in lieu of the foregoing 4 sentences:

Rates are based on direct loading at loading ports or docks, but the individual member line carriers may meet the competition of other member lines loading direct at terminal ports or docks, either by transshipment or by equalization from point of origin.

Otherwise the rules of the three conferences are substantially the same, insofar as they relate to the port of Stockton.

to which the cargo is tributary, to meet the needs of shippers of these commodities.

NOTE: Equalization on explosives is not permitted except that in the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing from a terminal through which explosives would normally move at a date which reasonably will meet the needs of such shipper or his consignee, equalization shall be permitted on such shipment, *Provided*, that the shipper certifies to the conference the need for space on such date and allows 48 hours after receipt of such certification for the conference to indicate the conference carriers who can provide space on a direct sailing which reasonably will meet the shipper's needs.

(d) Equalization is permitted on shipments of fresh fruits, which would normally be shipped via California terminal ports when shipped via terminal ports in Oregon, Washington, or British Columbia, when there is not adequate service from the California port, to which the cargo is tributary, to meet the needs of shippers of these commodities.

(e) *Cargo which would normally move from one terminal port in Oregon, Washington, or British Columbia, may be shipped under equalization through another terminal port in Oregon, Washington, or British Columbia, and cargo which would normally move from one California terminal port, may be shipped under equalization via another California terminal port.*

(f) *Equalization shall only be paid on the basis of the lowest applicable common carrier or contract carrier rates.*

(g) *In support of each claim for equalization the shipper must furnish the carrier a copy of transportation bill covering movement from point of origin.*

(h) *Prior to payment of equalization bills, carriers must submit to the conference on prescribed form a certified statement for confirmation and approval of applicable interior rates and/or the basis for equalization.*

FEDERAL MARITIME COMMISSION

No. 1216

ACTIVITIES, TARIFF FILING PRACTICES AND CARRIER STATUS OF CONTAINERSHIPS, INC.

Decided September 28, 1965

Containerships, by operating between fixed termini on a regular schedule and by soliciting major shippers of wheeled vehicles, held to be a common carrier by water in interstate commerce subject to section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933.

The Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, shall be construed to fulfill the remedial purposes thereof.

Gerald A. Malia, for respondent Containerships, Inc.

George F. Galland and *Amy Scupi*, for American Union Transport, Inc; *Carl H. Wheeler*, for Sea-Land Service, Inc.; and *Alan F. Wohlstetter* and *Ernest H. Land*, for Motorships of Puerto Rico, Inc., interveners.

Norman D. Kline and *Robert J. Blackwell*, 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*)

PROCEEDINGS

The Federal Maritime Commission instituted this investigation to determine whether respondent Containerships, Inc. has operated in violation of section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817), and section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844). These statutory provisions require common carriers by water in domestic offshore commerce to establish reasonable rates and to file these rates with the Commission. Therefore, the question to be determined in this proceeding is whether Containerships has been operating as a

common carrier by water in interstate commerce as defined in section 1 of the Shipping Act, 1916 (46 U.S.C. 801) ; if so, Containerships, by not having appropriate tariffs on file with the Commission, has operated unlawfully.

In February 1965, Containerships ceased operations because its vessel was placed in the custody of the mortgagee.

FACTS

Respondent Containerships began service, utilizing its vessel, the *New Yorker*,¹ in the southbound trade from the U.S. North Atlantic ports to Puerto Rico in October 1963.

For its southbound service, Containerships filed two tariffs with the Commission. Tariff No. 1 covered wheeled vehicles, and Tariff No. 2 covered numerous general commodities. Northbound, Containerships time chartered the *New Yorker* to American Seatraders, Inc. for the transportation of refined sugar for the account of the time charterer from Puerto Rico to U.S. North Atlantic ports.²

During this period the *New Yorker* made two to three sailings per month from Port Newark to Puerto Rico. Containerships, however, carried no general cargo, only wheeled vehicles.³ About 100 vehicles can be carried on the main deck, but with the planned installation of racks similar to those used by over-the-road motor carriers of automobiles, the capacity of the main deck can be doubled to 200 vehicles. These racks would be on hinges and would swing flush to the main-deck ceiling when sugar is carried northbound.

On October 29, 1964, Containerships notified the Commission that it would withdraw its tariffs and cease common carrier operations, effective October 30, 1964, although the cancellation of Tariffs No. 1 and 2 was made effective November 28, 1964. Beginning with Voyage No. 32, which sailed from New York on October 30, 1964, Containerships, considering itself to be a "contract" carrier exempt from tariff-filing requirements, operated without reference to a common carrier tariff on file with the Commission.

During the 30-day period between filing and effective date of the tariff cancellation, the *New Yorker* made three voyages. Although a tariff was still in effect, Containerships carried tractors and other units for International Harvester at rates other than the tariff rates.

¹ The *New Yorker* cost \$4,100,000 in 1960, is a twin-screw diesel, has a 16-knot surface speed, a crew of 24, and uses roll-on/roll-off loading and unloading through stern doors to its main deck which is unobstructed by bulkheads. Cargo can be handled to and from its upper or weather deck by the lift-on/lift-off method.

² The northbound operations were not alleged to be in violation of law.

³ The *New Yorker* was designed to handle containers and pallets. Consequently, it is more suitable for carrying trucks and automobiles than break-bulk cargo.

However, automobiles shipped on these voyages, as well as on the remaining voyages in 1964, were transported at the former tariff rates. Despite cancellation of its tariffs, Containerships continued to apply its former tariff rates on automobiles throughout the period that its legal status was pending before the Commission, so that shippers would receive equitable treatment regardless of the change in operation.

Since October 29, 1964, Containerships has transported wheeled vehicles (automobiles and trucks), cranes, and tractors. It has also unsuccessfully solicited liquid cargo for the *New Yorker's* unused tank space below the main deck.⁴

Containerships' expressed policy since October 29 has been to limit service to three or four shippers per voyage southbound, in the belief that such a limitation constitutes contract, exempt carriage. In order to preserve its image as a contract carrier, Containerships has rejected offerings of cargo from small shippers. Instead, it has executed a contract with one major shipper and negotiated with several others who, it hopes, will sign similar contracts. In this connection, Containerships has solicited General Motors, Chrysler, American Motors, and other important automobile shippers, who account for an estimated 95 percent of all new automobiles shipped to Puerto Rico, in an attempt to fill the capacity of its vessel without serving more than three shippers. Again, this number was selected because of its supposed relation to contract carriage. Containerships will turn to smaller shippers only if it is unable to sign the major manufacturers. Containerships' solicitation is limited primarily to wheeled vehicles, and it does not need to solicit the vast number of automobile dealers who sell Chrysler, General Motors, and American Motors products in Puerto Rico, because these companies maintain a single dealer who distributes to various dealers under his distributorship. Containerships has solicited roughly eight or nine potential customers, but shippers do not appear to be eager to sign contracts, particularly General Motors, which has shown reluctance to enter into a long-term commitment.

As of January 5, 1965, only one shipper had executed such a contract, the Hull-Dobbs Co. of Puerto Rico, a Ford dealer in San Juan. Pursuant to this agreement, Containerships undertakes to provide 30 voyages per year and 1 million cubic feet of under-deck space on the *New Yorker* for the carriage of vehicles. Port of loading will be Port Newark, N.J., with discharge at San Juan or Ponce, Puerto Rico. The shipper agrees to pay \$340,000 over the 30-voyage year, with pro rata payments on completion of each voyage. This actually represents \$0.32 per cubic-foot plus \$0.02 arrimo (port charge) multiplied by

⁴ Below the main deck, the *New Yorker* has considerable tank space suitable for liquid cargo.

1 million cubic feet, which corresponds to the rate in the withdrawn tariff.⁵ The shipper may utilize more than 1 million cubic feet and the contract permits Containerships to provide less than 30 voyages. Under such circumstances, the annual amount of compensation will be adjusted upward or downward. Efforts to sign Chrysler, General Motors, and International Harvester have been unsuccessful. Although additional contracts with other Ford dealers have been drafted, efforts to execute them have ceased since these dealers are permitted to utilize the space provided to Hull-Dobbs.

Shippers other than Hull-Dobbs have negotiated with Containerships, but none has finalized a long-term agreement. The unexecuted contracts with these shippers are almost identical with the Hull-Dobbs agreement. The International Harvester agreement provides for 100,000 cubic feet of space on deck for 30 voyages. The shipper pays various rates per cubic foot on motor trucks, station wagons, ambulances, tractors, etc., for each voyage. A contract with Boricua Motors Corp. grants the shipper 1 million cubic feet of space for 30 voyages rated at \$0.32 per cubic-foot for vehicles plus \$0.02 arrimo.

Contract with Mayaguez Motors provides 100,000 cubic feet at \$0.32 per cubic foot plus \$0.02 arrimo for 30 voyages. A contract with Southern Auto Sales Corp. provides 200,000 cubic feet at the same rate. A similar contract with Caribe Motors, Inc., follows the same form, but the amount of space and rate per cubic foot have not been inserted. All are made subject to the same 13 paragraphs of the contract of affreightment. The contracts provide 30 sailings annually for each shipper. This represents the approximate number of sailings made by the *New Yorker* during the 12-month period prior to October 30, 1964. The shipper cannot exercise control over the number of sailings and the contracts impose no penalty if the carrier provides less than 30 voyages per year. The shipper likewise cannot arrange sailings per month or week to suit his convenience.

The amount of space assigned to each shipper by the contracts represents an estimate of the particular shipper's requirements based on the previous year's experience. However, the contracts provide for additional space should the shipper so require. On the other hand, the shipper cannot control the number of automobiles to be carried on any one voyage.

Containerships attempted to provide an amount of space which would most nearly approximate the estimated requirements of its shippers. With respect to the automobile dealers other than Hull-Dobbs, such an estimate was sometimes difficult. If the estimate was wrong

⁵ This represents the approximate space requirements for 2,000 automobiles.

and the shipper failed to furnish the number of automobiles required to fill his assigned space, Containerships could theoretically bring legal action, but Containerships does not really intend to insist upon this right. The carrier and shipper will operate very flexibly under these contracts. Thus, if Hull-Dobbs fails to use its space, it can assign the space to another Ford dealer despite the fact that paragraph 12 of the contract of affreightment incorporated into the main contracts forbids such assignment. On the other hand, Containerships can utilize any unused portion of the shipper's space for its own use.

With respect to on-deck space, Containerships is perhaps even more flexible. The International Harvester contract provides for a minimum of 100,000 cubic feet on deck, although Containerships fully expects the shipper to use more space. If so, he will be granted as much space as he requires. Containerships' contracts are instruments by which it can guarantee to shippers a long-term rate; in this case, for 1 year. Under its tariff, of course, the carrier could alter its rate on 30 days' notice. However, the shipper is not bound to ship via Containerships exclusively during the year.

Containerships does not advertise its service nor does it publish sailing schedules, and it has withdrawn its tariff. It conducts its solicitation in the form of negotiation of long-term contracts with desirable shippers.

Containerships maintains a schedule of two or three sailings per month similar to that which existed prior to October 30, 1964, between Newark and ports in Puerto Rico. Containerships must expedite sailings of the *New Yorker* in order to meet its sugar commitments northbound from Puerto Rico; it has little interest in serving a large number of shippers. Sometimes these commitments require fast turnaround; at other times, the charterer of the vessel on the northbound leg will delay the vessel due to sugar shortages in Puerto Rico. Consequently, service southbound operates without precise sailing dates.

In place of bills of lading previously issued, Containerships now issues cargo receipts; its most important shipping documents, however, are contracts of affreightment between Containerships and particular shippers. Among its provisions are those which subject the carrier's liability to the Harter Act, allow alterations of voyage itineraries, grant the carrier the right to utilize the unused portions of the shipper's space for its own use, and forbid a shipper from assigning his space.

We will briefly compare the essential characteristics of Containerships' operations before and after October 1964.

The variety and type of cargo and the number and identity of shippers did not basically change. The number of voyages and schedule of the *New Yorker* remained the same. The voyage itineraries are identical. Insurance is essentially unaltered. The rates on automobiles have not changed. The physical structure of the *New Yorker* is the same as are the handling and delivering methods employed by Containerships.

Some changes did occur. Containerships now calls itself a "contract carrier" and disclaims the obligations of common carriage. It has withdrawn its tariffs. It now solicits preferred shippers and guarantees them long-term rates pursuant to contracts instead of tariffs. It rejects shipments of small volume and announces that it will limit the number of shippers to three or four. It issues "cargo receipts" instead of bills of lading, and entitles itself "contract carrier" on these documents.

DISCUSSION AND CONCLUSIONS

The question to be determined by this Commission is whether Containerships, in light of the facts describing its operations, is a common carrier by water in interstate commerce.

In his initial decision, Examiner Charles E. Morgan found Containerships' operations to be that of a common carrier. Noting that no single factor by itself is determinative of the status of a carrier, he found several factors to be pertinent: The respondent is clearly not a private carrier nor a tramp operator. It has only one executed contract which is with a consignee, not with the shipper who pays the freight charges. Respondent's executed contract and its unexecuted contracts generally are contracts of "intent" only, as may be concluded not only from the use of the word "intend" in most contracts, but also from respondent's own description of them as not being subject to a legal claim. There is no penalty in the contracts if the shipper uses the services of other carriers in the trade. The shipper cannot control the number of vehicles to be carried or the space used on any one voyage.

The Presiding Examiner found in general that the contracts seem not to have changed respondent's former relationship with its shippers. Respondent's operations since October 30, 1964, are little different than before. The same number of voyages, the same insurance, the same regular routes, the same ports served, the same physical services, are characteristics of both respondent's early operations and of its recent operations. The main difference in its recent operations is that respondent has refused to accept a few shipments from small-volume shippers, but considering the overall picture, this is insignificant. Ac-

cordingly, the Examiner concludes that Containerships has been and remains in its recent operations from October 30, 1964 and since, a common carrier in the trade from North Atlantic ports to ports in Puerto Rico.

The Commission's jurisdiction over carriers is set forth in section 1 of the Shipping Act, 1916.⁶ That section provides:

The term common carrier by water in interstate commerce means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

This decision hinges upon Containerships' amenability to this provision. This definition is descriptive, not categorical. Part of it describes the legal word of art, common carrier—"transportation by water of * * * property on the high seas * * * on regular routes from port to port;" part of the definition describes another legal word of art, interstate commerce—"transportation by water * * * between one State * * * of the United States and any other State, territory, district, or possession of the United States * * *." Since common carrier is defined in terms of common carrier, we must look elsewhere to ascertain its meaning pertinent to Containerships' operations.

Thus, the term "common carrier" in section 1 of the Shipping Act means a "common carrier at common law." *Philip R. Consolo v. Grace Line Inc.*, 4 F.M.B. 293, 300 (1953); *Galveston Chamber of Com. v. Saguenay Terminals et al.*, 4 F.M.B. 375, 378 (1954); *Agreement No. 7620*, 2 U.S.M.C. 749, 752 (1945); *Bernhard Ulmann Co., Inc. v. Porto Rican Express Co.*, 3 F.M.B. 771, 775 (1952). The Commission has examined the indicia of "common carrier at common law" on numerous occasions. The most frequently mentioned characteristic 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,⁷ *Transportation by Southeastern Terminals & S.S. Co.*, 2 U.S.M.C. 795, 797 (1946). In *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293, 300 (1953), the Commission cited *The Wildenfels*, 161 Fed. 864, 866 (1908) as follows:

The essential characteristics of the common carrier at common law are that he holds himself out to the world as such; that he undertakes generally and for all persons indifferently to carry goods for hire . . .

⁶ Section 5 of the Intercoastal Act provides:

"The provisions of this Act are extended and shall apply to every common carrier by water in interstate commerce, as defined in section 1 of the Shipping Act, 1916."

⁷ Included in the concept of holding out are such factors as solicitation, advertising, tariff filing, and contractual limitations.

Elsewhere the Commission defined a common carrier as, "one transporting goods from place to place for hire, for such as see fit to employ him . . .," *Transportation—U.S. Pacific Coast and Hawaii*, 3 U.S.M.C. 190, 197 (1950).

However, the Commission has held that it is not necessary for a carrier to hold himself out to transport all commodities for all shippers. "A line may be a common carrier of certain commodities as long as it is willing to carry those commodities for all who wish to ship them." *Investigation of Tariff Filing Practices*, 7 F.M.C. 305, 318 (1962). In addition to the "holding out" criterion, multiple other factors may create or obviate common carrier status. Thus, in some instances the common carrier may advertise sailings, solicit freight, and issue bills of lading. *In Re Coast S.S. Co.*, 1 U.S.S.B.B. 230 (1931); *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 440, 445 (1935). But common carrier status is not lost by the carrier's failure to publish sailing schedules or advertise. *Transportation—U.S. Pacific Coast and Hawaii*, 3 U.S.M.C. 190, 196, (1950).

Certainly an important factor is the regularity of service between ports. Section 1 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 language was also inserted to exempt from regulation tramps, which has been described by the Commission to be a "free lance" with a "gypsy like existence;" it has "no regular time of sailing and no fixed route and is ever seeking those ports where profitable cargo is most likely to be found." *Rates of General Atlantic S.S. Corp.*, 2 U.S.M.C. 681, 683 (1943).⁸

For that matter, the Commission has held that common carrier status can be acquired without regular calls at ports or regular sailings and even without sailing schedules. *Alaskan Rates*, 2 U.S.M.C. 558, 580 (1941); *Rates of General Atlantic S.S. Corp.*, 2 U.S.M.C. 681, 683, 684 (1943). Moreover, common carrier status may survive even if the carrier chooses not to solicit cargo. *Transp. by Mendez & Co., Inc., Between U.S. and Puerto Rico*, 2 U.S.M.C. 717, 720 (1944).

The number of shippers, either per voyage or otherwise, is not determinative of status. The Commission has indicated that two shippers per voyage creates a presumption of common carriage. *Transp. by Mendez & Co. Between U.S. and Puerto Rico*, 2 U.S.M.C. 717, 720 (1944); *D. L. Piazza Company v. West Coast Line, Inc., et al.*, 3 F.M.B.

⁸ As the Commission has stated:

The primary purpose for the insertion in the statute of the phrase "on regular routes from port to port" was to exclude from regulation traffic transported by tramp vessels. *Alaskan Rates*, 2 U.S.M.C. 558, 580 (1941); *Transportation—U.S. Pacific Coast and Hawaii*, 3 U.S.M.C. 190, 198 (1950).

608, 612 (1951). However, other cases hold that a carrier is not common though considerably more than two shippers are served. *New York Marine Co. v. Buffalo Barge Towing Corp.*, 2 U.S.M.C. 216, 219 (1939).

The carriage of cargo pursuant to special contracts also is not determinative of status. Every movement of cargo is subject to some contract or agreement 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 exemptions in the bills of lading or other contracts of affreightment. *Transportation—U.S. Pacific Coast to Hawaii*, 3 U.S.M.C. 190, 196 (1950). In *Investigation of Tariff Filing Practices*, 7 F.M.C. 305, 320 (1962), a carrier contended that it was not offering common carrier service since it did not advertise, solicit, or publish a sailing schedule and carried cargo only after it had secured a negotiated written transportation agreement with the shipper. The Commission rejected all these contentions and stated with respect to the last:

"It cannot be successfully contended at this late date that a carrier may avoid common carrier status by insisting on a transportation agreement with each shipper. All cargo carried for compensation moves on some form of transportation agreement, express or implied." 7 F.M.C. at page 321.

In *General Increases in Rates (1961)*, 7 F.M.C. 260, 280 (1962), the Commission stated that a special arrangement to secure the business of a shipper did not of itself convert the arrangement into one of contract carriage.⁹

The Commission has recognized that under some circumstances, a common carrier may execute contracts with particular shippers for the carriage of large volumes of cargo. This system does not abrogate common carrier status. The contracts are actually forward booking agreements.¹⁰

While the Commission has expressed general guidelines, the question in final analysis requires *ad hoc* resolution. In *Bernhard Uhlmann Co., Inc. v. Puerto Rican Express Co.*, 3 F.M.B. 771, 775 (1952), the Commission aptly stated that a carrier's status is determined by the nature of its service offered to the public and not upon its own declarations. A close look at its activities is necessary.

⁹ Other cases hold that contractual arrangements are not incompatible with common carriage. See *D. L. Piazza Co. v. West Coast Line, Inc., et al.*, 3 F.M.B. 608, 612 (1951); *Transportation—U.S. Pacific Coast and Hawaii*, 3 U.S.M.C. 190, 196 (1950).

¹⁰ In *Banana Distributors Inc. v. Grace Line, Inc.*, 5 F.M.B. 615 (1959), affirmed 280 F. 2d 790 (1960), the Commission ordered the carrier to execute 2-year agreements with banana shippers which would constitute forward booking and relieve a shortage of space for this cargo. The Commission stated that "forward booking is not new to common carriage." 5 F.M.B. at page 626. See also *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 (1953).

The determination of a carrier's status cannot be made with reference to any particular aspect of its carriage. 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. The absence of one or more of these factors does not render the carrier noncommon, and common carriers may partake of some or all of these enumerated characteristics in varying combinations. A carrier may be clothed with one or more of the characteristics mentioned and still not be classified a common carrier. It is important to consider all the factors present in each case and to determine their combined effect.

As the Commission has previously stated: “‘common carrier,’ however, is not a rigid and unyielding dictionary definition, but a regulatory concept sufficiently flexible to accommodate itself to efforts to secure the benefits of common carrier status while remaining free to operate independent of common carriers’ burdens.” *Puget Sound Tug and Barge v. Foss Launch and Tug Co.*, 7 F.M.C. 43, 48 (1962).

Considering Containerships’ operations in terms of the foregoing precedents, we believe Containerships to be a common carrier. Containerships operates between fixed termini on a regular schedule. Consequently, it meets the initial and most important prerequisite of Commission jurisdiction: the one explicitly set forth in section 1—“on regular routes from port to port.”

Furthermore, we find that Containerships sufficiently meets the common law notion of “holding out.” Initially we agree as mentioned above that a carrier may be a common carrier of one or a few commodities. Thus, the fact that Containerships’ solicitation of shippers or consignees of wheeled vehicles does not oust the Commission of jurisdiction. To be sure, Containerships limits itself to carriage of one type of commodity—wheeled vehicles. The shippers they solicited admittedly are small in number, but they constitute the major producers of automobiles and account for 95 percent of the new cars shipped to Puerto Rico. In other words, Containerships has held itself out as a carrier of a type of cargo (wheeled vehicles) for all who wish to ship them. The fact that they refused service to a few small shippers is inconsequential. “The public does not mean everybody all the time.” *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252 (1916).

In our view, Containerships’ self-assumed status as a contract car-

rier is legally meaningless. Substitution of contracts of affreightment for bills of lading, particularly where no substantive change results, is no more than a transparent attempt to avoid regulation. We will look beyond documentary labels. It is clear that Containerships has not altered its documentation substantially. Moreover, 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.

Neither do forward booking contracts somehow convert the regulated carrier to the unregulated. A closer look at the "contracts" Containerships has with its shippers shows that they are merely contracts of intent. It is evident that both Containerships and the individual shippers are willing to allow great flexibility in adherence to the terms of the contract. This being true, it follows that Containerships is not less a common carrier by reason of having these "contracts." It is still free to solicit other customers to use the cargo space supposedly "contracted" to specific shippers. Consequently, we hold that Containerships is and has been a common carrier by water amenable to the proscriptions of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

We consider now Containerships' exceptions to the initial decision. It is impractical to consider the exceptions *seriatim* for they simply reiterate, through various facets of the same argument, the claim that Containerships' operations are consistent only with contract carriage and that to find otherwise is to overlook the facts and the applicable case law.

First of all, we consider the concept of contract carriage itself. The term "contract carrier" appears nowhere in the Shipping Act, which mentions only common carriers and tramps. The Intercoastal Shipping Act, 1933, originally conferred jurisdiction over "every common and contract carrier by water engaged in the transportation for hire of passengers or property between one State of the United States and any other State of the United States by way of the Panama Canal." (46 U.S.C. 843.)

Prior to 1940, the Commission pursuant to this authority asserted jurisdiction over intercoastal contract carriers. *Intercoastal Charters*, 2 U.S.M.C. 154 (1939); *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 458, 461, 468 (1935).

The Transportation Act of 1940 (49 U.S.C. 901-923) considerably altered the jurisdictional scheme set forth above. The 1940 Act transferred 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, and the jurisdiction remaining in the Commission was limited to "common carriers." Consequently, "contract carrier" as a legal entity has no significance before the Commission.¹¹ Under the circumstances, Containerships' attempt to clothe itself with the ICC concept of "contract carrier" is meaningless.¹² Thus, Containerships is either a common carrier or something else. The cases showing what may or may not constitute contract carriage are inapposite.

For that matter, the cases relied upon by Containerships are distinguishable. Principally, *U.S. v. Contract Steel Carriers*, 350 U.S. 409 (1956) and *Home Ins. Co. v. Riddell*, 252 F. 2d 1 (1958), are cited as authority for the conclusion that Containerships is a contract, exempt carrier.

The *Contract Steel* case involved a motor carrier who held licenses from the ICC covering contract carriage of steel articles to and from three major cities over irregular routes. The carrier secured many new contracts with shippers as a result of active solicitation. In spite of the solicitation, the Supreme Court held the carrier was a contract carrier.

The case stands for the proposition that a contract carrier licensed by the ICC may solicit new business within the limits of its license without changing its carrier status. It does not stand for the proposition that solicitation is not an indication of common carrier status. Other factors—that the carrier was licensed as a contract carrier and the fact that it operated over irregular routes—outweighed the solicitation factor in *Contract Steel*. In this case, however, these two factors are absent, and the solicitation factor becomes very weighty with little to counterbalance it.

The *Riddell* case involved a motor carrier in a proceeding unrelated

¹¹ Section 320(a) of the Interstate Commerce Act (49 U.S.C. 920) (part of the Transportation Act of 1940) states that:

"The Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, are hereby repealed insofar as they are inconsistent with any provision of this part and insofar as they provide for the regulation of, or the making of agreements relating to, transportation of persons or property by water in commerce which is within the jurisdiction of the Commission under the provisions of this part; and any other provisions of law are hereby repealed insofar as they are inconsistent with any provision of this part."

¹² Actually, Containerships cannot qualify as a contract carrier as the term was previously construed by the Commission's predecessors which defined contract carrier as follows:

"Although the act does not define contract carriers, this term includes every carrier by water which under a charter, contract, agreement, arrangement, or understanding, operates an entire ship, or some principal part thereof, for the specified purposes of the charterer during a specified term, or for a specified voyage, in consideration of a certain sum of money generally per unit of time, or weight, or both, or for the whole period or adventure described." *Intercoastal Investigation*, 1935, 1 U.S.S.B.B. 400, 458 (1935); *Intercoastal Charters*, 2 U.S.M.C. 154, 162 (1939).

Containerships and their contract shippers cannot meet this test.

to regulation. The carrier was held to be a contract carrier on the basis of a peculiar factual situation, in which among other things, the carrier continuously negotiated rates with shippers which could differ from day to day even with the same shipper. Containerships does not resemble this motor carrier. Containerships' policy was to establish and maintain a long-term rate with each shipper pursuant to contract. And the court in the *Riddell* case was not concerned with regulatory problems.

Containerships excepts further to the fact that the Examiner placed reliance on the fact that the "contracts" did not bind shippers to use its vessel; and also excepts to the fact that the Examiner indicated that serving two large-volume shippers and one or two others on regular routes constituted common carriage.

Citing *Transp. by Mendez & Co. Inc., Between U.S. and Puerto Rico*, 2 U.S.M.C. 717 (1944), a case in which a carrier, operating between regular ports of call, was labeled not to be a common carrier, respondent seeks to belittle the value of the "fixed termini" criterion. As already noted, "regular routes from port to port" explicitly stated in section 1 is a most important factor in deciding carrier status. We do not say it is the only factor; it may be outweighed by other facts. Here it is not. The continuing argument is made that "fixed termini" are consistent with contract carriage and that Containerships' other activities are consistent only with contract carriage. But Containerships' activities in whole are merely consistent with Containerships' failure to live up to its common carrier duty, nothing more.

The contracts are simply devices to guarantee long-term rates to the extent selected, large-volume shippers may wish to use them. And the fact that Containerships transported cargo for no more than two shippers per voyage is also not of controlling consequence, for Containerships actively solicited all major shippers of wheeled vehicles.

Containerships contends that the Examiner erred in stating that it would turn to smaller shippers if it were unable to fill its vessel from cargo from major shippers. Perhaps Containerships would not, but this decision does not rest on this finding. Containerships is a common carrier irrespective of whether it would attempt to fill out its vessel with offerings from low-volume shippers.¹³

This conclusion is more easily reached and becomes especially important if it is considered in light of the purposes of the shipping acts and the Commission's responsibility for regulation in this area.

¹³ Respondent excepts in other respects. In such cases we either have not relied upon the material in the Examiner's decision to which exception was taken or we have not ruled because the exception was superficial. Each substantive exception was directed to the Examiner's conclusion and is discussed above.

In general, those purposes are to regulate carriers by water in foreign or domestic offshore commerce. One of the purposes of the Shipping and Intercoastal Acts was to remedy various discriminatory practices prevalent in the shipping industry concerning establishment and maintenance of rates and fares. The acts, however, limit the Commission's regulatory jurisdiction in this matter to "common carriers." In order to effectuate the remedies intended by the enactment of a regulatory statute such as these, it is necessary to allow flexible and liberal interpretation of the statute. In this respect the court, in *I.C.C. v. A. W. Stickle and Co.*, 41 F. Supp. 268, 271 (1961) (a case involving applicability of the term "common carrier" as used in the Interstate Commerce Act, § 201-227, 49 U.S.C. 301-327), stated:

"[I]n determining the true nature of the transportation, it is necessary to have in mind the purpose of the Act. . . . In addition, the court should have in mind the fact that this legislation is remedial and should be liberally interpreted to effect its evident purpose and that exemption from the operation of the act should be limited to effect the remedy intended."

Consequently, in addition to commonlaw concepts, this case contains an important practical question of Commission responsibility. If Containerships is exempt from regulation by the Commission, the remedial purposes of the Shipping and Intercoastal Acts will not be fulfilled. In the Puerto Rican trade, unregulated operations of carriers may be particularly harmful. Thus the Commission may also examine its jurisdiction in terms of its statutory responsibility—to regulate rates in the Puerto Rican trade. Containership may ship wheeled vehicles at a rate advantage against other carriers in this trade who are subject to the Commission's rate order, if Containerships is found not to be a common carrier. This would effectively stultify the Commission's efforts to stabilize the Puerto Rican trade.

To decide that Containerships is not a common carrier would result in giving it an advantage enjoyed by none of its competitors. It would be free to monopolize the vehicle trade to Puerto Rico at whatever price it desired to set. Its competitors, meanwhile, would be bound by the minimum rate announced in tariffs on file with the Commission. Such a result would be totally contrary to the previously-mentioned purpose of the shipping acts.

In a similar case involving the Interstate Commerce Act, in which a towing company claimed exemption from the Act's provision on the grounds that it was not a common carrier, *Cornell Steamboat Co. v. United States*, 321 U.S. 634, 637 (1944), the Supreme Court stated:

The act in which Congress has included this definition is designed, not to determine the legal status of vessels for all purposes, but to provide for reg-

ulation of the rates and services of competing interstate water carriers as part of a broad plan of regulation for all types of competing interstate transportation facilities. Cornell is in active competition with other types of interstate water carriers as well as with trucks and railroads. Therefore, if Cornell's particular method of providing water transportation facilities for others is not subject to regulation under the act, it would appear to present an anomalous exception to the congressional plan for regulation of competing transportation activities. We conclude that the language of the act brings Cornell's business within its coverage, and that to construe the act otherwise would frustrate the purpose of Congress.

In *California v. United States*, 320 U.S. 577, 584 (1944), this responsibility was discussed in terms of terminal operators. The Court stated:

The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers. California and Oakland furnished precisely the facilities subject to regulation under the Act, and with so large a portion of the nations dock facilities, as Congress knew (53 Cong. Rec. 8276), owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental facilities.

This rationale—that niceties of State or municipal control are not disqualifying to regulation—is even more persuasive in light of patent attempts of a carrier confronted with the prospect of being ordered to conform along with its competitors to a fair, uniform rate on automobiles. As we found in Docket No. 1145,1167; *Reduced Rates on Automobiles—Atlantic Coast Ports to Puerto Rico*, the automobile movement makes up a sizable portion of all shipments to Puerto Rico. We can, therefore, expect that a loss of automobiles by the regulated carriers as a result of a rate advantage in favor Containerships will have a resultant chaotic impact on the overall Puerto Rican rate structure. Under these circumstances, regulation of the Puerto Rican automobile trade without the inclusion of Containerships would be difficult, not to say unfair to the other carriers in the trade. Consequently, we feel that to construe the shipping acts not to include Containerships within the definition of common carrier would frustrate the purpose of Congress.

It is concluded that respondent, Containerships, Inc., as evidenced through its activities, was, both prior to revocation of its tariffs and after that date, a common carrier in the trade from North Atlantic ports to ports in Puerto Rico. As a common carrier without a tariff on file, the respondent was in violation of section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933.

An order will be entered requiring respondent to cease and desist hereafter from operating unlawfully, and requiring it to file an appropriate tariff before resuming operations.

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether Containerships, Inc., has operated in violation of section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817) and section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844). The Commission has this date entered its Report stating its findings and conclusions, which Report is made a part hereof by reference, and the Commission has found that Containerships, Inc., operated as a common carrier in interstate commerce as defined in section 1 of the Shipping Act, 1916 (46 U.S.C. 801) without a tariff on file with the Commission in violation of section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933.

Therefore, it is ordered, That Containerships, Inc., cease and desist hereafter from operating in violation of section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933, as found herein, and that Containerships, Inc., shall file an appropriate tariff as required by these provisions before resuming operations.

(Signed) THOMAS LISI,
Secretary.

9 F.M.C.

FEDERAL MARITIME COMMISSION

No. 1203

APPLICATION FOR FREIGHT FORWARDING LICENSE YORK SHIPPING CORPORATION

Decided October 5, 1965

Application for freight forwarding license denied.

An employee in a firm, a confirming house and a shipper in the foreign commerce of the United States, does not qualify as an independent ocean freight forwarder as defined in Public Law 87-254.

There is *no* proviso in Public Law 87-254 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 yet exercised.

Arnold Kronish, for applicant.

J. Scot Provan and *Robert J. Blackwell*, 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*):

This proceeding is before us on exceptions of Hearing Counsel to the initial decision of Examiner Edward C. Johnson in which he concluded that the applicant York Shipping Corp. (York) should be granted a license as an independent ocean freight forwarder.¹

Hearing Counsel excepts to the Examiner's conclusion on the ground that because of its relationship with American & Foreign Trade Corp. (A. & F.), York cannot qualify as an "independent ocean freight forwarder." It is Hearing Counsel's position that there exists the possibility of control over the operations of York by A. & F. because

¹ Section 1 of the Shipping Act, 1916, in part states:

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

York's sole owner, M. H. Nozik, is an office manager of A. & F., and that this possibility of control disqualifies York as an "independent ocean freight forwarder." Hearing Counsel's position is grounded on the premise that Nozick is completely dependent upon A. & F. for his livelihood and is therefore completely subject to the latter's control. York on the other hand contends that although its sole owner, Nozick, is an employee of a shipper to foreign countries, neither the existence or the exercise of any control over York by A. & F. has been shown in the record. York argues that the mere inference or possibility of control does not disqualify York as an "independent ocean freight forwarder" under section 1.

FACTS

A. & F. is defined in the record as a confirming house which represents importers in the trade of South Africa. It pays for the orders placed by South African importers (finances the shipments) and ships the merchandise, and it appears as shipper on the bills of lading and on the import documents. A. & F. therefore is a shipper and seller of shipments in foreign countries within the meaning of the act and does its own freight forwarding.

York was issued FMB Registration No. 438 on July 13, 1950, and ever since has been located on the same premises with A. & F. at 225 West 34th Street, in Suites 1118 and 1119, New York City. Mr. M. H. Nozick is director and officer and sole stockholder of York; is a full-time salaried employee of A. & F. as office manager and supervises the daily activities of A. & F. and has been closely associated with A. & F. since 1946 and derives his primary source of income from A. & F. which in 1963 was approximately \$9,000 as contrasted with some \$1,500 from York in its freight forwarding activities. As employee and office manager of A. & F., Mr. Nozick uses some of the office equipment to conduct the business activities of York, which requires about 3 hours a week of his time for the purpose of engaging in his freight forwarding activities. His wife, although not active in the business, is president of York and Mr. Nozick is the secretary-treasurer. York is located in the same suite of rooms with some four other businesses including Wall & Co., Inc. (Wall), and York pays \$250 per year to Wall for the use of the space plus telephone service. Herbert Wall is president of A. & F. and also a director of Wall & Co., Inc. Both York and Wall & Co., Inc., have the same phone and the same address (although York maintains other listings naming York as a freight forwarder) and occupies the same office space. York, A. & F., and Wall & Co., use the same legal firm, the same bankers, and at the present time and since May 1963 have not provided any forwarding services for A. & F., although prior to May 1963 York serviced the

accounts of A. & F. and handled numerous shipments for A. & F. York receives business from clients of A. & F. and others and maintains records and bank accounts separate from those of A. & F. It bills its clients for freight forwarding services on its own invoices and serves a limited number of clients involving service for some 50 to 60 shipments a year. York usually pays the ocean freight on the shipments out of its own funds and is later reimbursed by its clients. York apparently has never appeared as a shipper on any bill of lading.

For the reasons set forth below, we disagree with the conclusion of the Examiner. Exceptions not discussed herein nor reflected in our findings have been considered by us and are denied as unsupported by reliable and probative evidence or as irrelevant to this decision.

DISCUSSION AND CONCLUSION

The issue before us here is whether York "directly or indirectly . . . is controlled by . . ." A. & F. which control could disqualify it for a license as an "independent ocean freight forwarder" as defined in section 1, by virtue of Nozick's employment as the office manager of A. & F. It has been established in the record that York is "carrying on the business of forwarding" and A. & F. is a ". . . a shipper of shipments to foreign countries . . ." as defined in section 1.

The Examiner recommended granting applicant a license because Hearing Counsel failed "to show persuasively and by a preponderance of the evidence that York is either controlled, or the power to control is exercised by someone else." Hearing Counsel excepts to the Examiner's conclusion primarily on the ground that it is the existence of control and not the actual exercise thereof that is determinative of an applicant's ability to qualify as "independent" freight forwarder.

We have, in the past, disapproved shipper-forwarder connections when it has been shown that these "connections" would have resulted in the operations of the forwarder being subject to the actual control of a shipper, thus perpetuating the existence of the type of "relationships" condemned by the Congress.

In our decision in *Application for Freight Forwarding License—William V. Cady*, decided September 22, 1964, we denied applicant a license because he failed to qualify as an "independent" freight forwarder.

The essential facts in both the *Cady* case, *supra*, and the present proceeding are for all practical purposes exactly similar. Both William V. Cady and M. H. Nozick:

1. Are employed full-time by shippers of goods in the U.S.-foreign commerce;

2. Utilize their employers' offices and equipment to conduct their forwarding activities;
3. Perform forwarding for their employers in their capacity of employees;
4. Do not charge forwarding fees or "compensation" on employers' shipments;
5. Are subject to the complete control of their employers;
6. Receive forwarding business from clients of their employers;
7. At one time, in their capacity as "freight forwarders," did forward shipments for their employers;
8. Are completely dependent upon their employers for their main livelihood;
9. Operate their freight forwarding activities on a part-time basis; and
10. Are able to operate *only* through the continued generosity and benevolence of their employers.

On the basis of these facts, we stated in *Cady* at 8 FMC 359:

On its face, the master and servant relationship between a shipper and licensed forwarder is inconsistent with the purpose of the act that forwarders eligible to receive compensation from carriers be neither shippers nor sellers nor controlled by either. . . . (Footnote omitted.)

. . . The present intentions of Cady and his employer are immaterial, since the statute makes licensing depend upon the existence of control and not upon its exercise or nonexercise. Public Law 87-254 does not allow licensing upon condition that the forwarder refrain from collecting compensation from carriers with respect to shipments made by the forwarder or someone controlled by or controlling him. . . .

Faced with the same essential facts in this proceeding we cannot agree that Nozick was not subject to the control of his employer. Therefore he is not qualified for a license under section 1. We do not read the freight forwarder definition in section 1 to mean that a shipper must actively exercise control over the operations of a freight forwarder to disqualify the latter from being licensed. There is no sound distinction that would render the *Cady* decision inapplicable here. What was said in *Cady, supra*, is applicable here, "The present intentions of [Nozick] and his employer are immaterial . . ." and Nozick's present intention to cease forwarding for A. & F. cannot qualify him for a license. We think it clear that our decision in the *Cady* case is dispositive of this proceeding.

Public Law 87-254 is aimed at preventing payment of "compensation" in the form of brokerage in situations where it may amount to rebating. Thus, the congressional aim was that no forwarder be licensed who is subject to the control of a shipper in foreign commerce, an association which in the past had been conducive to rebating.

There is no proviso in Public Law 87-254 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.

CONCLUSION

Applicant, as an employee in a firm, a confirming house and a shipper in the foreign trade of the United States, does not qualify as an independent ocean freight forwarder as defined in Public Law 87-254 and cannot be licensed.

An appropriate order denying the application will be entered.

ORDER

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

It is ordered, That the application for license of York Shipping Corp. is hereby denied pursuant to section 44(b), Shipping Act, 1916, and Rule 510.8 of General Order 4.

By the Commission.

(Signed) THOMAS LISI
Secretary.

FEDERAL MARITIME COMMISSION

No. 1089

VOLKSWAGENWERK AKTIENGESELLSCHAFT

v.

MARINE TERMINALS CORPORATION, ET AL.

Decided October 12, 1965

Agreement between members of Pacific Marine Association, including respondents, establishing the method of assessing and collecting contributions to pay their obligation under an agreement with the International Longshoremen's and Warehousemen's Union found not subject to section 15 of the Shipping Act, 1916.

Respondents' having included the assessment in its entirety in their rate to Volkswagen for discharging automobiles found not to have violated sections 16 and 17 of the Act.

Stanley S. Madden and Walter Herzfeld, attorneys for Volkswagenwerk Aktiengesellschaft, complainant.

Bryant K. Zimmerman, attorney for Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), respondents.

Edward D. Ransom and Gary J. Torre, attorneys for Pacific Marine Association, intervener.

REPORT

BY THE COMMISSION (John Harlee, *Chairman*, Ashton C. Barrett and James V. Day, *Commissioners*.)

This proceeding arises out of a complaint filed by Volkswagenwerk Aktiengesellschaft (Volkswagen or VW) involving the payment of certain charges imposed by respondents Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), for services rendered in discharging complainant's automobiles at respondents' terminals in San Francisco and Los Angeles.

Pacific Marine Association (PMA), a corporation composed of carriers, marine terminal operators and stevedore contractors on the Pacific Coast, which acted as collective bargaining unit for these groups

in their negotiations with the International Longshoremen's and Warehousemen's Union (ILWU), intervened. Respondents are members of PMA.

An Initial Decision was issued by Examiner Benjamin A. Theeman, exceptions and replies thereto were filed, and oral argument was heard.

FACTS

Beginning in 1957 ILWU and PMA entered into a series of negotiations in an attempt to correct some of the inefficient practices that were prevalent in stevedoring on the Pacific coast and to allow for the introduction by employers of labor saving devices in connection with the work of cargo handling. In return for this concession to management, the workers were to share in the savings made possible by the reduction in wage costs.

On August 10, 1959, PMA entered into an agreement with ILWU to raise a \$1½ million fund for the benefit of the work force. The agreement did not state how the sum was to be raised, but it was accumulated by PMA's assessing its members on a man-hour basis. The fund, called "Mechanization and Modernization" fund (hereinafter "Mech" fund) was subsequently expanded to \$29 million to be accumulated over a 5½-year period by an agreement entered into between ILWU and PMA, subject to ratification by their respective memberships, on October 18, 1960. The method of collecting the fund from the PMA membership was reserved to PMA.

In January 1961, a committee of PMA studied alternative methods of assessing members for collection of the "Mech" fund. The majority of the committee recommended that all members be assessed on a straight percentage of tonnage carried with bulk cargoes assessed at one-fifth the general cargo rate as was the practice with respect to the assessment of a part of the PMA dues. This determination was based upon the feeling that an assessment geared to "man-hours" would unfairly result in least assessing those who had profited most from new and improved cargo handling methods. A minority report recommended a combined man-hour/tonnage method of assessment, as was made with respect to PMA dues. The minority reasoned that such a formula would not unduly favor those who would save most in man-hours. At the same time it would not unduly penalize those who would benefit most from the elimination of restrictive work practices. The majority position was adopted by PMA.

On November 15, 1961, a "Supplemental Agreement" effective January 1, 1961, was executed by ILWU and PMA ratifying the agreement of October 18, 1960.

The tonnage formula has remained in effect since January 16, 1961, when payment to the fund began, although the amounts were increased in December 1961, from 27½¢/ton to 28½¢/ton on general cargo and 5½¢/ton to 9¢/ton on bulk cargo. An additional assessment of members based on 15 cents per clerk-man-hour was made at this December meeting and was added by respondents to their charges against VW which bore it without protest.

Subsequently, in July 1962, the rate of assessment of coastwise lumber was reduced to 5¢/ton on the theory that such cargo was already subjected to penalty handling rates of \$1.00/hr. straight time and \$1.50/hr. overtime.

Volkswagen had persistently refused to pay respondents "Mech" fund assessments which they here found necessary to pass on to it in order to carry on their operations on a profitable basis. The vast majority of the carryings of Volkswagen on the Pacific coast (75 percent) are by vessels chartered by VW, and at the terminals of respondents 90 percent of all autos unloaded are those of complainant. A common carrier carrying complainant's autos, Wallenius Line, also protested and refused to pay the "Mech" fund assessments passed on to it.

Respondents and other terminal operators sought to have the form of assessment on automobiles modified. PMA had required the automobile tonnage assessment to be based upon measurement tons, rather than weight tons, regardless of how manifested. There is no uniform way of manifesting automobiles. In the foreign trades they are manifested on a unit basis on chartered ships, but weight and sometimes measurement is shown. On common carriers both weight and measurement are shown. Tariffs are on a unit basis but dependent upon measurement. In the coastwise trades, autos are manifested and freighted by weight. General cargo is assessed as manifested. This form of assessment increased Volkswagen's cost of discharge some 25 percent. The tonnage portion of the dues of respondents on automobiles had, since 1958, been assessed on a measurement ton basis.

At the PMA meetings of January 1961, respondents expressed their opinion that it would be impossible for them to absorb the "Mech" fund assessments, and it appears that the stevedore members of the PMA in general felt that they could not absorb the whole assessment. Although some stevedores indicated that it might be necessary to pass on the assessment in the stevedoring rate to their customers, several witnesses, both for respondents and PMA, testified that there was no understanding among the PMA members as to whether the assessment would be passed on to the customers or absorbed by the members themselves.

The Funding Committee of PMA in February 1961, reaffirmed its position with respect to automobiles, and this was adopted by the Board of Directors in March of 1961.

Several stevedores, including respondents, attacked the method of assessing automobiles as arbitrary and suggested a unit method of assessment. The Funding Committee rejected the proposal in December 1961, and the rejection was affirmed by PMA in March 1962.

Respondents concede that the method of assessment against automobiles on a tonnage basis is unfair, as stevedoring of cars has always been an efficient and economical operation, and testimony in the record shows that there is little likelihood of mechanical improvement in the method of unloading automobiles, and auto shippers will probably receive only general benefits from the fund plan, such as freedom from strikes or slowdown.

Aware of Volkswagen's dissatisfaction, respondents some time afterward offered Volkswagen a lower rate whereby respondents would absorb an amount equal to that if the assessment had been made on a weight ton basis. Volkswagen rejected this offer and stated it would not pay the "Mech" fund charge in the rate if it were based on a measurement ton basis. Since Volkswagen was satisfied with respondents' discharging operations, Volkswagen continued to use them.

Testimony indicates that stevedore members of PMA passed on the "Mech" fund assessments to common carrier members of PMA. The record also indicates that these carriers in turn absorbed the increases as it was stated that there was no increase in ocean freight rates due to the passing on to the carriers of the "Mech" fund assessments.

Some terminal operators may have absorbed the assessments in whole or in part, rather than pass them on to shippers when the services were performed directly for the shippers rather than for the common carriers. There is no showing as to the level of rates for terminal services charged by PMA members either before or after the establishment of the "Mech" fund.

PMA filed a libel against respondents in the United States District Court for the Northern District of California, Southern Division, demanding payment of unpaid "Mech" fund contributions from each respondent as a PMA member. By respondents' interpleader, Volkswagen was made a party to the Court action. Upon Volkswagen's request the Court stayed the proceedings therein, pending submission of the following issues to the Commission for determination:

1. Whether the assessments claimed from [Volkswagen] are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping

Act, 1916, as amended, 46 U.S.C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.

2. Whether the assessments claimed from [Volkswagen] result in subjecting the automobile cargoes of [Volkswagen] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U.S.C. 815 (1961).

3. Whether the assessments claimed from [Volkswagen] constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U.S.C. 816 (1961).

Thereafter Volkswagen filed the complaint in this proceeding alleging that respondents, other PMA members and PMA had conspired or agreed to impose an extra charge on Volkswagen for terminal services in discharging VW's in violation of sections, 15, 16, and 17 of the Act.

THE EXAMINER'S DECISION

The Examiner found that respondents, as parties to carloading conferences approved by the Commission and operators of terminal facilities were "other persons" subject to the Shipping Act, 1916. He further found that the "Mech" fund agreement which respondents had entered into with the other members of PMA, all of whom he found to be common carriers or "other persons" subject to the Act, was a "cooperative working arrangement." He concluded, however, that as the agreement contained no obligation upon the members of PMA to pass the "Mech" fund assessments on to shippers, the agreement was not the type of "cooperative working arrangement" intended to be included within section 15 as it did not "deal with" or "pertain to" "ocean transportation" and was not one of "the same general class" as the six categories of agreements specifically enumerated in section 15.¹ He therefore found no violation of section 15 in PMA's failure to file its "Mech" fund agreement.

The Examiner found no violation of section 16 as no "prejudice or disadvantage" to VW was shown by the method of assessment as all cars were assessed by the measurement formula.

The Examiner found no "unreasonable practice" under section 17 to exist with reference to the respondents' handling of Volkswagens as all autos were assessed on the same basis, Volkswagen never objected to the portion of the dues which was assessed on a measurement basis, and passed on to it, and respondents had offered to compromise the matter by absorbing a part of the assessment.

¹ These are agreements "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried. . . ."

DISCUSSION AND CONCLUSIONS

We have reviewed the exceptions of Volkswagen to the Initial Decision of the Examiner. Even if we assume all of the members of PMA are "other persons" within the meaning of the Shipping Act, 1916, we find nothing in the agreements of record in this proceeding which brings them within the purview of 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 Act, the legislative history is clear that the statute was intended by Congress 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 traveling public or their representatives.² *D. J. Roach Inc. v. Albany Port District et al.*, 5 FMB 333, 335.

Thus, for example, while agreements of persons subject to the Act to pool secretarial workers or share office space may literally be "cooperative working arrangements," they are not the type of agreements which affect competition 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.

As the courts have pointed out, our statute ". . . In its general scope and purpose, as well as its terms, . . . closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the questions under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion." *United States Navigation Company, Inc. v. Cunard Steamship Co., Ltd.*, 284 U.S. 474.

Section 5(1) of the Interstate Commerce Act (49 U.S.C. 5) provides for jurisdiction of the ICC over "Combinations and consolidations of carriers" establishing "Pooling, division of traffic, service, or earnings."

The courts, in construing this section, have determined that agreements which affect only labor-management relations do not come

² Recommendations of the "Alexander Committee," Proceedings of the Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations under H. Res. 587, p. 415, *et seq.* See also Hearings before the Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, on H.R. 4299, 87th Cong., 1st Sess. (1961) at page 428.

within its scope. A showing has been required, before labor-management agreements have been held to be subject to the jurisdiction of the ICC, that they have some impact upon the competitive relationship of those entering into them. "Section 5(1) empowers the Commission to exempt pools from the prohibition of the statute which it determines will not unduly restrain competition and will result in better service to the public or economy in operation, the broad sweep of the section does not encompass pools whose sole concern is labor-management relations." *Kennedy v. Long Island Railroad*, 211 F. Supp. 478, 489 (1962), aff'd. 319 F. 2d 366 (2d Cir. 1962).

It is not contested that the membership of PMA entered into an agreement as to the manner of assessing its own membership for the collection of the "Mech" fund. Such an agreement, however, does not fall within the confines of section 15 as, standing by itself, it has no impact upon outsiders. What must be demonstrated before a section 15 agreement may be said to exist is that there was an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators.

The record is devoid of evidence showing the existence of such an additional agreement. The record at most shows that some stevedores expressed the opinion that it might be necessary to pass on the assessment in the stevedoring rate to their customers. That these opinions were the basis for an agreement as to the manner of assessing their customers is denied by statements of witnesses for both PMA and respondents. Such conclusion is further vitiated by the actions of respondent and perhaps other terminal operators, who were willing to absorb a part of the assessment.

To hold that a section 15 agreement existed on this record would require us to disregard explicit statements to the contrary as well as actions on the part of both the common carrier members of PMA and respondents inconsistent with the existence of such an agreement. We would moreover, be obliged to reach the anomalous result of finding an agreement in spite of both testimony and conduct negating such an agreement, and then finding that such conduct was a breach of the agreement. It seems much more logical and less contrived simply to conclude that there was no agreement on the part of PMA members to pass on the "Mech" fund assessments.

We conclude, therefore, that no violation of section 15 has been shown.

Volkswagen itself admits that all of the relevant case law requires a showing that competitive cargo has been preferred to sustain an allegation of a violation of section 16. It further admits that its

automobiles have not been subjected to "prejudice or disadvantage" as compared to other automobiles, and that "there is no other cargo classification in competition with automobiles." We therefore uphold the Examiner in finding no violation of section 16.

Complainant's allegation of a violation of section 17 is that the passing on by respondents of the "Mech" fund assessment on automobiles on a measurement rather than a weight basis constituted an "unreasonable practice . . . relating to . . . the handling of property." It does not contest the propriety of the passing on of the assessment to it and states that the alleged discrimination would be removed if the assessment were made on a weight or unit basis.

It is true that the assessing of automobiles on a measurement basis results in an assessment ten times as great as would result from a weight basis, and that although other cargo is assessed as manifested, automobiles are always assessed on a measurement basis. It is further true that although the assessment on a measurement basis for some general cargo items exceeds the amount computed on a weight basis, in no instance is the difference as great as on automobiles, and that as there is little likelihood of mechanical improvement in the method of unloading automobiles, auto shippers will probably receive only general benefits from the fund plan, such as freedom from strikes or slowdown.

However, as complainant admits, there is no statutory requirement that all users of a facility be assessed equally. As long as "substantial benefits" are provided for one against whom a charge is levied, we will not normally declare the charge unlawful. *Evans Coöperage Co., Inc. v. Board of Commissioners*, 6 F.M.C. 415. The fact that the benefits may differ to some extent in both kind and degree is not material. An exception to the above principle might arise if it could be shown that the leviers of a charge imposed it in an unequal fashion because of a design deliberately to burden one of the users of its service more than another.

The assessment here, however, has been levied in its present form because it was necessary in the business judgment of respondents to do so. The reasonableness of respondents' activities is attested to by the additional facts that they have sought to change the method of "Mech" fund assessment on automobiles, have offered to pass on only a part of the assessment, and have levied a part of their dues assessment against Volkswagen for several years upon the same measurement basis without protest.

We agree with the Examiner that there has been no showing that the assessment against Volkswagen is an "unreasonable practice" within the meaning of section 17.

The complaint is dismissed.

COMMISSIONER JOHN S. PATTERSON, *dissenting*:

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

1. Respondents Marine Terminals have failed to file immediately (a) an agreement with common carriers by water and other persons regulating transportation rates and controlling and regulating competition among each other and (b) any memorandum of a cooperative working arrangement on the aforesaid subjects in violation of section 15 of the Act (Findings 1, 2, 3, 4, and 5).

2. Respondents Marine Terminals in conjunction with common carriers by water and other persons indirectly have subjected property and persons to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Act (Findings 1, 2, and 6).

3. Respondents Marine Terminals have failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property contrary to section 17 of the Act (Findings 1, 2, and 7).

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

INTRODUCTION

This proceeding was initiated by a complaint by Volkswagenwerk Aktiengesellschaft (VW) against Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) (both referred to as "Marine Terminals"), alleging that Respondents Marine Terminals were parties to an agreement with certain persons identified as both common carriers by water and other operators of terminal facilities to impose an "extra charge" for terminal facilities, including stevedoring and other terminal services. The "extra charge" was for the purpose of collecting "an assessment" imposed on Respondents by Pacific Maritime Association, of which Respondents are members, for contributions pursuant to a Supplemental Agreement on Modernization and Mechanization as hereinafter described.

The agreement to collect the extra charge was claimed to be subject to section 15 of the Shipping Act, 1916 (Act), providing:

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; . . . controlling, regulating, preventing, or destroying competition; . . . or

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in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

Even after the agreement is filed pursuant to the first paragraph of section 15, it is further claimed it may not be approved pursuant to the second paragraph of section 15 because the agreement is "unjustly discriminating and unfair as between shippers and importers, operates to the detriment of the commerce of the United States, is contrary to the public interest," (Complaint, VI), "subjects complainant and its automobile cargoes to undue and unreasonable prejudice and disadvantage," (Complaint, VII), and "by establishing regulations and practices which are not just and reasonable" (Complaint, X. (5)), is contrary to law in violation of sections 15, 16, and 17 of the Act.

The complaint originated in response to an order of November 29, 1962, by the District Court for the Northern District of California, Southern Division, No. 28599 in Admiralty, granting a motion for a "Stay of Proceedings" on a libel petition on condition that there be a "submission to the Federal Maritime Commission and final determination by it, or by a court of last resort upon appeal from such Commission action" of the following issues:

1. Whether the assessments claimed from respondent impleaded are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.

2. Whether the assessments claimed from respondent impleaded result in subjecting the automobile cargoes of respondent impleaded to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U.S.C. 815 (1961).

3. Whether the assessments claimed from respondent impleaded constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U.S.C. 816 (1961).

The Admiralty proceeding was initiated by the Pacific Maritime Association as a Libellant against Marine Terminals as one of the Respondents for refusal to pay \$67,004.27 assessments of contributions to a Mechanization and Modernization Fund created pursuant to the Supplemental Modernization Agreement. Marine Terminals petitioned to implead Volkswagen, stating the reason Marine Terminals had not made the assessed contributions was that VW contends that assessments under the Supplemental Agreement on Modernization and Mechanization "are unlawful and that neither libellant nor respondents can lawfully collect assessments pursuant to

said Agreement." VW was impleaded and thereafter filed its complaint with us.

Pacific Maritime Association (PMA), which describes itself as "a non-profit association existing under the laws of the State of California," filed a petition to intervene in opposition to the complaint. The petition was granted.

The majority has dismissed the complaint and decided the Examiner should be upheld in finding no violation of sections 16 and 17 of the Act.

My dissent to the dismissal is set forth in the following facts, findings, and discussion in support of the findings and conclusions.

FACTS

Because the content of facts as stated in the majority report are considered to be too meager a basis for decision, it is deemed essential to expand the scope of facts by advancing from the record before me the following 29 adequate statements of fact upon which my findings and ultimate conclusions are grounded.

1. Complainant VW is a shipper of automobiles from the Federal Republic of Germany through United States Pacific Coast ports. Automobiles are shipped on both chartered ships in private carriage and on "liners" which are the same as common carriage. The number of VW automobiles imported through Pacific coast ports during 1961 and 1962 were as follows:

	Common carrier (liners)	Private carrier (charter)
1961.....	9,363	29,111
1962.....	13,672	28,296

(Exh. 52.)

2. Respondents Marine Terminals are in the business of furnishing ship loading and unloading and storage activities in their terminal facilities located at San Francisco and Long Beach, California (Tr., 202-206). Facilities are available and furnished to both common and private carriers (Tr., 203-204), but about 90 percent of Respondents' work is in connection with common carriers (Tr., 236). Marine Terminals have provided facilities for VW since 1954 at both San Francisco and Long Beach (Tr., 203-204).

3. a. Marine Terminals furnish the following to VW in connection with both common and private carrier by water shipments:

- (1) unlashng and unchecking cars;
- (2) removal of cars from ship to pier by means of a patent bridle device to pick up vehicles from the hold;

(3) removal from shipside to storage area by means of tractors which push or pull, using special hooks, vehicles to the point of rest in the storage area; (Tr., 229-231)

(4) guard service, cleaning, lighting, heating, and maintenance of the terminal area; (Tr., 251-252)

(5) fenced-in storage areas where vehicles are surveyed, sorted into dealer lots, and made available for inland transportation by trucks (Tr., 207, 231) (Exh. 51).

The unloading services are performed by groups of laborers called "gangs" composed of ILWU members working both aboard the ship and on terminal property (Tr., 207-208, 211). The men working on the docks are called the "dock gangs." They haul automobiles from the ship's side and sort the automobiles. The gangs working exclusively aboard the ships perform what is called the "function of the ship" (Tr., 206-207). Marine Terminals charged VW \$10.45 per vehicle for the above services, regardless of model, size, or weight, during the period covered by the record (Tr., 205, 207, 210, 214, 279).

b. A typical "work order" called for the following to be covered by charges:

(1) Opening and closing of hatches, rigging and unrigging, opening of cardeck hatches.

(2) Unlashing and unchocking of cars (Hercules round-lashings not to be cut but to be collected on board for further use).

(3) Waiting time of 30 minutes or less whether in stevedores' control or not, but breakdown of ship's gear excepted.

(4) Travel-time and transportation of longshoremen and equipment to and from vessel.

(5) Supply of discharging gear in accordance with Volkswagenwerk instructions.

(6) 10 days free storage.

(7) The stevedores will provide all necessary stevedoring labor including winchmen, hatch tenders, tractor operators, also foremen and such other stevedore supervision as is needed for the proper and efficient conduct of work.

(8) Checking, clerking and supercargo.

(9) Public liability and property damage insurance, including third party risk, in respect of injuries arising from stevedoring operations, also taxes and Pacific Maritime Association assessments.

(10) For handling cars from ship's tackle to place of rest \$6—per car are to be collected from consignees and credited to vessel within the disbursements account.

Remarks:

Wharfage on cars at \$3—per 2,000 lbs for uncrated cars to be for consignees' account. (Exh. 51.)

4. a. Marine Terminals is a member of PMA, intervenor herein, an association incorporated June 3, 1949, composed of members meeting

the following qualifications as shown in its Bylaws as amended to April 1960 (Exh. 3), Article IV, Section 1:

Section 1. Any firm, person, association or corporation engaged in the business of carrying passengers or cargo by water to or from any port on the Pacific Coast of the United States (except Alaskan ports), or any agent of any such firm, person, association or corporation, and any firm, person, association or corporation employing longshoremen or other shoreside employees in operations at docks or marine terminals at any such port and any association or corporation composed of employers of such longshoremen or other shoreside employees shall be eligible for membership in this corporation.

The record shows 116 members meeting these qualifications for the year 1961 (Exh. 47—"Membership Roster").

b. Intervenor PMA includes in its membership several common carriers by water such as American President Lines, Ltd., American Mail Line, Ltd., Matson Navigation Company, Pacific Far East Line, Inc., States Steamship Company, and United States Lines Company as American-flag carriers and many foreign-flag common carriers by water (Exh. 47).

5. The corporate powers of PMA are "vested in and exercised, conducted and controlled by a Board of twenty-one (21) Directors, who need not be members of the corporation" (Art. I). Among PMA's powers is the power to "levy and assess and collect . . . dues or assessments . . ." not in excess of a maximum rate to be fixed at a regular or special meeting (Art. III, Sec. 1(e)).

6. A Memorandum of Agreement on Mechanization and Modernization of October 18, 1960 (Exh. 1, sub B) between PMA and the ILWU provided that PMA would "establish a jointly trustee Fund" (par. 38) to include specified amounts to be accumulated (par. 39). The purposes for which accumulations in the fund were to be used were stated (pars. 40-42). The terms of the Memorandum of Agreement were incorporated in a superseding "ILWU-PMA Supplemental Agreement on Mechanization and Modernization" (Modernization Agreement entered into as of the 1st day of January 1961, signed for the Union on November 15, 1961, by Harry Bridges and for the Association by J. Paul St. Sure. The Fund provisions are as follows:

1. *Amount and Rate of Accumulation.* Commencing January 1, 1961, and continuing for a period of five and one-half years ending June 30, 1966, a Mechanization Fund shall be established, subject to the provisions of Section 3 of Article V hereof, at the rate of Six Million Five Hundred Thousand Dollars (\$6,500,000) during the first year, Five Million Dollars (\$5,000,000) during each of the next four years, and Two Million Five Hundred Thousand Dollars (\$2,500,000) during the next succeeding six months, for a total of but not exceeding Twenty-nine Million Dollars (\$29,000,000) (Exh. I, Sub C, Art. II, par. 1).

7. The Modernization Agreement provides, with regard to contributions to raise the above amounts, "Principals who are Member Companies shall be responsible therefor to the extent the Association determines pursuant to its by-laws and in its sole discretion" (Id., Art. II, par. 2). Member Companies are defined in Article I as companies who are members of the Association and are subject to several specified collective bargaining agreements "respecting employment of Employees." The "Association" referred to is PMA (Id., Art. I, pars. 2 and 3). "Principals" are member companies "who do not employ directly Employees but who obtain stevedoring, terminal or similar related services under contracts . . ." (Id., Art. I, par. 6). "Contributions" are assessments required under "arrangements adopted by the Association, pursuant to its by-laws . . ." (Id., Art. I, par. 8).

8. For the purpose of adopting arrangements to discharge the responsibility to make the assessments needed to raise the specified contributions, PMA appointed a committee consisting of a representative from American President Lines, Ltd. (APL), Matson Navigation Company (Matson), and Pacific Far East Line, Inc. (PFEL); operators of U.S. registered ships as "common carriers by water" as defined in the first section of the Act, Holland American Line (Holland America), Union Steamship Company of New Zealand (Union), common carriers by water, and Overseas Shipping Company (Overseas) (status not clear in record) (Exh. 5). The committee's report on work improvement fund contributions procedures consisted of a majority report subscribed to by the Chairman on behalf of APL, Union, Holland America, and Overseas, and a dissent by Matson and PFEL (Exh. 5, sub A).

a. The majority recommended an arrangement for dividing the costs of the ILWU Modernization and Improvement Fund set forth in the Memorandum of Agreement with the ILWU of October 18, 1960, whereby contributions to the fund are to be "based on cargo tonnage basis" (Exh. 5-A, p. 1) with an annual review by the Association to determine the equity of the formulas as conditions change (Exh. 5, Sub A, p. 1). The report states, "the committee recommends that the contributions to the Fund be raised on a cargo tonnage basis . . .", but the committee's deliberations "centered on three methods of contribution . . . (1) contributions based on straight time man-hours of each employer, (2) contributions based on manifested cargo tonnage, (3) a combination of (1) and (2). In the text reference is made to "the same as the present tonnage formula" which is "the cargo is that manifested for loading or discharging at Pacific Coast ports" (p. 5). The "manifesting" qualification was an essential part

of the committee's report which was adopted by the membership. (See also p. 7, referring to "the proposed charge on manifested tonnage." Whatever the manifest showed was to be the guide.) (Note: The costs of the fund are those set forth in Art. II, par. 1, of the Modernization Agreement which incorporated, with revisions, the provisions of par. 39 of the Memorandum of Agreement of October 18, 1960. The former Agreement was not drafted in final form and signed and sealed until November 15, 1961, but was entered into "as of" January 1, 1961. The committee report was dated January 4, 1961.)

b. The minority reported that the formula should be based on a combination whereby part of the fund would be accumulated by tonnage assessments and part by man-hour assessments with 40 to 60 percent proportion to begin with, subject to correction in the light of experience (Exh. 5, Sub B 10-11).

9. The Committee's majority report was considered by the Board of Directors at a meeting on January 6, 1961, and after "considerable discussion" of the committee's report "it was moved and seconded that the collection of the Fund be based on a tonnage formula with all tonnage being treated equally as to rate for a period of six months . . ." The Minutes show the vote on the motion was 12 "yes," 3 "no" and 3 "withheld," followed by the notation "Motion carried," and were subscribed by J. A. Robertson, Secretary (Exh. 2-P).

10. The Board of Directors' action was considered by the membership at a meeting on January 10, 1961. Respondents were shown as "Present", represented by Messrs. C. R. Redlich and E. G. Horsman, along with representatives of about 81 members (not counting names of members appearing more than once) and staff personnel including the President of PMA. The Minutes showed the "three recommendations which had been made" as explained by the Chairman:

It was regularly moved and seconded that the Majority recommendation of the Committee appointed to propose a method for collection of the Fund, calling for a tonnage formula with bulk cargoes at one-fifth the general cargo rate, be adopted, with the understanding that the method of collection will receive continued study and be presented to the Membership again in six months.

The Chairman explained the three recommendations which had been made:

1. *Majority Report* (on which the motion is based)
 - 26¾¢ on general cargo
 - 5½¢ on bulk
2. *Minority Report*
 - 10¢ a ton
 - 12¢ per manhour
3. *Board of Directors*
 - 20¢ a ton

It was further agreed that the Board of Directors would examine and determine the definition of bulk cargoes.

followed by the notation that a secret ballot was taken and the vote polled as follows :

246 yes
74 no
21 withheld
67 absent

“Motion carried by a majority of the total voting strength¹ of the Association Membership.” The Agreement of October 18, 1960, between PMA and ILWU was ratified unanimously. The minutes were duly subscribed by the Secretary (Exh. 2-0). As of January 1, 1961, all cargo is to be measured for assessment purposes on tonnages as shown in ships’ manifests.

11. The record shows no challenge or question as to the regularity of the vote by either the directors or the members. The Bylaws provide that any contract made by PMA on behalf of its members with a union “shall bind the members” except that any member who has not voted or otherwise approved a commitment can relieve himself by resignation within seven days from the vote thereon (Exh. 3, Art. XI, secs. 1 and 3). The record shows no resignations.

12. The Board of Directors at a meeting on January 16, 1961, adopted a motion “that unpackaged scrap metal . . . is to be classified as a bulk cargo . . . effective as of January 16, 1961” and agreed “that the tonnage declarations made by companies are to be made in exactly the same manner as manifested and reported during the year 1959 . . .”. This action had the effect of adding the “during the year 1959” qualification to the “as manifested” qualification. The minutes were duly subscribed by the Secretary (Exh. 2-N).

13. The Vice President and Treasurer of PMA in a circular letter of February 3, 1961, wrote members on the subject, “Cargo dues—Tonnage—Automobiles,” after noting automobiles were being reported on a weight basis: “Any steamship company or contracting stevedore who has not been reporting and paying dues on automobiles on a measurement basis since January 1958 should immediately complete a revised tonnage declaration form . . . Future reports on automobiles for PMA dues and Modernization and Improvement Fund purposes are to be made on a measurement basis” (Exh. 36). A February 24, 1961, communication to “committee members,” referring to a February 21, 1961, meeting of members, stated :

¹ Members have different numbers of votes as prescribed in Article VI of the Bylaws. Votes at the membership meetings depend upon a formula which gives effect to the volume of cargo handled by each member at certain ports and to the number of personnel employed (Art. VI, Sec. 1).

(4) The Mechanization Fund assessment for autos should be on a measurement ton basis, regardless of how manifested. 8 agree, none oppose (Exh. 44).

As of February 21, 1961, the qualifications "as manifested" and "during the year 1959" disappeared and were replaced by "a measurement basis" in regard to automobiles only.

14. The Board of Directors at its regular quarterly meeting on March 8, 1961, approved changes (a) in assessments for full and empty "Army conexes" and (b) to provide that "coastwise cargo be assessed in the traditional manner at the rate of one-half the Work Improvement Fund rate for offshore and intercoastal cargo; that is, a single ton of coastwise cargo would pay a total of 27½¢ assessment, one-half at the point of loading and the other half at the point of discharge." The minutes were duly subscribed by the Secretary (Exh. 2-M).

15. As of December 18, 1961, PMA reduced the tonnage assessment on lumber, logs, and automobiles to 24½¢, but added 4¢ for the Walking Bosses and Foremen's Mechanization Fund and an assessment of 15¢ per man-hour "on all ship clerk hours" (Exh. 56, meeting 12-13-61).

16. The minutes of the annual meeting of members on March 13, 1961, show unanimous ratification "of all actions of the Board of Directors and Association Committees during the year 1960." The minutes were duly subscribed by the Secretary (Exh. 2-L). The minutes of the meeting of members on May 14, 1962, show "that the Membership action of March 14, 1962 [the defeat of the motion ratifying all action of the Board of Directors and Association Committees during the year 1961] be and hereby is rescinded and that all actions . . . during the year 1961 be ratified." The motion was carried and on another vote was "made unanimous," and the minutes were duly subscribed by the Secretary (Exh. 2-G).

17. The minutes of the Directors Meeting on July 3, 1962, show a motion unanimously carried that "the contribution rate on all lumber moving in the coastwise trade shall be \$0.05 per ton, 2½¢ of which is paid at the port of loading and 2½¢ at the port of discharging." The minutes were duly subscribed by the secretary (Exh. 2-F).

18. The minutes of the Directors Meeting on December 12, 1962, show a motion unanimously carried "that the contribution rate to the Walking Boss Mechanization Fund be 2¢ per ton effective January 1, 1963" instead of 4¢ per ton as before. The minutes were duly subscribed by the Secretary (Exh. 2-D).

19. At the annual meeting of the members of PMA on March 14, 1963, "all actions of the Board of Directors and Association Commit-

tees during the year 1962" were ratified by motion "unanimously carried." The minutes were duly subscribed by the Secretary (Exh. 2-A).

20. The several "actions," resolutions, and adopted motions of members of PMA were acted on by those members providing terminal facilities and wharfage, including Respondents, by charges to VW and other users by seeking collection from shippers and by being billed separately by Respondents (Exhs. 9, 23, 32). One member of PMA informed a PMA official that the cost of the assessment on automobiles is so much greater "as compared to the stevedoring cost" that it could never be considered that the cost would be absorbed (Exh. 24). The Committee considering the assessments itself knew shippers would be asked to pay in expressing a belief the measurement did "not work an inordinate hardship on the shipper" (Exh. 27). The entire membership considered (a) "the problem of collecting funds from Volkswagen due the Mechanization Fund" at one of its meetings (Exh. 2H) and (b) a recommendation to establish "an escrow account for payments by stevedores on behalf of Volkswagenwerk" (Exh. 2C).

21. a. At the meeting of the Board of Directors of PMA and American Flag Operators, July 3, 1962, after noting that companies handling Volkswagens "had made no contribution to the Mechanization Fund" (p. 5), a motion to approve a recommendation of the "Coast Steering Committee" was unanimously carried to modify a previous action so as "to provide that PMA counsel assist Marine Terminals (and other stevedoring companies handling Volkswagens) only if the action by or against Marine Terminals raises issues which jeopardizes the Mechanization Plan or other interests of the industry . . ." (p. 6) (Exh. 2-F).

b. The previous action was taken at the meeting of the Board of Directors, December 13, 1961, wherein "it was agreed that PMA will give such support and will participate in any legal action taken and that the matter will be turned over to PMA Legal Counsel." The support and action referred to "the problem of collecting funds from Volkswagen due the Mechanization Fund" and a request by Respondents "that they be authorized to bring suit against Volkswagen for the monies due" (Exh. 2-H, p. 4).

22. The facilities used by VW were initiated by means of a "Stevedoring Order" which described the contents of the arriving ship and the work to be paid for (Exh. 36).

23. Respondents were required to prepare a "tonnage declaration form" (Reports of Tonnages) and to send it, together with "a check

for contributions to be in the Association's hands *not later than the 20th of the month following the month in which such cargoes are handled*" (Exh. 35, item 7). The foregoing was dated January 17, 1961. A further instruction to members, including Respondents, over the signature of the Vice President and Treasurer of PMA on March 16, 1961, stated: "We again wish to reiterate the fact that this contribution is a contractual commitment, exactly the same as welfare, pension and vacation contributions, and should be paid into the Association not later than the 20th of the month following the month in which such tonnages were handled" (Exh. 55, p. 2).

24. Respondents, acting by their Vice President, discussed the problem of the assessment on automobiles with other companies who handle them on the Pacific coast, and none thought it was possible for members to absorb the assessment (Tr., 239). The matter was also discussed at PMA meetings (Tr. 240). It was the uniform opinion of the contracting stevedores with whom the Vice President talked that the assessment could not be absorbed by members when on a measurement basis (Tr. 241). No agreement was reached as a result of the discussions as to how assessments would be collected, it was stated (Tr., 247), but as a result everyone subject thereto did the same thing by using the same measurement, but not paying the resulting assessments on Volkswagens brought in under contract carriage (Tr., 209-270). After VW refused to pay the amount of billings representing the assessment on a measurement basis, the Respondents and members of PMA refused to pay their assessments, and so did Waterman Corporation of California, agents for Walleniusrederierna (Exh. 9). Respondents stated they "are merely following out the instructions of the Board of Directors of the Pacific Maritime Association and therefore are considered only a collection agency in this matter" and asked for instructions as to "what stand we can take in demanding payment of this assessment" (Exh. 9). Associated-Banning Co. had asked PMA officials for instructions on how to handle refusals to pay assessment charges (Exh. 11) after Waterman Corporation of California, agents for Wallenius Line, stated they would pay only on a unit basis as manifested in 1959 (Exh. 12), not on a measurement basis. Respondents discussed assessments with an official of PMA. In a letter to the official, Respondents' Vice President noted the official "was aware of what was behind" Respondents "not making certain payments into the plan, but nevertheless, you had to protect yourself by writing the letters referred to above" (Exh. 13). The "letters" were demands for payment of assessments.

25. Automobiles are assessed by a measurement ton measure rather than by a unit or weight measure. Comparative measures are as follows:

	Weight	Measurement
Sedans.....	1,643 lbs.=0.8 wt. ton.....	7.8 cubic tons.
VW transporters.....	2,193 lbs.=1.1 wt. ton.....	11.4 cubic tons ¹ (Tr., 281-282).
Other figures show:		
Sedans.....	1,609 lbs.=0.8 wt. ton.....	8.3 cubic tons.
VW average (tons approximate).	2,028 lbs.=1.0 wt. ton.....	10.0 cubic tons (Exh. 7).

¹ (NOTE: Exh. 7 shows for Transporters 2,447 lbs. and 11.8 tons and different average.) Roughly, the average assessment on Volkswagen vehicles would be about 10 times as high as on a measurement tonnage basis than on a weight ton basis. The measure applicable to Complainant's property was estimated to be at a level 10 to 15 times higher than the measure for assessing other general cargo (Exh. 7, p. 2, par. 6).

26. The assessment applicable to automobiles was stated to increase the cost of handling by from 33 $\frac{1}{3}$ percent (Exh. 25) to 35 percent (Exh. 9). Another estimate was that the increase caused by the new measure was about 22 percent in the case of sedans and 31 percent in the case of transporters (Exh. 26). Another estimate was "more than 26 percent in discharge costs" of Volkswagens (Exh. 7). These estimates were not refuted. In contrast, the estimated average increase in the "discharging costs" or "cargo handling expenses" of packaged general cargo resulting from the assessment was 2.2 percent (Exh. 7 and Exh. 26, p. 2). The measurement ton measure causes a \$2.76 per vehicle charge in comparison with a 28¢ per vehicle charge on a weight ton measure. The longshore cost is \$10.45 per unit. Lumber is assessed on a unit measure based on 1,000 board feet per unit at the rate of 21 $\frac{1}{2}$ ¢ per manifested ton (Exh. 26, p. 2). Unboxed automobiles are normally handled for charging purposes between factory and distribution on a unit basis (Exh. 26, p. 2).

27. The man-hours necessarily employed in handling Complainant's property, unboxed automobiles, always have been less than practically any other commodity (Exh. 26). The mechanized handling of packaged general cargo may effect savings, but because of past improved handling methods no new practical application of mechanization to the discharge of unboxed automobiles is visualized (Exh. 7). Automobiles will benefit less from mechanization than other cargo. The average direct labor cost, without fringe benefits, of discharging Volkswagen vehicles was 49¢ per measurement ton as compared with the 27 $\frac{1}{2}$ ¢ measurement ton assessment. The assessment is 56 percent of the average direct labor cost (Tr., 284). In 1962, 28 $\frac{1}{2}$ ¢ was the assessment, or 58 percent of the average. The total direct longshoremen's labor cost of all PMA members in 1962 was \$103,953,362, and total fund assessments were about \$5,200,000 (Tr., 285, Exh. 49),

or an assessment of 5.8 of the total direct labor cost ("wages") (Tr., 284).

28. For Volkswagen vehicles transported in chartered ships, the manifests and bills of lading show the number of automobiles and the weight in kilos. No specific rate or total freight is shown being noted by the endorsement "freight prepaid" or "freight as agreed." Contracts for freight are based on a rate per automobile unit. For the same reason, unloading charges are customarily on a unit basis (Exh. 7).

The intercoastal freight rate structure is on a weight basis, i.e., not measurement, and the reporting and levying of a tonnage assessment for automobiles is on a unit of 2,000 pounds (Id., and Tr., 222-223, 288-290, 313). The California State wharfage on unboxed automobiles is based on a weight ton of 2,000 pounds (Id.). Volkswagen vehicles are manifested for purposes of common carrier (liner) shipments on a unit basis of measure (Id., and Exh. 12). Many automobile manifests show weight, but some show measurements also (Tr., 323-324).

29. Any property other than automobiles would be measured for assessment charges on a manifest basis even where the per ton charge is less (Exhs. 7, 44).

FINDINGS

1. Complainant VW is a shipper of property consisting of automobiles on common carriers by water in foreign commerce and on private carriers through exportation from the Federal Republic of Germany (Germany) and importation into the United States, and obtains and uses the facilities of Respondents.

2. Respondents are persons carrying on the business of furnishing warehouse or other terminal facilities in connection with a common carrier by water and each is an "other person subject to this act" as defined in the first section of the Act.

3. Respondents have entered into an agreement with other common carriers by water and with other persons who are carrying on the business of furnishing wharfage and terminal facilities in connection with common carriers by water that they will regulate transportation rates and control and regulate competition among each other by establishing uniform charges which Complainant and others must pay for unloading and storage services, as a part of wharfage and terminal facilities, measured by the tonnages of property handled.

4. Respondents have provided for a cooperative working arrangement by agreeing to assess themselves in accordance with PMA directives and to pay assessments into the Mechanization and Modernization

Fund. Assessments and payments are collected by charges for facilities supplied to Complainants.

5. Neither a true copy of any agreement regulating transportation rates and controlling and regulating competition, nor any memorandum of the cooperative working arrangement has been filed with the Commission.

6. Respondents, in conjunction with other persons, members of PMA, by measuring the assessment of the amounts they are obligated to pay into the Mechanization and Modernization Fund, using a measurement ton regardless of how manifested for automobiles, but a revenue ton (i.e., whatever type of tonnage used to compute freight charges) as manifested for other cargo, and by adopting special rules for certain other property, indirectly subject the property automobiles and the particular person Complainant VW to undue and unreasonable prejudice and disadvantage.

7. Respondents' regulations and practices relating to and connected with receiving, handling, and delivering property consisting of automobiles are unjust and unreasonable insofar as such property is required to be measured differently, for the purpose of Mechanization and Modernization Fund assessments, from other property, with the result that such property bears a disproportionately high share of the cost of unloading when the assessment costs are included as part of Respondents' charges for facilities and services furnished to Complainant.

DISCUSSION

Introduction:

Respondents' Answer does not deny the status of Complainants as exporters of automobiles from Germany and as importers thereof into the United States, nor that Respondents are engaged in foreign commerce (Answer, par. II). Respondents admit that they are in the business of furnishing terminal services in connection with common carriers by water, but deny that terminal services were furnished Complainant in connection with a common carrier by water or that the Commission has jurisdiction over them as terminal operators (Answer, par. III). Respondents admit they have included as part of their charges for services the amounts of assessments under the Supplemental Agreement on Mechanization and Modernization (Answer, par. IV). Respondents deny anything they have done violates any provisions of the Act (Answer, pars. V, VI, VII, and VIII), but admit the statements regarding the action in Admiralty before a United States District Court and deny the Commission's jurisdiction with respect to the matters alleged (Answer, pars. IX and X). The facts admitted will be accepted without further dis-

cussion, particularly the fact that Respondents have passed on to Complainant in their charges and billings the agreed-upon assessments which produce the money for the Mechanization and Improvement Fund. Wherever services are rendered, it is considered that such services are part of the total facilities furnished by Respondents. (See cases cited below.) Herein the term facilities includes services.

Respondents' three major denials are:

First, they are not persons subject to the Act, at least with respect to the activities involved.

Second, no unfiled or unapproved agreements of the type described in section 15 are involved.

Third, they have not violated any other provisions of law in sections 16 or 17 of the Act.

Reasoning in Support of Findings:

Section 22 of the Act creates a right in "any person" to file a complaint setting forth a violation of the Act "by a common carrier or other person subject to this Act."

The facts in items 4, 5, and 9 through 19 establish that PMA members are both common carriers by water and other persons and that their activities which are the subject of this proceeding have all been taken after following correctly the procedures of their agreements of association and have all been duly authorized and carried out pursuant to such authorizations. There is no question herein as to unauthorized acts or agreements, nor that Respondents are not fully aware of, and responsible for, each action.

1. *Persons subject to the Act.*

There is no denial of Complainant's status as "any person," referred to in section 22, but Respondents deny they are an "other person" under the first section of the Act because their activities are limited to the stevedoring of chartered ships; neither wharfage, warehouse, or terminal facilities, nor facilities in connection with a common carrier by water are the subject of the proceeding; and, therefore, the law does not apply to them.

The denial is not supported. The facilities furnished to the Complainant and furnished to the public are far more comprehensive than stevedoring services. Stevedoring is combined with the furnishing of all kinds of terminal facilities. The services range from the opening of hatches to towing cars to storage areas and require the furnishing of many kinds of equipment such as towing tractors and other gear. The fact that VW's order is titled "Stevedoring Order" does not control what happens after the order is issued. Complainant's order to Respondents explicitly refers to charges covering the supply

of discharging gear, 10 days' free storage, public liability and property insurance, and wharfage on cars. As part of its nonstevedoring facilities, Respondents furnished motor-driven tractors and bridling devices and guard service, lighting, and cleaning for their storage spaces. Respondents may also be considered as furnishing warehouse facilities to the extent they furnished a parking lot pending collection of the cars by dealers even though there was no roof over, and walls surrounding, the cars as would be the case with a traditional warehouse.

A PMA official testified that longshoremen employed in terminal operations were to benefit equally with those involved in stevedoring work (Tr., 106-107, Exh. 5A, p. 7), thus admitting more extensive operations. The Commission's predecessors have held that persons furnishing hand trucks, flat top trucks, lift trucks, switch engines, and the labor required to operate such equipment are "other persons" and the furnishing of stevedoring and terminal services constitutes a "facility". *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761 (1946) and *Carloading at Southern California Ports (Agreement No. 7576)*, 2 U.S.M.C. 784 (1946). Where stevedoring has been combined with furnishing terminal facilities, the Commission has assumed jurisdiction and been sustained. *Greater Baton Rouge Port Comm'n v. United States*, 287 F. 2d 86 (5th Cir. 1961) cert. denied, 368 U.S. 985 (1962).

Respondents concededly furnished terminal facilities in connection with other common carriers by water and about 90 percent of their business is done for common carriers. Of this business Respondents furnished Complainants the use of their facilities in connection with the common carriage of some of the 9,363 vehicles in 1961 and 13,672 vehicles in 1962, shipped through Pacific ports, and made its facilities available at all times to importers, regardless of how the vehicles were shipped.

In *California v. United States*, 320 U.S. 577 (1944), the Supreme Court sustained jurisdiction over terminal operators in their relations to all carriers and shippers, stating (at 586) :

And whatever may be the limitations implied by the phrase "in connection with a common carrier by water" which modifies the jurisdiction over those furnishing "wharfage, dock, warehouse, and other terminal facilities," there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission. * * *

Jurisdiction depends on status. Respondents' status is that of an "other person" subject to the Act within the meaning of the first section, because their status is fixed once the connection with a common carrier is shown and does not shift to divest from time to time, depending on whether or not the warehouse or terminal facilities are

furnished for a common carrier. Respondents' acts in connection with common carriers—not conformity with other sections of the Act besides the first—fix their status or classification.

Findings 1 and 2 are supported.

2. *Unfiled Agreements.*

The record shows, first, there was an agreement that the collection of assessments for the Mechanization and Modernization Fund were to be made from users of members' services; and, second, the subject matter of such agreements is covered by section 15 of the Act.

First, each Respondent as an "other person subject to this act" and the members of PMA, consisting of common carriers by water and other persons furnishing terminal facilities, adopted motions, resolutions, and other actions prescribing their future conduct, and performed acts in accordance therewith. The Modernization Agreement to which respondents as members of PMA are a party expressly provides for collection of assessments under "arrangements adopted" pursuant to the PMA bylaws (Fact No. 7). Agreements under section 15 include "other arrangements," and this is one of them. Respondents were present at meetings and voted on the necessary resolutions to implement the Modernization Agreement. By these actions, Respondents became parties to an agreement and conformed in whole and in part with such agreements. Respondents understood and acceded to the directives of the Board of Directors and of the PMA officers, guided by approved committee reports, all of which were duly authorized in accordance with constitution and bylaws requirements binding on Respondents. The majority committee report was adopted after "considerable discussion" and so was well understood. Section 15 explicitly makes the term "agreements" include "understandings." Each action involved an understanding as to what was to be done, followed up by action. The Respondents were parties to all the agreements evidenced by the minutes of meetings and written communications from the directors and officers. Part of these understandings was that collection of the assessment would be from members' customers.

The majority believes the agreement as to the manner of assessing its own membership does not fall within section 15 because "standing by itself, it has no impact upon outsiders." It is hard to take this assertion seriously. In the first place there is no "impact" test to determine whether an agreement falls within section 15. In the second place this statement seems to say that assessments totaling \$29 million have no impact upon persons who will provide this amount of money. To make the agreement to assess stand by itself apart from how and from whom it is to be collected ignores significant realities. If the

agreement to assess really stood by itself, apart from any agreement to collect, and had no impact on outsiders, there would have been no need for members, including Respondents, to ask for instructions or authorizations when the outsiders refused to pay, nor for the refusal of Respondents, other terminal operators, and stevedores to refuse to pay the assessments. If the agreement to assess truly stood "by itself," each member would be honor bound to pay, no matter what happened. The claimed lack of agreement about collections is contradicted by the fact that everyone behaved as though all understood the assessment would be collected from outsiders such as Complainant and failed to pay after seeking instructions when VW refused to pay. The correspondence shows a general understanding that PMA members were only collection agents, and when shippers ("outsiders") refused to pay, the members need not pay. Their own concept as agents implies agreement and precludes adverse interest. The collection method was communicated to PMA officials and was discussed at meetings, attended by most of the members, in terms which conveyed an understanding that all had arrangements to have the amounts needed collected from users of members' services. The exact method each would follow to collect the money may not have been discussed, but it was understood that all would use the same measure and obtain the product of its use from customers. The evidence showed other terminal operators had done the same thing after discussion on the subject. The fact that some may not have segregated their charges the same as Respondents or stated them separately on a piece of paper does not negative the evidence and eliminate the fact of agreement to include the charges. Anyone who has expenses relating to the assessment would normally reflect his expenses by charges creating someone else's costs without agreement, but it might not be done after deciding on the same measure as here, nor after consultation, nor in accordance with instructions as to what to do if it didn't work, nor in agreement as to how to conduct litigation if this became necessary. Recognition of the understanding was shown in the letter referring to the "need to protect yourself by writing" letters asking for payment of overdue assessments. The letter preserved the appearance of rights, rather than made serious demands. The protection only concerned the need to dissemble the fact that the customers of Respondents were being billed for the assessments in one form or another and payment of assessments by Respondents would not be made unless the customers paid. One of the officers of PMA stated the intent of all members that the obligations to pay were a "contractual commitment," but it was clear actual payment depended on collec-

tions. There was only one practical way the commitment could be implemented, and this was well understood to be through payments by customers of Respondents.

Supplementing the evidence of an agreement to regulate rates and competition are the actions taken to select counsel to enforce collection of assessments. At a meeting on May 14, 1962, it was "agreed that PMA will give such support and will participate in any legal action taken and that the matter will be turned over to PMA Legal Counsel." The agreement was in response to a request by respondents that PMA give support "on the Volkswagen suit." The suit was referred to in "a communication from the Funding Committee covering the problem of collecting funds from Volkswagen due the Mechanization Fund." The funds were not considered to be due from Marine Terminals. This shows clearly the understanding of everyone that VW and other shippers, not the members, were to pay the money "due the Mechanization Fund" and members were collecting agents. Inability to collect from "outsiders" rather than from members was understood to be a shared "problem."

Later there must have been belated recognition of the perils of this action, because it involved PMA counsel in representing both the creditor PMA and the defaulting debtor member such as Respondent Marine Terminals who refused to pay his "contract commitment" assessment. The appearance that the assessment was due from members was all that had to be preserved, not the real claim. Thereafter, it was provided "that PMA counsel assist Marine Terminals Corporation (and other stevedoring companies handling Volkswagens) only if any action against Marine Terminals raises issues which jeopardize the Mechanization Plan or other interests of the industry . . ." PMA reserved the right to institute action against members still in default, by shifting to a limitation on actions.

It is not apparent how the shift takes the curse off the embarrassment involved in representing adverse interests because jeopardizing issues could arise in a debt action. The evidence underlines the point that respondents and PMA understood they were working together in a nonadversary arrangement to collect money due from "outsiders" rather than from members. Normally, even jeopardy to the Mechanization Plan would not justify such an understanding where some one has failed to meet a "contract commitment." It took a special understanding to alter normal conduct. Their initial spontaneous actions point to common understandings and arrangements to work together in effecting collections from shippers in spite of a conflicting debtor-creditor relation between PMA and its members,

and only their afterthoughts point to an understanding that the adversity must be preserved, but only where the Plan was not jeopardized. Both actions were preceded by agreement in any event. After agreement there was modified conduct in recognition of the adverse interests and separate counsel were retained when the admiralty action was initiated when all other action had failed to make the outsider VW rather than the members pay up without question.

Section 15 is explicit that the "term 'agreement' in this section includes understandings, conferences and other arrangements."

Respondents concede in their answer that they "admit that they have included as part of their charges for services the amounts of the assessments . . ." and the evidence supports the finding that they did so as the result of a common understanding, agreement, or working arrangement.

The majority disposes of this evidence by stating the record is devoid of evidence showing an additional agreement. Perhaps a court will decide the evidence is not adequate to prove the complaint contrary to my position, but absence of evidence will not be the reason for rejecting the complaint. The Administrative Procedure Act in section 8(b) directs us to provide a statement of the reasons or basis for our conclusions. The directive is not satisfied by such a succinct disposal of all this evidence. The reasons or bases are thought to be supplied by stevedores' opinions and explicit statements to the contrary. In my opinion, this evidence is overcome by other statements and deeds showing agreement to pass on the assessments, but, whatever the outcome may eventually be, the majority should not pretend the other evidence does not exist and accept such self-serving statements without also substantiating the statement and overcoming the evidence which complainants presented with reasons showing noncontradictory effect. The characterization of the majority position as "more logical and less contrived" does not supply the deficiency of reasons or basis for the "devoid of evidence" ruling.

Second, the subject matter of the agreements is related to the subjects of section 15. Section 15 requires that the subject of agreement be related to "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations or special privileges or advantages; controlling, regulating, preventing, or destroying competition . . . or in any way or in any manner providing for an exclusive, preferential or cooperative working arrangement." The subject matter of the agreements was (a) the measurement of the property using the terminal facilities, in accordance with the agreed guiding regulations, and (b) the method of collection of the charges calculated after mak-

ing the measurement. Both regulated or controlled rates and competition.

The effect of the measurement tonnage measure and assessment was to create a new cost element in addition to preexisting rates for terminal facilities. Respondents had to increase their charges to their customers to recover the new costs and thereby the total transportation cost of moving automobiles was increased. The measurement ton assessment on automobiles became a part of the Respondents' rate structure. The facts showed further that all operators got together and decided they could not absorb but would pass on the assessment applicable to automobiles, and PMA's members themselves agreed to impose the charge. Respondents' lawyers were under no illusion about everyone's understanding or contemplation when they wrote with reference to the Supplemental Agreement between PMA and ILWU effective January 1, 1961:

It was contemplated that these assessments, as added stevedoring or terminal costs, could be added to the charges of the stevedore or terminal companies.

The agreement on the conduct of litigation shows how important the method of collection was on rates. If it is understood Respondents need not pay assessments unless they or PMA can collect separately, rates will be regulated at a lower level than if assessments are a cost of business which Respondents must pay as a debt whether collected or not. Accordingly, these agreements regulate rates, depending on which course of action is followed. Granted there was plenty of ambiguity in the method of collection to be followed as shown by the shifting positions taken, but the fact of change itself shows a prior understanding that rates were to be regulated after each change. The high level of charges from the automobile measure and the large number of automobiles imported caused large sums of money to be involved. This situation created extreme pressures to prevent the "contract commitment" advice from being taken too seriously and to devise methods of collection which would not disrupt members' rates which would occur if the assessment were truly a debt of the members. The alteration of normal conduct and temporary confusion as to the niceties of selecting counsel disclosed an understanding of how Respondents' rates would be affected, depending on whether Respondents were debtors or PMA agents for collecting the assessment. In the former case the credit of PMA members and PMA power over them protected the Fund; in the latter, only the credit of a much larger number of shippers.

The increase in charges constitutes a regulation of transportation rates, and the combined activity of Respondents and other terminal

contractors and stevedores in agreeing to not absorb the assessment, as well as their activities as members of PMA, constitutes a control and regulation of competition.

Confirmation of the control of competition is supplied by generalized business considerations. If a group of competitors agree to share a cost element such as the rental of a pier and terminal area and then allocate the rent after a collectively made decision to named customers or specified types of property, instead of allowing actual use to govern the allocation, they thereby distort the normal forces of the market by their agreement to allocate, which is the equivalent of control.

The fact that the increased charges may have applied only to non-common carriage is not material, because the common carrier test applies to fixing the status of persons defined in the first section of the Act and does not exclude activities and property from the law's protection. The fact that the combined activities resulted in an understanding to collect by passing on assessments in the form of higher transportation charges and to make them apply to property transported in noncommon carrier service does not absolve the actor once he is classified as an "other person." Validating absolutism would make identical activity in relation to identical property have different consequences under the law, depending on the status of the ship carrying the property before it reaches the Respondent. Under the first section, the status of Respondent is fixed by his acts before the ship reaches the terminal facilities. Legal conclusions involving sections 15 or 16 must be based on status ascertained before the actions complained of, not on common carrier versus noncommon carrier refinements ascertained afterwards.

The majority seeks to avoid the consequences of reasoning by referring to the "literal language of section 15" relative to a "cooperative working arrangement" and stating the terms of section 15 were qualified by Congress by means of legislative history "to apply only to those arrangements" which affect "competition." The terms are also thought to be qualified by associating them with agreements to pool secretarial workers or to share office space and agreements which affect only labor-management relations. The latter was interpreted by a court not to be covered by a provision of the Interstate Commerce Act relating to combinations and consolidations of land carriers.

Section 15 is sufficiently explicit and need not be compared with unrelated laws or interpreted to limit the subject to cooperative working arrangements and "competition" in disregard of other provisions in section 15. My decision is also based on the other terms and on the understandings and arrangements, cooperative or otherwise, relative

thereto. Far from finding the record "devoid of evidence showing the existence of such an additional agreement" to pass on assessment expenses, I find the record amply supplied with evidence on such an agreement and its relation to the subjects referred to in the first paragraph of section 15.

Finding No. 3 is supported.

The acts of Respondents and others following their agreements to assess themselves in response to the adoption of the PMA resolutions and motions and the issue of PMA directives consisting of using the measurement tonnage measure on automobiles and collecting the amounts found to be due by passing on the necessary expenses equally constitute a cooperative working arrangement. Respondents and other PMA members all worked together in doing the same thing pursuant to their prior arrangements. Contributions are referred to in the By-laws as being required under "arrangements" of PMA. Everyone "contemplated" doing the same thing. The same reasoning applies here to support the finding as was applied to the preceding part of section 15.

Additionally, when VW refused to pay on billings including the assessment, the Respondents and other PMA members affected thereby refused to pay assessments. Wallenius Line, a common carrier but not shown as a member, also refused to pay (Tr., 324). This action constitutes evidence of an understanding and a cooperative working arrangement (a) to charge persons such as Complainants for the amount of assessments and (b) to relate the payment of the assessment directly to the Respondents' ability to collect the charge pursuant to the arrangement. If the amount could not be collected, the assessment would not be paid.

Under almost identical "cooperative working arrangement" language of Section 412 of the Federal Aviation Act, 1958 (49 U.S.C. § 1382), the Civil Aeronautics Board held that the establishment of an employer collective bargaining association of carriers was a cooperative working arrangement which had to be filed. *Airlines Negotiating Conference Agreements*, 8 CAB 354 (1947).

Finding No. 4 is supported.

The obligation to file has been established above. The records of this office confirm that none of the agreements found herein to exist have been filed. A finding that the agreements and memorandums of arrangements have not been filed is thus supported without the need for further proof.

Finding No. 5 is supported.

3. *Other provisions of law have been violated.*

Section 16 of the Act makes it unlawful for any other person subject to the Act either alone or in conjunction with any other person, either directly or indirectly, to give any preference or advantage to any description of traffic in any respect whatsoever or to subject any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. A violation of section 16 is complained of.

Two facts stand out in relation to preference, prejudice, or disadvantage:

First, the charges by Respondents to meet PMA assessments where automobiles are handled were measured by the measurement ton, regardless of how manifested, and no other property was measured by such a rule. Other property was measured according to the way it had been manifested in 1959. The use of the measurement ton measure required a change from both earlier methods and from current practices in regard to automobiles, in comparison with measure of all other property for assessments as freighted or manifested. The measure depended on how freight charges were determined, except for automobiles. The Vice President, before February 21, 1961, when the "measurement" measure for automobile assessments officially went into effect, had claimed such a measure rather than a tonnage measure had applied all along, at least since January 1958, but his claims never were adopted officially by PMA. All we have before February 21, 1961, is his personal assertion of what PMA should be doing rather than what PMA actually did. Somewhat inconsistently with the claim, letters regarding declaration forms refer only to "tonnages" in January and March 1961.

Second, the effect of the change in measurement and the different treatment was to make the traffic described as automobiles bear a substantially higher assessment charge: (a) about 10 times higher than if measured on a weight basis as shown in many manifests and as other cargo is measured, (b) from 22 percent to 35 percent higher in terms of unloading costs than other traffic described as packaged general cargo which bore a 2.2 percent increase as a result of the assessments, and (c) about 10 to 15 times higher than other general cargo.

Where exceptions were made for other descriptions of traffic, the charges were always lower: (a) lumber was measured on a unit basis for assessment charges, but automobiles were not, even though manifested in some cases on a unit basis and there was a normal method of measuring other handling costs on a unit basis, and (b) Army property and coastwise cargoes received concessions.

All the concessions applied to property in domestic transportation, but the increased charges applied to automobiles imported from foreign countries.

Unboxed automobiles were shown generally to require less man-hours handling per unit than practically any other commodity, yet automobiles still paid more.

There is no explanation in the record to show why the different measurement method was applied to Complainant's property. The method was shown to deviate from measurement practices on the coast for other purposes.

The result of the measurement ton measure is that, in the words of at least two stevedoring companies, it is "not based on practical considerations and has no comparison to other commodity assessments" (Exhs. 24 and 25). Still another stevedore referred to the measure as "discriminatory and is contradictory to overall basis of assessing weights or measurement as freighted", i.e., as manifested (Exh. 23). Other evidence showed that ever since Volkswagens were first shipped to the Pacific coast in 1954, "they have been freighted on a unit basis, or on lumpsum FIO or time charter" and not only freight but terminal facilities have always been computed and paid at so much per unit (Exh. 26). Another stevedore referred to statements that "establish the inequity of the effect of the present assessment to these vehicles on a measurement ton basis . . . disregarding the basis on which these vehicles are freighted, as well as the basis on which all stevedores on the Pacific coast handle their contracts" (Exh. 16). In other words, established trade measurement practices have been disregarded in this one instance for no apparent reason and followed in the case of all other property. This action creates an unreasonable prejudice.

The result of the shift to measurement tons for automobiles made the increase applicable to property where "the man-hours necessarily employed in their handling always have been less than practically any other commodity." This was said to accentuate the percentage disparity the cost increase. Others refer to the "undue burden on this one commodity" (e.g., Exh. 18). Such effect creates an unreasonable disadvantage.

There was not in 1959 nor at this time any uniform practice in manifesting automobiles any more than there was in 1959 with respect to other property, except that in the coastal trade automobiles are manifested and freighted on a weight basis and common carrier shipments of Volkswagens were and are most frequently manifested and freighted on a unit basis, although weights and measures may be shown. The treatment of automobiles cannot be justified on the basis of any uniform traditional trade practice of using a measurement ton measure. This action creates a preference for other property and a prejudice to automobiles.

Because of the difference in the method used to measure Complainant's property, both in relation to other services for automobiles and to other descriptions of traffic, and the resulting high increase in the economic effect caused by the departure from the usual measures, it is concluded that there has been preference and advantage to traffic other than Complainant's property and disadvantage and prejudice to Complainant's property. The actions have been indirect because the method used was to adopt the measure enforced by PMA in cooperative arrangement with other members.

Precedents of this agency have added to section 16 the requirement of a showing that competitors have been meted out different treatment before undue prejudice in violation of section 16 may be proven, *Afghan-American Trading Co. v. Isbrandtsen Co.*, 3 FMB 622 (1951) and *Huber Mfg. Co. v. N. V. Stoomvaart Maatschappij "Nederland" et al.*, 4 FMB 343 (1953), but others have held section 16 was violated without any proof of disadvantage among competitors, *Absorption or Equalization on Explosives*, 6 FMB 138 (1960), *Swift & Co. et al. v. Gulf and South Atl. Havana Conf.*, 6 FMB 215 (1961), affirmed: *Swift & Company v. Federal Maritime Commission*, 306 F. 2d 277 (U.S.C.A., D.C. 1962). In *New York Foreign Frgt. F. & B. v. Federal Maritime Com'n.*, 337 F. 2d 289 (U.S.C.A. 2d 1964) at p. 299 the Court held that the charge ". . . of widely varying amounts, for no apparent reason, suffices to establish discrimination in violation of section 16 (First)." The Court was referring to charging shippers disguised markups and was validating a rule which prevented a practice that was alleged to violate section 16 unless prevented by rule. The Court distinguished the cases involving "transportation or wharfage charges . . . dependent on the particular commodity involved . . ." where the fees for shipping bananas would bear no relation to the fees levied for heavy industrial equipment, and where proof of a violation would require a showing of competitive relationship. The Court continued by stating the fact that the widely varying amounts covered substantially identical services and ". . . seems to us to be prima facie discriminatory in a regulated industry" (Id.). This statement means the action itself violates the law without proof of a competitive relation to anyone else. The present facts do not concern a comparison of services and related versus unrelated charges for the services, but concern a cost of doing business in the form of an assessment which is like a tax. Nevertheless, a requirement of a competitive relationship is excludable as a prerequisite to proof of a violation because the measure of Respondents' charges is equally unrelated by apparent reason to what the charge is for, just as widely varying charges

are unrelated to services that are substantially the same. The statements of the Court about the sufficiency of variations unsupported by reasons and lack of need for competition as proof to establish violation of section 16 (First) are thus pertinent and applicable. A finding of undue prejudice or disadvantage under section 16 should not be made to depend on competition, but may exist in relation to other kinds of property where it is shown they should be treated alike, absent contrary reasons. The existence of competitive shippers may affect the amount of reparation due, but not liability under section 16.

Finding No. 6 is supported.

Section 17 of the Act requires every other person to observe just and reasonable regulations and practices relating to the receiving, handling, storing and delivering of property. Section 17 singles out certain acts of discrimination against property and authorizes the Commission to prescribe just and reasonable practices. Section 17 concerns practices in connection with property, no matter how it is transported, whether by common carrier or otherwise.

Respondents have established, observed, and enforced, relative to the receiving, handling, storing, or delivering of property, in the discharge of obligations as a PMA member, the following regulations and practices:

- a. Adoption of a method of measuring such property to obtain money to meet payments to the Fund;
- b. Acceptance of the obligation to make, and making monthly payments to PMA in accordance with the agreed measure; and,
- c. Inclusion in their charges for terminal facilities of the amount due by application of the agreed measure.

It has been held that practices which result in the assessment of charges against persons not directly benefited by services rendered are an unjust and unreasonable practice within the meaning of section 17. *Terminal Rate Structure—Pacific Northwest Ports*, 5 F.M.B. 53 at 55 (1956). In that proceeding only book entries were involved. A cost allocation accomplished by actual charges against persons not directly benefited, as where automobiles have lower handling charges than other cargo and receive less benefit than other general cargo on the average from the arrangement with ILWU, is equally if not more a "practice" than book entries. Our predecessor stated in the *Terminal Rate Structure* case (supra) at p. 56, "the terminals may not recover, through a service charge, deficiencies in revenue attributable to a totally different operation". Respondents have followed PMA directives by imposing charges resulting from the automobile

measure to make up for deficiencies in assessments and contributions to the Fund resulting from lower assessments on coastwise trade, lumber, certain Army property, and to some extent the lower assessment on all other property. Complainant's property is made responsible for bearing 10 times higher charges than other property and 20 times higher than that in the coastwise trade. The difference in treatment between Complainant and all others resulting in this expensive result is also an unjust regulation.

The Respondents' practice may not be looked at only in relation to one item of property, i.e., automobiles, but must be viewed as part of the complex of practices of which it is a part and comparisons and evaluations made as to the reasonableness of the entire system of cost measurement and allocation. The majority avoids this task of passing on reasonableness of the measure on the ground that (a) "there is no statutory requirement" of equality and (b) "it was necessary in the business judgment of respondents." Neither is there any statutory requirement of inequality and *Evans Cooperage Co., Inc. v. Board of Commissioners*, 6 FMC 415 (1961), does not hold that charges may be differentiated without reason so as to burden one person or class of property 10 times more than others where "the record contains no basis upon which a reasonable allocation of costs could be made". In the *Evans* case, on the contrary, the charge to complainant was exactly the same as to everyone else, and it was only found the benefits, while somewhat different, could not be measured precisely. The facts were that the ship charged dockage did not tie up to the dock, but to the seaward side of a ship already tied up. The "business judgment" argument only means the measure is reasonable because Respondents say so. This is an excuse, not a reason.

Finally, the fact that the decision was a business judgment unrestrained by normal forces of supply and demand introduces potential unjustness in the regulation by its unrestrained character. Here business judgment is not being exercised subject to competitive market restraints of other suppliers, but is being exercised by substantially all suppliers to regulate the market itself. Judgment is restrained by the vote of PMA members who are virtually the entire market for the handling of property passing through Pacific coast ports. The articles of association obligate obedience to the voted decision. There is no other practical restraint, particularly in view of evidence that ILWU was putting pressure on non-PMA members to contribute the same as members. Normally the function of regulating the market itself when needed in the public interest is reserved to government, rather than to a private association or to the association aided by the dominant labor union association.

If the assessment charges varied in response to competitive forces within the market, a business judgment decision might not be unjust because of the protective restraint afforded by the open market. Where the market protection is missing, however, there is no assurance of justness, and it is the function of government to provide the assurance. The facts of this case provide a perfect example of what happens when there is a single decision rather than an interplay of conflicting decision by many entrepreneurs. The tenfold charge would probably be impossible under competitive conditions. PMA was able to single out various subjects of commerce and, aided by labor unions, to make property subject to assessment to meet labor costs in the same way that the government measures property for tax purposes to meet costs of government. There was no practical restraint on its choice. The unrestrained choice of a measure unrelated to labor costs needs justification to begin with, but is made unjust by the unequal application made possible by Respondents' participation in the PMA control over the market.

The majority refers to the reasonableness of Respondents' activities attested by (1) efforts to change the Mechanization Fund assessments, (2) offers to pass on only part of the assessments, and (3) measurement levies on dues for several years without protest. Presumably the statement refers to the second paragraph of section 17, requiring other persons subject to the Act to establish "reasonable regulations and practices," and to activities equated with regulations and practices. There is no question in this dissent as to Respondents' good intentions in seeking a change in the assessment and offering to pass on only part of the assessment. What have been questioned and found wanting are the actual results of Respondents' practices in line with the agreed regulations. The facts show the assessments have not changed, nor have claims against VW for full payment actually been changed. At most the offer to pass on only part of the assessment was a bargaining concession, not a change of conduct. With regard to several years of levy without protest of the PMA dues assessment as distinguished from the Mechanization Fund assessment on a measurement basis, past failure to challenge the practice relative to dues may not be translated into present and future reasonableness of the disparate practices relative to the Mechanization Fund. The past in this case must relate to before November 1961, because around that time VW representatives made known their objections to what was being done to them in regard to the Fund Assessments (Tr., 151-155). If Respondents make the intended changes, another issue might be presented.

Finding No. 7 is supported.

4. *Observations.* The many complex considerations in this proceeding ultimately funnel themselves down to the single error of PMA in choosing property rather than labor (in terms of man-hours with adjustments to meet disclosed inequities) as a measure. PMA chose the wrong measure for its members' obligation to compensate the working man for displacement from mechanization improvements creating fewer opportunities for work. Praiseworthy as these endeavors are, PMA lost sight of the basic consideration that sections 16 and 17 of the Act are founded on a policy of protecting property in commerce and protecting its competing owners and the public against unfair competitive practices. Such policy includes protection of the public against unfair market control. Had PMA chosen to follow its minority committee report and avoided the use of the protected property to measure its charges on shippers and on commerce and used instead a labor measure, and property to a less extent, equitably applied, my conclusions about these acts would very likely be the reverse of what they are. With such a measure, any burden would be directly related to and attributable to labor costs and become a just cost of business. Different assessments would be based on genuinely different situations. No description of traffic and no particular person would be singled out as the object of disadvantage. The entrepreneurs' expenses would be related to the working man's production. The measure would be related to compensation for displaced production, would not be subject to unfair market control, and would be just, fair, reasonable, and without prejudice or disadvantage.

CONCLUSION

For the foregoing reasons the Examiner should be reversed in deciding there has been no violation of sections 15 or 16 and no failure to comply with section 17 of the Act, and the exceptions should be sustained.

COMMISSIONER HEARN, *dissenting*:

Like the majority, I conclude that the record does not establish violations of sections 16 and 17 of the Act. Complainant's automobiles have not been disadvantaged or prejudiced to the preference or advantage of any other automobile shipper, and the assessment of complainant's automobiles on a measurement rather than a unit or weight basis, has not been shown to constitute an unreasonable practice relating to the receiving, handling, storing, or delivering of property. Further, although it is asserted that automobiles shall derive only a general or common benefit from the fruition of the PMA-ILWU com-

pacts, there need "be no precise equivalence between the services rendered and the charges." *Evans Cooperage Co. Inc. v. Board of Commissioners*, 6 FMB 415, 419 (1961).

I disagree with the majority solely on the reading of the record in the light of section 15. As a general rule, our long established national policy frowns upon concerted action by members of all segments of our business community. Ocean shipping, forwarding, and terminal operating subject to our jurisdiction have traditionally enjoyed an exemption from this rule where the concerted action is not contrary to our public interest or detrimental to our commerce,³ and is pre-approved by the Commission. Absent the foregoing, such conduct is contrary to section 15 and is unlawful under the Shipping Act.

As exceptions to our national antitrust policy, proposed agreements must be scrutinized carefully:

The condition upon which such authority [the authority to legalize concerted action] is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than necessary to serve the purposes of the regulatory statute. *Isbrandtsen Co. v. United States*, 211 F. 2d 51, 57 (D.C. Cir. 1954).

It is in this context that the following language of section 15 is so important:⁴

Any agreement . . . not approved . . . by the Commission shall be unlawful, and agreements . . . shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, . . . any such agreement

Thus, the sole issue to which I address myself is whether respondents, persons subject to the Act, entered into and carried out an agreement, understanding, or arrangement within the purview of section 15 with other members of PMA, many of whom are admittedly common carriers by water or other persons subject to the Act.⁵ It is my conviction that the members of PMA entered into and carried out a "co-operative working arrangement" which, as I have noted,

³ "[T]he Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws." *Isbrandtsen Co. v. United States*, 211 F. 2d 51, 57 (D.C. Cir. 1954).

⁴ Unlike the Examiner, I find nothing in section 15 "inane." Nor did the Commission in *Unapproved Sect. 15 Agreements—S. African Trade*, 7 FMC 159 (1962) at page 190, find the phrase "inane" or superfluous:

"Accordingly, section 15 requires—as it has for the 45 years since enacted—the filing of a copy, or 'if oral' a true and complete memorandum, of 'every agreement' covering any of the wide range of anticompetitive activities therein mentioned, 'or in any manner providing for an exclusive, preferential, or cooperative working agreement.'"

⁵ The agreement or agreements between PMA and ILWU are clearly labor-management agreements and consequently are not within the reach of the Act. While these agreements may have triggered the arrangement by the membership of PMA, the PMA-ILWU compacts are irrelevant to the central issue here.

required this Commission's approval as a prerequisite to its effectuation under the explicit language of the statute.

I agree with the majority's statement that the legislative history of the Act makes it clear that section 15 was intended to apply only to those cooperative working arrangements "which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping . . . public . . ." but I read this record as definitely affecting (1) the shippers of automobiles ratewise, and (2) the competition among PMA members themselves with respect to the discharge rates that they may offer automobile shippers. While "agreements . . . to pool secretarial workers or share office space" may be cooperative working arrangements not within the scope of section 15 as the majority says, certainly a working agreement to raise \$29 million over a 5½-year period, through detailed and uniform assessments relating to cargo handled, is a different situation and is hardly akin to a secretary pool in my opinion. Furthermore, it is different not only in size but, more importantly, in character.

The record illustrates that PMA knew the assessment had to be passed on to the cargo, at least to automobiles.⁶ A telegram from Brady-Hamilton, one of the PMA members who handled Volkswagens states:

The position of the Committee, that the assessment on unboxed auto is the responsibility of the stevedore to pay, appeared to attempt to release [PMA] from any responsibility, to the extent that the stevedore could be entirely free to absorb all of the assessments if he desired. The cost of this assessment is so much greater as compared to the stevedoring cost it could never be considered (Ex. 24).

Marine Terminals, as well, advised PMA on November 29, 1961, (Ex. 25): "There is no way that the contractor could absorb such an increase . . ." and an interoffice PMA memo of December 13, 1961, (Ex. 27) states:

The Committee at present feels that the tonnage formula does not work an inordinate hardship *on the shipper* [Italics added].

In a letter dated March 1, 1961, Marine Terminals advised PMA of its difficulties in collecting contributions to the Mech Fund assessed against Volkswagens:

We have informed them that we at Marine Terminals are merely following out the instructions set forth by the Board of Directors of the Pacific Maritime Association and *therefore are considered only a collection agency in this matter.*

⁶ PMA also knew that assessments against Army cargo were passed on. PMA's records show that lest Volkswagen get relief, the Army would be next in line; ". . . they are still querulous about the propriety of such contributions." (Ex. 22.)

We find ourselves in a very awkward position and wish to be advised of the *committee's decisions on how automobiles will be assessed* and what stand we can take in demanding payment of this assessment. (Ex. 9.) [Italics added.]

The "collection agency" designation becomes more than a unilateral misconception on Marine Terminals' part when PMA's minutes of December 13, 1961 (Ex. 2H) are examined:

Chairman read a communication from the Funding Committee covering the problem of collecting funds *from Volkswagen* due to the Mechanization Fund . . . Marine Terminals requested that a letter covering this discussion be forwarded to them and that they be *authorized* to bring suit against Volkswagen for the monies due. Marine Terminals also requested that PMA give both legal and moral support on the Volkswagen suit. It was agreed that PMA will give such support and will participate in any legal action taken and that the matter will be turned over to PMA Legal Counsel. [Italics added.]

Again, PMA's minutes of March 14, 1963 (Ex. 2C) show:

On the matter of mechanization assessments Counsel recommended an escrow account for payments by the stevedores *on behalf of Volkswagenwerk*. The Board of Directors this morning took no action to modify its previous position that the contributions be paid currently. [Italics added.]

In my view, these exhibits⁷ reveal a cooperative working arrangement by members of PMA relating to the fixing or regulating of transportation rates, at least so far as automobiles and possibly Army cargo are concerned. It is of no moment that a formal, legally binding contract to assess certain tolls upon cargo has not been produced. "Section 15 is not concerned with formality but with the actual effect of the arrangement." *Unapproved Section 15 Agreements—S. African Trade, supra* at 188. The failure of respondents and PMA to get prior approval for the plan from the Commission renders the effectuation of it unlawful. As stated in *Status of Carloaders and Unloaders*, 2 USMC, 761 (1946) at page 766:

When carriers or "other persons" undertake, by agreement, to *fix or regulate* rates, . . . there must be performed a series of acts under the statute. (1) They must file the agreement with the Commission.

Due to the posture of the record and the narrow question under section 15 presented here, I do not reach the issue of approvability, under section 15, of PMA's plan in furtherance of the laudable social ends envisioned by its arrangements with ILWU. However, approvable or not, the parties are not relieved of their obligation to secure the approval of the Commission before they attempt to carry it out.

In conclusion, I believe the majority seriously erred in not finding

⁷ The exhibits are contemporaneous records and as such are far more persuasive than the after-the-fact, self-serving statements of PMA witnesses to the contrary.

that the respondents, Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) violated section 15 by being parties to, and carrying out, a cooperative working arrangement with other members of intervenor PMA without the prior approval of this agency.

No. 1089

VOLKSWAGENWERK AKTIENGESELLSCHAFT

v.

MARINE TERMINALS CORPORATION, ET AL.

ORDER

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is incorporated herein by reference, therefore,

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1170

FIRESTONE INTERNATIONAL COMPANY, A DIVISION OF THE FIRESTONE
TIRE & RUBBER COMPANY

v.

FAR EAST CONFERENCE ET AL.

Decided October 14, 1965

Respondents conduct in asserting breach of its dual rate contract with Complainant and in demanding damages therefor, found not to constitute coercion and harassment in violation of section 14 Third and section 14b of the Shipping Act, 1916.

A. Vernon Carnahan and Peter J. Gartland for complainant.

Herman Goldman, Seymor H. Kligler, and Sol D. Bromberg for respondents.

Robert J. Blackwell, Harold L. Witsaman, and Thomas Christensen as Hearing Counsel.

REPORT

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

This proceeding was initiated by the complaint of Firestone International Company (International) against the Far East Conference (Conference) and its member lines. Complainant, as a party to a dual rate freight agreement with the Conference, seeks of the Commission an order requiring Respondents to cease and desist from activities claimed to be in violation of section 14 Third (46 U.S.C. 812) and section 14b (46 U.S.C. 842) of the Shipping Act, 1916 (the Act), with respect to certain shipments in 1962 from International to various firms in the Philippines on nonconference vessels.

In his Initial Decision, Hearing Examiner Paul D. Page, Jr., concluded that no cease and desist order should be issued and recom-

mended the dismissal of the complaint. The parties filed exceptions and replies to the Initial Decision, and we heard oral argument.

FACTS

The following statement is based on the Examiner's findings, though in somewhat less detail.

Complainant, Firestone International Company, is an unincorporated division of the Firestone Tire & Rubber Company (Firestone of Ohio), an Ohio corporation. International engages in exporting Firestone of Ohio products, principally finished goods such as tires, tubes, and related products, synthetic rubber, and fabric textiles.

Respondents are the Far East Conference, an association of carriers encompassing trade from Atlantic and Gulf ports of the United States to Japan, Okinawa, Korea, Taiwan, Siberia, Manchuria, China, Hong Kong, Republic of the Philippines, Vietnam, Cambodia, and Laos; and its 19 member lines.

In 1940, Firestone International Tire & Rubber Export Company (the predecessor of the Complainant International) entered into a dual rate agreement with the Conference. In 1947, Complainant was substituted for Firestone International Tire & Rubber Export Company as the signatory to the contract. The provisions of this contract, as amended in 1948, which are relevant to this proceeding are:

1. The Shipper, in consideration of the rates and other conditions stated herein agrees to forward by vessels of the Carriers all shipments made, directly or indirectly, by him, his agent, subsidiary, associated and/or parent companies and shipped from United States ports, excepting, however, Pacific Coast ports, to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China, and Philippine Islands.

* * * * *

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

In order that the Conference may determine the existence or non-existence of a violation hereof, the shipper shall, upon request, furnish to the Conference full and complete information with respect to any shipment or shipments made by such Shipper in the trade covered by this Agreement.

* * * * *

8. Any disputes between the parties hereto arising out of this Agreement or involving the interpretation or effect thereof, shall be referred to a board of three arbitrators, one of whom shall be appointed by the Shipper, the second of whom shall be appointed by the two arbitrators appointed as aforesaid, including, but without limitation, the amount of damages arising from the same shall be made a rule of the Court.

Beginning about October 4, 1962, and continuing until about March 5, 1963, when the complaint was filed, Far East and International engaged in a continuing controversy with respect to nine shipments by International from United States Atlantic and Gulf ports to Philippine ports on nonconference vessels. The terms of sale on all nine shipments were FAS and all but one of these shipments were consigned to Firestone Tire & Rubber Company of the Philippines (Firestone of the Philippines).¹ International prepaid the ocean freight, prepared the documentation and appeared as shipper on the attendant bills of lading.

The first shipment was loaded aboard the nonconference steamer *Eurylochus* at Baltimore and was discharged at Manila about June 29, 1962. It was the only shipment of the nine which International sent to someone other than Firestone of the Philippines. On October 4, 1962, Mr. J. A. Dennean, the Conference Chairman, sent a letter to Complainant requesting information concerning that shipment, as provided in article 4 of the dual rate contract. Complainant replied that the shipment had been purchased on a FAS Baltimore basis and had been made on a nonconference vessel at the request of its customer, Sherwin-Williams Company.

On March 7, 1963, a further letter was sent by Chairman Dennean to Complainant stating that the Conference had received information that various other shipments had been made by International on nonconference vessels, *Elias Lemos*, *Eurymedon*, *Eurymachus*, *Eurygenes*, and *Negba*, from the ports of New York, Charleston, Houston, and New Orleans to Manila during November and December 1962. The Conference requested further information in order to determine whether there was, in fact, a violation of the dual rate contract.

On March 11, 1963, Mr. Marrubio, International's traffic manager, stated in reply that International made the shipments via nonconference vessels in accordance with instructions received from its cus-

¹ The Examiner found that Firestone of the Philippines is Complainant's 75 percent owned subsidiary.

tomers abroad. He attached a copy of a letter which had been sent by Firestone of the Philippines to Firestone of Ohio requesting that arrangements for future shipments to Manila be made via nonconference lines, since it appeared that considerable savings could be made by shipping on nonconference vessels. Mr. Marrubio added that "as these shipments were purchased on a FAS seaport basis (International) had no alternative but to comply with (International's) customer's request."

In correspondence through May 1963, the Conference asserted "indicated" contract violations by International and demanded further details regarding the shipments. International denied the violations and furnished no further information.

On June 11, 1963, Chairman Dennean wrote to International pointing out that Standard and Poor listed International as owning 75 percent of the voting power of Firestone of the Philippines. He stated that Firestone of the Philippines was a subsidiary company of International within the meaning of the terms of the dual rate contract, and that shipments made by Firestone of the Philippines were required to be made on vessels of members of the Conference.

The foregoing letter referred to shipments by International to Firestone of the Philippines on the nonconference vessels *Tagya* and *Navarino* for which the Conference requested the payment of \$6,617.44 in liquidated damages. The Conference stated that Complainant's failure to pay liquidated damages within 30 days would be cause for termination of Complainant's right to contract rates in accordance with the dual rate contract. As with similar shipments, International denied the asserted violations on the grounds that the shipments were purchased on a FAS seaport basis, and it had no alternative but to comply with its customer's request.

Mr. Dennean's letter of June 11, 1963, was answered not by International, but by Firestone of Ohio, speaking through Mr. R. W. Wettstyne, its Director of Traffic. He requested that any proceedings in regard to the dispute be held in abeyance pending the outcome of *The Dual Rate Cases* before the Federal Maritime Commission.

On October 30, 1963, counsel for the Conference requested of Mr. Wettstyne payment of \$36,702.28 in liquidated damages for all shipments in question. Firestone of Ohio was given the option of making payment of the liquidated damages or designating an arbitrator, in accordance with paragraph 8 of the contract. The letter reiterated that under the terms of the contract Firestone of Ohio's right to contract rates could be terminated.

On December 11, 1963, Conference Counsel again wrote Mr. Wettstyne, requesting payment of the liquidated damages owing to the Conference and stated that unless these were paid arbitration pro-

ceedings would be instituted. Apparently no reply was made and on January 30, 1964, the Conference through its attorney wrote International demanding arbitration pursuant to the dual rate contract, and referring specifically to the shipments made in 1962, and on the following vessels: *Elias Lemos*, *Eurymedon*, *Eurymachus*, *Negba*, *Eurytan*, *Eurygenes*, and *Eurylochus*. In this letter the Conference designated one arbitrator and requested International to do the same. International was also given the option of substituting the American Arbitration Association.

Shortly thereafter, on March 6, 1964, International filed this complaint which alleged in essence that Respondent was violating section 14b and section 14 Third of the Shipping Act, 1916, by asserting breaches of their dual rate contract, by demanding liquidated damages for the asserted breaches, by threatening to institute proceedings to collect liquidated damages, and by threatening termination of its rights to contract rates. In its prayer for relief, International asked that Respondent be enjoined from continuing any of these actions.

DISCUSSION AND CONCLUSIONS

The Examiner concluded that the dispute between International and the Conference was one arising out of their dual rate contract and that under the terms of that contract the parties had agreed to submit their disputes to arbitration, which International has refused to do. Moreover, he found that the evidence did not justify an order to the Conference to cease and desist from proceeding to arbitration nor did the evidence disclose any violations of the Act upon which the Commission could premise a cease and desist order. International and Hearing Counsel except.

In its complaint International alleged that the activities of the Conference (1) constituted unlawful activity under the Commission's regulations of March 15, 1962,² and (2) violated the provisions of section 14b and section 14 Third of the Act. Thus, upon the adverse decision of the Examiner, International excepts to the ultimate decision of the Examiner, and in particular to the Examiner's failure to find that the Conference's application and enforcement of the dual rate contract was unlawful under the Shipping Act. In addition, International excepts to the Examiner's finding that International is a stockholder in Firestone of the Philippines. Finally, International excepts to the failure of the Examiner to receive certain evidence and to make certain findings propounded on brief.

² This ruling was actually promulgated and published in the Federal Register on Mar. 21, 1962.

Although Hearing Counsel concur in the Examiner's ultimate conclusion insofar as he concludes that the complaint should be dismissed for failure of proof, they object to certain grounds upon which that decision was based. They contend that the Examiner has unduly concerned himself with the underlying dispute between the parties and has misconstrued the main issue for determination here to be whether the facts in this case justified an order to the Conference that they cease and desist from referring their dispute with International to arbitrators. Hearing Counsel assert that "although issuance of the order prayed for would necessarily preclude arbitration Complainant more importantly seeks relief from conduct which it alleges violates the Act." Therefore, Hearing Counsel advocate the dismissal of the complaint as recommended by the Examiner, but urge the Commission to base its decision solely upon a finding that the Complainant has failed to support its allegations that the Conference's activities constituted violations of section 14b and section 14 Third of the Act.

First, we must consider the dispute in light of the statutory background. On October 3, 1961, Congress enacted Public Law 87-346, which, among other things, added new section 14b to the Shipping Act, 1916, authorizing "* * * ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers and consignees, * * *" consistent with the standards therein established and provided such contracts expressly included certain specified clauses. Section 14b(3) provided as follows:

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

At the time Public Law 87-346 was enacted, the contract read in part:

The shipper, in consideration of the rates and other conditions stated herein agrees to forward by vessels of the Carriers all shipments made, directly or indirectly, by him, his agents, subsidiary, associated and/or parent companies and shipped from United States ports, excepting, however, Pacific Coast ports, to ports in * * * (the) Philippine Islands.

Section 14b(5):

Limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling;

The fourth clause of the Far East Conference dual rate contract at the time of enactment of Public Law 87-346 provided that if the shipper makes any shipment in violation of any provision of this contract, he "shall pay liquidated damages to the Conference in lieu of actual damages." This clause goes on to state that "such liquidated damages shall be paid in the amount of freight which the shipper would have paid had such shipment * * * moved via a Conference Carrier computed at the contract rate or rates currently in effect."

Section 3 of Public Law 87-346 provided for interim validity of existing dual rate contracts:

* * * all existing agreements which are lawful under the Shipping Act, 1916, immediately prior to enactment of this Act, shall remain lawful unless disapproved, canceled, or modified by the Commission pursuant to the provisions of the Shipping Act, 1916, as amended by this Act: *Provided, however,* That all such existing agreements which are rendered unlawful by the provisions of such Act as hereby amended must be amended to comply with the provisions of such Act as hereby amended, and if such amendments are filed for approval within six months after the enactment of this Act (April 3, 1962), such agreements so amended shall be lawful for a further period of not to exceed one year after such filing. Within such year the Commission shall approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act.³

By an interpretative ruling issued March 21, 1962, the Commission determined that:

* * * (Section 3 of P.L. 87-346 and Section 14b of the Shipping Act, 1916 prohibit) a carrier or conference of carriers from denying contract rates for a period of 90 days after April 2, 1962, to a contract shipper who on April 2, 1962, was a party to a lawful contract rate agreement and who prior to April 3, 1962 * * * advises said conference in writing or by telegram that he agrees to be bound by said contract rate agreement amended to the extent necessary to comply with the provisions of section 14b of the Shipping Act, 1916; *Provided,* That the conference has filed with the Federal Maritime Commission a proposed form of contract pursuant to section 3 of Public Law 87-346.

* * * * *
Furthermore, on and after April 3, 1962, the provisions of any contract rate agreement which has been modified in order to comply with the proviso clause of Section 3 of Public Law 87-346 are lawful and enforceable as between the parties only to the extent that such provisions (1) were lawful on April 2, 1962, and are not inconsistent with the requirements of Section 14b of the Shipping Act, 1916, or (2) are required to make said contract agreement comply with Section 14b of the Shipping Act, 1916. Any other provision of any such contract rate agreement is unlawful and may not be applied or enforced directly or indirectly, until such provision has been approved by the Commission.

³ By subsequent enactment, the time allowed the Commission (and the period of interim validity) was extended to Apr. 3, 1964, Public Law 88-5 (77 Stat. 5) (1963).

In accordance with the directives of the interpretative ruling quoted immediately above, Respondent filed with the Commission a proposed form of contract, and Complainant notified Respondent in writing of its agreement to be bound by the contract amended to the extent necessary to comply with the provisions of section 14b of the Act. Therefore, during the period of breaches asserted by Respondent, June 1962-January 1963 the contract between Respondent and Complainant was lawful and enforceable against it only to the extent that its provisions were lawful on April 2, 1962, and were not inconsistent with the requirements of section 14b.

In its complaint, International alleges that it was a party to a dual rate freight agreement with the Conference and that the Conference and its member lines have "knowingly and willfully" conspired to make unwarranted assertions of breach of contract against International, to demand the payment of damages therefor, and to threaten to cancel the dual rate contract. International's position is that these assertions of breaches were unwarranted and unlawful because they were known to be groundless, since shipments were made FAS and International did not have the legal right to select the carrier, and were designed to harass and coerce International into refusing to deal with carriers who were not members of the Conference. Underlying these allegations is a basic charge that the Conference was attempting to enforce a dual rate contract that did not meet the requirements of section 14b.

By the terms of the first provision of the parties' dual rate contract, all shipments by International and its affiliates were to be made on Conference vessels. The shipments in question, however, were made on nonconference vessels, and were consigned to Firestone of the Philippines allegedly a subsidiary of International, and to Sherwin-Williams. Furthermore, it appeared that International prepared the documentation required on all nine shipments, appeared as shipper on all bills of lading, and, along with Interplant,⁴ selected the carrier.

On the basis of the foregoing, we are of the opinion that the Conference had just and reasonable cause to suspect that International had breached its dual rate contract, and any attempt by the Conference to enforce its contract by the means made available therein was justified. As a matter of fact, the Conference would have been delinquent in its duty had it not attempted to police its dual rate contract because of the obligation it owes to its shippers to see to it that the enforcement of rates be consistent and uniform.

With respect to the merits of the dispute, the Conference contends that International had the legal right to select the carrier and that in

⁴ "Interplant" is a "department" of Firestone of Ohio, which International states, has no policy- or decision-making responsibility.

selecting nonconference carriers, International violated the contract. International, in defense of its position that Firestone of the Philippines had the legal right to select the carrier, asserts that the shipments involved were sold FAS seaboard, and that Firestone of the Philippines had directed it to ship nonconference.

It is not essential to this proceeding that the question of who had the legal right to select the carrier be resolved. All that need be said is that under the circumstances the Conference was justified in investigating possible violations of its dual rate contract, asserting a breach of the dual rate contract, demanding liquidated damages, and attempting to proceed to arbitration. Respondents' good faith prosecution of what it believed to be a valid claim cannot be held to constitute harassment and coercion.

International argues that the Conference by attempting to enforce a contract which did not, and which the Conference knew did not, meet the criteria required by section 14b violated the Shipping Act, 1916.

As noted above, the Far East Conference dual rate contract for many years contained a provision requiring a signatory not only to transport his shipments but the shipments of all affiliates aboard Conference vessels. Section 14b(3) provides that a dual rate contract must be limited to the extent that it "covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier." Section 3 of Public Law 87-346 provided that dual rate contracts legal before the passage of section 14b, such as the contract of the Far East Conference, shall continue to be legal to the extent authorized by section 14b. Thus, contracts that were lawful prior to the passage of section 14b remained lawful to the extent they were not inconsistent with the requirements of that section. Therefore, in the context of this proceeding, the dual rate contract of the Far East Conference was amended by operation of law to include the qualification that the contract would apply only to shipments where the party to the dual rate contract had the legal right to select the carrier.

Similarly, the liquidated damage provision of the contract was amended by operation of law, in order to preserve its legality under the Shipping Act, to incorporate the provision of section 14b(5).

In our view, the contract of the Conference, as amended by operation of law to meet the requirements of section 14b, was operative at the time of the alleged breaches. Consequently, the matter should be resolved, as required by that contract, by reference to arbitrators to determine if any breach occurred and whether damages should be awarded.

This holding is consistent with our earlier view of arbitration clauses as set forth in *The Dual Rate Cases*, 8 FMC 16 (Mar. 27, 1964), where we stated :

Arbitration has developed as an efficient means of settling disputes under commercial contracts generally and would appear to be an appropriate means of disposing of routine disputes which arise under dual rate contracts. We therefore have no objection to clauses which call for the arbitration of disputes * * *.

We reaffirm what we said there.

Arbitration provisions have a long history in both Commission approved Conference agreements and dual rate contracts, and they have met with our approval. In this manner, the Commission has given to the parties of those dual rate contracts the opportunity to settle their differences between themselves. Although cases do arise where recourse to the Commission can be had notwithstanding arbitration provisions, this is the exception rather than the rule. We will not nullify arbitration clauses without serious cause.

In light of our disposal of the case in this manner, it is unnecessary to discuss other exceptions.

An order dismissing the complaint will be entered.

By the Commission.

No. 1170

FIRESTONE INTERNATIONAL COMPANY, A DIVISION OF THE FIRESTONE
TIRE & RUBBER COMPANY

v.

FAR EAST CONFERENCE ET AL.

ORDER

This proceeding being at issue upon complaint, having been duly heard, and full investigation having been had, and the Commission on this day having made and entered a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof, *Therefore,*

It is ordered, That the complaint in this proceeding is dismissed.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65-29

IMPOSITION OF SURCHARGE BY THE FAR EAST CONFERENCE AT SEARSPORT, MAINE

Decided November 5, 1965

Agreement No. 17, the organic agreement of the Far East Conference, found to operate in a manner which is unjustly discriminatory and unfair as between ports; between exporters from the United States and their foreign competitors; detrimental to the commerce of the United States; and contrary to the public interest.

Far East Conference ordered to open rates on newsprint from Searsport, Maine to Manila, Republic of the Philippines.

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

Edward Langlois, for Intervener, Maine Port Authority.

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

REPORT

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

This proceeding is before the Commission upon an order directing the Far East Conference to show cause why its organic agreement (FMC Agreement No. 17) should not be amended to remove the Port of Searsport from the trading range of the conference.

The Commission directed this order to the Conference because it appeared that the applicable tariffs of the Conference result in a situation which is detrimental to the commerce of the United States, contrary to the public interest, and otherwise in violation of the Shipping Act, 1916.

This proceeding is the outgrowth of an earlier Commission investigation in *Imposition of Surcharge on Cargo to Manila, Republic of the Philippines*, FMC Docket No. 1155 (Feb. 3, 1965). The Commission instituted Docket No. 1155 to investigate the lawfulness of surcharges on cargo moving from ports in the United States to Manila.

Republic of the Philippines. The purpose of the proceeding was to determine whether the surcharges were contrary to sections 15, 16, 17, and 18(b) (5) of the Shipping Act, 1916.

As far as pertinent here, the Commission named as Respondents the Far East Conference and its members. The Far East Conference serves Manila from United States Atlantic and Gulf ports, but this range of service does not include Canadian Atlantic ports. Maersk Line, however, a Far East Conference member, serves Canada to Manila as an independent.

The Far East Conference on July 25, 1963, filed with the Commission surcharges of \$10 per ton, as freighted, on cargoes destined for discharge at Manila, to be effective October 28, 1963. The amount of the surcharge has fluctuated since, but a surcharge is still in effect at Manila and is scheduled to be increased from \$5 to \$10 per ton on January 1, 1966.

In Docket No. 1155 the Commission held that carriers operating from the United States to Manila were justified in imposing a surcharge on cargo unloaded at the Port of Manila, because of the extraordinary delay occasioned by labor difficulties and port congestion. Nevertheless, the Commission found that Respondent, Maersk Line, by imposing a surcharge on newsprint at Searsport, Maine, while not applying a surcharge at St. John, New Brunswick, Canada, demanded, charged, and collected a charge which is unjustly discriminatory between shippers and ports and unjustly prejudicial to exporters of the United States as compared with their foreign competitors contrary to section 17 of the Shipping Act, 1916.

In conjunction with this holding, the Commission discussed the matter in its opinion as follows:

The Great Northern Paper Company is an exporter of paper and newsprint, competing with Canadian mills for the Philippine market. It has traditionally shipped its products from Searsport, Maine, where the surcharge is applicable. Canadian competitors, shipping from Eastern Canada, pay no surcharge in the Philippine trade. Newsprint is a low-rated commodity with a small margin of profit. During the first nine months of 1963, Great Northern shipped about 700 tons of newsprint a month but none was shipped in November and December. Since Great Northern can avoid the surcharge by utilizing Canadian ports and thus maintain a competitive position in the Philippines, it has embarked on a program of diverting newsprint from Searsport, Maine, and has now begun to export from the Canadian port of St. John. This diversion to Canada is not without some expense to Great Northern, and it deplors the inability of Searsport to handle this cargo. Great Northern's business is so competitive in the Philippines that it has not been able to pass on the entire surcharge to its customers, and it lost sales totaling about 1,400 tons of paper in November and December 1963 that were made by Eastern Canadian mills.

These facts establish that Pacific Star Line and Maersk Line by assessing a surcharge on newsprint at Searsport, Maine, while not at Canadian Atlantic ports, have unjustly discriminated against Great Northern and the Port of Searsport while advantaging Canadian shippers of newsprint and the Port of St. John. We find that a sufficient competitive relationship exists between the shippers and ports concerned; we find that Great Northern and the Port of Searsport have suffered pecuniary harm by the imposition of the surcharge and the resultant diversion of traffic, and we find that the transportation conditions are similar from St. John and Searsport. Pacific Star and Maersk, therefore, have demanded, charged, and collected a charge which is unreasonable. We find this conduct to be contrary to the provisions of section 17, which provides that "no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors." *West Indies Fruit Co. v. Flota Mercante* (7 F.M.C. 66 (1962)). *Grays Harbor Pulp & Paper Co. v. A. F. Klaveness & Co. A/S*, 2 U.S.M.C. 366, 369 (1940). We will order these carriers to cease and desist from this unreasonable practice by removing the inequality of treatment between shippers and ports by appropriate tariff amendments.

To implement this result, the Commission directed Maersk to end the discrimination by some appropriate tariff action.¹

After issuance of the Commission's decision and order, Maersk applied for an extension of time to comply. The Commission rejected the request by order of February 19, 1965. In denying the petition, the Commission stated:

There can be no doubt that Maersk must comply with the terms of the original order. Certainly, a request for additional time to decide whether to seek reopening or to petition for appellate review cannot operate as an automatic stay of our order requiring the elimination of a demonstrable discrimination. Indeed, the filing of either does not have that result.

Nor can their pleas that compliance is difficult in light of their obligations as members of the Far East Conference and as parties to Agreement No. 8200 with the Pacific Westbound Conference alter our rejection of this request for enlargement. Maersk Line is directed to end the discrimination set out in our opinion. No obligation of a conference member can delay the elimination of action which is contrary to a statute of the United States. Conferences, which exist pursuant to our section 15 approval, must not only cooperate fully to eliminate discrimination but, indeed, we expect them to take the lead to such end.

For these reasons, we deny the request.

Still Maersk failed to comply. Thereafter, upon application of the Commission to the United States District Court for the Southern District of New York, Maersk was directed to show cause why an order should not be made by the District Court pursuant to section 29 of the Shipping Act to enforce obedience by Maersk to the Commission's order of February 3, 1965. In subsequently ruling upon that order to show cause, the District Court on July 13, 1965, refused to enter an

¹The order provided as follows:

"It is ordered, That Respondents Maersk Line and Pacific Star Line cease and desist from assessing on newsprint moving from Searsport, Maine, to Manila, Republic of the Philippines, a surcharge which is prejudicial and discriminatory to exporters of newsprint from the United States and to the Port of Searsport, Maine;

"It is further ordered, That Respondents Maersk Line and Pacific Star Line shall notify the Commission within 15 days of the date of this order the manner in which they shall eliminate such prejudice and discrimination."

injunction against Maersk on two grounds: (1) That Maersk was not serving Searsport and, therefore, it was not necessary that it change a rate applicable at the port, and (2) that Maersk, having on three occasions petitioned that Far East Conference to eliminate the Searsport surcharge in order to allow Maersk to comply with the order and was not permitted by the Conference to make the change, could not comply with the order.

Therefore, the Commission is confronted with the problem of how to alleviate the discrimination against Searsport and against shippers and exporters who desire to use the Port of Searsport. To be sure, the discrimination we found in Docket No. 1155 remains. A surcharge is still imposed at Searsport and no surcharge is imposed at St. John. The fact that Maersk does not serve both ports does not obviate this discrimination. The significant fact is that a Far East Conference member calling at Searsport must assess a surcharge. Thus Searsport is at a disadvantage compared to St. John whether Maersk calls at either port or not. And the direct causation of the disadvantage is the Far East Conference.

Briefly, it is the Conference whose refusal to amend its tariff that compels the continuance of a situation which has been found to be a violation of section 17. Although the actual instrumentality of discrimination was Maersk in serving both Searsport and St. John, the underlying responsibility for the continuation of the discrimination rests with the Conference. Since the Conference refuses to amend its tariff, we will amend it for them. We hereby order the Far East Conference to open the rate at Searsport on newsprint destined for Manila.

While the Order to Show Cause which initiated this proceeding contemplated striking Searsport from the range of the Conference, we have decided upon a less drastic course. We will leave the Conference intact at Searsport, but order the Conference carriers to set rates on newsprint independently at that port. Sections 15 and 22 are our authority for this action.

We must find, in order to invoke section 15, that an agreement between common carriers subject to our jurisdiction operates in a manner that is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Shipping Act.² We hold that the

² Section 15 provides:

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations."

Far East Conference agreement has operated in a manner which is unjustly discriminatory or unfair as between ports and between exporters from the United States and their foreign competitors. In addition, we find that the agreement has operated in a manner which is detrimental to the commerce of the United States and contrary to the public interest.

Initially, we take note of certain of the provisions of the organic agreement, approved by us, which permits the Conference members to act collectively. The preamble to Agreement No. 17, approved November 14, 1922, provides:

That the parties hereby associate themselves together in a FAR EAST CONFERENCE to promote commerce from North Atlantic, South Atlantic and Gulf ports of the United States of America to JAPAN, OKINAWA, KOREA, TAIWAN (Formosa), SIBERIA, MANCHURIA, CHINA, HONG KONG, REPUBLIC OF THE PHILIPPINES, and the territory formerly known as Indo-China, namely VIETNAM, CAMBODIA, and LAOS, for the common good of shippers and carriers, by providing just and economical cooperation between the steamship lines operating in such trades; and to the accomplishment of that end the parties hereby severally agree with each other as follows * * *³

Thus, two facts are readily apparent: The Conference serves United States, and not Canadian ports and the Conference was intended to promote commerce, in the United States to Orient trade, for the common good of shippers and carriers. It is now appropriate to measure the operation of the agreement against its own terms and purposes as well as the terms and purposes of section 15.

First we consider the question of discrimination between ports. In Docket No. 1155, we found that Maersk by imposing a surcharge on newsprint at Searsport while not applying a surcharge at St. John had demanded, charged, and collected a charge which is unjustly discriminatory between ports contrary to section 17. Let us examine what has occurred since we entered this finding. The surcharge is still applicable at Searsport, but no surcharge is applicable at St. John. As we found in Docket No. 1155, the two ports are competitive, Searsport has suffered pecuniary harm by the imposition of the surcharge, and transportation conditions from St. John and Searsport are similar. Only one significant fact has changed; Maersk no longer serves Searsport.⁴ Does this fact obviate the section 17 violation? We think not.

³ This language is taken from Agreement No. 17-31, approved Nov. 7, 1963, which updated the list of foreign countries served to reflect current geographic designations.

⁴ By depriving Searsport of service, this simply compounds the harm to this port.

Searsport is at the same disadvantage it was before. And Searsport remains at a disadvantage because the Conference refused to alleviate the discrimination. On at least three occasions, Maersk requested that the Conference permit Maersk to comply. The Conference refused.⁵

Thus, one cause of the discrimination against Searsport is the refusal of the Conference to remedy the situation. It would be possible for carriers to establish or permit rate parity between Searsport and St. John *but for* the artificial restrictions of the Conference tariff. For it is the recalcitrant Conference that is primarily responsible for higher rates being applicable at Searsport as well as for the curtailment of service there by Maersk. We, therefore, hold that the Far East Conference agreement has operated in a manner which is unjustly discriminatory between ports.

We consider next the issue of whether the agreement operates in a manner which is unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors. In Docket No. 1155, we found that Maersk, by assessing a surcharge on newsprint at Searsport while not assessing a surcharge at Canadian Atlantic ports, demanded, charged, and collected a charge which is unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Again, nothing new has occurred subsequent to our finding except that Maersk has ceased providing service at Searsport. And again, what difference does this make? As far as the prejudice to Great Northern is concerned, it can make no difference. Great Northern is still at a disadvantage as compared with their competitors from Canada. The disadvantage in large measure is the result of the Conference's collective rate making. This is so because of the Conference tariff requirements, pursuant to which carriers cannot treat Great

⁵ In *Federal Maritime Commission v. Maersk Line* 243 F. Supp. 561, 562 (S.D.N.Y. 1965) the Court found:

"Evidence has been offered that at three Conference meetings held since the issuance of the Commission's order, Maersk has moved for the elimination of the Conference surcharge, and that the motions have been lost."

The Far East Conference minutes which are required to be filed with the Commission and which are subscribed to and certified as being a true and complete record of all actions provide:

1. "Motion was made and seconded that the Manila surcharge applied on newsprint paper shipped from Searsport, Maine, be eliminated forthwith. Motion was lost. Motion was thereupon made and seconded that the Manila surcharge be withdrawn on shipments of newsprint paper irrespective of the port of shipment. Motion was lost. (Meeting No. 1989, Feb. 17, 1965.)
2. "Motion was made and seconded that the Manila surcharge be eliminated forthwith on newsprint paper shipped from Searsport, Maine. Motion was lost. Motion was then made and seconded that the surcharge be eliminated on newsprint paper shipped from all ports to Manila, P.I. Motion was lost. (Meeting No. 1990, Feb. 18, 1965.)
3. "Motion was made and seconded, subject to concurrence of Pacific Westbound Conference, that the surcharge be eliminated with respect to newsprint paper shipped from Searsport, Maine. Motion was lost. (Meeting No. 1991, Feb. 24, 1965.)"

Northern fairly as compared with exporters from eastern Canada. We therefore, hold that the Far East Conference agreement has operated in a manner which is unjustly discriminatory and unfair as between exporters from the United States and their foreign competitors.

We turn now to the issue of detriment to commerce. Are the rate making practices of the Conference or the rates themselves detrimental to the commerce of the United States? It would appear that the action of the Conference which results in Maersk's refusal to serve Searsport would be enough in itself to justify a holding that the Conference has acted to the detriment of our commerce. This, coupled with the harm to Great Northern in its export business, is the essence of detriment to commerce. The record discloses that Great Northern, in order to remain competitive, has absorbed part of the surcharge and on one occasion diverted cargo to St. John to avoid the impact of the additional charge. The record further shows that Great Northern has lost some business to competitors using Canadian Atlantic ports. Accordingly, we find that the Far East Conference agreement has operated in a manner which is detrimental to the commerce of the United States.

We are further convinced that the agreement is operating in a manner which is contrary to the public interest. As we noted in our order denying a request for an extension of time in Docket No. 1155, we expect the Conference to take the lead in ending discriminatory situations. "Conferences, which exist pursuant to our section 15 approval, must not only cooperate fully to eliminate discrimination, but indeed, we expect them to take the lead to such end." This "suggestion" was not made as a passing remark. To the contrary, the passage represents what we consider to be the obligation of conferences under the public interest criterion. Here we have a classic demonstration of indifference to the needs of the public. While carriers wish to group together in rate making conferences for private commercial reasons, in exchange for this privilege we insist that these arrangements contribute in some manner toward public interest. As we said in *Pacific Coast European Conference*, 7 FMC 27, 37 (1961) :

A Conference agreement is not some sacrosanct private arrangement but a public contract, impressed with the public interest and permitted to exist only so long as it serves that interest.

One would have to look hard and long to discover what contribution to the public interest has been made by the Conference in their arbitrary action at Searsport.

The Conference can hardly be said to have acted toward the common good of shippers and carriers nor to have attempted to promote commerce from a United States port, the purported purpose of the agree-

ment. The Shipping Act provides a pervasive regulatory scheme. This scheme cannot be avoided by carriers hiding behind section 15 agreements. As the Supreme Court said in *Federal Maritime Board v. Isbrandtsen*, 356 U.S. 481 (1958) "Congress struck the balance by allowing Conference arrangements passing muster under sections 15, 16 and 17." Here the Conference has shown no concern for the public interest and has actually aggravated a situation which we held to be contrary to section 17. Conference authority to set rates on newsprint at Searsport is the major cause of the current discriminatory situation. Consequently, we will withdraw authority to set this rate.

Our remedy—to open the newsprint rate from Searsport to Manila—is authorized by law. Section 15 itself provides that we may disapprove an agreement upon a finding that the agreement operates in a manner which is unjustly discriminatory between ports or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Similarly, the Commission may modify an agreement where the agreement operates in an unlawful manner. Indeed, the Commission has a duty to take such action in the face of such a finding. *Pacific Far East Line v. United States* 246 F. 2d 711 (1957).

In *Empire State Highway Transp. Ass'n v. Federal Maritime Bd.* 291 F. 2d 336, 339 (1961), the Court summarized this authority as follows:

[W]hen a Conference has engaged in conduct violative of the fair and reasonable standards of the Act the Board may withdraw approval of the basic agreement itself, or require its modification.

Therefore, the Commission has the power to take the action contemplated by the order to show cause that instituted this proceeding; that is, the Commission may modify the Far East Conference agreement to eliminate Searsport from the authorized trading range of the Conference. Since we may take this action, we obviously may take lesser action; we may declare the newsprint rate at Searsport "open." Rather than modify the basic agreement, we believe it will be more expedient to alter the rate structure developed under the basic agreement. This will leave Conference jurisdiction intact at Searsport, but it will require carriers serving that port to set rates individually on newsprint moving to Manila. Since the Conference serves many destinations in addition to Manila, we believe it desirable not to curtail the scope of the agreement in any other respect. We resort to individual rate fixing because collective action has proven to be discriminatory. This order is authorized by section 15 and section 22.⁶

⁶ Section 22 provides:

"The (Commission), upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act."

We reaffirm the view of our predecessors that we may act under section 15 not merely against the terms of section 15 agreements but against rates fixed in concert as well. In *Edmond Weil v. Italian Line "Italia"*, 1 U.S.S.B.B. 395, 398 (1935), our predecessors stated:

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.

While not necessary to the ultimate decision, this dictum is a proper statement of Commission authority.

In *Pacific Coast—River Plate Brazil Rates*, 2 U.S.M.C. 28, 30 (1938), this position was reaffirmed. There the Conference allowed commodity rates on lumber to expire and thereafter, because of the failure of the Conference to agree, the "cargo, not otherwise specified" rate was applied. The Commission, citing *Edmond Weil*, found this rate to be an unreasonably high rate detrimental to the commerce of the United States. Thereafter, the Conference agreed on the lumber rate, and the Commission stated that "[u]nder the circumstances there now is no reason for withdrawing approval of Conference Agreement No. 200."

Again, in *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342, 347 (1940), the Commission considered the activity of a conference in quoting rates at a fixed percentage below nonconference competition. The Commission held:

A rate may be so low as to be unreasonable, and as one of the purposes of the Conference agreement is the establishment of reasonable rates, this reduction is a violation of the agreement and constitutes a condition unfavorable to shipping in the foreign trade. Inasmuch as the Conference has restored the rate to 60 cents no order with respect thereto will be entered.

These cases stand for the proposition that the Commission may either cancel or modify the agreement or act against the offending rate itself. Indeed, as the Supreme Court said in *California v. United States*, 320 U.S. 577, 582 (1944):

Having found violations of §§ 16 and 17, the Commission was charged by law with the duty of devising appropriate means for their correction.

Once before the Commission considered a problem where individual carriers, operating pursuant to a Conference tariff, violated section 17. In *Nickey Bros v. Manila Conference*, 5 FMB 467 (1958) the Commission's predecessor noted that while some of the Conference members were not violating the statute because they did not operate in the particular trade in question, they were members of the Conference and since the Conference was ordered to establish rate parity, the order

was directed to all Conference members whether they served the trade (or violated the Shipping Act) or not. Our order in this case follows the rationale in *Nickey*; it is a practical means of eliminating the discrimination.

Thus, the Commission has the power to act against Conference rates. We will, therefore, remove the artificial barrier imposed by the Conference, which created the discriminatory situation, by opening the Conference rate at Searsport on newsprint moving to Manila. This will remove the excuse that carriers cannot establish rates on a non-discriminatory basis at Searsport. Upon opening the rate carriers may set rates freely. We will be alert to ascertain whether these independent rates are non-discriminatory.

The Conference argues that section 15 cannot confer the authority to remove Searsport from the range of the Conference. The argument is premised upon the contention that section 15 makes approval of agreements mandatory unless they are found to operate in a manner proscribed by section 15. The Conference contends that there is absolutely no showing (rather the Commission's own findings in Docket No. 1155 are to the contrary), that the Conference has violated section 15 in any respect. In other words, the Conference argues that the only legitimate inquiry would be for the Commission to show cause why the agreement should not enjoy continued approval.

The argument, however, ignores the fact that the Commission earlier found unjust discrimination against the port of Searsport and shippers using that port, and that the finding of unjust discrimination was based on substantial evidence. Since the condition which permits the continuation of this discrimination lies with the Conference, there is a sufficient foundation to find that Conference action should be modified by the Commission to alleviate the unlawful conduct.

The Conference argues that as a matter of law the Conference cannot be held to discriminate against Searsport by reason of Canadian rates. This argument is based upon a contention that the Commission's proposed remedy in this proceeding—to eliminate Searsport from the range of the Conference—can be made only if the Commission finds that the Conference itself violated section 17 by treating competitive exporters and competitive ports differently. And, of course, the Conference claims that this finding cannot be made on this record.

The argument runs this way: No finding of discrimination can be made unless the same person (or Conference) serves both the preferred and the prejudiced port; the Conference does not control rates from Canadian ports; therefore, the Conference did not discriminate;

citing *Texas & Pacific Ry Co. v. United States*, 289 U.S. 627 (1933).⁷ While we have not heretofore relied upon a holding that the Conference has violated section 17, we have relied upon the equivalent language in section 15.

The impact of this argument in the instant case would be curious indeed. First of all we could not find a violation of section 17 by the Conference since it, as a Conference, does not control rates from St. John. Secondly, we could not under section 15 scrutinize the Conference's conduct to determine whether there is discrimination between ports or between United States and foreign exporters. This is too restrictive. The Commission is not powerless to act against a situation which has a harmful impact on our commerce, one of our ports, and on one of our exporters simply because the trading range of the Far East Conference does 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. Certainly in this context such a holding would effectively frustrate the purposes of section 17. There is discrimination because shipments from Searsport pay a surcharge and shipments from St. John do not. So long as there cannot be parity between the two ports, the discrimination will continue. Consequently, since the Conference does not have control over Canadian rates and, therefore, cannot establish parity of rates, we will suspend their control over the newsprint rate at Searsport. Since the Conference does not control rates both from Searsport and St. John, we will not let them control either. Then carriers who do serve both ports can equalize the rates.

The Conference argues that this proceeding is procedurally defective because it denies the opportunity for cross-examination which is guaranteed by the Administrative Procedure Act. It also claims that the order fails to give them appropriate notice of the matters of fact and law to be asserted, and that this proceeding is improper because it was "conceived in vindictiveness and dedicated to harassment." However, the APA does not require a full evidentiary hearing with full opportunity for cross-examination. The right of cross-examination should be granted where it is necessary for full disclosure of facts.

⁷ The *Texas & Pacific* principle has been construed to apply only where the Interstate Commerce Commission is directing the carriers to remove the discrimination where the order requires the carriers to do something they are powerless to perform. In *New York v. United States*, 331 U.S. 234, 342 (1947) the Court commented as follows:

"If the hands of the (Interstate Commerce) 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, the 1940 amendment to § 3(1) fell far short of its goal. We do not believe Congress left the Commission so impotent."

The statutory provision alluded to is similar to Shipping Act provisions; therefore, we follow this principle.

Where it is not necessary, then the opportunity for cross-examination is not afforded as a matter of right.

The argument of the Conference shows this as section 7(c) merely states:

* * * Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and a true disclosure of the facts.

The obvious qualification is that a party is entitled to cross-examination only where it is necessary for full disclosure of the facts. Furthermore, the "hearing" to which Respondent is entitled does not necessarily mean a full evidentiary proceeding. "Hearing" is defined to be "any oral proceeding before a tribunal." It may be by trial or argument. Davis, *Administrative Law Treatise*, section 7.01, p. 407.

Respondent is, of course, entitled to a fair hearing. But that concept means only that the party must have an opportunity to meet such facts which adversely affect its interests.

A leading authority on administrative law has discussed this problem at some length and concluded:

The cardinal principle of fair hearing is neither that all facts used should be in the record unless they are indisputable, nor that all facts used should be subject to cross-examination and rebuttal evidence, nor that "nothing can be treated as evidence which is not introduced as such," but it is that parties should have opportunity to meet in the appropriate fashion all facts that influence the disposition of the case. Davis, *Administrative Law Treatise*, section 15.14, p. 432.

It is well recognized in administrative law that cross-examination is unnecessary where no issue of fact is raised and the party has full opportunity to be heard on the issue of law.

Thus, the Commission finds that the Conference has been given an opportunity to meet the facts which adversely affected its interests. And, with respect to the findings made in Docket No. 1155, these facts speak for themselves and may be used by the Commission. There is no further need for cross-examination, since the Conference was earlier provided an opportunity to contest such facts before the Commission.

While the APA requires notice in administrative proceedings, this requirement is flexible and is met if the notice amounts to a general summary of the matters in issue. Here, it is evident that respondents have been given adequate notice, since the Conference has been aware of the problem since its inception and since the Commission's order to show cause contains a summary of the development of the problem.⁸

⁸ See "Review of Dual-Rate Legislation 1961-64," 88th Cong., 2d sess., where the subject was discussed at 418-21 and 607-09 before the House of Representatives Merchant Marine and Fisheries Committee, Special Subcommittee on Merchant Marine.

In *Cella v. United States*, 208 F. 2d 783 (1953), the Court held that in an administrative proceeding, it is only necessary that the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled. As this Commission itself has stated in a previous case, 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. *Pacific Coast European Conference—Limitation on Membership*, 5 FMB 39, 42 (1956).

With respect to this argument, the Commission holds that the Conference has been given sufficient notice of the matters involved so that it could prepare its own position.

With respect to the harassment and vindictiveness of the proceeding, the accusations are unjustified, since the origin of the proceeding results from refusal of the Conference to allow Maersk to comply with a Commission order. The Commission is simply, and in accord with its duty, trying to alleviate a patently discriminatory situation.

The Conference also contends that the proceeding is procedurally defective because the order to show cause imposes upon it the burden to establish the facts. We reject this contention. No matter what may be the state of the law with respect to burden of proof in this proceeding, one fact remains: The Commission in its earlier decision made a finding of unjust discrimination and it now has evidence before it that the Conference has prohibited Maersk from complying with the order. In effect, the Commission has fulfilled its burden since we rely upon these indisputable facts. Thus, it is not now so much a question of burden of proof as a question of whether the facts already before the Commission have any legal effect. Furthermore, our decision rests upon the record, not on the basis of whether one side or the other has met its burden of proof.

ULTIMATE CONCLUSION

The Far East Conference agreement and the Conference tariff, by requiring the assessment of a surcharge at Searsport, Maine, on newsprint moving to Manila, Republic of the Philippines, has operated in a manner which is unjustly discriminatory and unfair as between ports and between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, and contrary to the public interest, contrary to the requirements of section 15 of the Shipping Act, 1916. We will order the Conference to open

the rates on newsprint at Searsport, and we will order carriers serving that port to file and observe nondiscriminatory rates.

An appropriate order will be entered.

COMMISSIONER HEARN dissenting:

The majority in ordering the rates on newsprint "open" at Searsport, Maine, only, in an effort to put that commodity at that port on a parity with the rates from the Port of St. John, New Brunswick, I fear, have missed the mark. Respondent Conference's surcharge in this trade has been approved by our decision in Docket 1155. That case established the fact that the surcharge is justified and is a legitimate expense because of port conditions in Manila over which the carriers have no control. As a matter of principle, all cargo lifted to Manila should bear equally its fair share of the increased costs attendant on calls at that port.

In *Imposition of Surcharge on Cargo To Manila*, Docket No. 1155, the Commission found that one of the Conference members, Maersk Line, in addition to serving the newsprint trade at Searsport under the aegis of the Conference, also lifted newsprint from the Canadian port of St. John, a port not within the scope of the Conference's jurisdiction. Maersk did not assess a surcharge against newsprint from the Canadian port and we found that its action constituted an unlawful discrimination against newsprint emanating from Searsport. To obviate that unlawfulness we ordered Maersk to cease and desist from assessing the surcharge on newsprint out of Searsport. Subsequently, Maersk abandoned its Searsport service.

While Maersk did not strictly comply with our earlier order neither did it violate that order since it abandoned the Searsport trade. In effect it avoided our earlier order. Currently Searsport is being well served by other members of the Conference who have a voice in setting Conference rates at Searsport and who wish to assess the Commission approved surcharge, based upon the earlier carefully deliberated decision, which in my opinion they have a right to do. Consequently, since the Conference does not serve St. John it has not engaged in discriminatory practices and has not violated the shipping statutes. Further, it is apparent that, in spite of long work stoppages this year, five Conference carriers have furnished Searsport with eight sailings through August; the State Port Authority Representative at oral argument, advised us that the current Conference service is adequate; and most importantly that since our order in Docket No. 1155 no newsprint has been diverted from Searsport to St. John.

The proceeding now before us was instituted, in light of the foregoing, to determine whether or not Searsport should be stricken from

the trading range of the Conference. I am convinced that Searsport does not want this result and there is no basis on this record for such drastic action. Nor do I believe that the less drastic action ordered by the majority here; i.e., opening of the newsprint rate at Searsport, is supported by the record. The plain facts are that we have already determined that the existence and the level of Respondent's surcharge is lawful, and that the Conference vessels who offer newsprint service and levy the surcharge at Searsport do not now offer the same services at lower rates at St. John.

The majority action here gives rise to grave questions respecting the legality of surcharges assessed:

- (1) against other commodities by Conference vessels throughout their service range; and
- (2) against newsprint which may be offered by shippers at other ports within the Conference range.

The majority action here is official Commission approval of a discrimination against shippers of newsprint from any other port and of an undue tariff burden against shippers of all commodities from all ports within the Conference range.

Finally, the ordering of the newsprint rate "open" may be completely illusory in so far as the level of the surcharge is concerned because the carrier's cost of doing business must be considered in setting a rate, even an "open" rate, and the cost of doing business in Manila involves elements not found at other ports. Consequently, the ordering of an "open" rate on newsprint may well leave the rates at the same level as they are today.

In my opinion no action lies against the Conference since it has conducted its activities within the letter of the law, if not within its spirit. *Practices of Fabre Line and Gulf/Mediterranean Conf.*, 4 FMB 611 (1955).

Therefore, I would discontinue this proceeding.

COMMISSIONER JOHN S. PATTERSON, dissenting:

I dissent from the results reached in the majority report in this proceeding, and, for reasons advanced by Commissioner George H. Hearn, I am in accord with his dissenting opinion.

My additional reasons for dissenting are:

1. The Commission has no authority to order the Far East Conference to revise rates nor to "withdraw their authority to set this rate" in response to an order of investigation to show cause by Federal Maritime Commission Agreement No. 17 should not be amended to remove the Port of Searsport from the trading range of the Conference. Such

an order reaches a decision not responsive to the order initiating the adjudication.

2. Alleged bad conduct does not confer authority to revise rates. If past and present conduct of the carriers is thought to be unlawful, acts must be proven in an adjudication pursuant to the Administrative Procedure Act and related to the Shipping Act, 1916. If the Far East Conference Agreement operates to the detriment of the commerce of the United States, the terms which guide the carriers' conduct have to be specified, and we must show in a hearing what has been done and how the detriment occurs. This has not been done.

ORDER

The Commission instituted Docket No. 65-29 pursuant to sections 15 and 22 of the Shipping Act, 1916, upon order directed to Respondent Far East Conference to show cause why Agreement No. 17 should not be amended to remove the Port of Searsport from the trading range of the Conference, because the applicable tariffs of the Conference result in a situation which is detrimental to the commerce of the United States, contrary to the public interest, and otherwise in violation of the Shipping Act (sec. 17, par. 1). The Commission has this date entered its report stating its findings and conclusions, which report is made a part hereof by reference, and the Commission has found that Agreement No. 17 of the Far East Conference has operated in a manner which is unjustly discriminatory and unfair as between ports and between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, and contrary to the public interest.

Therefore, it is ordered, That the Far East Conference on or before November 22, 1965, open the rate on newsprint at Searsport, Maine, on shipments to Manila, Republic of the Philippines. Carriers wishing to file tariffs to carry newsprint from Searsport to Manila shall file an appropriate tariff to become effective on the same date that the Conference rate becomes "open"; otherwise, individual initial tariffs must be filed on 30 days' notice. If the rate is not opened as ordered above within the time specified, Searsport shall be deleted from the authorized trading range of the Conference.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET Nos. 269-277, 279-281, 283-289, 291-311, and 314-363
TILTON TEXTILE CORP., ET AL.

v.

THAI LINES, LTD.¹

Applications dismissed.

Alan F. Wohlstetter for Respondent Thai Lines, Ltd. and Motorships, Inc.

Richard S. Harsh and *Robert J. Blackwell*, Hearing Counsel.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER²

Thai Lines, Ltd., by 90 applications filed pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure, seeks authority to pay reparation for overcharges to four Complainants and to waive the collection of undercharges from 86 Complainants.³ All of the shipments were in foreign commerce (Hong Kong to the United States). Thai Lines contends that these rate disparities resulted mainly from the failure of its General Agent in the United States, Motorships, Inc., to carry out instructions to file various rate changes * * * increases as well as decreases. Being unaware of this non-compliance, Thai Lines subsequently assessed shippers rates which differed from those in its tariff then on file with the Commission, thereby violating section 18(b)(3) of the Shipping Act, 1916. This section provides as follows:

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such

¹ These special dockets were consolidated for hearing with Docket No. 1083, Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade.

² This decision became the decision of the Commission on Nov. 12, 1965, and an order was issued denying the applications.

³ These applications were filed in September, October, and December 1963.

carrier rebate, refund, or remit in any manner or by any devise any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

The Commission's decision in Special Docket No. 377, *Ludwig Mueller Co., Inc. v. Peralta Shipping Corp.*, served January 13, 1965, is clearly dispositive of these applications. In that case the Commission concluded that it is without authority to grant special docket relief permitting deviations from foreign trade rates on file. Accordingly, waivers of collections of such undercharges cannot be granted and authorizations to refund such overcharges are unnecessary. The law forbids the former and directs the latter.

An order dismissing these applications will be entered.

(Signed) JOHN MARSHALL,
Presiding Examiner.

September 16, 1965

9 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 1167

REDUCED RATES ON AUTOMOBILES—ATLANTIC COAST PORTS TO
PUERTO RICO

Decided November 16, 1965

The 1¢ differential between the rates of South Atlantic & Caribbean Line, Inc., and TMT Trailer Ferry, Inc., for carriage of automobiles from Miami, Florida, to San Juan, Puerto Rico, removed and rates for both carriers fixed at 35¢ inclusive of all charges.

Homer S. Carpenter for TMT Trailer Ferry, Inc. (C. Gordon Anderson, Trustee).

John Mason and *Edward M. Shea* for South Atlantic & Caribbean Line, Inc.

Donald J. Brunner as Hearing Counsel.

REPORT ON REMAND

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

This Commission by Report and Order served February 4, 1965, set minimum rates for all carriers involved in the carriage of automobiles from the North Atlantic, Gulf, and South Atlantic coast ports to ports in Puerto Rico. Among the rates set were the rates of 36 and 35 cents for South Atlantic & Caribbean Line, Inc. (SACL) and TMT Trailer Ferry, Inc. (TMT), respectively. SACL petitioned the Court of Appeals for the District of Columbia Circuit (*South Atlantic & Caribbean Line, Inc. v. Federal Maritime Commission and United States*, No. 19,267) for review of the Commission order insofar as this one cent differential is concerned.

In its brief to the court of appeals SACL cited for the first time pertinent legislative history bearing on the authority of the Commission to set a rate differential based on quality of service rendered. The Commission petitioned the court of appeals to remand the proceeding to it for the determination of whether or not such authority exists.

On September 17, 1965, the court of appeals granted Respondents' motion to remand, retained jurisdiction of the proceedings, and directed the Commission to file its report on remand within 60 days. Specifically, we are required to answer the following question:

May the Federal Maritime Commission set different minimum rates on the carriage of automobiles between Miami, Florida, and San Juan, Puerto Rico, which difference in rates results in a differential between two competing carriers?

The Commission received briefs from TMT, SACL, and Hearing Counsel and heard oral argument.

The Commission in its report served February 4th prescribed a one cent differential between SACL and TMT because of its finding that TMT's slower time was a disadvantage in the trade and that TMT needed the differential to protect itself from such service disability. SACL has argued in its brief on remand and in its argument, that the legislative history of section 4 of the Intercoastal Shipping Act, 1933, indicates that Congress did not intend that the Commission have the authority to set rate differentials based solely upon differences in the quality of service rendered. In 1938 consideration was given to granting the Commission such power, but Congress rejected this course of action.¹ SACL does not now challenge the power of the Commission to set differentials based upon factors other than differences in the quality of service rendered; it does not, for example, challenge the power of the Commission to set different rates for different carriers operating between the same two ports based upon differences in costs.

We are persuaded that the legislative history cited by SACL reveals a congressional intent to withhold from the Commission the power to set rate differentials based solely on quality of service rendered. The arguments presented by TMT do not dissuade us from that view. TMT argues that the statute is plain on its face and that resort to legislative history is unnecessary in interpreting the statute. The Commission cannot agree.

¹ The House version of the bill which became sec. 4 (H.R. 10315, 75th Cong., 3d Sess., 1938) contained the following proviso:

"Provided, That in prescribing such maximum and minimum rates, fares, and charges, differentials *may be established* based upon differences in services rendered." (Emphasis added.) H. Rept. 2168, 75th Cong., 3d Sess. (1938), at 63.

The Senate version contained no such provision, and the conference report stated:

"The House bill authorizes the Commission in prescribing rates to establish differentials based on differences in service rendered. The Senate amendment omits this proviso, * * *. The bill as agreed to in conference (sec. 43) omits the proviso as to differentials, * * *." H. Rept. 2582, 75th Cong., 3d Sess. (1938), at 26-27.

The Chairman of the House Committee on Merchant Marine and Fisheries explained later that the proviso was omitted due to the objection of nearly all of the Senate conferees. 83 Congressional Record 8913.

Statutes must be read in the light of the legislative considerations surrounding their enactment, unless there is no ambiguity as to the meaning of the statute. *Gemsco, Inc. v. Walling*, 327 U.S. 244, at 260 (1945). See *Alcoa Steamship Company v. Federal Maritime Commission*, 348 F. 2d 756, at 758 (D.C. Cir., 1965). If the statute explicitly authorized rate differentials based on quality of service rendered, we would have no problem in affirming our previous opinion. But, the statute is silent, and the legislative history evidences an intent to withhold that power.

We therefore hold that the Commission may not as a matter of law set different minimum rates on the carriage of automobiles between Miami, Florida, and San Juan, P.R., which difference results in a differential between two competing carriers, if such differential is based on differences in the quality of service rendered.² The record in the instant proceeding provides no factual bases on which to base a rate differential between SACL and TMT.

We are therefore vacating our previous order insofar as it related to SACL and TMT, and a minimum rate of 35 cents per cubic foot, not subject to additional charges, will be set for both carriers. An appropriate order will be entered.

COMMISSIONER HEARN dissenting:

In the original Commission Report served February 4, 1965, I disagreed with the majority's decision whereby rates for the carriage of automobiles from Florida to Puerto Rico were approved at 00.35 (cents) for TMT and 00.36 (cents) for SACL. At that time, I stated in my dissent that I believed that the record supported the legality of 00.31 (cent) rate for TMT and 00.32 (cent) rate for SACL, but that I would not order a one cent differential in favor of TMT. There has been nothing added to the record now, since that time, which would cause me to change my view.

With respect to the question presented upon remand, I am constrained again, to disagree with the majority. In my opinion, the

² This holding is in accord with a decision of our predecessor, the United States Shipping Board Bureau, in *Intercoastal Investigation*, 1 U.S.S.B.B. 400. In that investigation, the Bureau stated that:

"A modern, efficient, and economical intercoastal service is in the public interest and any carrier offering it is entitled to all the protection of law. If the department allows Shepard (Shepard Steamship Co.) or any other carrier not offering that kind of service to set the standard of competition and permits it by means of tariff advantages, such as Shepard claims to itself, to undermine carriers attempting to offer that kind of service, it would inevitably lead to the gradual but sure destruction of such other carriers, which is inimical to the declared policy of the law." 1 U.S.S.B.B. at 430-431.

We think it noteworthy that Shepard was the principal advocate before the Congress in 1937 urging that the U.S. Maritime Commission be given the power to set rate differentials based on quality of service rendered. See Hearings Before the Committee on Commerce, etc., 75th Cong., 2d Sess., on S. 3078, part 2, Dec. 13, 1937, p. 49.

Commission does have the authority to set different rates for competing carriers regarding a particular commodity in the same trade. The authority for my view is the language of section 4 of the Intercoastal Shipping Act, 1933, as amended which, since it is clear and unambiguous, precludes a resort to legislative history or other aids to statutory construction *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485 (1943). In pertinent part that section provides that when the Commission finds:

“any rate * * * unjust or unreasonable; it may * * * order enforced a just and reasonable maximum or minimum or maximum and minimum rate * * *”

Conceivably, and quite probably, a particular rate on a given commodity between two geographic points could be unjust or unreasonable for one carrier yet just and reasonable for another carrier. The Commission, in such a case, could leave undisturbed the just and reasonable rate and “order enforced” a rate for the competing carrier which would then be “just and reasonable.” In such an instance, the resulting rates while different, would not constitute a “differential”; i.e., a protective “spread” in the rate levels of the competitors. Based upon varying costs, different rate levels could lawfully be ordered. And varying costs well may be the reflection of varying services. Compensatoriness, in my opinion is the touchstone of rate legality, and since costs are the reflection of services different services could result in diverse levels of compensatory rates.

However, while I believe the statute clothes the Commission with authority to set differing rates, in the context of this case, I cannot now, as I could not in February, find that the lower rate found lawful for TMT would not also be lawful for SACL. On the contrary, I find now, as then, that while SACL's 00.32 (cent) rate was just and reasonable and therefore lawful, and TMT's 00.31 (cent) rate was similarly lawful, there is nothing in the record to preclude SACL from initiating a 00.31 (cent) rate. I regret to say that the majority's action today, pegging the rate for both carriers at 00.35 cents, creates a 00.03 and 00.04 (cent) windfall for the carriers since the majority, referring to the existing rates of SACL and TMT (00.32 and 00.31 cents, respectively) in February, found “the present rates of the South Atlantic carriers do not appear to be noncompensatory * * *”

COMMISSIONER JOHN S. PATTERSON, dissenting:

The majority has decided that its decision to fix the rates of TMT Trailer Ferry, Inc. (TMT), and South Atlantic & Caribbean Line, Inc. (SACL), for transporting automobiles to Puerto Rico from Jacksonville and Miami, Florida, must be revised to fix the SACL

rate at 35 cents per cubic foot, which is the same rate fixed for TMT in the earlier proceeding when it raised the rates of each from 31 and 32 cents to 35 and 36 cents, respectively.

The Commission's statutory authority was considered at the time of the first Report in this Docket and was neither then nor is it now ambiguous. The authority may be exercised to adjudicate separate rates for separate services of individual carriers because of the references to "any rate" and "any carrier" in section 4 of the Intercoastal Shipping Act, 1933. Such an interpretation was the basis of my adjudication then and continues to be the basis of this adjudication in response to the *per curiam* order of the United States Court of Appeals for the District of Columbia Circuit in No. 19,267, filed September 17, 1965, ordering that the Commission's motion be granted and the case remanded to the Commission for reconsideration. Our motion was that the majority desired to reopen and reconsider its Report and Order inasmuch as certain "pertinent legislative history" relative to the 1938 amendments to the Intercoastal Shipping Act was "not presented to nor considered by the Commission before the Commission issued its Report and Order now under review." Such consideration has been completed, and the majority is now ready with a new rate and new order.

The newly fixed rate on the other hand is justified by the reasoning of the majority that the pertinent legislative history bearing on the authority of the Commission to set a rate differential based on the quality of service rendered is not authorized because it shows section 4 of the Intercoastal Shipping Act indicates that Congress did not intend that the Commission have authority to set rate differentials between individual carriers based solely upon differences in the quality of service rendered.

The majority is of course, by its earlier decision, committed to rate fixing, but must now disregard service differences because they consider themselves compelled to do so based on their interpretation of the legislative history, and must modify the previously fixed SACL rate so that TMT may not charge a lower rate than SACL. To me their reasoning is not warranted or compelling on this record.

There has been no new adjudication of the SACL rate and a finding that the rate is unjust or unreasonable as basis for the authority to "determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge * * *" pursuant to section 4, but only a new rate fixed based on a principle of equality. The power to decide on the rate has been taken from SACL and assumed by the Commission, regardless of unjustness or unreasonableness.

As regards the legislative history "cited for the first time" to the majority, the citing of the legislative history is not applicable to my dissent in the first report because it was considered to be a fundamental part of my responsibilities to interpret all matters of law, including if necessary legislative history, before my dissenting report was written.

My dissent has already found, and is reiterated here, that the two existing rates (TMT, 31 cents; SACL, 32 cents) are reasonable, and it was based on the belief that section 4 of the Intercoastal Shipping Act authorizes a rate differential based on the circumstances applicable to each trade.

Section 4 authorizes determination and prescribing of rates only if they are unjust or unreasonable. Review of the facts at the time of my first report showed that the existing rates did not need to be prescribed, both because of certain record deficiencies and because Respondents had sustained their burden of proof in justifying their rates, by showing that rates were established by each Respondent's own decisions based on existing competitive influences in a historic free market trade and by claims of fully compensated operations. Therefore, rates were concluded to be just, reasonable, and lawful.

At least two faults in the majority's present reasoning come into sharp focus and hence compel me not to revise my earlier opinion. They are:

First, the reasoning assumes service and cost are separable factors in adjudicating whether differentials in rates are just and reasonable.

Second, the reasoning is inconsistent in omitting consideration of the effect of service disability based on transit time between New York to Puerto Rico and Jacksonville and Miami to Puerto Rico as a justification for a rate differential.

The only relevant service differential is thought to be the longer transit time caused by TMT's tug propulsion and towed barge operation, rather than the longer transit time caused by geography.

Service, costs, and revenues are inseparable factors in ship operations. They are equally inseparable factors in rate regulation. The experienced costs must be obtained from revenues. Revenues are obtained from transportation service for various units of property at the established rates. Costs per unit of property transported depend on the amount transported, and the amount transported depends on rates in relation to the service supplied. The greater the property units transported the less the cost per unit. In this case, a relatively new or at least different type of service, low costs, and rates priced to attract property for transportation service available have produced

competition. The introduction and encouragement of competition in a free economy assures a certain amount of consumer-shipper protection through market restraints, obviating a need for strict regulatory control, particularly where full cost information is inadequate. Reasoning along these lines supported the earlier dissenting opinion. The earlier majority opinion at least gave shippers the protection of market choice in two methods of service and a small rate differential. The majority has now denied shippers even this protection and has thus assured a need for still stricter regulation. One of the carriers has been denied the ability to attract traffic proportional to its service, resulting in the carrier's probable elimination as a further blow to competition. Rate equality will benefit only SACL as the faster carrier. The majority stated as follows in recognizing the cost and service differentials:

A differential of approximately 4 cents would thus appear adequate to preserve the competitive relationship which naturally exists between the North and South Atlantic trades * * *

A representative of TMT indicated that TMT's slower service made it difficult for it to attract cargo, and auto dealers indicated that TMT's lower rates were in part the reason why they shipped on its vessels. At a time when SACL and TMT had approximately the same rate (the second quarter of 1963) and SACL carried new cars, over 50 percent of the new car tonnage TMT was scheduled to handle was diverted to SACL.

The record indicates that from February 14, 1964, to March 13, 1964, during which period TMT had in effect a rate in excess of 3 cents per cubic foot lower than SACL, SACL continued to operate at substantial vessel capacity.

The Examiner, weighing the above considerations together with the fact that the number of vessels of TMT might increase, determined that the differential could be somewhat smaller and still allow adequate protection to TMT.

Service differentials based on transit time to Puerto Rico exist also between carriers operating out of New York and carriers operating out of Jacksonville and Miami, Florida. The "competitive relationship" is equally service relationship. Nevertheless, the majority does not use legislative history to eliminate the New York to Puerto Rico longer transit time differential as a relevant justification for a rate differential. A 4-cent New York differential remains. Obviously, there is a difference in distance caused by geography between New York and Puerto Rico and between Jacksonville and Miami and Puerto Rico, but these distances are reflected in transit time as a service disability. A difference in distance caused by geography is just as much a cause of longer travel time as a difference in propulsion methods and ship construction is a cause of longer travel time. If the majority is going to take its stand on the fact that longer transit time is a service disadvantage in the trade (referred to as "slower time") but must be an irrelevant factor between TMT and SACL

because of legislative history, consistency demands an equivalent irrelevance in regard to the New York carriers and geography as a cause of longer transit time.

I fear the majority by continuing to ignore the disciplines and forces of the free marketplace is still in pursuit of illusory objectives, and its new conclusion, as far as TMT is concerned, seems to be an expensive and drastic consequence of rhetorical hair splitting over the application of section 4 of the Intercoastal Shipping Act alone as qualified by legislative history insofar as it separates service and cost and then prohibits service differentials out of Florida ports based on travel time caused by "inferior" service and permits cost differentials, but somewhat inconsistently disregards legislative history by ordering a uniform service differential for all carriers out of North Atlantic and Gulf ports based solely on travel time caused by longer distance.

ORDER ON REMAND

The Commission having considered the briefs and arguments of respective counsel on the question posed in its order on remand, and on this day having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and having found that it is without authority to set rate differentials between competing carriers based on quality of service rendered,

Therefore, it is ordered, That paragraph 3 of the Order of the Commission served February 4, 1965,* is hereby vacated, and the following is substituted therefor: The minimum rate of TMT and SACL operating from Florida ports shall be 35 cents. This rate shall not be subject to any additional charges for arrimo; and

It is further ordered, That a copy of our Report and Order on Remand, duly certified by the Secretary, be forthwith transmitted to the United States Court of Appeals for the District of Columbia Circuit.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

*Vol. 8 FMC Reports p. 428.

FEDERAL MARITIME COMMISSION

No. 996

PHILIPPINE MERCHANTS STEAMSHIP CO., INC.

v.

CARGILL, INCORPORATED

Decided December 2, 1965

Determination of the landed weight of copra found to be the responsibility of respondent-consignee and the assessment against the vessel of a charge for this service found to be an unjust and unreasonable practice relating to the receiving and handling of cargo in violation of section 17 of the Shipping Act, 1916. Proceeding remanded to Examiner for taking of additional evidence to determine which services and facilities are provided by Cargill for the benefit of the vessel or at least made available by Cargill to vessels desiring to use them. Reparations for any injury caused by improperly imposed service charges also to be considered upon remand.

Agreement between respondent and Consolidated Stevedoring Company providing for division of net profits found to be a "cooperative working agreement" for the "apportionment of earnings" and required to be filed under section 15 of the Shipping Act, 1916.

Robert L. Harmon for complainant.

Carter Quinby and *Raymond J. Dittrich* for respondent.

REPORT

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

This proceeding was instituted by a complaint filed by Philippine Merchants Steamship Co., Inc. (Complainant), a common carrier in our foreign commerce, alleging violations by Cargill, Incorporated (Cargill or Respondent), an operator of a terminal facility, of various sections of the Shipping Act, 1916 (the Act).

Specifically, it is alleged that (1) Cargill has entered into unfilled agreements with the San Francisco Port Authority (the Port) and Consolidated Stevedoring Company (Consolidated) in violation of section 15, and (2) Cargill has assessed service charges against Complainant and engaged in certain stevedoring practices in violation of sections 16 and 17 of the Act. Complainant requests reparations in the amount of \$9,130.85.

Hearings were held before Examiner John Marshall, pursuant to which an Initial Decision was issued to which both parties have filed exceptions and replies. We have heard oral argument.

FACTS

Cargill operates a terminal facility at Pier 84 in San Francisco under a license issued by the Port. The facility is used primarily for the unloading of Respondent's own bulk copra in conjunction with its copra warehouse and processing plant located immediately adjacent to the pier.

Copra is discharged by means of automatic diggers (electrically powered caterpillar track mounted equipment which is placed in the hold of the vessel) and pneumatic blowers which are located on the pier. These blowers draw the copra out of the vessel through flexible pipes and deposit it on a conveyor belt running lengthwise along the pier. From this conveyor belt the copra is automatically dropped to a drag-type conveyor belt which takes it to the scalehouse where it is automatically weighed in hopper-type containers and then automatically conveyed to either the warehouse or directly to the crushing plant. The usual discharge rate, based upon two 8-hour shifts, is 500 short tons per day. Vessels are at the pier about two-thirds of the time. The warehouse capacity is approximately 10,000 short tons.

Some 80 percent of Respondent's copra discharged at Pier 84 is from its own charters, the costs of which are not of record. The portion of the remainder carried by conference carriers has been at open rates ranging from \$17 to \$18 per long ton, berth terms, landed weight. That carried by Complainant, a nonconference carrier, has ranged from \$16.50 to \$17 depending on the loading point.

Shippers have their own methods, which vary, for determining the weight of the copra placed on board vessels, and bills of lading carry the notation "shipper's weight" or "Said to weigh." The master of the vessel for his purposes checks the weights to be taken on by applying a rule of thumb based upon a space stowage factor. Loading costs include a service charge of 68.32 cents per long ton (actually assessed as 61 cents per short ton). Bulk Philippine copra is conventionally shipped under c.i.f. terms. Ninety-five percent of the price is paid on first presentation of the shipping documents, leaving the consignee 5 percent with which to adjust differences in weights and grades.

The Agreements Between Cargill and the Port

Until July 1, 1954, Cargill occupied Pier 84 subject to the specific provisions of the printed form agreement utilized by the Port for all such waterfront licenses. This form, though twice revised, was con-

tinuously captioned "Assignment of Space" and provided that said assignment constituted a license to use the space revokable at the pleasure of the Port on 30 days' notice. The space was stated to be 11,470 square feet, and the monthly rental \$137.64.

Subsequent to July 1, 1954, Cargill has continued possession under successive editions of the printed form agreement recaptioned to read "License To Use Space Non-exclusive." The noted provisions have remained essentially the same except that the right of revocation has been extended to include licensees and the monthly rental payable by Cargill has been increased to \$172.05 and then to \$229.40. No agreement has contained any reference to service charges.

The port controls a large number of wharves on the San Francisco waterfront representing property values and capital investments of many millions of dollars. It operates none of these directly but instead grants nonexclusive licenses to others who may be engaged in some manufacturing or trading business, or may be steamship companies, or stevedoring companies, or strictly terminal companies. These licenses conform to the specific terms for wharf space licensing set forth in the Port's tariff. In the standard printed form agreement used there is provision for filling in the name and address of the licensee, a description of the space, and the monthly license fee. The fee is the rate per square foot prescribed in the Port's tariff multiplied by the number of square feet licensed. This tariff, the provisions of which are expressly made applicable to all licensed wharf areas, provides for two types of licenses defined as—

(a) a Preferential License which gives the licensee the right to the preferential non-exclusive use of the wharf area described in the license and

(b) a Temporary License which gives the licensee the right to the temporary non-exclusive use of the wharf area described in the license.

The rights under wharf area licenses are stated in the Port's tariff as follows:

Subject to the rates, charges, rules, and regulations named in this and other sections of this Tariff, and subject further to any restrictions, conditions, limitations, and modifications set forth in the license itself, wharf area license shall include only the license or right (a) to moor vessels owned, operated, or represented by the licensee at the area licensed, (b) to assemble, distribute, load, and unload merchandise and the cargoes of, or for such vessels, over, through, or upon the licensed wharf area, and (c) to perform such other related activities as may be necessary; subject further to the provision that when the licensed wharf area, or any part thereof, is not required for the use of the licensee, or is unoccupied, the Chief Wharfinger [agent of licensor] may, at his discretion, assign temporarily said facility, or any part thereof, to another.

By separate agreement dated October 15, 1956, the Port agreed to accomplish certain improvements to Pier 84 desired by Cargill on condition that Cargill would initially pay the costs estimated at not to

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exceed \$60,000. It was further provided that this expenditure would be amortized by means of the Port granting Cargill a credit each month to be determined at the rate of 45 cents per ton for all copra or other cargo discharged at Pier 84 for the account of Cargill. This credit applied to wharfage charges accruing to the Port at the rate of 50 cents per ton. The presently effective license agreement, dated July 1, 1963, No. 5829, was submitted by Cargill to this Commission for review. The Director, Bureau of Domestic Regulation, by letter dated October 9, 1963, advised Cargill that "Upon completion of the staff's review of the subject agreement, it has been concluded that it is not subject to section 15 of the Shipping Act, 1916."

The Agreement Between Cargill and Consolidated

Consolidated Stevedoring Company (Consolidated) is an independent contractor engaged in the furnishing of stevedoring services at various locations, including Pier 84. On June 1, 1960, Consolidated entered into an agreement with Cargill whereby Cargill agreed to develop and furnish Consolidated, "on a nonexclusive basis," equipment for aboard-ships digging of copra for use in connection with the blowers, drag conveyors, and other existing pier equipment, all in consideration of (1) a rental charge of \$1.50 (later increased to \$1.62½) per short ton of copra unloaded, and (2) a portion of the net profits realized by Consolidated from stevedoring operations utilizing the equipment. Maintenance of the blowers and conveyors, as well as the electric power for their operation, is provided by Cargill. The portion of profits to be paid to Cargill by Consolidated was based upon a schedule which ranged downward from 92 percent on small amounts to 70 percent on large amounts. Net profits were prescribed to be the total rates charged vessels minus the Pacific Maritime Association's payrolls and assessments, payroll taxes, payroll insurance, and Workmen's Compensation charges, the aforesaid \$1.50 per ton rental charge, and a fee of 50 cents per ton to cover Consolidated's management salaries, insurance, fixed costs, and other direct operating expenses attributed to each unloading. The latter fee of 50 cents, a so-called management fee, was later reduced to 37½ cents, and then eliminated. In lieu thereof, Cargill guarantees a minimum income to Consolidated of 37½ cents per short ton per ship.

The Service Charge

As noted Cargill assesses a service charge against the vessel of 61 cents per short ton on bulk copra discharged at Pier 84. There has always been a service charge at this terminal though not always as much, and it has always been collected by and accrued to the lessee. It is assessed against all vessels using the terminal and, under Re-

spondent's present tariff, covers any one or more of the following services performed by the terminal:

1. Arrange berth for vessel.
2. Arranging terminal space for cargo.
3. Checking cargo to or from vessel as required.
4. Receiving outbound cargo from shippers and giving receipts therefor.
5. Delivering cargo to consignees and taking receipts therefor.
6. Preparing manifests, loading lists or tags covering cargo loaded aboard vessel.
7. Preparing over, short and damage reports.
8. Ordering cars.
9. Supplying shippers and consignees with information regarding cargo and sailing and arrival dates of vessels.
10. Lighting the terminal.
11. Provision of dock facilities.
12. Providing a facility to furnish fresh water.
13. Order line handling gangs.
14. Provide electrical power to operate shoreside and shipboard machinery.
15. Provide extra lights for the top side of the ship.
16. Provide a gangway.
17. Provide slings and pallets for loading ship stores.
18. Provide road and dock space for making ship repairs, and for ship painting.
19. Provide a telephone service.
20. Provide a mail service for ships.
21. Provide a fork lift truck for loading supplies and repair material on board ships.

NOTE.—Service charges do not cover or include any cargo-handling operations or labor.

Until May 5, 1961, this service charge, as well as like service charges of three other terminals operating under license agreements with the Port, was published in successive tariffs issued by the Port. The other terminals were Islais Creek Cotton Terminal, Islais Creek Grain Terminal and Elevator, and Central Terminal. The services, which were the same for each terminal, consisted of those above numbered 1 through 11; the charge was assessed against a vessel for the performance of any one or more of them, and accrued to and was collected by the licensee unless otherwise provided in the license. On May 5, 1961, the Port deleted these service charge provisions from its tariff on advice of counsel “* * * so that there would be no question at any future time as to whether or not (they) belonged there.”

On or about June 7, 1961, Cargill wrote to the lines which had been regularly serving Pier 84, some 15 in number, to confirm (1) the decision of the Port to modify its tariff to delete service charges not collected by itself and, (2) the intention of Cargill to continue to assess the then current charge of 61 cents per ton. Complainant was not one of the 15 lines to which notice was sent on June 7, 1961, as it was not then one of the regular users of Cargill's facility. Some time between September 1 and November 22, 1961, Cargill issued its own service charge tariff, entitled Cargill, Incorporated Tariff No. 1, and filed it with the Commission.

During the summer of 1961 bulk copra was mechanically discharged from Complainant's vessels berthed at Pier 84 as follows:

<i>Dates</i>	<i>Vessel</i>	<i>Short tons</i>
June 13-26, 1961	SS Weybridge	8,703.65
July 8-10, 1961	SS Inchstaffa	1,820.16
July 13-17, 1961	SS Shaukiwan	3,263.36
Aug. 22-23, 1961	SS Tindalo	1,181.44

The service charges assessed against these four vessels, and paid, totaled \$9,130.85. Each of the individual invoices provided that the charge was for the operation of Pier 84 while the particular vessel discharged. There were and are no other charges assessed by Respondent against vessels utilizing Pier 84.

The Examiner's Decision

The Examiner found that the space license agreement and Pier 84 improvement agreement were the only agreements between Cargill and the Port. He further found that these agreements contained no provisions which required their filing under section 15.¹ The license agreement, he found, granted only "first call privileges" to use certain described terminal space areas for fixed monthly rentals, which are neither exclusive nor preferential, as these terms are used in section 15 of the Act." The pier improvement agreement, under which Cargill initially paid for the improvement and was granted allowance against wharfage was found by the Examiner to constitute nothing more than "partial payment of the wharfage charges due from Cargill to the Port in advance."

¹ Sec. 15 requires the filing of agreements of persons subject to the Act which involve fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports, limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

The Examiner treated the stevedoring agreement between Consolidated and Cargill as falling outside the scope of section 15 because he found that Consolidated was not carrying on the business of furnishing terminal facilities, and thus was not subject to the Commission's jurisdiction.²

In considering the validity of the "service" charge the Examiner, using the Freas formula,³ treated the amount charged for "service" as reasonable. He went on, however, to investigate the problem of against whom the service charges should be levied. Although the Examiner did not find that any of the 21 service charge items listed in Respondent's tariff was unavailable to vessels, he noted that some were seldom if ever performed, and that others seemed to represent negligible if any costs to Cargill or appeared to be services actually performed by Consolidated at no expense to Cargill. The Examiner specifically found that Respondent's practice of assessing the vessel for weighing the copra was not a proper charge against Complainant as the charge was for the benefit of the consignee (Cargill) which had the duty of weighing the copra under its contracts of affreightment and sale. He, therefore, found that the assessment of the weighing charge against Complainant was "an unjust and unreasonable practice relating to or connected with the receiving, handling, storing or delivering of property" in violation of section 17 of the Act. He further required that Respondent establish and observe just and reasonable regulations and practices to assure that its service charge reflects only the reasonable cost and value of services and facilities which it can and does make available and which are for the benefit of the vessel. As evidence of compliance with this requirement, he suggested that Respondent file, with the Commission, within 30 days of the final decision in this proceeding, a statement containing a realistic listing of the services and facilities covered by its charge and a showing that the charge does not constitute an unjust or unreasonable practice.

The Examiner found that the failure of Respondent to have at all times on file with the Commission a tariff covering the service charge was not an "unreasonable practice" in violation of section 17 since notice of the continuation of the service charge had been given through Cargill's letter to lines regularly using Pier 84.

² Sec. 15 extends only to those agreements to which each party is either a common carrier by water or other person subject to the Act. Sec. 1 of the Act defines "other person" to be anyone " * * * carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

³ This is a formula for segregating terminal costs among wharfinger services. It was approved in docket 640, Terminal Rates Structure—California Ports, 3 U.S.M.C. 57 (Aug. 24, 1948). The Edwards-Differding Formula, upon which it was patterned, was introduced in 1936. See Practices, etc., of San Francisco Bay Area Terminals, 2 U.S.M.C. 588 (1941).

DISCUSSION AND CONCLUSIONS

The Agreements

Complainant alleges that the Examiner erred in failing to find that the agreements between Cargill and the Port and the agreement between Cargill and Consolidated required filing for Commission approval under section 15 of the Act.

We feel that the Examiner was correct in his determination that the agreements between Cargill and the Port do not fall within the ambit of section 15. Complainant is unable to designate any particular provision of the agreements which would bring them within section 15, but it points to the following as indicative of comprehensive unfiled section 15 agreements between Port and Cargill:

(1) Cargill's "first call" berth privilege made pursuant to provisions in Port's tariff;

(2) The charging and retention of dockage and wharfage fees by the Port and the charging and retention of the service charge by Cargill;

(3) The credit allowed Cargill against wharfage as a means of amortizing the cost of improvements made for Cargill by the Port at Pier 84.

If no single part of the activities between Cargill and the Port falls within section 15, then, of course, the sum of these activities are not within that section. We feel that the Examiner correctly determined that the three activities noted above failed to indicate the presence of section 15 agreements.

The means whereby wharfage and demurrage is charged by the Port and the service charge made by Cargill is not by agreement at all, let alone section 15 agreement. The Port furnishes wharfage and collects for wharfage and demurrage not through any agreement, but according to its tariff which contains uniform rates for all users. Cargill imposes uniform service charges for all users of its facility over which the Port exercises no control of any kind.

It is true that the "first call" privilege is granted to Cargill pursuant to an agreement between Cargill and the Port—a license entered into pursuant to provisions contained in the Port's tariff. This agreement, however, is not one which grants to Cargill any kind of "special" privilege or could otherwise be said to fall within the scope of section 15. All users of the Port's facilities are free to enter into such licenses and to enter into them subject to the same tariff rates and regulations. These licenses differ in kind from the arrangements involved in the recently decided dockets No. 1128—*Terminal Lease Agreement at Long Beach, California*; No. 1129—*Terminal Lease Agreement at Oakland, California*; served June 18, 1965. In those cases, agreements granting the use of terminal facilities to a carrier were found to be subject to section 15, because those agreements, unlike

the license here involved, granted the use of the facilities to the carrier in consideration of a flat rental in lieu of the tariff charges which would otherwise have applied at the facilities.

Nor does Cargill's "wharfage credit" in any way "prefer" Cargill over the other users of the Port's facility. Cargill is, as noted above, required to pay the same wharfage as other users of the facility. Cargill is entitled to reimbursement for its expenditures at Pier 84. The record does not indicate that the \$60,000 figure set by the Port is an unreasonable amount for the expenditure. The "wharfage credit" merely constitutes a convenient way of reimbursing Cargill.

We agree, however, with Complainant's contention that the agreement between Cargill and Consolidated is one which must be filed for approval under section 15. The Examiner determined that the agreement was not subject to section 15 on the basis that Consolidated is a "stevedore" and that "the business of stevedoring, without more, has never been held to be within the scope of section 15." We need not here decide the broad question of whether one who provides only stevedoring services furnishes terminal facilities within the meaning of section 1 of the Act. It is sufficient for our purposes here to say only that Consolidated does furnish such terminal facilities.

The main function of the Cargill facility, the unloading of copra, is performed through the use of automatic diggers, pneumatic blowers and conveyor belts. While these diggers are owned by Cargill they are furnished to the carrier and operated by Consolidated, which rents them from Cargill. They are the means whereby copra is removed from vessel hold.

As our predecessor agency, the United States Maritime Commission, held in *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 767 (1946), terminal facilities means "all those arrangements, mechanical and engineering, which make an easy transfer of passengers and goods at either end of a stage of transportation service."

In that case, independent contractors who transferred property between railroad cars and place of rest on a pier were held to be "furnishers of terminal facilities" because the equipment and labor they furnished did provide for such easy transfer.

The fact that the equipment furnished by the carloaders and unloaders may have been owned by them while that furnished by Consolidated is owned by Cargill is irrelevant. One who operates an important link in the chain of transference of goods "furnishes" a terminal facility whether or not he owns that link. As the Supreme Court stated in *U.S. v. American Union Transport*, 327 U.S. 437, 443, 451 (1946), "no intent * * * appears to divide persons furnishing wharfage, dock, warehouse, or other terminal facilities into regulated
9 F.M.C.

and unregulated groups. * * * [I]f this board * * * effectually regulates water carriers, it must also have supervision of all those incidental facilities connected with the main carriers. * * *

Under the agreement between Cargill and Consolidated, provision is made for the payment to Cargill by Consolidated of a portion of the net profits realized by the latter through the furnishing of its services. This is a "cooperative working arrangement" for the "apportionment of earnings" within the meaning of section 15.

As respondent concedes, "there is little record evidence relating to (the) practical effects" of the Cargill-Consolidated stevedoring arrangement. While it is true that Consolidated is the only stevedore known to have served Pier 84, there is no showing that the Pier is closed to others, or that any others have ever sought or been denied the opportunity to work it, or that any carrier has ever requested any other stevedore. There is furthermore no showing that Cargill in any way controls the rates that Consolidated charges for its services or that these rates are unreasonable. Complainant had full opportunity to present such evidence, if it existed, at the hearings in this proceeding. It is, therefore, determined that the Cargill-Consolidated agreement has not been shown to violate sections 16 or 17 of the Act.

The Service Charge

Complainant contends that the Examiner was correct in finding that the imposition of the charge for weighing the copra against it was a violation of section 17, but in addition maintains that the Examiner erred in not finding that the imposition of the weight charge also violated section 16, and that the levying of the service charge as a whole against it was a violation of sections 16 and 17. It maintains that a terminal operator may not impose a service charge when it is also the consignee of the cargo and, even if it could, the service charge here should have been outlawed as no part of it was shown to benefit Complainant. It alleges that the Examiner improperly applied the Freas formula in holding the amount of the service charge to be reasonable.

Respondent asserts that the Examiner erred in outlawing the charge for the weighing of the copra as a charge against the ship. It argues that the ship benefits from the weighing as the determination of the correct weight is essential for the proper freight rate. It maintains, moreover, that even if the charge in the last analysis should be borne by the consignee, it is permissible under the rationale of our docket 744, *Terminal Rate Structure—Pacific Northwest Ports*, 5 FMB 326 (1957), to allow the terminal to assess it against the ship which will then pass it on to the consignee if it is so required by the terms of the contract of affreightment.

We hold that the Examiner was correct in finding that Cargill had not violated section 16 with respect to the service charge. There was no showing that competitive shippers were disadvantaged through the imposition of the service charge.⁴ The record, moreover, shows that certain of Respondents competitor-consignees also collect identical service charges.

Nor was there a showing that the charge was used by Cargill as consignee to obtain or by Cargill as terminal operator to allow itself to obtain transportation by water at less than the rates which would otherwise be applicable.⁵ Any charges levied by a shipper or consignee against a carrier of its cargo could be termed counter or offsetting charges, but so long as these charges are reasonably related to the cost of service they are proper in amount and cannot violate section 16. We hold that the Examiner properly applied the Freas formula in finding that the service charge was proper in amount.

Cargill is entitled to compensation for the legitimate expenses incurred in performing its terminal functions. Any charge levied to recoup such expenses cannot be said to be obtaining transportation for less than the applicable rates.

Moreover, an essential element for the proof of a violation of section 16, first paragraph, or section 16 second appears to be missing—the “unfair device or means.” To support an allegation of a violation of these sections it must be shown that one did something or attempted to do something which he knew or should have known was unlawful. Thus, for example, in *Hohenberg Brothers Company v. Federal Maritime Commission*, 316 F. 2d 381 (1963), the Court of Appeals for the District of Columbia Circuit affirmed the Commission’s determination that a shipper had violated section 16 because the shipper sought a “rebate” on the basis of a claim it knew or should have known was

⁴ Sec. 16 first, 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:

• • • 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.”

⁵ Sec. 16, first paragraph provides:

“That it shall be unlawful for any shipper consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.”

Sec. 16, second provides that it shall be unlawful for a “common carrier by water” or “other person”:

“To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false-billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.”

false. Such element of known illegality is not present here. The fact that terminal consignee competitors of Cargill assessed a similar service charge suggests that Cargill, rather than feel its charge was unlawful, had every reason to believe it was proper.

We also agree with the Examiner, however, that the imposition of the weighing portion of the service charge against complainant was improper and as such was an "unreasonable practice" within the meaning of section 17.

The carrier has no obligation to weigh the copra. Under the Trading Rules of the National Institute of Oilseed Products, the obligation to determine the proper weight of copra and the costs of weighing are borne by either the buyer or seller, depending upon whether the copra is sold on a "shipping weights" or "landed weights" basis. The record shows that the great majority of copra is sold on a "landed weights" basis. In such cases the obligation to pay weighing costs is placed by the trading rules upon the buyer-consignees. Although the determination of the correct weight is necessary for the assessment of the proper freight rate, and thus the carrier may be said to "benefit" from the weighing service, such benefit is not the kind that will justify the imposition of the weighing charge against the carrier.

As our predecessor held in *Intercoastal S.S. Frt. Ass'n v. N. W. M. T. Ass'n*, 4 FMB 387, 394 (1953), the imposition of a charge is to be made against one who "uses" the service and when "the vessel has no duty [to perform the service] * * * it naturally follows that Respondents' service for which the service charge is imposed is not for the use of the vessel * * *."

The ruling in our docket 744, *supra*, which allowed a terminal to assess a charge which was ultimately to be borne by the cargo against the ship in the first instance, does not apply to a situation such as this where the terminal operator is a party to the contracts of sale and affreightment. It is not true, as Complainant maintains, that a terminal operator may not impose a service charge when it is also the consignee of the cargo. If that were the case, the operator of a terminal facility would be free to violate section 17 of the Act by engaging in the "unreasonable practice" of excluding his cargo from the charge and imposing it upon other users of its facility.

However, as the Examiner observed, it is difficult to determine which services and facilities for which Cargill imposes its service charges are actually made available by it for the benefit of the ship. We are not now in a position to make a definitive statement on any portion of the service charges other than the weighing portion: the record with respect to them is not sufficiently clear. This proceeding must therefore be remanded to the Examiner for the taking of addi-

tional evidence to determine which of these services and facilities are provided by Cargill for the benefit of the ship, or at least made available by Cargill to ships desiring to use them. Charges should reflect only the reasonable cost and value of such services and facilities.

Reparations

Respondent has violated section 17 and a determination on remand must also be made of the amount of reparations due for any injury caused by the improperly imposed charges.

An appropriate order will be issued.

Commissioner John S. Patterson and Commissioner George H. Hearn concurring and dissenting.:

We concur in the conclusion of the majority, but would further find that Cargill has also violated the introductory paragraph of section 16 of the Act by obtaining or attempting to obtain transportation by water for property at less than the rates otherwise applicable, knowingly and willfully, directly or indirectly, by an unjust or unfair device or means. This record establishes that Cargill, at one and the same time, is both a consignee and a terminal operator, and that Cargill has deducted from the carrier's freight the cost of weighing copra (which all agree is for the account of the consignee) and other "service charges" many of which are of very doubtful validity. Cargill knew the effect of what it was doing. The unwarranted deductions constitute an "unjust or unfair device or means," and since the unwarranted deductions have resulted in a freight rate "less than the rates * * * otherwise applicable," Respondent's willfull conduct is unlawful under section 16. The cargo, and consequently the consignee, is the beneficiary of most of the elements of the "service charge," and shifting the cost of these benefits to the vessel by the consignee under its status as a terminal operator constitutes an unjust or unfair device or means.

FEDERAL MARITIME COMMISSION

No. 996

PHILIPPINE MERCHANTS STEAMSHIP Co., INC.

v.

CARGILL, INCORPORATED

ORDER

Full investigation of the matters and things involved in this proceeding has been had, and the Commission on December 2, 1965, has made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof. The Commission found in said report, *inter alia*:

1. That Respondent Cargill, Incorporated, has entered into an unfiled agreement with Consolidated Stevedoring Company in violation of section 15 of the Shipping Act, 1916;

2. The Respondent has violated section 17 of said Act by the imposition of a weighing charge against Complainant, Philippine Merchants Steamship Co., Inc.; and

3. That the record with respect to other violations of section 17 by the Respondent is not sufficiently clear.

Therefore, it is ordered,

1. That respondent cease and desist from imposing the weighing charge against Complainant;

2. That the proceeding be remanded to the Examiner for (a) the taking of additional evidence to determine which services and facilities are provided by Cargill for the benefit of the ship, or at least made available by Cargill to ships desiring to use them. Charges shall reflect only the reasonable cost and value of such services and facilities, and (b) the determination of the amount of reparations due Complainant for any injury caused by improperly imposed charges; and

3. That Respondent cease and desist from effectuating its agreement with Consolidated Stevedoring Company held to be subject to section 15 of said Act in the report in this proceeding until the agreement has been filed with and approved by the Commission.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 382

THE EAST ASIATIC CO., INC.—APPLICATION FOR PERMISSION TO WAIVE
COLLECTION OF UNDERCHARGES

Decided December 2, 1965

Application for permission to waive collection of undercharges on shipment of used Volkswagens from St. Thomas, Virgin Islands, to Los Angeles, California, denied.

Gordon L. Poole, Esq., Elmer E. Metz, Esq. and Robert Fremlin, Esq. for Applicant.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*; John S. Patterson, *Vice Chairman*; George H. Hearn, *Commissioner*):

This is an application pursuant to rule 6(b) of the Commission's Rules of Practice and Procedure filed by East Asiatic Co., Inc. (Applicant), the California agent for the East Asiatic Co., Ltd., a Danish-flag line, for an order authorizing it to waive the collection of undercharges to Europa Used Car Co. in the amount of \$6,567.08 in connection with a shipment of used Volkswagens from St. Thomas, Virgin Islands, to Los Angeles, California.

Examiner Edward C. Johnson issued an initial decision to which exceptions were filed by East Asiatic Co., Inc. The proceeding was remanded to the Examiner for further consideration, after which a supplemental initial decision was issued. This proceeding is before us on our own motion to review this supplemental initial decision.

The facts alleged in the verified application and found by the Examiner are substantially as follows:

Tropical Motors Corporation (Tropical), a used car dealer in St. Thomas, had overstocked itself with used Volkswagens and thereafter finding that there was a market for these automobiles in Los Angeles, entered into a sales agreement with Europa, a California importer of used automobiles. Just prior to May 3, 1963, Europa communicated with applicant and asked for a special rate for the carriage of the

used vehicles covered by its sales agreement with Tropical. Applicant's tariff on file with the Federal Maritime Commission (Commission) at the time quoted a rate for "Automobiles, new or used, * * *" of \$36.30 per ton W/M, with handling charges of \$.90 W/M. Applicant, however, agreed with Europa to grant it the lower rate of \$175.00 per automobile, subject to filing the tariff decrease with the Commission. Accordingly, Applicant sent a tariff reduction to the Commission naming a commodity rate for "Automobiles, new or used, * * *" of \$175.00 per unit, with handling charges of \$.90 W/M. Applicant, believing that the reduction was governed by the rules applicable to the foreign commerce of the United States; i.e., that the reduced rate became effective upon filing with the Commission, proceeded to book the automobiles aboard one of its vessels. Since East Asiatic Co., Ltd's service between the Virgin Islands and Los Angeles is in the offshore domestic trade, the Commission rejected the reduction for failure to afford the 30 days' notice required by section 2 of the Intercoastal Shipping Act, 1933. Pursuant to telephone conversations with the Commission's staff and its San Francisco representative, as a result of which applicant alleges that it was under the impression that no problem would arise if it filed another tariff page giving the appropriate notice, applicant filed a new tariff reduction. Because applicant had failed to provide that this tariff reduction cancelled the \$36.30 W/M automobile rate already on file, it was also rejected. By this time, the automobiles were on their way to the United States, having been booked under a \$175.00 per unit rate, although the \$36.30 per ton W/M rate was the one then legally on file. This amounted to an undercharge in the sum of \$6,567.08, computed as follows:

Freight under new rate:	
\$175.00 per unit.....	\$9, 100. 00
Freight under old rate:	
17,264 cu. ft. @\$36.30 per 40 cu. ft.....	15, 667. 08
	6, 567. 08
Difference—not paid.....	6, 567. 08

Europa contends that it owes nothing further to applicant for the carriage of the automobiles and refuses to pay the undercharges on the ground that it had received a booking at the lower rate.

In his initial decision, the Examiner denied the application of East Asiatic, Inc., and determined that the Commission's decision in Special Docket No. 377, *Ludwig Mueller Co., Inc. v. Peralta Shipping Corp., Agents of Torm Line* was controlling and required denial of the application.

Applicant excepted to the Examiner's recommended decision on the grounds, inter alia, that the *Ludwig Mueller* decision relied upon by the Examiner involved tariff deviations in the *foreign trade*, whereas the shipment involved herein was transported in the *domestic offshore trade*; that the Examiner's decision contained no discussion whatever of the Commission's authority to grant special docket requests in the noncontiguous domestic trade, although the Commission has determined that under certain circumstances it has such authority; and, that as a result of the foregoing, the Examiner had based his decision upon grounds which were not clearly disclosed or adequately sustained.

Since it appeared that the Examiner had failed to take full cognizance of our decision in *Ludwig Mueller*, at least insofar as it related to the Commission's authority to apply the special docket technique in the domestic offshore trade, and since it further appeared that the shipment involved herein was in fact made in the so-called offshore domestic trade, we remanded this proceeding to the Examiner for consideration under the Intercoastal Shipping Act, 1933.

In his supplemental initial decision, the Examiner granted East Asiatic, Inc.'s application for permission to waive the collection of the undercharges. Since it appears, however, that the basis upon which the Examiner granted relief is inconsistent with our position in *Ludwig Mueller*, we have determined to review this supplemental initial decision on our own motion.

DISCUSSION AND CONCLUSIONS

The general principles relevant to the decision of this proceeding have already been settled in *Ludwig Mueller*. In view of the fact, however, that the *Ludwig Mueller* decision did represent a departure from our prior policy with respect to rule 6(b) applications, we take this opportunity to restate and possibly clarify these principles, their scope and their purpose, as they concern our authority to grant rule 6(b) applications in the noncontiguous domestic trade.

There is no question that the applicable rate for the shipment of used Volkswagens involved herein was the \$36.30 W/M rate on file with this Commission during the period in question. Applicant, however, concedes that it has assessed and collected a lower rate of \$175.00 per unit.

Section 2 of the Intercoastal Shipping Act, 1933 (1933 Act), prohibits a carrier by water in intercoastal commerce from charging a greater or *less* or different compensation from that contained in the tariff on file with the Commission.

In his supplemental initial decision, the Examiner found the applicant to have violated the aforementioned section 2 of the 1933 Act,

but, nevertheless, concluded that the extenuating circumstances present in this record justified the granting of the equitable relief requested. The Examiner based his conclusions on the consideration that an innocent shipper should not be made to bear the consequences of a carrier's failure to file a particular rate which it had agreed to do and which it intended in good faith to make applicable to the shipment in question.

After a careful examination of the record, considered in the light of our recent decision in *Ludwig Mueller*, we are of the opinion that the Examiner misconstrued our holding in *Ludwig Mueller* and erred in permitting the waiver of \$6,567.08 in undercharges. The finding that here 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 basis upon which to rest the granting of relief in a special docket application.

In *Ludwig Mueller*, after determining that our controlling statutes did not permit us to authorize deviations from filed tariffs in the foreign trade, notwithstanding rule 6(b) of our Rules of Practice and Procedure, we went on to add:

It may be asked, at this point, what is the function of our special docket procedure and when may it be used. It is a procedure whereby there is approved a refund from a carrier to a shipper of the difference between a rate that the carrier admits and the Commission finds to be unreasonable (and therefore unlawful), and a rate which the Commission adjudges to be reasonable.

It becomes immediately apparent, therefore, that only in those cases where the Commission is empowered to direct the enforcement of a reasonable rate is our special docket technique applicable * * *. (Emphasis added.)

The Commission is empowered to direct the enforcement of a reasonable rate under section 18(a) of the Shipping Act, 1916, and section 4 of the 1933 Act, both of which relate solely to the Commission's jurisdiction over common carriers in the noncontiguous domestic trades.

Section 18(a) provides that whenever the Commission finds a rate to be unreasonable it may determine, prescribe, and order enforced a just and reasonable maximum rate. The Intercoastal Act, section 4, authorizes the Commission whenever it finds a particular rate unjust or unreasonable to prescribe and order enforced a just and reasonable maximum or minimum rate.

From the foregoing, it is evident that our special docket technique requires that all considerations of intention, error, misunderstandings, and the 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. We are well aware now, as we were in *Ludwig Mueller*, that this strict interpreta-

tion of our statutes with respect to special docket applications, may result in hardship in certain instances but the statutes, enacted by Congress and administered by this Commission are abundantly clear and we must adhere to them. In *Louisville & N.R.R. Co. v. Maxwell*, 237 U.S. 94, 97, Justice Hughes speaking for the Court, stated:

The rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it and they as well as the carrier must abide by it unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

And as we asserted in *Ludwig Mueller* in this regard:

* * * we believe that strict construction of the statute will result in more careful tariff administration and management by carriers and conferences, and the obviation of possible undue or unfair preferences or advantages and discriminations.

In view of what we have stated in *Ludwig Mueller*, and in the body of this opinion, the only proper way that we can authorize a deviation from duly filed tariffs and grant the waiver requested in the present application is for us to ground that waiver upon a finding that the tariff or legally applicable rate of \$36.30 W/M is unreasonable, and a concomitant finding that the rate of \$175.00 per unit, actually charged, is a reasonable one.

The Examiner, however, did not find nor did the applicant allege that the duly applicable rate was unreasonable and that the rate actually charged was reasonable. Indeed, the record is devoid of any facts upon which we, in the final analysis, could make any such findings. Therefore, on the basis of the record before us, we have no alternative but to deny East Asiatic Inc.'s application. An appropriate order will be entered denying the application.

COMMISSIONERS JAMES V. DAY AND ASHTON C. BARRETT dissenting:

Consonant with our dissenting opinion in Special Docket No. 377, *Ludwig Mueller Co., Inc. v. Peralta Shipping Corp., Agents of Torm Line*, we would grant the relief requested.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 382

THE EAST ASIATIC CO., INC.—APPLICATION FOR PERMISSION TO WAIVE
COLLECTION OF UNDERCHARGES

ORDER

The Commission has this day made and entered a report stating its findings and conclusions herein, which report is made a part hereof by reference. Accordingly,

It is ordered, That the application of East Asiatic Co., Inc. for permission to waive the collection of undercharges is hereby denied.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1159

IN THE MATTER OF AGREEMENT NO. 14-19 AND CLAUSE 11 OF AGREEMENT NO. 14-1 AS AMENDED, AND CLAUSE 10 OF AGREEMENT 14-20, TRANS-PACIFIC FREIGHT CONFERENCE (HONG KONG)

Decided December 2, 1965

Article 10 of Agreement 14-20 between the member lines of the Trans-Pacific Freight Conference (Hong Kong) providing for the exclusive services of shipping agents not being found unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Shipping Act, 1916, is approved pursuant to section 15 of the Shipping Act, 1916.

Charles F. Warren and John P. Meade for Respondents.

Robert J. Blackwell, J. Scot Provan, and Thomas Christensen as Hearing Counsel.

REPORT

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

This is an investigation into certain proposed exclusive agency arrangements between the member lines of the Trans-Pacific Freight Conference (hereinafter TPFC) and their agents.¹ In its now proposed form the agreement would forbid the agents, or their "subsidiaries and/or associated and/or affiliated and/or related companies" to represent a nonconference carrier in the trade.

Oceanic Lloyd, Ltd., an agent for independent carriers operating in the trade intervened in the proceeding, but later withdrew. Hearing Counsel remains as a party to the proceeding. Hearings have

¹ The original order of investigation covered Agreement No. 14-19. The Conference subsequently proposed Agreement No. 14-20 to supersede No. 14-19. Accordingly, the Commission by supplemental order expanded the proceeding to include No. 14-20.

been held and Examiner Paul D. Page, Jr., issued an Initial Decision approving the agreement to which exceptions and replies have been filed. Oral argument has been heard.

FACTS

The TPFC is an association of 24 steamship lines operating liner service from Hong Kong, Taiwan, and Bangkok to United States Pacific ports. Its membership includes seven American-flag lines, six Japanese, four Norwegian, three Philippine, one British, one Danish, one Dutch, and one Yugoslav.

As approved in January 1963, article 11 of the basic agreement contains TPFC's presently effective exclusive agency arrangements which merely prohibit the agent and/or its subsidiaries from representing nonconference lines. The present proposed amendment would further extend the prohibition to the Conference member "or its subsidiaries or its agent's subsidiaries and/or associated and/or affiliated and/or related companies or concerns either of itself or of its agents."

Almost all the lines, both Conference and nonconference, serving this trade are represented by agents. The most important duties of the agent are to solicit, process, and book cargo, provide cargo documentation, and in general build up his principal's carriage in the trade. Agents also service claims, clear vessels, operate and organize stevedoring, buy fuel and engage in other general husbanding of the vessels.

The agent in effect becomes part of the line it represents, and if the carrier is a Conference member, the agent sometimes represents the carrier at Conference meetings. The Conference lines view the relationship between themselves and the agent as one which is fiduciary in nature and because of this there is usually an exclusive agency contract between the two stating that the agent shall not represent another carrier in the same trade without permission of the carrier. In the TPFC some members have executed this generally accepted exclusive agency contract with their agents; others have not. Some members of the Conference utilize the same agents but only where the members do not compete for the same cargo movement or do not have competitive sailings.

The Conference bases the necessity of exclusive agency contracts on the conditions prevailing in the Hong Kong-U.S.A. liner trades.

Historically, service in this trade was provided by TPFC carriers and the leading independent Isbrandtsen, now American Export-Isbrandtsen. During the period 1954-61, Hong Kong exports to the

United States increased by approximately 900 percent. In 1962 there was an influx of nonconference lines in the trade from Hong Kong to the United States, at which time a rate war began, and there were thought to be violations of the Shipping Act, 1916, as well as of the Conference agreement and dual rate contract. This influx was allegedly induced by the fact that in April 1962 the Conferences were required by Congress to place into effect a weakened contract rate system (Public Law 87-346) which resulted in a depression of the charter market. As a result of the entry of the independents, intense competition arose among the nonconference lines and between them and the Conference lines. Rates fluctuated, and the trade became unstable.

During such periods exporters in the trade were under heavy pressure from stateside consignees to utilize nonconference carriers at lower rates than those offered by the Conference, even if this involved concealed violation of the exclusive patronage clause of the dual rate contracts.

TPFC feels that since its lines are represented at Conference meetings by their agents, and since the Conference lines have no secrets from these agents, it is necessary that exclusive agency agreements be enforced to eliminate the situation in which a "dual agent" is in a position to obtain information and transfer it to a competing line, thereby enabling the competitor to plan his destructive competition. The Conference claims such exclusive agency is necessary to insure adequate policing of dual rate contracts.

Though most of the TPFC members presently favor and practice the exclusive agency principle, the Conference feels it is necessary to have a clearly defined Conference rule on the matter to guarantee its uniform continuance, since if a single Conference member disregards this principle, it would open a pipeline carrying confidential information to the nonconference operators in the trade.

It is the use of a section 15 approved modification to the Conference agreement to accomplish this end, not the use of individual exclusive agency contracts, to which Hearing Counsel objects.

Hearing Counsel opposed the approval of this agreement on the ground that its adoption by the Conference would prevent the establishment of independent service in this trade because the agreement would preclude the nonconference operator from securing a good agent to represent him.

An executive of American Export-Isbrandtsen, which operates United States-flag vessels nonconference in this trade, testified in favor of the agreement stating that it represents "sound and practical, sensible and good Conference operation." The same executive further

testified that in his opinion the exclusive agency contracts do not hamper the entrance of independent lines into the instant trade.

THE INITIAL DECISION

The Examiner would approve the agreement in question on the ground that there is no showing that the agreement is (1) unjustly discriminatory or unfair as between carriers, (2) that it operates to the detriment of the commerce of the United States, (3) that it is contrary to the public interest, or (4) is in violation of the Act.

The Examiner concluded that the rule before the Commission is properly useful to Conference carriers in competition, will safeguard and promote rate stability, and is therefore a rule which will further the purposes and policy of the Shipping Act.

DISCUSSION AND CONCLUSIONS

We agree with the Examiner's ultimate conclusion that the agreement should be approved. Hearing Counsel's exceptions are primarily directed to the Examiner's reliance on and construction of the Court's decision in *Aktiebolaget Svenska Amerika Linien et al. v. Federal Maritime Commission*, District of Columbia Circuit Court of Appeals (No. 18,554), decided June 10, 1965. We think it unnecessary to deal with what may be a proper interpretation of the *Svenska* case, because regardless of the construction or applicability of that case, the record here compels us to reach the same conclusion as the Examiner regarding the approvability of this agreement.

Hearing Counsel's contention that approval of the agreement would prevent the establishment of independent service in the trade because the nonconference operator would be precluded from securing competent agents to represent him is unsupported by the record in this proceeding. The Examiner correctly found that there is no evidence that any independent was handicapped in entering the trade by inability to secure a competent agent, as a result of the existence of the exclusive agency rule.

The only evidence in the record to support Hearing Counsel's contention is the testimony of Mr. Keith David, president of Sabre Shipping Corporation, which formerly operated foreign-flag vessels in this trade. Mr. David expressed his belief that the existence of this agency rule would "tend" to prevent the establishment of independent service in the trade. The record contains no further evidence in support of this contention.

The Examiner correctly found that independent competition to the Conference exists and that competent agents in Hong Kong are avail-

able and eager to represent nonconference carriers who may desire to enter the trade.² Hearing Counsel himself, in oral argument, stated that he believed the Examiner was correct on this point.

On the basis of the facts in this case, it is concluded that this agreement has not been shown to cause agents to be unavailable to non-conference lines, and has not been shown to prevent the entrance of independents into the trade. Accordingly the agreement will be neither detrimental to the commerce of the United States nor contrary to the public interest, or in any way violate the standards of section 15. Of course, should our continuing surveillance over actual operations under the agreement reveal that the circumstances in this trade have altered so as to restrict the entrance of independents into the trade, we shall reconsider whether our approval granted here should be withdrawn. The agreement will be approved.

By the Commission.

² Among them are W. R. Loxley & Co. Ltd., established in the Far East trade since 1870, which has represented Nippon Yusen Kaisha and the Ben Line; Barrette Shipping (Hong Kong) Ltd. which was established in the Far East trade in 1954, and has represented Mitsubishi Line, Ino Line, Shinnihon Line, Nissen Line, Marchessini Line, and T.S.K. Line; and Elder Deacon & Co., Ltd. active in Far East trade for 125 years which has acted as agent for Peninsula & Orient Lines, British India Steam Navigation Co., Ltd., Eastern & Australian Co., Ltd., Silver Line, Prince Line, Burns, Philip Line, Salem Line and others.

No. 1159

IN THE MATTER OF AGREEMENT NO. 14-19 AND CLAUSE 11 OF AGREEMENT NO. 14-1 AS AMENDED, AND CLAUSE 10 OF AGREEMENT 14-20, TRANS-PACIFIC FREIGHT CONFERENCE (HONG KONG)

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,

It is ordered, That clause 10 of Agreement No. 14-20 be, and it is hereby, approved.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1114

IRON AND STEEL RATES, EXPORT-IMPORT

Decided December 2, 1965

Respondents' rates on iron and steel between United States North Atlantic and Gulf ports and ports in the French Atlantic/Hamburg range, between United States North Atlantic and Gulf ports and ports in the United Kingdom, between United States Atlantic, Gulf, and Pacific ports and ports in Japan, between United States Pacific coast ports and ports in Australia, and from United States Atlantic, Gulf, and Pacific ports to ports in the Republic of the Philippines, found not to be contrary to sections 15, 17, or 18(b) (5) of the Shipping Act, 1916.

When a rate disparity in reciprocal trades, in 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.

Elkan Turk, Jr., for Far East Conference; *Burton H. White* and *Elliott B. Nixon* for North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference, Orient Overseas Line, and Scandinavian American Line; *Edward D. Ransom*, *Robert Fremlin*, and *R. Frederic Fisher* for Pacific Westbound Conference and Pacific Coast Australasian Tariff Bureau; *George F. Galland* and *William J. Lippman* for States Marine Lines; *Ronald A. Capone* and *Robert H. Binder* for Cunard Steam-Ship Company Limited and China Merchants Steam Navigation Co., Ltd.; *Robert L. Harmon* for Knutsen Line and Holland America Line; *Edward S. Bagley* for Gulf/United Kingdom Conference and Gulf/French Atlantic Hamburg Range Freight Conference; *Richard W. Kurrus* and *James N. Jacobi* for American Export Isbrandtsen Lines, Inc.; *Thomas K. Roche*, *Sanford C. Miller*, *Charles S. Haight, Jr.*, and *William F. Faison* for Meyer Line; *Edward F. Platow* for China Union Lines, Ltd.; and *Morton Zuckerman* for Scindia Steamships, Ltd., some of the respondents.

John A. Kennedy, Jr., and *Nelson A. Stitt* for Japan Iron & Steel Exporters' Association; *Alan D. Hutchison* for Florida Wire Products

Corp., General Steel & Wire Co., Inc., Ivy Steel & Wire Company, National Wire Products Corp., Southeast Steel & Wire Corp., Southwest Wire Products Corp., and Wire Sales Company; *James M. Henderson* and *Jacob P. Billig* for The Port of New York Authority; *Thomas P. Brennan* and *John A. Kocur* for Crucible Steel Company of America; *D. Franklin Kell* for Textile Waste Association; *Chas. R. Seal* for Virginia State Ports Authority; and *C. H. Gourley* for Traffic Board—North Atlantic Ports Association; Interveners.

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

REPORT

Chairman Harlee and Commissioners Hearn, Barrett, and Day all agree that 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.

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

The Commission instituted this investigation to determine (1) whether the outward and the inward freight rates on iron and steel items published by Respondent Conferences and common carriers by water operating between United States North Atlantic and Gulf ports and ports in the French Atlantic/Hamburg range, between United States North Atlantic and Gulf ports and ports in the United Kingdom, and between United States Atlantic, Gulf, and Pacific ports and ports in Japan, are so unreasonably high or low as to be detrimental to the commerce of the United States, and (2) whether the discrepancy between such outward and inward rates results in unjust prejudice to exporters of the United States compared with their foreign competitors. Subsequently, the Commission expanded the investigation to include the trade between United States Pacific coast ports and ports in Australia, and the trades from United States Atlantic, Gulf, and Pacific ports to ports in the Republic of the Philippines.

Examiner C. W. Robinson issued an initial decision which we elected to review. In addition, Hearing Counsel filed technical exceptions, and we heard oral argument.

FACTS

At the end of World War II a large part of the world's steel-producing potential had been destroyed, and this vacuum was filled by exports from the United States until the second half of the 1950's,

when new and more modern foreign mills began to come into production. Eventually, the output of the foreign mills, which are better geared for exporting than are American mills, exceeded their domestic requirements, causing the mills to seek business abroad.

In 1955, the United States was a net importer of pipe, reinforcing bars, wire rods, and structural steel, but was a net exporter of most other steel products, particularly sheets, plates, and tin plate. In 1963, total imports from the world market were about 5½ million tons and exports were about 2 million tons.

One of the greatest strides in steel production has been made by Japan, which now is the third largest producer in the world. The quality of Japanese steel is equal and in some instances superior to American steel. After Japan, the largest producers of the free world are Belgium-Luxembourg, West Germany, France, and the United Kingdom, in that order. The primary foreign competitor on the Pacific coast is Japan; in the Gulf, the Benelux countries and Japan; and on the Atlantic coast, western Europe.

Generally, the large American steel manufacturer is not too interested in exporting and concentrates on its domestic business. The larger mills, however, would be more interested in exporting were overall conditions favorable to them. A very large amount of money has been and is being invested to modernize the domestic steel industry, to put it on a more competitive basis both at home and abroad, but full results from this program probably will not be felt for perhaps 10 years. American exporters at present sell certain steel products abroad because of service, quality, delivery, specifications, and in some cases the desire of the customer to maintain a source in the United States, at least on a partial basis.

When the large integrated mills are considering the prospect of exporting, primary attention is given to their own basic costs, customs duties and sales taxes in the foreign countries, other foreign charges, and competitive prices; these factors usually make it extremely difficult if not impossible for them to export to most of the areas here concerned, in the absence of peculiar situations such as the need for specialty items, strikes, disaster, or other nonrecurring conditions.

As far as the American exporter is concerned, the greatest disparity is in the price itself, and the ocean freight is not the vital factor; in fact, it usually is one of the last factors to be considered. In the case of Japan and Europe, the disparity in price sometimes exceeds the entire freight rate. In addition, some Japanese and German mills do not charge for incorporating better features in their products contrary to the general American practice. The foreign mills also make

considerable effort to describe their commodities more fully, to pack more substantially, and to ship more quickly. These little extras put the American exporter at a further disadvantage in his effort to find markets abroad, but the American mills are improving in that respect.

The mere fact that the imported commodity is cheaper than the domestic commodity does not necessarily mean that the former will be used by the domestic consumer. Such things as quality, delays, deliveries, and the possibility of damage, most of which are greater in the case of imports, must be considered, and the advantage of the imported product over the domestic product usually must be considerable before a determination can be made to purchase the imported material. Patriotism is another thought in the minds of some consumers. Although one witness for a large integrated mill agrees that there is some margin beyond which a consumer will not go to continue to buy imported steel, he is of the opinion that no one knows what the margin is or to what extent it varies by product or transaction or circumstance. On the other hand, other witnesses gave approximate dollar estimates as to what domestic customers will pay as a premium to purchase domestic steel, namely, between \$7 and \$10 a ton; they will pay less if it is a case of switching to domestic from foreign purchases.

Some of the fully integrated mills have increased their exports in the past few years. The closer the mill to shipside the more aggressive it is apt to be in attempting to export (lower costs for imported ores and no inland freight). Although one large mill, which uses independent liner services, complained of ocean freight classification problems, which its witness contends is a hindrance in exporting, it nonetheless has increased its exports to Europe, principally to Italy, which does not come within the geographical area of the investigation. Much of the movement of sheets abroad is the result of special prices induced by excess stocks or excess semifinished stocks, which are then finished within the limitation of the material; overruns; changes in sheet sizes at the end of an automobile production year; and rejects usable for other purposes.

The costs of production of standard carbon steel in all the countries within the scope of this investigation are considerably lower than those of the United States. That of Japan is lower than that of both the United Kingdom and the Continent. In 1962, steel wages in the United States were six times as high per man as those in Japan, and the latter's cost for the manufacture of a pound of steel was only 71 cents as compared with \$3.17 in the United States. Over the past 5 years American steel wages have been three times those of the United

Kingdom and the Continent. Fringe benefits for the American steel worker are much greater than in Japan. American productivity per man is about 30 percent greater than in Japan. Located adjacent to ports, Japanese mills have no inland freight; furthermore, having few natural resources, the mills can shop worldwide for raw materials. The low Japanese production cost is recognized by American exporters as an almost insurmountable barrier to sales in Japan, except under unusual circumstances.

The Pacific coast has been the area most affected by steel imports, principally those from Japan. All purchases of Japanese steel are made through trading companies, which in turn purchase from the mills. The trading companies recently have secured warehouse facilities on the Pacific coast, which enable them to effect more prompt delivery and offset, to a great extent, the ability of domestic suppliers to deliver quickly where necessary. In some instances, domestic mills on the Pacific coast have withdrawn their published prices and also reduced their prices which may have accounted for the decrease in the importation of some steel commodities in early 1964 as compared with 1963.

The total steel market in seven Far Western States is about 6-7 million tons a year. In 1961, the foreign steel sold in those States was about 8 percent of the total; in 1963, about 17 percent; and in the first quarter of 1964, about 18 percent. Virtually all Japanese hot-rolled sheets into the Pacific coast area move on tramps, as do more than half of all steel imports. About 80 percent of hot-rolled sheets imported into the area are for the accounts of large importing processors.

The United States has never been competitive in Japan in a wide range of steel commodities. Tin plates, scrap, and rerolling material comprise the largest items from America to Japan.¹ Scrap usually moves in shipload lots in chartered vessels and constitutes more than 99 percent of steel exports. On the other hand, rerolling material, an item very akin to scrap, ordinarily moves on liners. Only seven items appear to move in both directions to any real degree, and there is quite a difference in values per ton. Except for scrap and tin plate, United States domestic prices are higher than those of Japan. There has been an increasing, although relatively unimportant, trend in the percentage of Japanese imports of steel from the United States. At the same time, Japan is increasing its share of steel exports to the United States at a phenomenal rate. Not only are the steel items

¹ The volume of rerolling material is decreasing.

exported from the United States different from those imported from Japan, but there also is a difference in products of the same nature. The variety of Japanese steel products has increased in recent years. In most instances, the rates on steel from the United States to Japan have no influence on the inability of American shippers to export; large Japanese home capacity and lower production costs are the main deterrents.

Between five and seven times more cargo, by weight, is exported from the Pacific coast to the entire Far East than is imported from the entire Far East to the Pacific coast. Westbound bulk carriers are so numerous that on return voyages they offer very low rates on steel to avoid paying for ballast. Some vessels go out as tramps and return on berth. Other reasons for low inbound rates are the rate wars that occurred in the 1950's and the absence of dual rate contracts binding shippers and/or importers to the Conference lines.

Although the Philippines formerly was a good market for American steel, a drastic drop of steel exports from the United States to the Philippines resulted during the postwar period because of re-birth of the Japanese steel industry, closeness to Japan, imports from Japan and Australia (about 60 percent of the total imports of steel are from Japan), gradual elimination of a tariff situation favorable to the United States, establishment of a tin-plating mill in the islands, the ocean freight differential between United States Atlantic and Pacific ports and ports in the United Kingdom and on the Continent, and discontinuance of AID shipments in 1962.²

European and Australian mills have lost business in the Philippines to the Japanese in about the same volume as the United States. Some tinplate still is exported from the United States to the Philippines as well as copper-clad steel rods in coils and copper-clad steel rods or bars, as to which there is no European competition. One large western mill continues to ship grinding balls of extra quality and higher value to a customer of long standing, since its efficiency has improved to such an extent that it uses less grinding media.

Recently, private interests in the Philippines completed negotiations with the Export-Import Bank for the construction of an integrated steel mill which will produce a wide range of commodities, including tinplate. In all likelihood, this will further reduce imports from the United States, with some possibility of the eventual entry of the new mill into the American market. On the other hand, as in the case of Japan, there may be a resultant demand for American scrap.

² AID shipments are those financed by the U.S. Government and handled through the Agency for International Development (State Department).

Australia has become a steel-producing country, and has been able to invade the Philippine market because of its lower production costs, its nearness vis-a-vis the United States, and its lower ocean freight rates. As already seen, the investigation limits the Australian inquiry to Pacific coast ports; the record contains little if any facts on the movement of steel in either direction in that area. Most of the rates on steel from the Pacific coast to Australia are lower than the corresponding inbound rates.

The volume of steel imported into the Gulf is large, has increased in the past 5 years, and constitutes about 23 percent of the total steel used in the area. Some full shiploads come from Japan, which accounts for the low inbound rates. The area is second to the Pacific coast in the availability of tramps from Japan. Imported steel can be barged into the hinterland, the distance depending upon the cost, and some of it is warehoused, as on the Pacific coast, permitting quick delivery. The Gulf is a particularly good area for tubular products used in oil exploration and drilling. There has been a drop in the sale of imported wire rods and reinforcing bars following recent reductions of domestic prices.

Steel sheets—plain and stainless—shapes, and tinplate continue to move to the Continent from the Atlantic coast on berth liners, but in small volume. Very little steel moves from the Atlantic coast to the United Kingdom; occasionally steel sheets, but under unusual circumstances only. The principal imports from the Continent and the United Kingdom are sheets, galvanized sheets, and tinplate, even though there has been a decrease in domestic demand for tinplate. Inbound liner carryings have decreased because of more tramp tonnage, whose rates fluctuate in accordance with supply and demand. Tramps carry bulk commodities to the Continent and ordinarily would return empty but for the volume of steel available to them. There are no independent berth operators from the United Kingdom to the Atlantic coast, and there is not much nonconference competition in the reverse direction. On the other hand, there is much nonconference liner competition to and from the Continent. The rates on certain steel items are lower outbound than inbound between Atlantic coast ports and ports in the United Kingdom and certain of the continental ports covered by the investigation. Importers in England and Scotland are fully aware that they can buy steel cheaper in other parts of the world than in the United States, and they have no problem with export rates from the United States.

The movement of bulk cargo from the Atlantic coast to the Far East is greater than inbound, and tramps carry most of the inbound

steel movement. There is not much tramp competition from the Atlantic coast to Japan. The existence of the dual rate system from the Atlantic and Gulf coasts to the Far East has tended to keep rates higher than in the reverse direction, where there is no such system.

DISCUSSION

The Presiding Examiner has decided in summary that inbound and outbound rates on iron and steel products in the trades involved here are not contrary to sections 15, 17, and 18(b) (5) of the Shipping Act, 1916. No party excepts to this final result. We sustain the initial decision in its ultimate conclusion and take this opportunity to comment upon some of the problems which arise in the area of rate disparities.

The making of ocean freight rates is an art and not a science; many factors can be considered in the fixing of rates. Likewise, ocean transportation is subject to a high incidence of instability, particularly because of its international nature. Furthermore, the presence of so many unregulated carriers on the sealanes makes dependable liner services a somewhat hazardous venture at times. It is argued that this uncertainty and unbridled competition account in large measure for what may seem at first glance to be abnormal or unjustified rate structures.

Conference rates on iron and steel are set by rate committees or by the Conference as a whole. Each Conference arrives at its rates after consideration of the particular facts in the particular trade. The final judgment on the rate level is designed to maximize revenue without hurting the trade, and the weight to be given the individual factors underlying a rate varies from time to time and place to place. On this record, Conferences or independent liner operators have not been shown to have deliberately taken any rate action which would decrease the volume or entirely eliminate the movement of traffic.

Shippers of iron and steel products making applications for rate reductions ordinarily are tendered a form to be filled out for consideration by the Conference, or the request is made over the telephone. Throughout the United States, representatives of the individual member lines of Conferences are constantly in touch with shippers and their needs, and they duly report this information to the Conferences. The Conferences in turn communicate with shippers and elicit the kind of information which should enable the Conferences to give proper consideration to requests for rate adjustments.

Some fabricators of steel articles made from domestic material, or purchasers of domestic steel for resale, want the import rates on

certain types of steel raised in order to make their businesses more competitive, and they believe that such increases in the long run will have some downward effect on Japan's total sales, particularly on the Pacific coast. The Conferences maintain, however, that any increase in the rates from Japan would stimulate nonconference competition and, if raised beyond a certain point—particularly if the inbound rates are raised to the level of the outbound rates—it would mean the complete loss for them of the steel business in favor of nonconference operators of one kind or another. Increasing the rates, they add, would not raise the landed prices materially; on the contrary, it would penalize the importer and not help the exporter. They further point out that the recent raising of the Conference rates on wire rods from Japan to the Pacific coast has not reduced the volume of imports but that the commodity is not as readily available to the Conference lines.

In contrast to those who want the inbound rates increased, other importers urge very strongly that the inbound rates should not be raised; in fact, they assert that the present rates are too high. The livelihood of these companies depends upon their ability to import such materials as wire rods to be converted to various uses for resale domestically, since these materials are not always available in the domestic market or are too costly. As the spread between the price of rods and finished product is very thin, any increase to such concerns in the cost of the imported article would lessen their ability to compete. The level of the inbound liner rates on wire rods has necessitated the use of vessels by large consumers on a charter basis, but many small importers cannot use charters as it is not economically feasible to import full shiploads. Small-volume importers prefer liner service which permits greater flexibility and usually results in delivery of the rods in better condition.

While volume is a factor in the setting of rates, it was not shown in this proceeding that it has been determinative of the level of any of the rates on steel. It is the overall volume which concerns the Conference and not just the volume of a particular shipper. The history of one Conference is that most rate requests are for the purpose of developing business rather than complaining of lower foreign rates. Requests for lower rates on steel are not often granted because the Conferences consider them already too low. In rare instances, a special rate may be established for a short period to meet a passing competitive situation but, generally speaking, Conferences are chary of emergency rate requests. In evaluating a request for a reduction,

competitive foreign-to-foreign rates are taken into account only where the reduction would make a movement possible which otherwise would not be possible.

Vessel expenses, exclusive of cargo handling costs, are substantially the same outbound and inbound, but loading and discharging costs are higher in the United States than in the foreign areas under consideration.

In some of the involved trades, tariff rates on certain steel items are simply "paper rates"—rates under which cargo seldom if ever moves—but most shippers know that if there is a bona fide possibility of movement they and the carrier (or the Conference, as the case may be) would probably be able to negotiate a practical rate permitting the movement. To some degree, such rates are high enough to be a bargaining factor. Paper rates usually are increased the same as other rates whenever there is a general tariff increase. This type of rate exists in nearly all forms of transportation. Again, a particular steel item might be subject to the "Cargo, Not Otherwise Specified" rate which is usually higher than a specific commodity rate.

The outbound rates on steel have no effect on domestic competition with imports, and it is generally agreed by witnesses representing their respective interests that American steel exports are not affected by inbound rates, since they do not influence in any way the exporter's ability to sell. In other words, there is no relationship between the two sets of rates. If the outbound rates were equalized with the inbound rates, the general result would be lower carrier revenue with little increase in exports.

As already noted, the cost of production of steel in the United States is so much higher than the cost in the foreign countries here involved that American exporters, barring some peculiar circumstances, are simply estopped from participating in exports. In many cases, even if the steel were carried free, the basic American cost still would be higher than the corresponding foreign cost. In the opposite direction, the mere fact that importers find it difficult to pay the common carrier rates on steel does not, by itself, mean that those rates are unlawful.

Section 18(b) (5) was added to the Shipping Act by Public Law 87-346 in 1961. It has not been thoroughly construed and has not been specifically applied to many ratemaking situations, particularly in the area of inbound/outbound rate disparities. While we find no violation of section 18(b) (5), we believe certain comments are appropriate.

Section 18(b) (5) provides as follows:

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.

The Examiner found that the burden rests upon the Commission to prove the unlawfulness of the rates here under scrutiny, pointing out there is nothing in the Act which specifically declares that disparities in export-import rates are unlawful *per se*. The Examiner also relied upon the established fact that shippers and consignees expressed little if any concern over the disparity between outbound and inbound rates on steel.

In *Edmond Weil v. Italian Line "Italia"*, 1 U.S.S.B.B. 395, 399, cited by the Examiner, it was said:

The mere fact that the rate in the reverse direction is substantially lower does not justify a finding that the rate under attack is unreasonable or in any other way detrimental to our commerce.

The *Weil* case was referred to with approval on various occasions during the debates on the proposed amendments to the Act. As finally enacted (Public Law 87-346), section 18(b) (5), according to the Examiner, codified the interpretation enunciated in *Weil*.

Hearing Counsel contend that the existence of a rate disparity along with a showing that tonnage will not move because a rate is so high, where the rate on the same or a similar item in the reciprocal trade is lower, should constitute the former rate as *prima facie* unreasonably high, and absent successful rebuttal by the carrier of the presumption created, the rate should be declared unlawful and subject to correction.

Thus, Hearing Counsel contend that Congress contemplated unfavorable inbound-outbound disparities and that such disparities are, therefore, to be considered in determining whether rates are unlawfully high or unlawfully low. They believe it has not been the intent of Congress to strike down such disparities as *per se* unlawful; rather, they believe that the congressional awareness of unfavorable inbound-outbound disparities requires the imposition of a *prima facie* standard; i.e., wherever disparities are shown to exist to the detriment of our foreign commerce, the carrier must come forth with a rational justification based upon the attendant transportation circumstances.

The carriers and Conferences contend that disparities are neither *per se* nor *prima facie* unlawful. In general, they argue that this is so because Congress has not explicitly created such a presumption. Furthermore, they contend that the facts in this case show that such a determination ignores ratemaking factors which differ widely in

the inbound situation from the outbound and that the factors, such as competition, volume, stowage, and loading costs vary widely between inbound and outbound. Therefore, a comparison of the rates alone is meaningless.

The question of presumptions that may arise when disparities are found to exist is more of academic than practical importance. More important than questions of burden of proof, shifting the burden, rebutting presumptions, and the like, are questions of how a potentially detrimental rate situation can be resolved most feasibly.

Out of the infinite variety of rate situations, we find that certain common facts keep recurring. For instance, one common, recurring relationship between rates is the one of importance here, a rate disparity; i.e., a situation in which the rate in one direction is significantly higher than the rate in the reciprocal trade on the same or similar commodity. Our experience shows that the existence of a rate disparity, in and of itself, has no conclusive legal significance. This is so because only with reference to other facts can we determine whether either rate is harmful. The language of section 18(b) (5), "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.

It seems to us that 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, we may find that the outbound rate is high in relation to the inbound rate.

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 at-

tendant transportation circumstances require that the rate be set at the level. Subjects of justification may include myriad ratemaking factors which might differ between the inbound and outbound rates. These include competition, volume of the movement, stowage, stevedoring costs, and others.

Although there were a few isolated instances where shippers stated they lost sales because of their inability to secure a rate reduction from Conferences, the record lacks evidence from which it can conclude that the rates are unlawful.

Another matter of concern in this investigation is our authority under section 15 to question rates.

Section 15 states:

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

A long-standing view in Commission precedents is that the Commission may disapprove a Conference under circumstances where a Conference rate is so unreasonably high or low as to be detrimental to the commerce of the United States. While the Examiner appears to recognize this as being sound, he notes that the present record would not justify a finding that the agreements of the Respondent Conferences should be disapproved, cancelled, or modified, for it has not been shown that the agreements themselves have been the direct instrumentality of or used for the violation of either section 17 or section 18(b)(5), or that there has not been a showing that the Conference rates on steel are violative of either of those sections. We agree. However, the question of whether we could have taken action under section 15 remains.

Hearing Counsel argue that the Commission may disapprove an agreement where rates are "so unreasonably high or low as to be detrimental to the commerce of the United States." Thus, in *Edmond Weil v. Italian Line "Italia"*, 1 U.S.S.B.B. 395, 398 (1935), the Commission stated that an unreasonably high rate was detrimental to American commerce, 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 * * *.

We agree that this is still a proper statement of our power under section 15; we may disapprove or modify a Conference agreement under section 15, if the rates set by that Conference are so unreasonably high or low as to be detrimental to the commerce of the United States.³

ULTIMATE CONCLUSIONS

Respondents' rates on iron and steel between United States North Atlantic and Gulf ports and ports in the French Atlantic/Hamburg range, between United States North Atlantic and Gulf ports and ports in the United Kingdom, between United States Atlantic, Gulf, and Pacific ports and ports in Japan, between United States Pacific coast ports and ports in Australia, and from United States Atlantic, Gulf, and Pacific ports to ports in the Republic of the Philippines, not shown to be in violation of section 17 of the Shipping Act, 1916, or in contravention of either section 15 or section 18(b) (5) of the Act.

Additional views of COMMISSIONER JAMES V. DAY:

While I agree with Chairman Harlee and Commissioner Barrett in the views expressed above, I feel it necessary to add the following comments:

So-called "paper rates"—listed in carrier tariffs but under which it is said cargo does not move—should receive particular attention in our inquiries in connection with rate disparities.

One other aspect of this proceeding prompts me to further expression. I feel that the effect of import steel on the domestic steel market may be considered by us under sections 15 and 18(b) (5) of the Act, 1916.

The existence of the tariff duty laws does not preclude corrective action under the Shipping Act of 1916.

Furthermore, I have observed no express requirement that the phrase "detrimental to the commerce of the United States" means "detrimental to the foreign commerce of the United States." It would seem that the statutory scheme of the 1916 Act and the 1961 amendments thereto encompass all of the commerce of the United States. I note that under section 1 of the 1916 Act the Congress was concerned with both foreign and domestic carriers and carefully defined each. Again, though, subsections 18(b) (1) (2) and (3) contain the words "foreign commerce of the United States," 18(b) (5) contains those words only when describing the carriers covered and the word

³ See: *Pacific Coast—River Plate Brazil Rates*, 2 U.S.M.C. 28, 30 (1938); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342, 347 (1940); and *Empire State Highway Transp. Assn. v. Federal Maritime Bd.*, 291 F. 2d 336 (D.C. Cir. 1961).

“foreign” is omitted in the phrase “detrimental to the commerce of the United States.” Likewise section 15 should not be read to limit the phrase “detrimental to the commerce of the United States” to “detrimental to the foreign commerce of the United States.” Indeed, agreements between carriers in the domestic trade have been approved in connection with this section.

Thus, it would seem that in a proper case evidence should be admissible on the question of whether an import rate was adversely affecting a domestic steel producer who might potentially be a source of supply of goods moving in the commerce of the United States.

The Shipping Act would not only envision protection to a shipper, port or carrier, but to any person (e.g., section 22 of the Act).

I would also note that the effect of an import rate on a domestic steel producer could well be material not only to competitive relationships as well as damages under the Shipping Act, but also could well bear on the public interest standard of section 15.

COMMISSIONER HEARN concurring:

Based on the record in this case I agree with Examiner Robinson in that there are no violations of the Shipping Act.

However, I cannot in good conscience dismiss this long and voluminous case without an attempt to extract something therefrom which may help us to establish guidelines for the protection of the public interest, particularly since in my mind there is no doubt that disparities continue to exist unabated.

I believe (1) that both sections 15 and 18(b)(5) are broad enough to permit the Commission to protect the wholly domestic commerce of the United States, in effect, all of the commerce of the United States particularly when that commerce is jeopardized by inbound “dumping” rates; (2) that when a rate *disparity* in *reciprocal* trades, on *similar* commodities appears, and when movement of goods under the higher rates has been *impaired*, that the carrier quoting the rates must *demonstrate* that the disparate rates are *reasonable*; (3) that under section 43, the Commission should set forth rules respecting rate disparities as they relate to sections 15 and 18(b)(5) of the Shipping Act, and (4) that under section 212(e) of the Merchant Marine Act 1936, this record warrants certain recommendations to the Congress.

This record reflects that iron and steel imports, particularly to our Pacific coast from Japan, enjoy far lower rates than do our exports from the Pacific coast to Japan. The record also establishes that while our outbound rates from the United States were increasing sub-

stantially our exports were dwindling. Conversely, while inbound rates from Japan were stabilized much lower than the outbound rates from the United States, Japanese offerings increased. For example, wire rods from Japan to all United States ports in 1955 totaled only a little over 6,000 tons, and moved to the United States at "negotiated" or "open" rates, by 1962 the inbound wire rod movement totaled almost 300,000 tons, accounted for better than 25 percent of Japan's total iron and steel market in this country, and was carried at a \$19.00 rate, while the outbound rate for wire rods to Japan ranged from a low of \$21.65 in 1957 to a high of \$35.35 per ton in 1964 (with about seven fluctuations in this rate in these years), although a total of only 21 tons moved outbound in the trade between 1958 and 1962.¹ A similar story is told as to other commodities in these reciprocal trades. For example, outbound rates on steel plates from the west coast to Japan rose from a low of \$21.65 per ton in 1957 to a high of \$35.35 in 1964, although our exports plummeted from 275,269 tons in 1957 to less than 2,500 tons in 1962. Imports from Japan of steel plates to all United States ports burgeoned from slightly over 1,000 tons in 1955 to over 200,000 tons in 1962, although the rates from Japan to the Pacific coast edged from \$15.50 to only \$19.00 per ton in 1964.²

The record also shows that the importation of wire rods has had a most detrimental effect upon our domestic nail manufacturers on the Pacific coast. I believe that if this harm to them was caused by unreasonably low inbound rates then they are entitled to the protection which sections 18(b)(5) and 15 afford to the "commerce of the United States." It is irrelevant, I think, that other agencies of this Government protect our commerce against "dumping." If our commerce³ has been harmed by an "unreasonable" rate, whether high or low, it is the duty of this Commission to declare that rate unlawful. Unfortunately, this record does not show the costs of carrying rods, or the costs of loading or discharging them, and the existence of the

¹ Over 3,000 tons were shipped to Japan in 1956 and 1957.

² The disparate rate situation favoring Japanese wire rod and plates to Pacific coast ports is mirrored on the east coast and Gulf coast. The outbound rates of the Far East Conference, on the rods, rose from a low of \$22.00 to a high of \$39.95 in 1964, and on plates from \$24.00 to \$32.75, whereas in the reciprocal trade, the inbound conference rates moved only from \$17.00 to \$20.50 per ton on each of these commodities.

³ I read the word "commerce" in sections 15 and 18(b)(5) to be broader than do my colleagues. If Congress intended to limit that "commerce" in those sections to our "foreign commerce" it could easily—as it has in other sections of the same statute—have used that phrase "foreign commerce." The election of the Congress to omit that limiting word, "foreign" in my opinion evinced an intention to use the phrase in its normal, full sense. A situation could arise where an inbound rate on a commodity could be so low that actually a vessel would be out-of-pocket simply by carrying it. Upon importation, that commodity's sale well could be detrimental to the "domestic" commerce—which is part of our commerce—and I believe no one would doubt that in such a situation an injured party would have a cause of action under the Shipping Act.

disparity alone, is not sufficient to make the judgment that the rates are contrary to section 15 or 18(b) (5).

In all of these trades, the record, with relatively few and insignificant exceptions, demonstrates that substantial disparities in favor of inbound iron and steel products are the rule. We are told on the one hand that the inherent high cost of American manufacturer⁴ is a most serious impediment to the maintenance of foreign markets, that big steel producers are "hedging" against this barrier by establishing manufacturing or finishing plants abroad, that severe tariff barriers also must be taken account of, and that our competitors are now reaping the benefits of their postwar manufacturing programs. Subtlety implied in these contentions is the belief that American mills are not particularly interested in foreign markets in light of these barriers. On the contrary, this record details the efforts of one large mill, Crucible Steel Company, which is aggressively engaged in exporting. Interestingly, Crucible is especially concerned with the costs of ocean transportation and has often found that a small difference in ocean freight rates determines whether or not a sale can be made. On the shipping side, we are told that the absence of an inbound dual rate system in some trades, explains the disparity; that the cargo imbalance of reciprocal trades is another contributing factor, as is the fact that there is heavy tramp competition inbound. Whatever validity these arguments may have, it nevertheless remains obvious that our steel exports are declining,⁵ that our steel imports are increasing,⁶ and that disparities continue unabated. In this regard, it should be noted that while the United States accounted for more than 50 percent of the world ingot production in the 1920's, our production has declined from about 45 percent in 1950 to about 25 percent in 1961.

I believe that it is fair to assume that a carrier will not carry steel (or any other product) if the carriage involves a net loss to the ship. And I think it fair to assume that the actual cost of moving cargo in one direction should be substantially the same as it cost in the other direction. Of course, loading and unloading costs vary, and the best judgment that can be made on this record is that loading and unloading costs are higher at United States ports than they are at foreign ports, and generally, loading costs for iron and steel commodities universally exceed unloading costs. The precise difference cannot be gleaned from the record. However, all things considered, a reasonable disparity—

⁴ While it is true that the cost for the production of one pound of steel in Japan is 71 cents as compared to \$3.17 in the United States, that disparity is mitigated somewhat by the fact that per hour productivity here is greater at least by 30 percent.

⁵ From over 4 million short tons in 1955 to less than 3 million short tons in 1962. Deplorably, our 1962 exports include over 2 million tons of scrap.

⁶ From less than 900,000 short tons in 1955 to almost 5 million short tons in 1962.

in the ideal case—would be that disparity which reflects the difference in cargo handling costs alone. I am aware that this judgment appears doctrinaire, but I am aware also that, except for broad generalities by way of explanation, the disparities stand legally unexplained. I am convinced that the existence of a substantial rate disparity is strong evidence that either or both of the reciprocal rates are “unreasonable.” If there can be added to this evidence that our commerce has been harmed as a result of either or both of these rates, the carriers should be called upon to justify the rates. And by justification, I refer to transportation justification.

While this record may not suffice to support findings of unlawfulness, I think it unfortunate to let the matter rest here. This investigation has thrown much light on reciprocal disparities, and I believe it affords the Commission the opportunity, under sections 43, 15, and 18(b) (5) of the Act, to propose rules respecting the obligations of carriers to justify their rates. The Commission should consider the feasibility of promulgating rules to cope with disparate rate problems. For example, the Commission might consider such rules as (1) with the existence of a disparity of a fixed percentage between similar products in reciprocal trades, coupled with evidence that the outbound movements of the commodity is deterred, requires the carrier to justify the difference, under pain of having the rate disapproved, and (2) where an inbound rate appears to affect adversely our own commerce that the carrier be required to show that the rate exceeds the cost of loading and discharging the cargo. Failure to establish this should result in its disapproval.

Finally, I believe that if the Commission determines that it cannot successfully come to grips with this situation under our general rule-making grant, pursuant to section 212(e) of the Merchant Marine Act, 1936, the Commission should seek the help of Congress in solving this most vexing problem of disparities.

COMMISSIONER JOHN S. PATTERSON, concurring separately :

The order initiating this proceeding announced as its purpose :

- (1) to determine whether the freight rates on iron and steel items set forth in the tariffs of about 103 common carriers by water as defined in the first section of the Shipping Act, 1916 (Act), violate sections 15 and 17 of the Act or should be disapproved under authority of section 17 or section 18(b) (5) of the Act; and
- (2) to determine whether certain agreements among carriers associated in Conferences, heretofore approved, should be disapproved as authorized in section 15.

Because the evidence is inadequate for any of the foregoing purposes
I agree:

- (1) that no section of the Act has been violated,
- (2) that no rates should be disapproved, and
- (3) that no agreement should be disapproved.

The evidence consisted of testimony and exhibits. The testimony in 4,009 pages of the transcript explained how and why rates were established and the meaning of the exhibits.

There were 247 exhibits. Of these, 165 items were correspondence dealing principally with rates requests or inquiries. None involved a comparison of rates one way versus the return journey on the same product to show relationships. Eleven items were memorandums or statements by steel companies or their officials, describing the role of ocean freight rates in their businesses. None provided inbound-outbound comparisons, but indicated that other factors than freight rates affected their export business. The remaining items were a miscellany of documents, such as application forms for rate adjustments, reports to stockholders, a price history of several products in the San Francisco area, data on grinding balls shipped to the Philippines, an information bulletin, a statement of handicaps to trade by foreign governments, longshore wage rates in New York, a weekly report of charter fixtures in July 1963 by United States Steel Corporation, a reproduction of advertisements, newspaper articles, a cover sheet for a statistical analysis, etc.

In regard to tariffs, there were 21 abstracts from various conference tariffs, showing dates, two Meyer Line tariffs, one Meyer Line rate statement, one statement of export-import rates from Gulf to Europe, 1963-64, and two Zim Israel tariffs on selected steel items.

There were at least nine statistical presentations showing diverse information relative to trade with Japan between 1953 and 1962, and two dealing with the Far East trade generally between 1958 and 1962. There were six statements on Lykes' carryings between Gulf of Mexico ports and European ports in 1963 and 1964, and Lykes' cargo handling costs. Other figures on tonnages carried were supplied. It was impossible to analyze this information rationally.

The basic difficulty with the evidence is that the opinions in the transcript, the unrelated rates, the noncomparable commodities, the dissimilar shipping conditions, the uncorrelated time periods, and the statistics of rate history were too indefinite to be used as a basis of an adjudication with the assigned objectives of this proceeding. The evidence offered seemed to be only for the purpose of proving precon-

ceived theories or something generally against all respondents, not against carriers whose rates appeared in any specific exhibit. For me, it is impossible to decide that any Respondent has violated any law by particular acts at particular times, using such evidence.

Not one detrimental situation was proven. Among all the correspondence asking for favorable rate action, none indicated that any adverse decision would impede the flow of commerce. Some of the requests were 6 years old at the time of hearing and have nothing to do with commerce in the world today. Any detriment thought to exist was entirely in terms of what might have happened if rates had been more equal, and detriment is inferred from such a hypothesis. Individual law violation may not be based on such premises.

No doubt this proceeding proved the hard facts that it costs exporters substantially more to send goods abroad than it costs importers to move goods to the United States. As an abstract matter, this difference is hard to defend on grounds of fairness or logic. Most people would agree with the commonsense observation that it ought to cost about the same to carry the same article back and forth between the same ports, making allowance for the allegations that it costs more to load a steel product than it costs to unload the same product, and loading and unloading costs are higher in the United States. As victims, American exporters at least have the right to know why this situation exists. Possibly the Commission has the duty to examine into the reasons for this phenomenon and ought to find out if the commonsense abstractions have no basis in reality. It does not follow that the right way to go about the inquiry is to prosecute a whole segment of an industry. Neither does it justify, in the absence of facts, the conclusion that anyone who fails to fit his conduct neatly into this commonsense idea is *prima facie* a lawbreaker who ought to be made to come in and defend himself before a Federal inquisitor. Marketplace behavior is too complex for such easy procedures.

One might agree with the abstract proposition advanced by my colleagues that the appearance of "a rate disparity * * * when movement of goods * * * has been impaired * * *" requires a demonstration of reasonableness, assuming a ready way of determining impairment, but such a proposition is not supported by this record. In the absence of facts in this record to support a policy statement, a rule, or case law, whichever it is, as stated by my associate Commissioners, providing, as it will, future guidance, I believe under the circumstances and in the interest of keeping the subject open for dis-

cussion a proposed rulemaking proceeding may be desirable to establish the proposition, if such a rule is thought to be required.

In summary, my conclusions are:

I concur in the Examiner's ultimate finding that no violation of the Shipping Act, 1916, has been proven.

I conclude that the record in this proceeding proved that it costs exporters substantially more to send goods abroad than it costs importers to move goods to the United States.

I conclude that the available evidence in this proceeding is not suited to the objective of the adjudication, which was to determine whether rates are so unreasonably high or so unreasonably low as to be a detriment to commerce or whether disparities inbound and outbound are discriminatory and thereby prove Respondents have violated the Act. The deficiencies of the evidence are brought into sharp focus by the Examiner's generalized discussion of ratemaking as the reason or basis for conclusions.

I conclude there is no information in the exhibits permitting a comparison between inbound and outbound rates of any commodity of any carrier.

I conclude the Administrative Procedure Act requires the gathering of evidence and the empirical use of such evidence to reach a well reasoned conclusion concerning an alleged statutory violation. Also, I consider it to be axiomatic that in making judgments under section 18(b)(5) the Congress expects this Commission to compare, among others, an outbound rate with the reciprocal inbound rate. Such a comparison on this record reveals that the inbound rate is substantially lower as related to the outbound rate.

While not derivable from the facts on this record, although consistent with congressional intent, I believe that in the interest of evaluating the issue of fairness and reasonableness of freight rates, common sense alone dictates that it is incumbent upon this Commission in making judgments under section 18(b)(5) to consider that where a rate for transporting in one direction is high in relation to a corresponding rate in the opposite direction it establishes a recognizable out-of-balance condition which warrants that the rates be justified by the carrier making them, and the justification must be to the satisfaction of the Federal Maritime Commission. Such justification need not necessarily be furnished as part of any claim of law violation, but as an aid in staff studies designed to assist the Commission in performing its functions.

In order to get the answer to the question of why there is a substantial difference in shipping costs of exporting United States products versus importer's costs, I hold it is the duty of this Commission to ask the ratemakers to come forward and explain the basis on which the export rate is substantially higher. Depending upon what we find, the Commission may thereafter take appropriate action under the laws it administers.

The proceeding is discontinued.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65-9

AGREEMENT NO. T-1768—TERMINAL LEASE AGREEMENT

Decided January 10, 1966

Agreement No. T-1768, a Preferential Assignment Agreement of marine terminal property from the City of Oakland to Sea-Land, providing for the payment of an annual minimum and maximum compensation based upon the Port of Oakland Tariff, is subject to section 15 of the Act. As such, it has not been shown to be unjustly discriminatory or unfair or otherwise violative of section 15 if modified as ordered by the Commission. Agreement No. T-1768 is approved and Agreement No. T-5 covering part of the area covered by Agreement No. T-1768 is cancelled.

J. Kerwin Rooney, attorney for the City of Oakland, acting by and through its Board of Port Commissioners; *C. H. Wheeler* and *Sterling Stoudenmire, Jr.*, attorneys for Sea-Land of California, Inc., Respondents.

Miriam E. Wolff and *Thomas C. Lynch*, attorneys for San Francisco Port Authority; *Arthur W. Nordstrom* and *Walter C. Foster*, attorneys for City of Los Angeles; *Edward D. Ransom* and *Robert Fremlin*, attorneys for Encinal Terminals; *Leslie E. Still, Jr.*, attorney for City of Long Beach, Interveners.

Donald J. Brunner, Hearing Counsel.

REPORT

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

By order of investigation served April 9, 1965, the Commission instituted these proceedings to determine whether Agreement No. T-1768 between the City of Oakland (Oakland) and Sea-Land of California, Inc. (Sea-Land) should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916 (the Act). Oakland and Sea-Land appeared as Respondents favoring approval. The San Francisco Port Authority (San Francisco), City of Los

Angeles (Los Angeles), and Encinal Terminals (Encinal), intervened in opposition to approval. The City of Long Beach (Long Beach) intervened in favor of approval. A hearing and oral argument in lieu of briefs were held. An Initial Decision was issued by Examiner Benjamin A. Theeman to which exceptions and replies have been filed. We have heard argument on these exceptions and replies.

THE BACKGROUND OF THIS PROCEEDING

On June 18, 1965, the Commission issued its Report and Order in its Docket Nos. 1128: *Agreement No. T-4: Terminal Lease Agreement at Long Beach, California*; 1129: *Agreement No. T-5: Lease Agreement at Oakland, California*. In those cases the Commission held that agreements between Long Beach and Sea-Land and Oakland and Sea-Land were subject to section 15 of the Act. The agreements there under consideration granted to Sea-Land exclusive use of piers and adjacent areas at yearly rentals of \$147,000 in lieu of otherwise applicable tariff charges. As such, they were considered as granting to Sea-Land "special rates" and unlawful unless approved under section 15. The Commission approved the agreements over the exceptions of Encinal, Los Angeles, and San Francisco that the agreements were "unjustly discriminatory" because based on other than tariff rates and noncompensatory rentals and "contrary to the public interest" and "detrimental to the commerce of the United States, because their implementation would disrupt the traditional Pacific coast system of assessment of terminal charges in accord with published tariffs." The Commission found that the agreements were not unjustly discriminatory as the rentals prescribed therein provided adequate returns on the ports' investments and no adverse effects of the agreements were shown upon other carriers, other ports, or other terminals, the record failing to show the requisite competition between other terminals within the ports of Oakland and Long Beach. Furthermore, the Commission was unable to find that approval of the agreements was likely to cause disruption of the traditional uniformity of terminal charges on the Pacific coast.

THE PRESENT AGREEMENT

The agreement which is the subject of this proceeding, No. T-1768, covers not only the area covered by Agreement T-5, which was the subject of Docket No. 1129, namely berth 9 and the adjacent marshaling and storage yards, but also another berth (berth 8) and some addi-

tional storage area.¹ The term is 20 years. Oakland reserves secondary rights to the use of the premises. Sea-Land agrees that if it should publish a tariff of terminal charges, it shall be identical to Oakland's tariff for like services.² Use of the facility by Sea-Land is to be at tariff charges but minimum and maximum yearly figures are fixed at \$450,000 and \$550,000, respectively, subject to adjustment because of cost of improvements, including the installation of two cranes, to be made by Oakland, which was estimated at \$2,238,000.³ Paragraph 6 of Agreement No. T-1768 provides that in the event Agreement No. T-5 is approved, the area covered by it should be withdrawn from Agreement No. T-1768, and the maximum and minimum yearly compensation reduced by \$147,000.

THE INITIAL DECISION

The examiner, in his Initial Decision, approved Agreement No. T-1768. He found the rental to be fair and reasonable inasmuch as Oakland would more than recover its investment even under the minimum rental of \$450,000. He further found that the agreement was not unjustly discriminatory or unfair as between carriers, none of which protested it; shippers, who testified in favor of Sea-Land's service; or ports, which were not able to show injury because of the agreement, or that similar agreements would not be available to them. He finally found no likelihood of the destruction of the Pacific coast terminal system and thus did not find the agreement "detrimental to the commerce of the United States" or "contrary to the public interest."

The Examiner recommended, however, that paragraph 6 should be clarified. He stated, Sea-Land could conceivably avoid paying more than the minimum amount of compensation to the port if it exclusively uses berth 9 after the volume of business passes the \$450,000 mark.

DISCUSSION AND CONCLUSIONS

The vast majority of the issues raised by way of exceptions to the Initial Decision in this proceeding by San Francisco, Encinal, and Los Angeles were also raised by these parties in excepting to the Initial Decision in Docket No. 1129, and were explicitly rejected by us. Spe-

¹ Oakland grants a use in common by Sea-Land and Encinal of the apron area running parallel to berth 8, between the extreme westerly boundary line of the assigned premises and berth 7.

² Hearing Counsel suggested and Oakland and Sea-Land agreed to modify this provision to include tariffs published by "any business entity, affiliated as to ownership or control with (Sea-Land)."

³ Hearing Counsel suggested and Oakland and Sea-Land agreed to modify the words of this provision which originally read "twelve-month period" to read "year".

cifically, San Francisco and Encinal argue that agreements for compensation in lieu of tariff charges are unjustly discriminatory or unfair. As we have stated in our report in Docket No. 1129 and in *Agreement No. 8905—Port of Seattle and Alaska S.S. Co.*, 7 FMC 792, 800 (1964) :

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

There is nothing in the record in this proceeding to indicate operations under the agreement will take place in an unlawful manner. The record discloses no unlawful discrimination or prejudice against any carrier, shipper, port or terminal. No carrier testified against approval of the agreement, and the port of Oakland in fact has openly stated its willingness to assign other terminal properties in the same manner and under the same conditions offered to Sea-Land.

Shipper witnesses without exception testified in favor of Sea-Land's operations.

There is no showing that terminals or ports will be in anyway injured by approval of T-1768. The record is barren of proof that any cargo will be diverted from any port or terminal or that any carrier aside from Sea-Land will shift his operations to a different port or terminal.

San Francisco, Encinal, and Los Angeles all contend that the method utilized for determining the reasonableness and fairness of the compensation is not proper. This method is designed to assign all costs and expenses of the specific terminal property here involved, including allocations of all general terminal expenses, to the specific area covered by T-1768. This method has been utilized by us in both Docket No. 1129 and *Agreement No. 8905—Port of Seattle and Alaska S.S. Co.*, *supra*. We adopt it here as the proper method of determining the reasonableness and fairness of the compensation to Oakland for the use of its facility by Sea-Land.

San Francisco, Encinal, and Los Angeles in addition reiterate the allegations made in Docket 1129 that agreements for compensation in lieu of tariff charges are contrary to the public interest and detrimental to the commerce of the United States. Many dire consequences are foreseen by interveners if T-1768 is approved, including the disintegration of the tariff method of compensation for provision of terminal facilities and the collapse of the stability of Pacific coast terminal operations. There is no evidence in the record that such will take place. As we said in Docket No. 1129 (p. 15 of mimeographed

decision), "we will not disapprove the agreements on the basis of speculation alone."

The contention that Agreement T-1768 in fact gives an exclusive rather than the preferential use provided for by its terms is without merit. The record shows that Sea-Land's sailing schedule and the short in-port time of Sea-Land's vessels will allow for a secondary berthing, and Oakland officials have stated that every endeavor will be made to use the secondary berthing rights.

San Francisco and Encinal reraised the arguments made in 1129 that Oakland may act in an unlawful manner under the agreement and that the Commission should not wait to disapprove a subject agreement but should do so on presently available information. We once again reject these arguments. There is no showing on the record in this proceeding that Oakland will act in other than a lawful manner nor will we disapprove the agreement on the basis of speculation alone. T-1768 has much to recommend it. Oakland has acted to develop and improve its port and Sea-Land as well as members of the shipping public will benefit from T-1768.

Intervenors argue that approval of Agreement T-1768 would be contrary to our holding in Docket 1084, *Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports*, served August 18, 1965. This contention is without merit. In Docket 1084, we merely held that the Department of Agriculture was required to pay wharfage for its cargo which was transported over Respondents' wharves, because such cargo used the wharves. The level of the wharfage charge was not in issue and, in fact, the wharfage charged on the bulk grain (45 to 50 cents) was different from that assessed other cargo (80 cents). There is nothing inconsistent with that holding in our position here. In fact in Docket 1084 the Commission explicitly noted that grain terminals are special facilities, costs of such operations should be separately determine, and "a like course should be followed in connection with the handling of any other commodity that moves in large quantities under circumstances which are unique * * *." This is the situation present at the facility covered by Agreement T-1768: containerized cargo moves in large quantities over special facilities under unique circumstances. Sea-Land does pay all charges, including wharfage, up to the minimum and, as we have stated in Dockets 1128-1129, *supra*, there is no requirement, in the absence of a showing of illegality, that all users must pay wharfage computed upon the same basis. The minimum-maximum rental method of paying wharfage has been approved in Agreement No. 8905—*Port of Seattle & Alaska S.S. Co.*, 7 F.M.C. 792 (1964), as well as in Dockets 1128 and 1129, and

we see nothing present in this proceeding to show why it cannot lawfully be applied here.

Interveners allege that the Examiner erred in holding that injury need be shown for a violation of sections 16 or 17 of the Act. It is true that no "injury" in the sense of monetary loss must be shown for a violation of these sections as is necessary when reparations are sought for such violation. However, since 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 16 itself requires a showing of such unreasonable disadvantage. "Injury," as used by the Examiner, is to be considered as synonymous with "adverse effect."

There are only two issues in this proceeding not considered in Docket No. 1129: (1) the reasonableness and fairness of the compensation for the larger area here involved, and (2) the proper method of relating T-5 to T-1768; i.e., by modification of the latter and/or cancellation of the former.

The Examiner found the compensation for the area covered by T-1768 to be fair and reasonable upon the basis approved by the Commission in Docket No. 1129. The cost and expenses of the specific terminal property here involved, including allocations of all general terminal expenses to the areas covered by T-1768, were considered. It was shown that under the \$450,000 minimum compensation Oakland would more than recover its investment and would receive a rate of return of about 4.6 percent on the value of the land and improvements. The maximum figure (\$550,000) was shown to yield Oakland 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.⁴ Both minimum and maximum compensations are fair and reasonable. As we observed in Agreement No. 8905, *supra* (at 802), this "is not a rate case where we have a direct interest in the level of the Port's return on its terminal facilities. Beyond this, the Port, of course, is a public body, experienced in terminal management. We have no grounds for disputing its judgment * * *."

Although T-1768 does not appear to be in anyway unlawful, because it covers in part the same area which is the subject of T-5 it is possible for the parties to operate under T-1768 in a manner inconsistent with

⁴The cranes were considered differently, being movable equipment with a salvage value * the end of the 20-year period.

their express intent to conduct their operations at berths 8 and 9 as if the premises constituted one indivisible unit.

Agreement T-1768 provides for both a minimum and a maximum level of compensation. However, as intervener protestants observe, it is possible for the parties to operate under T-1768 so that only the minimum level of compensation will be paid. Paragraph 6 of T-1768 states that if T-5 is approved, the area covered by it; i.e., berth 9, will be removed from the scope of T-1768 and will be subject to the flat annual rental of \$147,000. Thus, Sea-Land could use the area as a whole until the \$450,000 minimum had been reached, thereafter restricting its activities to berth 9, where the flat rental there applicable would protect Sea-Land from paying any more for the use of the facility.

There is no indication that the parties to T-1768 will operate in this manner. However, because they realize that such a possibility exists, they have agreed to cancel T-5 and modify T-1768 by deleting paragraph 6. We feel that this cancellation and modification must be made because the failure to make them would leave on file with the Commission agreements which do not truly embody the intent of the parties.⁵

An appropriate order will be entered approving Agreement T-1768, with the deletion of paragraph 6, and the inclusion of the modifications agreed to by the parties noted above, and cancelling Agreement T-5.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

⁵ Section 15 requires, *inter alia*, that a "true copy, or if oral, a true and complete memorandum, of every agreement" subject to it be filed with the Commission.

FEDERAL MARITIME COMMISSION

No. 65-9

AGREEMENT NO. T-1768—TERMINAL LEASE AGREEMENT

ORDER *

The Commission has this date entered its Report in this proceeding, which is hereby made a part hereof by reference, and has found, *inter alia*, that Agreement No. 1768 between the City of Oakland and Sea-Land of California, Inc., as modified by the parties, is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, ports or between exporters from the United States and their foreign competitors, nor detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916, if modified by the deletion of paragraph 6, and that section 15 requires the cancellation of Agreement No. T-5 between the same parties.

Therefore, it is ordered, That

1. Agreement T-1768 is approved with the following modifications:
 - (a) On page 5, paragraph 4(a), in the 9th line from the bottom of the page, elimination of the words "twelve-month period" and substitution of the word "year" therefor;
 - (b) On page 6, paragraph 4(d), insertion between the word "it" and the word "should" the following: " , or any business entity affiliated as to ownership or control with assignee,";
 - (c) Deletion of paragraph 6.

By the Commission.

*Amended order of Jan. 26, 1966, follows.

FEDERAL MARITIME COMMISSION

No. 65-9

AGREEMENT NO. T-1768—TERMINAL LEASE AGREEMENT

AMENDED ORDER

JANUARY 26, 1966

The Commission issued its Report and Order in the captioned proceeding on January 10, 1966, approving Agreement No. T-1768 between the City of Oakland and Sea-Land of California, Inc., as modified and canceling Agreement T-5 covering a part of the same terminal area.

It now appears that Agreement T-1768 may not become operative, because of the problem involved in the purchase, erection, and installation of a crane until April, 1966. Because of this situation the parties could be left without an approved agreement under which they can operate.

Therefore, it is ordered, That ordering paragraphs 2 and 3 of the order of January 10, 1966, are deleted.

It is further ordered, That the order of January 10, 1966, is amended to read as follows:

2. Agreement T-5 shall remain in effect until the commencement of Agreement T-1768; and

3. The parties shall submit to the Commission on or before the effective date of Agreement T-1768 a modification of Agreement T-1768 complying with this order, and a cancellation of Agreement T-5.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1185

OCEAN FREIGHT CONSULTANTS, INC.

v.

THE BANK LINE LIMITED

Decided January 11, 1966

The Bank Line Limited, a common carrier by water, violated section 18(b) (3) of the Shipping Act, 1916, by charging a higher rate for a shipment in foreign commerce than the rate on file in its tariff properly applicable at the time.

Pursuant to section 22 of the Act, Ocean Freight Consultants, Inc., an assignee and holder of legal title to the claim, is entitled to payment of reparation in the amount of \$140.

Henry Wegner for Ocean Freight Consultants, Inc.

Paul F. McGuire and *John M. Linsemeyer* of Kirlin, Campbell & Keating for respondent, The Bank Line Limited.

REPORT

BY THE COMMISSION:

Chairman HARLLEE, Commissioner BARRETT and Commissioner DAY concluded that on this record The Bank Line Limited (Bank Line) must pay to Ocean Freight Consultants, Inc. (OFC) the sum of \$140. Their respective views are set forth below.

John Harlee, Chairman:

This proceeding arises out of a complaint filed by OFC, as assignee of Mead Johnson International, a division of Mead Johnson & Company (Mead Johnson), alleging that Bank Line violated section 18(b) (3) of the Shipping Act, 1916 (the Act), in assessing and receiving payment from Mead Johnson of a higher freight rate on certain exported commodities in foreign commerce than the rate

properly applicable at the time; and seeking reparation in the amount of \$140 pursuant to section 22 of the Act.

OFC is a New York corporation engaged in the business of auditing ocean freight charges. Where the audit shows overpayments, OFC attempts to collect the same on behalf of the shipper which may include proceedings before this Commission. Services are performed on a percentage of collection basis. In the agreement between Mead Johnson and OFC in evidence herein, it is provided that each claim must be submitted to Mead Johnson for approval before any action on the claim is taken.

On May 20, 1965, OFC filed its complaint on behalf of Mead Johnson, the shipper herein, setting forth three causes of action based on overcharges.¹ In addition to Bank Line, Strachan Shipping Company and U.S. Atlantic and Gulf/Australia-New Zealand Conference were named as respondents. On June 10, 1964, respondents moved to dismiss alleging, among other grounds,² that OFC had no legal capacity to sue absent an assignment from Mead Johnson. By letter dated June 12, 1964, received by the Commission on June 15, 1964, Mead Johnson assigned the claims to OFC "for collection of reparation * * * on our behalf * * *." The Commission denied this part of respondent's motion following the practice established by the Interstate Commerce Commission. The Interstate Commerce Commission has long allowed the assignment of claims for reparation for violations of the statute it administers. The Supreme Court has held that an assignment may vest legal title in the assignee without passing to him beneficial or equitable title, and such assignee may recover damages in an action brought in his own name but for the benefit of equitable owners of the claims. The Court further held that claims for reparation are an assignable property right in the absence of express legislative mandate to the contrary. Finding no such language in the Interstate Commerce Act, the Court allowed the action by an assignee of the legal title but not the beneficial interest in a reparation claim before the I.C.C.³ In its order dated December 22, 1964, the Commission stated:

In accordance with the stated purpose of our Rules of Practice and Procedure to "secure the just, speedy and inexpensive determination of every pro-

¹ The two other claims in the amounts of \$103.66 and \$38.87 respectively were dismissed by the Commission prior to hearing by order served June 8, 1965, because they were barred by the 2-year limitation contained in section 22.

² The motion also asked that the complaint be dismissed as against Strachan and the Conference for falling to state a cause of action against either. This part of the motion was granted by order served December 22, 1964.

³ See *Spiller v. Atchison, Topeka, and Santa Fe Railway Co.*, 253 U.S. 117, 133-135 (1920).

ceeding," * * * this assignment will be accepted as the filing of a new or supplemental complaint as of June 15, 1964 * * *.⁴

On January 7, 1965, respondents moved for reconsideration of the above denial alleging among other things (a) the Commission's order was based on an assignment to OFC of a claim which is in violation of New York State penal law and therefore illegal; and (b) the complainant being a corporation may not bring an action on behalf of others under the Commission's rules. By order dated February 19, 1965, the Commission denied respondent's motion stating:

The validity of an assignment under the New York State penal law may well affect the conduct of the complainant's business in that State, but cannot be determinative of our practice. We are required by section 22 of the Shipping Act, 1916, to permit the filing of claims for reparations by any person who may have suffered because of an alleged violation of the act, or his successor in interest. The practice before the Commission by "firms and corporations on behalf of others" prohibited by Rule 12(g) [sic] of our Rules of Practice and Procedure does not affect the ability of complainant to bring this action. Practice in this context refers to the gamut of activities performed by lawyers on behalf of others; it does not qualify the statutory right of any entity, corporate or otherwise, to seek redress to some legal grievance under section 22 of the Act.

Hearings were held before and briefs submitted to Examiner Benjamin A. Theeman. The examiner issued an initial decision in which he found a violation of section 18(b)(3) and awarded reparation.

No exceptions to the initial decision were filed. We have reviewed the initial decision on our own initiative.

FACTS

1. At all times herein mentioned, Bank Line published, maintained and had on file with the Commission, Freight Tariff No. 9, U.S. Atlantic and Gulf/Australia-New Zealand Conference F.M.C. No. 1 containing item #450, reading as follows:

<i>Description</i>	<i>Basis</i>	<i>Rate</i>
Canned goods, N.O.S. (foods), including beverages, non-alcoholic and canned shrimp -----	W/M	\$50.00

2. The details concerning the shipment are as follows:

(a) The shipment was transported by Bank Line on the MV *Nessbank* pursuant to Bill of Lading No. 77 dated at New Orleans, November 20, 1962;

(b) The shipper was Mead Johnson. The consignee was Charles McDonald, Mead Johnson PTY, Ltd., the Australian branch of Mead Johnson;

⁴The I.C.C. also treats assignments made subsequent to the filing of a complaint as the filing of a new or supplemental complaint. See *Carolina Cotton & Woolen Mill Co. v. Southern Railway*, 195 I.C.C. 654, 659.

(c) There were three items: (1) 300 cartons of canned infants' food known as Sobee powder (24 one pound cans per carton) measuring 350 cu. ft.; (2) 5 cartons of tube feeding sets measuring 25 cu. ft.; and (3) 1 carton of literature measuring 1 cu. ft. All three items measured 376 cu. ft.;

(d) Freight for the 376 cu. ft. was charged at the rate of \$66 per 40 cu. ft. and totalled \$620.40;

(e) The sales by Mead Johnson to its branch were on a CIF basis. However, full freight was prepaid by Mead Johnson.

3. OFC, on behalf of Mead Johnson, advised Bank Line that the rate of \$66 per 40 cu. ft., for the 300 cartons of canned food was improper; that the proper applicable rate was \$50 per 40 cu. ft. as set forth in item #450; and that an overpayment of \$140 had been made. OFC demanded a refund of the \$140 which Bank Line refused to make. This proceeding resulted.⁵

4. The record contains no evidence to show how or from where the rate of \$66 per 40 cu. ft. for the 300 cartons was obtained. Bank Line does not contend nor did it offer any evidence to show that item #450 of Tariff No. 9 does not apply to the 300 cartons as contended by OFC. Evidence was introduced to show that on May 3, 1962, a similar shipment of 100 cartons of Sobee powder and 3 cartons of tube feeding were shipped via Bank Line at a rate of \$50 per 40 cu. ft. for the powder and \$66 per cu. ft. for the tube sets.

DISCUSSION AND CONCLUSIONS

As early as 1915, the Supreme Court, in *Louisville & N.R.R. Co. v. Maxwell*, 237 U.S. 94, was called upon to interpret section 6 of the Interstate Commerce Act—not unlike our section 18(b) (3)—which then read in part:

Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, * * * except such as are specified in such tariffs.⁶

Justice Hughes, speaking for the majority, wrote:

Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which

⁵ OFC's claim is limited to the freight for the 300 cartons of Sobee powder.

⁶ Section 18(b) (3) in pertinent part reads as follows:

"No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time * * *."

has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

The *Maxwell* pronouncement has been followed recently in *Silent Sioux Corp. v. Chicago & North Western Ry. Co.*, 262 F. 2d 474 (1959) :

* * * the principle is firmly established that the rate of the carrier as duly filed is the only lawful charge.

and in *Johnson Machine Works, Inc. v. Chicago B & Q R. Co.*, 297 F. 2d 793 (1962) :

It is well established when the shipper designates the routing, the rate set out in the published tariff covering such route is the only lawful charge that can be properly made.

While it is true that the *Maxwell*, *Silent Sioux*, and *Johnson* cases (and the many that follow them) relate to the Interstate Commerce Act provision requiring the exaction by carriers of the filed tariff rate, section 18(b) (3) is similar to that provision and should be similarly construed. *U.S. Nav. Co. v. Cunard SS Co.*, 284 U.S. 474 (1932).

It is clear that the collection by Bank Line of the rate of \$66 per cu. ft. for the 300 cartons is not in accord with the tariff on file with the Commission. Thus, this action, in the light of the above, constitutes a violation of section 18(b) (3) of the Act.

Section 22 of the Act provides for the payment of "Full reparation to the complainant for the injuries caused by said violation." In this instance full reparation represents the difference between the rate that Mead Johnson should have paid on the 300 cartons and the rate it actually paid, or the sum of \$140. It is so found.

Bank Line contends that OFC is not entitled to reparation because "the freight charges * * * were not paid by OFC nor were they ultimately paid by Mead Johnson the shipper and OFC's assignor; * * * that the freight charges will ultimately be paid by the consignee in Australia. Thus, neither OFC nor Mead Johnson as OFC's sole assignor will have suffered any damage from the alleged overcharge." There is no merit to this contention. Similar contentions have been made to the predecessor to this Commission and the ICC and have been rejected. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B. 308, 311 (1934). The problem of reparation in overcharge cases before the ICC was finally adjudicated by the Supreme Court in *Southern Pacific Company et al. v. Darnell-Taenzler Lumber Company et al.*, 245 U.S. 531 (1918). Justice Holmes on page 533-534 stated:

The only question before us is that at which we have hinted: Whether the fact that the plaintiffs were able to pass on the damage that they sustained

in the first instance by paying the unreasonable charge, and to collect that amount from the purchaser, prevents their recovering the overpayment from the carriers. The answer is not difficult * * * The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.

Respondent repeats on brief to the examiner the contention formerly made in its motion for reconsideration that OFC should be barred from the collection of this claim because the nature of its business violates the criminal code of the State of New York wherein it was incorporated. As shown above, the Commission rejected this contention in its order of February 19, 1965. There is nothing in the record that constitutes new facts, or a new question of law that warrants altering the Commission's decision. The Act establishes the Commission as the agency entrusted with the duty to protect the public interest in connection with ocean transportation. There is no showing in this record that the holding of this proceeding is detrimental to the public interest, nor that consequences contrary to the public interest are anticipated.

On the record as a whole, it is found and concluded:

(a) The applicable rate in the tariff on file with the Commission affecting the shipment of 300 cartons of Sobee powder is \$50 per 40 cu. ft.;

(b) Bank Line violated section 18(b) (3) of the Act by charging a rate of \$66 per 40 cu. ft. for the shipment;

(c) OFC, as assignee of Mead Johnson, has legal title to the claim herein arising out of the overcharge and is entitled to file, prosecute, and receive payment of reparation thereunder.

An appropriate order will be entered directing Bank Line to pay to OFC the sum of \$140 representing the difference between the rate charged and the applicable tariff rate.

Commissioners James V. Day and Ashton C. Barrett:

It was not contended that any other rate than that on file with the Commission should be applied (and evidence was absent to show how or from where the rate of \$66 per 40 cu. ft. for the shipment of 300 cartons was obtained). We hold on this record that Bank Line must pay to OFC the sum of \$140 representing the difference between the rate charged and the applicable tariff rate.

Commissioner Hearn Dissenting:

An important question is presented in this proceeding and in my view that question transcends both the merits and statutory obligations in the premises. That question, which the majority answered in the affirmative, is whether the Federal Maritime Commission, as

a quasi-judicial agency, is going to countenance and entertain this type of champertous practice.

A simple perusal of the record reveals a shocking example of champerty. Ocean Freight Consultants (OFC) has been permitted to sue in its own name to recover reparation for harm which it never sustained, grounded on a shipping transaction to which it was never a party. The actual shipper, Mead Johnson, which obviously had a legitimate claim against respondent,¹ elected, rather than pursue that claim in its own name *pro se* or through an attorney or practitioner approved by the Commission, to enter into an agreement with OFC whereby proceeds realized through OFC's efforts would be divided between Mead Johnson and OFC.

When OFC's legal competence to bring this suit first was raised, Mead Johnson executed what has been accepted by the majority as an "assignment" of its claim to OFC. Evidence of this "assignment" is contained in Exhibit 8. A mere reading of the so-called "assignment" readily establishes that it is nothing more than an agency agreement between Mead Johnson and OFC, whereby the agent, OFC, is authorized to pursue the collection of the principal's claim. Exhibit 8 reads:

In matters before the Federal Maritime Commission, Docket 1185, Ocean Freight Consultants, Inc. versus the Bank Line Ltd., Strachan Shipping Company and U.S. Atlantic and Gulf/Australia-New Zealand Conference, we hereby assign claims 453, 455, and 460 to Ocean Freight Consultants Inc. *for collection* of reparation sought by Ocean Freight Consultants, Inc. *on our behalf* under section 22 of the Shipping Act of 1916. (Italics added.)

Quite obviously nothing was "assigned" to OFC by Mead Johnson except the right to represent it in litigation, and consequently, OFC had no claim properly to pursue before the Commission. For the majority to read Exhibit 8 as an "assignment" sufficient to support a suit for reparation renders a long standing and recently repromulgated rule a nullity. That rule, Rule 2(h) provides:

Practice before the Commission by firms or corporations on behalf of others shall not be permitted (46 CFR 502.28).

If Rule 2(h) has any merit, then quite apart from the laws of the State of New York (which absolutely prohibit OFC's suits in that State), and a traditional public policy decrying the type of suit here in issue, our own rules bar this proceeding.²

¹ I agree that reparation in this record could have been awarded to a proper complainant.

² During the pendency of this litigation our own Rules of Practice and Procedure were under review. In accordance with law, the proposed Rules were published in the Federal Register and otherwise made available to interested parties. Comments were invited and received. Rule 2(h) was included. Neither OFC nor any other person complained of Rule 2(h).

In this regard, I would like to note that the horrendous posture of the record bears out the Commission's wisdom in adopting Rule 2(g) of our Rules of Practice and Procedure, which provides that a person not an attorney at law shall be permitted to practice before the Commission upon specific admission after demonstrating that he—

possesses the necessary legal, technical, or other qualifications to enable him to render valuable service before the Commission and is otherwise competent to advise and assist in the presentation of matters before the Commission (46 CFR 502.27).

In support of its decision, the majority has placed unwarranted reliance on *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117 (1920). But while *Spiller* does countenance assignments of freight claims, that case must be construed in light of its peculiar facts, and those facts make all the difference. There, the real parties in interest were members of a Cattle Raisers' Association and the assignee was Secretary of that association. In fact, "the Cattle Raisers' Association was prosecuting the claims for the owners thereof" (253 U.S. 117 at 133) and they were represented by "counsel" at the hearing (253 U.S. 117 at 125). Here, the claim was prosecuted by a complete stranger to the transaction, and it may be said fairly, prosecuting the claim in the hope of reward for itself.

Certainly all in government, particularly an Independent Regulatory Agency, attempt to provide a forum wherein procedures are simplified in order to allow an aggrieved party an opportunity to present his case and if successful to be made whole. That is the spirit of the Administrative Procedure Act and in my opinion the way this agency attempts to act in the public interest. However, allowing this type of claim would in my mind encourage bounty hunting, which would have an injurious effect on the entire industry.

Therefore, I would not permit, as our Rules do not permit, this type of practice before the Federal Maritime Commission.

Commissioner John S. Patterson Dissenting:

An examination of the record discloses that complainants were retained by a shipper to audit and review copies of bills of lading for the purpose of discovering erroneous freight charges. For purposes of the present claims, complainants are shown by the record to be agents, not assignees. They are not in fact appearing in person. Complainants are appearing in a representative capacity. Rule 2(g) of our Rules of Practice and Procedure (General Order 16) prohibits such appearance before the Commission (46 CFR § 502.27; F.R. October 26, 1965, Vol. 30, No. 207).

FEDERAL MARITIME COMMISSION

No. 1185

OCEAN FREIGHT CONSULTANTS, INC.

v.

THE BANK LINE LIMITED

ORDER OF REPARATION

The Commission on this date made and entered a report in this proceeding, which is hereby incorporated herein by reference, in which it found, *inter alia*, that respondent, The Bank Line Limited, had violated section 18(b) (3) of the Shipping Act, 1916, in assessing and receiving payment from Mead Johnson International, the assignor of complaint, Ocean Freight Consultants, Inc., of a higher freight rate than the rate properly applicable, and that complainant is entitled to reparation for such violation.

Therefore, it is ordered, That respondent, The Bank Line Limited, pay to complainant, Ocean Freight Consultants, Inc., \$140.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

9 F.M.C.

FEDERAL MARITIME COMMISSION

No. 1066

ALCOA STEAMSHIP CO., INC.—GENERAL INCREASE IN RATES IN THE ATLANTIC GULF PUERTO RICO TRADE

Decided January 13, 1966

Proposed general increases in rates of respondent Alcoa in the regulated Atlantic and Gulf to Puerto Rico trade found to be unjust and unreasonable to the extent they provide a rate of return exceeding 10 percent on the rate base of \$1,293,936 computed utilizing ton-mile method of allocation of vessel expenses and depreciation. Alcoa ordered to adjust its rates accordingly.

Elmer C. Maddy and *Russel T. Weil* for respondent Alcoa Steamship Co., Inc.

John T. Rigby and *Seymour I. Berdon* for party complainant the Commonwealth of Puerto Rico.

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

REPORT

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

The Commission ordered this investigation concerning the lawfulness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, of the rates, fares, charges, rules, classifications, regulations, and practices contained in respondent Alcoa Steamship Co. Inc.'s tariff schedules in Outward Freight Tariff No. 3, FMC-F No. 4, naming numerous increases in commodity rates from Atlantic and Gulf ports in the continental United States to ports in the Commonwealth of Puerto Rico. The Commission's order of investigation suspended these schedules to and including November 25, 1962. The rates became effective on November 26, 1962.

The Commonwealth of Puerto Rico, by virtue of its protest to the increases, became a party complainant under rules 3(a) and 5(h) of

our Rules of Practice and Procedure. Hearings were held before Examiner C. E. Morgan, who issued an Initial Decision to which exceptions and replies have been filed.¹ We have heard oral argument.

Alcoa published increases in rates in varying amounts on about 1,400 of the 1,500 commodities in its tariff. Rates were not increased on self-propelled vehicles, vehicle accessories, bulk commodities, or explosives. The individual rates generally were increased about 20 percent, with a resulting overall increase of about 19 percent. This was the first general increase in rates by Alcoa since 1958, in spite of substantially increased costs since then.

There was some doubt whether Alcoa would experience as much as a 19-percent increase in its freight revenues in view of its competition and other factors, but a 19-percent increase in revenues for the projected year was accepted by the parties as a basis of their computations of net profits or net losses.

The leading commodities carried by Alcoa in the Puerto Rican trade in revenue tons for the year and for the half year listed below were:

	1961	1st half of 1962
Canned Goods & Groceries.....	15,125	6,085
Dry Goods.....	9,669	3,692
Electrical Materials & Equipment.....	16,097	4,102
Grain Products, Bagged.....	24,784	10,785
Iron & Steel Products.....	18,065	10,289
Machines & Machinery.....	3,943	4,782
Packing House Products.....	15,518	5,280
Vehicles.....	67,118	34,103
Total revenue tons.....	170,319	79,118

The total revenue tons carried from U.S. ports to Puerto Rico by Alcoa in 1961 were 343,378. Of this 1961 total tonnage, vehicles constituted about 19.5 percent, and the rates on self-propelled vehicles were not increased.

Before briefs were filed Alcoa reduced its rate on canned goods and groceries, and adding the 1961 tonnage for these commodities to the vehicle tonnage, makes a total of 24 percent for cargoes on which there were no increases or on which the increases later were dropped.

¹ The Commonwealth of Puerto Rico by letter asked the Commission to accept its brief before the Examiner in lieu of exceptions. Such a letter 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 is accordingly rejected as an exception to the Initial Decision. The position of Puerto Rico as expressed in its brief before the Examiner has, however, been considered by us in the determination of this proceeding.

In the first half of 1962, Alcoa carried a total of 238,510 revenue tons from U.S. ports to Puerto Rico. The rates as held down or later reduced on vehicles (34,103 tons), canned goods and groceries (6,085 tons), as well as all iron and steel products (10,289 tons) amount to a percentage of only 21 percent of the total tonnage carried by Alcoa in the United States-Puerto Rican trade. Moreover, inclusion of all iron and steel products tonnage overstates the above percentage since of these products only the rate on iron and steel plates (one of many items under the generic heading) was held down or later reduced. The rate on dry goods was increased from 54 cents to 65 cents, a cubic foot, and this rate was not held down. Other increases in the rates on the above listed commodities were 69 cents to 83 cents a cubic foot on electrical materials and equipment, 90 cents to 108 cents per 100 pounds on wheat in bags, 93 cents to 112 cents per 100 pounds on iron and steel billets, 60 cents to 72 cents a cubic foot on household washing machines, and 104 cents to 125 cents per 100 pounds on packinghouse products. As seen, these particular increases amount to 20 percent each.

No increase was proposed by Alcoa on certain liquids, such as lubricating oil, in bulk, in vessel's tanks, and on certain acids. These rates were held down to develop the business and because Alcoa had added deck tanks to its vessels and was using its deep tanks. Also, there was an absence of increased cargo handling costs for these commodities. The rate on merchandise, variety store, in carrier's containers also was held down, but here again Alcoa's cargo handling expenses were much less than in the case of ordinary package freight received in numerous small packages.

In a general revenue case, such as this one, we are concerned with revenues and expenses in general, but not with any analyses of costs for specific individual commodities.

Alcoa, a wholly owned subsidiary of the Aluminum Company of America, has operated a common-carrier service since 1951 southbound from United States, Atlantic, and Gulf ports, to ports in Puerto Rico, the Virgin Islands, West Indies, Venezuela, and the Guianas. It began a northbound common-carrier service from ports in Puerto Rico to New York, Philadelphia, and Baltimore in August 1962. Alcoa also is a contract carrier and proprietary carrier northbound of commodities such as bauxite, sugar, and phosphate. Bauxite transported mainly for its parent company is the principal northbound cargo of Alcoa.

In its southbound trade to Puerto Rico, Alcoa used seven vessels. Four of these were C-1's which were approximately 20 years old, and three were C-2's about 18 years old. Generally the C-1's were used in and out of the Atlantic ports, and the C-2's in and out of Gulf ports, but occasionally there were variations. Alcoa owned a total of 13 vessels, and chartered others for use in the other trades.

In 1961, Alcoa offered a weekly service to Puerto Rico from New York, and a weekly service from Baltimore generally via New York. From the Gulf in 1961, it provided a weekly service out of Mobile and New Orleans. No northbound common-carrier service from Puerto Rico to the United States was provided in 1961, or in the first half of 1962.

Since August 1962, Alcoa has offered a weekly service from Baltimore and Philadelphia, and fortnightly service out of New York via Philadelphia and Baltimore and has continued its weekly Gulf service from Mobile and New Orleans. The change in scheduling out of the Atlantic ports reduced Alcoa's transit time from Baltimore to Puerto Rico by three to four days. One of the reasons leading to the change in service of Alcoa out of Baltimore was the withdrawal of the Bull Lines from the Puerto Rican service. Alcoa presently faces the competition of Sea-Land Service, Inc., American Union Transport and Motorships, Inc., and other carriers out of the port of New York. Out of Baltimore Sea-Land provides direct sailings to Puerto Rico. The competitive picture is quite flexible since carriers may enter and leave this trade at will. There is no conference in the trade, and Alcoa's competition would restrain it somewhat from excessive increases in its rates.

In September 1962, Alcoa commenced weekly northbound service to Baltimore and Philadelphia, and a fortnightly service to New York. Alcoa also provided a weekly service northbound to Mobile and New Orleans. The northbound common-carrier service of Alcoa has been very insignificant tonnage-wise compared with its southbound service.

Operating southbound from Atlantic and Gulf ports, Alcoa generally also operated as a common carrier to the Virgin Islands with the same vessels on the same voyages as were used to serve Puerto Rico. Alcoa has provided common- or contract-carrier service to or from the Atlantic ports of Seaport, Maine; New York, N.Y.; Philadelphia, Pa.; Wilmington, Del.; Baltimore, Md.; Norfolk, Va.; and Charleston S.C.; and to or from the Gulf ports of Galveston, Tex.; Baton Rouge, New Orleans, and Braithwaite, La.; Gulfport, Miss.; Mobile, Ala.; and Pensacola, Panama City, Jacksonville, and Tampa, Fla. To a

relatively minor extent Alcoa in some instances with the same vessel as used to serve Puerto Rico and on a same voyage has served other foreign ports and has provided way-to-way service.

Operating as a contract carrier northbound Alcoa has transported (1) bauxite from Trinidad to Mobile, (2) sugar from ports in Puerto Rico to New York, Philadelphia, Wilmington, Baltimore, Norfolk, Jacksonville, Tampa, New Orleans, and Galveston, and (3) phosphate coastwise from Tampa to Baltimore, Norfolk, and Searsport, using the same vessels used in the southbound common-carrier service to Puerto Rico on the same individual round-trip voyages. The bulk commodities transported in the contract trade besides loading more heavily were more quickly handled, required less port time and encountered less delay than the general cargo.

For the entire year 1961 for its Puerto Rican service, Alcoa had a small net profit before Federal income taxes of \$69,919 or a net income after such taxes of \$39,061, both as calculated by Hearing Counsel, or a net loss before Federal income taxes of \$1,128,217, or \$1,308,873, or \$1,501,951 as calculated under various methods by Alcoa.

For the entire year of 1962 for its Puerto Rican service, Alcoa had a net loss before Federal income taxes of \$72,243 as calculated by Hearing Counsel, and which loss was \$908,690, or \$1,081,122, or \$1,435,599 as calculated under various methods by Alcoa.

On the basis of Alcoa's small profit or its loss in 1961, and its loss in 1962, regardless of which figures of record are selected as the most accurate for that year, it is clear that Alcoa is entitled to some general increase over its prior rates which were in existence in 1961 and for about 11 months in 1962. Alcoa is entitled to such an increase because it should not be compelled to operate at a loss as it did in 1962, or at a minimum profit or loss as it did in 1961.

For the projected year based upon the proposed increased rates both Alcoa and Hearing Counsel offered projected income figures. The respondent showed a net loss before Federal income taxes under its various calculations of \$227,242, or \$338,376, or \$654,848, whereas Hearing Counsel showed a net profit before Federal income taxes of \$771,393 and a net income after such taxes of \$375,769.

The largest differences between Alcoa and Hearing Counsel were in their calculations of vessel expenses,² which differ because of their

² Vessel expenses herein are intended to include: wages; payroll taxes; contributions—welfare plans; subsistence; stores, supplies & equipment; fuel; repairs—performed domestic; insurance—hull and machinery; insurance—P. & I.; insurance—other; and other vessel expense. Vessel expenses herein are intended to exclude port and cargo expenses, otherwise sometimes called voyage expenses. The total of all expenses shown by the parties exclusive of overhead, depreciation and U.S. income tax will be referred to as "vessel operating expenses."

different methods of allocating Alcoa's overall vessel expenses to its Puerto Rican service. Other differences were in the calculations of overhead and of depreciation, as well as differences in the valuation of Alcoa's assets as allocated to the Puerto Rican service.

Since the overhead figure for the projected year used by Hearing Counsel, and the overhead figures for that year used by Alcoa under two of the three results shown by it, are based upon total vessel and voyage expense ratios, the calculation of vessel expenses becomes doubly important.

Alcoa and Hearing Counsel substantially agree in their calculations of revenues and of port and cargo expense and other voyage expenses.

Since the expenses of Alcoa's Puerto Rican common-carrier service are commingled with the expenses of Alcoa's contract-carrier services and its Virgin Island and foreign service, a principal problem in this proceeding is the determination of a just and reasonable allocation of vessel expenses to the Puerto Rican common-carrier service of Alcoa.

In general, the respondent has allocated vessel expenses as between its southbound common-carrier service on the one hand, and, on the other hand, its northbound contract-carrier service on the basis of days operated in each service, whereas Hearing Counsel supports a ton-mile allocation. After the initial daily basis allocation above by respondent it initially made a further allocation of southbound expenses between Puerto Rico, the Virgin Islands, and other foreign ports on the basis of a revenue prorate. While Alcoa supports this revenue prorate as reasonable, it however, does not oppose a ton-mile prorate as between Puerto Rico and the Virgin Islands, after its initial breakdown of expenses on a daily basis as between southbound common-carrier service and northbound contract-carrier service. The ton-mile method of allocating vessel expenses adds together the costs of all voyages for a year's time, including in-ballast costs and idle and strike-time costs, and then allocates the total costs of the year to the various common-carrier and contract-carrier services on the basis of tonnage times distance carried in each service.

In fact, on brief Alcoa makes a computation based upon such a ton-mile prorate. Alcoa allocates total southbound vessel expenses on the daily basis, but separates southbound Puerto Rico expenses from Virgin Island southbound expenses on a ton-mile basis. The total for the Puerto Rican and Virgin Island tonnage for 1961 is 573,106,000 ton-miles. The Puerto Rican ton-miles of 504,988,000 are 88.1

percent, and Alcoa takes 88.1 percent of total southbound vessel expenses, which it calculates at \$2,958,987 to obtain the revised Puerto Rican vessel expenses for 1961 of \$2,606,868.

For the year 1961, Hearing Counsel calculate vessel expenses to be \$1,305,994, as compared with Alcoa's calculations of \$2,434,999 (daily basis between southbound and northbound, then revenue prorate on southbound between Puerto Rico and Virgin Islands), and \$2,606,868 (daily basis between southbound and northbound, then ton-mile prorate between Puerto Rico and Virgin Islands). Hearing Counsel calculated for 1961 a ton-mile ratio for the Atlantic of 27.927 percent, and applied this to Alcoa vessel expenses and fuel of \$2,724,780 to obtain Puerto Rican Atlantic vessel expenses and fuel of \$760,949. The same process for the Gulf used figures of 23.778 percent, and \$2,292,223 with resulting Puerto Rican Gulf vessel expenses and fuel of \$545,045, or a total for the Atlantic and Gulf of \$1,305,994.

Hearing Counsel for 1961 used the figure of \$5,515,913 as a total of port expenses, cargo expense and other voyage expense, making a total of vessel and voyage expenses of \$6,821,907, or of \$6,487,074 if net passenger and mail revenue of \$334,833 is deducted. Alcoa's figure of \$5,534,856 for the total of port expense, cargo expenses and other voyage expenses is not much different from Hearing Counsel's figure of \$5,515,913, and the relatively small difference is explainable from the handlings of passenger expense mainly, and from changes in figures resulting from adjustments of the number of voyages and voyage days, from 98 to 96 voyages and from 1,221 to 1,208 days. Throughout their calculations Alcoa and Hearing Counsel generally agree to the allocations of port, cargo and other voyage expenses, inasmuch as both allocate these expenses directly where possible or on a ton basis. Alcoa thus obtains its total of vessel and voyage expenses for 1961 of \$7,969,855 using the daily/revenue prorate of vessel expenses, or a similar total of \$8,141,724 using the daily/ton-mile prorate of vessel expenses.

Hearing Counsel used the total Puerto Rican vessel and voyage expense figure above of \$6,821,907 and a company-wide Alcoa vessel and voyage expense for 1961 of \$39,483,207 to obtain a ratio of 17.27799 percent applicable to Atlantic and Gulf. This percent times \$5,184,587, the Alcoa net overhead company-wide, results in an overhead for 1961 for the Puerto Rican service of Alcoa of \$895,792.

Surprisingly, Alcoa first calculated a lesser overhead than did Hearing Counsel. The overhead for 1961 as calculated first by Alcoa is

\$802,824 on the revenue prorate basis. On brief, Alcoa states it will accept Hearing Counsel's method of calculating overhead, and using its own figures of vessel and voyage expenses Alcoa obtains, by the vessel and voyage expense ratio method, an overhead figure for 1961 of \$983,480. Additionally, Alcoa calculates a third figure for 1961 for overhead of \$1,004,689 using its still higher vessel and voyage expenses based on the daily/ton-mile prorate, instead of the daily/revenue prorate.

Alcoa's depreciation for 1961 is computed by it as \$234,085, and by Hearing Counsel as \$142,442, a difference of about \$92,000. The difference results from the methods of allocating depreciation on vessels equipment, structures, and spare parts, to the Puerto Rican trade.

The principal difference of the parties in computing depreciation was in the allocation of depreciation to the C-2 vessels, one using a daily or time basis and the other a ton-mile basis. On C-2 vessels, Alcoa allocates depreciation of about \$126,400 and Hearing Counsel about \$55,400, a difference of about \$71,000. On the total depreciation on four C-2 vessels of \$233,223 in 1961, Alcoa takes 54.2 percent for the Gulf/Puerto Rican trade, which percent is determined from a ratio based on 593 days in the Gulf/Puerto Rican trade of these vessels compared with 1,095 optimum days of these vessels in all trades. Hearing Counsel take 23.778 percent of the \$233,223 depreciation figure, determining this percentage from a ton-mile ratio of 263,642,000 ton-miles in the Gulf/Puerto Rican trade compared with 1,108,756,000 ton-miles in all trades in which these vessels were used. This difference is another illustration of the fact that the daily basis used by Alcoa in allocating expenses to the Puerto Rican trade produces a higher expense than does the ton-mile prorate of Hearing Counsel.

On 1961 depreciation of \$14,116 on the C-1 vessels, Alcoa using a daily ratio of 615 days over 1,460 days, or a 42.1 percentage, obtains an allocation of depreciation to the Atlantic/Puerto Rican trade of about \$5,900 compared with Hearing Counsel's allocation of about \$3,900 which is based on a ton-mile prorate of 27,927 percent for the Atlantic Puerto Rican trade.

For 1961 depreciation on structures in Puerto Rico both Hearing Counsel and Alcoa allocate the same 100 percent, or about \$53,500,

and for depreciation on equipment in Puerto Rico both allocate the same 100 percent, or about \$14,400.

Of total depreciation on spare parts of \$9,378, Alcoa allocates 1,208 days in the Puerto Rican service over 4,745 optimum days, or 25.5 percent, or about \$2,400 depreciation to the Puerto Rican trade. Hearing Counsel use vessel and voyage expense ratios of 9.48932 percent for the Atlantic and 7.78867 percent for the Gulf to obtain a total depreciation on spare parts for the Puerto Rican service of \$1,620. Hearing Counsel's percentages are derived from Atlantic vessel and voyage expenses of \$3,746,690, a corresponding figure for the Gulf of \$3,075,217, and a total for all trades in which the vessels were used of \$39,483,207.

Hearing Counsel use the same vessel and voyage expense ratio percentages as above in computing depreciation allocable to the Puerto Rican trade on structures outside of Puerto Rico and on equipment outside Puerto Rico. Out of total depreciation on structures outside of Puerto Rico of \$27,527 and out of total depreciation on equipment outside of Puerto Rico of \$50,797, Hearing Counsel obtain depreciations for the Puerto Rican service, respectively, of about \$4,800 and about \$8,800. Alcoa obtains corresponding depreciation figures on structures and equipment outside of Puerto Rico allocable to the Puerto Rico trade of about \$10,800 and about \$21,200. Alcoa for these figures uses 41.8 percent, which is the prorate of the revenue on Puerto Rican cargo of \$7,586,785 over the revenues of all general cargo of \$18,150,850.

For the projected year, both Alcoa and Hearing Counsel project freight revenues in the Puerto Rican trade of \$12,395,842, and passenger and mail revenues in the trade of \$261,437. Both also make allowances for passenger and mail expenses of \$44,616 as part of other voyage expenses. Besides the difference in the projections of depreciation for that year, the other differences in the income account are in the projections for overhead and for vessel expenses.

The Examiner's decision

The Examiner found that the general increases in rates proposed by Alcoa are just and reasonable, and will not result in an unlawful rate of return, but rather in a small net loss.

The following table illustrates the differences in the parties' projec-

tions of Alcoa's income account for its Puerto Rican service and includes another projection by the Examiner:

TABLE I.—Alcoa income account Puerto Rican service projected year

	Alcoa's estimate	Hearing Counsel's estimate	Examiner's estimate
Revenues:			
Freight revenues.....	\$12,395,842	\$12,395,842	\$12,395,842
Passenger and mail revenue.....	¹ 261,437		¹ 261,437
Total.....	12,657,279	12,395,842	12,657,279
Expenses:			
Vessel expense.....	² 3,487,546	2,342,202	³ 2,914,874
Less passenger and mail revenues.....		¹ 261,437	
Gross profit after vessel expense but before voyage expense.....	9,169,733	10,315,077	9,742,405
Port, cargo and other voyage expenses including passenger and mail expenses.....	⁴ 8,275,108	⁴ 8,275,108	⁴ 8,275,108
Gross profit from vessel operations.....	⁵ 894,625	⁵ 2,039,969	⁵ 1,467,297
Overhead.....	⁶ 1,315,065	⁶ 1,097,966	⁶ 1,251,040
Depreciation.....	⁷ 234,442	⁷ 170,610	⁷ 234,442
Total (overhead and depreciation).....	1,549,507	1,268,576	1,485,482
Net profit (or loss) before Federal income taxes.....	⁸ (654,882)	⁸ 771,393	⁸ (18,185)
Federal income tax.....		395,624	
Net profit after taxes.....		375,769	

¹ All revenues are the same, except that in one projection passenger and mail revenues are deducted from vessel expenses, whereas in the other projections they are added to revenues.

² The Alcoa vessel expense figure in this table is based on the daily allocation of southbound and northbound expenses first, and then a ton-mile allocation between Puerto Rico and Virgin Islands.

³ The Examiner's vessel expense figure is the arithmetical average of the above figures of Alcoa and Hearing Counsel.

⁴ There is no dispute as to the allocation of voyage expenses.

⁵ The differences in gross profit from vessel operations result from the different allocations of vessel expenses; Alcoa allocated vessel expenses largely upon daily basis, Hearing Counsel on a ton-mile basis, and the Examiner on an average of these two bases.

⁶ The overhead figures herein are allocated on substantially the same methods, but are related to the three different totals of vessel and voyage expenses. The Examiner took his vessel expense above of \$2,914,874 plus agreed voyage expenses of \$8,275,108, or a total of \$11,189,982 times 11.18 percent to obtain his overhead figure of \$1,251,040. The 11.18 percent is the 1962 ratio of Alcoa's net overhead to its total vessel and voyage expenses for all of its operations, or \$4,734,178 over \$42,360,117.

⁷ Depreciation differences are composed largely of depreciation on C-2 vessels. The Examiner accepted the time basis here rather than the ton-mile basis.

⁸ Alcoa shows a substantial net loss before taxes, Hearing Counsel a net profit, and the Examiner a net loss of \$18,185.

Because of his determination that the proposed rates would be non-compensatory, it was unnecessary for the Examiner to find the rate base on which a rate of return should be allowed or what such rate of return should be. He did, however, make a finding as to the proper rate base. The table below shows the rate base as determined by Alcoa, Hearing Counsel and the Examiner.

Column I is Alcoa's computation including the listing of its vessels at market value, other assets at book value (prudent investment standard), and the computation of working capital on the basis of a "buffer fund" of 1 month's average expenses plus the difference between average monthly expense and average collections on current bills.

Alcoa's tariff provides for an extension of credit privileges up to 15 days. Working capital in column I is computed by taking the total vessel and voyages expenses for the first 6 months of 1962 of \$5,334,217, plus overhead of \$496,356, making a total of \$5,830,573 not including depreciation. One-sixth of this total is \$971,762, or 1 month's average expenses, and average monthly collections were \$815,800. The difference between the last two figures is \$155,962, and this added to the \$971,762 makes the working capital figure below \$1,127,724. In column II of the table below is Alcoa's computation of its rate base using both vessels and other assets at book value (prudent investment standard), and working capital of an amount equal to one round voyage expense for each ship in the service. In column III in the table below are the computations of Hearing Counsel, which also utilize "prudent investment" and working capital of an amount equal to one round voyage expense for each ship in the service. The differences between columns II and III are the result of the differing methods of allocating values to the Puerto Rican service, as well as of allocating vessel expenses, which result in the different computations of the components of working capital. Alcoa allocates the book value of vessels to the Puerto Rican trade based upon the number of days spent in that trade whereas Hearing Counsel allocates vessels on a ton-mile prorate. Structures and equipment located in Puerto Rico were directly assigned by both parties. Those located elsewhere were allocated on a revenue basis by Alcoa and on the vessel operating expense ratio by Hearing Counsel. Spare parts were allocated on a day basis by Alcoa while Hearing Counsel used the vessel operating expense ratio. Column IV in the table below is the Examiner's conclusion as to a fair and reasonable rate base.

TABLE II.—Alcoa rate base*

	I Alcoa	II Alcoa	III Hearing Counsel	IV Examiner
Vessels.....	\$1, 551, 250	\$280, 983	\$206, 450	\$243, 717
Other property and equipment.....	315, 128	315, 128	253, 769	284, 449
Working capital.....	1, 127, 724	861, 200	833, 717	847, 459
Total.....	2, 994, 102	1, 457, 311	1, 293, 936	1, 375, 625

*Cols. I and II are as of June 30, 1962; col. III is as of Dec. 31, 1961.

In general, the Examiner rejected market value as the means of evaluating vessel assets, and rejected the buffer fund basis of working capital in favor of the amount about equal to the proper share allocated to the Puerto Rican service of one round voyage expense for

each ship used in that service. He then gave weight to both the daily and the ton-mile methods of allocating to the Puerto Rican service the expenses of working capital and value of vessels and other assets by averaging the different figures in columns II and III above.

DISCUSSION AND CONCLUSIONS

Allocation of vessel operating expenses, vessel depreciation, and overhead

As will be seen from the above, a finding as to whether or not Alcoa will make a profit at its proposed increased rates depends upon what method is used to determine the amount of expenses which should be allocated to the Puerto Rican service. It is not surprising, therefore, that the principal issue upon exceptions in this proceeding is whether the Commission should adopt the vessel-day method of allocating vessel expense and vessel depreciation which Alcoa advocates, or the ton-mile method advocated by Hearing Counsel. Neither party is willing to accept the Examiner's use of an average of the figures derived by the two methods, each maintaining that its position is more accurate.

It is axiomatic in proceedings to determine the reasonableness of rates, that the concomitant "cost finding is not an exact science," and that "all that is required is that the results obtained represent a reasonably close approximation of the assignable costs." *Increased Rates on Sugar, 1962*, 7 F.M.C. 404, 411 (1962).

Having considered all the arguments in favor of the alternative methods, it is our opinion that the ton-mile method more nearly approximates the assignable costs of Alcoa to its regulated Puerto Rico service.

The vessel-day basis, although superficially appealing, suffers from many built in faults.

The benefit derived from a transportation service is that cargo (tonnage) is transported over distance (miles) to its receiver. As stated in a recent and definitive study, "The product which the transportation industry sells is the ton-mile in freight service and the passenger-mile (or passenger journey) in passenger service." "Study Of Cost Structures And Cost Finding Procedures In The Regulated Transportation Industries," R. L. Banks & Associates, Prepared for U.S. Department of Commerce dated November 1959, at page 21.⁸

⁸ While this study does criticize the ton-mile method for certain deficiencies, it does not even mention the vessel-day theory. To the same effect see "Explanation of The Development Of Motor Carrier Costs With Statement As To Their Meaning And Significance," I.C.C., Bureau of Accounts, Cost Finding and Valuation, Prepared by Cost Finding Section, Statement No. 4-59, dated Aug. 1959, at pages 12-13: "Tons and ton-miles * * * are the generally accepted 'sales' unit in transportation service."

This has often been recognized by this Commission and its predecessors. As we noted in *Atlantic & Gulf-Puerto Rico General Increase*, 7 F.M.C. 87, 98 (1962), "The basic factors contributing to vessel operating expenses [are] the tonnage and the distance carried."

The nature of ocean transportation is, furthermore, such that these 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 Alcoa, where the two services differ as to types of cargo, port time and vessel utilization, it is still true that if Alcoa 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 be otherwise borne, be allocated on the basis of tonnages times miles carried, i.e., the basic components of the service for which the users pay. The same is true of dry dock and repair days, particularly in light of the fact that testimony of record indicates that the contract bauxite is cargo which necessitates maintenance of vessels because of the manner in which it is loaded.

Ballast leg and positioning leg days also should be allocated on the ton-mile basis. An attempt to allocate such days on a vessel-day basis shows another basic flaw in that method, the great possibility for arbitrariness and inconsistent positions. Alcoa originally allocated nearly all of these costs to the regulated trade, arguing that unemployed legs should be charged against the cargo to be loaded at the end of such movements. However, in many cases, if not all, such movements are the result of having diverted the vessel from a direct return for the purpose of carrying contract cargo. The argument could well be made that costs of ballast and positioning legs should be charged against the cargo which caused the diversion in the first place rather than against the cargo to be loaded after the diversion from the direct route of return had taken place. The fact that Alcoa later revised its allocations to eliminate some ballast expenses originally allocated to the regulated trade merely serves to underscore the danger inherent in the vessel-day method. 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, we cannot accept the vessel-day method. The ton-mile method is proper, not only because it avoids the difficulties noted, but because we believe it fairly allocates expenses which, like

those discussed above, should be borne by users in proportion to amount of their tonnage carried.

Voyage expenses have been allocated by Alcoa either directly or by cargo tonnage by ports. The allocations by Alcoa of these items has been accepted by all participants.

All parties agree that overhead (administrative and general expense) is appropriately allocated in the relationship the vessel operating expense of the service bears to that of the company as a whole. The differences in results are caused by the different methods of allocating vessel expense. Having adopted the ton-mile method for the vessel expense portion of vessel operating expense, we accordingly also apply it to overhead.

All parties agree that in this proceeding depreciation should follow vessel expense and be allocated in the same proportions.

Depreciation is an accounting means of reflecting the wearing out of the fixed assets employed and therefore wherever possible 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 the trade.⁴

Alcoa asserts that the vessel-day allocation method more nearly approximates assignable costs than the ton-mile method because: (1) some of its expenses (primarily seamen's wages, insurance, and fuel) vary directly with time and not ton-miles; (2) the ton-mile method fails to distinguish between port days and sea days and allocate their expenses to the proper services; (3) the ton-mile method has overstated the expense of the contract (northbound) leg which requires less port time than the common carriage due to the fact that general cargo requires more time in loading than bulk proprietary cargo; and (4) the ton-mile method destroys the "venture theory" of accounting.

We cannot agree that these criticisms of the application of the ton-mile method of allocating costs to the common carrier operation of Alcoa are sufficient to justify the use of the vessel-day method with all of its inequities as pointed out herein.

Although it is true that expenses like seamen's wages do vary with time, it is not necessarily true that allocation should be made wholly on a time basis. The difficulties with such a method have been noted above. It is sufficient here to note that the "mile portion" of the ton-

⁴ Although originally computing overhead and depreciation on a revenue prorate, Alcoa now accepts an expense prorate method of computing these expenses, admitting this latter method is proper.

mile formula does take cognizance of the fact that there are time related expenses and gives weight to them for the simple reason that distance is traveled in time.

While it is recognized that there is some difference in vessel expense at sea and in port, due primarily to the reduced fuel consumption in port, an accurate allocation of port time to cargo carried is practically impossible due to the presence in port of a considerable amount of inactive time, which, as noted *supra* lends itself to arbitrary and inconsistent allocation. The various vessel expenses in port are such as should be borne in relation to tonnage carried.

In this proceeding, the justness of such an approach is highlighted by the fact that, as noted above, repair time is something obviously necessitated by the contract bauxite, and thus is directly related to the type of tonnage carried.

As the general overhead expenses affect all users of a service all of the time, they should be apportioned on the basis of directly incurred costs, in relationship to vessel operating expenses.

Finally, far from destroying the "venture theory" of accounting, the ton-mile method gives it full effect: it is, rather, the vessel-day method which destroys this theory. The venture theory of accounting attempts to reflect the fact that many costs of steamship operations are "joint costs" borne for the benefit of users of the transportation in both directions and which should thus be allocated to apply to both directions. As has been observed by an experienced steamship operator, "It is axiomatic in steamship operations that the entire voyage is the venture. This concept stems from the days of the Phoenicians and is equally true today. Voyages are scheduled and services extended or contracted on the basis of the results of the round voyage. To separate the results by voyage legs * * * produces * * * misleading results."⁵

The ton-mile formula and formulae similar to it are supported by considerable precedent, both of other transportation agencies and the courts.⁶

⁵ Statement of Frank A. Nemeo, Executive Vice President of Lykes Brothers Steamship Co., Inc., on behalf of the Committee of American Steamship Lines, before the Joint Economic Committee of the 88th Cong., 1st sess., Hearings of Nov. 19, 1963, p. 28.

⁶ C.A.B.—*American Airlines, Inc., et al., Domestic Trunk Lines, Service Mail Rates*, 21 C.A.B. 8, 37 (1955); *American Air Lines, Inc., Mail Rates*, 14 C.A.B. 558, 570, 571, 572 (1951).

I.C.C.—*Western Passenger Fares*, 37 I.C.C. 1, 22 (1915); *New York, S. & W. R.R. Co. Reorganization*, 236 I.C.C. 425, 432 (1939).

Courts—*Central of Georgia R. Co. v. Railroad Commission of Alabama*, 209 Fed. 75; 79 (M.P. Ala. 1913); *Boyle v. St. Louis & S.F.R. Co.* 222 Fed. 539, 541 (E.D. Ark. 1915), affirmed, 244 U.S. 106 (1917).

Although, as Alcoa points out, consistency in allocation methods applied should not be maintained if its result is inequitable, in the absence of a showing of unfair treatment it is indeed a goal to be sought. The application of the ton-mile method is therefore proper here, where we have shown it to be the fairer of the methods considered. Indeed, the Commission has adopted the ton-mile method for use by the carriers in the domestic offshore trades, and these carriers (including Alcoa) have submitted reports purporting to use it.⁷

Although the ton-mile method has not always been used in proceedings before this Commission and its predecessors, it has never been rejected and has been used more often than any other allocation method.⁸ The only case in which the vessel-day method was used for vessel operating and related expenses was *Pacific Coast/Puerto Rico Rate Increase*, 7 F.M.C. 525, 529 (1963). It is significant to note the language employed by the Commission in adopting that method which was employed by Waterman Steamship Corporation: "No party to the proceeding objected to the allocation methods utilized by Waterman, and they are found to be reasonable for the purposes of this proceeding." In other words, the vessel-day method was accepted because no one attempted to show there was anything wrong with it. That is hardly the case here, where many flaws of this method have been indicated.

We therefore adopt as proper in this proceeding the ton-mile method of computing vessel expenses and vessel depreciation.

The rate base

Having determined, unlike the Examiner, that the ton-mile method should be employed for allocating expenses, we find that Alcoa will earn a net profit after taxes at its increased rates of approximately \$375,769. (See Table I—Hearing Counsel's Estimate, page 12, *supra*.)

It therefore becomes necessary for us to determine the rate base upon which such earnings are predicated. Specifically we must find the proper amounts to be assigned for the value of vessels and other assets and the amount to be allotted to working capital.

Alcoa maintains that vessels should be valued at market value, while Hearing Counsel maintain that "book value" (prudent investment standard), should be used. We agree with Hearing Counsel. As de-

⁷ See F.M.C. General Order 11, Fed. Reg. June 17, 1964.

⁸ See e.g., *Atlantic-Gulf/Puerto Rico General Rate Increases*, 6 F.M.B. 14, 25 (1960); *Pacific-Atlantic/Guam Increases In Rates*, 7 F.M.C. 423 (1962).

fined by our decisions "prudent investment" means "amounts which have been invested prudently * * * as of the time they are first devoted to the particular trade, plus amounts prudently invested in betterments, all depreciated to the period for which the rates are being tested. * * *" *Atlantic & Gulf-Puerto Rico General Increase*, 7 F.M.C. 87, 107 (1962). Such a standard prevents an undue inflation of the rate base predicated upon monies which Alcoa has not spent. Valuations based upon market value, moreover, are subject to the opinion and predictions upon which such value is based which may be totally unrelated to the utilization of the property involved, the basis upon which assets must be valued. The evil of the use of a market value standard is brought forcibly home when it is realized that logically these non-utilization related factors would lead to an increase or decrease in rates as market values rise or fall, thus placing the general public at the mercy of these unpredictable fluctuations. This cannot be allowed to happen.

The "prudent investment" standard has been used by this agency consistently since the above-quoted case and is the traditional rate-base approach for all Federal regulatory agencies. It has, moreover, been approved by the courts as the standard offering the needed protection to consumers from exorbitant rates which should be followed unless justification appears for inflating the rate base. None appears here.⁹ We adopt the "prudent investment" method of assigning asset values.

As noted above, Hearing Counsel maintain that the amount allocated to working capital should be equal to one round voyage expense for each ship in the service, while Alcoa argues that its amounts should be equal to a "buffer fund" of 1 month's average expense plus the difference between average monthly expense and average collections on current bills. The Commission has consistently followed the round voyage expense measure of working capital,¹⁰ believing that it is sufficient for meeting current operating costs, the purpose of working capital. It was, in fact, the measure used in *Atlantic & Gulf-Puerto Rico General Increase*, *supra*, the last Puerto Rican case involving a general rate increase. In that case the Commission's predecessor explicitly disapproved working capital based on a "buffer fund" theory.

⁹ The fact that some of Alcoa's vessels have been fully depreciated does not justify the use of market value. The choice of using these vessels is Alcoa's. It should certainly not be rewarded because it has refused to replace 20-year-old vessels.

¹⁰ See *Atlantic & Gulf-Puerto Rico General Increase*, *supra* at 109; *General Increases in Rates* (1961), 7 F.M.C. 260, 289 (1962); *General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563, 582 (1963); docket 969, *Alaska Steamship Company—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska*, decided Mar. 5, 1964.

Alcoa attempts to distinguish this case from the earlier one by noting that in the prior case freight was prepaid under the tariff while a 15-day credit is allowed in this case. We think this distinction is without validity. Though the tariff allows 15-day's credit, there is no showing here that payments are actually deferred for that length of time. Even if they are, it is not unlikely that Alcoa is receiving credit on the expense side. The most persuasive answer, however, is that in the earlier case the Board did consider the possibility of lag between expenses and revenues and held "To the extent that there is any such lag, the working capital allowed by the Board—an amount approximately equal to one round voyage expense of each vessel in the service—is ample to take care of the carriers needs" (at page 109). No reason has been shown to depart from the measure which our experience has shown to be proper for working capital, and we adopt it here.

Alcoa's computations of working capital and valuation of assets made under the round voyage and prudent investment standard (see column II of table II) are also faulty. They are made on the basis of vessel-days and fail to reflect the proper nature of the expenses which are their components. We accordingly adopt Hearing Counsel's rate base computations embodied in column III of table II which properly compute asset values and working capital.

The rate of return

We must now determine the proper rate of return on the above rate base (\$1,293,936).

Alcoa asserts that it should be 15 percent after Federal income tax, and in any event should be sufficient to provide and maintain a prudent operating ratio (ratio of expenses to gross revenues) of from 88 to 90 percent after taxes.

Hearing Counsel maintain that such a high rate of return is not justified and that the operating ratio theory of rate of return should be rejected.

At the outset we reject the "operating ratio" theory of rate of return for use in this proceeding. Its application here as supported by Alcoa's witness would result in a return to the carrier of \$800,000 or some 62 percent of its rate base of \$1,293,936.

There are in addition other factors militating against the use of the "operating ratio" formula here. It fails to take into consideration the fact that the real test of adequacy of investment is the return on capital commitment in light of all risks. The operating ratio approach, concerning itself solely with revenues and expenses, gives no

clue to the supply price of capital. Because of its failure to consider the investment factor, operating ratio encourages constant rate increases. There is no incentive to hold down expenses when their very increase would justify increased revenues.

Alcoa argues that other regulatory agencies have applied operating ratio where the rate base was small as in the instant case.¹¹ This may well be true, but it should not be applied where, as here, the low rate base is due to the carrier's choice of continuing to use its vessels without replacement. To apply operating ratio in such a case might have the deleterious effect of discouraging carriers from replacing aged assets.¹²

Consistent with all of our precedents, we adopt as the measure of a reasonable rate of return 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 respondent's notes and to pay dividends adequate to give stockholders a return comparable with other investments having a comparable risk should be allowed.

In the light of this measure, Alcoa's requested 15-percent rate of return seems unreasonably high. The Commission has never approved such a high rate of return, and there appears to be no reason for approving it here. Alcoa's argument in support of this rate of return is based upon the testimony of its witness Mr. Erdahl, who in turn based his opinion as to its necessity in part upon the "operating ratio" theory we have rejected. Even to the extent Mr. Erdahl's opinion is based upon factors other than operating ratio, we feel that it will not support a 15-percent rate of return. An attempt was made to justify this percentage by showing that it was in line with the returns of three subsidized American-flag lines: American Export, Moore-McCormack and United States Lines. However, the collective average rate of return for the three carriers over the 15-year period chosen by Alcoa (1947-1961) is considerably below 15 percent on net book value of assets (8.26 percent) and somewhat below on a market value basis (14.2 percent). Moreover, rates of return for the period are not of persuasive force because the period includes several periods following the war in which profits were unusually high because of shortages, crises and special programs (e.g., Truman Doctrine, Marshall Plan, Berlin Blockade and Korean War).

¹¹ Operating ratio has never been used by this agency. See e.g., *Atlantic & Gulf-Puerto Rico General Increase*, *supra* at 104-5.

¹² At least 1 regulatory agency has explicitly rejected operating ratio because of this deleterious effect. *Re Salt Lake City Lines*, 30 P.U.R. 319 (Utah Public Service Commission, 1959).

We feel that considering all of the circumstances a rate of return not in excess of 10 percent is reasonable on this record, and rates allowing for a greater return are unreasonable. A rate of return is to be based in large part upon the type of risk attendant to an enterprise. It therefore appears reasonable to approve a rate of return for Alcoa no higher than those we have approved for other carriers in other trades with similar risks.¹³

It is true that the risks of the carriers in these trades are not identical to those of Alcoa. The number of recent cases involving instability in the Puerto Rican trade convinces us that the rate of return for Alcoa should be somewhat higher than in the Guam trade where a more stable situation exists and, consequently, risks of operation are lower.¹⁴

The risks attendant to the Puerto Rico trade seem more akin to those of the Hawaii and Alaska trades. Although it could be argued that Alcoa should be granted a greater rate of return than the carriers in the Alaska and Hawaii trades because the greater number of carriers in the Puerto Rican trade may increase Alcoa's risk in comparison with the risks borne by carriers in the Hawaii and Alaska trades at the time of our decisions relating to those trades cited, Alcoa's risk is reduced because of its ability to carry its own cargo inbound.

An order will be entered requiring Alcoa to file tariffs adjusting its rates to allow it a rate of return for its regulated Puerto Rican service not to exceed 10 percent of a \$1,293,935 rate base.

COMMISSIONER JOHN S. PATTERSON, CONCURRING AND DISSENTING:

I agree with most of what my fellow Commissioners have said about the standards to be applied in adjudicating reasonableness and lawfulness of respondent's rates for the period following November 26, 1962, excepting the "rate of return" discussion.

The facts as I have evaluated them in this record, even though they are considered meager in some respects, do in my opinion tip the scales between reasonableness and unreasonableness in favor of the former. Therefore, I conclude that a 15-percent rate is reasonable and hence allowable. Without discussing detailed factors, I consider the record showing the competitive conditions in the Puerto Rico and Virgin

¹³ We have approved the following rates of return for carriers in other domestic offshore trades:

1. Pacific Coast/Hawaii—8.82 and 10.59 percent (*General Increases in Rates (1961)*, 7 F.M.C. 260 (1962))
2. Pacific-Atlantic/Guam—6.42 percent (*Pacific-Atlantic/Guam Increases in Rates*, 7 F.M.C. 423 (1962))
3. Pacific Coast/Alaska—9.07 percent—(*General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563 (1963))

¹⁴ "Respondents APL and PFEL are the only common carriers providing service between the United States and Guam * * *", *Pacific-Atlantic/Guam Increases In Rates*, 7 F.M.C. 423, 424 (1962).

Islands trade and the capital attraction and retention needs of Alcoa Steamship Company fully justifies a rate of return in excess of that allowed by the Commission's order herein, if this company under present conditions is to have the ability to command capital. Certainly such capital will come from investors only if a fair and satisfactory return on their money is realized.

In my opinion, "rate of return" decisions should not be based on comparisons with other carriers' results at other times and places. I believe that such comparisons are not entirely irrelevant but that, generally, financial needs are only accidentally similar. To me, a prerequisite for decisions in this category is that decisions should be based primarily on a review of each carrier's financial requirements in the context of the historic forces of a free market place for capital, as close as possible to the time of decision.

ORDER

No. 1066

ALCOA STEAMSHIP CO., INC.—GENERAL INCREASES
IN RATES IN THE ATLANTIC GULF PUERTO RICO TRADE

The Commission, having on this date issued a report in the captioned proceeding, which report is herein incorporated by reference, which found, *inter alia*,

1. That the rate base of respondent Alcoa Steamship Co., Inc., for its operation in the regulated Puerto Rican service should be \$1,293,936, computed by utilization of the methods approved herein; and

2. That its rates in such service should be adjusted to allow it a rate of return not to exceed 10 percent of such rate base;

THEREFORE, IT IS ORDERED, That respondent file with the Commission within 30 days of the service of this order revised tariffs for its regulated Puerto Rican service adjusting its rates for such service as to allow it a rate of return not to exceed 10 percent of its \$1,293,936 rate base as related to revenues and expenses of the projected year.

By the Commission.

[SEAL]

(Signed) THOMAS LIST,
Secretary.

9 F.M.C.

FEDERAL MARITIME COMMISSION

No. 65-28

ADMISSION TO CONFERENCE MEMBERSHIP—PACIFIC COAST EUROPEAN CONFERENCE

*Decided January 11, 1966**

Agreement No. 5200 found not to comply with requirements of section 15 of the Shipping Act, 1916, and General Order No. 9. Pacific Coast European Conference and its member lines ordered to amend Agreement No. 5200 to so comply, otherwise the Commission will withdraw approval of their basic conference agreement.

General Order No. 9 is a reasonable and valid promulgation of rules pursuant to sections 15 and 43 of the Shipping Act, 1916, and the Commission is authorized to disapprove Agreement No. 5200 for noncompliance therewith.

Leonard G. James and *F. Conger Fawcett* for Pacific Coast European Conference, respondent.

Richard S. Harsh and *Donald J. Brunner*, Hearing Counsel.

REPORT

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

PROCEEDINGS

By order served August 9, 1965, we directed the Pacific Coast European Conference (Conference) and its member lines to show cause why their agreement (FMC No. 5200) should not be disapproved pursuant to section 15 of the Shipping Act, 1916 (the Act) because of the Conference's failure to comply with the requirements of that section and of our General Order No. 9 (General Order). The respondents have filed their opening memorandum, Hearing Counsel have answered, and respondents have replied thereto. We heard oral argument.

FACTS

The Pacific Coast European Conference is an association of common carriers by water operating from ports on the Pacific Coast of the

*Denial of petition to reopen decided March 22, 1966.

United States to ports in Europe, Iceland, North Africa, the Atlantic islands of the Azores, Madeira, Canary and Cape Verde, and by transshipment at the aforementioned ports to ports in West, South and East Africa. The operations and activities of the Conference are conducted pursuant to its basic conference agreement No. 5200,¹ which was originally approved under section 15 of the Act in 1937.

Section 2 of Public Law 87-346 amended section 15 of the Act to provide that no conference agreement shall be approved, nor shall continued approval be permitted for 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."

General Order No. 9 (46 C.F.R. 523 *et seq.*) was adopted in implementation of section 15 and contains the Commission's guidelines concerning admissions to and withdrawals and expulsions from conference membership.² Conferences subject to the Commission's jurisdiction were given until July 20, 1964, to file any amendments to their agreements which were made necessary by General Order No. 9.

On November 5, 1964, the Commission wrote the Conference chairman, Mr. David Lindstedt, advising him that as yet no amendments to Agreement No. 5200 pursuant to General Order No. 9 had been received and further advising him of the requirement of section 523.10 (a) of General Order No. 9 that all existing conference agreements be modified to comply with the General Order and filed with the Commission by July 20, 1964. The letter requested the chairman's clarification of the Conference's position regarding its agreement and General Order No. 9. In his response dated November 16, 1964, Mr. Lindstedt advised that he had "studied the conference agreement in the light of General Order No. 9 and believe[d] that every substantive provision of the General Order [was] fully set forth in the conference agreement." He further stated that if, in the Commission's opinion, the conference agreement did not fully comply with the General Order and he was advised in what respect this is so, the matter could be presented to the members of the Conference for appropriate action.

By letter of April 30, 1965, the Bureau of Foreign Regulation advised that Clauses 4, 10, and 15 of the conference agreement did not comply with the requirements of subsections 523.2 (a), (b), (c), (d), (e), and (i) of the General Order. The Bureau's letters con-

¹ Agreement No. 5200 provides, *inter alia*, for the establishment, regulation and maintenance of agreed rates, charges and practices on cargo moving in the trade covered by the agreement.

² For the complete text of General Order No. 9 see Appendix.

tained detailed discussion of the specific changes which would be necessary to effect compliance with the General Order.

The Conference made no attempt to amend Agreement No. 5200 to comply with the changes recommended by the Commission's staff. Instead, Mr. Lindstedt, by letter dated May 20, 1965, informed the Commission in relevant part as follows:

The five different reporting requirements . . . , appear to us to be indirect efforts of the Commission to demand reports from the members of the Conference that are not authorized by any provision of the Shipping Act. In our opinion, the Commission is attempting to obtain reports from the Conference that it cannot lawfully obtain otherwise, and is attempting to do this by forcing us to agree to furnish the reports. Section 15 of the Shipping Act does not require steamship lines to agree on anything. It only requires the steamship lines to file whatever agreements they may voluntarily enter into.

If you can show us anything in section 15 of the Shipping Act which requires that the lines shall adopt agreements that are prescribed in a General Order, then, of course, we will reconsider. Otherwise, the members of this Conference believe that their present Agreement is lawful in every respect, and that it continues lawful unless and until it can be disapproved upon proper, specific findings, as set forth in section 15 of the Shipping Act.

Following receipt of this explanation of the Conference's position, the Commission served the Order to Show Cause. The order stated that it appeared that Agreement No. 5200 did not comport with the provisions of General Order No. 9 in the following respects:

(a) There is no provision for furnishing a detailed statement of the reasons for expulsion to the party expelled (section 523.2(i)).

(b) There is no provision that applications for membership shall be acted upon promptly (section 523.2(b)).

(c) "Just and reasonable cause" for denial of admission to membership does not comply with the requirements of General Order No. 9 (section 523.2(a)).

(d) There is no provision for "prompt notification to the Commission of the admission of new members" (section 523.2(d)).

(e) There is no provision for advice to the Commission of the conference denial of membership to any line (section 523.2(e)).

DISCUSSION AND CONCLUSION

Respondents contend that, while their agreement "comports" with General Order No. 9 and section 15 of the Act, General Order No. 9 is invalid administrative "legislation"³ which is completely without statutory support and as such cannot provide the basis for disapproval of respondents' agreement. They argue that General Order No. 9 by "prescribing mandatory preconditions for approval (or continued approval)" of conference agreements effectively reverses the "pre-

³ In the words of the Ninth Circuit Court of Appeals "Rulemaking is legislation on the administrative level." *Willapoint Oysters v. Ewing*, 174 F. 2d 676, 693, cert. denied 338 U.S. 86 (1949).

sumption" in favor of conference agreements found in the Shipping Act and is thereby in "direct conflict with the statutory scheme, and is, as a consequence, void, 'a mere nullity.'" In short, respondents contend that we may make no rules implementing, explaining, interpreting, of clarifying the statutory requirement that conference agreements provide "reasonable and equal terms and conditions of admission and readmission to conference membership of other qualified carriers in the trade" and "that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal."⁴

A short review of the body of case law regarding conference admissions in existence when section 15 was amended to include the "reasonable and equal" provision will demonstrate that General Order No. 9 was indeed necessary to carry out the provisions of the Act and was intended to effectively insure that the Congressional intent behind the "reasonable and equal" provision was realized. While an early decision of the U.S. Maritime Commission approved the rejection of an applicant for admission on the ground that at the time of the request for membership it did not have an established operation in the trade, *Hind Rolph & Co. v. Compagnie Generale Transatlantique*, 2 U.S.M.C. 138 (1939), somewhat later the U.S. Maritime Commission rejected denial based on an agreement which permitted admission only of an applicant engaged in operating vessels regularly in the trade. *Black Diamond S.S. Corp. v. Compagnie Maritime Belge*, 2 U.S.M.C. 755 (1946). The Commission said in the *Black Diamond* case:

. . . a proper clause would be somewhat as follows:

Any common carrier by water as defined in section 1 of the Shipping Act, 1916, as amended, who has been regularly engaged as such common carrier in the trade covered by the agreement, or who furnishes evidence of ability and intention in good faith to institute and maintain a regular service between ports within the scope of this agreement, may hereafter become a party to this agreement. . . .

Thus, in 1962 the Antitrust Subcommittee of the House Committee on the Judiciary in its Report, *Monopoly Practices in the Ocean Freight Industry*, said:

Since 1940 the Commission (FMC) and its predecessors have committed themselves to an affirmative policy of assuring relatively easy access to conference membership for newcomers. . . . 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 within the ambit of the conference agreement. Such membership, of course, must be granted upon "equal terms" with existing participants in the conference *eo converso* a carrier willing to participate in any given conference

⁴ Our authority to promulgate "such rules and regulations as may be necessary to carry out the provisions of [the] Act" is found in section 43.

must be willing to abide by the terms and conditions of the conference agreement. (Footnotes omitted).⁵

Since the declaration of this "open door" policy conferences have sought to deny admission on many grounds and to impose a variety of conditions upon admission to conference membership some of which our predecessors found were in fact exclusionary and designed to prohibit or at least deter admissions. The cases on admissions are many and the repetitious citation here would accomplish little.⁶ It is sufficient to say, however, that securing free and open admission to conferences has in the past proved a constant problem. Nor has it ceased to be a problem today, for when the Antitrust Subcommittee issued its report in 1962, it said at page 99 thereof:

Various reasons have been offered over the course of years for excluding applicants from conferences. Since it is by now recognized by conferences that few if any of these alleged justifications would be considered valid today in view of the Board's "open door" policy with respect to membership, current efforts to exclude new members from steamship conferences have had to assume more subtle guises. These have taken the form of attempting to persuade applicants to remain outside the trade because of the thinness of traffic, delay and procrastination in the processing of applications for admission, or exacting as conditions of membership agreement with respect to rate practices in areas beyond the scope of the conference. (Footnotes omitted)

It was against this background that section 15 was amended to include the reasonable and equal provision.⁷ We think it clear that Congress in so amending section 15 was in fact but statutorily formalizing what had already been the declared policy for over two decades and that the reasonable and equal language was merely convenient legislative shorthand for the more particularized requirements found in the many decisions of our predecessors under section 15.

Experience under section 15 demonstrated that the problem presented by conference admissions to membership was twofold. On the

⁵ Report of the Antitrust Subcommittee of the House Committee on the Judiciary on Monopoly Problems in the Ocean Freight Industry, March 1, 1962, pages 96-98.

⁶ For example, however, the following bases for denial or conditions on admission were found unlawful: trade already adequately tonnage, *Sigfried Olsen v. Blue Star Line, Limited*, 2 U.S.M.C. 529, 532; requirement that applicant join additional conference, *Cosmopolitan Line v. Black Diamond Lines, Inc.*, 2 U.S.M.C. 321, 329; admission would bring about unnecessary and excessive competition, *Waterman S.S. Corp. v. Arnold Bernstein Line*, 2 U.S.M.C. 238, 243-44; possibility of applicant ceasing operation in future, *Sprague S.S. Agency, Inc. v. A/S Ivarans Rederi*, 2 U.S.M.C. 72, 76; agreement to impose condition on admission to membership that applicant withdraw from litigation before the Federal Maritime Board, in which applicant's position was adverse to conference's, *Pacific Coast European Conference—Limitation on Membership*, 5 F.M.B. 247.

⁷ Although the Antitrust Subcommittee's Report was not issued until after H.R. 6775 (the bill which ultimately became P.L. 87-346) was passed by the House, the Merchant Marine and Fisheries Committee which reported the bill had the benefit of the Antitrust Subcommittee's findings and conclusions since the bill itself was "the product of careful and harmonious work between the two standing committees of the House." Hearings Before the Merchant Marine Subcommittee of the Senate Committee on Commerce, June 16, 1961, Part 1, page 7.

one hand it concerned the validity of the various substantive criteria established by conferences for the determination of whether an applicant was qualified for membership, and on the other hand it concerned the more "subtle guises" of attempted exclusion such as persuasion, procrastination and the exaction of conditions. Thus General Order No. 9 itself seeks to achieve a twofold purpose. It seeks to insure that invalid substantive criteria established by conferences do not work to exclude qualified carriers from membership.⁸ It further seeks to insure that conferences do not practice the more "subtle" methods of exclusion by requiring that all applications be acted upon promptly (section 523.2(b)) and by requiring that all conditions of membership be specified in the agreement and approved by the Commission (Note to section 523.2(a)). Yet other provisions are designed to insure that all actions taken with regard to admissions, withdrawals and expulsions are promptly reported to the Commission so that we may insure that the requirements of section 15 are met (the reporting requirements of sections 523.2 (d), (g), (i)).

Notwithstanding all this it is apparently respondents' view that each conference action must be reviewed on an *ad hoc* basis because they variously state that "congress clearly intended that each case be determined on its own merits, with reference to the statutory standard," and that we cannot categorize in advance "across-the-board terms for automatic termination or disapproval," and that "to the extent that General Order No. 9 'requires' disapproval of Agreement 5200 for nonconformance to its terms, it is inconsistent with the statutory scheme . . . [and] is therefore necessarily invalid and of no legal force." Respondents offer many citations in support of their contentions, most of which deal with regulations found by the courts to exceed the statutory grant of power upon which the regulations were based. We find these cases inapposite. The reduction of almost 30 years of agency case law to a rule of future application is merely the substitution of administrative "legislation" for administrative *stare decisis* and can hardly be considered in excess of our statutory authority—particularly in view of the fact that the vastly predominant portion of the agency case law was made prior to the statutory amendment giving recognition to the policy established in that case law. Moreover, to take each conference action on an *ad hoc* basis would through time-consuming litigation result in just that delay in the admission of quali-

⁸ Thus, section 523.2(a) requires that all conference agreements contain a provision substantially as follows:

"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 his signature thereto."

fied applicants that the General Order seeks to prevent. Respondents content themselves with repeated assertions that General Order No. 9 is in direct conflict with section 15 but they do not state how this is so.⁹ We think the foregoing clearly demonstrates that far from being in conflict with section 15, General Order No. 9 is in complete harmony therewith and simply seeks to realize the Congressional intent behind that section.

Respondents in addition to arguing in invalidity of General Order No. 9 also contend that their agreement "comports" with the General Order anyway. The relevant provisions of respondents' agreement dealing with admissions, withdrawals, and expulsions are: Article 4 dealing with maintenance of service as a prerequisite to common carrier status and readmission fee; Article 8 prescribing the majority necessary to admit new members; Article 10 setting forth the qualifications necessary for admission; Article 11 providing for the admission fee; Article 12 providing for withdrawal from membership on 30 days' notice; and Article 13 providing that a resigning member shall be bound to the terms of the agreement for the 30-day notice period but will not be entitled to vote. We shall deal with the alleged instances of noncompliance in slightly different order than they appear in the show cause order instituting this proceeding.

As approved to date, Article 10 of Agreement 5200 which establishes the basic criteria for admission to the conference provides:

10. *Membership.* Any person, firm or corporation regularly operating, or giving substantial and reliable evidence of intention to operate regularly, as a common carrier by water in the trade covered by this agreement may become a member of the Conference upon the agreement of the parties as provided in Article 8, and by affixing his, their or its signature hereto, or to a counterpart hereof. No eligible applicant shall be denied membership except for just and reasonable cause and no membership shall become effective until notice thereof has been sent to the government agency charged with the administration of Section 15 of the U.S. Shipping Act, 1916, as amended.

This provision fails to comply with General Order No. 9 in two respects. On one hand it fails to provide that all applications shall be acted upon promptly as required by section 523.2(b) and the inclusion of the proviso that no application shall be denied except for "just and reasonable cause" is in conflict with section 523.2(c) which provides that "no carrier which has complied with the condition in paragraph (a) of this section shall be denied membership."¹⁰ As to the former respondents state that if the word "prompt" is the difference between

⁹ Unless the assertion that an agreement may not be disapproved for noncompliance with General Order No. 9 but only for noncompliance with section 15 is intended to illustrate this conflict. If this be the case the clear answer is that the agreement is or would be disapproved for failure to meet the standards of section 15 as explained and clarified in General Order No. 9.

¹⁰ See *supra* footnote 8.

compliance and noncompliance then the word "substantially" is without meaning.¹¹ Respondents misconceive the issue here. While Article 10 provides that "no membership shall become effective until notice thereof has been sent to the" Commission, the article is devoid of any statement requiring prompt conference action upon an application. As we have already noted, procrastination in acting upon applications for admission is one of the ways in which conferences may seek to discourage new members. So long as the basic agreement contains no requirement that prompt action be taken and so long as that agreement continues to enjoy our approval, conferences may at least argue that no such requirement is applicable. To avoid any such misunderstanding as to the obligations under the agreement, we shall insist on the inclusion of a clause which specifically requires prompt action on all applications for membership. This is not as respondent implies an attempt to achieve a "definitive, Platonically-'essential' conference document." Rather it is an effort to avoid the recurrence of the same sort of problem that has plagued regulatory efforts under the Shipping Act almost from the instant of its enactment—that of conflicting interpretations of conference agreements. The majority of proceedings under the Shipping Act concerned in one way or another the meaning of provisions of section 15 agreements and the authority, duties, and responsibilities of parties to them. Respondents themselves have been involved in several such proceedings over the years.¹² In promulgating General Order No. 9, we sought nothing more than the prevention of future controversy over the membership practices of conferences in our foreign commerce by the establishment of uniform guidelines. As we have already noted so long as respondents' agreement fails to contain the obligation to act promptly on applications for membership they are free to argue that by continuing our approval of the agreement, we have somehow waived the requirement as to them. But respondents argue that "substantial" compliance cannot hinge upon anything so minute as the absence of the word prompt, thus their agreement is in "substantial" compliance with the General Order.

We think our authority clearly extends to the prescribing of uniform admission, withdrawal, and expulsion clauses which must be included verbatim in all conference agreements, and we could have adopted this course. However, our experience has been that conferences operating in our foreign commerce have experienced some diffi-

¹¹ Section 523.1 requires that all conference agreements contain provisions "substantially" as set forth in the General Order.

¹² See for example, *Pacific Coast European Conference—Payment of Brokerage*, 5 F.M.B. 225 (1957); *Pacific Coast European Conference—Limitation on Membership*, 5 F.M.B. 247 (1957); *In Re Pacific Coast European Conference*, 7 F.M.C. 27 (1961); and *Pacific Coast European Conference Port Equalization Rule*, 7 F.M.C. 623 (1963)

culty in translating uniform clauses into the languages of the various countries operating vessels in our commerce. Thus, where consistent with the purpose of the Act and our responsibilities under it, we allow individuals to use their own language so long as the required result is achieved. Respondents' agreement does not, of course, achieve the required result, and unless amended to do so, it will be disapproved.

The second issue raised by Article 10 of respondents' agreement is concerned with that portion of the Article which states that "No eligible applicant shall be denied membership except for just and reasonable cause." The inclusion of "just and reasonable cause" as a ground for denying membership runs directly counter to section 523.2(b) which states that "no carrier which has complied with the requirements of paragraph (a)" of section 523.2 shall be denied membership.¹³ Respondents' Article 10 is otherwise in compliance with section 523.2(a) and carriers meeting the requirements of 523.2(a) should be admitted to membership without more. But respondents have added a further condition or proviso upon which admission can be denied—that of "just and reasonable cause."¹⁴ We will recognize no such further conditions. Respondents must delete the objectionable language.

Section 523.2(d) provides:

Prompt notice of admission to membership shall be furnished to the Federal Maritime Commission and no admission shall be effective prior to the postmark date of such notice.

Article 10 of Respondents' agreement provides in relevant part:

... no membership shall be effective until notice thereof has been sent to the governmental agency charged with the administration of section 15 of the U.S. Shipping Act, 1916, as amended.

Here again there is no requirement of prompt action, and since the effectiveness of any admission is contingent on the dispatch of the required notice the reason for requiring prompt notice is obvious. Procrastination in sending the required notice is just as harmful to the prospective member as delay in action upon his application. For the reasons stated *supra* we will require that the provision be amended to require "prompt" notice.

Section 523.2(e) provides:

Advice of any denial of admission to membership, together with a statement of the reasons therefor, shall be furnished promptly to the Federal Maritime Commission.

¹³ See footnote 8 *supra*.

¹⁴ For an instance in which respondents sought to use the proviso as a means of forcing an applicant for membership to withdraw from litigation before the Federal Maritime Board as the price of admission to the conference, see *Pacific Coast European Conference—Limitation on Membership*, 5 F.M.B. 247 (1957).

Although respondents concede that there is no express provision in its agreement which explicitly provides that advice of any denial of admission to membership shall be furnished to this Commission, they argue that denial of membership to any line would appear in the conference minutes, which must be filed with the Commission pursuant to Article 16 of their agreement.¹⁵ Respondents argue that this provision is perfectly adequate and that minutes are the "logical vehicle" for the conveyance of advice to the Commission.

Minutes may be one vehicle for submitting advice to the Commission, but their possible use as a means of communication in no way commits or directs anyone to provide anything. Our experience has been that minutes generally contain no more than a simple statement of the action taken and contain no explanation of the reasons underlying the action. Moreover, nothing in respondents' agreement requires that the "advice of denial" be furnished "promptly." As we have already stated, the matter of conference membership was deemed of sufficient importance to warrant a specific statutory amendment, and we consider it sufficiently important to require a separate report on all actions taken by conferences regarding admissions to and withdrawals and expulsions from conference membership. Respondents' agreement is not in substantial compliance with section 523.2(e) and must be modified.

Section 523.2(i) provides:

No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished the expelled member and a copy of such notification submitted to the Federal Maritime Commission.

Article 15 of respondents' agreement provides in pertinent part that:

... No expulsion shall become effective until and unless notice thereof with a detailed statement of the reason or reasons therefor and the record vote of the member lines thereon, shall have been mailed to the governmental agency charged with the administration of section 15 of the United States Shipping Act, 1916, as amended.

The Conference admits that Article 15 does not expressly provide that an expelled member will be furnished a statement setting forth the reasons for expulsion. Respondents contend, however, that Article 4, which stipulates in part that:

... Any member failing to make a sailing for a period of eighteen (18) consecutive months after July 1, 1961 shall be deemed to have abandoned common carrier status in the trade covered by this Agreement and shall forthwith cease to be a member of this Conference.

¹⁵ Article 16 provides:

"Copies of Minutes of all Meetings, rates, charges, classifications, rules and/or regulations and additions and amendments thereto, and changes therein adopted, pursuant to the provisions of this agreement, shall be sent to the United States Maritime Commission, Washington, D.C."

contains "the single most important reason" for expulsion and also contains, within itself, "its own 'detailed statement of the reason(s)' therefor."

Respondents' very assertion that Article 4 contains the "most important" reason for expulsion implies that there may be other grounds for which expulsion would be justified. These other grounds may not be found in the conference agreement. Neither does the agreement provide that a statement of the reasons for expulsion, whatever they might be, shall be furnished to the expelled member. The furnishing of such a statement is required by section 523.2(i), and the effective date of expulsion is conditioned thereupon. In the absence of a provision requiring that a statement of the reasons for expulsion shall be given to the expelled member, there can be no compliance with section 523.2(i).

There remains one final argument of respondents which is not directed to the merits but to the show cause procedure itself. First, respondents object to the show cause procedure if it is construed as shifting the ultimate burden of proof to respondents. The simple answer to this is that the Commission may not by choice of a particular form of proceeding shift the burden of proof to one upon whom the law does not place it. The burden of proof in a show cause proceeding, the same as in any other proceeding before us, is upon the proponent of the order (Administrative Procedure Act, § 7(c) 5 U.S.C. 1006). Secondly, respondents "seriously question" whether this show cause procedure "is proper, without consent of the parties." Respondents' argument is that (1) under our rules of Practice and Procedure "shortened procedure" under Rule 11¹⁶ may not be had without consent of the parties, (2) this proceeding is a shortened procedure, and (3) respondents have not consented to the procedure—therefore the proceeding is invalid.

We had thought the procedural validity of show cause proceedings was laid to rest in *American Export & Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 334 F.2d 185 (9th Cir. 1964). In that case these same respondents attacked the procedure on grounds such as: (1) failure to furnish the respondents with a copy of a complaint; (2) the Commission acted as both prosecutor and judge by allowing its own counsel to appear in the case; (3) the Commission permitted intervention in violation of its own rules and the Administrative Procedure Act; (4) failure to hold an evidentiary hearing in violation of the Commission's own rules and the Administrative Procedure Act; (5) failure to afford adequate notice of all matters of fact and

¹⁶ All references to Rules of Practice and Procedure are to the 1953 Revision which was in effect at the time of this proceeding.

law asserted in violation of the Administrative Procedure Act; and (6) failure to make findings required by the Administrative Procedure Act. In each instance the Court sustained the show cause procedure and stated:

We are not impressed by the criticisms, multiplicitous as they are, made by petitioners [respondents here] to the procedures adopted by the Commission in this case. From our review of the record we are satisfied that no substantial right of due process was denied to them and no prejudice was suffered by them. (334 F. 2d 191)

Respondents do not here allege that the show cause procedure denies them due process or works any prejudice. They merely assert that we needed their consent to the procedure and that such consent was never given. Respondents reliance upon Rule 11 is misplaced. It reads in relevant part:

(a) . . . By consent of the parties and with approval of the Commission by notice, a *complaint proceeding* may be conducted under shortened notice. . . . [Emphasis ours.]

Thus, from a simple reading of the first paragraph of Rule 11, it is patently clear that so-called "shortened procedure" is restricted to complaint proceedings and is in no way applicable to proceedings instituted on the Commission's own motion, be it by order of investigation or by order to show cause. As was made clear in the *American Export & Isbrandtsen* case, *supra*, show cause proceedings are governed by Rule 5(g) which provides:

The Board may institute a proceeding against a person subject to its jurisdiction by order to show cause. The order shall be served upon all persons named therein, shall include the information specified in rule 10(c), may require the person named therein to answer, and shall require such person to appear at a specified time and place and present evidence upon the matters specified.

Clearly, no consent of respondents is contemplated or required by Rule 5(g).

On the basis of all the foregoing, we find and conclude that the conference agreement does not contain provisions literally or substantially in conformance with the five specific provisions of General Order No. 9 set forth in the Show Cause Order. An appropriate order will be entered.

Commissioner JOHN S. PATTERSON, concurring separately:

For the purposes of this adjudication, General Order No. 9 (46 CFR, Part 523) is valid and must be obeyed by the regulated public. Accordingly, I concur in the conclusions herein.

The rules in General Order No. 9 may not be collaterally challenged in a proceeding to determine whether an agreement ought to be disapproved for noncompliance therewith. Considering my fellow Com-

missioners have elected to reply to the challenge, I deem it necessary to disassociate myself from the reply and to call attention to my dissent in the statement accompanying adoption of General Order No. 9, served May 4, 1964. Briefly, I believe the regulations are not authorized by law and, in my opinion, constitute overregulation. The variance from law is that section 15 of the Act authorizes more than one way of providing reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, but the rules allow only one way to conform, namely, by the use of all nine provisions which must be "substantially" as written in the rules. To the extent other ways are forbidden, the rule is not authorized and the carriers by policy are regulated more than is necessary.

APPENDIX

GENERAL ORDER 9

REPRINT FROM FEDERAL REGISTER

Issue of May 1, 1964 (29 F.R. 5797)

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[General Order 9]

PART 523—ADMISSION, WITHDRAWAL AND EXPULSION PROVISIONS OF STEAMSHIP CONFERENCE AGREEMENTS

On March 21, 1962, the Commission published in the Federal Register (27 F.R. 2646) a notice of proposed rule making (Docket No. 981) with respect to rules governing procedures for admission to and withdrawal and expulsion from conferences and invited comments thereon. After consideration of the comments received, the Commission revised certain of the proposed rules, republished the revised proposed rules in the Federal Register December 10, 1963 (28 F.R. 13369-13370), received comments and heard oral argument thereon.

The Commission has carefully considered the comments submitted and arguments on the proposed revised rules and in light thereof herewith adopts and promulgates its final rules. Comments and arguments not discussed or reflected herein have been considered and found not justified or not material.

Many conferences object to § 523.2(a) which sets forth the basic criteria for conference membership. These objections called for either greater generality or more specificity in spelling out the criteria for admission into a conference. Some conferences seek the right to deny admission for "just and reasonable cause" thus allowing broad discretion over the essential elements required for admission. Other conferences want included in the rules clear, well-defined standards of what constitutes "evidence of ability" to maintain common carriage. Particularly, these conferences would require that the common carrier

would have to give the conference precise data on its financial soundness and the types and speeds of its vessels.

The rule as drafted is neither extremely general nor overly specific, but rather it attempts to strike a balance giving the conferences some discretion in submitting for approval other conditions on admission to membership.

It is also contended that the requirements for readmission should not be the same as those for admission. Although there may be some distinction between the applicant which is applying for membership in a conference for the first time and an applicant which is applying for readmission to the conference, we are of the opinion that the rule covering initial admission to conference membership is sufficiently broad to allow conferences the necessary degree of discretion in submitting for approval specific proposals dealing with readmission to membership as well as when acting on applications for readmission.

Some conferences object to the provision making admission to conference membership effective as of the postmark date of notice to us of the admission, § 523.2(d). They contend that a carrier's status should not be indefinite pending postmarking of a notice, and that the risks of oversight or delay in the conference office or postal service may result in postponing the effectiveness of its admission to conference membership. Historically, the postmark form of notice has been used, and is the minimum necessary to insure us of prompt appraisal of all actions with respect to admissions to conference membership.

Objection is made to our requirement that we be furnished with an advice of any denial of admission to membership, together with a statement of the reasons therefor, § 523.2(c). The conferences urge that as a practical matter it is unnecessary to require the advice because an applicant which has been denied admission would probably complain to the Commission. The requirements of this section are almost self-explanatory. It is by no means a certainty that the denied applicant would complain to the Commission, and in order to see that the conferences are operating under their agreements and in accordance with the Shipping Act, 1916, it is necessary that we be kept informed of conference actions as they relate to admission to membership. We must be apprised of any discrimination real or potential regardless of whether the aggrieved party desires or is in a position to complain to us.

Several attacks have been leveled at § 523.2(f) regulating withdrawals from conferences.

Some conferences object to allowing a party to withdraw without a penalty. They contend that a penalty provision for withdrawal from a conference may be just and reasonable. The contention is without

merit and directly contrary to the explicit words of the statute, which requires that conference agreements "provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal."

Further objections were raised to a provision requiring a minimum period of 60 days written notice of an intention to withdraw from conferences employing dual rate systems. Section 523.2(f) has been modified to require only a 30-day notice period for withdrawal from all conferences.

Several conferences objected to our provision in § 523.2(h) making expulsion from a conference contingent upon a showing of "continued failure" to abide by the terms of the conference agreement. Certain single breaches of a conference agreement are said to justify expulsion. . . . We have removed the "continued failure" provision to allow conferences to so phrase their agreements to provide for expulsion for single offenses of certain provisions of the basic agreement and will determine the reasonableness of these expulsion criteria when the modified agreements are submitted to us for approval.

Several conferences objected to our requirement conditioning effectiveness of expulsion upon our approval. We have eliminated this requirement, substituting therefor provision § 523.2(i), which conditions the effectiveness of expulsion upon receipt by the expelled member and the Commission of a statement setting forth the reason or reasons for expulsion. To make the effectiveness of expulsion contingent upon our approval would perhaps unfairly allow the "expelled" member to compete as a conference member while attempting to postpone our approval of his expulsion as long as possible.

We do not, however, by removing approval as a condition precedent for expulsion intend to imply, as some conferences have suggested, that we have no authority over expulsion. We have and will exercise the authority to disapprove every agreement submitted to us which does not contain reasonable expulsion provisions, as well as reasonable conditions for admission and withdrawal. The Commission's power to prescribe the conditions under which expulsion may be permissible is implicit in the statutory language governing admission and withdrawal. The Commission's rules governing admission, designed to implement the statutory mandate of Public Law 87-346, could be rendered completely void by conference expulsion procedures if the requirement for reasonable and equal admission conditions is not interpreted to include reasonable expulsion provisions. To hold otherwise would enable any conference to admit a carrier pursuant to the rules and shortly thereafter expel that member on the slightest provocation.

Some conferences allege that it is unnecessary for us to be supplied with detailed explanations for expulsion of a carrier. The reasons behind the requirement that the Commission be informed of the reasons for any denial of admission to membership apply with equal force here.

Therefore, pursuant to sections 15 and 43 of the Shipping Act, 1916 (75 Stat. 763-4 and 766), 46 CFR is hereby amended by inserting a new Part, Part 523, reading as set forth below following Commissioner Patterson's dissent.¹

SUBPART A—CONFERENCE AGREEMENT PROVISIONS—ADMISSIONS, WITHDRAWALS,
EXPULSION

Sec.

523.1 Statement of policy.

523.2 Provisions of conference agreements.

SUBPART B—CURRENT CONFERENCE AGREEMENTS

523.10 Resubmission of current agreements.

523.11 Notice of filing.

SUBPART C—PROPOSED NEW CONFERENCE AGREEMENTS

523.20 Agreement provisions.

AUTHORITY: The provisions of this Part 523 issued under secs. 15 and 43 of the Shipping Act, 1916 (75 Stat. 763-4 and 766).

SUBPART A—CONFERENCE AGREEMENT PROVISIONS—ADMISSION, WITH-
DRAWAL, EXPULSION

§ 523.1 *Statement of policy.*

(a) Section 2 of Public Law 87-346, effective on October 3, 1961, amends section 15 of the Shipping Act, 1916, to provide that no conference agreement shall be approved, nor shall continued approval be permitted for any agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

(b) It is the responsibility of the Federal Maritime Commission under the Shipping Act, 1916, to determine that all conference agreements contain reasonable and equal terms and conditions for admission and readmission to conference membership of qualified carriers according to the requirements set forth in paragraph (a) of this section.

§ 523.2 *Provisions of conference agreements.*

In effectuation of the policy set forth in § 523.1, conference agreements, whether in effect on October 3, 1961, or initiated after that date, shall contain provisions substantially as follows:

¹ Filed as part of original document.

(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.

NOTE: The above Provision will not preclude the conference from imposing legitimate conditions on membership, including but not necessarily limited to, the payment of an admission fee, payment of any outstanding financial obligations arising from prior membership, or the posting of a security bond or deposit. All such conditions must be made expressed terms of the conference agreement, filed with and approved by the Commission pursuant to section 15 of the Shipping Act, 1916.

(b) Every application for membership shall be acted upon promptly.

(c) No carrier which has complied with the conditions set forth in paragraph (a) of this section shall be denied admission or readmission to membership.

(d) Prompt notice of admission to membership shall be furnished to the Federal Maritime Commission and no admission shall be effective prior to the postmark date of such notice.

(e) Advice of any denial of admission to membership, together with a statement of the reasons therefor, shall be furnished promptly to the Federal Maritime Commission.

(f) Any party may withdraw from the conference without penalty by giving at least 30 days' written notice of intention to withdraw to the conference: *Provided, however,* That action taken by the conference to compel the payment of outstanding financial obligations by the resigning member shall not be construed as a penalty for withdrawal.

(g) Notice of withdrawal of any party shall be furnished promptly to the Federal Maritime Commission.

(h) No party may be expelled against its will from this conference except for failure to maintain a common carrier service between the ports within the scope of this agreement (said failure to be determined according to the minimum sailing requirements set forth in this agreement) or for failure to abide by all the terms and conditions of this agreement.

(i) No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished the expelled member and a copy of such notification submitted to the Federal Maritime Commission.

SUBPART B—CURRENT CONFERENCE AGREEMENTS

§ 523.10 *Resubmission of current agreements.*

(a) All conference agreements which are lawful on the effective date of these rules and which are amended to comply with these rules and filed with the Commission within 60 days after adoption of these rules by the Commission, shall remain lawful unless disapproved, cancelled or modified by the Commission.

(b) Filing under this section may be accomplished by mailing to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, a signed original and fifteen (15) copies of the agreed modification, together with an original and fifteen (15) copies of a letter of transmittal and request for approval of the matter submitted.

§ 523.11 *Notice of filing.*

All modifications of conference agreements filed with the Commission pursuant to these rules shall be available for inspection at the offices of the Commission. A notice of such filing shall be published in the Federal Register as soon as practicable, and interested persons may, within twenty (20) days after such publication, file comments relating to such modification. Comments shall include a statement of position with respect to approval, disapproval, cancellation or modification, together with reasons therefor.

SUBPART C—PROPOSED NEW CONFERENCE AGREEMENTS

§ 523.20 *Agreement provisions.*

All new conference agreements, entered into subsequent to the date of adoption of these rules, shall contain provisions in substantially the form set forth in § 523.2, before approval by the Commission under section 15 of the Shipping Act, 1916.

By the Commission, April 21, 1964.

THOMAS LISI,
Secretary.

[F.R. Doc. 64-4258; Filed, Apr. 30, 1964; 8:49 a.m.]

By amendment dated June 26, 1964, the time for compliance with General Order 9 was extended to July 20, 1964.

FEDERAL MARITIME COMMISSION

No. 65-28

ADMISSION TO CONFERENCE MEMBERSHIP—PACIFIC COAST EUROPEAN CONFERENCE

ORDER

This proceeding having been initiated by an Order to Show Cause issued by the Federal Maritime Commission upon its own motion, and the Commission having fully considered the matter and having this day made and entered of record a Report containing its findings and conclusions, which Report is hereby referred to and made a part hereof;

It is ordered, That pursuant to section 15 of the Shipping Act, 1916, Agreement No. 5200 be disapproved, effective 60 days from the date of this Order, unless within that time, the Pacific Coast European Conference and its member lines shall have amended their conference agreement to comply with the requirements of section 15 of the Shipping Act, 1916, and the requirements of the Commission's General Order No. 9 in the following respects:

(a) to provide for furnishing a detailed statement of the reasons for expulsion to the party expelled (§ 523.2(i));

(b) to provide that applications for membership shall be acted upon promptly (§ 523.2(e));

(c) by deleting the phrase "just and reasonable cause" in the sixth line in Article 10 of the agreement and substituting the phrase "failure to meet the above requirements" therefor (§ 523.2(c));

(d) to provide for prompt notification to the Commission of the admission of new members (§ 523.2(d)); and

(e) to provide for prompt advice to the Commission of the Conference's denial of membership to any line (§ 523.2(e)).

By the Commission.

[SEAL]

(S) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65-28

ADMISSION TO CONFERENCE MEMBERSHIP—PACIFIC COAST EUROPEAN CONFERENCE

DENIAL OF PETITION FOR REOPENING

Respondents, Pacific Coast European Conference and its member lines, have petitioned to reopen this proceeding for rehearing, reargument and reconsideration. The sole basis for the petition is respondents' contention that "The final report does not, at any point, hold that Agreement 5200 contravenes any of the statutory proscriptions of Section 15 of the Shipping Act." Respondents quote from the opinion of the Court of Appeals for the District of Columbia Circuit in *Aktiebolaget Svenska Amerika L. v. Federal Maritime Com'n*, 351 F. 2d 756 (1965) at page 761:

The statutory language authorizes disapproval only when the Commission finds as a fact that the agreement operates in one of the four ways set out in the section [15] by Congress.

The particular portion of section 15 referred to above by the Court provides that we shall, after notice and hearing, disapprove any agreement which we find "to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest or to be in violation of this Act."

Citing our failure to find that their agreement operated in one of the above four ways, respondents take us to task because we "apparently overlooked the lesson learned from the *Svenska* case, *supra*, and that *Svenska* "should not, as it has been simply be ignored." Additionally, respondents renew their objection to the validity of our

General Order No. 9 and urge that it too "necessarily comes into conflict with *Svenska*."¹

Our failure to deal with *Svenska* was based on simple ground that the decision in that case has no bearing whatsoever on the issues at hand. Indeed, less attention to *Svenska* and more careful scrutiny of the full text of section 15 would, it seems to us, have rendered readily apparent the inapplicability of the limited portion of section 15 at issue in *Svenska* and upon which respondents place their sole reliance now. For in the sentence immediately succeeding the portion of section 15 now relied upon by respondents, the precise provision controlling the issues here appears. That respondents had no misgivings concerning the precise portion of section 15 is clear from the following statement appearing in their Opening Memorandum in this proceeding:

The relevant clause of Section 15 of the Shipping Act, from which the General Order is said to derive, was added to the statute in the 1961 amendments and states as follows:

"No [conference] agreement shall be approved, nor shall continued approval be permitted for any agreement, . . . which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal."

Notwithstanding the Show-Cause Order's conclusionary recital of "the Conference's failure to comply with the requirements of Section 15," it must be abundantly apparent that Section 15 has nothing whatever to do with it. Indeed, the charging allegations of the Order make specific reference solely to various provisions of General Order No. 9—none of which can be found in the relevant portion of Section 15.

In our report we went to great lengths to clearly show that General Order No. 9 was "necessary to carry out the provisions of the [Shipping] Act and was intended to effectively insure that the Congressional intent behind the 'reasonable and equal' provision [of section 15] was realized." No more need here be said about the validity of General Order No. 9. In our report and order on this proceeding we found that respondents' agreement failed to meet the requirements of General Order No. 9. Therefore, since General Order No. 9 was, as we took care to point out, in explanation and effectuation of the "reasonable and equal" provision of section 15, we found that the agreement failed to meet the requirements of section 15. Nothing more was required,

¹ In this regard, respondents are but restating their objection to a prior motion of Hearing Counsel to strike those portions of respondents' memoranda attacking the validity of General Order 9. In an order dated October 26, 1965, we served notice that any ruling on the motion would be withheld pending conclusion of oral argument thereby allowing the parties an opportunity to argue the motion. The discussion contained in our report of the issue of the validity of General Order 9 should have disposed of any doubt as to our disposition of the motion. However, it is hereby expressly denied.

certainly not a further finding of detriment to commerce or one of the other alternative grounds for disapproval of a conference agreement. Section 15 could not be more specific when it states "nor shall continued approval be permitted for any agreement . . . which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership. . . ." We found that respondents' agreement did not so provide. This disposes of the issues presented.

Respondents' motion to reopen the proceeding is hereby denied.

March 22, 1966.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1212

MEDITERRANEAN POOLS INVESTIGATION

Decided January 19, 1966

- (1) The Italy/U.S. North Atlantic Freight Pool, Agreement No. 8680, as amended to date and if further modified, not found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; detrimental to the commerce of the United States; or contrary to the public interest, or otherwise in violation of the Shipping Act, 1916.
- (2) The Medchi Freight Pool, Agreement No. 9020, as amended to date and if further modified, not found to be unjustly discriminatory, or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; detrimental to the commerce of the United States; or contrary to the public interest, or otherwise in violation of the Shipping Act, 1916.
- (3) The Adriatic North Atlantic Range Freight Pool, Agreement No. 9060, as amended to date and if further modified, not found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; detrimental to the commerce of the United States; or contrary to the public interest, or otherwise in violation of the Shipping Act, 1916.
- (4) The Israel-U.S.A., U.S.A.-Israel Freight Pool, Agreement No. 9233, as amended to date and if further modified, not found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; detrimental to the commerce of the United States; or contrary to the public interest, or otherwise in violation of the Shipping Act, 1916.
- (5) The Marseilles-North Atlantic U.S.A. Freight Pool, Agreement No. 9361, as amended to date and if further modified, not found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; detrimental to the commerce of the United States; or contrary to the public interest, or otherwise in violation of the Shipping Act, 1916.

Warner W. Gardner, Richard W. Kurrus, James N. Jacobi, Benjamin W. Boley, Edwin Longcope, and David I. Gilchrist, for respondents.

Stanley Sher for Constellation Lines.

C. Brooke Armat for the Department of Justice, intervenor.

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

REPORT

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

This proceeding was instituted on our own motion and is now before us upon the exceptions of Hearing Counsel to the Initial Decision of Examiner Paul D. Page, Jr. The investigation is concerned with the initial or continued approval under section 15 of five separate agreements providing for "the pooling or apportioning of earnings" within the meaning of that section. The Examiner would approve the agreements.¹ Hearing Counsel takes exception to the initial Decision on four broad grounds.

1. The Examiner erred in approving the agreements and amendments thereto on the grounds that there was no evidence weighing against approval.
2. The Examiner erred in rejecting every proposed finding of fact offered by Hearing Counsel on the grounds that said facts were irrelevant or unsupported or unnecessary.
3. The Examiner erred in failing to require that the agreements and amendments thereto be modified as urged by Hearing Counsel.
4. The Examiner erred in approving the heretofore unapproved Israel and Marseilles² agreements retroactively. The Examiner further erred in approving various new amendments to the previously approved WINAC, Adriatic and Medchi³ agreements retroactively.

THE AGREEMENTS

The agreements under consideration here are substantially similar in their operative provisions. Among the obvious differences are those

¹ Unless the context requires otherwise "agreements" as used herein includes the various amendments or modifications to the basic pooling agreements which are in issue. Also "approval" means both initial approval in the case of agreements not yet approved under section 15 and continued approval in the case of those agreements already approved.

² "Israel" and "Marseilles" are, respectively, the short form designations for the Israel-U.S.A., U.S.A.-Israel Freight Pool, and the Marseilles-North Atlantic U.S.A. Freight Pool.

³ "WINAC," "Adriatic," and "Medchi" are, respectively, the short form designations for the Italy/U.S. North Atlantic Freight Pool, the Adriatic North Atlantic Range Freight Pool, and the Medchi Freight Pool.

of geographical area covered,⁴ percentage shares of revenue allotted the various participating lines, and the memberships of the various agreements.⁵ With the exception of the Marseilles pool which is a gross revenue pool, each of the agreement's has as its purpose the pooling of net freight revenue in accordance with certain percentage shares allotted each member line.⁶ Net freight is arrived at by deducting a specified amount of "carrying money." Generally speaking, membership in the pool is conditioned upon membership in the conference covering the trade in which the pool operates. Each agreement provides for the admission of new lines and, upon specified notice, the withdrawal of members. The members of each pool undertake to maintain specified minimum sailing requirements and in some specified port calls penalties are provided for overcarriage and undercarriage and for failure to live up to the terms of the agreements. The pools are administered by secretariats to whom the lines submit manifests for accounting purposes. The secretary prepares provisional and final statements of the carryings of the members and the revenue accruing to them. Revenue is "divided" on the basis of these statements. Each agreement provides for bank guarantees and a system of penalties for breaches of the agreement as well as for overcarriage and undercarriage. Each agreement provides for a "governing" or "pool" committee composed of representatives of the members. These committees are the governing bodies of the pools and upon stated majorities can, among other things, change the provisions of the agreements, admit new members and extend the life of the pool. During the hearing an amendment to each agreement was proposed which would allow certain "interstitial" amendments to the agreements to be made effective without securing Commission approval. Under these proposed amendments changes in such things as carrying money, bank guarantees and memberships would be effected by resolution of the members without prior Commission approval although a copy of every such resolution would be promptly filed with the Commission for its information and records. Further details of the particular agreements are discussed below where necessary and pertinent.

⁴ Thus, WINAC pool covers cargo destined for U.S. Atlantic ports north of Hatteras from ports on the West Coast of Italy between Ventimiglia and Reggio Calabria (both included); Medchi covers cargo to U.S. Great Lakes ports on the West Coast of Italy, between Ventimiglia and Santa Maria di Leuca, all Sicilian and Sardinian ports, and Marseilles, Barcelona, Valencia, Seville, Lisbon and Leixoes; the Adriatic pool covers cargo from Venice to U.S. North Atlantic ports; the Israeli pool covers cargo moving between U.S. ports north of Hatteras and Israeli ports, and the Marseilles pool covers cargo moving from Marseilles to U.S. North Atlantic ports.

⁵ For a listing of the various memberships and the short-form designations used in this opinion, see appendix.

⁶ Various ingredients went into the formula for determining individual shares such as past performance, future potential, etc.

Before setting forth the findings upon which we base our conclusions in this proceeding it is necessary to dispose of a threshold exception of Hearing Counsel. The second exception of Hearing Counsel is that the Examiner erred "in rejecting every proposed finding of fact offered by Hearing Counsel on the grounds that said facts were irrelevant or unsupported or unnecessary." The objection appears not so much directed to the rejection of any specific proposed finding as it is to the rejection of all proposed findings with only what Hearing Counsel calls "boilerplate language." Hearing Counsel contends that the Administrative Procedure Act (A.P.A.) requires more.

We presume that Hearing Counsel refers to section 8(b) of the A.P.A. which requires that "the record (decision) shall show the ruling on each" proposed finding and conclusion submitted by the parties with reasons in support thereof. In the present proceeding the respondents proposed 152 numbered findings and Hearing Counsel accepted some as proposed, others if revised and rejected still others.⁷ As already noted Hearing Counsel then proposed his additional findings. The Examiner rejected these and other proposed revisions of Hearing Counsel stating, "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." The courts have made it clear that section 8(b) does not require that a separate finding need be made on each exception to the Examiner's decision where the agency's decision unmistakably informs respondent of its rulings on all exceptions. *NLRB v. State Center Warehouse & Cold Storage Co.*, 193 F. 2d 156 (9th Cir. 1951). By the same token, an Examiner need not make a separate finding on each proposed finding submitted by a party. See *NLRB v. Sharpless Chemicals, Inc.*, 209 F. 2d 645 (6th Cir. 1954).

We have set forth below our findings. They are based upon a careful analysis of all the proposals of the parties and the Examiner's findings. We do not comment seriatim on each proposed finding submitted by the parties or made by the Examiner which we have altered or rejected, for in our opinion to do so might well make it more difficult to ascertain the basic findings and the reasons underlying our conclusions. See *The Commonwealth & Southern Corp., Holding Act of 1935*, Securities Exchange Commission, Release No. 7357 (1947).

⁷ In doing this Hearing Counsel adopted the same method employed by the Examiner. Thus, Hearing Counsel merely states that, "Proposed facts not adopted are objected to as conclusory, argumentative, not supported by substantial evidence or too broad."

The WINAC Trade

The WINAC trade is the cornerstone of Mediterranean-U.S. commerce. Of all the Mediterranean areas, Italy generates the most liner traffic to the United States. Using the range of ports covered by Trade Route 10^s the westbound liner cargo from Italy represented 40 percent of the total westbound cargo in the Mediterranean/U.S. trades for the years 1960-63. The next largest loading areas are Spain and Yugoslavia, each averaging about 11 percent of the Mediterranean total. This dominance of the Italian trade is even greater in terms of value than in terms of tonnage. In addition, the trade is heavily unbalanced in that the liner cargo movement on Trade Route 10 is predominantly outbound by a ratio of approximately 2 to 1.

The result of this imbalance is that westbound free space is high. In the first 10 months of 1963 only 35 percent of the space offered by the conference vessels in the WINAC trade was occupied and heavy westbound free space is fairly typical.

All of the witnesses were in general agreement that the westbound WINAC trade was heavily overtonnaged. About 15 lines have in the postwar period entered the trade only to leave it because of insufficient cargo. Conference vessels have averaged about 750 L/T of westbound cargo on each voyage.

The carriers in the WINAC trade are in some degree differently situated in their dependence upon the Italian loadings. Thus, the conference members may be divided between :

<i>Lines serving only Italian ports</i>	<i>Lines serving other Mediterranean ports besides Italian ports</i>	<i>Lines serving Mediterranean ports after passage from the Far East</i>
AEIL	AEIL passenger	AEIL T.R. 18
Costa	Fabre	APL
Italia	Fassio	Concordia PG
	Concordia Mediterranean	Hansa
	Hellenic	Maersk
	Jugolinija	
	Prudential	
	Torm	
	Zim	

The difference in each line's dependence on Italian cargo is, however, rather less than might be supposed from the above tabulation. Italy is much the most important loading area in the Mediterranean. For example, APL, one of the "transit" services, has on the average about 550,000 cu. ft. of space available in its Mariners after discharging in

^s Trade Route 10 covers *inter alia*, Mediterranean ports in France, Spain, Gibraltar, Malta, Italy, Trieste, Yugoslavia, Greece, Turkey, Cyprus, Syria, Lebanon, Israel, Morocco, Algeria, Tunisia, and Egypt.

the Mediterranean, or about the equivalent of a full ship's space for smaller vessels.

The WINAC trade gradually increased from a volume of 293,000 L/T in 1952 to one of 386,000 L/T in 1960 followed by a 3-year decline to 343,000 L/T in 1963.

The Italian forwarder has played a most significant role in the history of the WINAC trade. In Italy, the forwarder is known as a "caricatore," which, literally translated, means "loader." Although sometimes the word is translated as "shipper," and the actual shipper or owner of the cargo is designated as the "exporter." Congested facilities at Italian ports require that considerable care be exercised in scheduling cargo for loading into vessels. Goods are transported from inland points by such various means as rail, truck, and even horse cart, and it is imperative that their arrival be coordinated properly with vessel schedules. For these reasons, the Italian exporter relies almost completely on the forwarder to expedite shipment of his merchandise. The forwarder performs a variety of services, including reserving space aboard ship, arranging for transportation from shipper's warehouse to vessel, arranging custom clearance, preparing shipping documents, and providing weighing and marking. Shippers customarily make single lump sum payments to forwarders known as "forfait," which include payment for the above services as well as ocean freight. The forwarder generally assumes responsibility for the handling of the goods from point of origin to ultimate destination and usually selects the carrier. This authority to select the carrier, of course, places the forwarder in an advantageous bargaining position *vis-a-vis* the carrier with respect to exaction of brokerage and rebates.

Competition among the forwarders in Italy is intense. The number of forwarders servicing the WINAC trade is greatly in excess of the needs of the market. Several hundred of them service the Italian export trade. In 1952, the WINAC Conference listed 152 forwarders for the ports of Genoa, Leghorn, and Naples. Approximately 10 percent of these accounted for about 50 percent of the business. At individual ports, a small minority of forwarders handle the bulk of the business, forcing many small firms to compete intensively for the residue. This intense competition induces forwarders to seek reductions and concessions from carriers on the ground that such measures are necessary in order to stay in business. There is evidence that forwarders have played lines off against each other by alleging fictitious concessions which has in turn fomented unrest and suspicion among the lines.

The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference was established pursuant to Agreement 2846, which was approved by a Commission predecessor on March 23, 1934. Originally, there were nine member lines. Membership has fluctuated, however, ranging from a low of five members before World War II to 24 in 1960. The headquarters of the conference is and has been located in Genoa except during the war when it was transferred to New York. After 1952, a slight increase in traffic already noted induced additional carriers to join the conference. At the present time the conference consists of the 11 respondent pool members and in addition Hellenic, Prudential, and Constellation. There is no significant nonconference competition now that Admiralty Line has been admitted to the conference. The conference employs a dual rate system, but in the opinion of Dr. Piacentini, director of liner activity for Costa Line, it has been easily evaded by forwarders using a different name.

The trade has in recent years proved unattractive to a number of lines. The 24 conference members in 1960 have been reduced to 14 in 1965. About 15 lines have since the war entered the trade and the conference only to withdraw. Since 1962 Mitsui O.S.K. Line, Fresco Line, Kulukundis Line, Waterman and Torm Line have left the trade and the conference.

The WINAC trade has a long tradition of special concessions to the shipper. Prior to World War II, a standard 4 percent brokerage was paid to Italian freight forwarders by conference members, also additional special commissions were paid by the lines to certain forwarders. However, the percentage amounts varied and not all forwarders received these special commissions. In addition to these commissions, a deferred-rebate system was in operation.

Since World War II rebates and special concessions have, in the opinion of the witnesses, been perpetuated by the seriously overtonnaged state of the WINAC trade.⁹ With every line seriously short of sufficient cargo to fill the available space, the pressures toward rebates and other concessions were formidable. These pressures toward malpractice were made almost irresistible by the power of the Italian forwarder, who through his control over the booking of cargo sought and often obtained rate concessions from the carriers in his efforts to remain competitive with other forwarders. An added impetus toward malpractice was the lack of confidence among the lines. The witnesses

⁹ In addition to Dr. Piacentini, Dr. Alto Mordiglia, attorney for the WINAC pool and conference, and Mr. A. Theodore DeSmedt, president of ABIL, also testified on the WINAC pooling agreement.

testified that when a forwarder undertook to play one line off against another, his statement of concessions offered would ordinarily be accepted as substantially true.

The economic pressures to malpractices are not inhibited in Italy by any legal proscription. Special discounts and rebates are both customarily and lawful in Italy. (Art. 1739, par. 3 of the Italian Civil Code.) In addition, the forwarders and many of the lines are active in trades other than those to the United States. Despite the fact that the WINAC Conference agreement forbids discounts, payments or returns to shippers without unanimous consent of all parties and provides that tariffs shall be strictly observed, concessions and rebates of one type or another have consistently plagued the WINAC trade. Effective curtailment of such practices in the WINAC trade is hindered because of their existence elsewhere since forwarders can be rewarded for WINAC cargo by large rebates, concessions, and commissions in Italian trades other than those involving the United States.

The WINAC Conference has undertaken a variety of efforts to eliminate malpractices. These have ranged from the appointment of a controller of cargo to investigate malpractices at Italian ports to a neutral body system of self-policing. All of the various attempts failed, either because they failed to win the necessary support of the conference membership or because the task proved too large for the particular device employed.

One such device rather clearly demonstrated the actual existence of malpractices. The Atlantic Cargo Inspection Corporation (ACIC) engaged by the conference to conduct spot checks on weights, measurements, and classifications reported that 325 misdeclarations out of 923 spot checks were uncovered. The ACIC also discovered instances of mismeasurement at Italian ports of loading although the conference had supposedly engaged sworn measurers at Leghorn and Genoa.

The most ambitious effort of the conference was represented by the neutral body program. On October 20, 1960, the conference appointed the accounting firm of Price, Waterhouse & Co. as a neutral body to police and enforce its regulations. The neutral body system did not work as well as expected, and in fact proved ineffective. This was not due to the deficiencies of Price, Waterhouse & Co. which was considerably the best and most qualified appointee available, but rather to the impossibility of obtaining actual evidence of the malpractices which everyone knew to be prevalent. All witnesses testified that every conference effort to control malpractices prior to 1961 was a complete failure.

By the fall of 1960 conditions in the WINAC trade had become so bad that AEIL, APL, and Concordia gave notice of their resigna-

tion from the conference; five additional lines shortly followed suit. They withdrew their notice only upon the assurance that rates would be opened on the principal commodities. It was the opinion of Dr. Piacentini, that the conference could not have survived these resignations.

In December 1960, rates were opened on about 40 of the principal commodities moving in the WINAC trade. This action greatly minimized the incentive to offer rebates and special concessions in order to obtain cargo. It was, however, disastrous to the financial position of the carriers. Rates fell to half or less of their prior level and Dr. Piacentini testified that they were shortly hovering just above the level of out-of-pocket cargo handling charges. Open rates made it extremely difficult for shippers to predict future rates for purposes of advance sales. Both Mordiglia and Piacentini stated that there is an inevitable tendency during an open-rate period to favor the large shippers.

Rates remained open throughout 1961. It was the opinion of the witnesses that had the open rate period continued much longer there would most probably have been a heavy migration from the trade, failure of some of the companies, and dissolution of the conference. In May 1961, the conference voted to extend the open rates until a pool should be formed among carriers in the trade.

The primary purpose of the lines in forming the WINAC pool was to bring the malpractices in the trade under control. All concerned were agreed that this could be done in no other way. A secondary purpose was to open at least the possibility of some rationalization of service, by reducing the largely excessive number of loading calls at the Italian ports.

There were pool agreements operating in at least 10 other export trades from Italy to destinations other than the United States. In the opinion of the witnesses they had worked well and were a natural road for WINAC to follow when all their other attempts to restrain malpractices had failed. The WINAC trade itself had operated under approved pooling agreements during part of the prewar life of the conference (e.g., agreement 6220 filed on June 10, 1938, and approved on July 14, 1938).

Almost the entire year of 1961 was devoted to negotiations over the formation of a pool in the WINAC trade. A drafting committee, on which the witnesses Piacentini and Dr. Amund Svendsen, Director of Mediterranean operations for Concordia, served, prepared drafts of the agreement. The major negotiating problem was the fixing of percentage participation for each line.

A great many factors, including past services, vessel types, ship capacity, and vessel speeds, were considered, but each line's historical participation in the trade was considered the most important. It was recognized by the parties that the larger carriers, such as AEIL, APL, Costa, and Fassio, would have to yield some of their share as indicated by historical carriage in order to gain the adherence of the smaller carriers by increasing their minimal share. Agreement was finally reached by the device of having each line schedule the share to which others than itself were entitled, averaging the results and scaling down to 100 percent.

Hellenic, Torm, Maersk, and Zim, though in favor of the pool, were dissatisfied with the share offered and did not join. Torm, Maersk, and Zim were quite small carriers in the trade, and their failure to join the pool at the outset was not of major importance. Hellenic, on the other hand, was a significant carrier, with about 4 percent of the total, and its failure to participate was of concern to the pool members; the pool can, however, operate with substantial success without Hellenic. It could not if a major carrier had refused to join. Torm, Maersk, and Zim subsequently joined the pool, though Torm has recently left the trade and resigned from the pool and the conference.

The conference members (except for Hellenic, Torm, Maersk, and Zim) finally reached agreement upon a pool on December 19, 1961, and as a result thereof the conference rates were closed effective December 23, 1961. The agreement was approved by the Commission on March 6, 1962.

The agreement carried an effective date of January 1, 1962, and was approved to be effective from that date. Dr. Piacentini testified that the January 1 effective date was probably indispensable to formation of the pool, as at least one member, and probably others, would not have agreed if their agreement were to be effective only from an uncertain date in the future. This was because the condition of the trade and the position of the carriers at that unknown date could not have been foretold by the signatories in December, and because the malpractices would otherwise have continued unabated for the indefinite period awaiting approval. Pending approval, the lines sent their manifests to the Secretary and statistics were maintained, and Dr. Piacentini testified that no other action was taken and no payments were made. Even with the comparatively short interval of 2½ months awaiting approval, some of the lines became restive and wished to re-examine their pool participation.

It is advantageous for a line to remain outside a pool which can function effectively without its participation. By doing so it gets

the benefit of a stabilized trade without contributing and without any restriction upon its service or its carriage.

The pool when formed consisted of 12 of the 16 WINAC Conference lines. Since then Torm, Maersk, Hansa, and Zim have joined the pool, while Fresco, Mitsui, and recently Torm, have withdrawn from the trade. Hellenic has always been outside the pool. Prudential resigned from the pool on June 30, 1964. Constellation has entered the trade and joined the conference but not the pool. In consequence, 11 of the 14 conference members are now members of the pool. The members of the pool would be very glad to see the three nonmembers join, since, in their view, some pool objectives of stability of rates and service, and of mutual confidence of all lines in the trade may not be fully attained without the membership of all.

Hellenic's share of the trade has increased since the formation of the pool, as has that of the nonpool lines generally. In 1962 they carried 17 percent of the Range I cargo and 21 percent of that from Range II. Constellation for its part has no objection to the pool, and remained outside only because of a difference over its proper share. Even Admiralty Line, while complaining of nonadmission to the conference, did not object to the pool.

Prudential by letter of April 6, 1964, explained to the Commission its reasons for resignation from the pool. It said, "We know of no conditions which would adversely affect the general desirability of continuing the pool in this trade." It nevertheless explained its resignation on the ground that "We consider it essential for Prudential, as a small operator, to make every effort possible to improve its carryings and provide better service to shippers. The restrictions of the pool would hamper us in accomplishing these goals * * *." Prudential's pool history shows:

(a) Prudential overcarried in one range and undercarried in the other in 1962; it undercarried in both ranges in 1963, and in both ranges in the first half of 1964.

(b) In 1962 it carried only 254 F/T to Boston, in 1963 none, and in one-half of 1964 only 19 tons. Its pool payments for undercarrying to Boston in these periods aggregated \$14,000, as compared to its 1962 overcarriage penalty of \$4,540.

(c) In 1963 and one-half of 1964 its Italian sailings and American calls were all at or about the minimum requirements of the pool agreement.

(d) Even with its payments for not serving Boston, Prudential in the three periods received (because of undercarriage) in the net balance of pool accounts some \$50,624 more than it paid.

Anticipation of the pool's approval by the Commission, in the view of the witnesses, curtailed malpractices, and it will continue to operate to this end by the simple mechanism of self-interest: If a line pays a rebate to obtain cargo, it loses money because the net freight must be paid into the common fund out of which the line derives a previously fixed percentage.

The effect was apparent from January 1, 1962, onward because the possibility of gaining nothing by malpractice, if the pool were eventually approved, was a sanction against improper concessions.

The witnesses could not speak as to the lines which were not members of the pools. They recognized that agents might out of their commissions make allowances which they would keep secret from their principals, or that shippers might on their own cheat as to description or measures of cargo. But insofar as the pool lines themselves are concerned, it is the judgment of all the witnesses testifying that malpractices have by virtue of the pool been reduced almost to the vanishing point. Witnesses for two nonpool lines agreed. It was further the judgment of the pool members that the beneficial results achieved were possible only through the operation of the pool, and if the pool were disapproved, they felt that the full tide of malpractice would at once recur.

In the opinion of the witnesses the WINAC trade is heavily over-tonnaged, and its nearly 500 westbound sailings a year, in 1961, were a great deal too many for the volume of cargo. One objective of the pool was to permit some reduction of duplicating calls by pool members, with a consequent effort to rationalize the service offered and to reduce the costs of operation.

The objective has been realized in varying degrees by the pool members. The differences arise out of the nature of their services. The results for the lines the representatives of which testified in these proceedings have been:

(a) The quantity of Costa's service, confined to the Italy-U.S. North Atlantic trade, is fixed by the heavier eastbound carriage. As an Italian line, it feels obliged to serve each of the three major ports on each voyage. In result, it has achieved no reduction in service because of the pool.

(b) Concordia, on the other hand, has by virtue of the pool been able to reduce the number of Italian calls made by its vessels. It schedules only one or two calls for each of its two westbound services going through the Mediterranean instead of the three which would be required without the pool.

(c) APL is more nearly in the position of Costa. Its round-the-world vessels move on as regular a fortnightly schedule as possible and its interport carriage ordinarily requires calls at all three of the major ports. It has, however, been able to reduce the time spent at Naples where, by virtue of its subsequent itinerary, its service is the least attractive.

(d) AEIL, like Concordia, has by virtue of the pool been able to make a substantial reduction, of about 20 percent, in the number of its Italian port calls.

Overall, there has been a significant reduction in calls by conference members at the three major WINAC ports, so that the 1963 calls were about 20 percent less than in 1961.

It is the opinion of the witnesses that the reduction in calls has not impaired the adequacy of the service offered the shippers. There are about six sailings a week out of Genoa and Naples and four a week out of Leghorn which it is contended is much more than ample for the trade.

Insofar as the lines serving the trade are concerned there is no port of consequence to the Italy-United States trade on the mainland West Coast of Italy other than Genoa, Leghorn, and Naples. The small port of Marina de Carrara can only accommodate vessels of shallow draft and short length.

The witnesses stated that they did not think that the pool has eliminated all competition among its members. In their view, every line is anxious to maintain and improve its position in the trade, to retain its present customers and to attract new ones; this is because none can expect a pool to last forever and there is in any case need for a strong bargaining position in view of the yearly opportunity for renegotiation. Costa, as one example referred to, has only recently moved at considerable expense to a new pier in New York in order to offer better service to its consignees. There is no evidence that the operation of the pool would discourage the entry into the trade of nonpool competition.

The pool by curtailing rebates has largely been responsible for a much more stabilized and, in the opinion of the witnesses, nondiscriminatory level of freight rates. As compared to 1960, the last year before the rates were opened, the WINAC tariff rate level has by 1965 increased by only about 10 percent; some have not yet regained their 1960 level. The rates on the commodities selected for study in these 2 years have been :

	1960	1965	Increase
			<i>Percent</i>
Marble blocks.....	\$43.50	\$48.00	10
Cotton textiles.....	35.00	55.00	57
Silk textiles.....	35.00	24.00	[31]
		55.00	57
Wine.....	55.00	57.75	5
Tomato sauce.....	28.50	28.00	6
Tomatoes.....	28.50	28.00	6
Pistachio nuts.....	57.00	63.00	12

Testimony in the record indicates that steamship costs in general have increased over the 5-year period a great deal more than 10 percent.

There have, to the knowledge of the witnesses, been no complaints at the formation or the operation of the pool by shippers or ports.

The Medchi Trade

This trade covers cargo moving either directly or by transshipment to the U.S. Great Lakes from West Coast of Italy ports, between Ventimiglia and Santa Maria di Leuca, Sicily and Sardinia, Marseilles, Barcelona, Valencia and Seville, and Lisbon, and Leixoes.

The Medchi trade is seasonal because of the closure of the St. Lawrence Seaway during the winter months of December through approximately mid-April when ice conditions on the seaway prevent its use by ocean-going vessels. The seaway was opened on May 1, 1959, and it has since been opened for navigation each season beginning April 8 to 15 and closing officially on November 30, with navigation by ocean-going vessels continuing for a few additional days depending on the weather conditions.

The westbound trade from Mediterranean ports to U.S. Great Lakes ports is in a sense a byproduct of the eastbound trade, which is considerably larger, and also of the trade from Mediterranean ports to Canadian ports. All pool members operating in the Medchi trade necessarily operate via Canadian ports, and most of them were doing so before the St. Lawrence Seaway was opened. In terms of tonnage and revenue the westbound trade from Mediterranean ports to Canadian ports (Med Can trade) is about twice as large as the Medchi trade. A pooling agreement presently exists in the Med Can trade.

Approximately 51 percent of the tonnage carried by the pool members in the Medchi trade originates at Italian ports, and the Italian cargo represents approximately 62 percent of the total pool revenue.

Total cargo moving from pool ports for the years 1962-64 was as follows:

	<i>Metric tons</i>	
1962.....		52,200
1963.....		45,412
1964.....		57,010

There are approximately 90 sailings during each shipping season by pool members. The trade is overtonnaged, with free space on the inbound sailings averaging something in the magnitude of 50 percent or more.

The members of the Medchi pooling agreement are members of the Medchi Conference.

The Medchi trade covers a broad range of Mediterranean ports¹⁰ and the seven pool members are of relatively equal size. Several of the members operate ships specially designed and constructed for this trade and all the members operate both inbound and outbound. These features tend to distinguish the Medchi pool from the WINAC agreement. Thus, WINAC covers primarily three major loading ports and a relatively small selection of discharging ports, and the WINAC membership varies from some small lines to some extremely large lines with a resulting divergence of views. The relative equality in size of the Medchi Pool members creates a tendency toward unanimity of agreement in dealing with pool problems and this in the view of the witnesses is the major factor in the success of the pool. It is also the stated reason for allotting each member one vote on pool matters as opposed to the "weighted" vote in WINAC.

At the present time, there are no nonconference operators in the trade, although in previous shipping seasons there has been competition from nonpool operators, particular the Yugoslav Line, which is now a member of the pool. The Medchi lines, however, face competition, both with respect to rates and with respect to the solicitation of cargo, from lines operating from the Mediterranean to the U.S. North Atlantic, from the Mediterranean to the U.S. Gulf, and from operators offering services from Continental European ports to the North Atlantic and to the Great Lakes.

The Medchi pooling agreement was approved by the Federal Maritime Commission on July 1, 1963, and became effective for the 1963 shipping season, which began in mid-April 1963. There were originally six members of the pooling agreement, AEIL, Fabre, Concordia, Montship, Watts Watts, and Zim. Watts Watts subsequently left the trade and withdrew from the pooling agreement. Canada Orient Line entered the pooling agreement effective with the 1963 shipping season,

¹⁰ The Mediterranean/American Great Lakes Westbound Freight Conference (Agreement 8260) covers "all ports served on the Mediterranean Sea from Gibraltar to Port Said including Marmara, Black Sea, and Adriatic ports and from Iberian Peninsula ports, North African ports including Morocco all inclusive to U.S. Great Lakes ports." In the opinion of the witnesses, it would be impractical for the pool to cover all conference ports because it would be impossible to fix sailing obligations of the members. Thus, the pool only covers 10 of the major Mediteranean ports. Prior to the pooling agreement almost every sailing of each line included calls at each of these ports.

pursuant to an amendment filed with the Federal Maritime Commission on April 20, 1964. Neither the amendment to the pooling agreement reflecting the withdrawal of Watts Watts Line nor the amendment setting forth the new membership of Canada Orient Lines has yet been approved by the Commission.

Although there is a substantial difference between the WINAC trade and the Medchi trade, the witnesses consider stability in the WINAC trade as of vital importance to stability in the Medchi trade. This casual interrelation is accounted for by the fact that the heart of the Medchi trade is the trade from Italy, and the major commodity movement in the Medchi trade is controlled by the same people who ship in the WINAC trade, mostly Italian forwarders. Additionally, the witnesses testified that if the Medchi Conference's effective rates on any specific commodity are too much above the rate to North Atlantic ports or to U.S. Gulf ports the cargo will be lost to carriers in these other trades.

The witnesses testified that each of the factors relating to rate instability and suspicion of rebates and malpractices existing in the trade from Italy apply equally to Italian cargo moving in the Medchi trade.

The reasons underlying the formation of the Medchi pooling agreement were explained by Mr. Amund B. Svendsen, the director of Concordia Line in charge of all of its Mediterranean operations, and Mr. Jacques Penaud, the manager of Montship/Capo Lines' combined operations. These men drafted the Medchi pooling agreement and were knowledgeable and informed as to all of the factors underlying the negotiations and drafting of the agreement.

The Medchi pool was formed in order to avoid the deterioration of the trade as had occurred in WINAC. There was at the time negotiations on the agreement began considerable fear and apprehension that factors which had disrupted the WINAC trade would also cause instability in the Medchi trade. Furthermore, when the St. Lawrence Seaway opened in 1959, a new group of reliable lines entered the trade (viz, Concordia, AEIL, and Zim). To those already in the trade these lines appeared determined to remain in the trade, each had substantial investments in the services which they were operating, and each offered services comparable to those of the existing operators. The pool was, therefore, a response of the parties thereto to the economic and competitive factors which existed in the trade and was thought necessary to avoid a useless and destructive rate war and a situation of rate instability, which in their opinion would benefit neither carriers nor shippers. Although the condition of the Medchi trade prior to the pool was never as serious as in WINAC, the lines were most anxious

to prevent this happening and no one wanted to take the chance of awaiting developments. At the time when negotiations began for the formation of the Medchi pooling agreement, during 1962, the situation in the Medchi trade was tending toward instability although there was no opening of rates.

The witnesses testified that the pool has assisted in reduction of port calls by the individual lines and consequently a more direct service from particular Mediterranean ports to U.S. Great Lakes ports than would have been achieved without the pooling agreement.

Mr. Svendsen explained that without the pooling agreement his vessels would have to spend more time in port seeking cargo and would have to call at more Mediterranean ports on each sailing. For example, without the pool, Concordia would have to serve 12 or 15 Mediterranean ports, whereas under the pool, it can eliminate at least 4 ports per voyage. As a result, Concordia has been able to operate its service in the Medchi trade with 5 vessels instead of the previous 6 by cutting out uneconomic and unjustified port calls, since it has the assurance that all ports will be more than adequately served by all of the pool members collectively. Similarly, Mr. Penaud testified that Montship/Capo has also been able to reduce, for the same reason, its fleet from 6 vessels to 5 and at the same time has been able to provide a more direct and better service. If each line were to call at each Mediterranean port on every sailing, schedules would be difficult to maintain and the transit time from the first port of call to the first port of discharge would be inordinately long. Furthermore, vessels would at times be compelled to wait in port several days in order to obtain sufficient cargo. These undesirable circumstances are minimized under the pooling agreement. For example, with the pooling agreement, cooperation among the lines in making port calls and in arranging sailing schedules results in a more efficient service and economic operation. In the opinion of witness Svendsen such cooperation would be impossible without a pooling agreement. Witness Penaud testified that under the pooling agreement, by providing service to fewer ports on each sailing, his company has been able to shorten transit time by 4 or 5 days.

Under article 16 of the agreement the administration of the pool is primarily the task of the secretary. Rationalization of sailings is accomplished through the secretariat which acts as a clearing house for the dissemination of information supplied to him by the pool members. The members of the pooling agreement furnish to the pool secretary a 2-month schedule corrected weekly. The secretary

can then determine if a particular port requires additional service and suggest in his advisory capacity that an undercarrying line should provide it. The same type of suggestion is made by the secretary in the case where two lines might provide service to the same port at the same time.

Tariff rates have risen only slightly since the Medchi pooling agreement became effective in the 1963 shipping season, which slight increase has been a partial reflection of increased operating costs. Even though there has been a slight increase in home rates in the Medchi trade, Mr. Penaud testified that the average rate for cargo moving in the trade has actually decreased. In this respect, the average rate per set ton of 1,000 kilos, in 1963, was \$49.30 and after 1 year of pool operations it became \$49.20.

The witnesses testified that the Medchi pool secretary maintains a close check on the cargo movement at the various pool ports and as an example, Messina shippers' requests for reefer space which the lines have not always been able to grant are now being taken care of by the agreement of Concordia to call with reefer facilities at Messina six times during the shipping season.

Carriage under the agreement displays considerable fluctuation in the position of the lines. Only AEIL's position of moderate overcarriage remained constant. Fabre went from a slight overcarrier to a substantial undercarrier; Capo nearly doubled its undercarriage; Concordia went from modest undercarriage to substantial overcarriage and Zim reduced its moderate overcarriage to slight undercarriage.

The Adriatic Trade

The Adriatic Pool covers cargo moving, either directly or by transshipment, from the Port of Venice to U.S. North Atlantic ports. Venice is served by AEIL and Jugolinija which constitute the membership of the pool. They operate roughly equivalent services, each making approximately 22 sailings a year, although AEIL's vessels are of a much larger capacity. The remoteness of the major Adriatic ports, Venice, Trieste, and Rijeka, renders the trade generally unattractive to shipping.

Cargo originating in the industrialized interior of northern Italy (Milan and Turin) and normally shipped out of Genoa may be routed via Venice. Inland transportation to Venice is excellent and while the land haul to Venice may be more expensive than to Genoa, cargo would be diverted when higher inland costs are offset by lower ocean freight rates.

The Adriatic Pool was instituted at the request of the members of

the WINAC Pool to prevent diversion of WINAC pool cargo to Venice which port is not within the scope of the WINAC pool.¹¹ The WINAC membership is fully informed of the movement under the Adriatic pool through the use of a common secretary. The terms and provisions of the Adriatic agreement are most similar to those of WINAC.

Prior to the negotiation of the Adriatic pool, AEIL held about 45 percent of the Venice traffic and Jugolinija 55 percent. Under the original agreement AEIL achieved a 55 percent share due to its demonstration that while its prepool cargo originated in Venice and its natural hinterland a portion of Jugolinija's cargo was being attracted from the West Coast of Italy. Experience under the agreement, however, demonstrated that not as much of Jugolinija's traffic originated outside the Venice area as was originally thought and the pool shares were adjusted giving 52.5 percent to AEIL and 47.5 percent to Jugolinija. Operations under the pool show that both lines are exceeding their minimum sailing requirements and there has been no substantial overcarriage or undercarriage.

The Israeli Trade

The service between U.S. Atlantic ports and Israel is peculiar in that, for various reasons, the only regularly scheduled service is provided by the two national-flag lines, AEIL and Zim, each of which has approximately the same involvement in the trade. AEIL's total capacity is slightly greater, however, because of the larger size of its vessels.

Due to the political problem that exists between Israel and the Arab States, ships serving the Eastern Mediterranean have the election of serving either Israel or the Arab countries, but not both on the same voyage. AEIL is able to operate a service between U.S. North Atlantic ports and Israel because its operations to the Mediterranean are extensive, thereby enabling it to offer a separate Israeli service. A vessel serving Israel cannot serve Syria, Lebanon, North Africa, Egypt, Tunisia, Algeria or Libya, nor can it transit the Suez Canal. Cargo from the Arab States to the United States is from 1½ to 2 times greater than that from Israel to the United States, not counting the citrus fruit movements.

The proposed pool covers U.S. North Atlantic traffic moving to Israel (U.S. exports) and traffic moving from Israel (U.S. imports) to U.S. North Atlantic ports.

¹¹ Venice is within the scope of the WINAC Conference but it was excluded from the WINAC pool because in the view of the WINAC members its inclusion would render accounting problems untwely and difficult.

The pool trade is covered by two separate conferences, one outbound and one inbound. Zim and AEIL are the only members of these conferences.

Zim and AEIL each enjoy substantial national flag preference by shippers, although initially (early 1950's), there was a strong shipper sentiment in favor of Zim.

Revenue earned by Zim and AEIL in the trade from Israel to the United States ("westbound") is only 10 percent of revenue earned in the trade to Israel from the United States ("eastbound") although the number of sailings in each trade is substantially identical.

To some extent, but not substantially, the traffic disparity between the eastbound and westbound Israeli trades is mitigated by the broader scope of other trades served on westbound voyages. This leads to the conclusion that the westbound Israeli trade is overtonnaged relative to the eastbound Israeli trade posing a threat to stability of rates and service.

The threat to the stability in the Israeli trades became imminent during the period 1962-63, when Zim determined to increase its participation and AEIL determined to maintain its position. Unlike the WINAC trade, which was beset by rebates and malpractices, Zim enjoyed a better position than AEIL in the Israeli trades because of its ability to grant favors to Israeli merchants who also used Zim in trades not in U.S. foreign commerce.

At least as early as October 1962, AEIL and Zim believed that a pool would be desirable in order to prevent the outbreak of destructive competition between them. AEIL and Zim met in Rome on January 29, 1963, to lay the groundwork for negotiating a pool.

AEIL believed that, based on future capability, the shares should be 60-40 in favor of AEIL eastbound and 60-40 in favor of Zim westbound. However, AEIL proposed a 55-45 division. Zim felt that past performance (last 3 years) should be the major factor in determining pool shares. During the negotiations, AEIL urged that the pool be on a 50-50 basis but receded to a 47.50 percent share eastbound and a 42.50 percent share westbound. Eventually, AEIL finally agreed to that westbound share and a 45 percent eastbound share.

Subsequent to April 5, 1963, Zim and AEIL worked out and agreed to further revisions in the pool draft and filed the final agreement with the Federal Maritime Commission for approval on August 2, 1963, to be effective August 1, 1963.

Full accounting records of the pool have been kept since August 1, 1963, but no financial settlements have been made.

It would have "very little" practical effect in the Israeli trades if the Federal Maritime Commission approved the pool effective as from the date of approval and not as of August 1, 1963.

Zim contends that the pool is not, and has not been, in operation since August 1, 1963.

There have been no serious problems between Zim and AEIL in the pool trades since August 1, 1963.

Agreement 9233 provides for 17 minimum sailings annually by both Zim and AEIL in each direction (art. 8). However, the present service of each line exceeds the minimum (24 AEIL sailings, 21 or 22 Zim sailings) and AEIL has no present plans to reduce its calls.

The service of AEIL and Zim, in terms of number of sailings, shows no significant change between such service prior to the negotiation of the pool and subsequent thereto.

The pool is expected to have the effect of improving service by inducing Zim and AEIL to schedule sailings so that their respective arrivals and departures do not coincide, thereby providing more comprehensive coverage of the berth.

There is nothing in the record to indicate that the successful negotiation of this pool in 1963 has led to increases in rates. However, that negotiation did have the effect of preventing rate decreases, a possible rate war and the breakup of the conferences.

The Marseilles Trade

There are nearly 200 sailings a year from Marseilles to U.S. North Atlantic ports. The liner cargo in this trade has been:

	L/T
1960 -----	49, 686
1961 -----	55, 685
1962 -----	57, 132
1963 -----	54, 977
Average -----	54, 370

The average loading is thus about 275 L/T per sailing. In consequence the trade is largely overtonnaged.

The trade is served by eight conference members: AEIL, APL, Fresco, Fabre, Fassio, Hansa, Zim, and (since 1964) Constellation. It is also served by Concordia, which because of malpractices resigned from the conference in 1962. Concordia carries perhaps 10-12 percent of the cargo. Additional nonconference competition is provided by a Norwegian tanker bulk service, which operates at least monthly on a round-the-world schedule taking parcel lots of bulk liquids. APL and AEIL are the largest carriers in the trade, followed by Fresco.

The conference in this trade was established in 1937. It covers the trade from Marseilles to the U.S. Atlantic coast. Marseilles is the

only port of consequence in southern France. Very little cargo moves to the South Atlantic ports. All of the lines in the trade serve Marseilles in conjunction with other trades. A dual rate system has not been employed, but an agreement to that end is now pending Commission approval.

The forwarder is important in the Marseilles trade but to a much lesser degree than in the WINAC trade. Cargo is delivered to the terminal, rather than to ship's tackle, and delivery is accomplished by the exporter himself. The "forfait" system is not employed.

On cargo of local origin, the shipper pays the cost of loading cargo. On that from areas to the north, which might otherwise be diverted to North Europe ports, the handling costs are paid by the carrier.

Since about 1960 or 1961 malpractices have been a severe problem in the Marseilles trade. They did not reach the level of the WINAC trade prior to the pool but were a matter of major concern. The allegations were of rebates, improper measurements and absorption by the carrier of handling costs on local cargo.

The conference has no neutral body nor any self-policing system more elaborate than an inspection of the manifests. Experience in other trades has not led the members to believe that results would be commensurate with the cost, especially for a small trade. Some form of cargo inspection service, preferably at discharge, was considered desirable even if the pool be approved, to guard against shipper misdeclarations.

Because of malpractices, rates were opened on some commodities in 1962. The open rates were applied to aluminum, rubber tires, tanning, extracts, dried cherries, and ferromanganese. These commodities were thought most subject to malpractice, and made up about 60 percent of the trade. Except for wines they covered all of the heavy-moving commodities.

Concordia resigned from the conference in 1962 owing to its impatience with malpractices.

The Marseilles lines by 1962 had the example of the success of the WINAC pool in curbing malpractices. In addition, there was the example of at least 4 pools in other trades outbound from Marseilles.

Efforts to conclude a pooling agreement were made in 1962, in December 1963 and in the spring of 1964. The first two efforts broke down over the usually divisive issue of percentage shares. Concordia did not participate in the negotiations but Constellation did. Constellation did not join the pool because of its dissatisfaction with the share offered.

The pool agreement was reached because of the independent need

of the trade to curb malpractices and not in response to any suggestion from WINAC. It would be theoretically possible to divert WINAC cargo to Marseilles but this was not, in the view of the lines, a very real practical possibility.

The Marseilles pool calls for division of gross revenue, not net revenue after carrying money. There are, unlike WINAC, no regular calls of passenger ships at Marseilles, so it is not considered inequitable to pool gross revenues. Again there are no loading costs to the carrier on most of the Marseilles cargo. The cargo loading that is paid by the carrier, with respect to the traffic subject to diversion to North Europe, is a variant that would have made a net revenue pool very complicated.

As filed the agreement is to be effective from July 1, 1964 to December 31, 1966, and thereafter to be extended for 1 year at a time, subject to 3 months' notice of resignation. This permits, after the initial period, yearly renegotiation of shares.

The minimum sailings and calls provided in article 10 are substantially below those usually made by the lines, and represent in the aggregate only about half of those now being made.

Since July 1, 1964, the lines have considered that the pool would probably be approved. This, just as in the interim period pending the WINAC approval, has sharply reduced the malpractices in the trade. By paying a rebate, the line would risk in the event of the pool's approval, loss of the rebate in order to contribute the tariff rate of freight to the common fund. Svendsen said that Concordia, operating outside the conference and the pool, had noted a marked improvement in the trade.

In response to this improved situation, and in the expectation that the pool would be approved, the conference in December 1964 closed the rates that had been opened in 1962.

The pool members have since July 1, 1964, been submitting their statistics to the secretary who has been compiling the necessary records. No actual payments have, however, been made, and the bank guarantees are conditioned upon approval of the pool.

Even though Concordia, with 10-12 percent of the trade, and Constellation, with about 7 percent of the trade, remain outside the pool, the witnesses were of the opinion it could probably operate, though it could more surely achieve its objectives if they were members. The pool could not, function, however, if a major carrier such as APL or AEIL, or probably Fresco, remained outside. Concordia is considering re-entry into the conference and perhaps into the pool in view of the probable curtailment of malpractices.

In the opinion of the witnesses, the pool should be about as effective as that of WINAC in eliminating malpractices and promoting confidence among the carriers, but on the other hand, if the pool were disapproved, the trade would deteriorate very rapidly, malpractices would immediately resume, and APL, at least, would want to revert to open rates.

The lines feel that the formation of the pool may serve to reduce the excessive and costly service from Marseilles. Zim has already made a marked reduction in its calls. APL upon approval of the pool would seek somewhat to rationalize its service, perhaps on some voyages calling only to discharge interport cargo.

The pool could lead to a moderate increase in the rates in the Marseilles trade which are severely depressed; for example, owing to the effect of malpractices upon the tariff, the rates on aluminum sheets and dried cherries are now lower than they were in 1960.

Concordia, though it had resigned from the conference and refused to participate in the pool negotiations, had no complaint and thought the pool a necessary step to preserve the trade from collapse. Constellation was of a similar opinion.

DISCUSSION AND CONCLUSIONS

Section 15 requires "that every common carrier by water * * * shall file immediately with the Commission a true copy * * * of every agreement with another such carrier * * * or modification * * * thereof * * * pooling or apportioning earnings, losses, or traffic * * *." Once such an agreement is filed section 15 further provides that,

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other (s) * * *.

In approving the agreements in issue, the Examiner found that all the evidence of record supported approval and that there was a complete "lack of an iota" of evidence controverting approval of the pools. Consequently no finding could be made that the agreements in fact operated in one of the four ways set out in section 15. In so concluding the Examiner relied upon the recent decision of the Court of Appeals for the District of Columbia Circuit in *Aktiebolaget Svenska Amerika Linien (Swedish American Line) et al. v. F.M.C.* No. 18,554, decided June 10, 1965, wherein the court stated that, "The statutory language (of section 15) authorizes disapproval only when the Commission finds

as a fact that the agreement operates in one of the four ways set out in the section by Congress.”

The first of Hearing Counsel's three remaining exceptions is that “the Examiner erred in approving the agreements and amendments thereto on the grounds that there was no evidence weighing against approval.” This exception contains two separable contentions. First, Hearing Counsel argues that the record is “replete with evidence that the pools will permit less service and higher rates than would otherwise prevail.” And secondly, Hearing Counsel argues that the Examiner's ground for approval is based upon an erroneous interpretation of section 15, for in Hearing Counsel's view the Examiner's failure to recognize the existence of any adverse facts at all results in his holding that no derogation of section 15 standards is in anyway involved here. Hearing Counsel would have the Commission “clearly announce that pooling agreements which enable carriers to prevent rate and service competition are *prima facie* detrimental to the commerce of the United States and contrary to the public interest and may only be approved upon the basis of a compelling demonstration that the detriments of reduced service and increased rates will be offset by clear and substantial economic benefits.”

Respondents find nothing in section 15 which gives rise to any *prima facie* unlawfulness of pooling agreements, and insofar as Hearing Counsel's contention seeks to shift “the burden of proof” to respondents, they contend that the law is clear that the burden rests with the Commission or anyone else seeking disapproval of the agreements. They urge that the Examiner was correct in restricting his decision to the simple finding that no derogation of section 15 standards is involved and contend that because the evidence of record demonstrates that the pools will establish “stability” of rates and effect a “reduction of excessive and duplicating calls in overtonnaged trades, the agreements are in the public interest and not contrary to it.”

It is readily apparent that the area of disagreement here is relatively narrow and were its resolution not of significant importance for future consideration of agreements under section 15 we would not be inclined to deal with it at all in any great detail. However, the arguments here and those in some cases reveal a very real need for a clear statement of the ground rules, so to speak, which apply to our consideration of agreements filed for approval under section 15.

Of prime importance at the outset is the clear recognition that section 15 represents a departure from our national policy—the promotion of competition and the fostering of market rivalry as a means of insuring economic freedom. See Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, chap-

ter 1. The policy is one against "undue limitations on competitive conditions," *Standard Oil Co. of New Jersey v. United States* 221 U.S. 1 (1911), and is embodied in the Antitrust Laws, 15 U.S.C. sections 1 *et seq.* Agreements approved under section 15 of the Shipping Act are exempted from the provisions of the antitrust laws. This exemption was granted by Congress with clear recognition of the public interest in the promotion of free and open competition, and it was granted only after an intensive investigation by a congressional committee revealed that anticompetitive combination in the steamship industry was a lesser evil than the destructive rate wars which seem inevitably to result absent some anticompetitive agreement between the contending lines. Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, House Merchant Marine and Fisheries Committee, 63d Congress (1914) pages 415-421.¹² The investigation made it clear that in the steamship industry there was no "happy medium between war and peace when several lines engage in the same trade." However, in the view of the committee "to terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong or to avoid a costly struggle, they would consolidate through common ownership." In the opinion of the committee, neither result could be prevented by legislation and "either would mean a monopoly fully as effective, and it is believed more so, than can exist by agreement."

Thus, Congress legalized agreements otherwise in violation of the antitrust laws primarily because it thought even stronger monopolies would result were such agreements completely prohibited, but in doing so it accepted the committee's condition that the anticompetitive combinations be subjected to "effective government control with power in the agency administering the law" to disapprove or cancel agreements which are "detrimental to commerce of the United States or contrary to the public interest." We think it now beyond dispute that "the public interest" within the meaning of section 15 includes the national policy embodied in the antitrust laws. For as the court said in *Isbrandtsen Co. Inc. v. United States*, 211 F. 2d 51 (D.C. Cir. 1954); cert. denied *sub nom. Japan-Atlantic & Gulf Conf. v. U.S.*, 347 U.S. 990 (1954) :

[T]he Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under antitrust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure he conduct

¹² Also known as the Alexander Report.

thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute.

Thus, the question of approval 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) a consideration of the circumstances and conditions existing in the particular trade involved which the anticompetitive agreement seeks to remedy or prevent. The weighing of these two factors determines whether the agreement is to be approved. The essential ingredient in this process is, of course, information or data for without it no intelligent judgment as to the probable future impact of the particular agreement upon our commerce would be possible. Almost uniformly, the kind of information necessary to this judgment is in the hands of those seeking approval of the agreement and the resultant exemption of the proposed anticompetitive combination from the operation of the antitrust laws; and it is incumbent upon those in possession of such information to come forward with it. Thus, in this sense it can be said that pooling agreements are *prima facie* contrary to the public interest, and if this is the intent of Hearing Counsel's proposition we agree. For presumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act. This is but a restatement of what has already been said most recently in our decision *California Stevedore & Ballast Co. v. Stockton Port District*, 7 F.M.C. 75 (1962) where we denounced a monopolistic practice, notwithstanding the lack of actual proof that the anticompetitive evils alluded to actually existed, because "healthy competition for business which is the best insurance against such evils has been destroyed." We went on to say:

Respondents failed to advance evidence of economic or other advantages flowing from monopolistic arrangements, sufficient to justify them notwithstanding the evils and detriment to the public interest inherent in monopoly. Our national policy makes free competition the rule, and monopoly the exception which must be justified, and here respondents have failed to justify the desired monopoly.

This construction of section 15 is not novel with the Commission. The Civil Aeronautics Board, the agency dealing with transportation problems most closely akin to our own has said: ¹³

¹³ Section 412 of the Federal Aviation Act under which anticompetitive agreements between air carriers are filed was modeled after sec. 15. See *McManus v. C.A.B.*, 286 F. 2d 414 (2d Cir. 1961).

Where an agreement has among its significant aspects elements which are plainly repugnant to established antitrust principles, approval should not be granted unless there is a clear showing that the agreement is required by a serious transportation need, or in order to secure important public benefits. (*Local Cartage Agreement Case*, 15 C.A.B. 850, 852 (1952).)

And again in disapproving a traffic routing provision of a mutual aid pact between air carriers in cases of labor strike the Board said in *Six Carrier Mutual Aid Pact*, 29 C.A.B. 168 at 175 :

In weighing the objections to the traffic routing provisions of the agreement, we must recognize that our order of approval would grant immunity from the antitrust laws. We have, therefore, scrutinized the agreement to insure that the conduct thus legalized does not inhibit competition to any significant extent or, if it does that the restraint is necessary to serve the purpose of the regulatory statute. (*Local Cartage Agreement*, 15 C.A.B. 815 (1952); *North Atlantic Tourist Commission Case*, 15 C.A.B. 225 (1952).)

Since the record fails to show any sound public justification for the restrictive provision, we cannot let it stand.

Respondents reject Hearing Counsel's contention of *prima facie* unlawfulness, but they do so only upon the basis of the record in this proceeding. Respondents contend that the record here does not support the conclusion that pools lead to reduced service and higher rates. To the contrary, assert respondents, all the evidence demonstrates that "the pools have led and will lead to the elimination of malpractices, as well as to a reduction in excessive and duplicating loading calls in painfully overtonnaged trades." This is but another way of saying that competition will be restricted. It matters not at this stage of the approval process that such competition takes the form of "malpractices" or "duplicating loading calls in painfully overtonnaged trades." The fact that the competition restricted is wasteful, destructive or even constitutes a breach of conference obligations is precisely that counterbalancing factor which would outweigh the public interest in competition which is free, open and above board as envisioned by the antitrust laws. But, we think it patently clear that agreements within the purview of section 15 are specifically intended by the parties to eliminate competition and in fact do so. And the evidence in the record before us unequivocally demonstrates that this is the case with the pools here under consideration.

Virtually all of the evidence in the record was voluntarily supplied by the respondents in an effort to justify approval of the agreements, and in our opinion they have succeeded in their attempt. For by demonstrating that conditions in the trades involved have deteriorated to the point where malpractices flourish, rate instability exists and competition is wasteful and destructive, they have also demonstrated that approval of the agreements will, among other things, achieve the

regulatory objectives of restoring rate stability and eliminating malpractices. Moreover, while "rationalization of sailings" with a consequent diminution in service is one of the admitted goals of the pools it does not appear that the shipper will be harmed through service being reduced to a point of inadequacy. On the basis of the foregoing we concluded that conditions in the Mediterranean trades as demonstrated by respondents are such that approval of the agreements, under consideration here, if modified as set out below, will be consonant with the public interest in that while they 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 by the agreements is destructive and wasteful and in itself tends to work hardship on shippers through discriminatory rebates and the creation of rate instability. Moreover, that the circumstances in the trades are inimical to the best interests of the carriers operating in them is clear from the record. Thus, we think respondents have clearly justified approval of the agreements by their demonstration that they are necessary to produce important public benefits and are based on a serious transportation need.

A word of caution seems appropriate, however. Respondents admit that most, if not all, of the competitive activity which the pools are designed to curtail constitutes a breach of the respective conference obligations. This is particularly true of the WINAC trade where it is also admitted that all efforts by the WINAC Conference at self-policing have proved inadequate. Section 15 requires that the Commission "disapprove any agreement which after notice and hearing on a finding of inadequate policing of the obligations under it." We view this as a requirement which 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. We fully expect respondents to continue their efforts to establish an effective system of self-policing. In exercising our responsibility of continuing surveillance over section 15 agreements, we shall keep this in mind.

Hearing Counsel also contends that "the Examiner erred in failing to require that the agreements and amendments thereto be modified as urged by Hearing Counsel."

Hearing Counsel proposed a considerable number of amendments which the Examiner rejected apparently because he could not find "upon their faces" that without them the agreements would be unlawful under section 15. Respondents, of course, urge that the Examiner was correct in rejecting all of the modifications for the reason that he did. Again there seems to be some misunderstanding as to the Com-

mission's responsibilities under section 15. The Examiner seems to imply that unless an agreement on its face is contrary to section 15 the Commission is without power to require modification of the agreement as a condition to its approval. He further states:

There is sound reason for the rule. First, the law authorizes disapproval or modification only where the agreement is found "to operate"; i.e., that it *really will operate* to the detriment of commerce, not that it *may*, in the future, *possibly* so operate; or where it is found that the agreement is contrary to the public interest, not where some act that *could* possibly occur in the future *might* make it so. Second, the Commission has a ready remedy if, under an approved agreement, the parties engage in activities the Commission did not expect when it approved, and will not sanction.

As we understand the Examiner he concludes that unless we can find as a fact that an agreement "will operate" in a way which is detrimental to the commerce of the United States, etc., we cannot order it modified. Again this confusion seems to stem from the court's decision in the *Swedish American Line* case, *supra*, particularly the statement that section 15 authorizes disapproval (or modification) only if "the Commission finds as a fact that the agreement operates in one of the four ways set out in the section by Congress." The Examiner found that some of the proposed amendments were grounded on fears "foolish on their faces" and others required respondents to do that which the statute already required of them. He concluded that the latter were better suited to the general rule rather than on the basis of agreement-by-agreement modification. He then concluded that it was unnecessary "to set out in *haec verba*" the proposed amendments "or to discuss their merits or demerits."

A word about the *Swedish American Line* case, *supra*, is appropriate here. The court's conclusion that before the Commission could disapprove a portion of the agreement before it, it "must find as a fact that the agreement operates in one of the four ways set out by Congress" in section 15 must be considered in the light of circumstances of that case. Significantly, the agreement under consideration had been approved by a predecessor of the Commission and operations had been conducted under it for a good many years. Thus, the particular language of the court, whatever its validity as an abstract proposition, becomes meaningful when it is applied to an already approved agreement of long standing. Thus, in the *Swedish American Line* case it could be found "as a fact" that the agreement either had operated to the detriment of the commerce of the United States, etc., or it had not. But this cannot mean that in passing on future agreements we must "find as a fact" that the agreement "really will operate" to the detriment of our commerce or really will be contrary to the public interest. Such a find-

ing is without the realm of the possible. The most that can be done in such cases is to draw upon past experience and expertise and make a reasoned judgment, or perhaps prediction is a better word, as to the probable future impact of the agreement. This is far from finding as a fact that an agreement really will operate to the detriment of our commerce or be contrary to the public interest. After a careful analysis of the proposed modifications we find that we disagree with the Examiner's disposition of certain of them, and for the reasons set forth below our approval herein is conditioned upon the filing of appropriate modifications.

The modifications urged fall into two general categories: (1) those which Hearing Counsel urges are necessary to clear up ambiguities in the language of and inconsistencies within the agreements; and (2) those which Hearing Counsel urges are necessary to prevent operations under the pool from being detrimental to our commerce, etc. As to the former, these are termed "drafting" amendments by the respondents. They contend that draftmanship is their responsibility and even though they admit to many instances of ambiguity or inconsistency, they contend that the Commission is powerless to require a modification to remove them. An example of this kind of modification is the one which would replace the term "Neutral Body" which appears in article 13 of the WINAC agreement with the term "Control Committee." Hearing Counsel points out that the WINAC Conference agreement no longer provides for a neutral body but the WINAC pool does provide for a "Control Committee." Respondents concede the error in draftmanship and take the position that "section 15 cannot be directed to this sort of minutia" and further that different agreements even though filed by the same parties in the same trade, etc., need not be "consistent" with each other. We disagree.

On several occasions our predecessors have pointed out that, "All agreements should be complete and the language used should be so clear as to eliminate all necessity for interpretation as to the 'intent' of the parties." In the *Matter of Agreement No. 6510*, 1 U.S.M.C. 775-778, 2 U.S.M.C. 22; see also *Beaumont Port Commission v. Seatrain Lines, Inc.*, 3 F.M.B. 556, 581. Moreover, "To sanction two agreements under section 15 in conflict with one another would be contrary to the public interest," *Application of Red Star Line for Conference Membership*, 1 U.S.S.B.B. 504. The modifications upon which we condition our approval and a brief discussion of our reasons for requiring them are set out below. Proposed modifications of Hearing Counsel which are not required or otherwise specifically discussed are rejected as being unnecessary to the approvability of the agreements under section 15.

Article 2 of the WINAC Pool and article 9 of the Marseilles Pool provide in part:

* * * it being understood that the Line whose carryings are in excess of its share is bound to regulate its carryings as near as possible to its share, so that the amount to be paid or to be received from the pool shall be as small as possible.

In Hearing Counsel's view this provision is contrary to the public interest and detrimental to commerce because it binds carriers to adhere to the negotiated share thereby deterring the growth and expansion of the better services while perpetuating the poorer and it is completely unnecessary to carry out the proper objectives of the pool. Respondents simply take the position that while there may be no need for the provision there is equally no need for its elimination. We will require the deletion of these provisions. They are inconsistent with respondent's contention that service competition is not completely eliminated by the pools because each line is free to overcarry and pay the penalty therefor in order to be in a better bargaining position and increase its percentage when the pool shares are renegotiated at the end of the pool year. Our approval here is conditioned upon the removal of the objectionable language not upon a restatement of the intent of the parties, for the purported preservation of this modicum of competition was considered in reaching our decision to approve the agreements. Should the parties to these two agreements now state that they intend the lines to regulate carryings so as not to exceed their allotted shares, thus eliminating this vestige of competition, we would have to reconsider our decision to approve.

Hearing Counsel would amend the title and the first sentence of article 4 of the WINAC pool to reflect the fact that the article not only excludes certain commodities from the coverage of the agreement but certain charges as well. Respondents contend that this is trivia and, again that the Commission lacks authority to "improve drafting." We have already answered the latter, and as to the former it is from just such "trivia" that future disputes over the coverage of agreements and the parties' authority thereunder arise. It is, of course, in the public interest to insofar as possible prevent such future disputes. The modification will be required.¹⁴

Article 13 of the WINAC pool erroneously refers to a "Neutral Body" rather than a "Controlling Committee." We have already discussed this modification and it will be required.

Article 15 of the WINAC pool and article 17 of the Marseilles pool refer to "the term as per previous paragraph." However, the

¹⁴ Hearing Counsel would also add to each agreement a provision which provides for the filing of all modifications to the agreements for approval under section 15. Since the statute itself already requires this we see no need for an explicit statement of the requirement in the agreements. Respondents are presumed to know the law.

term indicated is not in the previous paragraph but the immediate one. These modifications will be required for the sake of clarity and ease of future handling of the agreements.

Article 15 of the WINAC pool, article 17 of the Marseilles pool and article 19 of the Adriatic pool all require that resolutions effecting changes in the membership of the respective pools shall be filed for approval under section 15 of the Shipping Act. However, in each of these agreements other articles provide that such resolutions shall be filed with the Commission only "for the information and records of the agency." It is not difficult to imagine the dispute which would arise if this inconsistency were allowed to stand. Respondents were clear in their desire to secure our approval of amendments to all the pools which would allow them to make so-called "interstitial" adjustments or changes in their agreements without the need for securing prior approval under section 15. Among the "interstitial" changes respondents would make without the necessity of approval are changes in membership. Yet they were unwilling to agree to Hearing Counsel's modification which was designed to remove an inconsistency which could possibly defeat the very purpose they sought to achieve. Such an unyielding stand for whatever reason taken does not square with respondents' later assertion of a willingness to cooperate in voluntarily modifying their agreements should we informally request them to do so, which of course is the only way respondents think the modifications may be accomplished. Here again respondents apparently misconceive section 15 and the nature of agreements approved thereunder. As we have previously stated a section 15 agreement is not a "sacrosanct private arrangement" with which only the parties thereto have rights. It is rather "a public contract impressed with the public interest and permitted to exist only so long as it serves that interest." *Pacific Coast European Conference*, 7 F.M.C. 27 (1961). The so-called "interstitial" amendments are more fully discussed below and the modifications here under discussion will be required.

Hearing Counsel would modify article 12 of the Adriatic pool, article 10 of the Israel pool and article 12 of the Medchi pool to provide for the filing of the provisional accounting statements drawn up by the secretary as well as the final statements.¹⁵ These modifications will be required to insure the filing of the statements in aid of our responsibility of continuing surveillance of operations under the agreements.

¹⁵ These modifications are unlike those proposed by Hearing Counsel to WINAC and Marseilles, for in those agreements the requirement that the provisional statements be filed is already provided for in another article therein and to adopt Hearing Counsel's proposals would be to redundantly state the requirement twice.

Hearing Counsel would modify all five agreements so as to exclude from their coverage "all pool cargo on which open rates apply." Hearing Counsel, citing the statement of one witness that pooling of revenue on open rated cargo would be "impossible," says that it was not the parties' intent to include such cargo within the scope of the agreements. Respondents, however, state that the testimony was purely "speculative" since there are at this time no open rates in effect and that they should be allowed to deal with the problem of open rates if and when it arises.

There is nothing in the record which would preclude respondents from pooling open rated cargo if the means for doing so could be found. However, our failure to require the proposed modifications is in no way to be construed by respondents as any form of implied authority to fix rates under the pooling agreement when the conference has declared them open. Respondents themselves agreed to the deletion during the hearing of a provision which would have authorized them to fix rates under the pooling agreements in the event of the dissolution of the respective conferences. The modification will not be required.¹⁶

In a similar vein, Hearing Counsel would modify the agreements to provide for the automatic termination of the pool concurrently with the termination of the conference within the scope of which the particular pool operates. Hearing Counsel states that this merely makes it clear that the pool terminates when the rate-fixing authority of the conference ends. We will not require these modifications because if the pool members desire to apply for rate fixing authority under their pooling agreements, if and when the conference governing the trade dissolves, they should in our opinion be allowed to do so.

Other proposed amendments of Hearing Counsel fall into the "operational" category. Thus, Hearing Counsel would alter the "minimum tonnage" and "range of ports" provisions of the WINAC and Medchi pools, the minimum contribution provisions of the WINAC, Adriatic, and Israel pools and the "credit for calls" provision of Marseilles. All of these modifications are necessary in Hearing Counsel's view to prevent operations under the agreements from being detrimental to commerce and contrary to the public interest. We are of the opinion that Hearing Counsel has failed to muster enough record evidence to support his proposals. No detriment past or future has been shown. We will not require the modifications.

¹⁶ Of a somewhat similar thrust is Hearing Counsel's proposed deletion of references to the "Inspection Service" in article 8 of the Marseilles pool. Hearing Counsel points out that the pool does not yet have an inspection service. Respondents, however, point out that it is in the process of establishing one. We will allow them to provide for this contingency in the agreement.

Paragraph 2 of article 17 of the Marseilles pool provides:

Members who want to resign from the Pool before December 31, 1966, shall be allowed to do so, giving three months notice, subject however that such Member undertakes not to take any part whatsoever in the traffic covered by the Pool before December 31, 1966.

Hearing Counsel would delete this provision on the ground that it unnecessarily stifles competition by conditioning withdrawal upon cessation of all participation in the trade. Respondents on the other hand explained the provision as necessary to prevent disruption of the trade and the pool by reaping the benefits of the trade without any of the restrictions imposed by the pool. The purpose of the provision is to prevent resignations for "quick profit" reaped from a "trade" built up by pool members. In respondents' view there are only two reasons for withdrawing from the pool, either the line is withdrawing from the trade completely or it thinks it can make more money outside the pool. It is the latter which respondents seek to prevent. The Marseilles pool is due to expire on December 31, 1966.

The question here is whether the restriction is a reasonable exaction from a line desiring to reap the benefits of the pool. There is no evidence that the provision has harmed shippers or ports. In this instance we think the restriction is reasonable. However, should respondents seek approval of an extension of the pool, we shall have to reconsider the impact of this provision. The modification will not be required at this time.

Hearing Counsel would modify article 2 of the Israeli pool which conditions membership in the pool upon membership in both the inbound and outbound conferences in the trade. Hearing Counsel would condition pool membership only upon membership in the conference governing the particular trade be it inbound or outbound. There are at present no one-way operators in the trade and in our opinion the record does not justify adoption of the modification at this time. Should such an operator enter the trade and desire to pool, we will, of course, examine the condition afresh.

Hearing Counsel would amend article 17 of the Israeli pool and article 19 of the Medchi pool to make it clear that resolutions extending the duration of the agreements must be approved by the Commission before they become effective. When dealing with other provisions of WINAC, Marseilles and Medchi, respondents themselves agree that extensions of the duration of the agreements require approval under section 15 before taking effect. However, they refused to agree to these modifications. It is clear that extensions do require approval, thus the modifications will be required.

During the course of the hearing, respondents proposed to amend each agreement by the addition of an article which would allow the parties by resolution to make so-called "interstitial amendments" to the pooling agreements without securing prior approval under section 15 although copies of the resolutions would be filed with the Commission for its "information and records." Article 16 of WINAC which is typical provides:

The Governing Committee acting under Article 11 hereof is authorized by resolution carried by unanimous vote of all member lines: to admit new members to this Pool Agreement; to change the percentage division of net freight among the members as provided in Article 2; to change the minimum number of sailings and calls provided in Article 3; to add to or subtract from the list of commodities excluded from this Agreement by Article 4; to change the amount of the carrying money or the exceptions provided by Article 5; and to change the amount of the bank guarantee provided by Article 14. It is authorized by three-quarters of the voting power present at a meeting with a quorum to change the number of days or the amount of the fine or penalty specified in Article 8, Article 9 and in the 6th and 7th paragraphs of Article 11. The text of any resolution adopted under this Article 16 shall promptly be filed with the Federal Maritime Commission, or any agency succeeding to its function under the Shipping Act, 1916, for the information and records of such agency.

Certain of the amendments placed in issue by the order of investigation in this proceeding provide for such things as changes in membership, changes in the carrying money, etc. These have not yet been approved, and as a result certain lines have withdrawn from the pools and others have entered them in theoretical violation of section 15.

Behind these proposed amendments is the dispute between Hearing Counsel and respondents over our authority to approve section 15 agreements "retroactively" or as respondents and the Examiner would have it "agreements bearing earlier effective dates." Whatever nomenclature is employed, Hearing Counsel, the respondents, and the Examiner are all talking about the same thing—the authority of the Commission to approve an agreement for a period prior to the effective date of that approval. Hearing Counsel contends that section 15 forbids such an approval¹⁷ while respondents and the Examiner find nothing in section 15 which prohibits it. For the sake of convenience and to avoid all possibility of an incorrect paraphrasing we set forth *in extenso* the Examiner's resolution of this issue:

There remains for consideration the question as to whether the Commission would approve the *Israel* agreement (filed August 2, 1963, effective date August 1, 1963) or the *Marseilles* agreement (filed July 23, 1964, effective July 1, 1964) and a number of amendments without requiring modification so as to provide effective dates not earlier than the date the Commission approves them. Hearing

¹⁷ This is Hearing Counsel's fourth and final exception to the Initial Decision.

Counsel contend (1) that as a matter of law, the Commission *cannot* approve these agreements as they stand, and (2) that as a matter of discretion, the Commission *should* not approve them as they stand. In both contentions Hearing Counsel is incorrect.

The Commission's authority and all limitation thereon must be found in section 15 of the Act. Section 15 does not expressly or by implication forbid the Commission to approve an agreement because it bears a past effective date. Such an agreement *may* be disapproved by the Commission if *but only if* the Commission finds that it violates one of the standards set out in section 15, either because it bears a past effective date or because of something else. Section 15, by saying that the Commission shall disapprove agreements found to violate its standards, but "shall approve all other agreements" instructs the Commission to approve such other agreements regardless of what "effective dates" they bear.

It may be stressed again that section 15 is unambiguous. Even if it could be considered ambiguous, the Commission and its predecessor, the Federal Maritime Board, have for more than ten years considered that it authorized approval of agreements bearing effective dates prior to approval dates, and have approved such agreements. This consistent administrative construction of section 15 is well-known in the trade, and respondents had a right to rely upon it. Such long-continued administrative construction of a statute is given great weight by reviewing courts, and has almost the effect of law.²⁸ Nevertheless, the Commission—if convinced that it had in this particular been violating the law since the Commission was created—would not hesitate to reverse its predecessor and itself. It is not so convinced.

Section 15 contains no prohibition against "retroactive" approval, and even if such prohibition existed elsewhere, as it does not, that would not bar approval in this case, because approval of agreements bearing effective dates prior to their approval dates is *not retroactive*. It does not purport to authorize, legalize, validate, or exempt from the operation of the antitrust laws *in the past* any agreement or action, for this it *cannot* do in the face of the specific provisions of section 15 that any "agreement not approved * * * shall be unlawful"; that "before approval * * * it shall be unlawful to carry out such an agreement; and that only agreements "lawful under this section" shall be excepted from the provisions of the antitrust laws. As authorized, it does all these things for the future, and *only for the future*. Hearing Counsel's contention that by approving such antedated agreements in the past, the Commission approved unlawful conduct after it transpired, and thereby nullified violations of the Act and the antitrust laws, and would again do these things by approving here is unsupportable.

Hearing Counsel concedes that "the economic consequences of the *Marseilles* pool have already occurred and * * * *all that remains* (to be done) *is the settlement of accounts*. Those consequences may neither be done or undone by Commission approval, disapproval, or modification of the agreement" (emphasis supplied). The same may be said of the *Israel* agreement. It follows that all that would be accomplished by refusing to approve except upon condition that the effective dates be changed to the approval date would be frustration of

²⁸ Less than 100 days ago it was pointed out in *Aktiebolaget*, quoted above, that: "Where the disapproval follows a history of prior approvals, as here, * * * we think that the finding should be scrutinized by a reviewing court with greater care" (slip opinion, p. 5, footnote 5).

equitable division of pool revenues, a pointless punishment, in favor of which nothing has been or can be said.

No more has been or can be said against approval of the "antedated" amendments (see exhibits 7, 11, 12, 13) than has been said against approval of *Marseilles* and *Israel*, and this is stated on page 65 of Hearing Counsel's brief to be "that section 15 flatly precludes such approval." As this contention (which disclaims any argument that these amendments violate any of the four section 15 standards, and there exists no evidence to support a finding that either the agreements or any of the amendments do in fact violate any of these standards) is incorrect as a matter of law, the amendments as well as the *Israel* and *Marseilles* pooling agreements should and will be approved (*Aktiebolaget*, and pages 3-4, *supra*).

Situations may conceivably arise in which the approval of an agreement bearing an effective date in the past is shown to result in damage to somebody. This has not been shown here because it could not be shown. The one thing Hearing Counsel seeks to prevent—distribution of pool revenue—will damage nobody, and indeed it would be inequitable to prevent it under the circumstances of this case. The pooling agreements cannot be held contrary to the public interest because, *subject to the Commissioner's approval*, they authorize distribution to be effected *after such approval*. Not even the act to be performed by the conference (as distinguished from the Commission's act in approving); i.e., the division of pool revenue based on sailings made in the past, can be considered objectionably retroactive, for the measurement of present payments by past events (as in tax statutes) has many times come before the courts and been approved.

The most there is to be said for Hearing Counsel's position is that it suggests that a rule with respect to the dates of pooling agreements *might* be desirable *as a matter of policy*, and could be considered in a rulemaking proceeding in which all interested parties could thrash out the pros and cons (Cf. *Hasman & Baxt*, *supra*, page 13).

We disagree with this resolution of the issue.

Section 15 actually renders unapproved agreements unlawful in two situations. First, section 15 requires that agreements when reached must be "immediately" filed with the Commission. Thus, an agreement which is made but not filed for approval is unlawful even though no action is taken by the parties under it. *Unapproved Section 15 Agreements—North Atlantic Spanish Trade*, 7 F.M.C. 337. Secondly, section 15 makes it unlawful to carry out "in whole or in part, directly or indirectly" an unapproved agreement. Thus, where as here an agreement has been filed and is pending approval it is only unlawful for the parties to carry out the agreement, the agreement itself is not unlawful. All the parties and the Examiner agree that the Commission may not approve an agreement in such a way as to render lawful that which the statute explicitly declares unlawful, and therefore the Commission may not approve an agreement so as to validate conduct under the agreement prior to its approval. But while respondents and

the Examiner agree to this they disclaim this effect as a result of the approval of the agreements here. The basic contention is that approval of the agreements with their present earlier effective dates is not offensively retroactive because it simply allows the parties to the pool to measure their future conduct (distribution of pool revenues) by past events (the percentages previously agreed upon). But if respondents are correct there is no need whatsoever for approval back to the earlier effective date. For by their own reasoning they have done nothing in the past which requires our approval and the only "carrying out" to be approved, the distribution of revenue, will take place in the future and subsequent to our approval. Respondents never successfully resolve this dilemma; nor in our opinion can they. The settling of accounts or the distribution of revenue under the pool is but the culmination or final act in the total carrying out of a pooling agreement. Prior to this, the parties agree to percentages, minimum sailings and port call requirements, fix bank guarantees and amounts of penalties and carrying money, and agree to various other features of the pool. A pool secretary is appointed, the lines submit their manifests to him and he draws up pool statements and issues debits and credits, and presumably the parties meet and discuss pool matters. It defies credibility to then assume that after establishing this elaborate plan for the curtailment of competition that the individual lines continue their operations in the precise manner they were conducted prior to agreement, particularly when as here operations were conducted under the assumption that our approval will allow them to distribute revenue on the basis of operations begun immediately. The record in this proceeding is filled with evidence that this is not in fact the case. In every trade here involved the witnesses noted "improvement" due either to approval already granted or more importantly to approval assumed to be forthcoming. The improvement cited is the return of rates upward from their previously "depressed levels" and the reduction of port calls and turnaround time. But it is contended that this improvement consisted of the elimination of "malpractices" and thus could not be found detrimental to commerce or contrary to the public interest under section 15, and thus, under the *Swedish American Line* case, *supra*, it is not grounds for disapproval.

Section 15 does not distinguish in any way between conduct under an agreement which is beneficial to commerce and conduct which is detrimental to commerce—it prohibits all conduct prior to approval of an agreement. The reason for this is eminently sound. For to adopt the other philosophy would place the Commission in the impossible position of disapproving conduct which has already occurred and which

may have worked irreparable harm to shippers, other carriers, or ports. Respondents themselves seem to admit that retroactive approval of rate-fixing agreements would not be lawful under the statute; however, the reasonable and consistent result of their argument dictates that they could be approved if it could later be shown that the agreement was beneficial to our commerce. We think it clear that Congress never envisioned such a result. The granting of an exemption from the anti-trust laws on condition that the anticompetitive combinations be brought under government control could not contemplate an *ex post facto* control which from the standpoint of effectiveness is no control at all. On the basis of the foregoing we conclude that section 15 clearly prohibits approval of an agreement or any modification or extension thereof which bears an effective date earlier than the date of our approval.

Respondents, however, offer a series of practical difficulties which they contend will flow from a construction of section 15 which precludes retroactive approval of pools. It will, they contend, be well nigh impossible to form an effective pool if its operative effect is to be from some indeterminate date in the distant future because the incentive to malpractice continues until approval. Additionally, respondents point out that certain lines have withdrawn from and others have joined the various pools and that the amendments effecting these changes have not yet received approval—thus, these lines are operating in “technical violation” of the Act. As to the former, our own experience has been that at least part of the delay has been attributable to the failure of parties to section 15 agreements to accompany their filings with any information or data explaining the purpose of the agreement and the circumstances existing in the particular trade which warrant its approval. And in some instances when this information is informally requested, it is refused thus necessitating resort to formal process.

As to the problem of getting quick approval for changes in membership and other interstitial amendments, that has been rendered moot by our action below on the proposed amendments dealing with “interstitial changes.”

We consider these proposed amendments lawful under section 15. It has long been recognized that “every” agreement within the literal meaning of section 15 is not of necessity required to be filed for Commission approval and that some actions may be viewed as routine. *Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927). It is not necessary here to set out seriatim those matters which have been found routine and those which have not. The relevant test is whether or not the agreement as filed sets out in adequate detail the procedures to be

followed under it. *Joint Agreement Between Member Lines of the Far East Conference and Member Lines of the Pacific Westbound Conference*, Docket 872, decided July 28, 1965. The matters covered by the proposed amendments do not result in new anticompetitive procedures or devices. The filing requirement coupled with our responsibility for continued scrutiny of operations under the agreement should afford adequate protection against excesses or abuses. The modifications will be approved.

There remain only a number of modifications urged by Hearing Counsel as necessary to prevent approval of the agreements under consideration retroactively. While Hearing Counsel contends that we are without power to approve these agreements so long as they bear their present earlier effective dates, he recognizes that this construction of section 15 overrules at least a decade of consistent administrative interpretation the other way. It is evident that respondents relied on this interpretation in filing their agreements. The question is whether it would be equitable to hold respondents liable for activity done in reliance upon this prior construction of section 15. We think not. Nor would withholding our approval in this instance serve any regulatory purpose under the Shipping Act. The situation we find ourselves in here is somewhat akin to that of the National Labor Relations Board when it reversed its long standing refusal to assert jurisdiction over the building and construction industry. When the assertion of jurisdiction was made retroactively the court said:

The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing the law abhors. *NLRB v. Guy F. Atkinson Co.*, 195 F. 2d 141 (9th Cir. 1952)

Because of the circumstances present here we will approve the agreements bearing their earlier effective dates, but we wish to stress that future agreements filed with the Commission will not receive such approval. This action renders moot all but two of Hearing Counsel's proposed modifications dealing with retroactivity; i.e., the deletion of the phrase "effective in the manner and on the date agreed by such unanimous consent" from article 15 of the WINAC pool and article 19 of the Adriatic pool which articles deal *inter alia* with extensions of the duration of the pools. We will require these amendments lest there be some confusion in the future over respondents' right under the language in question to extend a pool with a retroactive effective date.

The agreements as they were considered and approved by the Examiner were those appearing in exhibit 93 of the record in this pro-

ceeding. During the hearing a succession of amendments were agreed to by the parties and approved by the Examiner. However, due to an oversight these amendments were not included in the agreements as they appeared in exhibit 93. Respondents submitted revised pages to the agreements incorporating the amendments. The revised pages have been inserted in exhibit 93 and are now part of the record. The Examiner's approval of these amendments with which we agree is set forth below:

- (1) Paragraph 1 of article 6 of the WINAC agreement to be amended by deleting language which respondents concede "would set up an improvised rate-making conference without some of the terms required by section 15 (of the Act) and without having all of the necessary terms of that agreement spelled out" (Hearing Counsel's Brief, 89-90; Respondents' Answering Brief, 35-36).
- (2) Article 10 of the WINAC agreement to be amended so as to require that minutes and pool statements shall be filed "promptly" (Hearing Counsel's Brief, page 92; Respondents' Answering Brief, page 37).
- (3) The last paragraph of article 13 of the Medchi agreement to be deleted and the following substituted:

The secretary shall submit immediately to the Federal Maritime Commission full and complete reports including all material facts relating thereto, of all complaints, disputes and matter presented to, and all actions taken by the parties and/or the arbitrators.

All records of the pool and that of the arbitrators with respect to the provisions on the above requirements shall be available for inspection by the Commission or its representatives. Nothing contained in this agreement shall interfere with the rights of the parties hereto under the Shipping Act, 1916, as amended, or the jurisdiction of the Federal Maritime Commission under said Act.

The last paragraph of article 13 presently provides:

At the termination of each pool period, a report giving a general description of every complaint or other matter disposed of during such pool period by the arbitrators pursuant to this article shall be promptly furnished the governmental agency charged with the administration of section 15 of the Shipping Act, 1916.

The substitute language is taken from article 13 of the WINAC agreement, and, as Hearing Counsel demonstrates, it is obviously preferable from a regulatory angle. (Hearing Counsel's Brief, pages 100-101; Respondents' Answering Brief, page 40.)

- (4) Article 13 of the Adriatic agreement to be amended identically with the amendment to article 13 of the Medchi agreement (see (3) above), and for the same reasons (Hearing Counsel's Brief, pages 104-105; Respondents' Answering Brief, page 41).
- (5) Paragraph 3 of article 2 of the Israel agreement to be eliminated (Hearing Counsel's Brief, pages 107-108; Respondents' Answering Brief, page 42).
- (6) Article 11 of the Israel agreement to be amended identically with the amendments to article 13 of the WINAC agreement and article 13 of the Adriatic agreement (see (3) and (4) above), and for the same reason (Hearing Counsel's Brief, page 112; Respondents' Answering Brief, page 43).

- (7) The last two sentences of paragraph 1, article 8 of the Marseilles agreement to be deleted. This is in line with the agreed amendment to article 6 of the WINAC agreement, indicated in (1) above (Hearing Counsel's Brief, pages 117, 89; Respondents' Answering Brief, pages 45, 35-36).
- (8) Articles 11 and 12 of the Marseilles agreement to be amended in line with article 10 of the WINAC agreement (see (2) above) and for the same reason (Hearing Counsel's Brief, pages 120, 92; Respondents' Answering Brief, pages 46, 37).
- (9) Article 15 of the Marseilles agreement to be amended in line with article 13 of the Medchi agreement and article 13 of the WINAC agreement (see (3) above) and for the same reasons (Hearing Counsel's Brief, pages 121, 100; Respondents' Answering Brief, pages 46, 40).

For the foregoing reasons, and if they are modified to conform with our decision herein, we will approve the agreements. An appropriate order specifying the required modifications and conditioning our approval thereon will be issued.

COMMISSIONER JOHN S. PATTERSON, concurring and dissenting:

I concur that Agreements Nos. 8680, 9020, 9060, 9233, and 9361, together with amendments or modifications by respondents of Agreements Nos. 8680-3, 8680-4, 8680-5, 9020-2, 9020-3, 9020-4, 9020-5, and 9060-1, referred to in our Orders served December 16, 1964, March 11, 1965, April 2, 1965, and May 28, 1965, in Docket No. 1212, titled "Mediterranean Pools Investigation (Discontinuance of Dockets 1169 and 1178)" should be approved, but dissent from requiring modifications by the Commission as a condition of approval and from the decision that the aforesaid agreements may be approved as lawful from their effective dates instead of from the date of our approval.

A. As the preceding report has noted, we have before us exceptions to an Examiner's initial decision approving, pursuant to section 15 of the Shipping Act, 1916, as amended (Act), pooling agreements filed by respondent common carriers by water in foreign commerce, as defined in the first section of the Act, as follows:

1. Thirteen common carriers in trade between the West Coast of Italy, Sicily, and Adriatic ports and United States North Atlantic ports, westbound service (Agreement No. 8680 and amendments 1 through 6, exhibit No. 11).

2. Eight common carriers in the trade between Mediterranean and U.S. Great Lakes ports, westbound service (Agreement No. 9020 and amendments 1 through 7, exhibit No. 12).

3. Two common carriers in the trade between Adriatic and U.S. North American ports, westbound service (Agreement No. 9060 and amendments 1 through 3, exhibit No. 13).

4. Two common carriers in the trade between Israel and U.S. ports, both westbound and eastbound service (Agreement No. 9233, no amendments, exhibit No. 14).

5. Seven common carriers in the trade between Marseilles, France, and U.S. North Atlantic ports, westbound service (Agreement No. 9361, no amendments, exhibit No. 15). (Each agreement and its amendments are herein referred to as an "agreement".)

B. Based on the record before me in this proceeding, my conclusions are as follows:

1. Each of the five agreements listed above should be approved, without requiring modifications not heretofore accepted by the respondents.

2. The Commission's approval should apply from the date of the order of approval and should not relate to obligations or acts before the date of our order.

3. The Commission should expressly rule on all exceptions presented.

C. My conclusions in 1. and 2. above result from the following proposed rulings on the four exceptions made herein:

1. The exception that the Examiner erred in approving the subject pooling agreements on the grounds that there was no evidence weighing against such approval should be sustained.

2. The exception that the Examiner erred in rejecting every proposed finding of fact offered by Hearing Counsel on the grounds that the facts were irrelevant or unsupported should be sustained.

3. The exception that the Examiner erred in failing to require that all the agreements be modified as urged by Hearing Counsel should be overruled.

4. The exceptions that the Examiner erred in approving Agreement No. 9233 and Agreement No. 9361 (items A.4. and A.5.) retroactively; and erred in approving various new amendments to the previously approved Agreement No. 8680, Agreement No. 9020, and Agreement No. 9060 retroactively (items A.1., A.2., and A.3.) should be sustained.

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

1. A majority of the Commissioners reasons that the "pools here under consideration" eliminate competition and are *prima facie* contrary to the public interest in the sense that the burden of proving otherwise is on respondents, but these agreements are also "in furtherance of the regulatory purposes of the Shipping Act in that the competition to be eliminated by the agreements is destructive and wasteful

and in itself tends to work hardship on shippers through discriminatory rebates and the creation of rate instability." These statements are preceded by a description of prior agency decisions on these subjects and of conditions thought to exist.

My reasoning begins from another starting point, namely, that the record proved, after inspection of evidence, that the agreements either have caused or will provide an incentive to make fewer calls at fewer ports (i.e., provide less service) at higher freight rates than prevailed before the agreements existed.¹⁹ As a matter of fact, these consequences were part of the acknowledged purposes of the agreements. It was not proven, however, that service diminished and rates increased in two of the five trading areas covered by the agreements, but the evidence of such conditions in three of the five areas, coupled with expert opinion regarding possibilities elsewhere and the agreement provisions authorizing service changes, permits the conclusion that the conditions may be realized. Such evidence contradicts what the Examiner stated, and there is plenty of evidence warranting consideration against approval. The evidence supporting disapproval was responsive to the initiating order; therefore, the evidence was relevant and required for a rational determination of the issues created by the order. For these reasons the first exception should be sustained.

2. Higher rates and less service, without more, are detrimental to commerce and contrary to the public interest because increased costs and diminished profitability to shippers tend to occur and inhibit the maximum international exchange of goods in foreign commerce. If we stop at this point, disapproval would be required. The record proved a great deal more, however.

It was proven:

a. The diminished service has not gone below the needs of shippers and American consignees. The diminished service provides more efficient service for shippers, and is less wasteful for carriers.

b. The agreements ended a threat of competition so severe as to imperil the ability of competing carriers to provide any service from the Italian and Marseilles areas to the United States.

¹⁹ WINAC—service, exhibits 6, 11; rates, exhibit 45. Medchi—service, exhibits 12, 25, 39; rates, no exhibits. Adriatic—service, exhibits 13, 40, 87 (tonnage in relation to calls shows good service); rates, no exhibits. See: West Coast of Italy North America Conference tariff in FMC files. Israel—service, exhibit 88, schedule B, Tr., 784. The only two carriers are each subsidized or financed by governments and service is governed by political, geographical, and economic factors not related to competition. No change of service before and after pool. Rates, record refers to threatened ability to start a rate war. Exhibit 88, schedule A, telex 3/2/63 Lewison to DeSmedt. Tr., 756, 781-782, 815. No record agreement led to increases. See: exhibit 46. Marseilles—service, no exhibits, rates, exhibit 47 (wine and aluminum only).

c. The tariff rates were not the effective rates, because of actual or threatened malpractices, until the agreements came into effect. Thereafter the incentives for malpractices were removed and shippers could trust the integrity of posted rates. The rates were made and the practices existed in foreign countries not otherwise controllable from the United States.

d. The agreements remove the incentives for service competition in excess of needs of ports, causing the carriers wasteful costs in commerce with the United States.

e. There is an excess of carrier capacity over shipper demand westbound compared to eastbound. A lesser demand for capacity causes an incentive to lower rates below economic levels to capture westbound cargoes. The agreements provide an incentive to maintain fixed rate levels.

(All the above factors were not proven as to all five areas, nor any factor as to any area to the same degree, but were shown to exist to some extent or potentially.)

The above factors offset and outweigh the detriment to commerce and contrariety with public interest established by other evidence, not by presumption. Increased costs and diminished profitability are restraints on private commerce which have to be considered in a context of many other economic factors. The result of the equation using detrimental or contrary factors offset by substantiated economic benefits is an evaluation requiring approval of the agreements under section 15.

All the above factors on both sides were developed from the record evidence and were summarized in proposed findings offered by Hearing Counsel. They were substantiated by similar proposed findings by respondents. The findings were supported by evidence necessary to the validity of arguments as to offsetting economic factors and relevant to the Order of Investigation. The Examiner was mistaken in rejecting the proposed findings; therefore, the second exception should be sustained.

3. Hearing Counsel asked that 19 subjects be covered by modifications before approval of the agreements. Some modifications of agreements were agreed to by respondents and adopted by the Examiner. I have no disagreement as to approval of agreed-to modifications. The third exception asserts the Examiner failed to rule properly on the remaining modifications. I would overrule the third exception and approve the respondents' agreements without requested modifications dealing with the following subjects covered by the designated agreements:

(1) Objection is made to an obligation to limit carryings. The carrier "whose carryings are in excess of its share, is bound to regulate its carryings as near as possible to its share * * *" (No. 8680, art. 2, and No. 9361, art. 9). This obligation deters growth and expansion of better services and perpetuates poor service. To the extent of a need to restrict overcarriage, the penalties provide the remedy. A carrier should, however, be allowed to pay the penalties if there is an advantage to do so and to expand service. The unmodified agreement would normally be held a detriment to commerce. In oral argument it was stated the agreement had been translated from Italian into English and in briefs the legal term "bound" was said to have limited application or to be qualified to "as near as possible" and consistently with a carrier's own purpose and plans. I assume we are dealing with honorable people and when they amplify these terms to state the true meaning to be, in effect, that each carrier will not be precluded from improving service, taking more shipments, and paying penalties, this interpretation and action will be put into effect. No breach of contract in addition to penalties will be asserted. The implications of the inconsistent penalty and other provisions will be honored, and there is no need to modify the language to eliminate the obligation. If we should ever find out such an interpretation is not being observed, a far more serious situation will be presented, but there is no need to assume such actions.

(2) Objection is made to a minimum tonnage provision at ports. Departures from other than specified ports are credited to designated ports provided "a minimum of 300 tons of weight cargo has been loaded" at the designated ports in the case of one agreement. Other specified places and minimums apply to the other agreement (No. 8680, art. 3, and No. 9020, art. 9). The purpose of such customarily used restrictions is to prevent competition from forcing uneconomic calls on carriers. In most cases the minor ports are located near major ports and carrier service is provided to the area in any event. The limit also promotes regular service. Modification is not required.

(3) A provision would be added to allow carriers to obtain credit for outport departures from ports other than Naples (No. 8680, art. 3, and No. 9020, art. 9). Testimony showed no port other than Naples loaded cargo in the specified trade range. We ought not to rewrite agreements to develop unproven trade possibilities in foreign countries, nor should we compel, once the principle of a pooling agreement is accepted, the uneconomic diversification of service. A pooling agreement purports to provide minimum adequate and regular service to achieve greater efficiency. There is no doubt there may be less

service under a pooling agreement and the public at eliminated ports loses direct service, but this is thought to be necessary to achieve the dominant consideration of greater economy and efficiency of ship operation without sacrificing service to an entire area.

(4) Objection is made to a reference to exclusion of certain charges in a section title and in an introductory sentence. The text of the obligating provision covers the subject adequately and the proposed references merely serve to improve the drafting (No. 8680, art. 4).

(5) A provision would be added to cover the subject of open-rated commodities; i.e., commodities on which freight rates are fixed by each carrier rather than by the conference. Open-rated cargo does not have to be expressly excluded from the agreements' obligations (Nos. 8680, 9020, 9060, 9233, and 9361). The difficulties of administering agreement provisions in such an eventuality are speculative and do not now exist. If carriers use the absence of any obligation on the subject, together with existing provisions, to distribute losses during a rate war or to operate collectively as a "fighting ship" forbidden by section 14 of the Act, other facts and issues not now foreseeable will arise which may be dealt with later.

(6) Objection is made to an obligation to make a minimum pool contribution measured per 1,000 kilos carried regardless of rate basis. The purpose of the minimum contribution is to ensure that no member carries cargo without pool accounting because the rate is less than the handling charge and to avoid any effort by low-cost lines to force a rate down to the average handling costs or below. The required minimum contribution provides a cushion over 1961 handling costs to discourage noncompensatory rates. The purpose is legitimate and no modification should be required. (No. 8680, art. 5, No. 9060, art. 5, No. 9233, art. 5.)

(7) A provision would be added to terminate the agreements when conference rate-fixing authority ends. There is no doubt there can be no rate-fixing authority without express approval under section 15, but it does not follow that failure expressly to provide for termination of the agreements when they become unworkable for lack of conference rates violates the tests of section 15 (Agreements Nos. 8680, 9020, 9060, 9233, and 9361).

(8) A provision would be added to compel submission to the Commission of quarterly statements in addition to annual statements. If the Commission requires information it may be requested pursuant to section 21 of the Act or required by rules applicable to all equally, but not compulsorily by creating obligations intruded into private con-

tracts. The absence of the quarterly information obligation from the agreements violates no section 15 standard (No. 8680, art. 9, and No. 9361, art. 11).

(9) Objection is made to the reference to "Neutral Body" instead of "Controlling Committee," because there is no "Neutral Body" provision in the related conference agreement. Respondents have conceded the error, but challenged the authority to require modification under section 15. Agreements should tell the truth, and variances creating false information ought to be eliminated, regardless of authority to compel accuracy, although public interest would be served by greater accuracy. Nevertheless, respondents' statement that the parties can be trusted to modify ("clear up") the agreement without Commission action is acceptable (No. 8680, art. 13, and No. 9361).

(10) Objection is made to an erroneous reference to a term "as per previous paragraph" instead of the immediate one. Here, too, inaccuracy may be contrary to the public interest, but the commitment to correct is acceptable (No. 8680, art. 15, No. 9361, art. 17).

(11) Modification would be required to reflect the consensus that advance, properly-provided-for changes in membership obligations require no further approval under section 15. Respondents agree, but challenge authority to compel the modification. Respondents' assumption of responsibility, which is taken to be an honorable assumption of a duty to modify, is acceptable (No. 8680, art. 15, No. 9060, art. 19, and No. 9361, art. 17). In my opinion, withdrawal and addition of signatories to an agreement is not routine or interstitial, and a duty to file exists by virtue of section 15, regardless of any contract obligation to the contrary.

(12) Objection is made to certain terms covering effective periods of agreement. In addition to the issue of whether agreements may be performed before Commission approval, the issue is made that agreements to be performed in the future may include phrases which make the agreement "effective in the manner and on the date agreed by such unanimous consent" (No. 8680, art. 15, No. 9060, art. 15); or "valid for the period, August 1, 1963," through a specified date (No. 9233, art. 17); or "effective as from" a specified prior time to a specified date (No. 9361, art. 17); all meaning that agreements may be performed before approval dates. The conclusions herein as to the invalidity of any retroactive effect of Commission approval eliminate a need to require modification because the provisions may not legally be performed by the carriers, no matter what terms are used. The proposed language may not confer authority to disregard the law. A retroactive amendment of the annual extension provision by any vote would

equally violate the prohibitions of section 15. I would agree that amendment of the duration provision of agreements requires express Commission approval, but no modification of these agreements is required.

(13) A provision would be added compelling modifications to be filed with the Commission. All agreements described in section 15, including modifications, are required by law to be filed. The compulsion of section 15 of the Act is all that is needed. Compelling an additional contract obligation to do what the law requires is an unauthorized intrusion into carriers' private contracting rights (no opinion is expressed here to what may be "interstitial" or "routine" as distinguished from modifications requiring filing) (Nos. 8680, 9020, 9060, 9233, and 9361).

(14) Objection is made to provisions for setting aside money to pay for an inspection service if one is established by the conference (No. 9361, art. 8). Questions are raised as to the wisdom or policy of the provisions, but detriments to commerce and the offense to the other tests of section 15 are not shown. The facts as to the inspection service have not materialized to a point where any showing can be made. The details have yet to be embodied in contract obligations. When the administering provisions are negotiated and subscribed to, there will be time enough to review the future filed agreement.

(15) Objection is made to a provision authorizing a committee to give credit (i.e., waive penalties) for a discharging call at ultimate port of destination on request "in special circumstances" not described (No. 9361, art. 10). It is not shown how the lack of standards for waiving penalties or possible conflict with another article (art. 18) are discriminatory, detrimental to commerce, or otherwise in violation of section 15 standards.

(16) Objection is made to a provision obligating a resigning carrier not to take any "part" in the "traffic covered by the pool before December 31, 1966," but if the pool is disbanded before then prior resigning lines shall not be precluded from serving (No. 9361, art. 17). The object is to prohibit carriers from receiving the benefits of a stabilized trade without contributing to the condition and without accepting any of the restraints. The provision unquestionably stifles competition, but is one of the sacrifices for other benefits, and therefore is not an undue restraint of otherwise contrary to section 15 tests. There is not enough testimony to establish whether the penalty on the resigner is excessive.

(17) Carriers should be compelled to file with the Commission provisional statements and divisions of accounts in addition to annual

statements (No. 9020, art. 12, No. 9060, art. 12, No. 9233, art. 10). For the reasons given above under item (8) the agreement need not be modified.

(18) Objection is made to the provision which denies carriers freedom to enter into a pooling arrangement eastbound if they do not desire to have one westbound or vice versa (No. 9233, art. 2) and any member of the eastbound or westbound conferences in this trade should have the right to become obligated with respect to operations in one direction only. At the moment there are only two parties to this agreement, each to some extent government-supported by the nations at either end of the trading route: the United States and Israel. There has been no other operator for the last 5 years, and no new operations appear contemplated as far as this record shows. The present agreement has the unanimous support this type agreement requires for success. If any new carrier later chooses to become a party on the terms of a one-way participation and shows on facts developed at that time that refusal to allow one-way participation would violate the Act, the issue of one-way versus two-way participation rights may be adjudicated. The agreement before us on the present facts should not be disapproved for lack of obligations dependent on abstract or presently nonexistent factors.

(19) Modification of the termination or extension provisions by requiring that new agreements on such subjects be filed with the Commission is requested (No. 9020, art. 19, No. 9233, art. 17). For the reasons given in items (7) and (13) above, the modification is not necessary to approval.

For the reasons given in items (1) through (19), modifications should not be required, and the third exception that the Examiner erred in failing to require all the modifications, as urged by Hearing Counsel, should be overruled.

4. One of the issues ordered in this proceeding is whether any provisions of the agreements may be approved "for any period of time prior to such approval or can be made applicable to any period of time prior to such approval" (pp. 8-9, item 15, Order served December 16, 1964). The Examiner decided, after stating his reasons in favor of approval of "antedated agreements", "* * * the amendments (of Agreements Nos. 8680, 9020, 9060) as well as the Israel (Agreement No. 9233) and Marseilles (Agreement No. 9361) pooling agreements should and will be approved." The Examiner made retroactive approval contingent on factual findings supporting or not supporting detriments to commerce, discrimination, etc., under section 15. My colleagues, by a majority, say they "disagree with this resolution of

the issue" and decide (a) "where * * * an agreement * * * is pending approval * * * the agreement itself is not unlawful," but may not be approved "so as to validate conduct * * * prior to its approval" and (b) to "approve the agreements bearing their earlier effective dates." The results between (a) and (b) above conflict. If the agreement is approved the conduct is validated. The distinction made between the "agreement itself" and "conduct" under the agreement is conceptual and has no practical basis. When parties create obligations to do certain things and to change power relations between them by agreement as of a certain date, they do not engage in frivolous activity, but undertake serious responsibilities having practical effects. It is impossible to approve agreements bearing earlier effective dates without also approving the parties' conduct for the period between the effective date and the date of approval. We are dealing with realities, not abstractions. For the purpose of my reasoning there is no difference between the words of agreement and the obligation to alter conduct immediately after the effective date. Agreements may be entered into and be dated any time the parties choose, but the effective date of obligations to alter conduct may not be until the moment of the Commission's order of approval and language does not change the situation.

Having concluded that my colleagues' reasoning is on shifting sands, the next question is to decide why the date of the Commission's order establishes the beginning of lawfulness for all of the agreements before us. The resolution of this question applies to both the amendments and the agreements to be approved for the first time. It is decided both law and policy require the above conclusion, and section 15 may not be qualified by equitable considerations.

The other Commissioners hold that an interpretation of section 15 which "overrules at least a decade of consistent administrative interpretation the other way" would not be "equitable," and they say that "because of the circumstances present here we will approve the agreements bearing their earlier effective dates * * *." The result accomplished must be that it is lawful to carry out the agreements between the effective date stated in the agreements and the date of the approving order. The effective date of the agreements may be before the date of the order. I see at least two objections to reasoning in support of this result. First, the statute forbids the result by its terms, and, second, there is nothing equitable about the result.

The applicable language of section 15 is as follows:

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlaw-

ful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; * * * (there follows nonapplicable provisions relative to tariffs covered by section 18(b)).

The statute makes unlawful agreements "not approved" and makes agreements lawful only "when and as long as approved." The "when and as long as" language marks out the beginning and duration of lawfulness of all agreements, whether filed or not, that might otherwise be unlawful because in violation of the Act of July 2, 1890, "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended, and sections 73 through 77 of the Act approved August 27, 1894, as amended (15 U.S.C. 1-11), and excepts the agreements from the provisions of these laws generally regarded as "the granting of an exemption from the antitrust laws" as the preceding report states. Unapproved agreements are not only unlawful, but before approval it is unlawful to "carry out"; i.e., perform any agreement "in whole or in part, directly or indirectly." Therefore, before the date of the Commission's order of approval and right up to the moment of approval both the agreements and the performance thereof are unlawful, no matter what date or dates may be in the agreements. The sole and only significant date is the date on our order which concludes adjudication under section 15. This interpretation is consistent with the policy of the law which is to protect the public from the consequences of potentially anticompetitive activity until after the Commission has reviewed the provisions of filed agreements and on the basis of its analysis has concluded that the activity will not result in discrimination or detriments to commerce, and will meet the tests of section 15 in spite of any anticompetitive effect. There is no need to assume anyone is going to be prosecuted for an unlawful agreement between the date of filing and the date of approval; and speculations about a gap in the law ought to remain theoretical as long as no one performs the agreement during this period. As far as this reasoning is concerned, it does not matter whether respondents take out any "effective date" language or not, because the requirements of law are going to be the same with or without the offending language. The reasoning of my colleagues' report seems to agree, when they state section 15 "prohibits all conduct prior to approval of an agreement," and Congress never intended "retroactive approval," but the full meaning is extracted only by examining the consequences to which the rhetoric leads in action or by considering its full effect. When they state

further after saying it would not be equitable: "Because of the circumstances here we will approve the agreements bearing their earlier effective dates," I can only conclude that both the agreement and performance thereof, before the date of our order, is approved and the consequences and effect of their decision are identical with the Examiner's "resolution of the issue" that the agreement and the actions before the date of our order are lawful and section 15 has not been violated. The inconsistency is not removed by stressing "that future agreements filed with the Commission will not receive such approval." On the contrary, the error becomes conviction by the prejudgment of future adjudications or the announcement of a rule of future conduct without going through rulemaking procedures prescribed by section 4 of the Administrative Procedure Act, whichever is intended by the decision.

I dissent from reasoning which reaches one result by a correct interpretation of the law and the conclusion that puts the opposite result into effect and that provides one decision for these respondents and another for everyone else.

My reasoning on the "equitable" issue is that that (1) a balancing of interests between respondents and the public will show there is no equity in favor of respondents, and (2) equity is served by making respondents assume the consequences of their own interpretation of the law.

The quality of being equitable is discovered after balancing opposing advantages and disadvantages. My colleagues refer only to the disadvantages of holding respondents "liable for activity done in reliance on a prior construction of section 15," as though only disadvantage to respondents is involved. We should balance against holding respondents liable the consequences to the public of not holding respondents liable. By not holding respondents liable, the public is deprived of protection from otherwise prohibited activities during the period before approval. From the effective date of agreements obligations are created and actions follow. For example, (1) the commodities moving in foreign commerce which are subject of the agreement and thus affected by the tendency to higher rates are designated; (2) accounting and other pertinent information of the otherwise competing pool members is made available to the pool administrator for the purpose of making decisions as to how much each has earned is to be divided among them in accordance with the percentages agreed upon; (3) the minimum number of cargo loading and discharging calls at assigned ports is specified affecting competitive service at such ports; (4) percentages of undercarriage and

overcarriage are agreed upon for the purpose of measuring payments among lines and tonnage limitations are observed; (5) faithful performance guarantee money, administrative expense money, is fixed and deposited subject to disbursement by the pool administrator; (6) amounts allowed carriers as "carrying money" before credits to a common fund; i.e., percentages of gross manifested freight charges to cover certain fixed expenses; and (7) the carriers in the trade who are to be included and excluded from the agreement are selected by negotiation. In short pool carriers operate in many respects as one carrier with the concentrated competitive power such an aggregation would have. The allocation by percentages of money required by the acts performed (even though not finally distributed), the service required by the agreement, and the acts controlling the allocations were all accomplished without review of their effect on the section 15 standards of discrimination, unfairness, the public interest, or detriments to foreign commerce before the date of an order adjudicating the disapprovability of the agreement. The public's interest in the determination of whether statutory tests are met before anything happens outweighs any possible equity in protecting the applicants for approval of pooling agreements.

Nevertheless, it seems to be reasoned, we will not allow retroactive approval in the future for others, thus protecting the public in the future. This reasoning is reflected in the statement that we will "require" amendments deleting the phrase "effective in the manner and on the date agreed by such unanimous consent" (art. 15 of Agreement 8680 and art. 19 of Agreement 9060) "lest there be some confusion in the future over respondents' right under the language in question to extend a pool with a retroactive effective date." The reasoning reflects the fallacious distinction between rhetoric and action.

The decision applies only to this case because it "overrules at least a decade of consistent administrative interpretation the other way." It is not believed the consistent administrative interpretation exists in the form of an express agency interpretation of the law one way or the other. The administrative interpretation exists only by inference from the fact of many approved agreements having earlier dates than the approval date, but without any discussion of the real issue of approving acts and obligations before a certain date, nor of the significance of the date and without any proven statement of agency position on retroactive approval. Applicants for approval may have acted as though they interpreted approval to relate back to the dates they chose and the agency may have failed to demur, but this action and failure is not an administrative interpretation. This conduct is

only risktaking by past applicants and silence and inaction by the agency. Silence and inaction ought not to be translated into consistent administrative adoption of misinterpretation. See: *H. Kempner v. FMC*, 313 F. 2d 586 (1963), *certioraria denied* October 14, 1963. Approval under section 15 of an exclusive patronage contract dual rate system by silence was held unauthorized. "The discriminatory rates here involved were not approved by the regulatory agency merely because it was silent concerning them. . . ."

Assuming I am mistaken about the meaning of past actions, equity is not served by departing from the rule that an interpretation of the law by an adjudicating agency merely states what the law has always been and speaks for the future only with regard to the same facts. Agencies are always free to change decisions even if to do so may injure those taking action in reliance on earlier interpretations. Equity is not abused by adjudicated decisions changing earlier interpretations, assuming my colleagues are changing their views. A great many court decisions invalidate past actions. I have never known misplaced reliance on legal interpretation to be a problem, either for these respondents or anyone else. The man who trusts the decision of an inferior court or trusts his own interpretation of precedent takes a chance of miscalculation as one of life's risks. His misplaced trust is no different from any other misconception of duties. There is no reason for treating these respondents more favorably in the name of equitable results. We are always subject to suffering for lack of ability to prophesy accurately. The respondents, no less than anyone else, are entitled to no insurance against being losers. (See Commissioner Patterson's dissent in *The Dual Rate Cases*, 8 FMC 16, and Merrill, Circuit Judge, decision in *Pacific Coast European Conference, et al. v. Federal Maritime Commission and United States of America*, 350 F. 2d 197 (9th Cir. 1965).) My colleagues' willingness to add an equitable exception to section 15 to ease what I interpret as their rationalizing problem is not acceptable. If precedent is needed to sustain these observations, see *Central Land Company v. Laidley*, 159 U.S. 103 (1894) (erroneous decision of a state court construing a statute less favorably to validity of a deed than earlier decisions does not involve a taking of property without due process); *Helvering v. Hallock*, 309 U.S. 106 (1940) (administrative decisions may change to cause loss of former advantage).

Equitable considerations aside, it is believed the need for consistency implied in a need to apply 10 years' administrative "interpretation" by silent consent to this case is far outweighed by a policy of maintaining correct legal principles, by not adopting misinterpretation.

For reasons of either law, equity, or policy, the fourth exception regarding retroactive approval of agreements should be sustained.

D. Summary.

For the reasons advanced above, my ultimate conclusion requires my concurrence in the other Commissioners' decision in regard to approval of Agreements Nos. 8680, 9020, 9060, 9233, and 9361, and their amendments in Nos. 8680-3, 8680-4, 8680-5, 9020-2, 9020-3, 9020-4, 9020-5, and 9060-1, and my dissent in regard to (1) requiring as a condition of approval modifications not acceptable to the respondents; (2) failing to decide the date of any initial approval must be the date of the Commission's order herein; and (3) failing to rule expressly on Hearing Counsel's exceptions.

The initiating order did not notify the respondents of any charge they were carrying out agreements before approval; consequently, no findings are made on this subject.

The initiating order referred to 15 topics for determination of issues. To the extent these topics have not been expressly dealt with herein, they are no longer relevant or have been covered by the reasoning or the conclusions required to be decided under the Act. There is a fully adequate response to these issues in the Reply Brief of Hearing Counsel (pp. 4-11).

COMMISSIONER HEARN concurring and dissenting:

In my opinion on this record the five separate agreements which are the subject of this proceeding, as amended to date and if further modified in accordance with the majority's opinion, are not contrary to the Shipping Act, 1916, and are approvable, except that I disagree with the majority and hold that the Israel and Marseilles pools, or any other agreements subject to section 15 of the Shipping Act, may not be approved *nunc pro tunc*. My judgment in this regard is based on the clear meaning of that section:

Any agreement * * * shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part * * * any such agreement * * *

The contention that the agreements will not be carried out until *after* Commission approval, because the accounts of pool members will be settled only then, is a patently defective argument. It is an argument, nevertheless, which has mesmerizing qualities. The central point of this argument is that since accounts will not be settled until *after* approval (and in the event that approval is denied, money or credits will not be transferred among the parties), then no agreement within the purview of section 15 has been carried out. But the settlement of accounts is only the final step in the total scheme, and that

step is the one with which the Commission is least concerned. The anticompetitive activities adopted by the parties are the principal concern of the Commission. And in passing upon agreements tendered for approval, ours is the obligation to determine whether such restrictions render the proposed conduct of the parties lawful or unlawful under the Shipping Act *before* they are carried out.

It is beyond doubt that the carrying out of an unfiled agreement is a violation of section 15. And it is likewise well settled that the failure promptly to file an agreement or present it for approval constitutes a violation of that section. *Unapproved Sect. 15 Agreements—S. African Trade* 7 F.M.C. 159 (1962). *Unapproved Sect. 15 Agt.—Coal to Japan/Korea*, 7 F.M.C. 295 (1962).

The authority of the Commission to approve anticompetitive conduct *in futuro* only, is pointed to in *Oranje Line et al. v. Anchor Line, Ltd. et al.*, 6 F.M.C. 199 (1961) where our predecessor stated:

The purpose of Sec. 15 was to place in Board custody information and proofs which the Board could review and analyze and make up its mind about whether the requirements of the second paragraph of Sec. 15, public interest, etc. were being followed.

Clearly, if "the requirements of the second paragraph of section 15 * * * (unjustly discriminatory, detrimental to the commerce of the United States, contrary to the public interest or in violation of the Act) being followed" were to be determined after the agreement was completely executed (save inter carrier bookkeeping), the Commission would be without any meaningful power to protect the public interest. It is impossible to do this except *in futuro*, and that to attempt it retroactively subjects the Commission to one more added pressure to approve an agreement. Our obligations to measure prospective section 15 agreements against the standards enunciated in that section are indeed grave. *Nunc pro tunc* cases, by the very nature of things, are virtually impossible to overturn. In such cases the only alternatives are legitimization of otherwise unlawful conduct, or a declaration of unlawfulness with consequent jeopardy for penalties. Unfortunately, neither alternative provides for the protection of the public interest, which is the principal concern of the Commission.

APPENDIX

- The pools, the respondents and their short form designations are:
- "WINAC"—Italy/U.S. North Atlantic Freight Pool, Agreement No. 8680.
 - "AEIL"—American Export Isbrandtsen Lines, Inc.
 - "APL"—American President Lines, Ltd.
 - "Concordia"—Concordia Line A.S.
 - "Costa"—Giacomo Costa fu Andrea.
 - "Fabre"—Compagnie Fabre—Societe Generale de Transports Maritime.
 - "Fassio"—Villain & Fassio E Compagnia Internazionale di Genova.
 - "Hansa"—Deutsche Dampschiffahrts Gesellschaft "Hansa."
 - "Italia"—"Italia" Societa per Azione di Navigazione.
 - "Jugolinija"—Jugoslavenska Linijska Plovidba.
 - "Maersk"—A. P. Moller—Maersk Line.
 - "Zim"—Zim Israel Navigation Co., Ltd.
 - "*Medchi*"—Medichi Freight Pool, Agreement No. 9020 AEIL.
 - "Concordia/Niagara"—Concordia Line Great Lakes Service and Niagara Line (Oranje Lijn N. V.) Fabre.
 - "Jadranska"—Jadranska Slobodna Plovidba.
 - "Montship/Capo"—Gestione Esercizio Novic—G.E.N.—Montship Lines Limited.
 - "Canada Orient"—United Arab Maritime Co.
 - Zim.
 - "*Adriatic*"—Adriatic /North Atlantic Range Freight Pool Agreement No. 9060.
 - AEIL.
 - Jugolinija.
 - "*Israel*"—Israel-U.S.A., U.S.A.-Israel Freight Agreement No. 9233.
 - AEIL.
 - Zim.
 - "*Marseilles*"—Marseilles-North Atlantic U.S.A. Freight Pool Agreement No. 9361.
 - AEIL.
 - APL.
 - Favre.
 - Fassio.
 - "Fresco"—Stockholms Rederiaktiebolag Svea and Rederektionenlag Frederika.
 - Hansa.
 - Zim.

FEDERAL MARITIME COMMISSION

DOCKET No. 1212

MEDITERRANEAN POOLS INVESTIGATION

ORDER

This proceeding having been instituted 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 Agreements 8680, 9361, 9060, 9233, and 9020, as they appear in exhibit 93, be modified as herein set forth :

1. *Agreement 8680*

(a) *Article 2*: Delete the following language from the last paragraph :

* * * it being understood that the Line whose carryings are in excess of its share, is *bound* to regulate its carryings as near as possible to its share, so that the amount to be paid or to be received from the pool shall be as small as possible. (Emphasis supplied.)

(b) *Article 4*: Amend the title of the article to read :

Commodities and Charges Excluded From This Agreement.

and amend the first sentence of article 4 to read :

The following commodities and charges are excluded from this agreement :

(c) *Article 9*: Modify the final sentence of paragraph 3 to read :

Copies of quarterly provisional and final yearly statements shall be promptly filed with the Federal Maritime Commission.

(d) *Article 13*: Delete in the first sentence of the first paragraph the term "Neutral Body" and the reference to "article 12" and substitute in lieu thereof, and respectively, the term "Controlling Committee" and the reference "article 17."

(e) *Article 15*: Modify the last clause of the last sentence of paragraph 2 to read as follows :

* * * if one or more other Members have meanwhile given due notice of withdrawal on or before March 31, 1966, on March 31 of any subsequent year.

(f) *Article 15*: Delete the phrase "or change in Membership" on line 4 of paragraph 5 and insert the word "or" between the words "termination" and "extension."

(g) *Article 15*: Delete the phrase "effective in the manner and on the date agreed by such unanimous consent" from paragraph 5 at lines 2 and 3.

2. Agreement 9361

(a) *Article 9*: Delete the provision immediately following the enumeration of pool percentages which states:

* * * it being understood that the Line whose carryings are in excess of its share is bound to regulate its carrying as near as possible to its share, so that the amount to be paid or to be received from the Pool shall be as small as possible.

(b) *Article 17*: Modify the final sentence of paragraph 4 to read as follows:

Irrespective of this term of notice, any Member may present valid notice of withdrawal within ten days prior to the date of expiration of the pool, if one or more other Members have meanwhile given due notice of withdrawal on or before September 30th, 1966, or September 30th of any subsequent year.

(c) *Article 17*: Delete the phrase "or change in membership" on the third line of paragraph 7, and insert the word "or" between the words "termination" and "extension."

3. Agreement 9060

(a) *Article 12*: Restate the final paragraph as follows:

Copies of annual pool statements of settlements as between the parties under this Agreement; Division of Accounts; and Provisional statements as provided for by Article 10 shall be filed promptly with the Governmental agency charged with the administration of section 15 of the Shipping Act, 1916.

(b) *Article 19*: Delete the phrases "or change in Membership" and "effective in the manner and on the date agreed by such unanimous consent" from the last paragraph at lines 3, 4 and 5.

4. Agreement 9233

(a) *Article 10*: Amend the final paragraph to include, between the words "all" and "Pool" on the first line, the following:

Provisional statements and.

(b) *Article 17*: Modify the present final paragraph by inserting the words "as prescribed in the preceding paragraph" between the words "agreement" and "shall" on line 2, and add the following sentence to the end of the paragraph:

This Freight Pool Agreement may, however, be terminated at an earlier date or extended beyond the periods foreseen above by unanimous consent and notice of such termination or extension shall be furnished promptly to the aforementioned agency for approval.

5. *Agreement 9020*

(a) *Article 12*: On the first line of the final paragraph insert between the words "all" and "annual" the following:

provisional statements and

(b) *Article 19*: Delete the phrase "unless otherwise resolved by unanimous decision of all Members" from the first sentence of the first paragraph and modify the final paragraph to read as follows:

This Freight Pool Agreement may, however, be terminated at an earlier date or extended beyond the periods foreseen above by unanimous consent and notice of such termination or extension shall be furnished promptly to the Federal Maritime Commission for approval.

It is further ordered, That Agreements 8680, 9361, 9060, 9233, and 9020, as modified herein, are hereby approved, provided, however, that if respondents fail to submit the required modifications within 60 days from the date of service of this order the approval granted herein shall be null and void.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1136

INVESTIGATION OF INCREASED SUGAR RATE IN THE ATLANTIC/GULF— PUERTO RICO TRADE

Decided January 25, 1966

Increased rate on refined bagged sugar from ports in Puerto Rico to ports in the United States mainly on the Gulf of Mexico found not to be unjust or unreasonable. Proceeding discontinued.

William N. Ruqua, Edward M. Shea, and John Mason for Association of Sugar Producers of Puerto Rico, Central Aguirre Sugar Co., Central Roig Refining Co., Puerto Rican American Sugar Refinery, Inc., and Western Sugar Refining Co., interveners.

Mark P. Schlefer and T. S. L. Perlman for Lykes Bros. Steamship Co., Inc., respondent.

Robert J. Blackwell and Norman D. Kline as Hearing Counsel.

REPORT

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

This is an investigation to determine the lawfulness under the Shipping Act, 1916 (the act), and the Intercoastal Shipping Act, 1933 (the 1933 act), of the increased rate of 85 cents on sugar refined or turbinated, in bags (refined sugar), from ports in Puerto Rico to ports in the U.S. mainly on the Gulf of Mexico, of respondent Lykes Bros. Steamship Co., Inc. (Lykes).

The Association of Sugar Producers of Puerto Rico and four of the member refiners intervened in opposition to the increased rate.

Hearings were held before Examiner Charles E. Morgan who issued an initial decision to which exceptions and replies have been filed.

The prior rate of Lykes was 75 cents. Respondent Lykes' 85-cent rate was protested by the Commonwealth of Puerto Rico, but was not

suspended, and it became effective on August 10, 1963.¹ Two of the four refiner interveners do not ship to Gulf ports.

Generally, 1962 cost figures were accepted in the record as pertinent to the issues because they had been available for detailed study.

In 1962, and 1964, no bagged refined sugar was carried by Lykes from Puerto Rico to U.S. Gulf ports. In 1963, Lykes carried a total of 2,445 long tons of this sugar on three voyages, all at the 75-cent rate.

Respondent's rate previously was increased from 59 cents to 75 cents effective January 4, 1963. The rate of Waterman Steamship Corp. of Puerto Rico on refined sugar from Puerto Rico to U.S. Gulf ports is 75 cents. It became effective on April 14, 1964, and also was an increase from a rate of 59 cents. American Union Transport and Alcoa Steamship Co., Inc., two carriers providing service from Puerto Rico to U.S. North Atlantic ports, both provide rates on refined sugar of 75 cents in lots of less than 500 tons, and 65 cents in lots of 500 tons or more.

Lykes calls at Puerto Rico as part of its Line A service. Its vessels in this service also call at ports in the West Indies, the Canal Zone, the Dominican Republic, Haiti, Colombia, and Venezuela. Two C-2 vessels have been used in the recent Line A service, and the duration of a round voyage is roughly 4 weeks.

In 1962, Lykes made 26 sailings in this combined domestic-foreign service, carrying 61,739 payable tons of foreign cargo. Also, in 1962, in addition to the above 26 sailings, Lykes made 2 sailings which served only foreign ports, carrying 8,576 payable tons. The total in the foreign segment of the service was 70,315 payable tons for 28 sailings or an average of 2,511.25 revenue tons per sailing.

The domestic (Puerto Rican) cargo on the 26 sailings in the combined domestic-foreign service in 1962 totaled 156,280 payable tons, or an average of 6,010.73 tons per sailing.

These 26 sailings made 169 direct port calls at ports outside of the continental United States, of which 91 calls or almost 54 percent were in the foreign trade, and 78 calls or 46 percent were at ports in Puerto Rico.

A computation by interveners of straight line mileages to foreign ports and to Puerto Rican ports times the number of calls at the ports shows 54.2 percent of the mileage so computed to be to the foreign ports, and 45.8 percent to the Puerto Rican ports.

Lykes prepared a statement of its vessel operating results for 1962 in the Puerto Rico trade in accordance with the Commission's General

¹The Commonwealth did not participate in the hearing and did not file a brief.

Order No. 11, promulgated June 2, 1964. Total vessel operating revenue of \$3,506,631.47 was exceeded by total vessel operating expense of \$3,585,876.22, leaving a direct loss on vessel operations of \$79,235.75. After allowances for depreciation, inactive vessel expense, and losses from other shipping operations and related companies, the total loss for 1962 was \$542,441.75 in the Puerto Rico trade.

The details of the operating results for 1962 shown by Lykes are.

Total vessel operating revenue.....	\$3,506,631.47
Total vessel expense.....	1,282,291.41
Agency fees and commissions.....	123,178.80
Wharfage and dockage.....	119,907.68
Other port expense.....	123,069.02
Stevedoring and other cargo expense.....	1,895,200.95
Other voyage expense.....	42,219.36
Total vessel operating expense.....	3,585,867.22
Direct loss from vessel operation.....	(79,235.75)
Overhead.....	322,100.00
Depreciation.....	79,664.00
Net loss from vessel operations.....	(480,999.75)
Inactive vessel expense.....	485.00
Loss from other shipping operations.....	9,240.00
Loss of related companies.....	51,717.00
Total new loss.....	(542,441.75)

The cost of moving a long ton (2,240 pounds) of sugar in the Puerto Rico trade by Lykes in 1962 was computed by the respondent to be \$26.69 includes the following items:

Vessel expense.....	\$9.28
Agency fees.....	.89
Wharfage and dockage.....	.87
Other port expense.....	.89
Stevedoring and other cargo expense:	
Loading.....	5.23
Discharging.....	6.31
Other voyage expense.....	.31
Overhead.....	2.33
Depreciation.....	.58
Total	26.69

No cost elements are included above for inactive vessel expense, or losses on other shipping operations or related companies.

Lykes' long ton vessel expense, other voyage expense, overhead, and depreciation computations are based on the ton-mile method of allo-

cating expenses to the Puerto Rico trade. Lykes' total of 156,280 revenue tons in the Puerto Rico trade in 1962 amounted to 138,205 long tons. Dividing this tonnage into the total vessel expense of \$1,282,291.41 produced the figure above of \$9.28 vessel expense per long ton. The other expenses per long ton above were computed similarly except that stevedoring and other cargo costs were based upon actual costs on two voyages on which sugar was carried in 1963, being voyage No. 65 Gibbs Lykes, and voyage No. 77 William Lykes. These actual costs were \$5.23 per long ton for loading and \$6.31 per long ton for discharging sugar.

In contrast to the above total cost for sugar of \$26.69 per long ton, the revenue at the 85-cent rate amounts to only \$19.04 a long ton, or a loss of \$7.65 a long ton.

While interveners did not offer any specific figures or results in accordance with their criticism of the figures of Lykes, the latter made such a calculation in the rough per long ton :

Vessel expense.....	\$7.32
Agency fees.....	.89
Wharfage and dockage.....	.87
Other port expense.....	.89
Stevedoring and other cargo expense:	
Loading.....	5.23
Discharging.....	6.31
Other voyage expense.....	.24
Overhead.....	1.82
Depreciation.....	.45
	<hr/>
Total	24.02

Vessel expense as recomputed by Lykes using methods designed to meet interveners' criticism totals \$1,011,274.26 or about 78 percent of the \$1,282,291.41 of vessel expense as computed under respondent's revenue ton-mile prorate. Lykes took the difference of \$271,017.15, and divided it by 138,205 long tons to obtain a reduction of \$1.96 a long ton from \$9.28 to obtain the recomputed vessel expense per long ton of \$7.32 shown above. The other voyage expense of \$.31 per long ton, overhead of \$2.33 per long ton, and depreciation of \$.58 per long ton were each reduced to 78 percent to obtain the respective figures above of \$0.24, \$1.82, and \$0.45. The agency fees, wharfage and dockage, other port expense, and loading and discharging figures were not changed. As seen above, the revised total cost per long ton of \$24.02 still exceeds the revenue of \$19.04.

THE INITIAL DECISION

The Examiner found in his initial decision that Lykes' 85-cent rate was not unlawful. In so finding he placed some reliance upon a ton-mile method of allocating expenses although he also maintained that the finding that the contested rate was not unlawful would have been sustained under any allocation method of record in the proceeding.

DISCUSSION AND CONCLUSIONS

We believe that interveners' exceptions are without merit and that the 85-cent rate of Lykes is lawful.

Basically, interveners except to the Examiner's use of the ton-mile formula in allocating certain costs of Lykes (total vessel expense; other voyage expense; overhead; and depreciation) to its domestic service. They contend that these costs are directly assignable, and that the ton-mile method of allocation is further deficient in failing to segregate vessel expense at sea and vessel expense in port.

As we have often said in proceedings to determine the reasonableness of rates, "cost finding is not an exact science." See, e.g., Docket 1066, *Alcoa Steamship Co.—General Increases in Rates in the Atlantic Gulf Puerto Rico Trade*, mimeo p. 15; *Increased Rates on Sugar*, 7 F.M.C. 404, 411 (1962).

We believe that the use of the ton-mile formula for the allocation of the above-mentioned costs to Lykes' domestic service is proper in this proceeding. The relative merits and faults of the ton-mile formula were discussed at length in Docket 1066, *supra*, in which that formula was applied in the allocation of vessel expenses, overhead and depreciation. The observations made in that case are applicable here.

All voyages of Lykes are inseparably in both services and the costs mentioned above are not directly assignable. As Lykes operates, vessels would not be proceeding to or stopping at Puerto Rico unless they were also carrying cargo in the foreign trade, nor would they move to or call at foreign ports unless they were carrying Puerto Rican cargo. Furthermore, vessel depreciation and overhead occur at all times, not only during those periods in which vessels are used in one particular service.

The ton-mile formula does in fact consider steaming expense and port expense. Steaming expense is closely correlated to distance. However, for a very sound reason, the ton-mile formula limits the steaming miles used to those representing the shortest navigable distance between the port of lift and the port of discharge. Through this de-

vice excess steaming expenses due to circuitous routes, storms at sea, ballast legs, etc., and all vessel expenses incurred while in port, are allocated on the basis of the most efficient transportation (i.e., shortest route possible) for each specific ton of cargo.

Although interveners challenged the use of the ton-mile formula in this proceeding, they did not propose an alternative method of allocation. It moreover appears that studies to determine expense at sea and vessel expense in port would be economically prohibitive in this case.

Lykes, in fact, attempted to answer the objections of interveners by recomputing the nondirectly assignable expenses along lines suggested by interveners. The difference between Lykes' directly assigned costs (\$14.19 per ton) and the revenue allowed at the 85-cent rate (\$19.04 per ton) is \$4.85. It is not possible that the allocated costs for total voyage expense, other voyage expense, overhead and depreciation could be less than \$4.85 under any reasonable allocation method. Intervenors are not bound by Lykes' recomputation purporting to show that the 85-cent rate is noncompensatory. However, even if "corrections" of the ton-mile formula suggested by interveners are used, a rough calculation shows that the 85-cent rate would be noncompensatory. This would be true even if the costs assigned by Lykes to the domestic trade were reduced by as much as 61.2 percent.

Intervenors also maintain that the initial decision (1) was unfavorably influenced against them because of the small amount of the commodity at issue which moves by respondent's service, (2) holds erroneously and irrelevantly that intervenors are not damaged by the challenger rate, and (3) fails to make proper expense and revenue allocations for costs relating to vessel repair time, time in preparation for vessel redelivery to the Maritime Administration, and passenger revenue.

The ton-mile formula appears adequate for this proceeding for the reasons stated above, and no other formulas would have produced substantially different results as far as the compensatoriness of Lykes' rate was concerned. It would be highly unfair to require Lykes, which carries very little of the commodity involved, to be put to the expense of developing the detailed information for the use of alternative formulas resulting in the same conclusion. A finding as to whether or not intervenors will not be damaged by the challenged rate is unnecessary in the light of the fact that the 85-cent rate is noncompensatory, and there is no evidence showing it is unreasonably high or otherwise unlawful.

Costs relating to vessel repair time, time in preparation for vessel redelivery to the Maritime Administration, and passenger revenue are insignificant. Moreover, the repair and redelivery expenses are offset by similar expenses assigned to other services of respondent when vessels were not operating in the A Line trades, and passenger revenue is offset by increased stevedoring expenses not considered in respondent's computations.

It is concluded that the increased rate of respondent Lykes here under investigation is not unjust or unreasonable. An order discontinuing the proceeding will be entered.

No. 1136

INVESTIGATION OF INCREASED SUGAR RATE IN THE ATLANTIC/GULF—
PUERTO RICO TRADE

ORDER

Full investigation of the matters and things involved in these proceedings having been had, and the Commission on this date having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, in which it found that the increased rate of respondent Lykes Bros. Steamship Co., Inc., here under investigation is not unjust or unreasonable;

It is ordered, That this proceeding is discontinued.

By the Commission.

[SEAL]

THOMAS LISI,
Secretary.

9 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 65-42

AGREEMENT 8765

ORDER TO SHOW CAUSE

Decided February 7, 1966

Where circumstances warranting approval of agreement under section 15 cease to exist, the agreement will be cancelled. Agreement 8765 disapproved.

Donald J. Brunner and Richard L. Abbott as Hearing Counsel

REPORT

BY THE COMMISSION:

John Harllee, *Chairman*; John S. Patterson, *Vice Chairman*; *Commissioners* Ashton C. Barrett, James V. Day, George H. Hearn

This is a show cause proceeding¹ to determine whether we should continue our approval of Agreement 8765 or whether we should cancel it. As originally approved in *Agreement 8765—Gulf/Mediterranean Trade*, 7 F.M.C. 495 (1963), the agreement was between five U.S.-flag carriers (respondents) all members of the Gulf/Mediterranean Ports Conference² and Kulukundis Maritime Industries, Inc., Levant Line Joint Service, and T. J. Stevenson & Co., Inc.—the U.S.-flag carriers operating in the Gulf/Mediterranean trade as independents. Under the agreement the independents were obligated to adhere to the uniform rates, charges, rules and regulations established in the conference tariff on nine designated commodities.³ The three independent lines

¹ The proceeding was instituted pursuant to Rule 5g of the 1953 revision of the Commission's Rules of Practice and Procedure. General Order 16 (46 FR 13604) effective December 1, 1965, superseded the 1953 revision.

² The Conference lines were, and remain, Central Gulf S.S. Corp., Isthmian Lines, Inc., Lykes Bros. S.S. Co., Inc., States Marine Lines, Inc./Global Bulk Transport Inc. (as one party), and Waterman S.S. Co.

³ These commodities were Cornmeal, in Bags; Cornmeal, in Barrels, Boxes or Cases; Wheat, in Bags; Flour, Wheat, in Bags; Flour, Wheat, in Barrels, Boxes or Cases; Milk, Powdered Skimmed, "For Charitable Purposes Only—Not for Resale"; Shortening; Rice, Clean, in Bags; Rice, Clean, in Bales or Cartons.

have advised the Commission of their withdrawal from the agreement.⁴ There are presently no independent carriers parties to the agreement.

Subsequent to the withdrawal of the last of the independents, T. J. Stevenson, Mr. L. M. Paine, Jr., Secretary of the Conference, was requested to advise the Commission of the reasons for continuing the agreement. Mr. Paine's reply stated simply that:

The members of Agreement 8765, in view of the amount of time consumed and money spent in effecting this agreement, as well as the fact that it is quite possible that the conditions responsible for this agreement could change, definitely desire and ask that this agreement be allowed to continue in full force. If the agreement is allowed to remain in force and should the conditions which warranted approval of the agreement return, it would enable the members to readily have the protection the agreement presently affords without having to spend additional time and expense in having another such agreement approved.

Under the terms of the order to show cause, respondents were directed to show cause why their agreement remained subject to section 15 and why the Commission should not order it cancelled. Because there appeared to be no disputed issue of fact involved, the proceeding was limited to the filing of affidavits of fact and memoranda of law and oral argument before the Commission. Hearing Counsel filed a memorandum of law and appeared for oral argument. Respondents neither filed an affidavit and memorandum nor appeared at oral argument. Mr. Paine, however, did by letter dated December 15, 1965, advise the Commission's Secretary, Mr. Thomas Lisi, that respondents found nothing in sections 15 or 22 of the Shipping Act "outlining the requirement of showing the cause requested" and "reminded" the Commission that Agreement 8765 "is a duly approved agreement, continues to meet the requirements of law, is not discriminatory and is not detrimental to the commerce of the United States." Mr. Paine then requested that the Commission inform respondents:

. . . under what section of the Shipping Act, 1916, as amended, the members are required to incur the additional expense that would be resultant, as a result of its request, for the purpose of justifying the continuance of this section 15 agreement and also on what provision of the law the Commission feels it can arbitrarily cancel this agreement.

By letter dated December 22, 1965, the Commission informed Mr. Paine that his letter of December 15, 1965, did not meet the requirements of the order to show cause nor did it conform to the Commission's rules of Practice and Procedure and therefore it was not accepted as a pleading in response to the show cause order. Mr. Paine

⁴ Advice of the resignation of Kulukundis was first received by the Commission on November 24, 1964, and repeated on May 14, 1965. Advice of the resignation of Levant Line and T. J. Stevenson was received on November 8, 1963, and July 18, 1965, respectively.

was further advised that the proceeding would be consummated in accordance with the terms of the order to show cause.

DISCUSSION AND CONCLUSIONS

Hearing Counsel urge disapproval of Agreement 8765 on two grounds: (1) that respondents have failed to make the showing required in the Order to Show Cause instituting this proceeding, and (2) section 15 requires the cancellation of any agreement no longer operative.

While on this record summary disapproval of the agreement for failure to comply with our Order to Show Cause would not result in a denial of due process and thus would be within our authority under the Shipping Act, our first duty not only to these respondents but to the entire regulated industry is to, wherever possible, afford guidelines for future conduct.⁵ Therefore, we shall set forth our reasons for cancelling Agreement 8765 in the hope that we may forestall future disputes in similar cases.

It is possible to view Agreement 8765 in two ways: (1) as an agreement between two groups of carriers, the conference lines and the independents, and (2) as an agreement between the conference lines only to offer *in futuro* to enter into an agreement with unspecified carriers entering the trade. When viewed as the former it has ceased to exist as an agreement, and it may no longer enjoy approval under section 15 since that section only extends to agreements. A somewhat different problem is posed, however, if it is viewed as an agreement between respondents. As such it would be approvable under section 15, since it is an agreement, if it meets the standards of section 15. We think it clear that it cannot.

Both initial and continued approval of any agreement under section 15 are dependent upon a determination that the agreement approved is not unjustly discriminatory as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors or contrary to the public interest or otherwise in violation of the Act and that it does not operate to the detriment of the commerce of the United States. Thus, one prerequisite for approval of an agreement is the actual existence or immediate probability of transportation circumstances in the trade covered by

⁵ That the show cause procedure is valid is now 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(g) now Rule 5(f) of the Commission's Rules of Practice and Procedure clearly outline the requirements of the show cause procedure. For the most recent Court decision upholding the show cause procedure see *American Export & Isbrandtsen L. v. Federal Maritime Com'n*, 334 F. 2d 185 (9th Cir. 1964).

the agreement which warrant approval. *Mediterranean Pools Investigation*, Docket 1212 served January 19, 1966.

When we approved Agreement 8765, we did so because we found that "a serious [rate cutting] situation existed in the trade" and concluded "that the conference lines [respondents here] were justified in attempting, within the ambit of section 15 of the Act, to find a satisfactory solution with the carriers concerned" [the independents]. Our approval was granted because we concluded that the agreement "was a reasonable solution under the circumstances." *Agreement 8765—Gulf/Mediterranean Trade*, 7 F.M.C. 495 at pages 498-499. But with the withdrawal of the independents, these circumstances have ceased to exist. There can be no rate-cutting since respondents as members of the conference are bound to adhere to conference rates and there are no U.S.-flag independents presently in the trade. When the circumstances warranting approval cease to exist so should the agreement grounded upon them. Respondents, however, urge that the circumstances may recur and that they should not be forced to seek approval of a new agreement in that event. But who is to judge when they do? Respondents would have themselves be the judge for continued approval if the agreement would permit respondents to invite each independent to become a signatory as it entered the trade without the necessity of securing our approval. We think it clear that the statute will not permit this. Continued approval of Agreement 8765 would constitute nothing but a delegation of authority in derogation of our responsibility under the Shipping Act to protect the public interest by fostering competition insofar as compatible with the regulatory purposes of that Act. *Isbrandtsen Co. Inc. v. United States*, 211 F. 2d 51 (D.C. Cir. 1954) *cert denied sub nom Japan-Atlantic & Gulf Conf. v. U.S.*, 347 U.S. 990 (1954). The agreement will be cancelled.

FEDERAL MARITIME COMMISSION

DOCKET No. 65-42

AGREEMENT 8765

ORDER TO SHOW CAUSE

ORDER

This proceeding having been instituted 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 Agreement 8765 is hereby cancelled.

BY THE COMMISSION.

[SEAL]

(Signed) THOMAS LISI
Secretary.

9 F.M.C.

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FEDERAL MARITIME COMMISSION

No. 1205

SEA-LAND SERVICES, INC.

v.

SOUTH ATLANTIC & CARIBBEAN LINE, INC.

Decided February 7, 1966

The use of split bills of lading, dock receipts, and terminal stops at Jacksonville, Fla., where respondent has a terminal but never calls, and the further practice of absorbing freight charges between Jacksonville and Miami, Fla., where respondent's vessel loads or discharges all cargo carried in its Puerto Rican service, implementing a substituted service rule in its tariff, is unjustified, as it diverts from a port providing adequate direct-call service, traffic which is naturally tributary to it and which would normally move through it, unduly preferring the port of Miami and unduly prejudicing the port of Jacksonville, in violation of section 16 First of the Shipping Act, 1916, as amended.

C. H. Wheeler (*H. H. Shull, Jr.*, substituted after hearing), for Sea-Land Service, Inc., complainant.

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

Edward T. Cornell and *John C. Bradley*, for TMT Trailer Ferry, Inc., intervener.

F. C. Hillyer, for Jacksonville Port Authority.

Robert J. Blackwell, *Donald J. Brunner* and *Thomas Christensen*, as Hearing Counsel.

REPORT

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

This proceeding was instituted by the complaint of Sea-Land Service, Inc. (complainant), a common carrier by water in the domestic offshore trade, alleging that South Atlantic & Caribbean Line, Inc. (respondent), another common carrier by water in the domestic offshore trade, is engaged in port equalization, rebating, and absorption of inland freight charges in violation of sections 14, 16, and 17

of the Shipping Act, 1916 (the Act), and contrary to section 8 of the Merchant Marine Act, 1920 (the 1920 Act).

Specifically, it is alleged that respondent has provided in its tariff for substituted service whereby respondent ships cargo by rail or truck from Jacksonville, Fla., where it has a terminal, but never calls vessels, to Miami, Fla., where all cargo is loaded or discharged in its Puerto Rican service. This, complainant says, is not true substituted service, but rather an unlawful diversion of traffic naturally tributary to the port of Jacksonville. As a result, traffic from complainant's own service has been diverted to respondent, and complainant seeks an order directing respondent to cease and desist from such practice. Reparation is not sought.

Intervenors were TMT Trailer Ferry, Inc. (C. Gordon Anderson, trustee) (TMT), a common carrier by water in the domestic offshore trade, providing a regular service by towed seagoing barge between Jacksonville and Puerto Rico; Jacksonville Port Authority, a State agency whose principal objective is promotion of world commerce through the port of Jacksonville, and which also operates certain facilities in the port; and Hearing Counsel.

Hearings were held in Washington and Jacksonville before Examiner Walter T. Southworth, who found in his Initial Decision that respondent's substituted service practices were in violation of section 16 First of the Act. Respondent and Hearing Counsel except.

Oral Argument was heard and the proceeding is now before us for decision.

FACTS

Respondent commenced operations in the South Atlantic-Puerto Rico trade in early 1962, with two vessels on a triangular service between Miami, Savannah, and San Juan. The Savannah service was unprofitable and was abandoned late in 1962, when one of the vessels began to call at Jacksonville. Thereafter, direct weekly service was maintained between Miami and San Juan, and between Jacksonville and San Juan by alternating the two vessels. Losses continued and in July 1963, one of the vessels was taken out of service and returned to its owners. For a short time thereafter respondent attempted to maintain weekly service from both Jacksonville and Miami with the remaining vessel, but was unable to do so, and direct calls at the port of Jacksonville were discontinued in August 1963.

While no direct call has been made at Jacksonville since that time, respondent continued to show Jacksonville, Miami, and San Juan as its terminal ports, with ocean freight rates between Jacksonville and San Juan identical with those between Miami and San Juan,

although wharfage and handling charges remained slightly lower at Jacksonville than at Miami. Respondent's single remaining vessel now operates between Miami and San Juan only; service from Jacksonville is maintained by rail and truck between Jacksonville and Miami, purportedly in accordance with the substituted service provision in respondent's tariff. This provision, designated Rule No. 8-A, is as follows:

CARGO DISCHARGED OR LOADED AT A PORT OTHER THAN THE PORT NAMED IN THE BILL OF LADING

When the Carrier elects, for reasons within his control, to load or discharge cargo at a port or terminal other than that named in the bill of lading, such cargo shall be transported at the risk and expense of the Carrier to or from the bill of lading port or terminal; cargo to be received or delivered only at the regular terminals used by the Carrier at the bill of lading port or terminal, except in accordance with applicable Tariff provisions.

Respondent's service has been a "roll-on-roll-off" container service, using truck-trailers as containers. Refrigerated cargo is carried in reefer trailers equipped with self-contained refrigerating units. Respondent's tariff provides that it will spot trailers within the city limits at port of loading or discharge for loading or unloading by the shipper, and return the loaded or empty trailer to the carrier's terminal. Less than trailer load (LTL) cargo may be delivered for loading to carrier's terminal or, at carrier's option, to carrier's pallets, sheds, containers, or vans, at the terminal, subject to additional charges.

Eagle, Inc., is the agent for respondent in Jacksonville and Miami. As such, Eagle performs various functions, including solicitation of freight; preparation of ocean bills of ladings, manifests, and export declarations; collections and disbursements; and, in certain instances, receiving and delivering freight. Eagle's activities in respondent's behalf will be treated as respondent's, whether done in respondent's or Eagle's name.

Respondent's Jacksonville terminal is located on waterside property of Southern Railway and it occupies the premises pursuant to an oral agreement with the railroad, subject to short notice to vacate. Respondent's facility consists of an office in a house trailer adjacent to a siding which could be used only for cargo arriving via Southern. A portable ramp which had been used to load the vessels remained on the premises. Respondent also maintains dry cargo trailers on the premises for LTL cargo and overflow shipments.

Eagle has only two regular employees at Jacksonville. One employee is available at any hour of the day or night to receive cargo

and to issue dock receipts on cargo passing through Jacksonville which is not actually unloaded at the terminal. Temporary help is used when required to load or unload trailers and boxcars.

Except for nonperishable LTL shipments, freight will not be booked at Jacksonville without prior confirmation from Miami. Respondent's procedures with respect to the handling of Jacksonville cargo differ according to the nature and source of the cargo. Dry cargo shipped by rail to respondent at Jacksonville is unloaded from the railroad cars into trailers at the Southern siding at respondent's terminal or at the public team track; the loaded trailer is then hauled, by a common carrier's tractor, to Florida East Coast Railway's piggy-back ramp for trailer-on-flat-car (TOFC) movement to Miami. Thus, when the delivering rail carrier is other than Southern Railway, the shipment does not physically pass through respondent's Jacksonville terminal; however, arrangements for local handling and forwarding to Miami are made by respondent's Jacksonville manager. If the shipment originates at Jacksonville, respondent's trailer is spotted at the shipper's plant for loading, pursuant to its tariff, and is hauled directly to the Jacksonville TOFC ramp of the Florida East Coast Railway. LTL cargo, however, may be assembled and loaded into a trailer at respondent's Jacksonville terminal and then taken to the TOFC ramp. At Miami, trailers are hauled by common carrier from the TOFC ramp to respondent's Miami terminal for loading aboard ship.

Refrigerated or frozen cargo, which has consisted only of eggs and frozen poultry, is received in reefer trailers which are loaded at the shipper's place of business and hauled over the road to Miami, via Jacksonville, by common or contract motor carrier. At Miami, the refrigerated cargo is transferred to a reefer trailer of respondent which is put aboard the vessel. These reefer trailers are never forwarded from Jacksonville by rail because the gasoline fueled refrigerating engines may require attention which is not feasible in TOFC movement. Moreover, shipping by unregulated motor carrier permits some latitude in negotiation of rates. Shipments of frozen poultry from Canton, Ga., and Boaz, Ala., are hauled straight through by an over-the-road motor carrier from point of origin to Miami, with a token stop at Jacksonville terminal, under an arrangement by which the shipper pays 50¢ per 100 lbs. for the haul to Jacksonville, and respondent pays 25¢ per 100 lbs. for the Jacksonville-Miami part of the run. For a time, respondent made this payment to the shipper, who in turn paid the motor carrier, but respondent now pays the carrier against his invoice.

It does not appear that any shipper ever retained any part of such payments made by respondent. The motor carrier's rate of 75¢ from Canton, Ga., and Boaz, Ala., to Miami, including the allocation of 25¢ thereof to the Jacksonville-Miami portion of the haul, was negotiated by the shipper, with respondent's approval as to its part of the rate. The agreed allocation did not give the shipper a lower rate than it otherwise would have obtained for shipment to Jacksonville. The same shipper has paid the same motor carrier a flat rate of \$204 per trailer when shipping frozen poultry to Jacksonville for carriage to Puerto Rico by complainant. At 50¢ per 100 lbs., the amount paid by the shipper for the movement to Jacksonville for transshipment by respondent out of Miami has been less than \$204 per trailer in some instances but more than \$204 in others, depending of course on the weight of the particular shipment. It is 360 miles by road from Jacksonville to Miami, and about the same distance from Canton, Ga., to Jacksonville.

In the poultry operation the shipper prepares two bills of lading, one showing itself as a shipper from Canton, Ga., (or Boaz, Ala.), delivery to be made to respondent at its Jacksonville terminal; the other shows respondent as shipper from Jacksonville to itself at Miami. Both show the Puerto Rican customer as consignee. The truck driver stops at respondent's Jacksonville terminal, where he is given a "dock receipt" and instructed to deliver to respondent's Miami terminal; the driver then proceeds to Miami, where he delivers the trailer load to respondent and receives another dock receipt. On at least one occasion the driver failed to check in at the Jacksonville terminal. An ocean bill of lading covering the shipment, showing the port of loading as Jacksonville and the port of discharge as San Juan, is made up at Miami after the shipment arrives there. This is the procedure with respect to all southbound substituted service shipments.

Another variation of respondent's substituted service is that of milk trucks shipped by drive-away from the plant of Murphy Body Works, at Wilson, N.C. The drivers are hired by Murphy and paid on a mileage basis for the Wilson to Jacksonville haul. Respondent pays the drivers for the Jacksonville to Miami haul at the same rate of compensation they received from Murphy. They pay their own return expenses. At first, respondent reimbursed Murphy for the driver's mileage from Jacksonville to Miami; now, however, respondent reimburses the driver by check to his order at Murphy's plant. When the drivers leave Wilson, they are instructed to go to respondent's Jacksonville terminal and proceed from there to Miami. At Jackson-

ville, the driver is given a "dock receipt" and a form letter stating that the "cargo" is to be delivered to respondent's Miami terminal. On one or two occasions drivers went through to Miami, in error, without stopping at Jacksonville. Murphy considers that it tenders the vehicles to respondent at Jacksonville, and that any damage thereafter would be for respondent's account.

Occasionally, through clerical error, shippers have been charged wharfage and handling charges at the Miami rate on Jacksonville cargo. Miami rates are a little higher than the Jacksonville rates.

Since respondent stopped calling its vessel at Jacksonville, it has not generally solicited Jacksonville traffic. Respondent's substituted service traffic is attractive to it as long as it utilizes vessel space that would not otherwise be used, but it would result in an operating loss if too much cargo were handled that way, rather than by sending a vessel to Jacksonville.

Respondent's operations are now profitable. At the time of hearing, respondent was planning to close a contract for the construction of a vessel for which designs had been developed to the tank testing stage. Respondent then expected the vessel to enter service within ten months, after which resumption of direct call service at Jacksonville was intended. The completion of the vessel was expected to be in April 1966. Subsequently, at oral argument, the date was extended to July of that year.

Complainant's Service

Complainant inaugurated common carrier service in the Puerto Rican trade in 1958. In 1959, complainant began carrying Jacksonville to Puerto Rico cargo. Until 1962, this was an indirect service with transshipment to another vessel of complainant at the port of New York. In April 1963, complainant started a weekly service direct from Jacksonville to San Juan, but reverted to the weekly service with transshipment at New York in July 1963. Direct weekly service was resumed May 2, 1964, and has since been continued. Complainant's service has been a "lift-on-lift-off" container service.

Complainant carries eggs, frozen poultry, and general cargo between Jacksonville and Puerto Rico. Its rates on general cargo are higher than respondent's by about \$100 per trailer. Complainant's rate on eggs is identical with that of respondent's. In the case of frozen poultry, complainant maintains a rate which is identical to respondent's, subject however to a minimum of 40,000 lbs.

TMT's Service

Intervener TMT offers an ocean-going barge service from Jacksonville to Puerto Rico. TMT uses non-self-propelled LST's which

carry 60 trailers each. It has operated its service since prior to 1963. TMT's transit time is greater than that of the vessels operated by respondent and complainant.

The tariffs of both complainant and TMT contain substituted service rules similar to respondent's Rule 8-A. Complainant has shipped overland between San Juan and Mayaguez or Ponce, Puerto Rico, when emergency conditions required its vessel to bypass a port, but no other use of the rule was shown.

DISCUSSION

The Examiner in his Initial Decision found that respondent SACAL's substituted service at Jacksonville is violative of section 16 First of the Act. The Examiner found that substituted service, as a species of port equalization, could not meet the conditions that section 16 First imposes upon port equalization.

Section 16 provides in relevant part:

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SACAL's substituted service rule provides that SACAL may ship or absorb the cost of shipping cargo by rail or truck from Jacksonville, where SACAL has a terminal but never calls a vessel, to Miami where a vessel loads cargo for Puerto Rico. We agree with the Examiner that this is port equalization in the general sense and that it is, therefore, appropriate to measure the substituted service rule under section 16 First in accord with standards previously announced regarding port equalization.

Port equalization means the allowance or absorption by the ocean carrier of such amount as will make the shipper's cost of overland transportation identical, or substantially so, from his inland point of origin to any one of two or more ports. Its purpose is to enable the ocean carrier to compete for cargo without calling at the port closest to, or enjoying the lowest inland transportation costs from, the point where the cargo originates. The most recent decisions of the Commission hold that port equalization violates section 16 of the Act where it (1) diverts traffic from a port to which the area of origin is naturally 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. *City of Mobile v.*

Baltimore Insular Line, Inc., 2 U.S.M.C. 474 (1941); *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500 (1941) and 2 U.S.M.C. 699 (1943); *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955) and 5 F.M.B. 118 (1956); *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48 (1960); *Stockton Port District v. Pacific Westbound Conference*, Docket No. 1086 (Sept. 24, 1965).

Port equalization is accomplished in various ways. In its simplest form (sometimes called "equalization" in contradistinction to "proportional rates" or "transshipment"), the carrier pays to the shipper or, sometimes, to 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; *City of Portland* cases, *supra*; *Stockton Port District v. Pacific Westbound Conference*, *supra*. A more complicated method involves "proportional rates," accomplished through the deduction of specified differentials from ocean tariffs where shipments originate at certain points defined in the tariff, *City of Mobile*, *supra*. A similar method, although relatively limited in scope, was proposed in *Proportional Commodity Rates on Cigarettes and Tobacco*, *supra*. There the basic commodity rates on certain tobacco products, from New York to Puerto Rico, were to be subject to deduction of specified differentials according to the location of the Virginia or North Carolina manufacturing plant at which the shipment originated. In each case, the differential specified in the tariff would have been equivalent to the exact amount by which the motor-carrier rate from point of origin to New York exceeded the motor-carrier rate from the same point to Baltimore. By means of these so-called proportional rates, the carrier would achieve precise equalization against the port of Baltimore on the commodities.

Port equalization may also be effected through "transshipment."¹ As used here transshipment refers to the movement of cargo, 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. Although sometimes employed when the water carrier, for operating or other reasons, does not make a scheduled call at the port where the cargo is delivered, transshipment is also recognized, along with equalization, as a method of meeting the competition of carriers who call

¹This is not to be confused with the ordinary transfer of cargo from one vessel to another for on-shipment beyond the limits of a carrier's service or division thereof.

directly at a port where the equalizing or transshipping carrier does not call, *City of Portland*, 4 F.M.B. at 665, footnote 1; *Stockton Port District, supra*; *City of Portland*, 5 F.M.B. at 133, and footnote 3. In the latter *City of Portland* case, the Commission's predecessor warned that its condemnation of unjustified equalization could not be thwarted by transshipment. Thus, 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." 5 F.M.B. at 134.

It is evident that respondent's practice of receiving general cargo at Jacksonville and shipping it, by land carrier at its own expense, to its loading terminal at Miami is exactly the same in every material detail as the "transshipment" practice described above. Respondent's practice with respect to poultry and eggs and milk trucks is more like "equalization" as described in the *City of Portland* case and in *Stockton Port District*, particularly where the driver fails to check in at respondent's Jacksonville terminal to pick up his "dock receipt" before proceeding to Miami. Whether respondent converts such equalization into "transshipment" by meticulously observing its prescribed ritual of terminal calls, dock receipts, and split bills of lading is not important, in view of the rationale of the port equalization cases in general and, particularly, the warning of the Commission's predecessor in the second *City of Portland* case.²

The record shows that the traffic accorded "substituted service" originated in areas which geography and normal inland transit routes make tributary to the port of Jacksonville and not tributary to the port of Miami. The record reveals, with regard to the diversion of traffic from Jacksonville, that the refrigerated egg and poultry movement from Canton, Ga., and Boaz, Ala., and the milk truck trade from Wilson, N.C., to Puerto Rico, are attracted by considerations of time, distance, and cost factors to the port of Jacksonville. From the poultry shipping area of Canton, Ga., which is near Atlanta, to Jacksonville is 360 miles. From Jacksonville to Miami is 360 miles. All told, from origin to destination under the respondent's substituted service, the distance is some 700 miles and time and cost necessarily depend on distance. This applies with equal force to the originating areas of Boaz, Ala., and Wilson, N.C. The fact that the movement

² That admonition was: "While the record does not entirely bear out Public Counsel's statement that the Board's condemnation of unjustified equalization is presently being thwarted by transshipment, we feel that, since this situation may arise, it is advisable to point out that the diversion of cargo from a port through which it would normally move would be unjustly discriminatory and unfair between ports within the meaning of section 15 of the Act . . . if accomplished by transshipment to the same extent as if accomplished by equalization." 5 F.M.B. at 134.

notwithstanding goes to Miami, in spite of these logical inducements to ship to Jacksonville, attests to the diversion of traffic which would otherwise move to Jacksonville.

Consequently, we hold that the record is adequate to support complainant's allegation of diversion of traffic from a naturally tributary area. This is because respondent's rates, although lower in some instances, are not so when the cost of the Jacksonville-Miami segment of the haul is added. Assuming, *arguendo*, there were savings to be realized on the Canton-Jacksonville portion of the haul under respondent's substituted service, the additional cost of on-carriage from Jacksonville to Miami would more than cancel any savings and the net result would be a higher rate notwithstanding for the overall Canton-Miami run. We conclude that but for the free inland transportation provided by respondent under its substituted service, the refrigerated freight would not have moved via Miami. However, SACAL would probably have handled the milk truck traffic in any event because Sea-Land never solicited the business and because TMT's transit time was longer and its service exposed the trucks to a greater risk of water damage. Nevertheless, we find that SACAL's substituted service rule has permitted SACAL to lift substantial tonnage at Miami which otherwise would have moved through the port of Jacksonville.

Finally, regarding adequacy of service from Jacksonville, the evidence shows complainant has had ample capacity to transport additional cargo from Jacksonville to Puerto Rico. Sea-Land's available space per vessel ranges from 196 to 226 trailers. The lift per sailing from Jacksonville has varied from 49 to 150 containers. While Sea-Land carried other loaded trailers on the voyage of record, it does not appear that they were a significant consideration insofar as extra capacity at Jacksonville was concerned. TMT also had additional space for Jacksonville cargo.*

The application by respondent of Rule No. 8-A to service from Jacksonville diverts from the port of Jacksonville traffic which is naturally tributary to Jacksonville and not tributary to the port of Miami, and which would normally flow through the port of Jacksonville. The diversion of this traffic is not justified by inadequacy of direct-call service at the port of Jacksonville or by emergency or exigent conditions affecting respondent's operations as a common carrier by water. Thus, the diversion of traffic unduly prefers the port of Miami and is unjustly prejudicial to the port of Jacksonville, in violation of section 16 First of the Shipping Act, 1916.

SACAL contends that the Examiner erred in considering this to be a question of equalization. In arguing that this is not an equalization

case, SACAL relies heavily upon *Puget Sound Tug & Barge Co. v. Alaska Freight Lines*, 7 F.M.C. 550 (1963). In this proceeding, the Commission found lawful under the Intercoastal Shipping Act, 1933, a tariff rule which provided for the substitution of an overland haul for a portion of water transportation offered, but not presently served, by the water carrier.

The Examiner distinguished *Puget Sound* because in that case the question of the propriety of "substituted service" under section 16 simply was not an issue before the Commission. SACAL argues that the issue was, indeed, before the Commission because it fell within the broad language of the order of investigation, because the issue was raised and argued by the complainant, and because the issue was the subject of questioning from the bench at oral argument. But the critical question remains: did the Commission decide whether the substituted service rule diverted traffic unlawfully? The Commission neither discussed nor decided the matter. *Puget Sound* holds only that such a rate could be filed under section 2. This does not include the question of legality of the practice, in operation, under section 16. Consequently, the port equalization decisions previously alluded to are not overruled by *Puget Sound*, nor are they made inapplicable to questions of substituted service.

Next SACAL argues that the Examiner erred in not finding that Jacksonville is a point on SACAL's route. However, this finding is appropriate to the controversy considered in the *Puget Sound* case—filing of rates under section 2 of the 1933 Act; it is not controlling here. No matter whether Jacksonville is a point on SACAL's route, we find that substituted service in this case results in an unwarranted diversion of traffic. Whether Jacksonville is a point on SACAL's route is immaterial to this finding. We, therefore, overrule this exception.

SACAL would further distinguish the port equalization cases because the care and custody of the cargo under substituted service varies greatly from equalization generally. However, we are concerned here with unlawful diversion of traffic, not niceties of documentation, care, or custody. We overrule the exception as immaterial.

SACAL contends that the substituted service rule does not divert revenue from Jacksonville because SACAL maintains an adequate marine terminal there and pays wharfage and handling on cargo moving under substituted service. These facts may limit the impact upon the port of Jacksonville of the diversion of cargo, but they do not completely obviate this impact. The port and the carriers that serve the port have lost traffic which would have generated income to the multiple services and labor at Jacksonville. Certainly, actually handling additional cargo would contribute far more to the port economy

than handling and wharfage alone. Furthermore, there is an absolute loss to the carriers who provide service at Jacksonville. In *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. at 505, we held that a port and its transportation services are indissolubly linked together, are interdependent, and a practice harmful to one injures the other. Thus, here there is harm to Jacksonville obviously not re-couped by the charges paid by cargo moving under substituted service.

SACAL argues that the record does not support the Examiner's finding that service at Jacksonville, excluding SACAL's substituted service, is adequate. The fact remains, however, as we discussed above, that two carriers, Sea-Land and TMT, offer regular service at Jacksonville with ample capacity to carry additional cargo.* We find this service to be adequate in general for shippers who use or may wish to use Jacksonville. This is so even though Sea-Land's rates may be higher generally than SACAL's or TMT's, or TMT's service may be less suited to the needs of some shippers. The service is sufficiently adequate so that the traffic naturally tributary to Jacksonville should not be artificially diverted elsewhere. Certainly, Jacksonville could handle some significant portion of the diverted traffic. It should be given the opportunity to do so.

SACAL argues that the service is inadequate at Jacksonville since milk trucks in no event would move through Jacksonville. However, we are here speaking of adequacy of service generally. The fact that a particular shipper must or wishes to use a certain port does not justify an across-the-board absorption practice, for the rationale of our decision is that cargo should move in the direction determined by the myriad costs and requirements facing shippers, not by artificial tariff concessions.

According to SACAL, the Examiner erred in finding that Sea-Land had ample capacity to carry additional cargo from Jacksonville. Again, the record shows that there is space available at Jacksonville. The record does not show that Sea-Land would be forced to shut out cargo at other ports by booking more cargo at Jacksonville. The point is that Jacksonville has adequate service, and cargo that normally would be induced to move there should not be diverted. We do not hold that cargo tributary to Jacksonville must move to this port, nor do we say that service must be adequate to accept all cargo. We hold simply that a carrier cannot utilize a substituted service rule to siphon off cargo some of which would otherwise move through Jacksonville. In *Stockton Port District v. Pacific Westbound Conference, supra*, at 27, the carriers contended that equalization was proper where service was unsatisfactory in any respect. We rejected this

qualification in favor of our previous legal test of equalization: if the 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. We will not require more.

SACAL argues that the Examiner failed to make the findings necessary for a violation of section 16. We have set forth above in some detail the legal test to be applied to port equalization. Our findings have been made in accord with that legal test. Consequently, we overrule this exception.

The remainder of the exceptions of SACAL are immaterial to the result we reach here.

Hearing Counsel's exceptions to the Initial Decision urge that Sea-Land has wholly failed to prove its case. Hearing Counsel argue that it is necessary that complainant, a carrier, prove that a locality, Jacksonville, has been unlawfully deprived of traffic to which it is entitled. Hearing Counsel urge that Sea-Land has failed to meet the necessary standards of proof in this respect; in particular, that SACAL's substituted service has diverted cargo from Jacksonville to Miami that would have moved through Jacksonville *but for* the substituted service of SACAL. And they argue that this finding cannot be sustained.³

We have previously endorsed the Examiner's test to be applied in equalization cases under section 16 First. Hearing Counsel would define "diversion of traffic" to mean traffic that would have moved through Jacksonville instead of Miami *but for* the substituted service rule. They cite *Phila. Ocean Traffic Bureau v. Export S.S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936).

We reject the "but for" test advocated by Hearing Counsel. In *Phila. Ocean Traffic Bureau*, our predecessor formulated an extreme requirement for a finding of violation of section 16 First. To the extent that this language relates to port equalization or qualifies our expression of the applicable standards for port equalization cases, *Phila. Ocean Traffic Bureau* is overruled.

As we said in answer to SACAL's exceptions, we do not hold that cargo tributary to Jacksonville must move to this port, nor do we say that service must be adequate to accommodate all tributary cargo. Furthermore, we have discussed above at pages 346-347 the evidence establishing that cargo moving in substituted service was naturally tributary to Jacksonville, not Miami, substantial tonnage was diverted,

³ Hearing Counsel also claim the record is defective since it does not show the excess of revenue derived from direct-call service over present expenditures at Jacksonville in connection with substituted service. We disposed of this argument above at page 349 in dealing with SACAL's exceptions.

and that this diversion is not justified by inadequacy of direct-call service at Jacksonville. It is unnecessary to reiterate this discussion. For the reasons stated above, we overrule Hearing Counsel's exception that Sea-Land has failed to meet the necessary standards of proof.

We, therefore, hold that SACAL's Rule No. 8-A operates in a manner which is in violation of section 16 First of the Shipping Act, 1916. An appropriate cease and desist order will be entered.

Commissioner Hearn's concurring opinion:

I concur in this decision for the reasons stated by the majority as well as those stated in my dissent *Stockton Port District v. Pacific Westbound Conference*, Docket 1086, served September 24, 1965. I find these cases legally indistinguishable.

ORDER*

Full investigation of the matters and things involved in this proceeding has been had, and the Commission on February 17, 1966, has made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof. The Commission found in said report, *inter alia*:

The application by respondent South Atlantic & Caribbean Line, Inc., of Rule 8-A of its tariff, which provides for substituted service at the port of Jacksonville, diverts from the port of Jacksonville to the port of Miami traffic which is naturally tributary to Jacksonville and not tributary to Miami. This diversion of traffic is not justified by inadequacy of direct-call service at the port of Jacksonville or by emergency or exigent conditions affecting respondent's operations as a common carrier by water. Therefore, Rule 8-A of respondent's tariff unduly prejudices the port of Jacksonville and unduly prefers the port of Miami in violation of section 16 First of the Shipping Act, 1916 (46 U.S.C. 815).

Therefore, it is ordered, That the respondent cease and desist from the application of its Rule No. 8-A to traffic between Jacksonville, Florida, and Miami, Florida, within 30 days after the date of this order.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

*Stay of order, page 352.

FEDERAL MARITIME COMMISSION

No. 1205

STAY OF ORDER*

Decided March 17, 1966

The effective date of the Commission's order of February 17, 1966, that respondent cease and desist from the application of its Rule 8-A to traffic between Jacksonville, Florida and Miami, Florida is hereby stayed pending action by the Commission on Respondent's Petition to Reopen for Reconsideration.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

*Further order of stay granted to April 25, 1966.

Note: The text changes referenced in the footnote on pages 347 and 349 is as follows:

The sentence at page 347 reading,

"TMT also had additional space for Jacksonville cargo." is deleted.

The sentence at page 349 reading,

"The fact remains, however, as we discussed above, that two carriers, Sea-Land and TMT, offer regular service at Jacksonville with ample capacity to carry additional cargo."

is changed to read,

"The fact remains, however, as we discussed above, that Sea-Land offers regular service at Jacksonville with ample capacity to carry additional cargo."

The above changes are contained in the Denial of Petition for Reopening decided by the Commission March 29, 1966.

FEDERAL MARITIME COMMISSION

No. 65-38

ISRAEL/U.S. NORTH ATLANTIC PORTS WESTBOUND FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) SYSTEM AND CONTRACT

Permission granted respondents, under the authority of section 14b of the Shipping Act, 1916, to institute an exclusive patronage (dual rate) system.

Edwin Longcope for respondent Zim Israel Navigation Company Ltd.

James N. Jacobi for respondent American Export Isbrandtsen Lines, Inc.

Howard A. Levy and *Richard L. Abbott*, Hearing Counsel.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER¹

This proceeding was initiated by the Commission pursuant to sections 14b and 22 of the Shipping Act, 1916, as amended (the Act), to determine whether:

(1) the proposed system and the form of the exclusive patronage (dual rate) contract meet the requirements of section 14b, or will be detrimental to the commerce of the United States, contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; and (2) the application for permission to institute the proposed contract/noncontract system and the use of the proposed form of exclusive patronage (dual rate) contract should be permitted pursuant to the requirements of section 14b of the Shipping Act, 1916.

The conference is composed of American Export Isbrandtsen Lines, Inc., an American national line, and Zim Israel Navigation Co. Ltd., an Israeli national line. Both are engaged in the foreign commerce of the United States and therefore are subject to the provisions of the act. Operating under F.M.C. Approved Agreement No. 8420, they serve the trade moving from Mediterranean ports of Israel to U.S. North Atlantic ports (Hampton Roads/Portland, Maine range).

The member lines have learned from experience in the trade that a substantial amount of cargo which would normally be expected to move via the conference lines moves through indirect and unnatural

¹ This decision became the decision of the Commission on March 9, 1966, and it was ordered that this proceeding be discontinued.

routings. For the most part these routings have been through European countries, principally Turkey, Greece, and the Northern European ports of Antwerp, Rotterdam and Hamburg. Such routings result in an instability in the rate structure in the trade between Israel and the United States and an uncertainty of service provided shippers and U.S. importers. While no central control exists from which the member lines can estimate the tonnage diverted to these indirect routings traffic solicitations disclose this diversion to be substantial. It has brought about a diminution of the service they provide and a consequent loss of revenue.

The proposed dual rate system is conceived as a means of relieving this situation and providing conference vessels with that nucleus of cargo required to sustain the provision of regular and efficient service. The conference lines believe that in the particular circumstances of this trade the desired result can only be achieved by utilizing the full 15 percent spread authorized by the act.

Hearing Counsel contend that the introduction of an effective and fair dual rate system in this trade will serve to foster efficient, modern and economical ocean transportation thereby promoting commerce between Israel and the United States in the interest of both nations; that the record in this proceeding is full and adequate; and that the proposed dual rate contract form (Exhibit 1), which was extensively modified following the issuance of and in accordance with the Commission's order of investigation, (1) meets the requirements of section 14b of the act and (2) incorporates the uniform provisions prescribed by the Commission's decision in *The Dual Rate Cases*, 8 F.M.C. 16.

CONCLUSIONS

It is found and concluded that the proposed dual rate contract form conforms to the general standards enumerated in section 14b, the express requirements of section 14b (1) through (9) of the act, and the criteria established by the Commission in its decision in *The Dual Rate Cases, supra*. There is no evidence that the institution of a dual rate contract system by the conference will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors.

The application for permission to institute the proposed dual rate system and employ the proposed form of dual rate contract is approved and the proceeding is discontinued.

FEBRUARY 25, 1966

(Signed) JOHN MARSHALL
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET No. 1095

AGREEMENT No. 150-21, TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN AND AGREEMENT No. 3103-17, JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

Decided March 24, 1966

Agreement No. 150-21 as modified by No. 150-29, and Agreement No. 3103-17 as modified by No. 3103-26, approved pursuant to section 15, Shipping Act, 1916.

Section 15 does not require that modifications to conference basic agreements be adopted by unanimous vote of the parties.

George F. Galland and *Amy Scupi* for protestants States Marine Lines.

Charles F. Warren and *John P. Meade* for respondents.

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

REPORT

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

This proceeding which is before us upon exceptions to the Initial Decision of Examiner John Marshall is concerned with the validity of the self-policing systems of respondents, the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic & Gulf Freight Conference.¹

The proceeding was originally instituted as a show cause proceeding and on October 30, 1963, we issued a report and order upholding the validity of respondents' then-proposed neutral body system. States Marine then appealed our decision to the Court of Appeals for the District of Columbia Circuit, *States Marine Lines, Inc. v. Federal Maritime Commission*, No. 18,227. In its brief to that Court States

¹ The self-policing systems of both respondents are identical and are embodied in arts. 10, 12, and 25 of the basic agreements. Art. 10 covers Breach of Agreement, art. 12 calls for Faithful Performance, and art. 25 establishes the Neutral Body and its procedures. For the full text of these provisions as presently approved see app. A.

Marine relied heavily on a recent Supreme Court decision in *Silver v. New York Stock Exchange*, 373 U.S. 341 (May 20, 1963)—a case decided subsequent to oral argument in the original proceeding and not cited to us by States Marine. We nevertheless petitioned the Court to remand the case to us in order that we might reconsider our decision in the light of *Silver*.

In requesting the Court to remand the case to us, we indicated our intention to “vacate the existing report and order” and to reopen the proceeding to afford the parties “full opportunity to offer evidence and argument in the reopened proceeding.”

The order reopening the proceeding placed in issue the approvability of proposed modifications to the respondents’ basic agreements.² By subsequent order we granted a motion of States Marine to specifically include in the investigation the issue of the validity of articles 10, 12 and 25 “as they now stand approved” in both agreements. We further amended the order reopening the proceeding to include the question of whether unanimous vote of the parties was required for modifications to agreements approved under section 15 notwithstanding that the agreement might provide for modifications by vote of a lesser majority.

Just before the close of the hearings, conference counsel sought to introduce further modifications to articles 10 and 25 which he urged were responsive to a number of the objections made by States Marine to the then-proposed modifications. These modifications, adopted by the conferences over the objection of States Marine had been filed earlier and designated Agreement No. 150-29 and Agreement No. 3103-26. States Marine opposed their inclusion in the proceeding. The Examiner ruled that the new agreements went beyond the scope of the order of investigation insofar as the question of their approvability was concerned but admitted them solely for the purpose of showing “States Marine motivation” in protesting approval of the agreements. The Examiner closed the record and respondents thereafter moved the Commission to amend the order of investigation to include the new agreements. We denied the motion stating in our order of March 31, 1965:

Of course, there is nothing to preclude counsel for the conference from setting forth in their briefs any proposals for modification of the contested clauses which alleviate the dispute between the parties.

Our decision in Docket 1095 will resolve the issues between States Marine and the conferences as to what the conferences self-policing provisions may and should include and all proposals by counsel for the parties will be considered.

² The Trans-Pacific Conference operates pursuant to Agreement No. 150. The proposed modification (No. 150-21) would amend art. 10, 12 and 25. The Japan Atlantic & Gulf Conference operates pursuant to Agreement No. 3103. The proposed modification (No. 3103-17) would also amend art. 10, 12 and 25 of the agreement.

The Examiner quite correctly interpreted the above "to constitute assurance to respondent conferences that any proposals for modification of contested provisions which alleviate the disputes between the parties will be considered." The Examiner accordingly considered the proposed modifications in his initial decision.

FACTS

This proceeding is the outcome of several years of controversy between protestant States Marine and the two respondent conferences, Trans-Pacific Freight Conference of Japan (Trans-Pacific) and Japan-Atlantic & Gulf Freight Conference (JAG). States Marine is a member of both conferences, one of which serves Pacific Coast ports and the other of which serves Atlantic and Gulf Coast ports of North America inbound from Japan.³

It is helpful to review the events which led to the present proceeding.

In the early 1950's extreme competition in these trades resulted in a rash of malpractices and caused instability in the trade. To combat this, Trans-Pacific in 1958 held a meeting in Hakone, Japan, to initiate a neutral body self-policing system to investigate complaints alleging malpractices by member lines, and to assess fines therefor. Article 25 of the conference's agreement was the result.

The international accounting firm of Lowe, Bingham & Thomsons (Lowe) was retained to serve as the original Neutral Body. States Marine subscribed to the conference's agreement with Lowe. Lowe was chosen because it possessed desired qualifications such as international connections, accounting expertise, and professional character.⁴

Lowe, in performance of its duties as Neutral Body, sought in 1959 to investigate a complaint against States Marine. The complaint alleged that States Marine had granted Japanese mandarin orange shippers free passage from San Francisco to Japan. In January of 1959 Lowe representatives visited States Marine's Tokyo office to investigate the complaint. Evidence of a request for free passage was found but there was no indication that it had in fact been honored.

Subsequently, on three occasions in the course of its attempt to investigate the complaint, Lowe tried to obtain records from the New York office of States Marine or its subsidiary Isthmian Lines, Inc. Each time the party seeking the documents was Price, Waterhouse and Co. (Price), acting under the direction of Lowe. Price

³ The Trans-Pacific conference with 20 members serves the trade from Japan, Korea and Okinawa to United States and Canadian Pacific Coast ports. The Japan-Atlantic and Gulf conference with 15 members serves the trade from Japan, Korea and Okinawa to Atlantic and Gulf ports of North America.

⁴ JAG also retained Lowe under an identical "Neutral Body" system.

is the New York correspondent of Lowe. Later developments disclosed that Price is also the regular auditor of United States Lines Co. which is a member of Trans-Pacific and a competitor of States Marine and Isthmian in that trade.

When Price first sought access to States Marine's records, States Marine proposed that its own regular auditors make the investigation under the directions of Price. Price rejected this offer and States Marine thereupon refused to allow Price access to the records. The Neutral Body levied a fine of \$10,000 (maximum fine for first offense) on States Marine for refusing access, a breach of the neutral body agreement.

States Marine objected to the fine, and alleged that Lowe was not qualified to serve under the Neutral Body agreement because of the affiliation of its correspondent Price with United States Lines, a conference member. States Marine filed a complaint with the Commission (Docket 920).

While the proceeding in Docket 920 was pending, Price again sought access to States Marine's records. States Marine again refused and was fined an additional \$15,000 (maximum fine for second offense). States Marine again objected and filed a second complaint with the Commission (Docket 920-1).

Price made a third attempt to gain information about the mandarin orange shipment, this time seeking to investigate the records of Isthmian, a wholly owned subsidiary of States Marine. Isthmian refused and was fined \$10,000, upon which it filed a complaint with the Commission.

The Commission in its Report and Order in Docket 920 and 920-1 found Lowe's appointment as Neutral Body to violate the neutrality requirements of the Neutral Body agreement insofar as the original agreement had not provided for a Neutral Body which could be affiliated with another conference line. Although Trans-Pacific subsequent to Lowe's appointment, had deleted certain neutrality requirements, the Commission found such deletion illegal as a "modification" of the agreement which was never approved by the Commission. The fines were ordered cancelled. *States Marine Lines, Inc. v. Trans-Pac. Freight Conf.*, 7 F.M.C. 204 (1962).

On appeal by Trans-Pacific the Ninth Circuit Court of Appeals upheld the Commission. *Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n*, 314 F. 2d 928 (9th Cir. 1963). Neither the Commission nor the Court dealt with the question whether a Neutral Body could be lawfully affiliated with a conference member. Both merely held that Trans-Pacific had neither in its original Neutral Body system nor by approved modification provided for a Neutral

Body which could be so affiliated, and therefore the appointment of Lowe was in contravention of the agreement as approved and thus in violation of section 15 of the act.

Before the Commission issued its decision in Docket 920, Trans-Pacific and JAG respectively filed presently pending modifications (Nos. 150-21 and 3103-17) which provided that a Neutral Body must disclose any professional or financial affiliation which it has with any member line. Such affiliation, however, will not disqualify the Neutral Body from serving, unless the affiliation is with an accused line. In such a case the Neutral Body must appoint an unaffiliated agent to conduct the investigation.

DISCUSSION AND CONCLUSION

The Examiner would approve respondents' self-policing system as it is set forth in Agreement No. 150-21 as modified by No. 150-29 and Agreement No. 3103-17 as modified by No. 3103-26. States Marine took 18 numbered exceptions to the Examiner's decision many of which are but restatements of others and all of which can be reduced to the following alleged errors of the Examiner insofar as he:

1. Failed to properly apply the Supreme Court's decision in *Silver, supra*, and concluded that respondents' agreements are unlawful thereunder—specifically with respect to right of appeal from decisions of the Neutral Body.

2. Failed to adopt States Marine's proposals regarding notice, confrontation of witnesses, weight of evidence, hearing, and notice of decision.

3. Failed to require the establishment of "criteria" for the assessment of fines.

4. Concluded that an accounting firm may serve as a Neutral Body when it serves as the regular auditor for a conference member.

5. Failed to conclude that modifications adopted by less than unanimous vote are contrary to the public interest and detrimental to the commerce of the United States in violation of section 15 of the Shipping Act, 1916.

6. Approved the present signature of the conference used in submitting proposed modifications and failed to require that conference minutes show by name the members opposed to any proposed modification.

7. Approved Agreement Nos. 150-29 and 3103-26.⁵

⁵ Hearing Counsel also filed exceptions to the initial decision which will be discussed where appropriate in our treatment of the exceptions of States Marine.

We shall deal first with the alleged error in considering the modifications embodied in Agreement Nos. 150-29 and 3103-26.

The proposed modifications which were included in respondents' brief in accordance with our action on respondents' motion to amend the order of investigation were designed to narrow the issues for final decision by meeting certain of States Marine's objections to the Neutral Body system as it appeared in Agreement Nos. 150-21 and 3103-17. For example, a 2-year period of limitation was placed on investigations in answer to States Marine's objection that the Neutral Body was free to investigate any alleged violation no matter how stale it has become through the passage of time. States Marine's argument against considering these modifications is simply that they were not in evidence and not at issue. All further discussion of the amendments merely shows that as far as States Marine is concerned the amendments do not go far enough in satisfying its objections to the system, but this is no ground for excluding them from our consideration.

Exclusion of the proposed amendments would achieve nothing more than a delay in their ultimate consideration. They have been filed with us for our approval. They raise no new issues and they cannot prejudice States Marine since they seek to remedy defects in the system alleged by States Marine itself. Moreover, our authority under section 15 of the act is not simply the sterile power to accept or reject that which parties to agreements file with us. Section 15 expressly grants us the power to modify agreements filed with us.⁶ Thus, even if respondents had not expressed their willingness to meet certain of States Marine's objections to the system by voluntarily amending their agreements, we could order them to do so as a condition precedent to our approval of the system. The only difference between the two courses of action is that the latter takes more time because we cannot force parties to accept a particular agreement—they always have the option of no agreement at all. Our situation here is much the same as that of the Federal Power Commission in *Florida Economic Advis. Coun. v. Federal Power Com'n*, 251 F. 2d 643 (D.C. Cir. 1957) when it granted a certificate of public convenience subject to certain curative conditions imposed after close of hearings. The petitioner claimed he would be adversely affected if not heard on these conditions. In

⁶Sec. 15 provides in relevant part:

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this act, and shall approve all other agreements, modifications, or cancellations."

denying the petition the Court stated, "the conditions only resolved issues raised, argued, and briefed in the hearing. They involved no surprises except insofar as they may have gone further or not so far as petitioner would have wished." This contention is plainly without merit and is rejected.

States Marine next excepts to the Examiner's application of the *Silver* case.

Silver involved a suit by a securities dealer against the New York Stock Exchange under the antitrust laws for the concerted refusal of the Exchange's members to continue private teletype and stock ticker service to the plaintiff, a nonmember of the Exchange. The Exchange had discontinued these services and refused to tell the plaintiff the reason in spite of numerous requests by plaintiff. The Court found that, notwithstanding *Silver's* prompt and repeated requests, he was not informed of the charges underlying the decision to invoke the Exchange rules and was "not afforded an appropriate opportunity to explain or refute the charges. * * *" The Court stated that:

Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner. 373 U.S. 364

* * * * *

[N]o justification can be offered for self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position. No policy reflected in the Securities Exchange Act is, to begin with, served by denial of notice and an opportunity for hearing. 373 U.S. 361

The Examiner distinguished *Silver* on several factual and legal grounds. He pointed out that:

Silver was an antitrust case, this is not; States Marine is a member of both conferences, *Silver* was not a member of the Exchange; the Shipping Act specifically exempts agreements approved thereunder from the antitrust laws, the Securities Exchange Act does not; the problems and considerations having to do with stock exchange self-regulation differ materially from those having to do with steamship conference self-regulations; notice and hearing, the only two specific safeguards in issue in *Silver* are expressly provided for under the conferences' proposed system; and States Marine chose to join the conferences thereby surrendering some sovereignty.⁷

Notwithstanding the legal and factual distinctions quoted above, and noting that the term "due process" is nowhere to be found in the body of the majority opinion, the Examiner found the *Silver* case "persua-

⁷ The Examiner noted that a practical *caveat* was present in any consideration of States Marine's "true freedom of choice" to operate outside the conference when and if the respondents' dual rate systems are approved and go into effect. Nonconference lines would then be largely precluded from carrying cargo of shippers signing dual rate contracts.

sive" insofar as it "clearly supports a requirement for 'fundamental fairness' in industrial self-policing systems, but not for the so-called defensive safeguards and techniques historically identified with constitutional due process of law."

We agree with the Examiner's treatment of *Silver* and think it eminently sound. The real thrust of States Marine's argument regarding *Silver* is that the Neutral Body system is required to assure a conference member accused of a breach of the conference agreement virtually all the safeguards the criminal law affords a person charged with a crime. *Silver* clearly will not support such a proposition, and to adopt anything like it here would in our view render any self-policing system totally ineffectual and thus defeat an express statutory purpose of Congress.⁸ Moreover, the only indication in *Silver* as to what type of notice and hearing should be afforded in a self-policing system is contained in footnote 17 at page 364 of the Court's opinion:

The basic nature of the rights which we hold to be required under the anti-trust laws in the circumstances of today's decision is indicated by the fact that public agencies, labor unions, clubs, and other associations have, under various legal principles, all been required to afford notice, a hearing, and an opportunity to answer charges to one who is about to be denied a valuable right.

Thus, the Court makes it clear that 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 procedural safeguards accorded in these institutions are not the same as those accorded a criminally accused. 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.

We think respondents' self-policing system as ultimately proposed by them meets this standard of fundamental fairness.⁹

States Marine, however, takes specific exception to the Examiner's conclusion regarding notice, confrontation of witnesses, weight of evidence necessary to find a violation, hearing, and notice of decision.

Right to Notice.—The conference's latest proposal regarding notice to a line accused of a violation provides in substance that upon receipt of a complaint the Neutral Body would have authority to call upon the members named in the complaint 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.

⁸ Public Law 87-346 amended sec. 15 so as to empower us to disapprove a conference agreement upon a finding of inadequate policing of the obligations of the members under it. The legislative history of this amendment is replete with instances of total disregard of conference obligations by member lines and malpractices resulting from the disregard.

⁹ For the full text of art. 10, 12, and 25 as proposed in Agreements Nos. 150-21, as modified by 150-29, and 3103-17, as modified by 3103-26, see app. B.

After investigation the accused will be advised as to whether or not there are reasonable grounds to believe that a violation occurred. If so, he will be informed of the nature of any alleged violation and of the evidence concerning it which can be revealed without jeopardizing the confidentiality of the Neutral Body's source of information. The accused is then afforded a hearing (art. 25(b)(3)).

The Examiner found that since the proposal provides for notice and hearing before final decision, it is clearly in keeping with the standards of fairness prescribed by *Silver*, since *Silver* imposed no requirement of notice before investigation. As the conference witnesses testified, notice prior to even the investigation would facilitate the concealment of incriminating records and thus effectively frustrate the investigation. The primary purpose of notice is to inform the accused of the charges against him and to afford him an opportunity to defend himself. This should not include the opportunity to hide or conceal evidence of a malpractice. The Neutral Body upon receipt of a complaint must find evidence to support the charges contained therein if such evidence exists. The only real possible source of such evidence is the records of the accused. If there is to be any kind of workable Neutral Body system, the Neutral Body cannot be deprived access to its only source of information. It could be so deprived, however, if the Neutral Body were required to give notice to an accused prior to investigation.

Under the proposed provisions regarding notice, an accused would be afforded an adequate opportunity to defend itself, not by concealing incriminating evidence, but in the more conventional manner of offering rebutting evidence to known charges.

The proposal on notice does provide the accused with information concerning "the nature of the alleged breach and the evidence concerning it." This is sufficient to inform the accused of "why a rule is being invoked to harm him and allowing him to reply in explanation of his position." This satisfies the fundamental fairness requirements of *Silver*.

States Marine also objects to that portion of the notice provision stating that evidence will not be disclosed if such disclosure will result in the identification of the accuser. We will deal with this *infra* in conjunction with the issue of confrontation.

Confrontation.—Article 25(e)(1) as last proposed by the conferences reads, "The Neutral Body will under no circumstances disclose the name of the complainant to the respondent * * * unless specifically authorized to do so by the complainant."

Article 25(f)(3) states "In so advising the respondent [of the nature of the breach] the Neutral Body shall disclose the actual evidence

which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information."

On these points the Examiner found that fair play requires and article 25(f)(3) anticipates, that the accused will be informed of the factual basis of the Neutral Body's conclusions and will be afforded an adequate opportunity to reply or explain. He further found that a requirement necessitating the disclosure of the identity of the complainant would seriously cripple the Neutral Body since few complaints would then be filed.

States Marine relies on *Silver* and several other cases in excepting to these findings of the Examiner. The language of *Silver* quoted by States Marine in support of its position that confrontation and cross-examination of the accuser are required reads as follows:

In addition to the general impetus to refrain from making unsupportable accusations that is present when it is required that the basis of charges be laid bare, the explanation or rebuttal offered by the nonmember will in many instances dissipate the force of the *ex parte* information upon which an exchange proposes to act. 373 U.S. 362.

We do not understand this statement as requiring confrontation and cross-examination of the accuser. Quite the contrary, the Court simply states that by laying bare the basis of the charges and affording the accused an opportunity of rebutting them "the force of the *ex parte* information" upon which the charge is made may be dissipated—not that the charge may not properly be made on the basis of *ex parte* information. *Silver* does not support States Marine's contention.

The several other cases cited by States Marine involved either criminal rights or government action against an accused and are not applicable to this type of private voluntary association.¹⁰

States Marine's desire to know the identity of the accuser must be balanced against the unwillingness of the member lines to file complaints if they are to be identified as the accuser. Their very real concern is that almost invariably the complaint will alienate a preferred shipper should the identity of the complainant be known. In our view such a requirement would render the Neutral Body system unworkable.

But both States Marine and Hearing Counsel argue that an accused will not be guaranteed that he will be confronted with all the evidence against him in view of the discretion given the Neutral Body in reveal-

¹⁰ States Marine relies primarily on *Greene v. McElroy*, 360 U.S. 474 (1959) which involved security clearance revocation by the Department of Defense and *Greene v. U.S.* where the same plaintiff sought damages for revocation of his security clearance.

ing confidential information. The Examiner correctly observed that in those instances where evidence relied upon for decision should not be shown to the accused in its original form because of undesired disclosures, it would certainly be within the "basic precepts of fair play" for the Neutral Body to go as far as it reasonably can without disclosing the identity of complainants or sources of confidential information, to inform the accused of the substance thereof as material to an adequate understanding of the charges and findings. The substance of the evidence relied upon 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.

Investigation and Hearing.—The Examiner concluded that the conference proposals on these matters satisfied the requirements of *Silver*.

The proposals regarding investigation provide the Neutral Body with 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 (art. 25(d)).

States Marine would have the investigation made by an accused line's regular auditors under the Neutral Body's direction. States Marine seeks this as a matter of convenience and to avoid exposing its confidential business affairs. Inherent in this position is the unstated and in our view unwarranted assumption that the Neutral Body will make unwarranted and unauthorized disclosures of States Marine's business affairs. We have difficulty imagining such conduct on the part of accounting firms such as Price, Waterhouse or Lowe. There is no basis here for predicting such conduct no matter who is ultimately selected as the Neutral Body.

The conference proposals regarding hearing which were approved by the Examiner provide for notice and disclosure of evidence and, "within fifteen (15) days, or within such reasonable time thereafter * * *, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or attorney, and offer to the Neutral Body such explanation and/or rebutting evidence as it may deem proper and desirable. At such hearing the Neutral Body shall consider all of the available evidence * * *." (Art. 25(f)(3).)

In making its decision "the Neutral Body will not be restricted by legal rules of evidence or the burden of proof required to establish criminality, or even a civil claim. Instead, it will employ rules of common sense * * * and the only standard required is that the informa-

tion developed is persuasive to the Neutral Body itself that the breach occurred." (Art. 25 (f) (2).)

States Marine's objections here are but a repeat of its objections to the provisions for disclosure of evidence. Again, States Marine urges that there can be no fair hearing or opportunity to explain when there is no guarantee that an accused will be adequately informed of the charges or of the evidence supporting such charges and again it is our view, if the accused is not sufficiently informed of the charges against him and the evidence in support thereof so as to prepare his rebuttal, the elements of fundamental fairness are missing.

Mitigating Circumstances.—The latest proposed modifications to the agreements provide: "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." (Art. 25(f) (4).) The Examiner approved this language.

States Marine argues that such a standard is inadequate; that due process requires specific criteria (such as whether the violation was purposely committed, whether it is a first offense, whether it is also a violation of law, etc.) to be followed in determining the nature of the fine. Hearing Counsel feel that the agreement should be amended to provide a graduation of fines based on gravity of offense. The Examiner correctly concluded that there is no evident basis for anticipating that the Neutral Body will not exercise fundamental fairness in determining and considering such mitigating circumstances as may be reasonably determinable and relevant in each case. But as evidence that the Neutral Body does not exercise fairness in such matters, States Marine offers the fines assessed against it and subsequently invalidated in Docket 920. In each instance the maximum fine was assessed. To begin with, the fines were invalidated not because the amounts were unreasonable but because the appointment of the Neutral Body itself was not in conformity with the conference's basic agreement. Moreover, we cannot say that the maximum penalty allowed is unwarranted for a refusal to allow the Neutral Body access to company records. We do not find the instances of other fines by other Neutral Bodies in other conferences persuasive here.

Neutrality.—Under the presently approved system the conferences appoint a Neutral Body from responsible accountants or other persons. The appointee may not be employed by nor financially interested in any party to the basic agreement. The conference's latest proposed system provides for the appointment of an impartial, independent person, firm, or organization, subject to disclosure to the confer-

ence of any professional, business or financial interest it may have, then or later, with any member line. In the event of a complaint against a member with which it has any such interest, the Neutral Body would have to disqualify itself and appoint a substitute agent having no such interest. Any financial interest in any member line, however, will defeat appointment and if acquired after appointment will be disqualifying (art. 25(a)). The Examiner approved the latest proposal, thereby authorizing the Neutral Body to be professionally affiliated with any conference member (including the complaining line) other than the accused.

States Marine excepts to this finding. It feels a Neutral Body which has an affiliation with any member line, especially with the complaining line, cannot be neutral so as to be able to sit and judge objectively and without bias. States Marine urges the time honored proposition that any person or body sitting in judgment, be it called judge, arbitrator or referee, etc., must be free from all bias or interest in the outcome of the case. Hearing Counsel feel that to be consistent any interest in either the accused or the complainant should be disqualifying. Be that as it may, we do not agree that being under contract to perform professional auditing services of a member line of the conference other than the accused gives the Neutral Body an interest such as would disqualify it.

Mr. Ralph S. Johns, Chairman of the Ethics Committee of the American Institute of Certified Public Accountants, testified that proposed article 25 was not inconsistent or incompatible with the Code of Ethics of the Institute and that a member's affiliation with a complainant would not impair its independence. Johns pointed out by way of emphasis, that "It is a common situation among the larger accounting firms to serve two or more competing enterprises and in my own personal experience in Chicago not only do we, as the same firm, serve the two largest farm implements corporations, but we serve them right out of the same office and we have done so for over 50 years." We think the Examiner was correct when, after a summary of the testimony, he stated:

In view of the fact that the Neutral Body functions are fact finding rather than judicial; that the conclusive facts are usually, if not always, obtained from the books of account and records of the accused; that accounting firms are uniquely qualified both professionally and by procedural and ethical standards, to perform this work; that fees are paid on the basis of time devoted to a case, and without regard to whether the complaint of malpractice is sustained or dismissed; that there is no evidence of actual bias or nonneutrality relating to any of the firms heretofore used; and that the application of unduly broad exclusions will disqualify or bring about the disinterest of most, if not all, of the otherwise eligible firms, thereby destroying this self-policing system, contrary to the public

interest and to the detriment of commerce, it is found that 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.

States Marine offers nothing on exceptions which would affect the Examiner's findings with which we agree.

Right to Appeal.—Neither the presently approved nor the latest proposed modifications to the agreements contain any provision for appeal from the Neutral Body's decision. The latest proposal states that "the members agree to accept the decisions of the Neutral Body as valid, conclusive, and unimpeachable." (art. 25(g)).

The Examiner found that provision for the right to appeal to arbitration would not be necessary for approval of the self-policing systems.

States Marine in exceptions contends that the *Silver* doctrine of "due process fairness" requires provision for appeal from the Neutral Body's decision to an arbitration panel; the fees and expenses of the arbitrators being paid by the conference. They believe appeal is necessary to prevent "runaway decisions by a neutral body."

Hearing Counsel consider the right to arbitration to be desirable as a double check on arbitrary action.

An appeal is, of course, not required by law. Where a federal statute denied an appeal of Tax Court determination in renegotiation cases, the Ninth Circuit Court of Appeals in *French v. War Contracts Price Adjustment Board*, 182 F. 2d 560 at 565 (1950) rejected a contention of unconstitutionality, concluding " * * * that there is no constitutional right of appeal is well phrased in *Luckenbach Steamship Co. v. United States*, 1926, 272 U.S. 533 at 536 * * * 'the well-settled rule applies that an appellate review is not essential to due process of law, but is a matter of grace.' "

The testimony of record demonstrates why appeal would render the self-policing system ineffective. It would cause delays and is unnecessary since 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 of the candidates for the Neutral Body position indicated they would not serve if their decisions were to be subject to appeal.

Since the law does not require appeal and since other reasons exist for not requiring appeal, we find that it is unnecessary to have such a provision in this Neutral Body agreement.

Knowledge of Acquittal.—States Marine opposed the original proposals because they contained no provision for notice of acquittal to an accused. The conferences' latest proposal provides for notice

in the event of either acquittal or conviction. The Examiner approved this latest proposal. States Marine does not object to the substance of the provision, but has doubts as to whether it was properly before the Examiner for consideration. We have found that the Examiner's consideration of these proposals was proper. We also found the Examiner's approval of the provision for notice of acquittal as well as conviction was well founded and proper and it is upheld.

Unanimity.—The present voting requirements of the respondent conferences are set forth in articles 18 and 19 of the basic agreements. They provide that four-fifths of all parties entitled to vote constitute a quorum when changes in the basic agreement are being considered. Once a four-fifths quorum is present, all parties agree to be bound by changes made with the consent of two-thirds of all parties entitled to vote.

Throughout this proceeding States Marine has contended that section 15 requires that such modifications to the conference agreement can only be approved upon unanimous adoption by all members of the conference. Accordingly, they contend that the Neutral Body proposals in question here cannot be approved since States Marine has not endorsed them.

The Examiner found that a unanimous vote is not required, and States Marine takes exceptions thereto. The contention is that a nonunanimous amendment rule has been contrary to the public interest and has operated to the detriment of the commerce of the United States in violation of section 15. States Marine, in support of this contention, maintains that the present rule has caused a high coefficient of friction in the conferences, that it makes it impossible for States Marine to retain control over its own business and corporate affairs, and that it pledges the company to adhere to contracts never formulated by its management.

In our previous report we said:

States Marine contends that notwithstanding the language of articles 18 and 19, a modification of the basic agreement without unanimous consent of the parties alters the contractual relations of the dissentient parties contrary to the principles of contract law and is thus invalid. States Marine argues, in an attempt to avoid its obligations under articles 18 and 19, that because it was not among the original organizers of the respective conferences and had no part in the formulation of their basic agreements it remains free to attack those portions of the agreements which it considers improper. For States Marine to prevail, some provision of section 15 must render the voting requirements of articles 18 and 19 invalid, for if they are valid States Marine as a subscriber to the agreement is bound thereby.

In attempting to show that the voting requirements are invalid States Marine attempts to draw analogies from the field of private contract law. We think

these analogies improper. Private contracts, normally between two parties, cannot reasonably be equated with agreements approved under section 15. An agreement providing for the organization of a conference to operate in our foreign commerce is of necessity an agreement which attempts to reconcile a number of divergent interests insofar as is consistent with Congressional policy and the public interest in the free flow of our foreign commerce. Such an agreement must provide for the continuing commercial operations of a relatively large number of conference members with as little friction and obstruction as possible. The very heart of such an agreement is that each individual line relinquishes some of its freedom of action, in exchange for the benefits resulting from participation in the conference arrangement.²

This concept of majority rule is not uncommon in the ocean freight industry. A good many agreements on file with the Commission provide for the modification thereof by a stated majority. We do not consider it unreasonable for a conference to make such a provision in its basic agreement, provided it is not applied so as to contravene the standards of section 15. We find nothing in the concept of majority rule as applied to the proposed modifications here under consideration which renders it discriminatory as between carriers or shippers, detrimental to the commerce of the United States, contrary to the public interest or otherwise contrary to the requirements of section 15. States Marine in accepting membership in the respondent conferences has bound itself to the terms of the basic agreement, and so long as it chooses to remain a member it must conform to all modifications thereto which are regularly made and duly approved by the Commission.

States Marine has offered nothing which causes us to change our views as expressed above. We would only add that in our view unanimity could well work to increase rather than decrease friction among the members of the conferences. The record here clearly demonstrates that if the respondent conferences each had the unanimity rule, there would be no Neutral Body system presently before us for approval. Therefore, the respondents' attempts to satisfy their statutory obligations to adequately police their obligations under the respective agreements would be frustrated. Such a result would of course be contrary to public interest and detrimental to commerce within the meaning of section 15.

There remains States Marine's objection to the way in which modifications to the agreements are subscribed to by the conference chairman. The conference chairman executes a standard form of subscription in submitting proposal agreement modifications to the Commission for approval. This form provides:

²This is by no means a novel relationship. Analogous situations pervade our political, economic and social structure. Just one example in the economic sphere is found in corporate organizations. A corporation can make fundamental changes in its charter, changing the very nature of the corporate business, and most States require only that the consent of two-thirds or three-fourths of the stockholders be given to this change. The dissenting stockholder must either bow to the will of the majority, or sell his stock. The latter alternative is, in effect, resignation from the corporation.

IN WITNESS WHEREOF the [conference], the members of which are all hereinafter listed, has authorized the foregoing amendments by resolution passed at its regular conference meeting held _____, 19____, in Tokyo, Japan.

There follows a typed list of the membership and the signature of the conference chairman as such. States Marine contends that this creates "a record which on its face is misleading, a half truth, and may be utterly false" in that the signature of the conference chairman on behalf of the entire membership implies that the modification was carried unanimously.

We agree with the Examiner's finding that this contention is without merit.

He stated:

Conference chairmen are merely accomplishing the ministerial function of filing duly adopted modifications on behalf of the conference and in so doing are listing the lines currently holding memberships, all of whom are bound by the modifications. Such listing has nothing whatever to do with a vote tally or representation of unanimity. Both the Commission and the individual member lines are on direct notice that under the provisions of articles 18 and 19, *supra*, resolutions referred to in the standard form require the affirmative vote of only two-thirds majority. On this record, it cannot be found that the form is actually misleading or otherwise in violation of the act.

Since States Marine's objections to the proposed Neutral Body systems here under scrutiny are based almost exclusively upon the Supreme Court's decision in the *Silver Case*, our discussion of them has been primarily concerned with the applicability of the *Silver* standards to the systems. What we have said makes it clear that the proposed systems are fully in accord with the standards of *Silver* insofar as they can be said to be applicable to industry's self-policing agreements under the Shipping Act. More importantly, we think it equally clear that the proposed systems are fully in accord with the standards and requirements of section 15, and should enable respondent conferences to satisfy their responsibility to police adequately their obligations under their respective agreements. There is nothing in this record to show that the systems will in any way operate in a manner which would be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign counterparts, or detrimental to the commerce of the United States, or contrary to the public interest, or in violation of the Shipping Act.

VICE CHAIRMAN JOHN S. PATTERSON, *dissenting*:

This case is before the Commission for the second time because the United States Circuit Court of Appeals for the District of Columbia

granted our petition to remand our first report and order of October 30, 1963, shortly after the intervenors herein had appealed our order as authorized by the Review Act of 1950, but before a final adjudication by the Court of Appeals. Our petition acknowledged that our decision was made without considering a recent Supreme Court precedent in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (herein referred to as "*Silver*"), and we expressed a desire to reopen and reconsider this case in the "light of *Silver*." The *Silver* case held the New York Stock Exchange did not have the power to deny private teletype and stock quotation "ticker" service to a nonmember broker without first according fair procedures pursuant to self-regulation rules of the Stock Exchange authorized under the Securities Exchange Act.

After the remand ordered March 16, 1964, we vacated our first report and order. Additional hearings before an Examiner were ordered and completed, followed by a decision by an Examiner concluding that the agreements should be approved. Exceptions were filed.

The purpose of the entire proceedings is to adjudicate whether the two agreements which contain similar provisions should be disapproved in response to the protests of the intervenors. The protested provisions relate to procedures for policing the obligations under the agreements. The purpose of this particular phase of the proceeding is to rule on the exceptions and then to decide whether or not the Examiner was in error in approving the agreements.

Dissent is made to the preceding decision and to its rulings on the exceptions for the reasons:

First, there has been a failure to decide in conformity with changed conditions in law requiring modified actions as we represented to the court of appeals in our petition. The agreements should be disapproved.

Second, the agreements considered by the Examiner and subject of the rulings are not part of the record herein and are not subjects of this proceeding.

A. We have before us 18 exceptions by intervenors and 2 exceptions by Hearing Counsel to the Examiner's initial decision approving, pursuant to section 15 of the Shipping Act, 1916 (Act), Agreements Nos. 150-29 and 3103-26, instead of Nos. 150-21 and 3103-17 which were before the court of appeals and which were approved in our first report. Agreements Nos. 150-29 and 3103-26 were the subject of our order titled "Denial of Motion to Amend Order Reopening Proceed-

ing", denying, on March 31, 1965, a motion to amend the order reopening the proceeding after the record had been closed and the hearings concluded on March 3, 1965. The denied motion was for the purpose of making "these revised self-policing provisions" in Agreements Nos. 150-29 and 3103-26 a part of the record. Therefore, my rulings on the exceptions are confined to the question of approval or disapproval for adequacy of self-policing provisions of Agreements Nos. 150-21 and 3103-17 which are part of the record.

B. Based on the record before me in this proceeding, my conclusions are that Agreements Nos. 150-21 and 3103-17 should be disapproved because after notice and hearing it is found Agreements Nos. 150-21 and 3103-17 contain inadequate policing under the obligations of the previously approved Agreements Nos. 150 and 3103, contrary to the requirements of the third paragraph of section 15 of the act.

C. My conclusions result from the following proposed rulings. These rulings apply to the numbered exceptions of each party as stated by them and set forth in appendix C hereto. Intervenors' exceptions 1 through 7 and 12 through 17 should be sustained. Intervenors' exceptions 8 through 11 and 18 and both of Hearing Counsel's exceptions should be rejected.

D. As regards my conclusions and proposed rulings, the reasons in support of them and for my decision are advanced in the following discussion.

The facts consist entirely of the agreements subject to the applications for approval in the first hearing, and "affidavits and memoranda, replies thereto and oral argument" pursuant to the terms of our order served March 14, 1963, and in the second hearing testimony and exhibits pursuant to the terms of our order served April 3, 1964, as amended to expand the issues to be resolved. Agreements Nos. 150-29 and 3103-26 were never subject either to hearing or to cross-examination.

The two agreements subject of this proceeding are between common carriers by water in foreign commerce associated as the conferences identified above and respondents herein. The purpose of the agreements is to establish a procedure for policing the obligations under the agreements. The procedures for policing the obligations were in amendments of the agreements (Agreements Nos. 150-21 and 3103-17) which we are required to approve or disapprove pursuant to the directive in the third paragraph of section 15 of the act, pertinent portions of which have been underscored:

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

The issue underlying all others is the adequacy or inadequacy of the provisions for policing of the obligations under the agreements proposed by the respondents. Before this issue may be decided we have to know which two out of the four agreements presented to the Commission one way or another are to be reviewed for adequacy. The Examiner considered he had Agreements Nos. 150-29 and 3103-26 before him for review. On the other hand, I consider I have Agreements Nos. 150-21 and 3103-17 before me. The latter agreements are located in exhibits 1 and 2 and consist of identical provisions in article 10 titled "Breach of Agreement," article 12 titled "Faithful Performance," and article 25 titled "Neutral Body," which amend or modify the first approved agreements of respondent conferences. Only the provisions of article 25 are questioned or challenged as to adequacy.

Exclusion of the proposed amendments (i.e., Agreements Nos. 150-29 and 3103-26), it is stated, would achieve nothing more than a delay in their ultimate consideration and there is "no ground for excluding them [the undeleted provisions of appendix B containing the provisions of Nos. 150-29 and 3103-26] from our consideration." There are, to the contrary, both reasons for delay and grounds for exclusion. The reasons for delay are that intervenors will be given their presently denied opportunity, because the agreements were submitted after the record was closed, to furnish evidence, cross examine, and argue against adequacy and approval. Such opportunity founded on rights to be heard may not be denied for reasons of expediency. The grounds for exclusion are that we have already excluded Agreements Nos. 150-29 and 3103-26 by our order served on March 31, 1965. We have not issued any order opening the record for their admission. The latter agreements may not at the same time be excluded by order and included by considering and approving them anyway. If adequacy is found, the agreements must have been reviewed and considered; and, to review, the agreements must have been read. We may only read and pass on what is in the record. The Examiner has obviously read and passed on the excluded nonrecord evidence. No matter how justifiable such reading may seem to avoid delay or how unfair disregard of improvements or compromises may seem on second thought, we may only make decisions upon material issues of fact presented on the record if we are to obey section 8 of the Administrative Procedure Act. I elect to obey this section.

Perhaps exclusion of the proposed amendments may be thought to be precluded because we invited respondents to set forth "in their briefs any proposals for modifications of the contested clauses which alleviate the disputes between the parties." These agreements with higher numbers, however, are being approved as new agreements in the record, not as modifications proposed and imposed by the Commission. Any such invitation would also misconceive our objective when we adjudicate approvability of agreements. We are approving and disapproving agreements and we are not alleviating disputes. Agreements come into the record because they are admitted by an Examiner as evidence subject to cross-examination and argument before disapproval, rather than as proposals to "alleviate" disputes. Neither are agreements automatically in the record by filing with the staff. The Commission is finding adequacy or inadequacy and thereafter adjudicating approval or disapproval. Any other objective deprives intervenors of serious rights, and we should delay as long as necessary to accord them their rights.

It should be clear that both the subject the Examiner and I are reviewing and the objective the Examiner and I are trying to accomplish are entirely different. For these reasons, the first exception to Examiner's approval of Agreements Nos. 150-29 and 3103-26, when the modifications therein were not in evidence as a result of a Commission denial of a motion to reopen the record to consider them, should be sustained.

The next step is to find out whether the agreements in the record have adequate or inadequate self-policing provisions. We must compare the standards for self-regulation in the *Silver* case as we said we would do in our representations to the court of appeals in our remand petition. Our petition referred to our Rules of Practice and Procedure, Rule 16(a), stating the Commission might reopen and reconsider and may modify a report or order if such action is found to be required "by changed conditions in fact or law." The expression "self-regulation" in the *Silver* case applied to Stock Exchange regulations is the same as "policing the obligations" in section 15 of the act applied to conference agreement provisions. As a result changed conditions in law have been shown requiring a change in my earlier conclusions.

The agreements herein have been approved in spite of the disclosure that the *Silver* case changed conditions in law applicable to self-regulation of the Stock Exchange which must now be applied as an interpretation of the act before a conclusion of adequacy or inadequacy of the policing provisions may be reached. In discussion of later excep-

tions, I find the agreements violate two of these new standards, which are now law, in addition to the existing findings supporting lack of fundamental fairness as stated in my dissent to the Commission's Report in this docket served October 30, 1963 (7 FMC 653, beginning p. 659). For these reasons the agreements are found to violate the new laws for industry self-regulation, and the second exception should be sustained.

Correct consideration of this case in the light of the new standards in the *Silver* case requires more than a comparison and a finding of nonapplicability based on distinctions and arguments alone.

The Examiner's "treatment" of *Silver* is thought to be "eminently sound." My difficulty with the soundness of the treatment is that the distinctions and arguments all existed at the time the earlier remanded report was being reviewed by the court of appeals. All the distinctions and arguments might have been presented to the judges at that time without asking for the remand. A representation serious enough to induce a court to remand a case to us for more expensive and time-consuming adjudication ought to involve some new discoveries and a shift of position rather than the preappeal decision reached once again by now finding that the law of the precedent either does not apply, or to the extent the new law applies the respondents' self-policing system "meets the standard of fundamental fairness" and is presumably adequate. The reasons assigned to justify the remand, for better or for worse, completely changed the comparisons to be made, and it is too late to act as though our representations about changed conditions in law in *Silver* do not change anything else. The Commission is committed to considering the changes seriously. We could not foresee what was to come, nor prejudge, but at the time I believed we had the serious purpose of applying the precedent. I am attempting to give such consideration and application, as I indicate herein, because we chose not to take up the opportunities to argue when we were subject to the Court's judgment and elected to use the opportunities only when we got the case back subject to our judgment. One must now get on with this assignment. Accordingly, it is believed I must not only disagree with the treatment of the *Silver* case, but must reconsider my own position in my previous dissent.

Section 15, as amended by Public Law 87-346 in 1961 to add the third paragraph, establishes as a principle that self-policing is a governmentally recognized method of enforcing conference agreements. Given such a principle, the consequences to government policing must be that short of displacing government enforcement of laws, some displacement of Commission concern with enforcement of conference

agreement obligations affecting conformity with the act is inevitable. Loss of protection to the public caused by any displacement may be restored by assurance of fair procedures in administering a self-policing plan. To me, this is the lesson of or the "light" cast by the *Silver* precedent. Stated in other words, equally applicable to the third paragraph of section 15, the Supreme Court wrote:

"Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner." 373 U.S. 341 (1963) at p. 364.

Whatever may have existed before, a fundamentally unfair manner is now equivalent to inadequacy. We protect the public when we assure adequate procedures.

I do not believe, however, that what is fundamentally fair for the New York Stock Exchange operating in conformity with the Securities Exchange Act for the purpose of protecting licensees and promoting fair dealings among Exchange members within the United States is to be regarded as an imperative for ocean freight rate-fixing conferences operating in conformity with the Shipping Act for the purpose of protecting shippers and carriers under the traditions of international shipping. Nevertheless, some concessions to public protection are necessary to achieve fundamental fairness. For the reason that the Examiner made no concession to public protection beyond what existed before, there has been a failure to apply standards, and the failure amounts to an incorrect consideration of this case in the light of *Silver* in line with our petition, and the third exception should be sustained.

Procedural safeguards established under Agreements Nos. 150-21 and 3103-17 for shipping conferences may differ from those for securities exchanges and be less sophisticated and exacting because carriers are dealing with each other. Also, procedural requirements derived from our own jurisprudence need not guide impositions on conference members, most of whom are nationals of countries where traditions are not the same as ours. The jurisprudence of which official notice may be taken in many conference member nations is inquisitorial rather than adversary in nature, and adequacy of self-policing procedures may take this factor into account. The possibility of international retaliatory regulation, not present in national securities exchange regulation, also argues for restraint in imposing our traditions. The differing subjects of regulation, the less sophisticated conference procedures, differing traditions of jurisprudence among those to be regulated, and other international considerations dictating

restraint are all factors which justify minimum procedural requirements to achieve fundamental fairness as qualification of adequacy. It is concluded that, to restore assurance of public protection and avoid inadequacy, at least some, but not all, of the argued-for procedural safeguards of *Silver* are required. For these reasons the fourth exception to the Examiner's conclusion, that Agreements Nos. 150-21 and 3103-17 establish a fundamentally fair system of industry self-regulation within the meaning of *Silver* when none of the procedural safeguards specifically named are provided, should be sustained.

Without findings of fact and only with arguments, the Examiner approved agreements without procedures for giving an accused carrier (1) notice of complaint, (2) opportunity to confront, (3) the evidence used to reach decisions, (4) a hearing (including if essential cross-examination) before a decision, and (5) notice of the decision, including a specification of the charges found proved and those found unproved as urged by the intervenors. The agreements approved were not in the record. If the above five standards do not apply to the record agreements, we ought to know what facts or other argued considerations cause the standards not to be applicable. Intervenors supplied quite a few facts which they argued showed inadequacy, detriments to commerce, and absence of public interest if all the standards were not found applicable. Parties are entitled to a refutation based on factual findings. If the findings are absent the conclusions may not be made. The fifth exception as to conclusions despite lack of findings of fact on the agreements in issue should be sustained.

The sixth exception, together with my ruling on the fourth exception, leads to a question of what standards must be applied to agreements as tests of adequacy. It has already been decided above that some but not all of the proposed procedural safeguards must be applied and that it is error to apply none of them. Which particular ones apply depend on practicalities and circumstances of international ocean shipping traditions.

The essential basis for fundamentally fair procedures is to encourage discovery of as much of the truth about a commercial transaction as is possible so that a truly neutral judge may know most of what is relevant for deciding who is right and who is wrong after a complaint of malpractices. Fair procedure is not a ritual for the benefit of disputants, nor an assurance of personal "rights," but is a practical means for helping out a truly neutral adjudicator. The new tests need not have anything to do with "due process" observed by courts nor with distinctions between criminal and civil jurisprudence. If they are simply practical aids to truth finding, they are adequate for

policing the obligations. A system providing only for a power referee would be inadequate. Almost any procedures, varying from conference to conference, that facilitate disclosure should meet the *Silver* standards of fairness as tests of adequacy.

Applied to the five proposed tests, these considerations lead to choosing notice of complaint, disclosure of evidence used to reach a decision, and a hearing of some sort before decision. Neither confrontation nor notice of decision are necessary, although the latter would seem to be reasonable and not be a controversial point. Disclosure of evidence and hearing with cross-examination might all be at the same time and place after preparation and might occur in the presence of the adjudicator. The notice and hearing (including disclosure of evidence) are essential to provide an opportunity to answer charges by one who is about to be deprived of valuable commercial privileges or fined.

In the subject agreements, article 25 contains eight subarticles (a) through (h). Of these none provides for notice, and the closest they get to notification is a power given the neutral body "to call upon a member or its agents at any of their offices during office hours and inspect * * *" etc. Subarticle (f) refers to a "hearing for the respondent" in the title, but this phrase occurs, if it can be called a "hearing," "on concluding its investigation" and after the body decides "in its absolute discretion whether the facts * * * constitute a breach * * *," but the promise of the title is barely kept because the respondent is allowed, after arrival at a "tentative decision," if requested by respondent, to meet with the Neutral Body and offer explanations. The privileges offered are too late and too little. The "Neutral Body" is in effect the adjudicator. The purpose of a notice is to give the accused the opportunity to bring in all the proof he has to support whatever he has done or to refute what is claimed he did. Obviously, the accused will be motivated by a desire to defend himself and will at least produce some facts in his favor which would be useful to the adjudicator. It is equally to be assumed the complainer will already have produced what supports his case. A hearing procedure will assure that the adversaries will provide the adjudicator with a large number of facts. Notice is an essential practical move, at least to start the fact assembling process, and the notice should be at the earliest possible time to be useful, and certainly before any decision is made. To the extent the agreements before us for approval contain no notice provision or any agreement delays notice until after a decision, they should be disapproved as inadequate if the lessons of the *Silver* case are to be taken seriously.

Confrontation does not seem essential because commercial transactions of the type involved in malpractices are largely documented, involve payments and measurements, and tend to be impersonal. Secret unsupportable accusations and wrongs of a civil or criminal nature where various states of mind are material are less apt to occur in commercial transactions, and malice, vindictiveness, intolerance, prejudice, or jealousy are less apt to be present. The fact that conference agreements are formulated by carriers of many nationalities from a diversity of legal systems does not preclude application of the lessons of the *Silver* case, even under a policy of restraint and minimal standards. The truth is discoverable without confrontation or even disclosure of the identity of the complainer consistently with adequacy.

Investigation and hearing are essential from the adjudicator's point of view for the purpose of adding to or explaining the facts previously supplied by the complainer and the accused. During this stage, both sides may reply with other facts and the adjudicator as an auditor or accountant may go out and assemble business records. A procedure such as that in article 25, which does not make explicit where the evidence must come from, in this regard is inadequate. The adjudicator may, consistently with a hearing procedure as I envision it, simply meet with the parties to allow them to offer explanations or further answering evidence which the adjudicator should then consider and thereafter decide on whether it proves a malpractice or not.

A combination of adversary and inquisitorial procedures having in rudimentary form and simple terms at least the above two elements would satisfy adequacy requirements of section 15 of the Act qualified by the *Silver* decision.

To the extent my dissent in the earlier proceeding approved use of procedures without the elements of notice and hearing, it has been reconsidered and revised by the foregoing in response to what is thought to be the Commission's commitment to the court of appeals.

To the extent the Examiner fails to find policing of the obligations inadequate under the standards of the *Silver* precedent as related to notice and hearing, the sixth exception should be sustained; and, to the extent the Examiner fails to adopt proposals for modification to include the new standards of adequacy in the subject agreements, the seventh exception should be sustained. No need is found for passing on that part of exception 6 questioning whether the self-policing systems operate to the detriment of the commerce or are contrary to the public interest.

Exceptions 8, 9, 10, and 11 deal with failures to find, consider, or recommend agreement provisions relating to criteria for assessment of fines and appeal and review of neutral body decisions. The facts all deal with past abuses and oppressions by respondents, such as the imposition of maximum or disproportionate fines for refusal to reveal company files to a suspected hostile auditor, and situations potentially resulting in virtual bankruptcy of defendants by excessive fines without appellate review. The facts as to intervenors alone do not establish the necessity of an appeal as a condition to adequacy modified by fundamental fairness lessons. Past history on the facts of this case indicates some appellate restraint on a Neutral Body might be advisable in these particular agreements, but offsetting proposed procedural safeguards should supply the restraint. Apart from procedures, appellate need is eliminated when added to the court-supported principle that appellate review is not an essential to due process, but is a matter of grace, and to the consideration that appeal does not improve the finding of truth but rather improves the application of law. Absence of a right to appeal or restraint on fines does not result in inadequacy. The 8th, 9th, 10th, and 11th exceptions dealing with these subjects may be rejected.

The 12th and 13th exceptions are to the Examiner's conclusions that an accounting firm employed as an auditor by a conference member line may serve as a Neutral Body and may consider a complaint of the member which employs it as auditor (subarticle (a), item (2), 2d paragraph). The issue in both exceptions is whether it is fundamentally fair to use such a person as a neutral in any controversy and whether procedures authorizing such use are inadequate. The reasons for finding provisions of an agreement containing such procedures are inadequate are stated in my dissent in this proceeding in our first report referred to above. Such provisions do not provide a system of true neutrality. In spite of the now reasserted reasons advanced at that time, there still seems to be a misconception of the issue when the Examiner refers to professional accounting firms as being uniquely qualified both professionally and by ethical standards to perform this work. There is no question that this finding or opinion is correct, and nothing stated earlier or here questions qualifications or ethical standards. The issue, at least as I see it, is not individual professional ethics, qualifications, or conduct, but the effect of an existing business relationship on the purity of the system itself to assure true neutrality and dangers to public interest without such assurance. Any appearance of bias or favoritism must be avoided. Our concern ought to be with the tendency to corruption of decision and with the consequent

erosion of public confidence. Suspicion about all decisions is the by-product of existing provisions and the respondents no less than intervenors have much to gain by strict adherence to assured neutrality. Whatever may be said about professional behavior, the provisions allow the policing agency to have a special or closer relation to one and not to the other of two adversaries if he is the auditor of the complainant. The relation with one side unavoidably destroys assurance of siding with neither of two adversaries, an essential ingredient of the true neutrality referred to in the earlier dissent.

By missing the two points of a need for provisions assuring (1) the integrity of the system used and (2) the true neutrality of the policing body, the Examiner has not approved a fundamentally fair system of policing the obligations. For these reasons the 12th and 13th exceptions to the Examiner's conclusions that an accounting firm may serve as a Neutral Body even though it is the regular auditor of a member line and may consider a complaint and render a decision on an accused when serving as auditor of the complainant-accuser ought to be sustained.

The 14th through the 17th exceptions are to the failure of the Examiner to find facts related to the issue of approving agreements by less than all conference members and that the facts create agreements detrimental to commerce and to the conclusion of the Examiner that such agreements may be approved when submitted in the name of all members, including those who oppose the agreement. The exceptions raise an issue as to what is an "agreement" within the meaning of section 15 of the Act. Such an issue ought to be resolved before getting to any other issue as to inadequacy of provisions.

The Examiner held in effect that agreements submitted to the Commission under section 15 may be accepted for filing and approved even though they are not signed by all of the parties to be obligated. He holds that if an earlier agreement provides that later agreements modifying the earlier one may be amended by less than unanimous consent all of the parties are nevertheless obligated by the later modification.

The error of his position is in assuming that a change of an agreement is within the scope of the agreement. A change or amendment is inevitably outside the scope, but is nevertheless an agreement under section 15 if properly accepted. The Examiner fails to distinguish between actions within the scope of an agreement accomplished after vote and changes of the agreement itself which are to enlarge or restrict the scope. The latter require either unanimous consent or obligate at the most only those who accept the terms offered and evidence their acceptance by authorized signatures. The issue here is not one of

inadequacy, but whether there is any agreement at all as described in section 15. The issue is legal, involving the law of contracts, and the best advice available convinces that a reservation by some parties to a contract of an unconditional future right to determine the nature of performance by changing the scope of the agreement makes the promise too indefinite to be enforced and the contract is not complete. (Williston, *Contracts*, 3d ed., sec. 37) If agreements may be changed for all parties by less than all parties, they have no ascertainable meaning for all the parties at the time they are entered into because a later nonagreeing party has no way of knowing what his obligations are at any time during the life of the contract. The dissenter may be obligated in ways never assented to. There is no meeting of minds, no accepted offer, at the moment of agreement about what is to happen if less than all parties may change later the scope of performance. I would hold that a later agreement not accepted at the time of later change by all the parties to be obligated is an agreement only of those who accept and does not obligate those who do not accept, notwithstanding any earlier agreements to be bound by votes of other parties because the earlier agreements create an indefinite and unenforceable contract.

The foregoing is based on legal advice and may not be subject to final adjudication before this agency forum. Agreements under section 15 may not be equated with contracts known to law, but up to now it has never been necessary to resolve this issue. Accepting the premise that the courts may prove my efforts at legal opinions poorly advised, I would nevertheless hold that agreements under section 15 must show unanimous consent before they may be approved. We are not dealing with any abstract concept of majority rule either as known to political science or the management of internal association affairs. We are dealing with agreements, *first*, which only after approval are lawful and when lawful are excepted by the fifth paragraph of section 15 from the provisions of specified laws commonly known as the "anti-trust laws;" and, *second*, which both enlarge and restrict commercial relationships of all member carriers. The first creates valuable privileges to make pricing decisions free from competitive restraint, and the second substantially affects opportunities for profit by foregoing competitive opportunities. The less-than-unanimity imposition of obligations outside the scope of the initial conference agreement enables less than all the associated carriers to force a carrier against managerial judgment to engage in noncompetitive activity or to be exempt from the otherwise applicable laws when a carrier's management wants to resort to competition. It is a paradoxical interpretation of section

15 to say we must accept for filing and thereafter approve an agreement compelling, rather than permitting, noncompetitive activity. Considered abstractly, I wholeheartedly endorse conference association, but it should not be compelled in this manner. The less-than-unanimity rule affects opportunities as shown by testimony that intervenor's management because of its past difficulties was not "going to join or continue in a conference * * * unless we absolutely as a matter of staying in the trade, have to do it" (Tr. 414). What this means is the company found it impossible to retain control over its business and corporate affairs by committing it to contracts not formulated by management but formulated by its competitors. Conflict among business associates likewise may affect profits. The unsupplied facts and findings by the Examiner would have shown a long history of disputation and resultant indecision (Tr. 355, 412) with the less than unanimous rule inducing nonreconciliation. The rule has provoked friction on this record.

The generalized considerations of this discussion alone may not be persuasive reasoning to support detriments to commerce and lack of public interest dictating disapproval even if a fileable agreement is proven. Combined with the facts of a long history of dissension, a conclusion of disapproval is warranted. If less than all parties may not amend an agreement, a statement at the end of an agreement that all of the members of the conference have "authorized the foregoing amendments," including in a list the names of carriers voting against the amendment, cannot be an entirely true statement. Misleading or false statements are not in the public interest and agreements containing them should be disapproved. Amending agreements are the same as an initial agreement under section 15 and ought to bear the signatures or otherwise evidence approval by all the parties to be obligated and not be signed by the secretary or some other conference official.

For these reasons exceptions 14, 15, 16, and 17 dealing with failure of findings of fact relating to the issue of approval by less-than-unanimous votes; failure to find amendments adopted over a member's dissent operate to the detriment of the commerce and are contrary to public interest; the conclusion that amendments are approvable when adopted by a less-than-unanimous vote; and approval of a form of agreement submitted in the name of all members should be sustained.

The 18th exception to the Examiner's failure to find the minutes of conference meetings should show by name which member lines voted against the adoption of an amendment is rejected as not necessary to a final decision in view of the prior rulings. A ruling is not required for a reasonable decision as to adequacy of policing of obligations under the agreements, nor to approvability of the agreements.

Hearing Counsel excepts (1) to the failure to find the agreements should contain certain proposed provisions and (2) to the Examiner's interpretation of a court precedent. It is not considered we are proposing desirable agreements, but are only disposing of applications for approval of agreements that have been contested. Absent any showing of inadequacy or precedents compelling disapproval of what we have before us, the proposals are irrelevant to anything we are doing. I agree with Hearing Counsel that the finding that the Examiner ought to make is related to adequacy of obligations, but our order of investigation raised the issue of whether the agreements before us should be "approved, disapproved, or modified" on the premise that we must "disapprove" inadequate agreements; therefore, the Examiner's choice of rhetoric was correct, whatever he may have said about court precedents. For these reasons, Hearing Counsel's two exceptions should be rejected.

To sum up:

1. This report, unlike the decision of the Examiner,
 - (a) reviews and disapproves the agreements in the record rather than agreements as modified by agreements excluded from the record; and
 - (b) adjudicates approvability of agreements rather than attempts to reconcile disputes between respondents and intervenors by accepting nonrecord modifications.
2. The agreements reviewed are inadequate and must be disapproved because, in the light of the changed conditions in law introduced by the *Silver* case, the provisions for policing obligations do not provide for:
 - (a) notice of complaints, or
 - (b) a hearing, including the production of evidence and opportunity to argue and explain, or
 - (c) fundamentally fair procedures through true neutrality.
3. Changes in the scope of the agreements must be made by all of the parties to the agreements (i.e., by unanimous consent),
 - (a) in order to be legally binding agreements, or
 - (b) to be approvable under section 15 of the Act.
4. The foregoing permit rulings as follows:
 - (a) sustaining intervenors' exceptions 1 through 7 and 12 through 17,
 - (b) rejection of intervenors' exceptions 8 through 11 and 18, and
 - (c) rejection of Hearing Counsel's two exceptions.

To conclude:

After notice and hearing herein, Agreements Nos. 150-21 and 3103-17, for which respondents have applied for approval under section 15 of the Act, should be disapproved on a finding of inadequate policing of the obligations under the aforesaid contracts, and a finding of non-unanimous consent thereto.

COMMISSIONER GEORGE H. HEARN, *dissenting in part:*

I do not subscribe to the majority view *in toto*.

A steamship conference, of course, is a voluntary association, a cooperative venture, and it must be grounded upon the good faith of its members, not only for the furtherance of the public good, and the protection of the shipper, but for the efficient, reasonable, practical, and harmonious day to day business and commercial betterment of its members. No one will deny that procedural safeguards are granted to persons and corporate entities under the constitution, or that many fundamental rights are protected by the great body of common law; nevertheless, when a steamship line elects through the exercise of its managerial judgment to become a member of a conference, for the benefits inuring therefrom, it may contract away some of its rights and privileges for what it considers to be business expedience but it cannot agree to an abrogation of obligations cast upon the group by law. It is my opinion that certain rights and privileges which are not essential to the public interest need not be observed; on the other hand, some fundamentals which do not impair the reasonable and practical day to day functions of the business need not be obviated. Here, an erosion of fundamental rights, while neither enhancing the self-policing duties nor perfecting the better flow of business of the conference, may well set a precedent for future agreements wherein important necessary and fundamental rights, as well as practices, are omitted. Therefore, I would modify the proposed self-policing agreement in several respects.

My proposed modifications, however, are not dictated by the decision in the *Silver*¹ case which is clearly distinguishable from the instant case, the principal point being that *Silver* involved a nonmember of the New York Stock Exchange while States Marine is a member of the conference herein.

First, the Neutral Body should be neutral in all respects. I am not convinced that the duties of the Neutral Body could not be undertaken by accountants, attorneys, or men schooled in the steamship business. I do not subscribe to the theory that the calling to conference policing is so specialized that there are only a handful of qualified men able to

¹ *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

perform the functions of a Neutral Body. Moreover the access to the private business operations of competitors requires, in my mind, that the Neutral Body conducting the investigation of alleged wrongs have *no* relationship with or interest in *any* of the activities of the members of the conference. To the extent, therefore, that the proposed amendments to these agreements permit the slightest affiliation between the conference's Neutral Body and any of the members of the conference for any reason whatsoever, I would not approve them.

Second, I would not approve the agreements to the extent that they permit a Neutral Body to investigate, on its own motion, the business affairs of a conference member. The better view, I believe, is to permit investigation by the self-policing organization only upon receipt of a written complaint which asserts, with some specificity, a breach of any of the obligations of the conference agreement by one of the members. A Neutral Body should be discouraged from going on fishing expeditions, thereby establishing the necessity for its self-perpetuation and possibly satisfying the majority of the conference members at the expense of one member. Since one of the reasons for a conference is the betterment, businesswise, of each individual member, as well as all of the members thereof, it is presumed, in theory, that they will each conduct themselves toward each other in the highest ethical traditions of the business and commercial world.

Third, I believe that reasonable notice of the gravaman of the complaint, but not the identity of accuser, should be given the accused, before the complaint is investigated, at least before the Neutral Body undertakes a visitation through the accused's papers, books, files, records, etc., for the alleged violation. This restraint, in my view, would limit odious harassments initiated by an unknown and disgruntled accuser.

Fourth, while I agree that the investigation should be conducted by the conference's Neutral Body, the agreements should make it clear that the accused has the right to have its own accountant, attorney or other representative present during the visitation, at which time the accused members' books, documents, files, etc. are reviewed for the specified breach of violation.

Fifth, the Neutral Body's investigation should be limited by the gravaman of the complaint. Fishing expeditions, especially those where the searcher stands to be financially rewarded, should not be encouraged. Under the proposal of the conference concerning this item, if the accused is found guilty by the Neutral Body, the cost of the entire investigation is assessed against the accused. In my view

the conference, as the employer of the Neutral Body, should underwrite all of its expenses. I fear this could at least be an involuntary instruction to the Neutral Body to have its investigation result in finding a violation or a breach based upon any minor technicality. In my opinion the cost of the investigation should be borne by the conference, since it is incumbent upon all members to see to it that their particular conference at all times is acting in the public interest.

An order approving the agreements will be issued. By the Commission.

No. 1095

AGREEMENT NO. 150-21, TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
AND AGREEMENT NO. 3103-17, JAPAN-ATLANTIC AND GULF FREIGHT
CONFERENCE

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 Agreement No. 150-21, as modified by No. 150-29, and Agreement No. 3103-17, as modified by No. 3103-26, are hereby approved.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX A

10. *Breach of Agreement.*—(a) In the event of any violation of this agreement by any of the parties hereto and/or their respective agents, except as provided in articles 25 and 30 hereof and as otherwise agreed upon for specific violation covered by conference resolution passed in conformity with the provisions of the basic agreement, such party or parties shall be subject to the payment of damages for each and every violation which shall be decided and assessed to the satisfaction of all parties hereto, except the party or parties charged with the violation, but if the party and/or parties hereto committing the alleged violation of this agreement are dissatisfied with the decision come to, such party and/or parties shall have the right to appeal, in which event the question of breach of agreement and damages shall be left to the determination of three arbitrators to be nominated within 30 days from the day on which the appeal of the party and/or parties charged with the violation will be received at the conference office.

One of the arbitrators will be nominated by two-thirds of the parties hereto, except the party or parties charged with the violation, one by the party or parties charged, the third shall be appointed in agreement of the two arbitrators so nominated. The arbitrators shall make their award friendly and the decision of two or more of the arbitrators shall be final and binding on the parties hereto. There shall be no appeal against the award of the arbitrators.

Any fine assessed by the Neutral Body under this agreement shall be paid to the conference. All conference members agree that the existing twenty-five thousand dollars (\$25,000) U.S.A. currency faithful performance bond already posted with the conference shall also serve as a guarantee of the faithful performance of the foregoing and of prompt payment of any fine which may accrue against any party for its acts or the acts of its agents, subagents, subsidiary and/or associate companies under this agreement. Fines collected under this agreement shall be used toward defraying the expenses of the Neutral Body and other expenses which may be incurred in connection therewith. The maximum fines shall be:

(a) First offense, ten thousand dollars (\$10,000) U.S.A. currency or equivalent in yen at the official mean rate of exchange.

(b) Second offense, fifteen thousand dollars (\$15,000) U.S.A. currency or equivalent in yen at the official mean rate of exchange.

(c) Third offense, twenty thousand dollars (\$20,000) U.S.A. currency or equivalent in yen at the official mean rate of exchange.

(d) Fourth offense and subsequent offenses, thirty thousand dollars (\$30,000) U.S.A. currency or equivalent in yen at the official mean rate of exchange.

(b) In addition to the payment of damages, the offending party at the option of the conference shall be liable to expulsion from the conference or suspension of voting rights for such period of time as the conference may determine. Determination in the first instance as above as to a violation of this agreement and/or

of any rules, regulations or tariff provisions of the conference, and whether the penalty shall be expulsion, suspension of voting rights and/or the payment of damages, and if the latter, the amount thereof, shall be made in accordance with article 19.

(c) In no case shall the party complained against have any vote in the determination of any of the foregoing matters. The party complained against shall have the right to be heard and to offer a defense against the accusation even though such party may not be afforded the right to vote on his guilt or innocence.

(d) No expulsion shall become effective until and unless notice thereof, with a detailed statement of the reason or reasons therefor, shall have been airmailed or cabled to the governmental agency charged with the administration of section 15 of the United States Shipping Act, 1916, as amended. Notice of suspension of voting rights pursuant to this article shall be furnished promptly by airmail or cable to the aforementioned governmental agency.

12. *Faithful performance.*—(a) As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or of any award or judgment which may be rendered against them hereunder, the parties hereto agree to deposit with the conference the sum of twenty-five thousand dollars (\$25,000) in United States Government bonds, or in the United States currency, or security bond of like amount satisfactory to the conference, which shall be deposited or invested as may be agreed by the parties pursuant to article 19. Any interest accruing thereon shall be for the account of the party making such deposit and shall be remitted promptly to such party if received by the conference. Each of the parties further agrees to deposit additional cash or security upon demand so as at all times to maintain cash or securities or any combination of both of a total market value equivalent in United States currency to the amount hereinabove specified. Such deposits or the proceeds thereof shall be applied to the payment of any damages imposed in accordance with article 10 or elsewhere in this agreement, unless otherwise fully paid or previously satisfied.

(b) In the event of the termination of this agreement or the termination of membership or withdrawal of any of the parties hereto, the deposits made by the parties concerned shall be returned to them, together with any accrued interest in the possession of the conference, but only after any indebtedness to the conference has been fully satisfied.

25. *Neutral Body.*—There shall be a Neutral Body selected and appointed by the conference from responsible accountants or other person or persons, not a party to, nor employed by or financially interested in any party to the agreement upon such terms as are agreed between the conference and the Neutral Body. The Neutral Body shall have the following powers, duties and responsibilities:

1. To receive complaints in writing from members of the conference pursuant to their obligations hereunder to report malpractices.
2. To investigate said complaints and receive evidence thereon from members of the conference or from the conference offices or otherwise.
3. To engage agents, lawyers or other experts in connection with its investigation and consideration of complaints and to pay on behalf of the conference all costs incidental to engagement and use of such agents, lawyers and other experts.
4. To have absolute discretion to decide whether or not an infringement has taken place and the conference shall have no right to questions such decision, subject to the maximum fines set forth below:

The maximum fines assessed by the Neutral Body shall be :

- (a) First offense up to a maximum of U.S. \$10,000.
- (b) Second offense up to a maximum of U.S. \$15,000.
- (c) Third offense up to a maximum of U.S. \$20,000.
- (d) Fourth offense and subsequent offenses up to a maximum of U.S. \$30,000.

5. To report to the extent appropriate the result of its investigation to Ethics Committee but without disclosing the names of complainants. The Ethics Committee shall notify the member lines through the conference Chairman.

6. To give directions as to payment of fines after assessment and notification to the Ethics Committee.

7. The undersigned lines promise to report immediately to the Neutral Body directly any apparent or alleged deviation from the conference agreement of its rules and regulations of correct and ethical practices thereunder which come to their attention or knowledge.

All lines agree to accept the decision(s) and any assessment(s) of fines thereof by the Neutral Body as final and binding.

8. To enable complaints to be investigated, the conference shall make available to the Neutral Body all records, correspondence and documents of every kind wherever located and give all assistance and information whatsoever verbal or otherwise which may be required by the Neutral Body at their absolute discretion. All the records of the freight conference at the secretary's office will also be available to the Neutral Body.

9. The conference members jointly and severally shall indemnify the Neutral Body against any liability to third parties including employees under any libel or other action which might be brought against the Neutral Body arising from the performances of its duties under this agreement. The conference members jointly and severally shall have no right to claim against the Neutral Body or their agents in any such libel or other action.

10. The retainer fee and other compensation for services of the Neutral Body shall be as agreed between the member lines and the Neutral Body.

APPENDIX B

The original version is agreement 150-21. Modifications proposed by agreement 150-29 are indicated by crossing out (delete) and underlining (add).

Article 10. Breach of Agreement:

~~(a) Except as provided in articles 25 and 30 hereof and as otherwise agreed upon for specific breaches covered by conference resolution passed in conformity with the provisions of the basic agreement, in the event of any breach of this agreement by a member and/or its agents, such member shall be subject to the payment of damages for each and every such breach. The determination of a breach and the amount of damages payable therefor shall be decided and assessed by vote of the conference under article 10 hereof; provided however that the member charged with breach shall not have a vote.~~

(a) In the event of any breach of the terms of this agreement by a member and/or its agents, such member shall be subject to the payment of damages for each and every such breach. The determination of a breach and the amount of damages payable therefor shall be decided and assessed by vote of the conference under article 19 hereof; provided however that the member charged with a breach shall not have a vote; and provided further that breaches of the terms of articles 25 and 30 and breaches involving malpractices as defined under article 25 shall not be determined hereunder.

If the member committing the alleged breach of this agreement is dissatisfied with the decision, such member shall have the right to appeal, in which event the questions of breach of the agreement and damages shall be left to the determination of three arbitrators to be nominated within thirty (30) days from the date of receipt of said member's appeal at the conference office.

One arbitrator shall be nominated by two-thirds of the members, excluding the member charged with breach, one by the member charged and the third shall be appointed by agreement of the two arbitrators so nominated. The arbitrators shall make their award by decision of two or more of them, and the award shall be final and binding on all members. There shall be no appeal against the award of the arbitrators. Nothing contained in this agreement shall interfere with the rights of any member line under the provisions of the Shipping Act, 1916, as amended, or the jurisdiction of the Federal Maritime Commission under said Act or any other pertinent Federal laws.

(b) In lieu of or in addition to the payment of damages, the offending member, at the option of the conference, shall be subject to expulsion from the conference or suspension of voting and other rights for such period of time as the Conference may determine. The determination of breach and assessment of the penalty of expulsion or suspension and, if suspension, the duration thereof, shall be in accordance with paragraph (a) above.

(c) In no case shall the member complained against have any vote in the determination of any of the foregoing matters. The member complained against shall have the right to be heard and to offer a defense against the allegations even though such member shall not be afforded the right to vote on the matter.

(d) No expulsion shall become effective until and unless notice thereof, with a detailed statement of the reason or reasons therefor; shall have been furnished the expelled member and a copy airmailed or cabled to the governmental agency charged with the administration of section 15 of the United States Shipping Act, 1916, as amended. Notice of suspension of voting rights pursuant to this article shall be furnished promptly by air mail or cable to the aforementioned governmental agency.

Article 12. Faithful Performance:

(a) As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or any award of the Neutral Body, or any other award of judgment which may be rendered against them hereunder, the members agree to post and maintain with the conference the sum of twenty-five thousand dollars (\$25,000) in United States currency or United States Government bonds, which shall be deposited or invested as may be agreed by the parties pursuant to article 19.

(b) In lieu of United States currency or United States Government bonds provided for in the preceding paragraph a member may post and maintain with the conference one or more irrevocable letters of credit in the total sum of twenty-five thousand dollars (\$25,000); provided that those letters of credit create an absolute obligation for the bank to pay against drafts drawn by the conference chair-

man or the Neutral Body accompanied by a debit note bearing a date not later than 'thirty (30) days prior to said notice and, in the case of a Neutral Body assessment, a copy of the Neutral Body report; and further provided, that no other conditions for payment may be inserted in such letters of credit; that they are at all times maintained in the total sum of twenty-five thousand dollars (\$25,000); and that they are in all other respects satisfactory to the conference.

(c) The deposits and letters of credit provided for in paragraphs (a) and (b), and the proceeds thereof, if any, shall be applied to the payment of any dues, damages or Neutral Body assessments payable under articles 10 and 25 or elsewhere in the agreement, unless fully paid or previously satisfied before they become delinquent in accordance with article 28 hereof. In the event a letter of credit is posted in lieu of United States currency or United States Government bonds, the Neutral Body will have the authority to draw drafts under the credit, accompanied by a copy of its report finding a breach and assessing damages and also a copy of the delinquent debit note, and to receive payment of the amount assessed from the bank on behalf of the conference.

(d) In the event of the termination of this agreement or termination of a membership or withdrawal of any of the members, the deposits made by the members concerned shall be returned to them, together with any accrued interest in the possession of the conference, or in the case of letters of credit, they will be revoked, but only after any indebtedness to the conference has been fully satisfied and three (3) months have elapsed from the date of termination or withdrawal or until a decision is made in any Neutral Body cases pending against such member on the effective date of termination or withdrawal or in any case filed within said subsequent 3-month period.

Article 25. Neutral Body:

(a) Appointment and Qualifications of the Neutral Body:

(1) The conference shall appoint, upon terms to be fixed by separate contract, an impartial independent person, firm, or organization to be designated the Neutral Body which shall be authorized to receive written complaints reporting possible breaches of the conference agreement, tariff rates, or rules and regulations involving malpractice, and to investigate and decide upon such alleged breaches and, if such breaches are found, to assess damages, and in addition, to collect damages assessed, after payment thereof becomes delinquent.

(2) Appointment of the Neutral Body hereafter will be by vote of the conference membership under article 19 of the conference agreement. The appointment will be made from amongst candidates which are qualified and willing to serve.

Prior to such appointment a candidate will be required to divulge to the conference any ~~material~~ "professional or business relationships or financial interests" or ~~service contracts~~ (hereafter in this article simply "interests") which it may have with any of the members, their "employees, agents, subagents, or their subsidiaries or affiliates" (hereafter in this article simply "agents"). The candidate will also be required to agree, in the event of appointment, to divulge any future proposals it might receive to create such interests, and promise to obtain conference approval thereof before accepting any such proposal. Such interests so divulged, if any, exclusive of financial interests, will not affect the qualification of the Neutral Body when appointed by the conference with knowledge thereof, and the members will not raise an

objection, based on such grounds, to an investigation or decision made or damages assessed by the Neutral Body or its agents; provided, however, that the Neutral Body will be required before appointment to agree to disqualify itself in the event of a complaint against a member with which it may have such an interest. After disqualifying itself the Neutral Body is authorized to appoint an agent without such interest in the respondent to conduct the particular investigation and handle the complaint on behalf of the Neutral Body and such appointee shall have all of the authority and duties of the Neutral Body for that particular matter up through the date when the appointee reports its decision to the Ethics Committee under this article 25(f)(4).

(3) The Neutral Body will have the authority and responsibility to engage agents, lawyers and/or experts, including shipping experts, who can assist with its investigation and consideration of complaints and to pay on behalf of the conference all costs incidental thereto. Such agents or experts appointed by the Neutral Body must not have any interest in the particular member named in the particular complaint; although they will not be disqualified because they may have an interest, exclusive of a financial interest, with any other member or its agents.

(4) For purposes of this paragraph (a), the words "financial interests" do not include professional or business relationships whereby the Neutral Body or its agents or experts are engaged as independent contractors for professional or business services.

(b) Jurisdiction of the Neutral Body :

(1) The Neutral Body shall have jurisdiction to handle, in accordance with the procedures of this article all written complaints submitted to the Neutral Body by the conference Chairman or a member alleging breach of the conference agreement, tariff rates, or rules and regulations, involving malpractice or, on its own motion, any breaches of the terms of this article 25; ~~provided, that nothing herein contained shall change the functions of the Migrating Committee.~~

(2) "Malpractice" as used in this article shall mean any direct or indirect favor, benefit or rebate, granted by a member or its agents to a shipper, consignee, buyer, or other cargo interests or any of their agents, or any other act or practice resulting in unfair competitive advantage over other members.

(3) The Neutral Body shall have no authority to investigate any breach involving a malpractice which occurred more than two years before the filing of a written complaint pursuant to article 25(b) (1), or more than two years before the discovery thereof under article 25(f) (1).

(c) Member Lines' Responsibility to Report Breaches and Assist Investigations :

(1) The members and/or the conference Chairman shall report promptly to the Neutral Body in a written complaint any and all information of whatsoever kind or nature coming to their knowledge which, in their opinion, indicates a breach of the conference agreement, tariff rates, or rules and regulations involving malpractice or any breach of this article 25 by a member or its agents, and failure to report such information by any member will be a breach of this article.

(d) Investigation :

(1) The Neutral Body and/or its agents, shall have the power, authority and responsibility to investigate written complaints and in investigating said complaints to call upon a member or its agents at any of their offices during office hours and inspect, copy and/or obtain "correspondence, records, documents, signed written statements or oral information and/or other materials" (hereinafter in this article "materials"), which materials are deemed by the Neutral Body in its sole discretion to be relevant to the complaint. Upon making such a call the Neutral Body shall have the right to see and copy such materials immediately and without prior screening by the member or its agents.

(2) Correspondingly each of the members shall have the duty and responsibility to supply such materials, and to cooperate in interviews promptly upon demand made in person by the Neutral Body or its agents and without prior screening, whether said materials or personnel are located in the members' own offices or in its agents' offices. Failure of a member or its agents to supply the materials required by the Neutral Body or its agents promptly will constitute a breach of this agreement by the member, and the member undertakes to thoroughly inform its agents of the members' liability for their conduct and obtain their commitment to comply with the conference agreement, tariff rates, or rules and regulations. In addition the members undertake an affirmative duty to cooperate and assist the Neutral Body in obtaining other required information whenever possible.

(3) The records of the conference will be made available to the Neutral Body on request and the conference Chairman and staff will render all assistance possible to the Neutral Body during investigations.

(e) Confidential Information :

(1) The Neutral Body will under no circumstances disclose the name of the complainant to the respondent or anyone else, including the Neutral Body's agents, unless specifically authorized to do so by the complainant.

(2) The Neutral Body will treat all information received during investigations regardless of the sources, as confidential and will not divulge any such information to anyone, except in reporting breaches found and damages assessed to the Ethics Committee, and then only to the extent that the Neutral Body itself deems appropriate.

(f) Hearing for the Respondent; Neutral Body Decisions and Announcement Thereof :

(1) On concluding its investigation, the neutral Body will consider the information obtained and decide in its absolute discretion whether the facts have been sufficiently established to constitute a breach of the agreement, tariff rates, or rules and regulations, involving a malpractice, and if a breach involving a malpractice is found which was not covered by the complaint, such breach may also be reported and damages may be assessed thereon against any member liable.

(2) In deciding whether a breach exists based on the results of its investigation, the Neutral Body will not be restricted by legal rules of evidence or the burden of proof required to establish criminality, or even a civil claim. Instead it will employ rules of commonsense in determining breaches and assessing damages and the only standard required is that the information developed is persuasive to the Neutral Body itself that the breach occurred.

(2) After the Neutral Body has completed its investigation and arrived at its tentative decision that there was a breach (but before announcing the breach to the Ethics Committee, and even before the amount of damages is decided), the Neutral Body will inform the respondent of the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose. Within fifteen (15) days, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or counsel, and offer to the Neutral Body such explanation as it may choose at such meeting.

(3) After the Neutral Body has completed its investigation, it shall advise the respondent either that a breach has not been found or that there are reasonable grounds to believe that a breach occurred. In the latter event, the respondent will be informed at this time of the nature of the alleged breach, and the evidence concerning it which the Neutral Body in its absolute discretion is able to disclose. In so advising the respondent, the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information. In all cases, however, the Neutral Body will inform the respondent of the nature of the alleged breach, bearing in mind basic precepts of fairplay. Within fifteen (15) days, or within such reasonable time thereafter as the Neutral Body may in its sole discretion grant, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or attorney, and offer to the Neutral Body such explanations and/or rebutting evidence as it may deem proper and desirable. At such hearing, the Neutral Body shall consider all of the available evidence and make its decision in accordance with the standards set forth under article 25(f) (2) hereof.

(4) The Neutral Body will then make its final decision and either discharge the respondent or assess liquidated damages against him. On the basis of its decision, the respondent shall either be advised that a breach has not been found or, should a breach be determined to have been committed, assessed liquidated damages. In assessing said damages, the members recognize that breaches of the conference agreement, tariff rates, or rules and regulations cause substantial damages, not only in lost freight but in consequent instability of the conference rate structure. The members further recognize that the damages caused are cumulative with the number of breaches, but the members further recognize that it is difficult to assess such damages precisely. Therefore the Neutral Body is authorized to assess liquidated damages in accordance with the following schedule:

(a) First breach: maximum of ten thousand dollars (\$10,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

(b) Second breach: maximum of fifteen thousand dollars (\$15,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

(c) Third breach: maximum of twenty thousand dollars (\$20,000) U.S.A. currency or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

(d) Fourth breach and subsequent breaches: maximum of thirty thousand dollars (\$30,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

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.

After its decision the Neutral Body will then report to the Ethics Committee the decision and the amount of the damage assessed, if any. In addition the Neutral Body may report evidence or information discovered during its investigation, but the extent of such further reporting, if any, shall be subject to absolute discretion of the Neutral Body, and in no event will the Neutral Body report the name of the complainant without consent, or report confidential information.

(5) The Ethics Committee will notify the members through the Chairman, of the decision and damages, if any, and will also at the same time instruct the Chairman to notify the respondent of the decision, ~~but only if a breach is found; and in such case~~ and in case of a breach the respondent will be furnished with the Neutral Body report and a conference debit note covering the liquidated damages assessed.

(g) Unquestioned Recognition of Decisions of the Neutral Body:

(1) The members agree to accept the decisions of the Neutral Body as valid, conclusive and unimpeachable, but it is understood between the members that decisions of the Neutral Body are not admissions of proof or guilt or liability under law.

(2) The members further agree that neither jointly or severally will they bring any action whatsoever against the Neutral Body or its agents for damages allegedly arising out of its acts, omissions and/or decisions as the Neutral Body. In addition each member agrees to hold the other members of the conference and the Neutral Body and its agents harmless from any claims which may be brought by its agents or employees against another member, the conference or the Neutral Body or its agents for damages allegedly arising out of the Neutral Body's acts or functions.

(h) Payment of Damages:

(1) The members will pay all damages duly assessed by the Neutral Body upon receipt of a debit note from the Chairman, and if not paid within thirty (30) days of receipt of the debit note, the damages will become delinquent under article 28 of the conference agreement.

(2) The Neutral Body will have the power and responsibility immediately, without notice to or further authority from the conference, to collect as agent for the conference and by any measures recommended by legal counsel, any damages duly assessed, as soon as they become delinquent, from the deposit or substitute security submitted and maintained by the members under article 12 of this agreement. The Neutral Body will pay over to the conference immediately all damages collected.

APPENDIX C

NUMBERED EXCEPTIONS OF STATES MARINE LINES, INC.

1. Approves Modification 150-29 to Agreement 150-21 and Modification 3103-26 to Agreement 3103-17, when these modifications were not in evidence and the Commission denied a motion to reopen the record to consider them.

2. Approves Agreements 150-21 as modified and 3103-17 as modified, when these agreements, with or without the modifications, violate the standards for industry self-regulation set forth by the Supreme Court in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

3. Fails correctly to consider this case in light of *Silver v. New York Stock Exchange*, although the Commission requested the court of appeals to remand the proceeding to the Commission in order to reconsider it in the light of that case.

4. Concludes that Agreements 150-21 and 3103-17 establish a fundamentally fair system of industry self-regulation within the meaning of *Silver* when none of the procedural safeguards specifically named in *Silver* are provided in such agreements.

5. Concludes, despite the lack of findings of fact on the agreements in issue, that conferences may establish a system of self-regulation which authorizes the assessment of fines upon a finding of breach of the conference obligations without giving an accused:

(a) Notice of a complaint;

(b) Opportunity to confront and cross-examine adverse witnesses;

(c) The evidence upon which the determination of guilt or innocence will rest;

(d) A hearing prior to a determination of guilt; and

(e) Notice of the decision rendered, including specifications of which charges were found proved and which unproved.

6. Fails to find that a system described in paragraph 5 above (a) is illegal under *Silver v. New York Stock Exchange* and other applicable precedents; (b) operates to the detriment of the commerce of the United States; and (c) is contrary to the public interest.

7. Fails to recommend adoption of the States Marine proposals concerning notice, confrontation, investigation, hearing, and posthearing procedure.

8. Fails to find that the conference agreements should include criteria for the assessment of fines, in order to prevent assessment by the Neutral Body of excessive, unreasonable fines which in the past have operated to the detriment of the commerce of the United States and have been contrary to the public interest.

9. Fails to make any finding of fact on the necessity of allowing an appeal from the Neutral Body's decision.

10. Fails to consider, and rejects the applicability of *Silver v. New York Stock Exchange*, insofar as *Silver* held that there should be a review of industry-imposed self-disciplinary procedures and penalties.

11. Fails to recommend approval of the States Marine proposal for appeal of the Neutral Body's decision to arbitration.

12. Concludes that an accounting firm may serve as Neutral Body, even though it is the regular auditor of a member line of the conference.

13. Concludes that such an accounting firm, serving as Neutral Body, may consider a complaint and render judgment on an accused when the Neutral Body serves as the regular auditor for the complainant-accuser.

14. Fails to make any findings of fact with respect to the evidence adduced at the hearing relating to the issue of whether amendments to conference agreements may be approved when adopted by a less-than-unanimous vote of the conference members.

15. Fails to find that amendatory agreements adopted over the dissent of any conference member operate to the detriment of the commerce of the United States and are contrary to the public interest.

16. Concludes that amendments to agreements are approvable under section 15 of the Shipping Act (46 U.S.C. sec. 814) when adopted by a less-than-unanimous vote of all parties to the agreement.

17. Approves the form of submission of amendments to conference agreements which is submitted in the name of all member lines of the conference, including members who opposed the adoption of the amendment.

18. Fails to find that the minutes of conference meetings should show, by name, which member lines voted against the adoption of an amendment.

NOTE: The respondent did not file exceptions, and the exceptions of Hearing Counsel are not susceptible of framing in summary statement form.

9 F.M.C.

FEDERAL MARITIME COMMISSION

No. 65-27

MARSEILLES/NORTH ATLANTIC U.S.A. FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) SYSTEM AND CONTRACT

Decided March 31, 1966

~~Proposed dual rate system and dual rate contract form of the~~ Marseilles/North Atlantic U.S.A. Freight Conference, modified in accordance with this decision, meet the requirements of section 14b of the Shipping Act, 1916, and are permitted pursuant to that section.

Benjamin W. Boley and Warner W. Gardner for respondent.
Howard A. Levy and Donald J. Brunner, as Hearing Counsel.

REPORT

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

This is a proceeding under section 14b of the Shipping Act, 1916, for the approval of an exclusive patronage (dual rate) contract to be used by respondent conference. In his initial decision, Examiner Edward C. Johnson approved the proposed dual rate system and the dual rate contract form. No exceptions to the Examiner's decision have been filed. The proceeding is before us upon our own motion to review.

After careful consideration of the record, we are of the opinion that the Examiner's findings and conclusions were proper and well founded except insofar as he approved the use of the phrase "or via" in article 1(a) of respondent's contract.

In *The Dual Rate Cases*, 8 F.M.C. 16, at page 33, we approved for all dual rate contracts then before us the following clause:

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

Article 1(a) of respondent's proposed dual rate contract complies generally with the provisions of the above required clause. It reads as follows:

The Merchant undertakes to ship or cause to be shipped all of its ocean shipments, for which contract and noncontract rates are offered, moving in the trade from *or via* the port of Marseilles, France to ports on the Atlantic Coast of the United States in the range from Hampton Roads to Portland, Maine, on vessels of the Carriers unless otherwise provided in this agreement.

After conceding that the inclusion of the phrase "or via" was a "deviation," the following was offered by way of explanation:

The effect of this language is to expressly provide that cargo transshipped at Marseilles on a separate bill of lading (as distinguished from transshipped on a through bill) is subject to the contract. This provision is not objectionable and merely expresses the implied intent of previously approved contracts.

The explanation is insufficient and serves to raise more questions than it resolves. In the first place the term "or via" does not accomplish the distinction between through bills and separate bills which is the prime reason for the deviation from the approved form of other contracts. We have indicated before that we will allow departures from the normally approved language where circumstances peculiar to the trade warrant them. Nothing of this sort has been offered here. Accordingly, and in order that respondent may utilize its dual rate contract in the interim, we will permit the use of the proposed form of exclusive patronage contract subject to the deletion of the phrase "or via" in article 1(a).

This permission is without prejudice to respondent filing a future modification to article 1(a) to accomplish the avowed purpose of the phrase "or via," accompanied by a statement of the circumstances of the trade warranting the modification.

An appropriate order will be issued by the Commission.

FEDERAL MARITIME COMMISSION

No. 65-27

MARSEILLES/NORTH ATLANTIC U.S.A. FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) SYSTEM AND CONTRACT

ORDER

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

It is ordered, That the Marseilles/North Atlantic U.S.A. Freight Conference exclusive patronage (dual rate) contract, be modified as herein set forth:

Delete the words "or via" on line 3 of article 1(a)

It is further ordered, That the Marseilles/North Atlantic U.S.A. Freight Conference exclusive patronage (dual rate) contract, as modified herein, is hereby approved, provided, however, that if respondent fails to submit the required modification within 60 days from the date of service of this order, the approval granted herein shall be null and void.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65-6

PACIFIC WESTBOUND CONFERENCE AMENDMENT TO DUAL RATE CONTRACT

Decided April 4, 1966

Petition of Pacific Westbound Conference to amend the charter-exclusion clause in its dual rate contract so as to exclude proprietary cargo not raised, grown, manufactured, or produced by the merchant, denied.

Edward D. Ransom and Gordon L. Poole for respondents.

Jerome H. Heckman and Robert R. Tiernan for Dow Chemical Company and Dow Chemical International, S.A., *Don A. Boyd and Francis P. Desmond* for E. I. du Pont de Nemours and Company, *Edwin Longcope* for Mitsubishi International Corporation, and *Elkan Turk, Jr.*, for Far East Conference, intervenors.

Thomas Christensen, Donald J. Brunner and Robert J. Blackwell, Hearing Counsel.

REPORT

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

This proceeding arises out of a petition filed by the Pacific Westbound Conference (Conference) requesting permission to amend the "charter-exclusion" clause of its dual rate contract. Protests to the proposed amendment were filed, and we instituted this investigation to determine whether the proposed revision meets the requirements of section 14b of the Shipping Act, 1916 (the Act) and should be permitted, or modified, pursuant to that section.

The Far East Conference, E. I. du Pont de Nemours and Company (Du Pont), Dow Chemical Company and Dow Chemical International, S.A. (Dow and Dow, S.A.), and Mitsubishi International Corp. (Mitsubishi) intervened in this proceeding. Mitsubishi withdrew after the prehearing conference. Examiner C. W. Robinson issued an Initial Decision, denying the Conference petition, to which exceptions and replies have been filed.

FINDINGS OF FACT

1. The Pacific Westbound Conference is composed of nineteen common carriers by water who serve the trade from United States and Canadian Pacific Coast ports to ports in Japan and other Far East countries.

2. Cotton is one of the principal commodities moving in the trade. In the past, the Conference has carried about 99 percent of all cotton moving from Pacific Coast ports to Japan. In 1960 cotton accounted for 30.6 percent of the total revenue tons handled by Conference lines to Japan. The corresponding figures in 1963 and 1964 were 27.9 percent and 13.8 percent respectively; through March 1965, cotton accounted for 15.7 percent of the total revenue tons. Revenue from cotton moving to Japan amounted to roughly \$6.2 million in 1960. In 1963 this was approximately \$4.3 million, dropping to \$3.6 million in 1964 and to \$2.2 million for the first four months of 1965.

3. Cotton export markets (including Japan) have dwindled in recent years apparently due primarily to the Federal Government's cotton pricing and subsidy programs. Despite this decline, cotton remains an important source of revenue to Conference carriers.

4. The movement of cotton in the trade is seasonal, moving most heavily from October or November through May. Shipments vary between 100 and 500 bales, and average about 4 bales to the short ton.

5. Cotton shipped through Pacific Coast ports to Japan comes principally from California, Arizona and New Mexico. The raw baled cotton is purchased by U.S. traders from growers, grower cooperatives or cotton ginners for sale to counterpart traders in Japan. The Japanese traders in turn sell the raw cotton to spinners. (Thus, cotton traders neither grow nor gin cotton; neither do they spin it nor manufacture cotton products.) Vessel bookings are controlled and made by buyers in Osaka, Japan, the main cotton center.

6. The Conference has been granted permission to utilize a dual rate contract system in the trade pursuant to the Commission's Order in *The Dual Rate Cases*, 8 F.M.C. 16 (1964). As required by that Order, the Conference dual rate contract contains the following exclusion for shipments made on owned or chartered vessels:

ARTICLE 1(d) (2) This agreement shall not include any shipments by Merchant when carried in vessels owned by Merchant or in vessels fully chartered by Merchant for the exclusive use of the Merchant for a period of not less than six months.¹

7. Mitsubishi, a Conference dual rate contract signatory, is an American subsidiary of Mitsubishi Shoji Kaisha, a very large and diversified

¹ The agreement defines the term "merchant" as "an exporter and/or importer of merchandise."

Japanese trading company. It procures in this country all the products needed by the Mitsubishi firms in Japan. On October 21, 1964, Mitsubishi, relying on its right to charter under the terms of Article 1(d)(2), quoted above, time chartered the Liberian vessel SS ONSHUN for a period of seven to nine months. The first sailing thereunder was from San Diego, Calif., on December 24, 1964, with a full load of cotton (20,000 bales). On or about February 21, 1965, Mitsubishi again employed the ONSHUN in the Conference trade for the movement of a partial shipload of cotton combined with other commodities.

8. Shortly after the ONSHUN sailed the first time, Toyomenka, Ltd., another large Japanese concern engaged in trading cotton and numerous other commodities, chartered the vessel MEIKO MARU for the movement of a full shipload of cotton (approximately 16,000 bales) to Japan. Three other charter sailings carrying either full or partial loads of cotton were made by that company in the Conference trade between January 25, 1965, and April 15, 1965.²

9. Toyomenka has its head office in Osaka, Japan. It operates in this country through an office in San Francisco and through the Toyo Cotton Company of Dallas. Upon inquiry, the Conference learned that the San Francisco office "didn't have anything to do with cotton, they didn't ship cotton" and that apparently only the San Francisco office, rather than the parent in Osaka or the Dallas subsidiary was bound by the Conference contract. Therefore, although it is not clear from the record, it is quite possible that some of the shipments made by Toyomenka may not have been made under the charter-exclusion clause.³

10. As a result of the six charter movements made by Toyomenka and Mitsubishi, the Conference lines estimate their losses as 16,847 net tons (64,795 bales), totaling \$661,244.75 in revenue.⁴

² The four charter sailings of Toyomenka were described in the record as follows:

"1. MEIKO MARU, sailing 1/20/65, full load of cotton.

"2. ROBERT KABELAC, 1/25/65, cotton and other cargo.

"3. MEIKO MARU, 4/15/65, full load of cotton.

"4. BAYMASTER, 4/15/65, cotton and other cargo."

³ With reference to whether the Toyomenka's shipments were made under the charter-exclusion clause, Mr. William C. Galloway, Conference Chairman, testified as follows:

"Q. They [Toyomenka] were not contract signers at the time?

"A. That's the question. We thought they were. Our problem in the contract isn't limited to the charter-exclusion clause. We had such a narrow definition of who the merchant signed is and whose entity is covered. We had, apparently the U.S. or San Francisco Company and not the parent company in Osaka.

"Q. This sailing may not have been exclusively under the exemption for charter vessels; it may have been made partly under some other arrangement?

"A. That is entirely possible."

⁴ None of the chartered vessels involved are owned by member lines of the Conference.

11. After ascertaining the facts with respect to these sailings the Conference concluded that such charters were technically not in breach of the provisions of the existing charter-exclusion clause of their dual rate contract. However, in order to forestall occurrences similar to those just described, and "to conform the language and the use of the charter exclusion to the purpose and intention as expressed by the Commission," the Conference filed a petition requesting amendment of its charter-exclusion clause. In its petition, the Conference asserted that the proposed revision was necessary as a means of furnishing adequate protection against spot-raiding of its cargoes by nonproprietary traders. The proposed revision, which is the subject of this proceeding, reads as follows (the additions are italicized) :

ARTICLE 1(d)(2). This Agreement shall not include any shipment by Merchant of *Merchant's proprietary cargo* when carried in vessels owned by Merchant or in vessels fully *time or bareboat* chartered by Merchant for the exclusive use of the Merchant for a period of not less than six months. *As used herein "proprietary cargo" means cargo which has been raised, grown, manufactured, or produced by Merchant and is marketed by Merchant in its name as its own product. It does not include goods purchased by Merchant for resale or bought and sold by Merchant on behalf of others. It excludes all goods of agents, traders, or commission merchants.*

12. Whereas there are perhaps 10 traders in Japan, as well as other traders in the Far East generally, who deal in a variety of products and are potential charterers, only a few American cotton traders are large enough to charter a ship for full loads for any period of time. Probably the largest shipper is California Cotton Co-operative (Calcot), a corporation which acts as agent or trader for cotton growers in California. The growers, as members and stockholders in the corporation, consign their cotton and its title to the corporation, which then sells it. Dividends are paid to the growers at the end of the year if there has been a profit. The proposed amendment would prevent Calcot from taking advantage of the clause as the corporation is not a manufacturer, raiser, or grower of cotton. Some of the 66 trader-members of Western Cotton Shippers Association are large enough to charter, and most of the members ship regularly in the trade; all of them that ship to Japan are signatories to conference contracts.

13. Two small cotton traders (Conference contract signatories) testified that they supported the Conference's proposed amendment. Neither trader could say, however, that the charter movements had prevented him from having a good year in exporting cotton to Japan.

14. Although neither the Conference nor the two cotton traders who testified know of other cotton charters, either in the past or contemplated, they are concerned lest the idea of chartering spread to other commodities or a combination of commodities.

15. The record does not show that the freight cost to Mitsubishi or Toyomenka, when using chartered vessels was any less than the cost of transporting cotton to Japan by Conference carriers, nor is there evidence of any recent history of instability in the Conference rates on cotton as a result of the charters.

16. Intervener Du Pont requests that the petition be denied. Intervener Dow requests denial of the petition in its broad terms but does not oppose "limited relief, if relief is deemed appropriate." In that connection, Dow suggests that the existing Conference charter exclusion clause remain intact but that the following exception be added: "Provided, however, That this right of exclusion shall not be available for shipments of raw baled cotton."

DISCUSSION AND CONCLUSION

In his initial decision, the Examiner recommended denial of respondent's petition on the grounds that the proposed amendment was not in conformity with the charter-exclusion clause prescribed by the Commission in *The Dual Rate Cases, supra*, and that the Conference had failed to make a showing sufficient to warrant a Commission approved departure from the prescribed clause. Except to the extent modified herein, we find the examiner's findings and conclusions to be proper and well-founded.

The entire subject of dual rate contracts was extensively treated in our report in *The Dual Rate Cases, supra*. In that single proceeding, we gave final approval to the dual rate contracts of some 60 steamship conferences and one independent carrier. In our report in *The Dual Rate Cases*, we took cognizance of the desire of Congress that "insofar as was possible dual rate contracts should be standard or uniform" in order to simplify the problem of shippers regarding the meaning and application of contract provisions.⁵ The present form of charter exclusion contained in the Conference's dual rate contract is that prescribed in *The Dual Rate Cases*. Respondent would now have us approve a different charter-exclusion clause on the grounds that this proposed amendment is dictated by a change of circumstances in the

⁵ The validity of the procedures used by the Commission in consolidating hearings upon issues and of filing a consolidated report was upheld (except as to certain matters not relevant herein which were remanded to the Commission) by the United States Court of Appeals, Ninth Circuit, in *Pacific Coast European Conference v. United States*, 350 F. 2d 197 (1965), cert. denied 382 U.S. 958 (1965). The Circuit Court stated:

"In our judgment the terms and conditions under which dual rates might be charged were the subject of rule making. In this area the Commission was acting in implementation of § 14 (b); its action was legislative rather than judicial in character. It was a prospective determination of the standards under which the conferences were to be permitted to act in the future rather than an adjudication as to whether those standards in a particular case had been met." 350 F. 2d at 205.

trade and by the facts of record in this proceeding. We do not agree. For reasons stated below, we find that the Examiner was entirely correct when he concluded that "the petition of the conference to amend the charter-exclusion clause in its dual rate contract has not been shown to be justified," and that the petition should therefore be denied.

Section 14b requires that we permit dual rate agreements unless we find that "the contract [or] amendment * * * will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors," and provided that the agreements meet the eight specific requirements of section 14b(1) through 14b(8). In addition, section 14b(9) gives us authority to require or permit such other provisions as are not inconsistent with section 14b.

It was under the "other provisions" section (14b(9)) that we required the "charter exclusion" clause to be included in all dual rate contracts.

The legislative history of section 14b demonstrates that a limited exemption for merchant owned or chartered vessels was one of the matters which Congress clearly intended that the Commission should deal with in its approval of dual rate systems. Thus, in its report on the bill which ultimately became Public Law 87-346, the Senate Committee on Commerce stated:

A second matter which the Commission should resolve by rule or regulation involves the extent to which, if at all, dual rate contracts should exclude full cargoes which move in shippers' private or chartered vessels. Obviously, unless this question is carefully considered, it is quite possible that one of two things might result: First, large shippers would be able to gain substantial competitive advantage over their smaller competitors; or second, contract shippers could not make fair and legitimate use under certain circumstances of their own or chartered vessels. S. Rept. No. 860, 87th Cong., 1st sess. (1961) p. 15.

Thus, in *The Dual Rate Cases, supra*, we stated:

Exclusion from contract coverage of a merchant's goods moving on the merchant's owned or chartered vessels would primarily benefit larger shippers. However, neither the economic philosophy of the United States nor section 14b of the Shipping Act require that a merchant be deprived of all normal economies which go along with largeness. An important purpose of the Shipping Act is to facilitate the flow of commerce, and while it recognizes that a proper conference system can contribute to this end, it does not undertake to give the conference prior claim on all cargoes nor afford the conferences protection from all possible competition. We therefore are requiring that all contracts, whether or not they previously did so, shall permit merchants to transport cargoes on their owned vessels, or on vessels chartered by the merchant provided the term of the charter is 6 months or more. By limiting this to charters for periods of some duration, the conferences are accorded reasonable protection from spot raiding of cargoes and merchants accorded the right to engage in bona fide proprietary carriage under reasonable conditions. 8 F.M.C. 16, at 42-43.

The clause as finally formulated by the Commission strikes what we believe to be a fair balance between carrier and merchant interests, and to be in the best interest of the parties concerned, the public, and the commerce of the United States. It is now incumbent upon the Conference to come forward with such facts and circumstances peculiar to its trade as would warrant departure from the uniform clause. As we pointed out in *The Dual Rate Cases, supra*, at page 21, departures from the clauses prescribed therein will be allowed to suit "the reasonable commercial needs of a particular trade"⁶ upon a showing by substantial evidence that such a change is needed or warranted.⁷ Thus, the Examiner was correct when he found that the Conference must justify any departure from its present clause, and we find the Conference's first four exceptions, all of which deal in one way or another with the requirement that it "justify" its proposed amendment, not well taken.

But respondent further contends that the evidence in this proceeding is sufficient to support the approval of the proposed amendment and that "no barrier to approval thereof is posed by section 14(b) of the Shipping Act, 1916." On this record, we are compelled to find to the contrary.

As previously seen, the only charters known to have been executed in the Conference trade are those of Mitsubishi and Toyomenka. In its exceptions, the Conference characterizes the alleged revenue loss incurred as a result of these charter movements as "sizeable and seri-

⁶ Cf. *Persian Outward Freight Conference—Exclusive Patronage (Dual Rate) Contract*, Docket No. 1079 (served August 31, 1964); *Japan-Atlantic & Gulf Conference—Exclusive Patronage (Dual Rate) Contract*, Docket No. 1078/1080 (served October 30, 1964).

⁷ The Conference argues that its proposed amendment does not work a departure from the prescribed clause, but rather it makes explicit the true intent of the Commission in *The Dual Rate Cases*. In this regard, it is respondent's position that in our decision in *The Dual Rate Cases* contemplated approval of an owned/chartered vessel exclusion clause which would be limited to cargoes raised, produced or grown by the merchant and marketed in its own name as its own product. In our view, respondent is suffering from a misconception of the intent and purpose of the owned/chartered exclusion clause prescribed by us in *The Dual Rate Cases*.

In drafting the clause at issue herein, it was not our intention 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. We did not, directly or indirectly, put a restriction on the type of nonbulk cargo which the merchant might carry, so long as it was of a proprietary nature. And 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. That there is no implied requirement that the cargo be raised, grown, manufactured, or produced by the merchant, has been decided by us on at least one other occasion. In *The Persian Gulf Outward Freight Conference Exclusive Patronage (Dual Rate) Contract*, Docket No. 1079 (served August 31, 1964), a case that involved Commission approval of a proposed form of dual rate contract, we stated:

"In conformance with our Order on Reconsideration in *North Atlantic Westbound Freight Association—Exclusive Patronage (Dual Rate) Contract*, Docket No. 1059 (served August 3, 1964), the exclusion has been worded so as to make it clear that chartered vessels are limited to the carriage of the merchant's *owned*, cargo." (Italic supplied.)

ous." When the total volume of the three full and three partial charters is considered, however, it is found that such volume was only approximately sixteen percent of the total cotton tonnage handled by the Conference in 1964. Expressed another way, the alleged loss of 16,847 tons of cotton because of the charter movements represents only slightly over two percent of the total revenue tons carried by the Conference of all commodities for 1964. Even these percentages are probably less since it appears that some of the charter movements made by Toyomenka were not made under the Conference's owned/chartered vessel exclusion clause. Be that as it may, however, we are of the opinion that such a limited adverse effect on the interests of the Conference carriers does not justify the sweeping change proposed by respondent.

Fears have been voiced by Conference representatives that other commodities or combinations thereof are somehow likely to move on chartered vessels in precisely the same manner as has cotton. These fears, however, are entirely unfounded on the basis of the present record. In sum, whether or not there will be further charter movements in the Conference trade cannot be determined from the record and a finding one way or the other would be the product of unallayed speculation. This Commission has said that the mere possibility that a conference agreement may result in a violation of the Act is insufficient reason to disapprove the agreement. *Agreement 8492—Alaskan Trade*, 7 F.M.C. 511, 519 (1963); *Agreement 134-24—Gulf/Mediterranean Ports Conference*, Docket No. 1158 (served March 15, 1965). Likewise, the mere possibility that large traders may utilize the charter-exclusion clause would not justify the granting of the present petition.

Shipper and Conference witnesses agree that rate instability has not developed in the trade as a result of the charters, but the Conference expresses a fear that cotton traders will put a squeeze on its members for a lower rate. This fear is somewhat neutralized by the fact that the Conference, effective August 16, 1965, instituted a general rate increase of \$1 per revenue ton (although this increase occurred subsequent to the hearing, the Examiner took official notice thereof as do we). The Conference is also worried lest the continued use of chartered vessels, especially for commodities other than cotton, weaken the Conference and make it necessary for some of the member lines to consider withdrawing from the trade. This record is also devoid of any evidence which would support this course of action. Thus, the Conference's exception to the Examiner's "conclusion" that departures from the required clause cannot be made "until serious adverse effects * * * are incurred" by the conference is not well taken. We do not

read the Examiner's decision that way. He simply found as do we that the record here does not justify such departure. If slightly over two percent of all revenue tons carried is objectionable, then presumably the Conference would have a charter-exclusion clause which would in fact exclude nothing.

On the other hand, to tighten the charter-exclusion clause in the broad manner here sought would adversely affect the rights of many shippers whom the Conference admits have caused it no problem. It would effectively preclude merchant shippers, such as Dow and Du Pont, from utilizing chartered vessels to transport those goods which they own but which they have not grown, produced or manufactured. Thus, the restrictive clause proposed by the Conference would place the merchant-shippers, who do not make or grow the product that they sell, at an obvious commercial disadvantage, *vis-a-vis*, those merchant-shippers who do. The evidence in this record does not justify this result. Consequently, we find that the imposition of a limitation on the right of all shippers to utilize proprietary carriage is "unjustly discriminatory [and] unfair as between shippers" in violation of the standards set down in section 14b of the Shipping Act, 1916.

In the light of all the foregoing considerations, we conclude that the Conference has advanced neither facts nor arguments of sufficient weight to establish that its proposed departure from the Commission prescribed charter-exclusion clause is justified or lawful. The Conference's petition to amend is therefore denied.

Finally, respondent excepts to the Examiner's failure to consider the more limited amendment proposed by Dow; i.e., a clause which would provide that the charter exclusion right shall not be available for shipments of raw, baled cotton. In his initial decision, the Examiner determined that "it [was] unnecessary to discuss the amendment offered by Dow" since it appeared that the Conference was unwilling to consider alternatives to its proposed amendment. We believe that the Examiner has correctly interpreted the record and was perfectly justified in questioning the willingness of respondent to accept an alternative to its proposed clause. Consequently, respondent's exception in this regard is not well taken. The record demonstrates clearly that at the hearing in this proceeding, respondent was adverse to any change or modification of the proposed amendment. In light of the Conference's present posture in regards to Dow's proposed amendment, however, it remains for us to determine on the merits whether Dow's proposal applicable to cotton only, is supported by the facts and arguments in this proceeding. In this regard, we find that the present record no more supports the Dow proposal than it did the Conference's and that our rationale denying approval to the Conference proposal

applies with equal force here. Respondent's exception to the contrary is found to be without merit.

Vice Chairman JOHN S. PATTERSON, concurring

Consistency with the Commission's decision in *The Dual Rate Cases*, 8 F.M.C. 16 (1964) requires that the Commission overrule the exceptions and sustain the Examiner's Initial Decision. I do not necessarily agree with the reasoning used in the preceding report to reach this conclusion, but would confine myself to finding that there has not been a sufficient showing of special circumstances to warrant a departure from a precedent.

An appropriate order will be entered.

No. 65-6

PACIFIC WESTBOUND CONFERENCE
AMENDMENT TO DUAL RATE CONTRACT

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;

It is ordered, That the petition of the Pacific Westbound Conference to amend the owned-chartered vessel exclusion clause in its exclusive patronage (dual rate) contract so as to exclude proprietary cargo not raised, grown, manufactured, or produced by the merchant, be, and hereby is, denied.

By the Commission.⁸

[SEAL]

(Signed) THOMAS LISI.

⁸ Commissioner Hearn did not participate.

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 Harlee, *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 Commission'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 permitted 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 debaring 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^{re} 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*, 398-404 (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 Finnlincs 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 Finnlincs' "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. When-

ever 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 particularly, 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.

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FEDERAL MARITIME COMMISSION

An order denying this application will be entered.

(Signed) Benjamin A. Theeman,
Presiding Examiner.

MARCH 30, 1966.

9 F.M.C.

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 Harlee, *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 Israel 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-

"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/non-contract 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. Atl. 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. Atl. 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 sec-

tion 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 par-

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 Harlee, *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

⁴Based 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 prejudicial 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.

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, 398 (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 EXAMINER¹

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-

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 non-carrier 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
	107, 234
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 lingering 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.

9 F.M.C.

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 Harlee, *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
	<i>Cents</i>		<i>Cents</i>	<i>Cents</i>		<i>Cents</i>
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, <i>including</i> arrimo and insurance.
SACAL	43 cents per cubic foot, <i>including</i> arrimo and insurance. 37 cents in 1187 (Sub. 1).
Sea-Land	41 cents per cubic foot, <i>plus</i> arrimo (2 cents) and insurance.
AUT	48 cents per cubic foot, <i>plus</i> arrimo (2 cents) and insurance.
Seatrain	48 cents per cubic foot, <i>plus</i> arrimo (2 cents) and insurance.
Motorships	48 cents per cubic foot, <i>plus</i> 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, 263. 0	\$258, 712. 96
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 150, 628. 98 (60 percent).
 ["equalization territory"].
 (c) Favorable to Jacksonville..... 67, 956. 09¹(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]	<i>Revised by TMT to reflect actual consist of trailer cargo</i>
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

Seatrains 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 35 $\frac{1}{3}$ 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:

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.

REDUCED RATES ON MACHINERY AND TRACTORS TO PUERTO RICO 473

	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, assessed 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 latter's 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 (*Inter-coastal 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 Con-

gressional 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 "wastefulness 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

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

Brush cutters

Brush rakes

Bulldozers

Carry cranes

Cranes, excavating

Force feed loaders

Mobile loaders

Power shovels

Road graders

Road rippers

Road rollers

Road scrapers

Root cutters

Rooters

Side dozers

Stump splitters

Tamplng rollers

Trail builders

Traxcavators

Treedozers

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

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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
	<i>Cents</i>		<i>Cents</i>	<i>Cents</i>		<i>Cents</i>
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 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 dif-

ferential 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 SACAL 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 trans-

portation 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 de-

ecided 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 negating consideration here is that TMT for 1963 carried 13,692.7 payable tons (exhibit 20); AUT carried 681 measurement tons (exhibit 11); 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 south-bound 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).

*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 diverts "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 Inter-coastal 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 intervenor Empire State Highway Transportation Association, Inc.

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

Christopher E. Heckman for intervenors 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 intervenor Middle Atlantic Conference.

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

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

Leo A. Larkin, and Samuel Mandell for intervenor 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 Harlee, *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 8005³ 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.

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, re-rigging 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 agree-

ments 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, slow-downs 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 interfere 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-

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'wy 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.

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 whether 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.

9 F.M.C.

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 Harlee, *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 off-shore 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 States³ 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.

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.⁵

⁵ 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 "sign-off" 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 is 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 Lines, 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, 873 (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. Dettledach*, 239 U.S. 588 (1916); *Southern Ry. v. Prescott*, 240 U.S. 632 (1916).

¹⁶ *Calcot Ltd.*, *supra*, at 873, 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.

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 definition 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 Harlee, *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 con-

veyed 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 Oversight 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 "over-side 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	
<i>Blumenfeld</i>	Jan. 7-23.....	\$7,768.24		
<i>Duffield</i>	Jan. 21-29.....	4,762.23		
<i>Northern Sunlight</i>	Mar. 13-22.....	2,420.94		
<i>Alnfield</i>	Mar. 29-Apr. 4.....	5,083.10		
<i>Baymaster</i>	Apr. 3-4.....	2,300.85	\$4,056.37	\$4,462.23
<i>World Felicia</i>	Apr. 11-16.....	2,601.06	2,918.03	3,279.13
<i>Alnfield</i>	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 Cooperaage 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. 235.

⁵ See e.g. *Jarka Corporation of Baltimore v. Pennsylvania R. Co.*, 130 F. 2d 804, 807; *C. M. McMahan & 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 wharfing 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.

9 F.M.C.

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 anti-trust 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 respondents paid \$4 per ton to BNA amounted to the implementation of an unfiled and unapproved section 15 agreement.

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 transportation 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.

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 exempted 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 transpor-

tation 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., 63, 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 prejudicial 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 business 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 competition 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 the 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 anti-competitive 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 Commission 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 $\frac{3}{4}$ majority for the setting of rates could not be approved. In effect, a unanimous vote would be required. A $\frac{2}{3}$ 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 shipper 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 transhipped at Marseilles on separate bills of lading as distinguished from through bills. If the conference desires to accomplish the purpose of including cargo transhipped 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 transhipped 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. Transshipment 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 differential 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 machinery 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 carriers. 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 existence 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 requires 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.

SHIPPER'S 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 commerce. 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 prejudicial 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 facilities, 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.

