

**DECISIONS OF THE
FEDERAL MARITIME COMMISSION**

VOLUME 13

JULY 1969 TO JUNE 1970

**U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1971**

FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

June 30, 1970

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FEDERAL MARITIME COMMISSION

DOCKET No. 68-13

ASSEMBLY TIME—PORT OF SAN DIEGO

Decided July 18, 1969

A tariff rule providing an additional 10 days' free time, exclusive of Saturdays, Sundays, and holidays, at the Port of San Diego on commodities shipped for the account of the United States Government found not to be violative of section 16 First or section 17 of the Shipping Act, 1916.

A tariff rule granting 10 days' processing time, in addition to the present 10 days' free time provided by the Port of San Diego, on commercial bulk cargo bagged on the Port premises moving in single consignments of 10,000 tons or more found not to be violative of section 16 First or section 17 of the Shipping Act, 1916.

Aaron W. Reese and Joseph D. Patello for respondent Port of San Diego.

William A. Imhof, Neal A. Jackson, and Charles W. Bucy for intervenor United States Department of Agriculture.

Miriam E. Wolff for intervenor San Francisco Port Authority.

Albert E. Cronin, Jr. and Walter H. Meryman for intervenor Stockton Port District.

J. Robert Bray for intervenor Virginia State Port Authority.

James H. McJunkin and Leslie E. Still for intervenor Port of Long Beach.

J. Kerwin Rooney and John E. Nolan, for intervenor Port of Oakland.

Norman D. Kline, James N. Albert, and Donald J. Brunner as Hearing Counsel.

REPORT

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

We instituted this investigation by Order of March 7, 1968 to determine whether a tariff rule proposed by the Port of San Diego au-

thorizing an additional 10 days' "assembly time" for "consignments of not less than 3,000 net tons of bagged or Government owned or sponsored outbound cargo" is contrary to section 16 First and section 17 of the Shipping Act, 1916, and whether and in what respect the Commission should modify its order in Docket No. 1217—*Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966) to permit the proposed assembly time practice.

United States Department of Agriculture (USDA), City of Long Beach, City of Oakland, San Francisco Port Authority, Stockton Port District, and Virginia State Ports Authority intervened in the proceeding.

An Initial Decision was issued by Examiner John Marshall to which exceptions and replies thereto were filed, and oral argument was heard.

BACKGROUND AND FACTS

On May 23, 1966, this Commission, after an exhaustive analysis of prior free time decisions, handed down its decision in Docket No. 1217, *supra*, wherein we held that 10 days for outbound cargo, exclusive of Saturdays, Sunday, and holidays, was a reasonable amount of free time necessary for the assembly or removal of shippers' goods prior to the loading and subsequent to unloading of vessels at San Diego. In striking down San Diego's practice of granting 30 days' free time, the Commission found that the unreasonable extension of free time beyond 10 days either violated section 16 First because it shifted the burden of defraying the cost of providing what amounted to free storage to nonusers of the service or, if the cost of providing this service was not shifted to nonusers, it constituted an unreasonable practice within the meaning of section 17 because the service was being granted at charges less than that which it cost the terminal to provide, 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.

Some 18 months after our decision in Docket No. 1217 was served, the Port of San Diego entered into a five-year lease agreement with Freight Handlers, Inc.¹ for some 21,000 square feet of space in the port area upon which Freight Handlers constructed a fertilizer bagging facility. Consideration of this operation was prompted by the fact that the closing of the Suez Canal had caused ocean freight rates from U.S. Gulf ports to Southeast Asia to become somewhat

¹ Freight Handlers, Inc. is a subsidiary of Crescent Wharf and Warehousing Company which functions primarily as a stevedoring contractor at the ports of San Diego, Los Angeles, and Long Beach.

higher than from West Coast ports. A particular commodity initially of interest was potash from the Carlsbad, New Mexico area which was being exported to India for use as fertilizer. Since then potash from Utah, diammonium phosphate from Idaho, soda ash from Wyoming and different grades of borax from undesignated sources, all used as fertilizer, have been added.

Until the construction of the bagging plant at San Diego, these materials from the added areas were not competitive for export markets. Such commodities cannot be shipped in bulk to a number of the recipient countries concerned because of the lack of bulk unloading facilities. The ports are open roadsteads where the cargo must be lifted ashore and then carried on human backs, or on trains, trucks, or carts to inland points for ultimate use. At the time there were no other export oriented bagging facilities on the Pacific Coast. The Ports of Oakland and Los Angeles have since installed bagging plants. The facility at Los Angeles, however, was built to handle inbound cargoes.

In order to remain competitive with the Gulf ports where free time above 10 days is accorded² and to afford Freight Handlers the opportunity to participate in the bagging and shipment of cargoes which up to that time had never moved out of West Coast ports, San Diego on January 23, 1968 petitioned the Commission for approval of the two proposed tariff items set forth below:

PROPOSED ASSEMBLY PERIOD

Item 437. An assembly period of not to exceed ten (10) working days, in addition to the free time provided by Item 435, may be granted for the assembly of single consignments of not less than 3,000 net tons of bagged or Government owned or sponsored outbound cargo. The granting of such assembly time shall be subject to the availability of space and granted only when arrangements therefor are made in advance of arrival of cargo at Port terminal facilities, and when the need for such an assembly period for single consignments is clearly established.

PROPOSED DEFINITION OF ASSEMBLY TIME

Item 5.(z). "*Assembly Time*" is a designated number of days, not to exceed ten (10), in addition to allowable free time, which may be granted for the accumulation of single lots or consignments for a particular shipper which constitutes a volume substantially in excess of an average shipment. Such a shipment shall be 3,000 tons or more to qualify for assembly time. Assembly time shall be granted only when the nature of the cargo or other circumstances preclude its delivery at the Port's marine terminals as a single consignment at one time.

² The Ports of Corpus Christi, Galveston, New Orleans, Pensacola and Tampa allow up to 30 days free time. Galveston provides that "Free time for outbound cargo may be extended 15 days for assembly of single consignments of not less than 3,000 net tons" and Houston has the same provision for shipments of not less than 5,000 tons.

Over 95 percent of the cargo bagged and shipped from San Diego has consisted of the various types of chemicals consigned to developing countries for use as fertilizer pursuant to programs of the Agency for International Development (AID). Most consignments range from 10,000 to 12,000 tons, this being the capacity of typical tramp vessels chartered for the purpose. The bagging facility is capable of an output of from 600 to 650 bags per 8 hour day. Thus, approximately 17 to 18 working days are required to bag and assemble a consignment. Operationally, the normal 10 days' free time presently provided for in San Diego's tariff would appear to be adequate to bag and assemble a 10,000 ton consignment since charter parties provide for loading at the rate of 1,000 tons per day and demurrage does not accrue while a vessel is loading.³ In order to bag and load these large consignments within the prescribed period, however, Freight Handlers has found it necessary to operate two eight-hour shifts and to "absorb a considerable amount of overtime" which they state they cannot financially continue to do.

Besides operational problems, the bagging plant at San Diego has encountered problems in coordination. The bulk fertilizer moving to the San Diego bagging facility comes from distant inland points and there are delays in arrival of fertilizer, bags, and vessels. Coordinating the flow of USDA cargoes is especially troublesome. The problem here is due in part to the large number of suppliers and persons facilitating the movement of the commodities. For example, in the case of bagged grain products and nonfat dry milk, there are times when single consignments may originate from as many as a dozen suppliers.⁴ Thus, effective coordination of such shipments is not always possible.

Between mid-August 1967 and the latter part of February 1968, Freight Handlers bagged and shipped in excess of 80,000 tons of cargo. Had it not been for the bagging facility, this cargo could not have moved through San Diego and it probably would not have moved through any other port of the West Coast. No showing has been made that the operation of the bagging facility has caused *any*

³ San Diego's tariff provides for waiver of demurrage during vessel loading. Moreover, an additional 10 days' free time is granted if a chartered ship is delayed.

⁴ It is a basic goal of USDA programs to get the maximum amount of commodity per dollar spent. To this end suppliers are accorded periods varying from 3 weeks in the case of grain to 13 weeks in the case of dry milk within which to ship the commodities. The period required to accumulate these staggered shipments at the port must also take into account a leeway of 15 days for arrival of a vessel included in most charter parties. Compounding these problems is the requirement imposed by the Cargo Preference Act of 1904 (46 U.S.C. 1241(b)) that at least 50 percent of USDA cargoes move on U.S.-flag vessels. The result is that USDA cargoes are sometimes held at the terminal for a longer period than would otherwise be necessary in order that they may be shipped on a U.S. vessel.

diversion from other California ports. As a result of the bagging facility, the Port realized revenues totaling \$49,783.17 which it would not otherwise have received. During fiscal year 1967-1968 Freight Handlers' bagging operations accounted for 16 percent of San Diego's export tonnage.

The USDA, which vigorously supports the efforts of the Port of San Diego to obtain authorization from the Commission to provide up to 10 days' "assembly time" in addition to normal free time for Government cargoes, is charged, *inter alia*, with the accomplishment of certain foreign aid programs set forth in Titles I and II of the Agricultural Trade Development and Assistance Act of 1954 (7 U.S.C. 1691, *et seq.*), commonly known as Public Law 480. Briefly, Title I authorizes the Commodity Credit Corporation (CCC) to finance the sale and exportation of agriculture commodities to friendly countries. Title I cargoes move pursuant to sales agreements between foreign governments and U.S. suppliers who are businessmen selling from private stocks. The commodities move under commercial bills of lading. The foreign buyer arranges ocean transportation and nominates the port of loading. The recipient nation is *generally* responsible for *all* transportation costs. The purchase and transportation is financed by various types of loans from the U.S. Government. The only Title I commodity which moved through San Diego, at least since 1965, has been cotton—3,645 long tons in bales.

Under Title II, commodities are exported to needy foreign countries, not as sales, but as outright gifts in cooperation with voluntary relief agencies. Transportation is arranged by the USDA which pays all costs, including inland transportation and terminal charges. Overall supervision of Title II programs is vested in the Agency for International Development. In the main, these cargoes consist of bagged grain products and vitamized nonfat dry milk.

DISCUSSION AND CONCLUSIONS

In his Initial Devison, Examiner John Marshall found that a tariff rule providing for an additional 10 days' assembly time at San Diego for "Government owned or sponsored cargo, or for charitable purposes" is in accordance with the policy set forth in section 6 of the Intercoastal Shipping Act, 1933⁵ and would not offend the prescriptions of section 16 First or section 17 of the Shipping Act, 1916.

⁵ Section 6 of the Intercoastal Shipping Act, 1933 provides:

"That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or municipal Governments, or for charitable purposes."

Accordingly, the following model tariff provision, recommended by Hearing Counsel, with the concurrence of USDA, was adopted by the Examiner:

For good reason and upon the request of the U.S. Government, or for charitable purposes, additional free time may be granted over and above the initial ten-day free-time period, not to exceed ten days, excluding Saturdays, Sundays, and holidays.

The Examiner further required San Diego to maintain records of any extension of free time granted pursuant to the approved rule, showing the request, reason, commodity, consignee and the amount of additional free time used. Such records were to be maintained for "at least two years."

San Diego's request for permission to allow up to a 10-day "assembly time" period for "non-government" cargo was denied by the Examiner on the ground that the "relatively small" amount of such cargo had not been shown on the record to require any additional time.

Exceptions to the Examiner's decision have been filed by Stockton Port District and San Francisco Port Authority to which the Port of San Diego, USDA, and Hearing Counsel have replied.

A. *Government Cargo*

Before we touch upon other aspects of this proceeding as they relate to "government cargo," we should like to first dispose of Stockton's challenge to the Commission's jurisdiction generally to authorize additional free time for such cargo. While Stockton acknowledges that section 6 of the Intercoastal Shipping Act, 1933, authorizes the granting of free or reduced rates to the U.S. Government, it takes the position that the " * * * Shipping Act [1916] makes no exception for government * * * cargo, and for the Examiner to make such a recommendation would be to usurp the authority of Congress." This argument totally ignores the fact that the Intercoastal Shipping Act, 1933 is but an amendment to the Shipping Act, 1916. This fact is not only supported by the legislative history of the 1933 Act, but by the language of the preamble to the 1933 Act which clearly states that it is an act " * * * *Amending* the Shipping Act, 1916 * * * " (emphasis added).⁶ It follows, therefore, that section 6 exempts transportation for the United States from the rate provisions of the Shipping Act, 1916, with the same force and effect as it does with regard to the provisions of the 1933 Act.⁷

⁶ In this regard, see also the preamble to Commission General Order 21, where we specifically recognized that the Intercoastal Shipping Act, 1933, was but an "amendment" to the 1916 Act.

⁷ Moreover, section 6, like section 22 of the Interstate Commerce Act after which it was patterned, is merely declaratory of the pre-existing common law principle that the sovereign was entitled to reduced transportation rates; since, at common law, any statute

We move now to the specific objections of the parties to the Examiner's adopted model tariff rule. San Francisco, while not disagreeing in principle with the granting of additional free time for government cargo, objects to the Examiner making the rule applicable to "government owned or sponsored" cargo "for good cause." It is argued that this language is vague, undefined, and could result in the granting of unjustified extensions of free time to strictly commercial cargoes. Hearing Counsel agree that some of the language used in tariff rule, as interpreted by the Examiner in his decision, is ambiguous and submit that "* * * there is a valid question raised by San Francisco as to whether these provisions apply to shipments in which the U.S. Government is indirectly or remotely 'sponsoring' a movement and is not the actual owner or shipper." In this regard, it is Hearing Counsel's position that the United States should be accorded special treatment under section 6 *only* where it is the actual shipper and ultimately bears the transportation costs. They maintain that existing principles of law and the prevailing custom among U.S. ports clearly militate in support of this conclusion.

The USDA, on the other hand, argues that all cargo moving under Title I and Title II of Public Law 480 should qualify for extended free time, even where the U.S. Government itself does not receive any direct or actual benefit and where the United States is reimbursed for the transportation costs. They take the position that since both programs are charitable in motive and designed to improve our relations with recipient nations, the benefits of free time should be extended to all shipments moving under Title I or Title II, regardless of who ultimately receives the benefit of the special rate.

Whatever might be said for allowing additional free time on shipments for which the United States does not ultimately incur the cost of transportation on purely humanitarian or political grounds, it is abundantly clear that section 6 of the 1933 Act cannot be interpreted to allow free time under such circumstances. An early opinion of the Attorney General, 25 Ops. Att'y Gen. 408 (1905) declared that the applicability of section 22 of the Interstate Commerce Act, after which section 6 is patterned, *depends on whether the government receives the entire benefit of the reduced rate.* The opinion went on

which would tend to restrain or diminish the sovereign's power, rights, or interest was not binding unless the sovereign was named therein. *Emer. Fleet Corp. v. West. Union*, 275 U.S. 415 (1927). It would indeed seem, as we pointed out in *In the Matter of the Carriage of Military Cargo*, 10 F.M.C. 69, 81 (1966), that "* * * any denial of reduced rate transportation to the Government would have to be based on *express* statutory language." (emphasis added). In this connection, see also *Guarantee Co. v. Title Guaranty Co.*, 224 U.S. 152 (1912); *United States v. California*, 297 U.S. 175 (1936); and *Paul v. United States*, 371, 245 (1963).

to construe the words "for the * * * governments" or "for the United States" as meaning *for the benefit* of the governments and further specified that this benefit must be *total* and *direct*. Consistent with this Attorney General's opinion and the principles of law stated therein, the ICC has historically held that it is improper to permit the benefit of special rates on Government material to accrue to anyone other than the Government itself. *Havens & Co. v. C. & N. W. Ry. Co.*, 20 I.C.C. 156, 158 (1911); *Givens v. L. & N. R. Co.*, 140 I.C.C. 605 (1928).

More recently, in *Interpretation of Gov't. Rate Tariff—Eastern Central*, 323 I.C.C. 347 (1964), a case directly on point, the ICC had occasion to consider the question of whether a carrier could accord a nongovernment (commercial) shipper a reduced rate under section 22 of its act, if "the costs paid to the carrier by the shipper or receiver are to be reimbursed by the Government." In concluding that the Government is entitled to "free or reduced rates" only where it is completely responsible for the payment of the transportation charges, the Commission stated:

* * * [W]e conclude that section 22 quotations are applicable on transportation services which are performed for the government, so long as the direct and entire benefit of the special rates accrues solely to the government * * * [S]ection 22 rates are proper only where the government pays the charges or directly and completely reimburses the party which initially bears the freight charges * * *

Indirect cost * * * is that which cannot be related specifically to a particular item because it is incurred for common or joint objectives of both the contractor and the government. Since the entire benefit does not accrue solely to the government, transportation which is considered a matter of indirect cost cannot be regarded as "for the government" so as to qualify for special rates under section 22, even if the indirect cost item is allowable and an allocable portion is in fact paid by the government. 323 I.C.C. at pp. 350-352.⁸

We agree with the reasoning and conclusions of the above opinions and we find nothing in the wording of our statute or in its legislative history to support a different interpretation. We find, therefore, that section 6 "free or reduced rates" are applicable on transportation services which are performed for the Government so long as it derives the direct, actual and entire benefit of the special rate. Applying this standard to the situation before us, we conclude that only those shipments for which the U.S. Government bears ultimate responsibility

⁸ Upon further consideration of its *Eastern Central* decision last year, the ICC, in approving the use of specific endorsements on bills of lading, reaffirmed its earlier conclusion and again cautioned carriers "* * * to confine the application of section 22 rates to shipments on which the government pays the transportation charges." *Interpretation of Gov't. Rate Tariff—Eastern Central*, 332 I.C.C. 161, 163 (1968).

for the transportation costs can qualify for additional free time, beyond the 10 days now provided, at San Diego.⁹

In order to eliminate any possibility that "benefits of the rule would accrue to commercial shippers or to any party other than the U.S. Government," Hearing Counsel suggest that the tariff rule adopted by the Examiner might be amended to read as follows :

Upon request of the United States Government, additional free time may be granted over and above the initial ten (10) day free-time period, not to exceed ten (10) days, excluding Saturdays, Sundays, and holidays. This provision shall apply only to commodities shipped for the account of the U.S. Government.

We fully endorse Hearing Counsel's recommended tariff rule. It is not only legally sound but also answers all of the valid objections raised by the parties.

We will not pretend to fully understand all of the legal intricacies and ramifications of P.L. 480 programs or the distinctions between Titles I and II as they relate to our decision here. Suffice it to say that the Government will have to support any request for additional free time by demonstrating to San Diego's satisfaction that the shipments involved are in fact being shipped for its "account" and that it will derive the full benefit of the additional free time. In order that we might be in a better position to police the implementation of the above tariff rule and to relieve any apprehension that these suggested rules would be abused by the Port of San Diego by extending privileges to cargo not entitled thereunder, we are adopting the Examiner's requirement that the Port maintain detailed records for inspection purposes of each extension granted for at least two years.

It must be noted significantly here that, other than the requirement that an extension of free time be granted *only* on those cargoes shipped for the account of the U.S. Government, we have imposed no conditions on the future use of the additional free time. Thus, the adopted rule is not limited in application to U.S. Government cargo bagged on the premises but would apply to *any* cargo shipped for the account of the U.S. Government moving through the Port of San Diego. This position we find to be consistent with the statutory policy described above.

Besides clearly indicating that the free time benefits would not extend to parties other than U.S. Government, Hearing Counsel's suggested rule also effectively eliminates other possible ambiguities.

⁹This is also consistent with the interpretation already placed on such provisions at other U.S. ports. For example, witnesses testifying on behalf of Virginia ports stated that under the rule in their tariff special treatment would be limited to shipments where the Government was the actual shipper and paid for the costs of transportation, and not where it is merely lending money to foreign nations for purchase of American commodities.

In the first place the above provision eliminates reference to the introductory phrase "For good reason" which San Francisco contends to be subjective and improper for inclusion in tariffs. We concur with Hearing Counsel that there is no real need for the phrase since it is the policy and custom to grant special treatment to Government cargoes without further reason.

It will also be noted that Hearing Counsel remove from the ambit of the rule requests "for charitable purposes." While they explain that they "do not oppose such language in principle since policy and custom support it," they do agree with San Francisco that the term is not defined in the record and there is no evidence of record concerning *any* charitable commodities shipped through San Diego. Since San Diego did not request special treatment for charitable cargoes, nor does there appear to be any practical need for such an exception from established practices at the port, we find Hearing Counsel's deletion of the ambiguous language to be fully proper.

Moreover, we find that the granting of additional free time for U.S. Government cargo at San Diego has not been shown to be an unjust or unreasonable practice relating to the handling of property within the meaning of section 17 of the Act. There is no indication whatever in the record that the implementation of an additional free time rule for U.S. Government cargo would in any way interfere with and disrupt the normal flow of other cargo, otherwise contribute to congestion at the Port, or impose any additional expense on other cargo.

Without deciding whether section 16 First of the Act, requiring the equality of treatment between "any particular person, locality or description of traffic," could ever be violated by according "free or reduced rates" to U.S. Government cargo pursuant to section 6, we further find and conclude that there is no evidence to indicate that undue or unreasonable preference or prejudice in violation of section 16 First would result from the incorporation of the above extended free time provision into San Diego's tariff.

B. *Commercial Cargo*

The Examiner in his decision found that nongovernment or "commercial cargo" constituted something "less than 5%" of the total outbound cargo bagged and shipped at San Diego and that "* * * this relatively small portion of the total * * * [could not], on this record, be found to require or to be entitled to additional free time for assembly." Considering the fact that our interpretation of what constitutes "government property" within the meaning of section 6 of the Intercoastal Shipping Act, 1933, is manifestly more restrictive than the Examiner's, this finding has been rendered a little less than accurate. While a complete and precise breakdown of U.S. Government/com-

mercial cargo moving through San Diego is not contained in the record, it is nevertheless clear that there is sufficient "commercial cargo" being bagged and shipped at that port to warrant our consideration of San Diego's petition.

As it relates to commercial cargo, the essence of San Diego's initial petition, is a request to provide a specified period of time, in addition to the free time presently allowed, during which bulk cargo arriving at the port could be bagged or processed on port premises without accruing wharf demurrage or other terminal charges. Now, whatever else this period of time might be considered, whether it be "assembly", "bagging" or "processing" time, it clearly does not fall within our definition of "free time." In *Investigation of Free Time Practices—Port of San Diego, supra*, we defined the nature of "free time" as follows:

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 * * *. 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 * * *

Thus, "free time" is limited strictly to that period of time required by the shipper to *assemble* or the consignee to *remove* his cargo prior to it being loaded or subsequent to its being discharged from the vessel. Clearly, it was never intended to encompass the period of time required by the shipper to bag or otherwise process his cargo while on terminal premises.

Processing time, as we shall refer to it herein, is not required as a "necessary part of the carrier's transportation obligation." The carrier has absolutely no obligation, transportational or otherwise, to provide a shipper any time beyond what is reasonable and necessary for the shipper to assemble, or the consignee to pick up, his cargo. Nor is the port itself in any way required to allow a shipper's goods to occupy terminal space beyond the normal free time period, free of terminal charges, while it is being processed. An allowance of "processing time" is provided gratuitously to the shipper as a service, and so long as it is not unlawful, it is solely within the managerial discretion of the port.

Considered as a terminal practice the validity of providing such a service is dependent on its "reasonableness" under section 17 and its "reasonableness" under this section is based, in turn, on a broad consideration of many factors relating to the conditions existing at the port

and the characteristics of the traffic involved. Viewed in the light of the foregoing and for reasons set forth below, we find that the record in this proceeding fully supports and justifies San Diego's allowance of time, free of terminal charges, for the "processing" of bulk cargo under certain conditions. In the first place, we fully recognize that San Diego is not here involved, as it was in Docket No. 1217, in a promotional "give-away program" of valuable port storage space at noncompensatory rates calculated solely to attract cargo to the port and give it the competitive edge over neighboring ports. San Diego's position in this proceeding represents an effort to meet specific operational needs which exist at the port in order to assure the continued movement through the port of a specific and limited type of cargo for which special transportational requirements exist.

The record is clear that the chemical fertilizers, which represent at least 95 percent of the total cargo bagged by Freight Handlers at San Diego, *cannot* move in bulk to the ports of the recipient countries because of deficient or nonexistent bulk unloading facilities at those ports. To the extent that these commodities *must* be bagged prior to shipment, they do in fact, as San Diego has contended throughout this proceeding, constitute a new and unique type of cargo.

Although mathematically the normal 10-day free time period should be adequate to process a 10,000 ton consignment, it has been shown that this does not always prove true in practice. In fact, the record indicates that the capacity of the plant is limited and the facility has been severely taxed to bag and load 10,000 ton lots within the normal free time. Or, as the Examiner found in his decision :

There are conditions, beyond the control of either the exporter or Freight Handlers, which arise from time to time rendering the normal ten day free time allowance inadequate for bagging and assembling large consignments. Included are unpredictable lapses in the availability of materials at the source and delays in the receipt from the manufacturer of the particular size bags specified in a particular bagging contract. The bags are actually procured by the exporter. As the bagging of this cargo is a necessary step in transporting it from source to destination, these are transportation problems and are not based on merchandising considerations or matters of commercial convenience. While the present ten day free time allowance may prove adequate in most instances additional time must be made available when it is not reasonably possible to receive, bag and assemble large consignments that quickly.

And as one witness testified, the coordinating problems that arise are the product of uncontrollable factors in the shipping process and cannot be attributed to fault on the part of any party.

The only reason that Freight Handlers has generally been able to bag, assemble, and load a 10,000 ton shipment within the presently allowable 10-day free time is because it has operated two eight hour shifts

and has "absorbed" the overtime. Freight Handlers has testified, however, that they cannot remain in business in San Diego if they must continue to absorb losses when conditions conspire to prevent the processing and assembly of shipments within the regular time period. Under these circumstances, we think it plain that a 10-day "processing time" period for single consignments of 10,000 tons or more is neither unrealistic nor excessive.

At this juncture, we might point out that the 3,000 ton minimum on single consignment proposed by San Diego is manifestly unrealistic and unsupportable on the record. In the first place, the record clearly demonstrates that under actual experience the present 10-day free time period is more than sufficient to process a shipment as small as 3,000 tons. Secondly, the commodities in question here generally move in approximately 10,000 ton lots because this represents the normal capacity of the vessels which are chartered. In this regard, one of San Diego's own exhibits showing the actual experience of the bagging facility indicates that of 11 vessel loadings, only in 4 instances was the total tonnage loaded less than 10,000 tons and one of these came about as a result of some 194 tons being shut out of an earlier loading. For this reason, we find that the 10,000 ton minimum recommended by Hearing Counsel at San Francisco's suggestion is more consistent with the record.

Besides being required by existing circumstances, there is no indication that the establishment of a 10-day processing period at San Diego would in any way operate to the detriment or otherwise adversely affect the efficiency, economy, and financial soundness of port operations at San Diego. The operations of Freight Handlers have not caused displacement of any other cargoes normally being shipped or received at San Diego. The record is clear that the port space that has been utilized by Freight Handlers for the bagging and accumulation of bagged cargo was not needed for any other cargo. Nor is there any indication that the establishment of a processing period would in the future displace or impede the flow of other cargoes.

As far as the economy and financial soundness of the port is concerned, the construction of the bagging facility has provided new sources of revenue to the port and has brought cargo to the port, which would not have otherwise moved out of the West Coast. There has been no evidence that there has been any diversion of cargo from any other West Coast port as a result of the new industry at San Diego.

In *Investigation of Free Time Practices—Port of San Diego, supra*, at 547, we determined that as used in section 17 and as applied to terminal practices, a "* * * 'reasonable practice' most appropriately means

a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view." In view of all that has been stated herein, we find that a provision such as the one set forth below would not only satisfy the above criteria as to "reasonableness" but would also accomplish the objectives of the Port of San Diego:

Processing time not to exceed ten (10) days, excluding Saturdays, Sundays, and holidays, in addition to the free time provided by Item 435, may also be granted for the bagging of commercial bulk outbound cargo moving in single consignments of 10,000 net tons or more.

Moreover, it has not been shown that the implementation of a tariff rule allowing a specified period of "processing time" for commercial bulk cargo under the conditions set forth herein would in any way unduly or unreasonably prefer or disadvantage any person, locality, or description of traffic within the meaning of section 16 First of the Act.

ULTIMATE CONCLUSIONS

1. On the basis of all of the foregoing and the entire record herein, it is found and concluded that the tariff provisions set forth below would not offend the proscriptions of either section 16 First or section 17 of the Shipping Act, 1916:

Upon request of the United States Government, additional free time may be granted over and above the initial ten (10) day free-time period, not to exceed ten (10) days, excluding Saturdays, Sundays, and holidays. This provision shall apply only to commodities shipped for the account of the U.S. Government.

Processing time not to exceed ten (10) days, excluding Saturdays, Sundays, and holidays, in addition to the free time provided by Item 435, may also be granted for the bagging of commercial bulk outbound cargo moving in single consignments of 10,000 net tons or more.

2. With regard to free time extensions granted for commodities shipped for the account of the U.S. Government, San Diego will maintain records of such extensions for at least two years. These records will reflect the request, the reason, the commodity, the consignee and the additional free time used.

An appropriate order will be entered.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

13 F.M.C.

ORDER

The Commission having this day entered its Report in this proceeding which is hereby made a part hereof by reference and concluded the Port of San Diego's tariff rule providing an additional 10 days exclusive of Saturdays, Sundays, and holidays on commodities shipped for account of the United States Government is not violative of section 16 First or section 17 of the Shipping Act, 1916; and having further concluded that the Port of San Diego's tariff rule granting an additional 10 days' processing time in addition to the present 10 days' free time on commercial bulk cargo bagged on the Port premises moving in single consignments of 10,000 tons or more is not violative of section 16 First or section 17 of the Shipping Act, 1916,

It is ordered, That the Port of San Diego amend its tariff to provide:

Upon request of the United States Government, additional free time may be granted over and above the initial ten (10) day free-time period, not to exceed ten (10) days, excluding Saturdays, Sundays, and holidays. This provision shall apply only to commodities shipped for the account of the U.S. Government.

Processing time not to exceed ten (10) days, excluding Saturdays, Sundays, and holidays, in addition to the free time provided by Item 435, may also be granted for the bagging of commercial bulk out-bound cargo moving in single consignments of 10,000 net tons or more.

It is further ordered, That with regard to free time extensions granted for commodities shipped for the account of the U.S. Government, San Diego will maintain records of such extensions for at least two years. These records will reflect the request, the reason, the commodity, the consignee and the additional free time used.

By the Commission.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 69-7

IN THE MATTER OF AGREEMENT No. 5200-26
(PACIFIC COAST EUROPEAN CONFERENCE)

Decided July 22, 1969

Where modification of conference self-policing system is designed to guarantee a fair and impartial hearing to an accused line and does not affect any substantive right or obligation of the members under the conference agreement, such procedures may be used to investigate and prosecute breaches which predate the approval thereof provided Commission approval under section 15 is obtained.

Approval of agreement authorizing a conference to utilize recently amended self-policing procedures to investigate and prosecute breaches of the conference agreement which predate the approval of such amendment does not constitute the retroactive approval of past unauthorized activities.

An amendment to a self-policing system which creates no new substantive liabilities but merely guarantees to an accused line the right to a fair and impartial hearing is procedural only and an agreement permitting its retrospective application does not amount to an *ex post facto* regulation.

Where the approval of an agreement authorizing a conference to utilize its recently amended self-policing procedures retrospectively will restore the continuity of the conference's self-policing system such agreement is in harmony with the legal requirement of section 15.

Leonard G. James, F. Conger Fawcett, and John P. Meade for respondents, Pacific Coast European Conference and its member lines.

George F. Galland and Amy Scupi for respondent, States Marine Lines.

Donald J. Brunner and James N. Albert, Hearing Counsel.

REPORT

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

We instituted this proceeding to determine whether Agreement No. 5200-26 should be approved, disapproved, or modified pursuant to

section 15 of the Shipping Act, 1916, as amended. The agreement, if approved, would authorize the Pacific Coast European Conference to utilize its recently amended self-policing provisions,¹ “* * * to investigate and prosecute pursuant to those provisions, any alleged breaches brought to its attention at any time after March 8, 1967.”

A protest urging our disapproval of the agreement was filed by States Marine Lines, a former member of the Conference, which resigned its membership on December 1, 1967 while allegations of malpractices were still pending against it. States Marine Lines and the Pacific Coast European Conference and its member lines were named as respondents in the order of investigation. Hearing Counsel also participated. There appeared to be no genuine or material issues of fact and the proceeding was limited to the submission of briefs and affidavits. We heard oral argument.

THE FACTS

The Pacific Coast European Conference is a conference of common carriers by water serving the trade between U.S. Pacific Coast and Alaskan ports and ports in Europe and its environs. The Conference was established pursuant to Agreement No. 5200 and approved by the Commission's predecessors on May 26, 1937. Although Agreement No. 5200 has undergone many modifications since it was originally approved, certain Articles of the Agreement have remained virtually unchanged from the beginning. Among such provisions are Articles 2 and 3, whereby members of the Conference agree to adhere to the Conference's published rate structure and regulations. These Articles provide in pertinent part:

2. No party hereto shall engage, directly or indirectly, in the aforementioned transportation under terms, conditions and/or rates different from those agreed upon by and between the members hereto, * * *.

* * * * *

3. All freight and other charges for and in connection with such transportation shall be charged and collected by the parties hereto based on actual gross weight or measurement of the cargo or per package according to tariff, and strictly in accordance with the rates, charges, classifications, rules, and/or regulations adopted by the parties. There shall be no undue preferences or disadvantages, nor unjust nor unreasonable discrimination, or unfair practices against any consignor or consignee by any of the parties hereto.

Each of the parties hereto agrees that neither it nor its principals nor associated nor affiliated companies of any of them shall give or promise, either directly or indirectly, to any shipper, or consignee or broker, or prospective shipper or consignee or broker, or to any officer, employee, agent or representa-

¹ Agreement No. 5200-25, approved by order of the Commission on November 15, 1968.

tive of any such shipper or consignee or broker, or prospective shipper, or consignee or broker, or to any member of the family of any of the aforesaid, in any manner, any return, commission, compensation, concession, free or reduced storage, free or reduced passenger rates, any bribe, gratuity, gift of substantial value or other payment or remuneration through any device whatsoever, or render to any of the foregoing any service outside or beyond that called for in the contracts of affreightment or tariffs.

NOTE:—Free or reduced ocean passages. Personal Grounds—Principals of Member Companies may grant free or reduced rate passages on personal grounds, but in no instance shall free or reduced rate passages be granted in conflict with the above or in violation of Section 16 of the Shipping Act, 1916.

There shall be no payment or refund of freight or compensation received and no absorption at loading and discharging ports of rail, truck or coastal steamer freights or other charges directly or indirectly, by any of the parties hereto, except as may be agreed to by three-fourths of the parties hereto at any regular meeting of the Conference.

The parties hereto and each of them further agree that they shall not enter into any agreement of any nature, with any party or parties, which would in any way affect the integrity of this agreement, or any agreements, rates, rules or regulations made pursuant hereto.

Until December 1, 1967 respondent, States Marine Lines, Inc. and Global Bulk Transport, Inc., operating as a joint service, held a single membership in the Conference. It had been a member continuously for approximately 18 years.

Prior to November 15, 1968 the procedures governing the Conference's self-policing activity consisted primarily of two Articles in the agreement which read as follows:

Article 15

BREACH OF AGREEMENT. Except as otherwise provided in Article Four (4), liquidated damages for nonobservance of this Agreement, or of any of the rules, regulations or tariffs of the Conference, shall be not less than Five Hundred Dollars (\$500.00) nor more than Ten Thousand Dollars (\$10,000). If in the opinion of the Conference members, failure to observe the Conference Agreement or Conference rules, regulations or tariffs, in a particular case, or cumulatively, jeopardizes the accomplishment of the basic purposes of this Agreement, the offending party may be expelled from the Conference. The determination as to nonobservance of this Agreement or of any rule, regulation or tariff of the Conference and whether the offending party shall pay liquidated damages or be expelled from the Conference shall be by agreement of the parties as provided in Article Eight (8). Should an offending party fail to pay liquidated damages assessed hereunder to the Conference within five (5) days after written demand therefor, the said party shall be and become liable to civil action. In no case shall the party com-

plained against cast any vote on the matter under consideration. No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished to the expelled member and a copy of such notification mailed to the governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

Article 8

DECISIONS. Decisions at Duly called meetings are to be made by a three-fourths vote of members present and entitled to vote; otherwise, they are to be made by three-fourths vote of all members entitled to vote. Changes in this agreement, however, shall be made only by unanimous vote of all members entitled to vote.

In March 1967 the United States Court of Appeals for the District of Columbia Circuit determined² that a conference self-policing system must contain specific assurances that an accused member will be treated fairly and provision for impartial review by a totally disinterested person or body of any determination to penalize a member line.

Within a few days following this decision counsel for the Conference wrote a letter to the Conference Chairman advising that, in his opinion, the self-policing system should be amended to conform to the guidelines laid down by the Court and submitted a draft revision for that purpose. A general conference meeting on the draft was held in London on June 28, 1967, at which time 21 members of the 22-member conference voted to adopt the proposed revision. (The conference agreement requires unanimous vote to effect changes in the basic agreement.) On July 6, 1967, States Marine notified the Conference that it was withdrawing its affirmative vote, requesting time to consult with counsel. On July 10, 1967, Weyerhaeuser Line, the one member absent from the meeting held in June, voted "no" to a proposed revision.

On August 22, 1967, the Conference instituted a self-policing action against States Marine for alleged breaches of the Conference agreement seeking liquidated damages in the amount of \$130,000.

Instead of defending against these charges on the merits, States Marine filed the complaint which became our Docket 67-49.³ It also sought and obtained an injunction against the Conference and its member lines in the United States District Court for the Northern District of California Southern Division (No. 47855) forbidding any

² *States Marine Lines, Inc. v. Federal Maritime Com'n*, 376 F.2d 230 (D.C. Cir. 1967).

³ *States Marine Lines, Inc., et al. v. Pacific Coast European Conference, et al.*, 12 FMC 1, 1968.

attempt to collect penalties from States Marine until the Commission had made its decision in Docket 67-49.

On August 29, 1967 States Marine did furnish the Conference with its recommended modifications. These proposals were similar to the system which had been voted on at the London meeting but were considerably more detailed on the procedural safeguards to be afforded the accused as well as the arbitration procedures.

While Docket No. 67-49 was pending before the Commission, States Marine gave notice of its intention to withdraw from conference membership and, in fact, did resign effective December 1, 1967.

Subsequently, the Conference Chairman advised States Marine that a meeting of the Conference would be held on January 4, 1968, to consider the outstanding charges. States Marine was invited to be present and to participate in its defense. By letter dated January 3, 1968, States Marine declined to participate and suggested that the matter be postponed until after the Commission reached its decision in this docket.

Nevertheless, the meeting was held, and States Marine was found guilty and penalized by the membership in the amount of \$130,000. In a letter signed by the Conference Chairman dated January 5, 1968, States Marine was advised of this action. In this letter, States Marine was also offered an opportunity to have the adverse determination reviewed by an impartial board of arbitrators.

Our report in Docket 67-49 was served June 27, 1968, and in it we held that the Conference's self-policing system as it then existed was "legally defective in that it contained] no procedures guaranteeing fundamental fairness as defined by the Court in the *States Marine* case." We added that, "It may not be used and the assessment against States Marine is void." The Conference was ordered to amend its self-policing procedures.

Therefore, the Conference sought reconsideration of our decision and a stay pending judicial review. These requests were denied, and on October 21, 1968 the Conference filed Agreement No. 5200-25 which we approved on November 15, 1968.

On October 28, 1968 Agreement No. 5200-26, now under consideration, was filed for approval. It consists of one paragraph as follows:

The procedures contained in this article conform to the decision in *States Marine Lines, Inc. v. F.M.C.*, 376 F. 230 (D.C. Cir. 1967). The amendment of this article to so conform shall affect self-regulatory procedure only, and shall effect no substantive change in the parties' rights or obligations under this agreement. The amended procedures shall apply to, and the Conference shall be authorized to investigate and prosecute pursuant to these provisions, any alleged breaches brought to its attention at any time after March 8, 1967.

DISCUSSION

The scope of this proceeding is limited to the following legal issues:

Whether section 15 approval should be given to Agreement No. 5200-26 which contains (1) legal conclusions, and (2) a provision which would give retroactive effect to a recently approved self-policing procedure.

In their opening briefs, both States Marine and Hearing Counsel opposed the approval of the first two sentences contained in the agreement on the ground that the legality and interpretation of an agreement filed under section 15 is for the Commission and the courts to determine and is not something to which the parties may agree.

In its reply brief, the Conference indicated its willingness to delete these two sentences in the interests of avoiding unnecessary controversy and suggests that Agreement 5200-26 be approved in the following form:

The amended self-policing procedure approved by the Federal Maritime Commission on November 13, 1968, shall apply to and the Conference shall be authorized to investigate and prosecute pursuant to such provisions, any alleged breaches brought to its attention at any time after March 8, 1967.

Since the Conference has agreed to withdraw the objectionable language, this issue has been rendered moot and nothing more need be said.

When it filed its complaint in Docket 67-49 States Marine noted only two deficiencies in the Conference's then-existing self-policing system. The first was the lack of any procedures guaranteeing the right of an accused line to be furnished with all of the evidence to be relied upon and a fair opportunity to rebut or explain such evidence. The second was the absence of any provision for an impartial tribunal vested with the final authority to pass on questions of guilt or level of penalty to be assessed.

States Marine did not challenge the legality of Articles 2 and 3 of the basic conference agreement defining malpractices, nor did it attack the range of penalties which might be assessed upon a competent finding of guilt. Its objection was addressed solely to the conference agreement's failure to include specific procedures for the adjudication of alleged malpractices in accordance with the principles set down in the opinion of the Court of Appeals in the *States Marine* case, *supra*.

In our report in Docket 67-49, we agreed that the Conference's self-policing system as then constituted was:

[L]egally defective in that it contains no procedures guaranteeing "fundamental fairness" as defined by the court in the *States Marine* case. It may not be used and the assessment against States Marine is void.

Having made this determination, we added:

This does not mean, however, that the Conference has lost its right of action against States Marine for alleged wrongdoing while a Conference member. It could well be that the Conference may still enforce Conference obligations incurred by States Marine prior to its resignation from the Conference.

The legal defect of the Conference's former self-policing system consisted solely in its lack of a procedural system whereby a fair and impartial hearing would be guaranteed to the accused member and only so much of the system which required the conference members themselves to sit in final judgement was affirmatively found to be illegal in Docket 67-49.

Since its original self-policing system was first approved, the Conference has always had the legal right and obligation to investigate malpractices and bring charges against members where probable cause existed.

Thus, not all actions taken under that earlier system were illegal. The method of investigating and bringing formal charges was neither challenged nor at issue. It was only the lack of fair procedures and an impartial tribunal which prevented the Conference, once having initiated a self-policing proceeding, from seeing the case through to a final decision. In short, the Conference's old self-policing system was not totally illegal—merely inadequate. While the deficiency in the old self-policing system was serious enough to effectively block any final action against an accused line, this disability was removed when Agreement No. 5200-25 was approved on November 15, 1968.

However, since States Marine resigned from the Conference on December 1, 1967, it was not a party to Agreement No. 5200-25, and contends that it can never be tried under the new procedures. It poses the problem in the form of a dilemma. Under the old self-policing system the Conference was helpless to try States Marine, since its procedures were legally inadequate in the light of the procedural standards required by the *States Marine* case. While the Conference still had its "illegal" self-policing system, States Marine withdrew from membership. By the time the Conference amended its agreement so as to comply with the *States Marine* case, States Marine was no longer a member and, therefore, cannot be bound by its terms.

In asserting that the Conference has never had valid self-policing jurisdiction, States Marine misconstrues our holding in *States Marine v. Pacific Coast European Conference, supra*. Its argument is premised on the erroneous assumption that the Conference was stripped of all self-policing authority by reason of our conclusion in Docket 67-49 that the procedures were inadequate.

The validity of an allegation of breach of a conference agreement or a malpractice thereunder is not affected by the illegality of the procedural machinery under which such charges are to be tried. Thus, a valid charge, i.e. one which, if proved, constitutes a breach for which penalties may be properly assessed, stands until adjudicated. Any such adjudication, of course, had to await the adoption and approval of legal procedures.

In the instant case there has never been a valid assessment of penalties nor has there been a competent, final determination that States Marine is guilty of any conduct which would justify such an assessment. However, there are charges, regular on their face, outstanding against States Marine. These charges were equally legal under the old and new procedures and have lost none of their vitality by virtue of the amended procedures contained in Agreement No. 5200-25. All that was lacking was the existence of a valid tribunal before which to try the charges and appropriate procedures to protect the accused. This is all that our report in Docket 67-49 stands for.

Accordingly, we conclude that the Conference has never lost the legal right to police its own membership although it has been under a legal disability to conduct a valid adjudicatory proceeding under its old self-policing procedures. This temporary disability was removed upon the approval of Agreement No. 5200-25 which created a viable set of procedures fully in accord with the Court's decision in the *States Marine* case, *supra*.

States Marine contends, however, that the Commission cannot approve Agreement No. 5200-26 because to do so would confer retroactive section 15 approval.

In support of this argument, it cites the following cases: *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966); *Agreements No. T-2108 and T-2108-A and Agreement No. T-2138* (Dockets No. 68-26 and 68-27, 12 F.M.C. 104 and 110 (1968)); *River Plate & Brazil Conf. v. Pressed Steel Car. Co.*, 227 F.2d 60 (2nd Cir. 1955); and *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966). All of these cases stand for the proposition that the Commission has no authority to approve any conduct under a section 15-type agreement which transpired prior to approval. In each of the cited cases there was an attempt to legitimize activity which had already taken place.

In this case the Conference has done nothing under Agreement 5200-26, nor is it asking the Commission to approve any conduct which has taken place in the past. The only activity contemplated under Agreement 5200-26 is the future investigation and prosecution of malpractices and the utilization of newly amended procedures for the adjudication of such allegations.

It could be argued that an amendment such as Agreement 5200-26 which makes no substantive changes in the self-policing system, i.e. one which neither adds nor deletes offences for which sanctions may be imposed is automatically applicable to prior breaches as well as those which take place after approval.

Agreement No. 5200-25, however, is silent on whether the new procedures contained therein may be used to investigate and adjudicate offences which occurred prior to its effective date.

In *States Marine Lines, Inc. v. Trans-Pac. Freight Conf.*, 7 F.M.C. 204, 216 (1962), we had occasion to comment on the possible application of newly approved self-policing procedures to past offenses :

[I]f it is the purpose of a conference to have its neutral body or other self-policing system deal with past events, this purpose should be specifically included in the agreement establishing the self-policing system when it is submitted for approval.

We perceive no reason to deviate from that position and in the interests of clarity it is better that it be spelled out in the form of an amendment such as the one which is before us.

As we stated in *Joint Agreement—Far East Conf. and Pac. W.B. Conf.*, 8 F.M.C. 553, 558 (1965) :

Any interested party should be able, by a reading of the agreement, to ascertain how the agreement is to work, without resort to inquiries of the parties or an investigation by the Commission.

In its opening brief, States Marine asserts that the order of investigation should have included the issue of whether the agreement is "discriminatory and unfair as between carriers, operates to the detriment of the commerce of the United States, and is contrary to the public interest."

Because this "issue" was not specifically included in the order of investigation, States Marine simply declined to brief it.

There are two reasons—either one of which is sufficient—why this argument should be rejected.

If a party with an interest in an agreement is dissatisfied with the scope of an order of investigation or in doubt as to its scope, the appropriate vehicle for relief is the filing of a timely motion. States Marine waited until its opening brief to raise this issue for the first time, although a full month had elapsed after service of the order of investigation.

Secondly, a cursory examination of this so-called issue reveals that it is a dubious one at best. The order of investigation specifically states that the legal issue is :

Whether section 15 approval should be given to Agreement No. 5200-26 which contains (1) legal conclusions, and (2) a provision which would give retroactive effect to a recently approved self-policing procedure.

Thus, the issue before the Commission in this case is the approvability of Agreement 5200-26 under the legal standards imposed by section 15. Or, in other words, would the agreement be discriminatory or unfair as between carriers, operate to the detriment of the commerce of the United States, or be contrary to the public interest within the meaning of section 15. Thus, the only way to urge disapproval of the agreement in question was to argue the very issues allegedly precluded by our order.

The Conference has made it clear that if Agreement No. 5200-26 is approved, it intends to utilize its recently approved self-policing procedures to adjudicate the charges which were outstanding against States Marine at the time it resigned its membership.

States Marine, however, insists that the "entire purpose of the agreement is to further the Conference's vendetta against States Marine," and that it is illegal on its face.

This is essentially the same accusation which States Marine made in Docket No. 67-49. In that case it was on firmer ground since the then existing procedures lent themselves to the possibility of arbitrariness. This argument has lost its vitality since the approval of Agreement No. 5200-25.

The charges outstanding against States Marine have been held in abeyance for precisely the reason that without adequate procedural protection and without an impartial tribunal the possibility of arbitrary and discriminatory treatment was indeed real. With the advent of a procedural system which even States Marine concedes⁴ is fair, the possibility of injustice has been minimized, if not entirely removed.

If the Conference follows its own self-policing procedures conscientiously, as it must under the law, States Marine will be afforded every procedural protection and the right to an impartial determination of the charges outstanding against it. Nevertheless, if it should happen that the Pacific Coast European Conference uses its self-policing system as an instrument of oppression, States Marine (or any other line so victimized) would not be without recourse.

⁴ States Marine was a party to the proceeding which resulted in the approval of Agreement 5200-25 and voiced no objection to it. Moreover, counsel for States Marine in the oral argument in this case stated:

* * * [I]t filed a new self-policing system which States Marine did not oppose. It was Agreement No. 5200-25 and it was approved by the Commission on November 15, 1968. States Marine makes no contention that this new agreement is illegal.

In *Modification of Agreement 5700-4*, 10 F.M.C. 261, 274 (1967), we said in language which is equally pertinent here :

The remaining reasons advanced by States Marine for an evidentiary hearing are premised on the assumption that the self-policing formula will not be applied justly and in good faith. This is mere speculation on the part of States Marine.

In short, States Marine's objections to the self-policing system consist mainly of conjectures as to how the self-policing system might be used as an instrument of oppression. We are duly concerned about the rights of an individual member of a conference and the doors of the Commission are always open to anyone with a legitimate complaint. If a conference does not administer its approved system of self-policing in a fair manner this would surely support a finding of " * * * inadequate policing of the obligations under it * * *" for which the mandatory penalty is disapproval of the entire conference agreement.

States Marine admits that the Conference has not lost its right of action against it if the conference agreement was breached. In its opening brief (repeated again in its reply brief) States Marine asserts :

* * * If States Marine had indeed violated the conference agreement, the conference has a cause of action at law, enforceable in court, against States Marine.

This statement, while true, is a gross oversimplification of the law governing the right of a conference to discipline its members.

If a member of a conference breaches the agreement or engages in an act defined therein as a malpractice it is accountable to its fellow members in accordance with the terms and conditions of the agreement. The fact that a member of the conference terminates its membership in the organization in no way changes the right of the conference members to proceed against the former member for breaches or malpractices which occurred during the accused member's period of membership any more than a former member of a private club can escape liability for obligations incurred during membership. The courts have uniformly held that a private club or association must first exhaust its own internal administrative processes before seeking judicial aid to enforce a right of action against a member. 6 Am. Jur. 2d *Associations and Clubs*, § 39, p. 469. Thus, even if the Pacific Coast European Conference were a purely private organization it would be required to exhaust its own internal remedies before going into court.

Needless to say, a conference is more than a mere private organization. We have repeatedly held that a section 15 agreement is " * * * a public contract impressed with the public interest and permitted to exist only so long as it serves that interest." *In Re: Pacific Coast European Conference*, 7 F.M.C. 27, 37 (1961).

When Congress amended section 15 in 1961⁵ it clearly directed the

⁵ This language was added to section 15 in 1961 by P.L. 87-346, sec. 2, 75 Stat. 764.

conferences themselves to police the malpractices of their own members. We are required to disapprove any agreement "on a finding of inadequate policing of the obligations under it * * *."

Pursuant to this amendment and our general rulemaking authority under the Act, we promulgated General Order 7 on August 22, 1963,⁶ saying in part:

This provision, in demanding the adequate policing of the obligations under the agreement, clearly presupposes the establishment of some procedure for that purpose.

In the *States Marine* case, *supra*, the Court admonished that:

* * * [T]o place the Commission in the role of an on-going appellate panel, intimately involving it in a case-by-case review of the Conferences' Neutral Body system, would hardly be consistent with Congress' intent that the Conferences engage in *self-regulation*. 376 F. 2d 230 at 242.

States Marine's suggestion that the Conference may bring a lawsuit for breach of the conference agreement runs directly counter to the Congressional mandate that the conferences regulate themselves as well as the common law governing the right of associations to discipline their members. While a conference is by no means barred from seeking judicial aid, it should do so only after first utilizing the procedural scheme contained in its own basic agreement.

These charges against States Marine are still outstanding. The situation is precisely the same as it was January 1968 with one important exception. The Conference now has adopted, and we have approved, an agreement to the basic conference agreement⁷ which requires the Conference to follow carefully defined procedures governing the conduct of self-policing cases, all of which are designed to afford a fair hearing to an accused member. The legal disability which arose by reason of the lack of adequate self-policing procedures has been removed, and the Conference is free to police its members' obligations within the limits of its approved agreement. Moreover, upon the approval of Agreement 5200-26 these procedures may be used to investigate and prosecute offences which are alleged to have occurred any time after March 8, 1967, including the charges outstanding against States Marine.

Of course, States Marine may not be tried for any offence which did not constitute a breach at the time it was alleged to have occurred. Similarly, States Marine may not be subjected to any penalty save those which were specified in the conference agreement at that time.

⁶ 28 F.R. 9257.

⁷ Agreement No. 5200-25, *supra*.

Aside from this, there is no reason in logic or in law why States Marine may not be tried under amended procedures as approved by the Commission even though it is no longer a member of the Conference and, therefore, did not "agree" to these amendments.

For the reasons stated herein, we will approve Agreement No. 5200-26. An appropriate order will be entered.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

13 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 69-7

IN THE MATTER OF AGREEMENT No. 5200-26
(PACIFIC COAST EUROPEAN CONFERENCE)

ORDER

The Commission having this day entered its report in this proceeding, which is hereby made a part hereof by reference and concluded that Agreement No. 5200-26 should be approved under section 15, Shipping Act, 1916,

Now therefore, it is ordered, That Agreement No. 5200-26 be, and the same hereby is approved in the following form:

The amended self-policing procedure approved by the Federal Maritime Commission on November 13, 1968, shall apply to, and the Conference shall be authorized to investigate and prosecute pursuant to such provisions, any alleged breaches brought to its attention at any time after March 8, 1967.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 69-22

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION— VIOLET A. WILSON D/B/A TRANSMARES

Adopted July 23, 1969

Applicant, Violet A. Wilson d/b/a Transmares, will be an independent ocean freight forwarder as defined in the Shipping Act, 1916; is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder; the proposed forwarding business will be consistent with the national maritime policies declared in the Merchant Marine Act, 1936; and will be issued a license as provided in section 44(b) of the Shipping Act, 1916.

Violet A. Wilson on her own behalf.

James Albert and *Donald J. Brunner* as Hearing Counsel.

INITIAL DECISION OF PAUL D. PAGE, JR., CHIEF EXAMINER¹

This investigation was ordered because it appeared that applicant's husband,² Cristobal Mandry, has in the past few years conducted freight forwarding without being licensed, and has in other ways so conducted himself that a license should be denied if he was to take any part in applicant's activity as a forwarder. The record fully bears out the Commission's misgivings with respect to Mr. Mandry's unfitness, and the application would be denied if the record did not establish, as it does, that Mr. Mandry will not have any part in transacting applicant's forwarding business.

At the conclusion of the hearing the following questions were asked and answered:

¹ This decision became the decision of the Commission July 23, 1969.

² Applicant will be doing business as "Transmares", a name formerly utilized by Cristobal Mandry. Mrs. Mandry as applicant uses her maiden name, Violet A. Wilson. Sometimes in the record and in this decision, applicant is called Mandry and sometimes Wilson.

EXAMINER PAGE: Do you fully understand, Mrs. Mandry, that if you are licensed by the Commission that such a license will be issued relying on your representation that your husband has no part whatsoever in the business and will play no part in your activities as a forwarder?

Do you fully understand that?

MRS. WILSON: Yes, sir.

EXAMINER PAGE: And that if that understanding should not be kept, of course, your license would be forfeited promptly?

MRS. WILSON: Yes, I understand.

Turning now to Mrs. Wilson's qualifications in her own right, the evidence is undisputed and conclusive that she is a qualified applicant, fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936.

This is disclosed by the testimony of Robert E. Sunkel, the Commission's chief investigator in the New Orleans Office, detailing a thorough and careful investigation made by him. His testimony is that to the best of his knowledge Mrs. Wilson was not active in the unlicensed forwarding, as she became ill in the early part of the 1960's, was no longer active in the forwarding business, and worked at home as a seamstress.

Mr. Sunkel contacted several groups about Mrs. Wilson. With respect to steamship companies and agents, there were responsible officials of Strachan Shipping Company, United Fruit Company, Amarand Shipping Company, and Ayers Shipping Company. He summed up what he learned from them as follows:

All of these people furnished recommendations as to Mrs. Mandry's abilities as a freight forwarder.

Essentially all of them stated that they have known her for many years dating back into the early to mid-fifties.

They all stated that they considered her an excellent forwarder and completely capable of handling her own forwarding business.

They had never experienced any difficulties with any documentation work she had done on shipments going forward on their lines.

Each and every one of them recommended that she be licensed.

The Whitney National Bank, The International Bank, and the Hibernia Homestead gave satisfactory reports, and at none of them was any derogatory information discovered.

While stating that they had no personal acquaintance with Mrs. Wilson, Mr. T. R. Spedden, president of the New Orleans Freight Forwarders Association (he holds F.M.C. License No. 1) and another

officer of the same association, Mr. Walter Flower, both stated that they knew no reason why she should not be licensed.

Hearing Counsel summed up his feeling as to applicant's qualifications as follows:

I personally feel as though Mrs. Mandry should be given a license on the basis of the record we have before us today as well as information that has come to my knowledge to Mr. Sunkel and through my own investigation.

He was careful to point out that Mrs. Wilson's community property interest in her husband's unlicensed forwarding in the past was a negative factor which might be ground for denying a license.

Upon the whole record it does not appear that this lady should be punished for activities in which she had no part, and which took place while she was in bad health and working as a seamstress. The important point is that she is fully qualified to go into the forwarding business, to be joined as she testified, by her son upon his graduation from high school, and fit to act in the important fiduciary position of independent freight forwarder.³

ULTIMATE CONCLUSIONS

Applicant, Violet A. Wilson d/b/a Transmares, will be an independent ocean freight forwarder as defined in the Shipping Act, 1916; is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission issued thereunder; the proposed forwarding business will be consistent with the national maritime policies declared in the Merchant Marine Act, 1936; and will be issued a license as provided in section 44(b) of the Shipping Act, 1916.

(Signed) PAUL D. PAGE, Jr.,
Chief Examiner.

It is ordered, That Violet A. Wilson d/b/a Transmares, Inc., is granted an independent ocean freight forwarder license pursuant to Section 44 of the Shipping Act, 1916.

It is further ordered, That this proceeding is discontinued.
By the Commission.

(Signed) THOMAS LISI,
Secretary.

³ It is both a duty and a pleasure to commend the performance of Mr. Albert and Mr. Sunkel in this case. The latter investigated fully and fairly, and as a witness testified impressively. The former while overlooking nothing adverse to the applicant (who appeared without counsel) took no advantage, and at the end of the testimony stated his opinion that applicant should be licensed.

FEDERAL MARITIME COMMISSION

DOCKET No. 67-56

PITSTON STEVEDORING CORPORATION

v.

NEW HAVEN TERMINAL, INC.

Initial Decision Adopted August 8, 1969

Usage charge of \$1.00 per 1,000 board feet of lumber assessed by New Haven Terminal, Inc. against Complainant's stevedoring operation at Respondent's terminal, has not been shown to be reasonably related to the services and facilities furnished and accordingly found to be an unjust and unreasonable practice within the meaning of section 17 of the Shipping Act, 1916.

Respondent's assessment of a usage charge of \$1.00 per 1,000 board feet of lumber found to be unduly and unreasonably prejudicial or disadvantageous in violation of section 16 First of the Shipping Act, 1916.

Reparation found to be due but amount thereof cannot be ascertained upon present record. Proceeding remanded to Examiner for determination of reparation.

Charles M. Mattingly, Jr. and *Richard P. Lerner* for Complainant.

John W. Barnett and *David P. Faulkner* for Respondent.

John Cunningham and *Mark P. Schlefer* for intervener, Nacirema Operating Company.

Donald J. Brunner and *G. Edward Borst, Jr.*, Hearing Counsel.

REPORT

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

This proceeding was initiated by the complaint of Pittston Stevedoring Corp. (Pittston) against New Haven Terminal, Inc. (New Haven), alleging that New Haven's assessment of a "usage charge" subjected Complainant to an undue or unreasonable prejudice or disadvantage within the meaning of section 16 of the Shipping Act, 1916 (the Act),

and constitutes a practice which is unjust and unreasonable in connection with the receiving, handling, or delivery of property within the meaning of section 17 of the Act. Complainant seeks reparation in the amount of \$100,000 and an order requiring Respondent to cease and desist from levying the charge. Nacirema Operating Company, Inc., a Port of New York terminal operator and stevedoring company, and Hearing Counsel, intervened in the proceeding.

In his Initial Decision served April 23, 1969, Examiner Herbert K. Greer ordered New Haven to cease and desist from imposing its usage charge. In so doing, the Examiner concluded that a :

* * * usage charge of \$1.00 per 1000 board feet of lumber assessed by respondent against complainant's stevedoring operation at respondent's terminal bears no reasonable relationship to the use by or services rendered to complainant and imposing it constitutes an unjust and unreasonable practice in connection with the receiving of property in violation of section 17 of the Shipping Act, 1916.

The Examiner further found that while Pittston was entitled to reparation, the amount could not be fairly determined "without consideration being given to a *fair and reasonable charge* against complainant for use of respondent's facility" (emphasis added), a determination which could not be made on the present record. Accordingly, he directed the Complainant to prepare a statement and otherwise comply with section 15(b) of the Commission's Rules of Practice and Procedure and added that "* * * if necessary further hearing will be held for the purpose of hearing evidence or argument on reparation * * *." The proceeding is now before us upon exceptions to the Initial Decision.

Respondent's exceptions are generally directed to the Examiner's finding that the subject usage charge was not related to the services rendered. In essence, these exceptions constitute nothing more than a reargument of issues and contentions which were exhaustively briefed and considered and resolved by the Examiner in his Initial Decision. A careful consideration of the record in this proceeding leads us to the conclusion that the Examiner's disposition of these issues and contentions was proper and well founded, except to the extent that he failed to find that New Haven's assessment of the subject usage charge was violative of section 16 First of the Act as well as section 17.

The Examiner in effect rejected the allegation that the assessment of the "usage charge" also violated section 16 of the Act. He acknowledged that Complainant had "raised the issue of self preference," but concluded that "* * * no authority is cited or found which would require a terminal operator to charge itself for the use of its own facilities." Pittston, in its exceptions, reasserts its position that "* * * the implementation and selective application of the usage charge resulted

in an undue, unreasonable preference in violation of * * * section [16].” Hearing Counsel concur with Pittston that New Haven violated section 16. We also find considerable merit in Complainant’s position.

The language of section 16 forbidding “any undue or unreasonable prejudice or disadvantage in any respect whatsoever” is specifically directed against *every* form of unjust discrimination against the shipping public. *Armstrong Cork Co. v. American-Hawaiian Steamship Co.*, 1 U.S.M.C. 719, 723 (1938). This principle of equality forbids any difference in charge which is not based upon a difference in service. *Eden Mining Co. v. Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41, 45 (1922). The record is abundantly clear that Respondent’s exaction of a “usage charge” was applied *only* to movements of lumber and to no other commodities. It follows, therefore, that unless the services and facilities rendered incident to Complainant’s unloading and handling of lumber, justified the charge assessed, discrimination within the contemplation of the statute is established. From the facts of record in this proceeding before us, it is manifest, as the Examiner found, that the Respondent has not justified the imposition of a “usage charge” on lumber. We conclude, therefore, that to the extent Respondent’s usage charge has been found unrealistic in terms of the terminal facilities and services furnished, it subjects a “description of traffic,” namely lumber, to an “undue and unreasonable prejudice or disadvantage” in violation of section 16 of the Act.

We are remanding this proceeding to the Examiner for determination of reparation consistent with his finding that the amount of reparation must take into consideration any amount determined to be a “fair and reasonable charge” against complainant.

Accordingly, and to the extent that it is not inconsistent with the foregoing, we adopt the Examiner’s Initial Decision (a copy of which is attached hereto and made a part hereof) as our own.

An appropriate order will be entered.

By the Commission.

THOMAS LISI,
Secretary.

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 findings and conclusions, which Report is hereby referred to and made a part hereof;

Therefore, it is ordered, That New Haven Terminal, Inc. cease and desist from imposing a "usage charge" of \$1.00 per 1,000 board feet of lumber as set forth in its Lumber Tariff No. 1; and

It is further ordered, That the proceeding in Docket No. 67-56 be, and hereby is, remanded to the Examiner for determination of reparation due Complainant as a result of Respondent's assessment of an unlawful "usage charge." Reparation should be determined pursuant to Rule 15 of the Commission's Rules of Practice and Procedure if possible, but, if necessary, further hearing may be held for the purpose of hearing evidence or argument on reparation.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.
13 F.M.C.

FEDERAL MARITIME COMMISSION

No. 67-56

PITSTON STEVEDORING CORPORATION

v.

NEW HAVEN TERMINAL INC.

A terminal operator may impose a usage charge on persons coming onto its facility for a gainful purpose, however, such charge is subject to the just and reasonable requirements set forth in section 17 of the Shipping Act, 1916.

Usage charge of \$1.00 per 1000 board feet of lumber imposed on stevedores doing business at a terminal in competition with terminal operator's stevedoring operation, found not reasonably related to the services furnished, and its imposition by respondent constitutes an unjust and unreasonable practice which violates section 17 of the Act. Cease and desist order entered.

Charles M. Mattingly, Jr. and *Richard P. Lerner* for complainant.

John W. Barnett and *David P. Faulkner* for respondent.

John Cunningham and *Mark P. Schlefer* for intervener, Nacirema Operating Company.

Donald J. Brunner and *G. Edward Borst, Jr.*, Hearing Counsel, interveners.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER¹

Pittston Stevedoring Corp. complains that the lumber tariff filed by respondent New Haven Terminal, Incorporated, which imposes a charge of \$1.00 per thousand gross feet of lumber on stevedores, rail carriers, truckers, shippers or cosignees loading or unloading railcars, vessels, or trucks, subjects complainant to an undue or unreasonable prejudice or disadvantage within the meaning of section 16 of the Shipping Act, 1916 (the Act), and constitutes a practice which is unjust and unreasonable in connection with the receiving, handling or delivery of property within the meaning of section 17 of the Act. Complainant asks for reparation in the amount of \$100,000 and for an order requiring respondent to cease and desist from levying the charge.

¹ This decision became the decision of the Commission August 8, 1969.

Hearing Counsel and Nacirema Operating Co., Inc., intervened.

THE FACTS

1. Pittston Stevedoring Corporation (Complainant) is a New York corporation engaged in the business of furnishing stevedoring services to common carriers operating in the foreign and domestic commerce of the United States.

2. New Haven Terminal, Inc. (Respondent), a person subject to the Act, is a corporation operating a terminal facility at New Haven, Connecticut, furnishing wharfage, dock, warehouse and other terminal facilities in connection with common carrier by water, and also furnishing stevedoring services.

3. For approximately fifteen years prior to December 11, 1968, complainant operated at respondent's New Haven facility, unloading lumber from vessels to a place of rest on the dock. From this place of rest, respondent backhauled, stored, and delivered the lumber to consignees who were charged for such service in accordance with rates set forth in respondent's tariff.

4. Wilford and McKay, an agent of the carriers, engaged complainant to stevedore vessels at respondent's facility.

5. Prior to November 1, 1967, complainant operated at respondent's New Haven facility without being subjected to a usage charge. On or about September 1, 1967, respondent issued FMC Lumber Tariff No. 1, cancelling all prior lumber tariffs and levying a new charge of \$1.00 per thousand gross feet of lumber for:

The use of terminal facilities by rail carrier, stevedoring company, truckers, shippers or consignees, their agents, servants and/or employees when they perform their own loading or unloading of railroad cars, vessels, trucks or the use of said facilities for which a charge is not otherwise specified.

6. On September 1, 1967, in response to complainant's inquiry as to what services were not compensated for under respondent's former tariff, respondent wrote:

Our present tariff includes rates for backhanding (which includes wharfage) storage, dockage, loading trucks and ships on overtime. Items such as services supplied to longshoremen for their use and convenience are not included in the listed rates. The "Usage" charge covers all these services provided for the longshoremen.

7. The services supplied by respondent for the convenience of longshoremen and complainant's three supervisory personnel were the same before and after the effective date of the usage charge. Complainant's timekeeper used a space 6 x 6 feet in a 20 x 25 foot shed on the pier,

the balance of the space in the shed being used by respondent. A telephone was in the shed but was used by the timekeeper only about 10 times each year. Ordinarily, calls were made from public telephones, two of which were in a shack on the pier which was also available to longshoremen for use during coffee breaks and lunch hour. The shack contained a water cooler. Three of respondent's personnel used parking spaces on the installation. Toilet facilities were available. Complainant had not at any time requested respondent to provide services or facilities for longshoremen. The facilities used by complainant's personnel were also available to stevedores employed by respondent.

8. In addition to the above described facilities, respondent furnished a stacker (7½ ton forklift) to unload and load forklifts which complainant brought by truck to New Haven from other localities. The stacker was operated by either respondent's or complainant's employee and the loading or unloading consumed from 15 to 30 minutes. Respondent, in determining its stevedoring costs, used \$1.50 per hour for one forklift which included 50¢ for gas and oil.

9. A lumber stevedoring gang consists of 14 longshoremen, a foreman and a driver. Complainant, when operating at respondent's facility obtained longshoremen from the same union respondent obtained stevedores for its own operation. In addition to using the local longshoremen, complainant sent from its New York office a mechanic, timekeeper, and a superintendent, the superintendent not being present during 25% of complainant's New Haven operations.

10. A gang of stevedores unloads an average of 30,000 board feet of lumber per gang hour. The number of gangs employed to unload a vessel varies according to the number of hatches to be served. The usage charge is determined by number of board feet unloaded, not on the number of gangs working on the vessel, persons using the conveniences or days involved.

11. Subsequent to the effective date of the usage charge, complainant continued to operate at respondent's facility. During the period January 1 to September 30, 1968, complainant unloaded 49,715,430 gross feet of lumber. Complainant continued to operate at New Haven until December 10, 1968. Respondent billed complainant for \$72,075.36, usage charge and complainant paid \$6,165.85 but refused to make further payment. Because of this refusal, respondent denied complainant further use of its facility.

12. Prior to the imposition of the usage charge, complainant's New Haven operation yielded a profit of 50¢ per 1000 feet of lumber stevedored during 1964, 45¢ during 1965 and 41¢ during 1967.

13. Respondent's bookkeeping method resulted in showing a profit of \$1.15 per 1000 board feet during 1967 and 97¢ during 1968.

14. During the period January 1 to September 30, 1968, complainant would have suffered a loss of \$33,960.54 if all usage charges assessed had been paid.

15. Complainant is unable to compete with respondent for stevedoring at the New Haven installation for the reason that the usage charge exceeds complainant's profit, and the charge is not applicable to respondent's stevedoring operation.

16. Respondent performs stevedoring services at its terminal other than lumber stevedoring.

17. Terminals other than respondent, include usage charges in their tariffs, however these charges may not be compared with respondent's usage charge because of varying methods employed.

18. Lumber terminals are available to vessels and shippers at New London, Connecticut, 48 miles from New Haven, and Bridgeport, Connecticut, 20 miles from New Haven.

19. Wilford and McKay, agents, ordinarily select the stevedore to handle vessels transporting lumber from Canada.

20. The costs incurred in stevedoring operations relate principally to labor. Respondent's overall stevedoring costs are, to some degree, less than complainant's costs due to location and to an arrangement with Excello Corporation (having common officers and stockholders) for the furnishing of equipment. The difference in profit computations submitted by the parties is mainly due to the difference in accounting methods and assigning or apportioning of costs.

POSITION OF THE PARTIES

Complainant

Complainant contends that the usage charge when considered alone violates section 16 of the Act in that it creates a self preference in respondent which is undue and unreasonable. It is pointed out that respondent, in addition to being a terminal operator, is also a stevedore competing with complainant and that while complainant must pay the usage charge, respondent does not impose the charge upon itself nor upon its lumber stevedoring customers which situation, complainant asserts, results in prejudice to its operation. Complainant maintains that respondent is receiving compensation for services furnished stevedores by including a charge thereof in its wharfage, backhauling and storage tariff, although such service is not specified in the tariff. Complainant argues that the usage charge bears little or no relation to the services rendered and thus violates section 17 of the Act as an

unjust and unreasonable practice. It is contended that the purpose and effect of the usage charge is to create a monopoly in respondent to perform all stevedoring services at its New Haven installation, contrary to the national policy which favors free and healthy competition and that respondent has failed to establish benefits which will flow from a monopoly to justify the disadvantages which will result to complainant, the carriers involved, and the public. Respondent's accounting method is said to be unrealistic, and demonstrates a "profit loss" not supported by reliable fiscal evidence.

Respondent

Respondent argues that a practice in the industry, recognized by this Commission, establishes that when a terminal's facilities are used for any gainful purpose, a charge for such use is permissible. It is contended that the \$1.00 usage charge is reasonable in that it falls within the dollar amount of contribution to unallocated overhead and profit which respondent itself obtains from its own stevedoring revenue; that is, when a competitor stevedors at the New Haven terminal, respondent is losing the opportunity to defray its overhead and/or contribute to its profit in an amount which exceeds the amount of the usage charge. Respondent contends that sections 16 and 17 of the Act are designed to protect shippers, shipowners, cargoes and consignees from burdensome or discriminatory regulations and practices which might jeopardize freedom of commerce or safety on the high seas but that such considerations are not here involved. Respondent distinguishes prior Commission precedent relating to the ship master's right to select a stevedore on the ground that this proceeding involves only unloading; not loading a vessel for carriage of cargo on the high seas. The usage charge is said to be non-discriminatory because it applies equally to all persons using respondent's facility; that the charge does not constitute an unjust or unreasonable practice or regulation because it has been fairly determined. Complainant's accounting method of showing its costs is challenged. Respondent questions the commission's authority to inquire into rate levels in a proceeding based on sections 16 and 17 of the Act.

Hearing Counsel

Intervening Hearing Counsel consider the usage charge not justified on a cost basis and the profit to respondent emanating therefrom to be artificially high. It is maintained that the charge results in a monopoly in respondent inasmuch as complainant has demonstrated that it cannot operate at the New Haven facility if the charge is imposed; and proposed that such monopoly is detrimental to the commerce of

the United States as well as constituting undue prejudice to complainant in violation of section 16 of the Act. Hearing Counsel urge that the charge be found in violation of the Act without prejudice to the institution of a charge related to the cost of providing the services covered by the charge.

Intervener Nacirema Operating Co., Inc., takes the position that the charge is unlawful in that the natural consequence thereof is to create a stevedoring monopoly at respondent's terminal, contrary to Commission precedent and national policy, and that it constitutes an undue preference of the terminal itself in the capacity of a stevedore.

DISCUSSION

The primary issue presented for decision is whether a usage charge assessed by respondent against complainant's stevedoring operation at respondent's facility violates section 17 of the Act, the second paragraph of which 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 delivery of property. Whenever the board finds that any such practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

It is respondent's position that any person using its terminal facilities for a gainful purpose should pay for the privilege. The Commission's General Order 15, CFR 533.1-533.6, in section 6(d)(8) recognizes that a tariff may be established for "the use of said facilities for any gainful purpose for which a charge is not otherwise specified", and complainant when stevedoring at New Haven uses respondent's facilities for a gainful purpose. The term "practice" as used in section 17 of the Act is associated with rates and charges. *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. at page 432 (1935). The question then is whether the usage charge is an unreasonable or unjust rate, and practice, in connection with the receiving of property. Respondent assessed complainant on the basis of \$1.00 per 1,000 board feet of lumber unloaded from vessels at the New Haven facility. The record discloses that a gang of stevedores unloads an average of 30,000 board feet of lumber each hour, thus the charge amounts to \$30.00 per hour. The test to be here applied is whether the charge levied is reasonably related to the services rendered. *Volkswagenwerk v. F.M.C.*, 390 U.S. 261 (1968).

Complainant's operation at respondent's facility differed from general stevedoring. As described by its witness:

* * * lumber contract was made with the steamship operator simply for discharging the ship to a place of rest on the dock. You are not concerned with the

taking it away from the ship onto the terminal. Whereas, with general cargo you have the receiving the cargo, gathering, storing on the pier and loading, and vice versa for the discharging; with lumber, you are finished with the lumber as soon as you land it on the dock and the terminal takes it away.

Respondent's tariff includes a charge for wharfage which is applied against the vessel or the cargo on all cargo conveyed over or onto the wharf and complainant performed the unloading service as contractor or employee of the vessel. Thus use of the wharf by complainant for that purpose cannot be considered in determining the reasonableness of the usage charge, General Order 15 limiting usage charges to those "not otherwise specified." The only services or facilities furnished to complainant's employees by respondent for which no charge was specified consisted of a 6 x 6 foot space in a shed for the use of a timekeeper, 3 parking spaces, a shed where longshoremen ate lunch or used during coffee breaks and which contained a water cooler and a public telephone, toilet facilities, and the occasional use of a stacker to unload and load complainant's fork lifts from a truck. These facilities were not constructed for or set aside for complainant's exclusive use. Except for the stacker, they were also used by the longshoremen employed by respondent during its own stevedoring operations. Respondent's letter of September 1, 1967, evidences its intent to base the usage charge on services provided for longshoremen. A lumber stevedoring gang consists of 16 men. The intermittent use of the above-described facilities or services by 16 men, even if the use of the stacker is added, bears no reasonable relationship to a charge of \$30.00 per hour and fails to meet the standard set forth in *Volkswagenwerke, supra*. Justification on a cost basis does not appear on the record.

Nevertheless, respondent argues that the usage charge is founded on a rational economic basis. Economic considerations are somewhat confused due to the different accounting methods employed by the parties. Complainant's accountant testified that its computation of an average of 46¢ per 1,000 board feet of lumber stevedored was well founded and his computations are acceptable. He further testified that if his method was applied to respondent's operation, the result would be a loss. Respondent's method of accounting showed a gross profit of approximately \$1.70 per 1,000 board feet but when applying overhead, this figure was reduced to approximately \$1.00. It is respondent's position that if a competing stevedore obtains business which respondent might have obtained, respondent is deprived of the opportunity to contribute lumber stevedoring profits to overall overhead and gross-profit. Otherwise stated, if respondent is deprived of the opportunity to earn revenue, it may assess against the competing stevedore a charge equal to the profit it thereby loses. Justification for the amount of the

charge is not found in this position. Granting that respondent profits by its stevedoring activities (although the amount is questionable) and recognizing that respondent is entitled to a return on its substantial investment in terminal facilities, a rate set forth in a tariff remains subject to the statutory requirement that it be just and reasonable. *California Stevedore & Ballast Co. et al. v. Stockton Elevators, Inc.*, 8 F.M.C. 97, 104. (1964). The fact that respondent may lose an opportunity to earn revenue and profit thereby does not relieve it from the statutory requirement that it must establish and maintain just and reasonable practices (rates) in connection with receiving property. Nor is that fact justification for escape from the Supreme Court's mandate that a charge must be reasonably related to the services rendered. Respondent may assess a usage charge on persons using its facility for a gainful purpose, but it must be ordered to cease and desist the assessment of \$1.00 per 1,000 board feet of lumber stevedored by others at its installation. This finding is without prejudice to the filing of a lumber tariff imposing a charge reasonably related to the services rendered.

Respondent questions the authority and nature of the Commission's powers over the usage charge. In *California v. United States*, 320 U.S. 577 (1944), the Supreme Court held:

The withholding of rate-making power for services other than water carriage does not qualify the unlimited grant to the Commission of the power to stop effectively all unjust and unreasonable practices in receiving, handling, storing or delivering property. Finding a wrong which it is duty bound to remedy, the Maritime Commission as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the framework of the Shipping Act, fashion the tools for so doing.

The requirement that respondent cease and desist from imposing an excessive charge and substitute a charge based on the services rendered is clearly within the Commission's authority.

Regardless of the intent of respondent in imposing the usage charge, it has resulted in the exclusion of stevedores competing with respondent for the performance of lumber stevedoring at the New Haven facility. Complainant, Intervener and Hearing Counsel consider this a monopolistic situation contrary to the national policy of free and open competition. It is well established that monopolistic practices, to be accepted, must be well justified. Further, it is the custom in ocean commerce that the vessel be permitted to select the stevedore inasmuch as stevedoring is a responsibility of the vessel. *California Stevedore & Ballast Co., et al. v. Stockton Port District*, 7 F.M.C. 75 (1962). Sufficient justification does not appear on this record for depriving the master of a vessel of the right to select a stevedore, whether directly

or through an agent. Nor is there economic justification for excluding competing stevedores from respondent's installation. While this finding may add to the unlawful nature of the usage charge, it may not contribute to the ultimate solution of the problem presented. It is proper, as above stated, for respondent to impose a charge on persons coming onto and using its facilities for a gainful purpose and a charge reasonably related to the services rendered may be set forth in the lumber tariff. The nature of those services as shown on this record would indicate that a reasonable charge would not result in excluding all stevedoring competition and the issue of monopoly would then become moot. It is stressed that no attempt is here made to fix the usage charge but only to provide a guide or "tool" for establishing a reasonable rate.

Complainant has raised the issue of self preference arguing that it is unlawful for respondent, competing for stevedoring business at its installation, to impose a charge on other stevedores but not upon itself. There is no doubt that in this situation, respondent has an advantage over its competitors but no authority is cited or found which would require a terminal operator to charge itself for the use of its own facilities. The usage charge, as above stated and as set forth in General Order 15, may be applied to persons using another's facilities for a gainful purpose. A usage charge may result in a preference but it would not be undue if reasonably related to the use by parties against whom the charge is assessed. In respondent's words, complainant is not entitled to a "free ride."

It is noted that the wording of the tariff where it refers to stevedores may require modification. The tariff applies to stevedores doing their *own* loading or unloading and a stevedore, as employee or contractor of a vessel, does not perform this service for itself. For that reason, the usage charge as it applies to complainant has been related to that portion of General Order 15, above quoted, which permits a charge for use "not otherwise specified."

The question of the amount of reparation is not discussed in the briefs. The record discloses that complainant has not been able to compete with respondent at the New Haven terminal due to the imposition of the usage charge since December 11, 1968. Complainant and respondent stipulated that:

The total billings of the usage charge to date have been \$72,075.38 of which there has been paid \$6,165.85 and there is due and unpaid \$65,909.53.

Complainant is entitled to reparation but the amount cannot be fairly determined without consideration being given to a fair and reasonable charge against complainant for use of respondent's facility, a determination which cannot be here made. Reparation should be determined

pursuant to Rule 15 and if necessary further hearing will be held for the purpose of hearing evidence or argument on reparation at a date to be later determined.

Other issues discussed by the parties have been considered but found not necessary to the resolution of the basic problem presented.

ULTIMATE CONCLUSIONS

The usage charge of \$1.00 per 1,000 board feet of lumber assessed by respondent against complainant's stevedoring operation at respondent's terminal bears no reasonable relationship to the use by or services rendered to complainant and imposing it constitutes an unjust and unreasonable practice in connection with the receiving of property in violation of section 17 of the Shipping Act, 1916.

Respondent may impose a usage charge on persons coming onto its facility for a gainful purpose provided such charge is reasonably related to the use by, or services to, such persons.

Reparation is due but the record does not contain sufficient information upon which to assess damages to complainant. Complainant shall comply with Rule 15(b) of the Commission's Rules of Practice and Procedure and the amount of reparation shall be thereafter determined.

Respondent shall cease and desist from imposing a usage charge of \$1.00 per 1,000 board feet of lumber set forth in its Lumber Tariff No. 1.

An appropriate order will be issued.

(Signed) HERBERT K. GREER,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 406

CHEVRON CHEMICAL CO. ORTHO DIVISION

v.

NIPPON YUSEN KAISHA LINES LTD.

Adopted September 4, 1969

Respondent permitted to refund to complainant the sum of \$1,240.20 as a portion of freight charges assessed and collected on four shipments of agricultural insecticides from Oakland, California to Kenya.

R. O. Flood for complaint.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER¹

Nippon Yusen Kaisha (N.Y.K.), a common carrier by water, through its agent Transmarine Navigation Corp., has filed an application for permission to refund a portion of the freight charges collected from Chevron Chemical Company, Ortho Division, on four shipments of Agricultural insecticide from Oakland, California to Mombasa, Kenya.

Prior to the date of these shipments and during the latter part of 1968, Chevron inquired of N.Y.K. whether they would be interested in handling cargo to Mombasa, Kenya via Japanese ports, at the same rate as was being charged by Nedlloyd Lines on shipments direct from San Francisco to Mombasa. N.Y.K. advised Chevron that they would so handle the cargo. The Nedlloyd rate on file with the Commission applicable to such commodity as of April 1, 1968, was \$57.00 W/M, per 40 cubic feet reduced to \$51.00 as of October 7, 1968, and increased to \$55.75 as of December 2, 1968 the latter being the rate in

¹ This decision became the decision of the Commission September 4, 1969.

effect at the time of the shipments here involved. N.Y.K., having agreed with Chevron to apply the Nedlloyd rates, filed an amended rate with the Commission during the month of November, 1968, however by reason of administrative error, the tariff set forth a rate of \$61.75 W/M, instead of the Nedlloyd rate of \$55.75.

Chevron dispatched by N.Y.K. vessels, the following shipments of agricultural insecticides:

Consignees	Measurement (cubic feet)	Bill of lading date	Freight
Kleenway Chemicals Ltd., Nairobi, Kenya.....	1,013	Mar. 3, 1969	\$1,563.82
Shell Chemical Co. of Eastern Africa Ltd.....	1,620	Apr. 12, 1969	2,500.88
Murphy Chemicals (East Africa).....	3,510	Feb. 4, 1969	5,418.56
	2,125	Feb. 4, 1969	3,280.47
Total.....	8,268		12,763.73

The rate applied to these shipments was \$61.75 per 40 cubic feet, that being the rate erroneously filed with the Commission by N.Y.K. Had the Nedlloyd rate of \$55.75 W/M been applied as N.Y.K. had agreed and as it had intended to charge, the total freight charges would have been \$11,523.53, or \$1,240.20 less than the freight collected.

Public Law 90-298 75 Stat. 764, authorizes the Commission in its discretion and for good cause shown to:

* * * permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier by water in foreign commerce * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: Provided, further, That the carrier * * * agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: And provided further, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

N.Y.K. has filed a rate of \$55.75 W/M per 40 cubic feet applicable to the commodities here involved prior to filing its application for authority to make refund. Applicant avers that no other shipments

of the same or a similar commodity moved via its vessels during the same or approximate period the shipments here involved were made. The application was deposited in the United States Mail on July 31, 1969, and received by the Commission on August 4, 1969. Rule 8(f) of the Commission, Rules of Practice and Procedure provides that the day of service of documents served is deposited in the United States mail, thus the application was filed with the Commission within 180 days of the earlier shipment here involved.

It appearing that the application has been timely filed; that no other shipments were made of the commodity involved on applicant's vessels in the approximate period during which the Chevron shipments were made; that the applicant has filed a tariff showing the rates here sought to be applied prior to the date of the application; that the rate applied was erroneously filed by reason of administrative mistake; and good cause appearing, Nippon Yusen Kaisha Lines Ltd. is authorized to refund to Chevron Chemical Company, Ortho Division, the sum of \$1,240.20. Applicant shall publish the appropriate notice referred to in the statute above set forth and in 46 CFR 502.92 and the refund shall be effective within 30 days after publication of such notice. Within five days thereafter, applicant shall notify the Commission of the date of the refund and the manner in which payment was made.

(Signed) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C., *August 15, 1969.*

13 F.M.C.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 406

CHEVRON CHEMICAL Co. ORTHO DIVISION

v.

NIPPON YUSEN KAISHA LINES LTD.

Adopted September 4, 1969

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on September 4, 1969.

It is ordered, That Nippon Yusen Kaisha Lines Ltd. refund to Chevron Chemical Company, Ortho Division, the sum of \$1,240.20.

It is further ordered, That Nippon Yusen Kaisha publish promptly in its appropriate tariff, the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 406, that effective February 4, 1969, the rate on agricultural fungicides from Oakland, California, to Mombasa, Kenya, for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of N.Y.K. during the period from February 4, 1969, until April 30, 1969, inclusive, is \$55.75 W/M, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further ordered, That Nippon Yusen Kaisha notify the Secretary on or before October 3, 1969, of the date and manner in which the refund herein ordered has been made

By the Commission

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65-46

TRUCK LOADING AND UNLOADING RATES AT NEW YORK HARBOR

Decided September 15, 1969

Implementation of terminal conference tariff truck loading and unloading definition which includes a charge to cargo for movement between transit shed and truck tailgate constitutes an unjust and unreasonable practice under section 17 of the Shipping Act, 1916.

Elkan Turk, Jr. and Joseph A. Byrne for respondent New York Terminal Conference.

Elmer C. Maddy, Baldwin Einarson, and John Williams for respondent United States Lines, Inc.

Elven S. Sheahan for respondent The Cunard Steam-Ship Company Limited.

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

Herbert Burstein and Arthur Liberstein for intervenor Empire State Highway Transportation Association, Inc.

Robert G. Gawley for intervenor Niagara Frontier Tariff Bureau, Inc.

Warren D. Mulloy for intervenor Eastern Railroads.

Samuel W. Earnshaw for intervenor International Latex Corporation, its Subsidiaries and Affiliates.

Bryce Rea, Jr., and Thomas M. Knebel for intervenor Middle Atlantic Conference.

Eugene W. Johnson for intervenor The Copper Development Association.

Seymour Graubard and Michael H. Greenberg for intervenor American Institute for Imported Steel, Inc.

Norman D. Kline and Donald J. Brunner for Hearing Counsel.

REPORT

BY THE COMMISSION (James F. Fanseen, *Acting Chairman*; Ashton C. Barrett, George H. Hearn, *Commissioners*):¹

We instituted this investigation by order of December 14, 1965 to determine the reasonableness of truck loading and unloading rates charged by members of the New York Terminal Conference (Conference). United States Lines, Inc. and The Cunard Steam-Ship Company Limited were named respondents by supplemental order. Intervention was granted to the parties as listed in the appearances.

During the course of hearings the Conference introduced a cost study in an attempt to establish that its truck loading and unloading rates did not violate the provisions of the Shipping Act, 1916 (Act). Empire State Highway Transportation Association, Inc. (Empire) and Hearing Counsel took issue with the cost study, alleging it improperly allocated costs to cargo rather than to the ocean carriers. The alleged improper allocation was said to result from the Conference's tariff definition of truck loading and unloading. The Conference would have the service of truck loading include movement of cargo between truck tailgate and transit sheds as well as stowing in the body of the truck whereas Hearing Counsel and Empire would limit it to stowing at the tailgate; charging the tailgate-shed movement and cost thereof to the ocean carrier.

The parties agreed that a quick decision on the propriety of the Conference's tariff definition was necessary to enable the parties to proceed in presenting or evaluating meaningful cost data.

In response to a petition filed by Hearing Counsel, with the concurrence or acquiescence of all interested parties, we served a supplemental order on February 19, 1969. We stated in that order that the cost study prepared by the Conference based on its tariff definitions might have improperly allocated costs to cargo interests rather than to ocean carriers; that it is in the public interest to determine a reasonable method of cost allocation to insure proper ratemaking practices for the future; and that an expedited determination of these matters will assist in bringing the proceeding to an orderly conclusion. We therefore ordered that the investigation specifically determine whether the implementation of the definition of the truck loading and unloading service as quoted by the New York Terminal Conference constitutes a just and reasonable practice within the meaning of section 17 of the Shipping Act, 1916; and whether the utilization of any

¹ Vice Chairman Day abstains.

method of cost accounting or allocation based upon such a definition distributes costs between cargo interests and ocean carriers in a just and reasonable manner within the meaning of section 17. We ordered these issues severed from those already in the proceeding for expedited hearing and the issuance of an early decision.

Hearing Counsel, the Conference, Cunard Line, and Empire prepared a stipulation of facts pertaining to the severed issues. This stipulation has the concurrence of the interested parties and has been received into the record. The stipulation is set forth below. The appendices referred to in the stipulation have been omitted.

Of the parties listed in the appearances, the Conference, U.S. Lines, Empire, Middle Atlantic, the American Institute for Imported Steel, and Hearing Counsel have participated on brief and at oral argument in respect to the severed issues.

STIPULATION OF FACTS

Respondent New York Terminal Conference operates about 125 piers in the port of New York, varying in size, physical facilities, and age. The piers operated by respondents are either of the "finger" or "quay" type and, with limited exceptions, have been constructed in the last ten years or piers which may have been constructed prior thereto but have been substantially modernized within the last ten years.

Practically all of the common-carrier-by-water inbound and outbound general cargo handled in the Port of New York moves over the piers operated by respondent's members.

Prior to December 31, 1953, truck loading and unloading at New York was performed by public loaders, who performed such functions independently of the terminal operators. Abuses developed under this system, and public loaders were outlawed by the provisions of the New York-New Jersey Waterfront Commission Compact, P.L. 87-252, approved August 12, 1953. In pertinent part the declaration of policy stated in the compact is:

* * * that the function of loading and unloading trucks and other land vehicles at the piers and other waterfront terminals can and should be performed, as in every other major American port, without the evils and abuses of the public loader system, and by the carriers of freight by water, stevedores and operators of such piers and other waterfront terminals or the operators of such trucks or other land vehicles.

The abuses which gave rise to the aforementioned legislation pertained widespread corruption among the public loaders in which unsavory elements demanded bribes and often performed no service at all,

although a tariff for truck loading was actually published. If unloading was requested by the truckman, the public loader performed the service at a negotiated rate. (See Official Loading Charges in the Port of New York, established by Truck Loading Authority, which consisted of Joseph P. Ryan, President for I.L.A., Joseph Bergen, President for Port Loaders Council Local 1757, and Joseph M. Adelizzi, Chairman for Joint Shipper-Truckmen Committee and issued by Hugh E. Sheridan, Chairman, Effective June 5, 1950.) The public loader often owned no equipment and his usual service consisted of loading cargo onto a truck from a point not more than a truck's length away from the tailgate. In many instances, the public loaders extorted the free use of equipment and labor from shipping and stevedoring companies. In most cases the public loader kept no financial records, did not maintain cargo liability insurance, and was unregulated. Each pier had its "boss loader" through who all loading work had to be cleared, regardless of whether his or any loader's services were desired by anyone. Public "boss loaders" were, in most instances, members of an I.L.A. local and at the same time were employers of members of their own union. (New York State Crime Commission, *Public Hearings* (No. 5) *Port of New York (Waterfront)*, December 3, 1952-March 17, 1953.)

In the days of the public loaders, the ocean carrier paid for the discharge of the vessel, the movement of the inbound cargo to a place of rest on the pier and not infrequently, under duress from the public loaders, also paid for the movement of cargo from place of rest to the tailgate of the truck or the vicinity thereof, in cases where the truck did not proceed to the vicinity of the place of rest.

Previous to the public loader system, it was customary for truckmen to load their own trucks with the aid of one or more helpers. With the stringency of labor during World War I, truckmen began dispensing with their helpers and hiring necessary manpower from among the laborers available at the piers. Such laborers would, naturally, tend to be longshoremen and members of longshoremen's unions. The public loader system was born out of this background. Thenceforth, loading was under the control of the public loaders.

After the public loaders were outlawed, ocean carriers were generally unwilling to furnish truck loading and unloading service. They generally urged that terminal operators provide same in order to keep the piers clear and conditions fluid. Thereafter, committees representing the terminal operators and the truckers met and arrived at the informal decision that the terminal operators should take over the responsibility of furnishing the truck loading and unloading service. Termi-

nal operators were hesitant until arrangements were worked out whereby steamship companies would make terminal operators whole for whatever losses would be incurred. Truck loading and unloading is a service essential to the efficient operation of ocean carriers. In the handling of freight at the piers, the steamship lines' objective is to have a vessel loaded and unloaded in the shortest period of time, so that the turnaround period of the vessel is kept at a minimum. To accomplish this, the terminal operator's objective is to have cargo move onto and off of the pier by truck and lighter as quickly as possible. It is also essential in order for the cargo owner to get his goods and fulfill his obligation to get them off the pier or pay progressive demurrage. After a period of flux, during which the responsibility for the service and the charges therefor were unsettled, the present system evolved pursuant to Agreement No. 8005, approved by the Commission's predecessor, on March 23, 1955.

Agreement No. 8005 authorized the members of the New York Terminal Conference who theretofore had been permitted individually by the Waterfront Commission Compact "to load or unload waterborne freight onto or from vehicles at piers or at other waterfront terminals in the Port of Greater New York and vicinity, for a fee or other compensation, * * *" jointly "* * *" to establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices * * *" with respect thereto. The members were required to "assess and collect rates and charges for and in connection with such services strictly in accordance with rates, charges, * * * set forth in said tariffs. * * *"

A subsequent amendment to Agreement No. 8005 authorized the members to restrict performance of the service of truck loading to the operators of the piers or waterfront terminals. This agreement implemented the jurisdictional position of the I.L.A. with respect to waterfront truck loading and facilitated the planning of labor hiring by the terminal operators. The same system exists with regard to the non-member respondents.

Pursuant to the authority granted by the Commission, terminal operators who are parties to Agreement 8005 have issued a number of tariffs, the present tariff being No. 7 in the series. The tariffs provided for class and commodity rates.

The great preponderance of service performed by the terminals under the tariffs is truck loading rather than unloading. The truckers, in most cases, do their own unloading. Prior to the issuance of Tariff No. 4, the tariffs provided for "partial service", which was defined to mean "the moving of the cargo from a place of rest on the dock which

is readily accessible to the truck and elevating the same to a place of rest on the truck without the necessity of placing men on the truck." Tariff No. 4 does not provide for partial service, leaving the truckers the choice between full service and no service.

Tariff No. 1, issued by the Terminal Conference, defined the service as follows:

1. "Truck Loading" shall mean the service of moving cargo from its place of rest on the dock to the truck, elevating onto the tailgate of the truck and placing in the truck, but shall not include the sorting of cargo by marks at time of delivery nor the loading onto consignee's pallets.

(a) The loading and placing of cargo in the truck shall be with the assistance of, and under the supervision of, the driver of the truck.

(b) When the complete truck loading service is requested and performed the charge therefor shall be as provided herein under the column headed "Tailgate Service".

(c) When only tailgate delivery of the cargo is requested and performed the charge therefor shall be as provided herein under the column headed "Tailgate Service".

(i) Tailgate service shall mean the moving of cargo from its place of rest at the dock to the truck and elevating same to the level of the tailgate or floor of the truck.

(d) When the trucker performs the complete loading service he shall not be required to break down cargo more than man high (6 feet).

2. "Truck Unloading" shall mean the service of removing cargo from the body of the truck to a place of rest designated by the terminal operator, and shall include sorting by port.

(a) The unloading of cargo from the truck shall be with the assistance of, and under the supervision of, the driver of the truck.

(b) When the complete truck unloading service is requested and performed the charge shall be at the full tariff rate.

(c) When only tailgate delivery of the cargo is requested and performed the charge therefor shall be as provided herein under the column headed "Tailgate Service".

(i) When the truck driver and/or his helper palletize the cargo at the tailgate there shall be no charge for tailgate receipt.

(d) When the trucker performs the complete unloading service he shall not be required to tier cargo more than man high (6 feet).

This tariff never became effective because of dispute and litigation. Tariff No. 2, effective August 15, 1955, provided for three types of service, viz: truck loading-full service, truck loading-partial service, and truck unloading. Truck loading-full service was defined to be "the service of moving cargo from a place of rest on the dock which is readily accessible to the truck, elevating the cargo on to the truck and stowing of the cargo in the truck, but shall not include the sorting of the cargo by marks at the time of delivery nor the loading on to consignee's pallets."

Truck loading-partial service was defined as "the moving of cargo from a place of rest on the dock which is readily accessible to the truck and elevating the same to a place of rest on the truck without the necessity of placing men on the truck." Truck unloading was defined as "the service of removing cargo from the body of the truck to a place of rest designated by the Terminal Operator, and shall include sorting by port."

In the case of truck unloading, the motor carrier had the option to perform the service itself, and in this instance, all the motor carrier was required to do was to remove the cargo from the truck to a point on the terminal facility adjacent to the truck tailgate as designated by the terminal operator. This provision is still in effect. The service of moving the outbound cargo from the place adjacent to the truck tailgate is not deemed to be included within the truck unloading service for which the motor carrier may be assessed a charge.

Partial service was deleted from Tariff No. 4.

The above definitions of truck loading and unloading are substantially the same as those published in Tariff No. 7 except for the deletion of partial service and the clause "which is readily accessible to the truck" following the words "place of rest." The latter deletion first occurred in Tariff No. 6, effective April 1, 1963. On May 24, 1962, the U.S. Court of Appeals for the District of Columbia Circuit had decided *American President Lines, Ltd. v. Federal Maritime Board*, 317 F.2d 887. Truckers may elect to unload their own trucks, in which case they do not use a tariff service and are not charged by the terminal operators for moving cargo from the truck or beyond the tailgate.

The piers are policed, and no one may enter or leave a pier without permission. This policy is dictated both by good business practice and by regulation of the Waterfront Commission. The procedure for delivering inbound cargo to a truck is fairly uniform. The truck is registered at the entrance to the terminal and a gate pass is issued to the driver. The driver goes to the delivery clerk and submits the necessary customs permits, releases and proof of this authority to receive the cargo. If the drivers' papers are in order and approved, he then awaits the assignment of the necessary checkers, truck loaders and designated loading station. In the rare instances, under present practice, in which the truck moves on to the pier and up to the pile of cargo, clearance for entry must await satisfactory conditions on the pier as to a clear access and non-interference with other operations. After the truck is loaded, the driver is required to go to the delivery office to sign for the load according to the checker's tally. Thereafter, the gateman permits the truck to leave the pier.

Trucks, to be loaded speedily and efficiently, require the use of hilos, pushers, cranes, escalators, pallets, pallet and live rollers, and other special equipment. Such equipment is owned and maintained by the terminal operators at the piers they operate, and it is utilized by them for the truck loading and unloading service.

In the case of imports, the inbound cargo is removed from the ship and placed upon the stringpiece and almost immediately thereafter removed to the shed or moved directly from the ship to the shed. Except in limited instances, the shed has a platform, and motor vehicles arriving to pick up import cargo may be backed in the platforms in truck bays for the receipt of import cargo. Additionally, the compound-farm area may be used to load trucks. Whether platform or compound-farm area or both are used depends upon prevailing conditions at the pier, in the judgment of the terminal operator. For reasons of safety and efficient operation, trucks are not allowed to drive freely throughout the pier premises. In exceptional cases, with the consent of the terminal operator, it may still be possible for trucks to back into the immediate vicinity of the pile for the receipt of cargo.

The custom generally is to elevate and stow cargo in trucks at some place other than the place of rest where the cargo was located when the truckman arrived. When cargo is moved from first place of rest to another, this is not for the account of the cargo and was not included as a cost in the Price Waterhouse study.

In cases where the truck does back into the immediate vicinity of the pile of cargo, the run for the lift truck between cargo and truck will be shorter than otherwise. The same charge is assessed, however, as if the cargo had been moved from place of rest to tailgate. This is so because the charges in the conference tariffs are assessed on the basis of average experience throughout the port.

In all cases, except in the rare instances described above, when a motor vehicle is ready to receive the import cargo from the terminal operator, the latter moves the cargo by hilos from the shed to the platform or compound-farm area, where it is then stowed upon the truck.

In the case of truck unloading, the trucks will either be backed into the platform or placed in the compound-farm area, and the freight removed from the truck on to the platform or at a point in the immediate vicinity of the truck or placed on pallets stacked tailgate high at the tail of the truck and thereafter removed by the terminal operators to a point in the shed, pending arrival of a vessel.

The determination of place of rest and loading area is made by the terminal operator based upon type and volume of inbound cargo and

experience as to the order in which cargo will be called for. It is physically impossible to keep each and every consignment discharged from an ocean-going vessel in such a location that a truck tailgate can be placed adjacent to it throughout the period from completion of discharge until the cargo is called for. Generally, the truckman will call the pier to ascertain if the cargo is available, unless he has information that the vessel has already completed discharge. Unless arrangements are made by the terminal operator and the motor carrier for the pickup of inbound cargo at a specified time, there is no certainty as to what inbound cargo will be picked up on any given day or the hour thereof. The inbound cargo is handled on the pier by I.L.A. labor from the place of rest to the tailgate of the truck. The loading and stowing on the truck is done by I.L.A. labor under the supervision and with the assistance of the truck driver. The terminal operators hire I.L.A. longshoremen for loading and unloading trucks. This labor is identified as terminal labor, as opposed to gang labor who are, in turn, responsible for loading and unloading the vessels. The I.L.A. terminal labor is hired for a four-hour period from 8:00 to 12:00, and may be rehired for the afternoon period from 1:00 to 5:00. Checkers are hired for a full eight-hour day. The men must be paid for at least the minimum periods of hire. The number of men hired by the terminal operators for performing truck loading and unloading is determined by the terminal operator's judgment as to the amount of cargo that will either be picked up or delivered to the pier on a given day. The Collective Bargaining Agreement setting forth the terms and conditions of employment for the terminal labor is negotiated between the International Longshoremen's Association and the New York Shipping Association, of which the terminal operators are associate members who do not have a vote as to the approval or disapproval of any collective bargaining agreement entered into by the parties. However, representatives of the terminal operators do participate in the negotiations.

Terminal and stevedoring services performed for the ocean carrier by terminal operators are provided pursuant to negotiated contracts between individual terminal operators and ocean carriers. There is keen competition among terminal operators for these contracts. The bulk of the operators' revenues, about 90%, are derived from services other than the truck loading and unloading. The latter services are not the subject of competition but are provided at uniform rates as set forth in the New York Terminal Conference Tariff No. 7.

Contracts between terminal operators and ocean carriers vary in types, frequently covering services beyond bare stevedoring, which may

include movement of cargo to the vicinity of the truck. Such additional services may include, among other things, sorting according to B/L marks, movement on the pier to accommodate changing situations, e.g., simultaneous receipt and loading of outbound cargoes for the same or another vessel, getting packages for weighing or sampling, moving cargo from place of rest to the head of the pier in anticipation of a call by a trucker and, again, in some instances, movement of the cargo between the place of rest on the pier and the vicinity of the truck. There are some contracts under which the ocean carrier pays the cost of all terminal service and is credited with revenue under the Conference tariff. There are in effect some bare stevedoring contracts which make no reference to truck loading or unloading. In such instances, the ocean carriers perform the aforeaid service.

Respondent Cunard Lines, effective March 10, 1969, in order to bring its tariff definitions into line with its practices followed throughout the periods covered by its Tariffs Nos. 1 and 2, F.M.C. T-1 and T-2, amended its Tariff No. 2, F.M.C. T-2, to define truck loading as:

Truck Loading Service shall mean the service of moving cargo from a place of rest *adjacent to truck tailgate* on the dock, elevating the cargo onto the truck and stowing of the cargo in the truck, but shall not include special stowage, sorting or grading of, or otherwise selecting, the cargo for the convenience of the truckers or the consignee, nor the loading onto consignee's pallets.

and truck unloading as:

Truck unloading shall mean the service of removing cargo from the body of the truck to a place of rest *adjacent to truck tailgate* designated by the Terminal Operator, and shall include sorting by port. Truck unloading shall be performed at the request of the truckman. (The underscored is the amending language.)

DISCUSSION

The issue before us, as set forth in our supplemental order, is whether the implementation by the Conference of its definition of the truck loading and unloading service constitutes a just and reasonable practice within the meaning of section 17 of the Act.

As is seen above, the controversy arises over that part of the Conference's definition which includes in the service of truck loading and unloading the movement of cargo between place of rest on the terminal facility and place adjacent to the truck tailgate. Implementation of this definition assesses a charge for this movement on the cargo via the trucker. We separated this portion of the proceeding to determine

if the assessment of this charge through the Conference's definition constitutes an unjust or unreasonable practice. We conclude that it does.

The Conference and U.S. Lines have maintained that the inclusion in the truck loading tariff definition of the movement of cargo from place of rest on the pier to a spot adjacent to the truck accurately reflects the boundary between the obligation of ocean carriers with respect to inbound cargo at the Port of New York and the responsibilities of receivers of such cargo who employ truckmen or others to call for their cargo. In other words, they contend that it is entirely proper to assess a charge against the receivers of cargo for this particular movement and that the carrier is not responsible for performing this service.

The Conference argues that it is well settled that the ocean carrier's obligation, under its contract of transportation, ceases when it has discharged the cargo and placed it in a location from which it can readily be located and removed, and has allowed the cargo interests concerned the specified period of free time within which to call for the cargo. *American President Lines, Ltd. v. Federal Maritime Board*, 317 F.2d 887 (D.C. Cir. 1962), is cited to support this position.

U.S. Lines stresses that the carrier, by law, has no obligation to remove the cargo from the dock; that after the carrier has put the cargo on the dock, reasonably accessible, properly segregated and marked, it is for the receiver to take over and remove it; that the persons who aid in that task do it for the account of the receiver; that it is the receiver's lift-truck, in this sense, that comes to the pile, takes up the cargo and brings it to the truck.

U.S. Lines points out that the stipulation of facts shows that it is physically impossible to keep every consignment of inbound cargo in such a location that a truck tailgate can be placed adjacent to it. They conclude then that as long as the cargo is readily accessible to the receiver's forklift, there is no impediment in his way and there is no further duty on the carrier's part to effectuate delivery of the cargo.

The *American President Line* case, *supra*, described the transportation obligation of ocean carriers. The Court said:

Ships bringing transoceanic freight into port are required by their transportation obligation, absent a special contract, to unload 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.

In citing this case to support their position the Conference stresses the point that the carrier's duty ends at place of rest. They argue that place of rest at the Port of New York is the transit shed and therefore the carrier's duty ends at the transit shed. We do not read the case as so limiting the carrier's responsibility. The Conference would have us overlook the Court's language which describes place of rest as a place "accessible to the consignee". The carrier's duty is not fulfilled by bringing cargo to rest in a transit shed when the transit shed is not accessible to the consignee or cargo receiver. We recognize that at the Port of New York cargo cannot be placed in areas adjacent to trucks immediately upon discharge from ships and that neither can trucks freely drive around the piers searching for cargo. However, we think Hearing Counsel correctly recognized that it is the carrier's duty to provide adequate terminal facilities which are convenient and safe for delivery and receipt of cargo, and that if, as is the case at the Port of New York, cargo can only be brought to truck tailgate after first being deposited in a transit shed in order to prevent chaos on the piers, the necessary movement to truck tailgate is part of the service required to be provided by the ocean carrier and not one for which a separate charge is assessed the cargo receiver. Ocean carriers have not rendered the cargo "accessible" to the trucker by placing it in transit sheds from which trucks are barred entry.

Much has been said in this proceeding as to what constitutes accessibility of cargo to the cargo receiver. As mentioned above, U. S. Lines contends that the cargo at rest in the transit shed is accessible in that the cargo receiver can simply send in a forklift, hilo, or whatever, and move the cargo to the truck.

U. S. Lines' position might be correct if the cargo receiver were permitted to so utilize his own equipment or were not assessed an additional charge for this movement. However, to say that cargo is accessible because the cargo receiver can send in a terminal operator's lift truck is simply not reasonable. Neither is it logical to say cargo is accessible to the cargo receiver when the cargo receiver is required to pay an additional charge to obtain the cargo or to bring the cargo to truck tailgate. Since it is the obligation of the ocean carrier to render the cargo reasonably accessible to the cargo receiver, any service performed by the terminal operator which contributes to the fulfillment of that obligation is for the account of the ocean carrier. This in no way changes the rule that the carrier is not required to make delivery to the consignee.

The Conference looks to another portion of the *American President Line* case to support its position. This case involved a controversy over

the Federal Maritime Board's interpretation of its free time and demurrage rules. The Board's interpretation was to the effect that carriers would be barred from assessing demurrage on cargo when they are unable to deliver because of a longshoremen's strike, and this bar would apply regardless of whether the cargo was made available during the entire prescribed period of free time. The Court described the Board's position and characterized what the Board sought to accomplish as being a violent shift from the provisions of its previous rule regarding demurrage and free time. The Court said at p. 890:

The Board's position, as made clear by its brief and argument here, is that the legal duty of the carrier to deliver continues until the consignee calls for the cargo; that even after free time has expired the carrier has the duty of making the cargo physically available to the consignee's trucks; and that the carrier must provide the labor to load the consignee's trucks. A longshore strike, the Board says, prevents the carrier from fulfilling this obligation. This is a violent shift from the provisions of General Order 69 and introduces a new concept into the industry. A carrier does not, as we have pointed out, under long-established custom and official rules, deliver good to consignees; it tenders them for delivery, makes them available for delivery. We think the proposal to deny the carriers demurrage charges at the first period demurrage rate, where goods have been properly marked, etc., on the dock for more than five days before the strike began, is a violation of General Order 69 * * *.

The Conference characterizes this language as a rebuke by the Court of an attempt by the Board to extend the carrier's duty to include the service in question here. The Conference feels this decision bars us from finding the carrier responsible for movement of cargo to a place adjacent to truck tailgate.

A careful analysis of the Court's opinion shows that it would not relieve the carrier of its duty to perform the service in question here. The "violent shift" the Court was worried about was a shift in the free time and demurrage requirements to preclude demurrage payments to a carrier even after it had properly tendered cargo for delivery for the entire free time period. The case before us does not involve free time and demurrage requirements. This case does involve the requirement discussed by the Court of a carrier to tender for delivery. We are saying no more than the Court in *American President Line*, i.e., a carrier must tender goods for delivery, it need not deliver them to consignees. A proper tender is not made at the transit shed when the cargo receiver has no access to that area. The Court was worried that the former Board's position would extend the carrier's duty to include making the cargo physically available to the consignee by providing labor to load the consignee's truck. We agree that this would be a new concept in the industry. However, we are

not suggesting such a requirement. We are only requiring a carrier to bring cargo to a place accessible to the cargo receiver for truck loading. We are not requiring the carrier to load or to provide labor for loading.

U.S. Lines has cited several other cases to support its position regarding the obligation of a carrier to deliver or tender for delivery. The select portions quoted by U.S. Lines sometimes appear on their face to lend support to its position. However, as suggested and carefully outlined by Hearing Counsel, a closer analysis of each of these cases demonstrates that they are not controlling, largely because of different facts and sometimes because of different customs or regulatory laws involved.

There has been much discussion in this proceeding as to who will bear the costs of the service in question and whether assessment of the charge by the terminal operator results either in double payment by the cargo or double compensation for the carrier or the terminal operator.

Three forms of stevedoring contracts between the carriers and the Conference are employed at the Port of New York and bear on this question.

Under one form of contract the terminal operator bills the carrier for stevedoring services on the basis of actual cost plus a profit. The terminal operator credits the carrier with revenue collected under the truck loading tariff. This type of arrangement is said to result in the ocean carrier receiving double compensation for the service of making cargo reasonably accessible to the consignee; once in the freight rate and a second time in the revenues from truck loading.

Another type of contract calls for no reimbursement by the carrier to the terminal operator for the tariff service of truck loading. The terminal operator bears the costs and keeps the revenue obtained under the truck loading tariff. It is alleged that under this category of contract the cost of the service is charged by the terminal operator to the cargo rather than to the carrier, permitting the carrier, who received payment for the service in the freight rate, to retain compensation for a service which it did not provide to the consignee.

Under the third type of contract, the carrier pays the terminal operator for "assisting receiving and delivery". It is suggested that the terminal operator in this case is being compensated both by the carrier and the consignee for the same service, and that in any event the carrier may unjustly benefit to the extent that it does not reimburse the terminal for its full costs of moving cargo from the transit shed to the tailgate of the truck.

Whether the employment of any of these contracts in conjunction with the Conference's current truck loading tariff results in double payment or double compensation is not clearly established. Double compensation to the carrier occurs if the carrier includes the movement from transit shed to truck tailgate in its freight rate. This is assumed or conjectured, but not established. Double payment by the cargo also depends on this assumption. Double compensation to the terminal operator for this service occurs if its service to the carrier of "assisting delivery" includes the movement in question.

While the many allegations and counter-allegations about double payment and double compensation may not be conclusively shown to be true, we think they sufficiently point out the potential dangers inherent in the employment of the Conference's present truck loading definition in connection with the stevedoring contracts in use at the Port of New York. The existence of these real or potential dangers only accentuates the desirability and necessity of requiring a change in the conference tariff definitions to properly allocate between carrier and cargo the costs of the various aspects of the loading and unloading service.

The Conference has also argued that a change in the truck loading definition to relieve the cargo owner or his agent, the truckman, of the cost of movement between place of rest and tailgate would be a radical departure from the "user concept", which stands for the proposition that the cost of a service must be borne by the users of that service, and that accordingly the rates charged the users must be sufficient to produce revenue which will meet costs and a reasonable profit. The Conference explains that to make carriers bear the cost of this service would compel them to subsidize all or part of the costs of the service rendered to truckmen. This they say will result in subsidization of users by nonusers since some of the carriers' patrons use lighters for pickup and delivery and if the steamship companies should pass on, through higher freight rates, the cost of subsidizing the truckmen, the result would be that users of lighters would be contributing to the cost of the service rendered to those who pay truck loading and unloading tariff charges.

This argument is answered simply by pointing out that there would be no passing on of the cost to subsidize truckmen since carriers would not in fact be subsidizing truckmen. What would happen is that the carriers would be paying for movement to tailgate; a service which is part of their legal obligation to tender for delivery. The carriers would not be paying a loading charge or any other charge which might properly be assessed the truckman. Hence, there is no subsidization or passing on to non-users.

The Conference raises the additional argument that with one exception the definitions of truck loading and unloading contained in the current tariffs governing operations at various North Atlantic ports, other than New York, clearly encompass the movement between the truck and the place of rest on the pier, and that since uniformity of practice in this respect is desirable, the Commission would be ill advised to require a change in the New York Conference's definition.

While we are desirous of obtaining uniformity of practice among ports wherever feasible, we are unable to base any decision on the evidence in the record concerning practices employed at the various North Atlantic ports. The simple reason for this is that we have no information before us to indicate what are the customs, practices, or conditions at these ports. We have the bare tariff provisions but the experience of Cunard Line demonstrates the danger of drawing conclusions as to practice based simply on tariff provisions. The Cunard tariff previously defined truck loading to mean "the service of moving cargo from a place of rest on the dock, stowing of the cargo onto the truck, etc." Cunard has stated that place of rest in practice has always meant place of rest "adjacent to truck tailgate". This could not be determined by a mere reading of the language in the tariff.

Finally, the Conference resurrects its argument that if we were to require a revision of the tariff definition of the service upon which the cost study was premised for the purpose of refining the allocation of costs between ocean carriers and truckmen, we would be exercising a degree of ratemaking authority over the terminals which we do not possess. The argument is that we do not have conventional ratemaking authority with respect to marine terminals; our ratemaking authority being limited to carriers.

The fact that we have authority to investigate unlawful rating practices under section 17 of the Act was established long ago in *California v. United States*, 320 U.S. 577 (1944). The District Court for the Southern District of New York in *Federal Maritime Commission v. New York Terminal Conference, et al.*, 262 F. Supp. 225 (1966),² more recently confirmed this. The Court's language is directly responsive to the Conference's argument about our conventional ratemaking authority. The Court said at p. 228:

Granting that the Shipping Act gives the Commission the power to prescribe just and reasonable rates, in *haec verba*, only with regard to carriers, * * * this does not preclude the regulation of rates charged by other persons subject to the Act under other provisions. Rates charged by the Conference are expressly made subject to Commission review by Section 15, 46 USC § 814, and the rates * * * may constitute unreasonable practices under Section 17, 46 USC § 816.

² *Federal Maritime Com'n v. New York Terminal Conference*, 373 F.2d 424 (C.A. 2, 1967) affirming.

The Conference further states that whatever ratemaking authority we might have under section 15 to protect against concerted setting of exorbitant rates which yield an outrageous profit would not be exercisable here, since the Conference's cost study already indicated that the rates are not outrageously profitable.

In view of our decision here that the Conference's tariff definition improperly charges cargo for a portion of the service, no reliance can be placed on the Conference's cost study since it is based on that definition.

CONCLUSION

Respondent, New York Terminal Conference's tariff definition of loading and unloading improperly assesses a charge on cargo for a movement which is the responsibility of the ocean carrier. Consequently the implementation of that tariff definition constitutes an unjust and unreasonable practice within the meaning of section 17 of the Act. Additionally, the utilization of any method of cost accounting or allocation based upon such a definition distributes costs between cargo interests and ocean carriers in an unjust and unreasonable manner within the meaning of section 17.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 65-46

TRUCK LOADING AND UNLOADING RATES AT NEW YORK HARBOR

ORDER

By supplemental order of February 19, 1969, the Federal Maritime Commission severed this portion of the proceeding to expeditiously determine whether the implementation by the New York Terminal Conference of its definition of the truck loading and unloading services contained in its Truck Loading and Unloading Tariff No. 7 constitutes a just and reasonable practice within the meaning of section 17 of the Shipping Act, 1916. The Commission also sought to determine whether the utilization of any method of cost accounting or allocation based upon such a definition distributes costs between cargo interests and ocean carriers in a just and reasonable manner within the meaning of section 17.

The Commission has fully considered these matters and has this date made and entered a report containing its finding and conclusions thereon, which report is hereby referred to and made a part hereof.

It is ordered, pursuant to section 17 of the Shipping Act, 1916, that the New York Terminal Conference cease and desist from implementing the definition of the truck loading and unloading service contained in New York Terminal Conference Truck Loading and Unloading Tariff No. 7.

It is further ordered, pursuant to section 17 of the Shipping Act, 1916, that the New York Terminal Conference amend its Truck Loading and Unloading Tariff No. 7 to define the services of truck loading and unloading as follows:

Truck Loading—shall mean the service of moving cargo from a place of rest on the terminal facility adjacent to truck tailgate, elevating the cargo onto the truck and stowing of the cargo in the truck, but shall not include, among other things, special stowage, sorting or grading of, or otherwise selecting, the cargo for the convenience of the trucker or the consignee, nor the loading of cargo onto consignee's pallets.

Truck Unloading—1. When the Participating Member performs truck unloading, such service shall consist of removing cargo from the body of the truck to a place of rest on the terminal facility adjacent to truck tailgate as designated by the Participating Member, and shall include sorting by port. Truck unloading shall be performed by the Participating Member at the request of the motor carrier.

2. When the motor carrier's employees perform the unloading service, it shall include the removing of cargo from the body of the truck to a place of rest on the terminal facility adjacent to truck tailgate, as designated by the Participating Member. Motor carrier's employees shall be required to tier cargo to the height specified by the Participating Member but in no event shall they be required to tier cargo more than six (6) feet high.

By the Commission.

[SEAL]

THOMAS LISI,
Secretary.

13 F.M.C.

FEDERAL MARITIME COMMISSION

No. 69-4

IN THE MATTER OF AGREEMENT NO. T-2214 BETWEEN THE CITY OF
LONG BEACH, CALIFORNIA, AND TRANSOCEAN GATEWAY CORPORATION

Adopted September 18, 1969

Rental for marine properties for use as a public container terminal, subject to an adjustment in the minimum rental for the second year, found compensatory on proposed ten-year basis, and not shown to be unjustly discriminatory or unfair to other ports or terminals. Lease agreement approved subject to said adjustment in second year minimum rental.

Leslie E. Still, Jr., for respondent, the City of Long Beach, California.

Joseph Lotterman and *Howard A. Levy* for respondent, Transocean Gateway Corporation.

Roger Arnebergh, *Edward C. Farrell*, *Walter C. Foster* and *Maynard Asper* for petitioner, the City of Los Angeles, California.

Donald J. Brunner and *Robert H. Tell* as Hearing Counsel.

INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER ¹

By order of investigation served January 10, 1969, the Commission instituted this proceeding to determine whether Agreement No. T-2214 (the Agreement), a marine terminal lease, between the City of Long Beach, California (Long Beach), and Transocean Gateway Corporation (Transocean), should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (the Act).

The Commission has received a protest against approval of the Agreement from petitioner, the City of Los Angeles, California, urging that the Agreement should not be approved because the rentals contained therein are noncompensatory in violation of section 15 of the Act. Accordingly, the Commission's order of investigation pro-

¹ This decision became the decision of the Commission September 18, 1969.

vided that the issues in this proceeding are to "be confined to whether the rentals contained in Agreement No. T-2214 are non-compensatory resulting in prejudice to other ports or terminals." Hearing was held April 8-9, 1969. The matter was argued orally before the Presiding Examiner by respondents, Long Beach and Transocean, and by petitioner, the City of Los Angeles, and in accordance with the procedure agreed to by all parties, Hearing Counsel filed a reply brief, and respondent Transocean an answering brief. Long Beach and the City of Los Angeles waived the filing of answering briefs in consideration of their presentations on oral argument. The City of Los Angeles opposes, and the other parties favor approval of the Agreement.

The Agreement provides for the non-exclusive preferential assignment to Transocean of the wharf and contiguous wharf premises at berths 246 and 247, Pier J, Long Beach, California (Parcel I). In addition, the Agreement provides that Transocean has an option for the non-exclusive preferential assignment of the wharf and contiguous wharf premises at berth 245, Pier J (Parcel II), together with an option for the non-exclusive preferential assignment of up to 80 acres of additional property adjacent to or contiguous to Parcel I and Parcel II. Transocean is to use the leased properties as a public container terminal. At the terminal, Transocean will furnish warehousing and rail and truck facilities, facilities for the loading and unloading of vessels, and facilities for other generally related purposes.

Transocean has the right under the Agreement of first refusal of any additional public container facility constructed or made available by Long Beach. The term of the lease is ten years, with an option to renew for an additional ten years. Long Beach reserves the right to make a temporary assignment of the leased facilities to other persons when the premises either in whole or in part are not required by Transocean.

Transocean will assume the burden of providing the requisite container handling equipment, such as cranes, top loaders and containers, at an estimated cost to Transocean initially of about \$1,333,333. Initially Transocean will provide one container crane and certain other equipment, but for the operation of the container terminal at full capacity, there would have to be substantial additional investment on the part of Transocean, including another container crane.

Construction of facilities in the terminal area in issue was begun by Long Beach with no specific tenant in mind. These facilities were offered to certain Japanese steamship lines before the Agreement was made with Transocean. When negotiations were commenced with

Transocean, the wharves for the two berths in issue were about one-third complete. At present, the wharves on berths 246 and 247 are virtually finished, and the back area is being graded to its final elevation.

Under terms of the Agreement, Transocean will provide its services in operating a public container terminal at rates that shall conform as nearly as possible to those in the tariff of the Port of Long Beach.

As compensation for the leased premises, Transocean, for each month of its occupancy of these terminal facilities, shall pay to Long Beach a sum equal to the total amount of all charges for dockage, wharfage, wharf demurrage, wharf storage and all other terminal charges, computed on the basis of the Port of Long Beach tariff with respect to Transocean's operations at the premises for vessels berthed and for cargo loaded, discharged or held, subject to certain provisions, including those in the next paragraph.

For the first year of the Agreement, the amount paid by Transocean to Long Beach is subject to a maximum of \$300,000, but with no minimum; for the second year, there will be a minimum of \$200,000 and a maximum of \$350,000; for the third year, and any succeeding year of the Agreement, the minimum will be \$340,000, and the maximum will be \$420,000.

In summary, for the ten-years of the Agreement, the minimum payment by Transocean to Long Beach would be zero for the first year, plus \$200,000 for the second year, plus eight times \$340,000 for the next eight years, or a total of \$2,920,000.

The expenses of Long Beach in connection with the leased facilities for the 10 year period have been estimated by Long Beach to total \$2,381,500, which is a sum less than the minimum revenues of \$2,920,000 which Long Beach would receive from Transocean. In addition, Long Beach might receive other revenues from the leased facilities through its right to make temporary assignments of the leased facilities to persons other than Transocean when the premises either in whole or in part are not required by Transocean. Also, both respondents expect that in due time, the facilities will earn in excess of the agreed minimum revenues.

Long Beach did not insist on a minimum rental for the first year of the lease, because of its desire to have a public containership terminal, because Transocean agreed to furnish from its own funds the operating equipment, such as the container crane, and because Long Beach was willing to speculate along with Transocean that the venture would be a success. A principal reason for the lack of a minimum rental for

the first year apparently was because Transocean was to pay for the container crane and other terminal equipment, thereby obviating an investment by Long Beach in container crane and related equipment.

The investment costs in land and water area of Long Beach for Berths 246 and 247 are estimated to total \$1,542,200. This estimate is based on 710,200 square feet of land at \$2 a square foot or \$1,420,400; on 103,600 square feet of area under wharf at 50 cents a square foot, or \$51,800; and on 140,000 square feet of water area at 50 cents a square foot, or \$70,000. Improvements estimated as of February 26, 1969, totalled \$1,236,800. The improvements include paving, freight station and office, gate house, railroad tracks, utilities and other items. Based on a contract figure of \$1,109.75 per linear foot and 1,400 feet of wharf, the wharf was valued at \$1,553,660. The total of the land area, the improvements, and the wharf is \$4,332,660.

The concrete wharf is assigned a life of 50 years, with a straight line depreciation of 2 percent a year, and the other structures, utilities, paving and improvements are assigned a life of 20 years, with a straight line depreciation of 5 percent a year. Two percent of the estimated value of the wharf, plus five percent of the estimated value of the structures and improvements amounts to about a composite 2.14 percent of the total estimated investment in berths 246 and 247. Accordingly, depreciation was calculated by Long Beach on a yearly basis at the composite figure of 2.14 percent of the total investment.

Prorated port costs, or costs that could not be directly assigned to any particular berths of the Long Beach Harbor, on the last available annual basis totalled \$2,847,492, or 2.50 percent of the total investment cost of \$113,775,813 of the revenue producing facilities of the Long Beach Harbor.

Direct costs attributable to a particular berth or terminal were determined from a previous study of Long Beach to average 0.84 percent of the cost of investment.

The sum of 2.14 percent for depreciation, 0.84 percent for direct costs, and 2.50 percent for prorated port costs results in 5.48 percent for the total expenses for berths 246-247, whereas the average annual gross rate of return over the 10-year life of the Agreement based on minimum payments by Transocean would be 6.74 percent (revised investment of \$4,332,660 divided into one-tenth of minimum 10 year return of \$2,920,000). This leaves a net profit on investment to Long Beach of 1.26 percent. If Transocean were to make maximum payments for the 10 years, the net profit to Long Beach would be 3.78 percent.

The principal issue herein is whether the proposed rentals are compensatory. A subsidiary issue is whether the rentals must be compensatory on a year by year basis, that is for example, must the rental for the first year be compensatory. Neither the minimum rental of zero for the first year, nor the minimum rental of \$200,000 for the second year is compensatory. All other rentals, whether minimum or maximum, in the Agreement are compensatory, in that they exceed the estimated total expenses of Long Beach of \$238,150 per year. The City of Los Angeles admits that the rental provisions of the Agreement when considered on the overall 10-year term of the Agreement are compensatory. The respondents insist and Hearing Counsel agree that whether the rentals are compensatory or not must be decided on the 10-year basis of the Agreement.

The City of Los Angeles in opposing the Agreement relies in part on the finding in Docket No. 68-26, *Agreements No. T-2108 and T-2108A, 12 F.M.C. 110*, October 15, 1968, in which a lease agreement was approved subject to an increase in the minimum payment to insure that the facilities in question were not furnished at less than cost during any year of the pendency of the agreement. This cited case concerned an agreement to lease for three years which was cancellable at the end of the first year at the option of the lessee-tenant.

In the present proceeding we have a somewhat different situation, in the form of a non-cancellable ten-year lease, which is admittedly compensatory over this ten-year period on the basis of the total of its minimum yearly rentals. The City of Los Angeles argues in part that this lease is no better than the financial capability of its tenant-lessee, but here we must defer to the judgment of Long Beach.

It has been said in other cases of terminal rentals that it is not our prerogative to prescribe specific rates of return to public bodies experienced in terminal management. The present record generally affords no ground for disputing Long Beach's judgment in negotiating this lease to Transocean.

Nevertheless, there is one disturbing element in the Agreement, and we are constrained to listen to the argument of the City of Los Angeles that there be some limit placed on the number of years that the minimum rental in a lease of this nature may be less than fully compensatory. There appears in the present case to be ample justification for the lack of a minimum rental for the first year, particularly because of the substantial investment in terminal equipment to be made by Transocean. However, it is our conclusion that the second year's rental should not be less than compensatory, nor should any succeeding year's rental.

Accordingly, the present agreement appears approvable subject to the change or adjustment of the minimum rental for the second year from its noncompensatory amount of \$200,000 to the compensatory amount of \$240,000.

It is concluded and found that the total minimum rental in Agreement No. T-2214, a non-cancellable ten-year lease, subject to the adjustment in the minimum rental for the second year of the lease to \$240,000 is compensatory and does not result in undue prejudice to other ports or terminals. It is further concluded and found that the Agreement subject to the adjustment to \$240,000 of the minimum rental for the second year of the lease, has not been shown to be otherwise unlawful under section 15 of the Shipping Act. The Agreement subject to the change in the second year's minimum rental will be approved.

CHARLES E. MORGAN,
Presiding Examiner.

WASHINGTON, D.C., *June 25, 1969.*

13 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 68-14

C. H. LEAVELL & COMPANY

v.

HELLENIC LINES, LIMITED

Decided September 29, 1969

Where complainant shipped cargo on two of respondent's vessels scheduled for Red Sea port via Suez Canal, which was closed after commencement of voyages following outbreak of Arab-Israeli War of 1967 requiring both voyages to be diverted via Cape of Good Hope, the first after back tracking from Alexandria, a 65% surcharge imposed on the voyage which was extended 164% in time and 193% in mileage, and a 25% surcharge imposed on the voyage which was extended 71% in time and 94% in mileage, found authorized by filed tariff rule and bill of lading clauses providing for additional compensation in unspecified amount in the event of such contingency, and not in violation of section 18(d) of the Shipping Act, 1916.

Incorporation by reference of definitely ascertainable matter in bill of lading terms comprising transportation agreement follows established maritime custom which is not invalidated by section 18(b) of Shipping Act, 1916.

Samuel W. Earnshaw for complainant.

Stanley O. Sher for respondent.

Donald J. Brunner, E. Duncan Hamner, Jr., and Robert H. Tell,
Hearing Counsel, intervener.

REPORT

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

This is a complaint proceeding brought by C. H. Leavell & Co., a shipper, to recover reparation for surcharges collected by respondent carrier, Hellenic Lines, Limited, in alleged violation of the Shipping Act, 1916 (46 U.S.C. 801, *et seq.*). Examiner Walter T. Southworth issued an initial decision on February 6, 1969, in which he concluded that the surcharges were justified. Leavell and intervener Hearing

Counsel filed exceptions. The Commission heard oral argument on June 25, 1969.

FACTS

Leavell is a construction contractor. It held a \$5,000,000 contract to construct a sewage project in Khartoum North, Sudan, sponsored by the Agency for International Development (AID). Hellenic is a foreign-flag common carrier by water in the foreign commerce of the United States. Until the 1967 closing of the Suez Canal, Hellenic maintained a regularly scheduled, advertised liner service from Atlantic and Gulf ports of the United States via the Mediterranean and Suez Canal to ports on the Red Sea and Gulf of Aden. Leavell shipped construction material and equipment for its Khartoum project, consigned to itself at Port Sudan, on the *Hellenic Glory* and *Hellenic Pioneer*, on voyages which were scheduled to call at the Red Sea ports of Jidda and Port Sudan in the said service, as well as at Alexandria (in the case of *Hellenic Glory*, at least) and ports beyond Port Sudan.

The *Hellenic Glory* commenced her voyage at New Orleans on May 5, 1967. She proceeded to Houston, then returned to New Orleans, where on May 18, 1967, she loaded 5,275,000 pounds of cargo for Leavell. In addition to some 4,200,000 pounds of asbestos cement pipe, the cargo included trucks, tractors, concrete mixers and other heavy construction machinery; total freight was more than \$142,000. The *Glory* departed New Orleans (second call) May 19, 1967, and arrived at New York May 23. There she loaded a relatively small shipment (about 300 revenue tons) of construction supplies, tools, and small equipment likewise consigned by Leavell to itself at Port Sudan.

The *Glory* departed New York May 27, 1967. At that time there was no thought that she might not be able to transit the Suez Canal; the possibility had not been discussed with complainant or its freight forwarder, or with any other shipper. Her first scheduled call was Alexandria, then Jidda (on the easterly shore of the Red Sea, across from and slightly north of Port Sudan), Port Sudan, and on to Djibouti, Karachi, Rangoon, and Calcutta. She was originally scheduled to arrive at Port Sudan June 14, 1967, but the normal time from New York to Port Sudan via the canal is 22 days with stops at Alexandria and Jidda, or 18 days without such stops. Freight charges were calculated in accordance with basic tariff rates without the inclusion of any unusual or additional sum because of any apprehension of war or closing of the canal.

On May 13, 1967, the U.A.R. had begun to move forces through Cairo eastward into the Sinai Desert, following threats of Israel's prime minister (provoked in turn by raids of the Syrian-sponsored Al

Fatah organization) that it would "choose the time, the place, and the means to counter the aggressor." On May 18, the U.A.R. formally requested withdrawal of United Nations forces on the Sinai border. On May 22, President Nasser, under pressure in the Arab world, closed the Strait of Tiran to Israeli Shipping.

On Sunday, June 4, the Israeli Cabinet decided upon war. It began next morning, June 5, with an air strike that destroyed the U.A.R. Air Force as a fighting service in three hours. The land battle for Sinai began the same morning.

That day *Hellenic Glory* was less than a day's steaming time from Gibraltar. She was not, of course, privy to Israel's plans, any more than President Nasser had been. She entered the Strait of Gibraltar, passed Gibraltar on June 6 at 4:00 a.m. Gibraltar time (which is the same as Greenwich Mean Time), and hove to pending further developments and the receipt of instructions from her owner's office in New York. After "steaming about in circles" for a day, she was directed to put in at Ceuta (directly across the Strait from Gibraltar) for fuel. This unscheduled call was made to take advantage of Ceuta's bunkering facilities while *Hellenic's* New York office was assessing the situation. Every effort was being made to find out just what was going on in Egypt and Israel. The company had access to such information as was publicly available, through a news ticker in its office; it was unable to establish contact with its own representative in Cairo.

On Thursday evening, June 8, the UN Security Council concluded a cease-fire after four days' trying, and the battle for Sinai gradually came to an end. By that night, the fourth day of the war, the Israeli forces commanded the length of the Suez Canal. The same day, the *Glory* sailed from Ceuta and proceeded slowly eastward into the Mediterranean. President Nasser had ordered the Suez Canal closed on June 6.

On Friday, June 9, the Israeli forces attacked Syria from the north-east border of Israel, farthest from the Sinai Desert and the canal. The Arabs abandoned their positions within 27 hours.

Meanwhile the *Glory* was proceeding eastward. She was ordered into Heraklion, on the island of Crete, where she arrived June 14. The next day, June 15, she finally went in to Alexandria, the first scheduled port of call.

The *Glory* was directed not to wait for the canal to open, but to proceed to Jidda and Port Sudan via Gibraltar and the Cape of Good Hope. She departed Alexandria June 17, stopped at Durban for fuel, and, after practically circumnavigating the African continent, arrived at Jidda July 21. She discharged her Jidda cargo, sailed July 24, and

arrived at Port Sudan July 25. At the date of this decision, the Suez Canal is still closed.

The *Glory's* scheduled voyage from New York, its point of departure from the United States, to Port Sudan via Alexandria, the canal and Jidda was one of about 22 days and 6,000 miles. The actual voyage was one of 58 days and 17,565 miles from New York. In terms of percentages of the scheduled time and mileage, the course followed added 164 percent in time and 193 percent in mileage.

Hellenic added a 65 percent surcharge to the normal freight charges due from complainant. Such surcharge was made against all cargo on this voyage of *Hellenic Glory*.

Leavell's cargo on *Hellenic Pioneer* was loaded at New Orleans on or about May 29, 1967. It consisted of 1,086,082 pounds of merchandise, principally steel reinforcing bars in addition to some trucks and other construction and office equipment. Total freight was about \$18,000, calculated at regular tariff rates in contemplation of the scheduled voyage via the Suez Canal, under the same circumstances as set forth above with respect to *Hellenic Glory*. *Hellenic Pioneer* left New Orleans May 30, made calls at Baltimore and Philadelphia, and arrived at New York June 7, two days after the war began. She could have sailed June 10, but was held at New York until June 16 pending clarification of the situation in the Middle East.

While the *Pioneer* was at New York, Hellenic's traffic manager had daily telephone conversations with the president of Mohegan International Corporation, complainant's freight forwarder, which had made all the arrangements for Leavell's shipments. It was never suggested to Hellenic that Leavell's cargo be discharged at New York.

On June 8, 1967, Hellenic filed with the Commission, by special permission, a tariff amendment, effective the same date, adding a 25 percent surcharge on all rates due to the Middle East crisis.

Hellenic's disposition of the *Pioneer* was consistent with that of the *Glory*. On June 16, the day before the *Glory* sailed from Alexandria, the *Pioneer* sailed from New York for Jidda, via the Cape of Good Hope instead of via Gibraltar and Suez as had been scheduled when she sailed from New Orleans. She arrived at Jidda July 18, left there July 20, and arrived at Port Sudan July 21. The distance was 11,649 miles and the time about 35 days, against some 6,000 miles via Suez and (without a stop at Alexandria) about 20 days. The normal mileage was thus increased by about 94 percent and the elapsed time by about 71 percent. Hellenic assessed a 25 percent surcharge, equivalent to \$4,544.52 against complainant's shipment on the *Pioneer*.

On June 7, when *Glory* was at Ceuta and the *Pioneer* at New York, Leavell had instructed Mohegan, its freight forwarder as follows:

CONFIRMING TELEPHONE INSTRUCTIONS GLORY OR PIONEER ARE NOT TO SAIL WITHOUT PREVIOUSLY ADVISING US SO WE MAY GIVE INSTRUCTIONS AS TO DISPOSITION OF CARGO.

Mohegan conveyed the message to Hellenic that day. No "instructions" were thereafter given by Leavell, although Leavell was kept informed as to Hellenic's intentions. On June 15 (a Thursday), Leavell cabled its Khartoum representative (with copies to AID and the United States Embassy): "Glory sailing from Alexandria Friday and Pioneer from New York over weekend both via Cape for Port Sudan." This was approximately correct; the *Pioneer* sailed from New York Friday the 16th, and the *Glory* sailed from Alexandria Saturday the 17th.

While the *Glory* was sailing westward toward Gibraltar there was some talk between Leavell and Mohegan about the possibility of discharging Leavell's cargo at Genoa or some other Mediterranean port. Hellenic's traffic manager told Mohegan's president, Seymour, that this would involve great difficulty because 2,000 tons of cargo destined for Jidda were on top of Leavell's cargo and would have to be discharged before Leavell's cargo could be reached, and then reloaded; and that a deviation of Genoa would require consideration from the standpoint of vessel and cargo insurance. On the afternoon of June 20, when the *Glory* was two days from Gibraltar, Seymour wired Leavell that Hellenic refused to offload its cargo at Genoa "due to excessive exposure of damage and loss on super-imposed cargo"; and that the *Glory*, and also the *Pioneer*, were proceeding to ports of destination via the Cape of Good Hope. Hellenic's witness denied that there was a refusal to offload and there was no evidence thereof other than the hearsay telegram; Seymour did not testify. In any event, the subject was not renewed with Hellenic after its traffic manager pointed out to Seymour the difficulty it would involve. At no time prior to the arrival of the vessels at Port Sudan did Leavell take any firm position contrary to or critical of Hellenic's handling of the situation (other than the imposition of the surcharges), although it was at all times kept advised of Hellenic's acts and intentions through its freight forwarder.

The Tariffs and Bills of Lading

Hellenic had tariffs on file with the Commission and open to public inspection. These tariffs contained rules or regulations and specimens of the bill of lading evidencing the transportation agreement. Among the provisions of such rules and regulations and bill of lading were the following:

1. Under "Rules and Regulations," paragraph (a) of Rule 3 ("Application of Rates") provided, as far as pertinent here:

If the expense of transiting the Suez Canal increases through any cause whatsoever except carriers' fault, and/or in the opinion of HELLENIC LINES LIMITED it is unsafe, imprudent, inadvisable or unlawful, a Surcharge on all freights and charges as specified herein may be levied without notice regardless of the other provisions of this Rule; and owners of the goods shall pay the Surcharge.

2. Hellenic's bill of lading provided, in Clause 5 thereof:

Without limitation of any other provision herein, in any situation whatever or wherever occurring and whether existing or anticipated before commencement of, or during the voyage, which, in the judgment of the carrier is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to, or loss of the ship or any part of the cargo or to make it unsafe, imprudent or unlawful for any reason to * * * continue the voyage or to give rise to delay or difficulty in arriving, entering, discharging at or leaving the port of discharge * * * the carrier, whether or not proceeding toward or attempting to enter the port of discharge, may proceed by any route or return directly or indirectly to or stop at such other port or place whatever as the carrier may consider safe or advisable under the circumstances once or oftener, backwards or forwards in any order and discharge the goods at any place he may select there, or the carrier may retain the cargo on board until a return trip or until such time as the carrier thinks advisable and discharge the goods at any place whatever as herein provided, or the carrier may discharge and forward the goods by any means whatever, all at the risk and expense of the goods * * *. The carrier shall be entitled to a reasonable extra compensation for any services in connection with the foregoing above the agreed freight * * *.

3. Hellenic's bill of lading provided, in Clause 25 thereof:

Baltic Suez Stop Clause 1956 is considered as incorporated in the present Bill of Lading.

The Baltic Suez Stop Clause was drafted in 1956 by the Baltic and International Maritime Conference, an association of shipping lines and shipowners based in Copenhagen which has drawn various forms of bills of lading and charter parties. The clause reads as follows:

If before the vessel commences loading navigation on the Suez Canal is interrupted the owners/carriers shall be entitled to cancel this contract; if navigation is interrupted as aforesaid after loading has commenced the vessel may proceed by some other route and the freight shall be increased in proportion to the longer sailing distance.

The Baltic and International Maritime Conference is not comparable to the ordinary steamship conference; it does not make rates. Hellenic is not a member, and no copy of the Suez Stop Clause is on file with the Commission, as far as the record shows. Hellenic sent a copy to complainant's forwarder, Mohegan, and to all other shippers

on the vessels, shortly after it decided to divert the *Glory* and *Pioneer* via the Cape. Prior to that time it had not furnished, or been asked to furnish, a copy to Mohegan or complainant.

Although Leavell's shipment on the *Glory* made up about 20 percent of the vessel's cargo, there were about 1,000 shippers on the voyage, all of who, except the Military Sea Transportation Service, have paid the 65 percent surcharge and (except for complainant) have made no complaint about it; in fact Hellenic has had "several telephone calls complimenting us for fulfilling the voyage of the vessel." A claim for about \$2,200 is being filed against Military Sea Transportation Service.

DISCUSSION

The presiding examiner found that the surcharges were authorized by the tariffs on file and the bills of lading which provided for additional compensation in an unspecified amount in the event of an unforeseen deviation due to the outbreak of the Arab-Israeli War of 1967.

The examiner reasoned that the goods were shipped under a tariff duly filed with the Commission which gave notice by rule that if it were "unsafe, imprudent, inadvisable or unlawful" to proceed through the Suez Canal, and an alternate route was used, a surcharge on all freights and charges specified in the tariff might be levied without notice. Since transit of the canal was not only unsafe, imprudent and unlawful, but impossible, as the result of circumstances which arose after the voyages commenced, the examiner found Hellenic was justified in using alternate routes to reach the port of discharge.

In addition, the examiner relied upon the fact that the shipments were governed by bills of lading, specimens of which were included in the tariffs filed with the Commission as provided by section 18(b) (1), which contained provisions applicable to the instant situations as part of the transportation agreement between the parties. Clause 5 of the bill of lading stipulated generally that the carrier should be entitled to "a reasonable extra compensation for any services in connection with" various situations arising during a voyage, including situations likely to result in risk of damage or delay in arriving at the port of discharge or make it unsafe, imprudent, or unlawful to continue the voyage; in which events the carrier might (among other options) proceed toward the port of discharge by any route. Clause 25 of the bill of lading incorporated by reference the "Baltic Suez Stop Clause 1956," which clause specifically provided that if navigation of the Suez Canal were interrupted during the voyage, the vessel might proceed by some other route and the freight be increased "in proportion to the longer sailing distance."

The examiner concluded that although Hellenic relied on the "Baltic Suez Stop Clause" in assessing the 25 percent and 65 percent surcharges, any one of the three clauses—Tariff Rule 3 (a), bill of lading clause 5, or bill of lading clause 25—authorizes the charges, and satisfies section 18(b) as interpreted in the *All Cargo* case.¹

In *All Cargo*, the Commission sustained a surcharge of 125 percent assessed because the shipper's perishable cargo was kept under refrigeration aboard the vessel, at anchor or at dock, during a longshoremen's strike which caused the vessel to lose about 33½ days on a scheduled voyage of about 25 days (or 13 days from the last European port to the first United States port), under the following bill of lading provision:

For any service rendered to the goods as hereinabove provided, the carrier shall be entitled to extra compensation; and if in following the procedure permitted herein the length or duration of the voyage of the ship is increased the shipper and consignee shall pay proportionate additional freight, all of which shall be a lien on the goods.

The amount of extra compensation charged in *All Cargo* was found to be lawful and not arbitrary, not as being "proportionate" to the increased "length or duration of the voyage," but simply because it was considerably less than the expenses for charter hire and bunkers incurred by the carrier during the period of the strike.

The examiner found that Hellenic rendered services, obviously at increased cost to itself, in connection with circumstances within the contemplation of clause 5 of its bill of lading. Hellenic did not merely return the goods to the port of loading as it might have done under the bill of lading clause, but carried them on to the port of destination although (in the case of the *Glory*) it added a month and some 11,500 miles to its scheduled voyage in order to do so. Effort was made and action taken to deliver the goods otherwise than by the direct carriage contemplated by Hellenic's tariff, and for such services extra compensation was provided in the transportation agreement. Hellenic was therefore entitled to reasonable extra compensation by reason of bill of lading clauses 5 and 25 as well as tariff rule 3 (a).

The examiner next considered whether under the circumstances the 65 percent and 25 percent surcharges constituted fair and reasonable extra compensation, under the express and implied limitations of the filed tariff rules and transportation agreement, for the services rendered the goods over and above the services covered by the basic transportation rates and accessorial charges.

¹ *Extra Charges Caused by Longshoremen Strike*, 8 F.M.C. 437 (1965), aff'd sub nom. *International Packers, Ltd. v. Federal Maritime Com'n*, 356 F.2d 808 (D.C. Cir. 1966).

The examiner found that in the case of the *Glory*, the scheduled voyage from New York—the voyage upon which Hellenic's underlying rates were based—would have covered about 6,000 miles and required about 22 days. The actual voyage was one of 17,565 port-to-port miles exclusive of mileage to nonscheduled ports and steaming in circles while awaiting developments—an increase of 193 percent. The actual time was 58 days—an increase of 164 percent. Even if half the carrier's total costs—including voyage operating costs, overhead, and depreciation—be assumed to consist of port and cargo costs which were not increased, and with due consideration for the relatively nominal saving of \$6,000 to \$7,000 in canal tolls, the examiner found the surcharge to be reasonable.

In the case of the *Pioneer*, the examiner found a 6,000-mile, 20-day voyage became an 11,649-mile, 35-day voyage; an increase of about 94 percent in distance and 71 percent in time. The examiner found that these facts provide a sufficient showing of reasonableness in the circumstances to support a 25 percent surcharge.

Leavell argues on three major points: (1) whether the 1961 amendments to the Shipping Act as interpreted in light of their Congressional policy, permit a carrier to depart from its expressed tariff in any way; (2) whether the tariff and bill of lading provisions permit the surcharges; and (3) whether the surcharges, if legal at all, are reasonable in amount.

Leavell emphasizes the legislative history of section 18(b) to establish a single purpose: that tariff compliance and enforcement requirements be strictly applied and enforced. In other words, Leavell argues that in spite of emergency or other conditions and in spite of any terms which might be included in the carrier's bill of lading, the tariff rate is absolutely mandatory, and no exceptions whatsoever are permitted. In support of this proposition Leavell relies upon the failure of the statute or the legislative history to contain any authority to the contrary. Further, Leavell cites the pronouncements of sister transportation agencies that no deviations shall be allowed from the applicable tariff. In conclusion, Leavell argues that there are no exceptions to the tariff filing and enforcement requirements of section 18(b).

Section 18(b), containing tariff filing requirements applicable to carriers in the foreign commerce of the United States, was added by P.L. 87-346, effective October 3, 1961. "These requirements are generally that rates must be posted and filed with the Board 30 days prior to their effective date; that terminal and other accessorial charges must be stated separately; that carriers will not charge a different rate than that filed with the Board and posted publicly; and that the Board may

establish regulations relating to the form of tariff which shall be used by such carriers.”² The objective of section 18(b)’s filing requirements was similarly expressed in a 1962 letter of the Chairman of the Commission concerning implementation of P.L. 87-346:

* * * we are convinced * * * that shippers and receivers are entitled to know their transportation charges *in advance*, and that such *certainty of charges* is beneficial to our foreign commerce. We are equally persuaded that the public interest requires the assurance of *equal treatment* to all who are similarly situated. (Emphasis added.)

The emphasized words in the preceding quotation indicate the purpose of section 18(b). The shipping public is entitled to be provided with advance notice of rates certain to be charged and which will be charged equally to all shippers for the same services. This does not mean, however, that in all cases and under all circumstances the conditions will prevail which permit strict adherence to those requirements.

Business life is filled with intangible elements and non-quantifiable factors. This is especially true in the business of ocean transportation and is recognized, in particular, in the contracts which are employed between carriers and shippers. This being so, it can hardly be suggested that Congress, in enacting section 18(b), intended to legislate away the traditional and necessary relationships between the shipper and carrier.

It cannot be practically expected that carriers can put a predetermined price on every conceivable contingency of the kind to which ocean transportation is subject. On the other hand, it is equally hard to assume that legislation is written without an awareness of contemporary conditions. We are no longer living in the days of wind-driven wooden ships with all their navigational inadequacies.

We cannot interpret statutory provisions in terms no longer relevant. “Enlightened regulation is the key to effective regulation; no regulatory agency can permit regulation to be outstripped by new techniques in the industry.” *Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 and 2, FMC Nos. 10 and 11*, 11 F.M.C. 476, 489 (1968). See also *American Trucking Assns. Inc. v. A.T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967).

Consequently, while we conclude that section 18(b) does not preclude reference to an implementation of emergency language in tariffs and bills of lading, we do not approve unlimited use of such practices. It

² From letter of Secretary of Commerce to Chairman, Committee on Merchant Marine and Fisheries, House of Representatives, March 20, 1961, recommending favorable consideration of the bill (H.R. 6775) on behalf of the Department and the Federal Maritime Board. Legislative History of the Steamship Conference/Dual Rate Law, 87th Cong., 2d Sess., Document No. 100, p. 132.

is not a question of conflict between the tariff filing requirements of section 18(b) and established maritime law. Rather we are confronted with the matter of the public interest which this Commission is statutorily obliged to protect. Consequently, there must be a balancing of the interests of a need for adherence to section 18(b), a recognition of the contingencies of ocean transportation and an obedience to public interest standards.

Under these circumstances we find no malfeasance in the actions of Hellenic in this case; and we find that in a proper case extra compensation may be provided for by the agreement of transportation set forth in the bill of lading, with the reasonable amount thereof to be determined upon the occurrence and in light of the circumstances of the contingency.

However, resort to clauses in tariffs or bills of lading which effect a change in the tariff rate is closely circumscribed by the policy of section 18(b). We interpret that section to mean that only where it is impossible to file a new rate (and seek special permission where required) will a carrier be allowed to depart from the tariff rate pursuant to emergency provisions. For example, this means that the emergency must occur while the vessel is at sea, or at least after the cargo has been loaded. And, of course, the emergency must be such that it was unforeseeable to a prudent steamship operator in the exercise of a high degree of diligence. Cf. *Surcharge at U.S. Atlantic and Gulf Ports*, 10 F.M.C. 13, 23 (1966).

Thus, each case involving an emergency departure from filed rates will be determined on its own facts; and, as we have said, unlimited use of emergency rate provisions will be subjected to severe scrutiny. In essence, however, contractual relationships between the shipper and carrier are commercial matters. It is best if shippers and carriers reach accommodation on such matters without government agency interference. Consequently, we hope shippers and carriers recognize the need for their commercial practices to keep in step with the modernization of transportation technology.

We are not persuaded by Leavell's reference to the decisions of other transportation agencies.³ These cases are distinguished simply because they do not concern themselves with emergency situations. Likewise, Leavell's reliance on the Commission's General Order No. 13, 46 C.F.R. 531.0, et seq., is misplaced. The general order applies to normal, not emergency conditions.

³ *United States v. Associated Air Transport, Inc.*, 275 F.2d 827 (5th Cir. 1960); *Holt Motor Co. v. Nicholson Universal S.S. Co.*, 56 F. Supp. 585 (D.C. Minn. 1944); *Rardin Grain Company v. Illinois Central Railroad Co.*, 288 F. Supp. 813 (S.D. Ill. 1968); and other cases.

Leavell objects to the strong reliance upon the *All Cargo* case. Leavell would distinguish that case because here there was no statement in the tariff or stipulation by the shipper that the transportation was subject to the terms of the bill of lading. Leavell would also distinguish the case because of its feeling that there is a vast difference between a labor strike and the closing of the Suez Canal. Leavell's argument is based upon its contention that the closing of the canal was readily foreseeable, while the typical labor strike is not. Next, Leavell would distinguish the *All Cargo* case because that case was based upon the inability of the carrier to comply with the terms of the bill of lading; that is, to discharge the cargo. On the other hand, Hellenic was able to deliver cargo to the port of destination; it was simply unable to use the route that it had contracted with Leavell to follow. Thus, Hellenic actually performed the transportation in the manner contemplated by the bill of lading—transportation from United States to Sudan.

In *All Cargo*, the carrier's tariff of rates stated, on its title page, that transportation thereunder was "subject to the terms and conditions of the line's bill of lading and other documents currently in use by the lines"—a fact which, not surprisingly, was noted by the Hearing Examiner whose decision was adopted by the Commission, as well as by the affirming Court of Appeals. That fact was not essential to the decision; however, for under section 18(b) (1) the specimen bill of lading is by definition a part of the carrier's tariff required to be filed: "Such tariffs * * * shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement."

Here respondent's specimen bill of lading was filed with the Commission pursuant to section 18(b) (1). By that circumstance it became part of respondent's filed tariff, within the meaning of the statute; no additional effect could have been obtained by mentioning it in the title page of the "tariff"; i.e., the document showing rates and rules, which in common parlance is usually referred to as the carrier's tariff.

The differences between Hellenic's bill of lading provisions and those in *All Cargo* are not substantial. Both bills of lading provided for "extra compensation"; more precisely, in Hellenic's case, "reasonable extra compensation", although the *All Cargo* clause would certainly be limited, by interpretation, to reasonable extra compensation. The *All Cargo* clause went on to provide that, if the "length or duration of the voyage" were increased, the shipper should pay "proportionate extra freight." Obviously, "proportionate" meant proportionate to the increased length or duration of the voyage. This interpretation matches the emergency language of Hellenic's tariff and bill of lading.

Therefore, there is no significant, legal distinction between *All Cargo* and the present situation.

Leavell next argues that, even if section 18(b) allows resort to emergency language, Hellenic's tariff and bills of lading do not justify the surcharges. Thus, Leavell contends that rule 3(a) contains no specific formula for determining the amount of the surcharge.⁴ With respect to clause 5 of the bill of lading, Leavell argues that the bill of lading was not incorporated by reference into the tariff and is too vague to be considered to be a valid tariff provision. Finally, Leavell argues that the Baltic-Suez Stop Clause was not on file with the Commission and cannot be used to justify the surcharges.

Complainant shipped goods on what were mutually expected to be normal liner voyages, scheduled to proceed through the Suez Canal to the Red Sea and thence to Port Sudan. They were shipped under a tariff duly filed with the Commission which gave notice by rule that, if it were "unsafe, imprudent, inadvisable or unlawful" to proceed through the Suez Canal, and an alternate route were used, a surcharge on all freights and charges specified in the tariff might be levied without notice. In fact, transit of the canal was not only unsafe, imprudent and unlawful, but impossible, as the result of circumstances which arose after the voyages commenced.

As the examiner found, the scheduled voyage of the *Glory* from New York—the voyage upon which respondent's underlying rates were based—would have covered about 6,000 miles and required about 22 days. The actual voyage was one of 17,565 port-to-port miles exclusive of mileage to nonscheduled ports and steaming in circles while awaiting developments; an increase of 193 percent. The actual time was 58 days—an increase of 164 percent. Even if half the carrier's total costs—including voyage operating costs, overhead and depreciation—be assumed to consist of port and cargo costs which were not increased, and with due consideration for the relatively nominal saving of \$6,000 to \$7,000 in canal tolls, the 65 percent surcharge was reasonable. Cf. *Outbound Rates Affecting Export High Pressure Boilers*, 9 F.M.C. 441, 454 (1966).

Likewise, the record shows that *Pioneer's* itinerary increased from a 6,000-mile, 20-day voyage to an 11,646-mile, 35-day voyage; an increase of about 94 percent in distance and 71 percent in time. Therefore, the 25 percent surcharge was reasonable under the circumstances.⁵

⁴ Leavell's suggestion, that Hellenic's basic rates were too high, is not proven on the record.

⁵ Leavell recalculated the additional mileages and times for both voyages. However, Leavell's calculations, even assuming their validity, would not compromise the reasonableness of either surcharge.

The burden of showing that the charges were unreasonable is upon complainant, although the fact of substantial surcharges alone is sufficient to require the carrier to come forward with some proof of their propriety. Both Hearing Counsel and complainant contend that respondent must justify its surcharge by showing its actual costs and the increase therein attributable to the lengthened voyage. That was done in *All Cargo*, to the extent of showing daily charter expense and estimated fuel costs attributable to the additional time spent at anchor; but that is not the only way to show reasonableness. In *All Cargo*, the fact that the vessel was under charter provided a simple means of proof. In the instant case, respondent's showing of increased voyage distance and duration is sufficient to overcome any presumption of unreasonableness; and there is no basis for a finding that the surcharges assessed were unreasonable, in the complete absence of any proof of unreasonableness. On the contrary, the record supports a positive finding that the surcharges assessed for the extra services rendered to complainant's cargoes represented, in each case, a reasonable extra charge for such services.

In addition to the tariff rule expressly directed to closure of the Suez Canal route, the shipments were governed by bills of lading, specimens of which were included in the tariffs filed with the Commission as provided by section 18(b) (1), which contained provisions applicable to the instant situations as part of the transportation agreement between the parties. Clause 5 of the bill of lading stipulated generally that the carrier should be entitled to "a reasonable extra compensation for any services in connection with" various situations arising during a voyage, including situations likely to result in risk of damage or delay in arriving at the port of discharge or make it unsafe, imprudent or unlawful to continue the voyage; in which events the carrier might (among other options) proceed toward the port of discharge by any route. Clause 25 of the bill of lading incorporated by reference the "Baltic Suez Clause 1956", which clause specifically provided that, if navigation of the Suez Canal were interrupted during the voyage, the vessel might proceed by some other route and the freight be increased "in proportion to the longer sailing distance."

Tariff Rule 3(a) and bill of lading clause 5 both authorize the assessment of the 25 and 65 percent surcharges. However, we do not rely upon the Baltic Suez Stop Clause, which was allegedly incorporated by reference into bill of lading clause 25. The Baltic Suez Stop Clause was not on file with the Commission and does not appear to have been readily available to shippers. Therefore, there was insufficient notice to shippers. Accordingly, it cannot be given any effect; and, in fact,

carriers should be very wary of relying on material which is not on file with the Commission as a basis for determining rates and surcharges.

Leavell argues that Hellenic has failed to come forward with dollars and cents justification for the level of its surcharge. Leavell specifically objects to the examiner's emphasis upon time and mileage comparisons which are not indicative of specific costs. Likewise, Leavell argues that the surcharges are unreasonable because competitive carriers did not assess such surcharges. We see no reason why Hellenic should come forward with additional dollars and cents justification of the level of the surcharges. The fact that competitive carriers who, may or may not, have found themselves in situations similar to Hellenic, did not assess emergency surcharges is immaterial.

Hearing Counsel, an intervener in this proceeding, have also excepted to the initial decision of the examiner. Initially, Hearing Counsel argue that the examiner reached the wrong result because, contrary to well established maritime principles, the examiner construed the applicable tariff and bill of lading against the shipper and in favor of the carrier. According to Hearing Counsel this alone is grounds for reversal, although they do not attempt to state how they would construe the appropriate language.

We disagree; the examiner did not construe any bill of lading or tariff provision for or against anyone. He simply construed the provisions as they are. Hearing Counsel's suggestion that this is a matter of ambiguity misses the mark.

Next, Hearing Counsel argued that Tariff Rule 3(a), which does not specify a sum certain for the amount of surcharges that will be levied in the event some contingency occurs, is defective. In arguing this point, Hearing Counsel urge that the examiner's reliance upon the *All Cargo* case is misplaced. Hearing Counsel would distinguish this case because of their feeling that the contingency in issue here—the closing of the Suez Canal—was not entirely fortuitous. Hearing Counsel contend that respondent was aware of the potential closing of the canal and should have set forth in its tariff the surcharge to be applied in the event the canal was closed.

On the contrary, there was nothing in the events immediately preceding the outbreak of hostilities which gave respondent or complainant, or anyone else, reason to believe that the particular developments with which we are concerned would occur when and as they did. Thus, there is no support in the record for Hearing Counsels' prediction that the Suez Canal crises was predictable.

Therefore, we conclude that the 65 percent and 25 percent surcharges collected from Leavell for shipments on respondent's *Hellenic Glory* and *Hellenic Pioneer*, respectively, under the circumstances hereinabove set forth, were authorized by respondent's tariff, including its specimen bill of lading setting forth the transportation agreement, duly filed with the Commission pursuant to section 18(b) of the Shipping Act, 1916, and were not in violation of any provision of the said section 18(b).

The complaint is dismissed.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 410

B. H. LOVELESS & Co.

v.

MICRONESIA INTEROCEAN LINE, INC.

October 14, 1969

Respondent permitted to refund to complainant the sum of \$125.24 as a portion of freight charges assessed and collected on a shipment of asphalt floor tiles from San Francisco, California, to Saipan.

B. H. Loveless for complainant.

Kai Angermann for respondent.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER ¹

Respondent Micronesia Interocean Line, Inc., a common carrier by water in the foreign commerce of the United States, has filed an application for permission to refund a portion of the freight charges collected from complainant B. H. Loveless & Co., a foreign freight forwarder, on a shipment of Asphalt Floor Tiles via respondent's vessel from San Francisco, California to Saipan, Marianas Islands.

Public Law 90-298, 75 Stat. 764, authorizes the Commission in its discretion to:

* * * permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier by water in foreign commerce * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: Provided, further, That the carrier * * * agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal

¹ This decision became the decision of the Commission October 14, 1969.

Maritime Commission may require, which give notice of the rate on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: And provided further, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

The application was transmitted to the Commission on May 9, 1969, and the shipment involved was under bill of lading dated February 7, 1969, thus the application was timely filed.

Respondent's bill of lading LA/SAIPAN No. 4 included 109 Cartons of Asphalt Floor Tile weighing 5,693 pounds to which commodity respondent applied the N.O.S. rate of \$94.50 per 2,000 pounds and collected from complainant the sum of \$268.99. The request for permission to refund is based on an agreement between respondent and the Trust Territory of the Pacific Islands whereby respondent agreed to assess rates no higher than those in effect for shipments moving on Far East Line to the Trust Territory via Guam. Respondent, when issuing its tariff in September 1968, listed only rates on commodities known to be moving in the trade, being to a degree handicapped by reason of destruction of certain records by Typhoon Jean. Subsequently, it found that certain commodities moving in the trade had been omitted and in March 1969, in order to comply with its agreement, revised its tariff to include rates on other commodities, including a rate of \$50.50 per 2,000 pounds for asphalt floor tile. The omission of asphalt floor tile in the tariff at the time of the shipment here involved was in the nature of an administrative error.

Had the \$50.50 per 2,000 pound rate on asphalt tile as corrected in the March 1969 tariff revision been applied to the shipment here involved, the freight would have been \$143.75, or \$125.24 less than the amount charged and paid by complainant.

Respondent has filed its application within the 180 days statutory period and has filed a tariff reflecting the lower rate here sought to be applied prior to the date of the application. One other shipment of asphalt floor tiles was carried during the period here involved and respondent has concurrently filed an application to make refund on that shipment (Special Docket No. 409). The rate charged and collected having been due to administrative error, since corrected, respondent is authorized to refund to complainant the sum of \$125.24. Respondent shall publish the appropriate notice referred to in the above set forth statute and in 46 C.F.R. 502.92 and the refund shall be made within 30 days of such notice. Within 5 days thereafter, respond-

ent shall notify the Commission of the date of the refund and the manner in which payment was made.

(Signed) HERBERT K. GREER,
Presiding Examiner.

ORDER

It is ordered, That Micronesia Interocean Line, Inc., refund to B. H. Loveless and Co., the amount of \$125.24.

It is further ordered, That Micronesia Interocean Line, Inc., publish promptly in its appropriate tariff, the following notice:

Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 410, that effective February 7, 1969, the rate on asphalt floor tiles from San Francisco, California, to Saipan Mariana Islands, for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of Micronesia Interocean Line during the period from February 7, 1969, until March 13, 1969, is \$50.50 per 2,000 pounds, subject to all other applicable rules, regulations, terms, and conditions of the said rate and this tariff.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before November 20, 1969, of the date and manner in which the refund herein ordered was made.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

13 F.M.C.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 407

HAWAII STATE STEEL COMPANY LTD.

v.

MICRONESIA INTEROCEAN LINE, INC.

Adopted October 16, 1959

Respondent permitted to refund to complainant the sum of \$29.03 as a portion of freight charges assessed and collected on a shipment of lamps from Honolulu to Koror, Palau, Western Caroline Islands.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER ¹

Respondent Micronesia Interocean Line, Inc., a common carrier by water in the foreign commerce of the United States, has filed an application for permission to refund a portion of the freight charges collected from complainant Hawaii State Steel Company Ltd., on a shipment of lamps via respondent's vessel from Honolulu to Koror, Palau, Western Caroline Islands.

Public Law 90-298, 75 Stat. 764, authorizes the Commission in its discretion to:

*** permit a common carrier by water in foreign commerce *** to refund a portion of freight charges collected from a shipper *** where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund *** will not result in discrimination among shippers: *Provided further*, That the *** carrier *** has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund *** would be based: *Provided further*, That the carrier *** agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund *** would be based, and additional refunds *** as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further*, That application for refund *** must be filed with the Commission within one hundred and eighty days from the date of shipment.

¹ This decision became the decision of the Commission October 16, 1959.

The application was transmitted to the Commission on May 29, 1969, and the shipment involved was under bill of lading dated March 13, 1969.

Respondent's bill of lading No. KOR-4 included a shipment of lamps totalling 85.5 cu. ft. Respondent applied the N.O.S. rate of \$94.50 per 40 cu. ft. and complainant paid the sum of \$203.18. The request for permission to refund is based on an agreement between respondent and the Trust Territory of the Pacific Islands whereby respondent agreed to assess rates no higher than those in effect for shipments moving on Far East Line to the Trust Territory via Guam. Respondent, when issuing its tariff in September 1968, listed only rates on commodities known to be moving in the trade, being to a degree handicapped by reason of destruction of certain records by Typhoon Jean. Subsequently, it found that certain commodities moving in the trade had been omitted and in April 1969, in order to comply with its agreement, revised its tariff to include rates on other commodities, including a rate of \$81.00 per 40 cu. ft. for lamps. The omission of lamps from the tariff at the time of the shipment here involved was in the nature of an administrative error.

Had the \$81.00 per 40 cu. ft. rate on lamps been applied to this shipment, the freight would have been \$174.15 or \$29.03 less than the amount paid by complainant.

Respondent filed its application within the 180 day statutory period and, prior thereto, amended its tariff to reflect the lower rate. The rate charged and collected having been due to administrative error, since corrected, respondent is authorized to refund to complainant the sum of \$29.03. Respondent shall publish the appropriate notice referred to in the above set forth statute and in 46 C.F.R. 502.92 and the refund shall be made within 30 days of such notice. Within 5 days thereafter, respondent shall notify the Commission of the date of the refund and the manner in which payment was made.

JOHN MARSHALL,
Presiding Examiner.

Washington, D.C., SEPTEMBER 24, 1969.

It is ordered, That Micronesia Interocean Line, Inc., refund to Hawaii State Steel Company Ltd., the amount of \$29.03.

It is furthered ordered, That Micronesia Interocean Line, Inc., publish promptly in its appropriate tariff, the following notice :

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 407, that effective March 13, 1969, the rate on lamps from Honolulu, Hawaii, to Koror, Palau, Western Caroline Islands for purposes of refunds or waiver of freight charges on shipments which may have been shipped on vessels of Micronesia Interocean Line on March 13, 1969, is

\$81.00 per 40 cu. ft., subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before November 20, 1969, of the date and manner in which the refund herein ordered has been made.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

13 F.M.C.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 411

B. H. LOVELESS & COMPANY

v.

MICRONESIA INTEROCEAN LINE, INC.

October 16, 1969

Respondent permitted to refund to complainant a portion of the freight charges assessed and collected on a shipment of insecticides and a shipment of plastic pipe fittings between San Francisco, California and Saipan, Mariannas.

B. H. Loveless for complainant.

Kai Angermann for respondent.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER ¹

Respondent Micronesia Interocean Line, Inc., a common carrier by water in the foreign commerce of the United States, has filed an application for permission to refund a portion of the freight charges collected from complainant B. H. Loveless & Co., a foreign freight forwarder, on two shipments from San Francisco, California to Saipan in the Trust Territory of the Pacific Islands. Public Law 90-293, 75 Stat. 764, authorizes the Commission in its discretion to:

* * * permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier by water in foreign commerce * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: Provided, further, That the carrier * * * agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate

¹ This decision became the decision of the Commission October 16, 1969.

on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: And provided further, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

The application was transmitted to the Commission on May 9, 1969 and within 180 days of the date of the shipments.

Respondent issued bill of lading SF/S-21 on December 14, 1969, designating complainant as forwarder, E. D. Black as shipper and Black Construction Company, Saipan, as consignee. The commodities shipped were generally described as construction materials but included by reference to a list attached to the bill of lading, 9 Drums of Insecticide measuring 56 cubic feet. Respondent charged and complainant paid the N.O.S. rate of \$94.50 per 40 cubic feet, a total of \$132.30.

On February 7, 1969, respondent issued bill of lading SF/S-24 designating complainant as forwarder, Heidi & Cook, Ltd. as consignor and consignee. The commodities described on the bill of lading included 4 cartons of plastic pipe fittings measuring 36 cubic feet. Respondent charged and complainant paid the N.O.S. rate of \$94.50 per 40 cubic feet, a total of \$85.05.

The request for permission to refund is based on an agreement between respondent and the Trust Territory of the Pacific Islands whereby respondent agreed to assess rates no higher than those in effect for shipments moving on Far East Line to the Trust Territory via Guam. Respondent, when issuing its tariff in September, 1968, listed only rates on commodities known to be moving in the trade, being to a degree handicapped by reason of destruction of records during Typhoon Jean. Subsequently, it found that certain commodities moving in the trade had been omitted and in March, 1969, in order to comply with its agreement, revised its tariff to include rates on other commodities. In this revision, a rate of \$84.25 per 40 cubic feet was set forth for insecticides and a rate of \$67.25 for plastic fittings. The omission of insecticides and plastic fittings from the tariff in effect at the time of the shipments was in the nature of an administrative error.

Had the \$84.25 per 40 cubic feet rate been applied to the shipment of the insecticides, the freight would have been \$117.95, or \$14.35 less than the \$132.30 charged and collected. Application of the rate of \$67.25 to the shipment of plastic fittings would have resulted in a freight charge of \$60.53, \$24.52 less than the \$85.05 charged and collected. The total respondent requests authority to refund is \$38.87.

Respondent has filed its application within the 180 day statutory period and has filed a tariff reflecting the lower rates here sought to be applied prior to the date of this application. One other shipment during the time here involved was made at the higher rate, however, respondent has filed a request to make similar refund with the Commission. The rate charged and collected having been because of administrative error, since corrected, respondent is authorized to refund to complainant the sum of \$38.87. Respondent shall publish the appropriate notice referred to in the above set forth statute and in 46 C.F.R. 502.92 and the refund shall be made within 30 days of such notice. Within 5 days thereafter, respondent shall notify the Commission of the date of the refund and the manner in which payment was made.

HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
September 24, 1969.

It is ordered, That Micronesia Interocean Line, Inc., refund to B. H. Loveless and Co. the amount of \$38.87.

It is further ordered, That Micronesia Interocean Line, Inc., publish promptly in its appropriate tariff, the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 411 that (1) effective December 14, 1969, the rate on insecticides from San Francisco, California to Saipan, Mariana Islands, during the period from December 14, 1968, until March 13, 1969, is \$84.25 per 40 cubic feet; and (2) effective February 7, 1969, the rate on plastic pipe fittings from San Francisco, California to Saipan, Mariana Islands, during the period from February 7, 1969, until March 13, 1969, is \$67.25 W/M. The above rates are for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of Micronesia Interocean Line and are subject to all other applicable rules, regulations, terms, and conditions of the said rates and this tariff.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before November 20, 1969, of the date and manner in which the refund herein ordered was made.

By the Commission

[SEAL]

(Signed) THOMAS LISI,
Secretary.

13 F.M.C.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET No. 412

WALTER PLUNKETT & COMPANY

v.

MICRONESIA INTEROCEAN LINE, INC.

October 16, 1969

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

No exceptions having been taken to the initial decision of the examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on October 16, 1969.

It is ordered, That Micronesia Interocean Line, Inc., refund to Walter Plunkett and Co., the amount of \$62.28.

It is further ordered, That, as to other matters set forth in the application herein, permission to refund is denied.

It is further ordered, That Micronesia Interocean Line publish promptly in its appropriate tariff the following notice:

Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 412 that, effective December 14, 1968, the rates on "copper sheets" and "automobile parts and accessories" from San Francisco, California, to ports in the Trust Territories for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of Micronesia Interocean Line during the period from December 14, 1968, until March 13, 1969, are \$72.00 per 2000 pounds and \$62.50 W/M, respectively, subject to all other applicable rules, regulations, terms, and conditions of said rates and this tariff.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before November 20, 1969, of the date and manner in which the refund herein ordered has been made.

By the Commission.

[SEAL]

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 412

WALTER PLUNKETT & COMPANY

v.

MICRONESIA INTEROCEAN LINE, INC.

October 16, 1969

Respondent permitted to refund to complainant a portion of the freight charges assessed and collected on shipments of copper sheets and auto parts from San Francisco, California to ports in the Trust Territories.

Richard Parmenter for complainant.

Kai Angermann for respondent.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER ¹

Respondent Micronesia Interocean Line, Inc., a common carrier by water in the foreign commerce of the United States, has filed an application for permission to refund a portion of the freight charges collected from complainant Walter Plunkett & Company, a foreign freight forwarder, on six shipments carried by respondent from San Francisco, Calif. to ports in the Trust Territory of the Pacific Islands. Public Law 90-298, 75 Stat. 764, authorizes the Commission in its discretion to:

* * * permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier by water in foreign commerce * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: Provided, further, That the carrier * * * agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order ap-

¹ This decision became the decision of the Commission October 16, 1969.

proving the application: And provided further, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

The application was transmitted to the Commission by respondent on June 3, 1969 and as originally submitted involved shipments made on November 8, 1968 and December 14, 1968. Delay was occasioned by the necessity to require modifications of the application (together with several other applications submitted by respondent). Respondent was advised by the Commission that as to the shipments of November 8, 1968, refund could not be considered as the statutory time of filing had expired. Although the application as submitted to the examiner referred to such shipments, the application as to shipments made on November 8, 1968 is hereby denied, the filing having been more than 180 days subsequent to shipment.

Two shipments made on December 14, 1968 are here considered. The first shipment, evidenced by respondent's bill of lading SF/K21, designated complainant as the forwarder, R. M. Waite Co. as shipper, consigned to the order of the Bank of Hawaii, involved the following commodities:

Item No.	Commodity	Cubic feet	Weight in lbs.
(1)	Bdls. Copper Sheets.....	38	3, 687
(2)	Bales Plastic Conduits.....	39	551
(3)	Ctn. Plastic Pipe.....	4	41
(4)	Fittings.....	36	815
(5)	Bdl. Aluminum Conduits.....	9	302
(6)	Ctns. Bolts, Anchors and Screws.....	21	3, 550
(7)	Ctns. Glue.....	2	38
(8)	Ctn. Calking Compound.....	1	40

Freight charges were assessed by respondent and paid by complainant as follows:

- 3687 lbs. @ 94.50/ST—174.21 (Item No. 1)
- 88 Cu. ft. @ 63.50/40'—139.70 (Items Nos. 2, 3, 4, & 5)
- 3350 lbs. @ 94.50/ST—167.74 (Item No. 6)
- 3 cu. ft. @ 94.50/40'—7.00 (Items Nos. 7 & 8)

The second shipment here involved was under respondent's bill of lading SF/S12, complainant being designated as the forwarder, Gates Export Corporation as the shipper and as the consignee. The following commodities were described in the bill of lading:

Item No.	Commodity	Cubic feet	Weight in lbs.
(1)	Integral Automobile Parts.....	26	340
(2)	Plastic Garden Hose.....		1, 225

Freight charges assessed and paid by complainant were:

134 cubic feet @ \$94.50/14'—316.58

As to all commodities except those items numbered 2, 3, 4, and 5 in the bill of lading first above described, respondent assessed the N.O.S. rate of \$94.50 W/M.

The request for permission to refund is based on an agreement between the Trust Territory of the Pacific Islands whereby respondent agreed to assess rates no higher than those in effect for shipments moving on Far East Line to the Trust Territory via Guam. When issuing its tariff in September, 1968, respondent listed only rates on commodities known to it to be moving in the trade, being to a degree handicapped by reason of destruction of certain records during Typhoon Jean. Subsequently, respondent found that certain commodities moving in the trade had been omitted from its September, 1968 tariff, and effective March 14, 1969, revised its tariff to include those items. Copper sheets under the revised tariff were assessed \$72.00 per 2000 pounds; auto parts and accessories, N.O.S. were assessed at \$62.50, both W/M.

Had respondent's tariff reflected its agreement with the Trust Territory at the time of the shipments, the rate of \$72.00 per 2000 pounds would have been applied to the shipment of 3687 pounds of copper sheets, for a total charge of \$132.73 or \$41.48 less than the \$174.21 collected by respondent from complainant. Applying the \$62.50 per 40 cubic feet rate to the automobile parts measuring 26 cubic feet, the freight would have been \$20.80 less than the freight charged and collected. The application does not demonstrate that any other commodities shipped on December 14, 1968 are subject to refund.

The application insofar as the shipments made on December 14, 1968, was timely filed. No other shipments of the commodities here involved were made during the same period. Respondent had filed a tariff showing the rates here sought to be applied prior to the date of the application for permission to refund and the rate applied was omitted from the tariff upon which the charges were based by reason of administrative mistake. Good cause appearing, respondent Interocean Line, Incorporated is authorized to refund to complainant Walter Plunkett & Company the total sum of \$62.28 and shall publish the notice referred to in the statute above set forth and in 46 C.F.R. 502.92. The refund shall be made within 30 days after publication of such notice and within 5 days thereafter, respondent shall notify the Commission of the date of the refund and the manner in which payment was made. As to other matters set forth in the application, permission to refund is denied.

HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C., *September 24, 1969*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 417

ENTERPRISE SHIPPING CORP.

v.

MICRONESIA INTEROCEAN LINE, INC.

October 22, 1969

Respondent is permitted to refund to complainant the sum of \$33.18 as part of the freight charges assessed and collected for the transportation of brooms from San Francisco, Calif., to Truk, Trust Territory of the Pacific Islands, in February 1969.

Kai Angermann for applicant/respondent.

INITIAL DECISION OF C. W. ROBINSON, PRESIDING EXAMINER ¹

This is an application filed by Micronesia Line, Inc. (applicant), concurred in by complainant, for permission to refund to complainant the sum of \$33.18 as part of the charges assessed and collected by applicant for the transportation of the cargo referred to below.

On February 24, 1969, at San Francisco, Calif., there was delivered to applicant by complainant, on behalf of Associated Cooperatives Inc., among other commodities not here involved, a shipment of 10 cases of brooms for carriage on applicant's vessel *Aase Nielsen* to Truk, Trust Territory of the Pacific Islands. On-board bill of lading No. SF/T-26 was issued therefor on February 27, 1969. Freight charges of \$106.31 were assessed in accordance with the rate of \$94.50 per ton, weight or measurement, contained in Item 140 of applicant's Tariff No. 1, FMC No. 1, applicable to nonhazardous cargo, NOS. The charges were paid by complainant to applicant on March 18, 1969.

By agreement between applicant and the Trust Territory of the Pacific Islands, the former's rates are to be no higher than those in effect for shipments moving via Pacific Far East Line to the Trust

¹This decision became the decision of the Commission October 22, 1969.

Territory by way of Guam, or moving on vessels of other carriers serving the Trust Territory via Japan. When its tariff was issued in September 1968, applicant chose to use the same commodity items as shown in Trust Territory of the Pacific Agreement Tariff, Freight Tariff No. 2, applicable to the Trust Territory via Japan. In constructing its tariff applicant had attempted to obtain statistics showing commodities, etc., moving in the trade, but was unable to do so partly because of the destruction of records in Saipan as the result of typhoon Jean. Applicant thereafter learned that commodities other than those for which there were specific rates in its tariff were moving to the Trust Territory, whereupon new rates were established as applicant became aware of such shipments.

At the time of shipment there was no specific rate on brooms in applicant's tariff, for which reason there was assessed the rate of \$94.50 for cargo, NOS. Upon ascertaining that brooms could move via another carrier at a lower rate, applicant amended its tariff, effective March 13, 1969, by publishing a specific rate of \$65.00 per ton, weight or measurement, for "Brooms, Mops and Parts" (Item 110 of the tariff). At the new rate the charges on the instant shipment would have been \$73.13. The difference between the charges assessed and collected (\$106.31) and the charges which would have been assessed and collected under the new rate (\$73.13) amounts to \$33.18.

The failure to have on file a specific rate for brooms at the time the present shipment moved was, under the circumstances, an administrative error for which applicant and complainant should not be penalized. Applicant has complied with all of the preliminary requirements of the statute. In view of the foregoing, applicant hereby is authorized to refund to complainant the sum of \$33.18, and it shall publish the appropriate notice referred to in the statute. Refund shall be made within 30 days of such notice. Within five days thereafter, applicant shall notify the Commission of the date of the refund and of the manner in which payment has been made.

(Signed) C. W. ROBINSON,
Presiding Examiner.

Washington, D.C., SEPTEMBER 29, 1969.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 408

CARLTON J. SIEGLER

v.

MICRONESIA INTEROCEAN LINE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

October 22, 1969

No exceptions having been taken to the initial decision of the Examiner in this proceeding, and the Commission having determined not to review same, notice is hereby given, in accordance with Rule 13(g) of the Commission's Rules of Practice and Procedure, that the decision became the decision of the Commission on October 22, 1969.

It is ordered, That Micronesia Interocean Line, Inc., refund to Carlton J. Siegler the amount of \$125.12.

It is further ordered, That Micronesia Interocean Line publish promptly in its appropriate tariff the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 408, that effective February 7, 1969, the following rates were in effect from San Francisco, California to Majuro, Marshall Islands and Yap, Western Caroline Islands for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of Micronesia Interocean Line during the period from February 7, 1969, until March 13, 1969, subject to all other applicable rules, regulations, terms, and conditions of said rates and this tariff.

Commodity :	Rate W/M
Beds and Bed Parts.....	\$75. 50
Carpets, Carpeting, Rugs.....	\$77. 50
Linoleum	\$68. 00
Aluminum, N.O.S.....	\$79. 50
Insecticides	\$84. 25
Pads, Belts, and Napkins, Sanitary.....	\$70. 75
Brooms, Mops.....	\$65. 00

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before November 22, 1969, of the date and manner in which the refund herein ordered was made.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 408

CARLTON J. SIEGLER

v.

MICRONESIA INTEROCEAN LINE, INC.

Adopted October 22, 1969

Respondent permitted to refund to complainant the sum of \$125.12 as a portion of freight charges assessed and collected on seven specified commodities shipped from San Francisco to Majuro, Marshall Islands and Yap, Western Caroline Islands.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER ¹

Respondent Micronesia Interocean Line, Inc., a common carrier by water in the foreign commerce of the United States, has filed an application for permission to refund a portion of the freight charges collected from complainant Carlton A. Siegler on shipments of seven specified commodities via respondent's vessel from San Francisco to Majuro, Marshall Islands and Yap, Western Caroline Islands.

Public Law 90-298, 75 Stat. 764, authorizes the Commission in its discretion to:

* * * permit a common carrier by water in foreign commerce * * * to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund * * * will not result in discrimination among shippers: *Provided further*, That the * * * carrier * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: *Provided further*, That the carrier * * * agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the

¹ This decision became the decision of the Commission October 22, 1969.

Federal Maritime Commission may require, which give notice of the rate on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further*, That application for refund * * * must be filed with the Commission within one hundred and eighty days from the date of shipment.

The application was transmitted to the Commission on May 5, 1969, and all of the four bills of lading involved² were dated February 7, 1969.

The shipments in question totaled 249 cu. ft. Respondent applied the N.O.S. rate of \$94.50 per 40 cu. ft. and complainant paid the sum of \$588.26. The request for permission to refund is based on an agreement between respondent and the Trust Territory of the Pacific Islands whereby respondent agreed to assess rates no higher than those in effect for shipments moving on Far East Line to the Trust Territory via Guam. Respondent, when issuing its tariff in September 1968, listed only rates on commodities known to be moving in the trade, being to a degree handicapped by reason of destruction of certain records by Typhoon Jean. Subsequently, it found that certain commodities moving in the trade had been omitted and in March 1969, in order to comply with its agreement, revised its tariff to include rates on other commodities as follows:

Commodity :	Rate W/M
Beds and Bed Parts-----	\$75. 50
Carpets, Carpeting, Rugs-----	\$77. 50
Linoleum -----	\$68. 00
Aluminum, N.O.S.-----	\$79. 50
Insecticides -----	\$84. 25
Pads, Belts and Napkins, Sanitary-----	\$70. 75
Brooms, Mops-----	\$65. 00

The omission of these commodities from the tariff at the time of these shipments was in the nature of an administrative error.

Had the above commodity rates been applied, the freight would have been \$463.14 or \$125.12 less than the amount paid by complainant.

Respondent filed its application within the 180 day statutory period and, prior thereto, amended its tariff to reflect the lower rates. The rate charged and collected having been due to administrative error, since corrected, respondent is authorized to refund to complainant the sum of \$125.12. Respondent shall publish the appropriate notice referred to in the above set forth statute and in 46 C.F.R. 502.92 and the refund shall be made within 30 days of such notice. Within 5 days.

² B/L Number SF/M-5, SF/M-41, SF/M-45, and SF/YAP-3.

thereafter, respondent shall notify the Commission of the date of the refund and the manner in which payment was made.

JOHN MARSHALL,
Presiding Examiner.

Washington, D.C., SEPTEMBER 26, 1969.

13 F.M.C.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET No. 414

I.G.E. EXPORT DIVISION

v.

MICRONESIA INTEROCEAN LINE, INC.

November 25, 1969

NOTICE OF ADOPTION OF INITIAL DECISION AND
ORDER GRANTING REFUND

No exceptions having been taken to the initial decision of the examiner served November 4, 1969, in this proceeding and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on November 25, 1969.

It is ordered, That Micronesia Interocean Line, Inc., refund to I.G.E. Export Division, the amount of \$375.19.

It is further ordered, That Micronesia Interocean Line publish promptly in its appropriate tariff, the notice set forth at page 113.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before December 24, 1969, of the date and manner in which the refund herein ordered has been made.

By the Commission.

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 414

I.G.E. EXPORT DIVISION

v.

MICRONESIA INTEROCEAN LINE, INC.

November 25, 1969

Refund authorized of portion of freight charges collected because of error due to inadvertence in failure to file a new tariff item on shipment of insulated copper wire and cable, from San Francisco, California, to Koror, Palau, Western Caroline Islands.

C. F. Schlehner for complainant.

Kai Angermann for respondent.

INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER¹

This application under section 18(b) (3) of the Shipping Act, 1916, (the act), seasonably filed on May 23, 1969, by the respondent, and concurred in by the complainant, is for permission to refund to the complainant \$375.19 as a portion of the freight charges collected on a shipment of insulated copper wire and cable on February 27, 1969, from San Francisco, Calif., to Koror, Palau, Western Caroline Islands.

An agreement between the Trust Territory of the Pacific Islands and the respondent calls for freight rates no higher than those in effect on shipments on vessels of the Pacific Far East Line via Guam or on vessels of various other carriers via Japan, to the Trust Territory. The shipment herein was charged on the bases of a cargo N.O.S. rate of \$94.50 W/M, whereas it apparently could have been moved at a rate of \$72 W/M via another carrier (Pacific Far East Line).

Based on the respondent's newly established rate of \$72 W/M, effective March 13, 1969, and using the measurement rate per 40 cubic

¹This decision became the decision of the Commission November 25, 1969.

feet and the measurement of 667 cubic feet of the shipment, the freight charges would be \$1,200.60, instead of the charges actually collected of \$1,575.79, and the respondent now seeks approval to refund the difference of \$375.19. No other shipment of copper wire or cable moved on respondent's line during this period in issue, and the authorization of the refund will not discriminate among any shippers. Section 18 (b)(3) of the act permits the Commission in its discretion and for good cause shown to permit a refund of a portion of the freight charges collected as in the circumstances herein provided that, among other things, the carrier shall publish in its tariff the appropriate notice referred to in statute, giving notice of the rate on which the refund is based. This notice shall be as follows:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 414, that effective February 27, 1969, the rate on insulated copper wire and cable from San Francisco, California, to Koror, Palau, Western Caroline Islands for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of the respondent from February 27, 1969, until March 12, 1969, inclusive is \$72.00 a ton W/M, subject to all other applicable rules, regulations, terms and conditions of the said rate and of this tariff.

Good cause shown, the respondent hereby is authorized to refund to the complainant \$375.19, provided that the respondent upon receiving final permission to make this refund publishes in its tariff the appropriate notice required by the statute. The respondent shall notify the Commission within 30 days after the date of final decision herein of the date and manner in which the refund herein authorized was made.

CHARLES E. MORGAN,
Presiding Examiner.

WASHINGTON, D.C., *November 4, 1969.*

13 F.M.C.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET NO. 415

DISCAL CORPORATION

v.

MICRONESIA INTEROCEAN LINE, INC.

November 25, 1969

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

No exceptions having been taken to the initial decision of the Examiner served November 6, 1969, in this proceeding, and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on November 25, 1969.

It is ordered, That Micronesia Interocean Line refund to Discal Corporation, the amount of \$11.96.

It is further ordered, That Micronesia Interocean Line published promptly in its appropriate tariff the notice set forth at page 116.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before December 24, 1969, of the date and manner in which the refund herein ordered has been made.

By the Commission.

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 415

DISCAL CORPORATION

v.

MICRONESIA INTEROCEAN LINE, INC.

November 25, 1969

Refund authorized of portion of freight charges collected because of error due to inadvertence in failure to file a new tariff item on shipment of automotive storage batteries, from San Francisco, California, to Saipan, Mariana Islands.

Carroll Heath for complainant.

Kai Angermann for respondent.

INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER ¹

This application under section 18(b)(3) of the Shipping Act, 1916, (the Act), seasonably filed on May 14, 1969, by the respondent, and concurred in by the complainant, is for permission to refund to the complainant \$11.96 as a portion of the freight charges collected on a shipment of automotive storage batteries on February 7, 1969, from San Francisco, California, to Saipan, Mariana Islands.

An agreement between the Trust Territory of the Pacific Islands and the respondent calls for freight rates no higher than those in effect on shipments on vessels of the Pacific Far East Line via Guam or on vessels of various other carriers via Japan, to the Trust Territory. The shipment herein was charged on the basis of a cargo N.O.S. rate of \$94.50 a ton of 2,000 pounds, whereas it apparently could have been moved at a rate of \$86.00 W/M via another carrier (Pacific Far East Line).

Based on the respondent's newly established rate of \$86.00 W/M, effective March 13, 1969, on the per ton basis on the shipment of 3,600 pounds, the freight charges would be \$154.80, instead of the charges

¹ This decision became the decision of the Commission November 25, 1969.

actually collected of \$166.76, and the respondent now seeks approval to refund the difference of \$11.96. No other shipment of automotive storage batteries moved on respondent's line during this period in issue, and the authorization of the refund will not discriminate among any shippers. Section 18(b)(3) of the Act permits the Commission in its discretion and for good cause shown to permit a refund of a portion of the freight charges collected as in the circumstances herein provided that, among other things, the carrier shall publish in its tariff the appropriate notice referred to in statute, giving notice of the rate on which the refund is based. This notice shall be as follows:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 415, that effective February 7, 1969, the rate on automotive storage batteries from San Francisco, California, to Saipan, Mariana Islands for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of the respondent from February 7, 1969, until March 12, 1969, inclusive is \$86.00 a ton W/M, subject to all other applicable rules, regulations, terms and conditions of the said rate and of this tariff.

Good cause shown, the respondent hereby is authorized to refund to the complainant \$11.96, provided that the respondent upon receiving final permission to make this refund publishes in its tariff the appropriate notice required by the statute. The respondent shall notify the Commission within 30 days after the date of final decision herein of the date and manner in which the refund herein authorized was made.

CHARLES E. MORGAN,
Presiding Examiner.

WASHINGTON, D.C., *November 6, 1969.*

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET No. 409

INTERNATIONAL MATERIALS CORP.

v.

MICRONESIA INTEROCEAN LINE, INC.

December 2, 1969

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

The initial decision of the examiner in this proceeding was served September 30, 1969. In the absence of exceptions, we issued our notice of intention to review the decision on October 24, 1969.

After careful review of the decision, we conclude that the examiner's disposition of the application herein was correct and, accordingly, adopt his decision as our own.

It is ordered, That Micronesia Interocean Line, Inc., refund to International Materials Corp. the sum of \$19.18.

It is further ordered, That Micronesia Interocean Line publish promptly in its appropriate tariff, the following notice:

Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 409 that, effective December 21, 1968, the rate on tiles, N.O.S., from Los Angeles, California, to Koror, Palau, W.C.I., for purposes of refunds or waivers of freight charges on any shipments which may have been shipped on vessels of Micronesia Interocean Line during the period from December 21, 1968, until March 13, 1969, is \$83.50 per short ton, subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before January 9, 1969, of the date and manner in which the refund herein ordered was made.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 409

INTERNATIONAL MATERIALS CORP.

v.

MICRONESIA INTEROCEAN LINE, INC.

December 2, 1969

Respondent permitted to refund to complainant the sum of \$19.18 as a portion of freight charges assessed and collected on a shipment of tiles from Los Angeles to Koror, Palau, Western Caroline Islands.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER ¹

Respondent Micronesia Interocean Line, Inc., a common carrier by water in the foreign commerce of the United States, has filed an application for permission to refund a portion of the freight charges collected from complainant International Materials Corp. on a shipment of tiles via respondent's vessel from Los Angeles to Koror, Palau, Western Caroline Islands.

Public Law 90-298, 75 Stat. 764, authorizes the Commission in its discretion to:

* * * permit a common carrier by water in foreign commerce * * * to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund * * * will not result in discrimination among shippers: *Provided further*, That the * * * carrier * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: *Provided further*, That the carrier * * * agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the man-

¹ This decision became the decision of the Commission December 2, 1969.

ner prescribed by the Commission in its order approving the application: *And provided further*, That application for refund * * * must be filed with the Commission within one hundred and eighty days from the date of shipment.

The application was transmitted to the Commission on May 26, 1969 and the shipment involved was under bill of lading dated December 21, 1968. In Special Docket No. 406 the Commission held that, in accordance with rule 8(f), applications deposited in the United States mail within 180 days of the date of shipment are timely filed.²

Complainant's shipment of tiles totaled 3,488 lbs. Respondent applied the N.O.S. rate of \$94.50 per short ton and complainant paid the sum of \$164.80. The request for permission to refund is based on an agreement between respondent and the Trust Territory of the Pacific Islands whereby respondent agreed to assess rates no higher than those in effect for shipments moving on Pacific Far East Line to the Trust Territory via Guam. Respondent, when issuing its tariff in September, 1968, listed only rates on commodities known to be moving in the trade, being to a degree handicapped by reason of destruction of certain records by Typhoon Jean. Subsequently, it found that certain commodities moving in the trade had been omitted and in March, 1969, in order to comply with its agreement, revised its tariff to include rates on other commodities, including a rate of \$83.50 per short ton for tiles, N.O.S. The omission of tiles from the tariff at the time of the shipment here involved was in the nature of an administrative error.

Had the \$83.50 per short ton rate been applied to this shipment, the freight would have been \$145.62 or \$19.18 less than the amount paid by complainant.

Respondent filed its application within the 180-day statutory period and, prior thereto, amended its tariff to reflect the lower rate. The rate charged and collected having been due to administrative error, since corrected, respondent is authorized to refund to complainant the sum of \$19.18. Respondent shall publish the appropriate notice referred

² The statute is remedial * * * being intended to provide shippers some equitable relief from the rigid provisions of section 18(b) (3) of the Shipping Act, 1916. It does not provide that applications must be received by the Commission before filing is accomplished. In the absence of statutory provision to the contrary, the Commission is free to consider applications filed when mailed. 71 C.J.S. 847. If such a requirement were to be imposed, applicants not willing to hazard the fallibilities of the postal service would be forced to hand carry applications to Washington or perhaps to a regional office of the Commission.

These applications are pleadings in the nature of complaints, albeit the complainant is hand in hand with a friendly respondent, and are subject to the Commission's Rules of Practice and Procedure. Rule 8(f) has been consistently applied to filing requirements such as those for exceptions and replies set forth in rule 13(g). General Order 13 concerns the filing of tariffs and is in no way relevant to the filing of special docket applications or any other pleading.

to in the above set forth statute and in 46 C.F.R. 502.92 and the refund shall be made within 30 days of such notice. Within 5 days thereafter, respondent shall notify the Commission of the date of the refund and the manner in which payment was made.

JOHN MARSHALL,
Presiding Examiner

WASHINGTON, D.C., *September 30, 1969.*

13 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 69-33

ATLANTIC & GULF/WEST COAST OF SOUTH AMERICA CONFERENCE
AGREEMENT No. 2744-30, ET AL.

REPORT

December 15, 1969

Agreement whereby respondent conferences are authorized to agree to and establish through intermodal arrangements with other modes of transportation approved for a period of eighteen months provided prohibition of negotiation on such matters by individual lines is removed.

John R. Mahoney and *Jose A. Cabranes* for Respondent Conferences.

Raymond P. Demember and *Howard A. Levy* for the Freight Forwarders Institute.

John Mason and *Robert L. Dausend* for Sea-Land Service, Inc.

Fritz R. Kahn, *Arthur Loback*, and *Raymond M. Zimmet* for the Interstate Commerce Commission.

Norman D. Kline, *Thomas A. Ziebarth*, and *Donald J. Brunner*, Hearing Counsel.

BY THE COMMISSION: (*James F. Fansen*, *Vice Chairman*; *Ashton C. Barrett*, *George H. Hearn*, *Commissioners*)*

This proceeding was instituted to determine whether nine conferences serving the U.S. South American trades could amend their basic agreements by adding the following clause:¹

*Chairman *Helen Delich Bentley* did not participate.

¹ The nine respondent conferences are: Atlantic & Gulf/West Coast of Central America and Mexico Conference (Agreement No. 8300-8); Atlantic & Gulf/West Coast of South America Conference (Agreement No. 2744-30); East Coast Colombia Conference (Agreement No. 7590-16); Leeward & Windward Islands & Guianas Conference (Agreement No. 7540-18); U.S. Atlantic & Gulf-Haiti Conference (Agreement No. 8120-8); U.S. Atlantic & Gulf-Jamaica Conference (Agreement No. 4610-13); U.S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference (Agreement No. 6190-23); U.S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference—Oil Companies Contract Agreement (Proprietary Cargo) (Agreement No. 6870-77); West Coast South America Northbound Conference (Agreement No. 7890-5).

No provision of this agreement shall be deemed to prohibit the Conference from agreeing to, and establishing, through rates by arrangement with other modes of transportation; or to prohibit the publication and filing of through rates by the Conference, in conformity with any such rate agreement, or to prohibit the issuance by the member lines of through bills of lading pursuant to a published Conference tariff embodying through rates or the adoption by the member lines of any uniform through bill of lading which may be agreed upon, and formally adopted, by the Conference. However, no member line, either individually or in concert with any other member line or lines or any non-member line or lines, may negotiate, establish, publish, file or operate under any through intermodal transportation rates or issue any through bills of lading otherwise than pursuant to the formal action and authorization of the Conference.

In addition each agreement would be modified to remove certain language clearly in conflict with the above.

Permission to intervene was granted to Sea-Land Service, Inc., the Gulf/Mediterranean Ports Conference, the Gulf/United Kingdom Conference, Gulf/Baltic & Scandinavian Sea Ports Conference, the Department of Transportation, the Interstate Commerce Commission, and the Freight Forwarders Institute. The proceeding was limited to affidavits, briefs and oral argument. The issues as framed in the order instituting the proceeding are:

1. Whether the concerted activities stated in the new paragraph to be added to each agreement are approvable in the form requested by the Conference.
2. The extent to which the Commission has jurisdiction to approve such agreements.
3. The extent to which the Commission may accept for filing under section 18(b) of the Shipping Act, 1916, the through rate tariffs and through bills of lading that appear to be contemplated by the agreements.
4. The extent of the antitrust immunity that would stem from approval of the agreements.

In *Disposition of Container Marine Lines*, 11 F.M.C. 476 (1968), Container Marine Lines (CML) filed tariffs which named rates between ports in the U.S. North Atlantic Eastport to Hampton Roads Range and inland points in the United Kingdom via the Port of Felixstowe. At the time CML was a member of the North Atlantic Westbound Freight Association and the North Atlantic United Kingdom Freight Conference. The conferences objected to the CML tariffs claiming that the transportation involved was subject to conference jurisdiction and only the rates in the conference's tariffs could lawfully be charged. The Commission held that the intermodal service offered by CML was not within the scope of the conference agreements and thus not subject to conference control.

The conferences have stated that it is to avoid the situation in the CML case that they have filed the proposed modification which would

allow the conferences to adapt to the intermodal developments with a minimum of confusion and conflict among the member lines.

DISCUSSION AND CONCLUSION

Before directing our attention to the substantive issues, it is necessary to deal with certain procedural allegations and arguments made by the Freight Forwarders Institute.

The Institute argues that included in this proceeding as "subsidiary issues" are such things as "the estimated tonnage involved" in operations under the proposed modifications, "the treatment to be accorded small shippers, the basis on which inland rates will be predicated and the manner in which interline arrangements will be established." The Institute calls for a public evidentiary hearing lest these subsidiary issues "be administratively determined without any discovery, any gathering of the facts, indeed without a scintilla of evidence to support the Commission's ultimate conclusions."

The "subsidiary issues" raised by the Institute are simply not presently before us. Questions such as how small shippers will be treated or how inland rates will be fixed will arise only when and if the conferences enter into actual intermodal arrangements. These arrangements must, of course, be preceded by meetings, discussions, and negotiations. Such meetings, etc. must be conducted by the conference within the framework and authority of the basic agreements. The proposed modifications are designed solely to insure that the concerted activity necessarily preliminary to any intermodal arrangement is in fact within the authority granted by us in the respective conference agreements. Any approval we may grant to the modifications here at issue would not, of course, extend to the particular intermodal arrangements arrived at by the conferences should those arrangements involve matters subject to section 15. Viewed in this light, the Institute's subsidiary issues are patently premature. They deal with questions aimed at facts and agreements which do not now exist. Thus, an evidentiary hearing on these questions is not warranted at this time.

The institute places its principal reliance in *Marine Space Enclosures, Inc. v. Federal Maritime Commission* (D.C. Cir. No. 22,936, July 30, 1969). In *Marine Space Enclosures*, the Court of Appeals held that we erred in approving without any kind of hearing a contract for the construction and maintenance of maritime passenger terminal facilities and the Port of New York and a companion agreement between carriers and the Port of New York Authority for the use of the terminal. The case is simply not precedent applicable to the

issue here. The Institute's reliance on the *Marine Space Enclosures* case ignores the basic holding—namely, that “What the words of § 15 fairly indicate is that *an appropriate hearing* shall be held prior to either approval or disapproval.” *Marine Space Enclosures, supra*, at 9 (emphasis ours). In this proceeding, which involves no discernible questions of fact, the receipt of memoranda of law and sworn statements and the hearing of oral argument will sufficiently develop the issues. (See, e.g., *The City of Los Angeles v. Federal Maritime Commission*, 388 F. 2d 582 (D.C. Cir. 1967); *Outward Continental North Pacific Freight Conference v. Federal Maritime Commission*, 385 F. 2d 981 (D.C. Cir. 1967).)

The conferences do not yet know the nature of any arrangements or tariffs which might emerge from the projected discussions with carriers of other modes of transportation. However, the conferences do recognize that any such arrangements and underlying facts and circumstances will be subject to the scrutiny of the Commission when such arrangements are submitted to the Commission at a later stage under sections 15 and 18(b) of the Act.

The renewed request for an evidentiary hearing is hereby denied.

1. *Approvability of the modifications in their present form.*

The respondent conferences, of course, urge that the modifications are approvable in their present form. They argue that the only purpose of the modifications is to permit the conferences to participate in the development of intermodal transportation by the use of through movements of freight between inland points in foreign countries and inland points in the United States. The modifications were filed, they say, as a result of the Commission's decision in the *CML* case and are designed to prevent unilateral entry of conference members into the movement of intermodal traffic—thereby avoiding the strain on the conference structure arising in the *CML* case. The respondent conferences stress that the modifications are necessarily broad so as to provide for the full development of intermodal transportation in the future even though the conferences have not at this time embarked upon any large scale containerized system of transportation in their respective trades. Accordingly, they are merely here seeking the authority to sit down with carriers and freight forwarders, subject to the Interstate Commerce Act, as well as foreign carriers and forwarders, to discuss arrangements for through intermodal routes and rates and related bill of lading provisions. The conferences realize that the results of these negotiations will have to be filed with us in appropriate tariffs or agreements.

However, Hearing Counsel would substitute the following language for that submitted by the conferences.

Subject to approval under section 15 of the Shipping Act, 1916, the conference may enter into arrangements with other modes of transportation whereby through rates may be agreed to and established, and, in conformity with any such rate agreement, may publish and file such through rates. The member lines may issue through bills of lading pursuant to a published Conference tariff embodying through rates or pursuant to a uniform bill of lading agreed to by the member lines and formally adopted by the conference. However, no member line, either individually or in concert with any other member line or lines or any non-member line or lines, may negotiate, establish, publish, file or operate under any through intermodal transportation rates or issue any through bills of lading otherwise than pursuant to the formal action and authorization of the Conference at any time after the Conference has published and filed a through rate pursuant to any arrangement which may be entered into in accordance with this paragraph.

Hearing Counsel's main problem with the modifications as they are presently drafted concerns the possible misuse of the authority granted in them. Thus, while Hearing Counsel feel that the conferences have taken a step in the right direction, they feel that the conferences may by their refusal to act to stimulate the intermodal movement of cargo frustrate a progressive carrier member in its desire to establish a through intermodal movement on its own. Since the modifications in their present form provide that members may quote intermodal rates only pursuant to conference tariffs, a refusal by the conference to enter into intermodal arrangements would effectively prevent any member from doing so on its own initiative. Hearing Counsel would remove this impediment by providing each member with the right of independent action—achieved by adding language to the effect that no conference member may establish an independent intermodal service if the conference itself has already published and filed rates for such a service.

The conferences urge that the proposal to permit individual member lines of the conferences to take independent ratemaking action is based upon a fundamental misunderstanding of the purpose and function of conferences of steamship lines; ignores other well-established devices available to the Commission in the exercise of its regulatory functions; and would not in any event accomplish its intended purpose.

Hearing Counsel's proposal appears to the conferences to be based upon the erroneous notion that, as a result of the adoption of these proposals and amendments, the conferences' member lines would be "*giving up* * * * the right to independent action", and this mistakenly assumes that the proposed amendments would somehow withdraw from the member lines a right which they now possess.

The conferences contend the adoption of Hearing Counsel's proposal to "preserve to the individual members of the conferences the right of independent action", would actually have the effect of *establishing* that putative "right". The conferences further argue that Hearing Counsel's proposal ignores explicit Congressional repudiation of the "right of independent action" on the part of individual carriers within a single conference. Thus, at the time of the adoption of the Dual Rate Law, Public Law 87-346, 75 Stat. 762 (1961), it was proposed that section 15 of that Act be amended to prohibit the approval of agreements between carriers of 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 conferences) each conference retained "the right of independent action". The proposed amendment to section 15 was accepted only after both houses of Congress had agreed to limit the prohibition on carrier agreements to carriers not members of the same conference. The legislative history of the resulting provision in the second paragraph of section 15 is clear. In the words of the report of the Committee on Merchant Marine and Fisheries of the House of Representatives, this provision was "not meant to require the right of independent action on the part of the individual carriers *within a single conference.*"²

We cannot agree with Hearing Counsel that a right of independent action is called for here. It could in fact do much more harm than good. Any conference is but a fragile balancing of conflicting competitive interests. Foremost in the mind of each member is, quite naturally, its own economic well-being. The conference is able to exist as an entity only by restricting the individual's right to go his own economic way. Thus, it is that rates are maintained at stable levels and frequent and reliable service is offered. Current forms of the intermodal concept are new and their fruition will occur, undoubtedly, only after some experimentation and much give-and-take among the parties in interest. It can come about only through the cooperation of all concerned. Thus, if each member of a conference is free to pursue his

² House Committee on Merchant Marine and Fisheries, *Providing for the Operation of Steamship Conferences*, H. Rep. No. 498, 87th Cong., 1st Sess., on H.R. 6775 (June 8, 1961) at 10 and *Index to the Legislative History of the Steamship Conference/Dual Rate Law*, Senate Doc. No. 100, 87th Cong., 2d Sess. at 121 (emphasis supplied), quoted with approval in Senate Committee on Commerce, *Steamship Conferences and Dual Rate Contracts*, S. Rep. No. 860, 87th Cong., 1st Sess., on H.R. 6775 (August 31, 1961) at 16 and *Index to the Legislative History of the Steamship Conference/Dual Rate Law*, *supra*, at 215. See, also, Conference Report No. 1247, *Index to the Legislative History of the Steamship Conference/Dual Rate Law*, *supra*, at 445, and 1961 U.S. Code Cong. and Adm. News 3108, 3145.

own way at any point in the midst of conference efforts, the possibility is very real that successful conference action would be frustrated.

We are not unmindful, however, of the problem pointed to by Hearing Counsel. A conference could through foot-dragging, inertia, opposition by a few members, or otherwise, effectively stifle the desire of its progressive members from instituting intermodal service. On the other hand it is not the policy of the Commission to compel carriers to offer any particular type of service when carriers deem commercial considerations not to warrant it. Thus, we must find a balance between the need to prevent inhibitions to progressive service and to not unduly interfere in commercial matters.

To accomplish this, we will approve the proposed agreement modifications with two limitations. First we will limit the duration of our approval; and, second we will grant a limited right of independent action.

The duration of our approval will be 18 months. During that time conference members will be able to act in concert toward the establishment of intermodal service, and, upon timely request, to seek renewed approval of the subject modifications. However, if during the first 12 months of the initial approval period, the conferences do not achieve any results from their negotiations (which will have to be filed with this Commission), then at the end of that first 12 month period the prohibition in the modifications against mere negotiation by an individual member will lapse.

Such limitation of the prohibition against mere negotiation will allow any individual member, in the face of the conference's failure, refusal or inability to move forward on its own, to at least preliminarily prepare itself for the institution of its own intermodal service should the conference's efforts fail completely. The imposition of a time limit on our approval should serve as an impetus to conference efforts. Furthermore, the independent efforts of individual members during the last six months could have some bearing on a request for renewed approval of the modifications.

Hearing Counsel's other language changes wording to cast the modifications in the "affirmative" rather than the "negative". The conferences, however, object to this. The conferences submit that their "negative" formulation ("No provision of this Agreement shall be deemed to prohibit * * *") is unobjectionable and preferable to the "affirmative" formulation proposed by Hearing Counsel. The "negative" formulation would preclude conflicting interpretations of any and all other provisions of the several organic agreements, including

the "port-to-port" language. Thus, other possibly conflicting provisions of the organic agreements need not be amended or altered in any way, including the "port-to-port" language to which Hearing Counsel refers.

There is nothing inherently wrong with phrasing a modification in the negative. Since we have limited our approval to 18 months, the negative casting eliminates the need to engage in extensive remodification should the present modification not receive continued approval.

Finally, intervenor Sea-Land would substitute the following for the conference's modification :

No provision of this Agreement shall be deemed to prohibit the Conference from agreeing to, and establishing, through ~~rates routes~~ by arrangement with other modes of transportation; or to prohibit the publication and filing of ~~through rates~~ by the Conference of *rates applicable to such through routes, such rates to be a combination of the conference port to port rate and the rate applicable to such other mode of transportation; in conformity with any such rate agreement*; or to prohibit the issuance by the member lines of through bills of lading pursuant to a published Conference tariff embodying ~~through rates rates applicable to through routes~~ or the adoption by the member lines of ~~any uniform through bill of lading of uniform practices~~ which may be agreed upon, and formally adopted, by the Conference *in connection with through bills of lading*. However, no member line, either individually or in concert with any other member line or lines or any nonmember line or lines, may negotiate, establish, publish, file or operate under any through intermodal transportation rates or issue any through bills of lading otherwise than pursuant to the formal action and authorization of the Conference.

Intervenor Sea-Land's position is that the proposed amendments "in their present form go further than needed" to accomplish their purpose. Sea-Land is apparently concerned that "the Conferences would be authorized to negotiate joint rates which would provide, as to the port-to-port segment of the joint transportation, a return to the ocean carrier which differs from the port-to-port ocean freight rates published by the Conferences." As we have already noted, the proposed amendments to the organic agreements of the several conferences merely permit the conferences to meet with freight forwarders and carriers of other modes of transportation to discuss arrangements for through routes and the rates and bills of lading related thereto. The kind of arrangements which may emerge from such discussions with carriers of other modes of transportation and freight forwarders are presently unknown. Any arrangement which the conferences might make under the proposed amendments would be reflected in agreements and tariffs filed with this Commission and in accordance with other appropriate statutes and rules.

Sea-Land is premature in raising the spectre of so-called "port equalization practices", which it apparently feels travels in the guise of so-called joint rates. The Chairman of the conferences, in an affidavit of July 29, 1969, has unequivocally stated that:

The proposed amendments to the organic agreements of the several Conferences are in no way concerned with port equalization or absorption of inland transportation costs. The proposed amendments are not designed to approve or disapprove of either of these practices (Affidavit of Charles D. Marshall, July 29, 1969, paragraph 11).

The conferences argue that the questions raised by Sea-Land can and should be raised by it, and any other interested parties, when and if the practices feared by Sea-Land are embodied in through inter-modal transportation arrangements submitted to the Commission and other regulatory agencies.

Sea-Land further asserts that the proposed amendments go "too far" in authorizing the conferences to agree upon and formally adopt a uniform through bill of lading. Sea-Land does not explain what conceivable interest it could have in the adoption under applicable law of a bill of lading governing the operations of other enterprises. Nor does Sea-Land explain or cite authority for its view that the particular provision referred to is in any way objectionable. Consequently, we will approve the provision as submitted provided prohibition of negotiations on such matters by individual lines is removed.

2. *Jurisdiction over the modifications.*

Only the Freight Forwarders Institute challenges our jurisdiction over the proposed modifications. Both Hearing Counsel and respondents point out that the parties to the agreements are subject to the Shipping Act, 1916, and the subject matter is appropriate to section 15. Thus, the two ingredients essential to our jurisdiction are present. They also contend that the inclusion of persons not subject to our jurisdiction in the actions taken under the agreements does not deprive us of our jurisdiction. We agree.

Section 15 of the Act, 46 U.S.C. § 814, requires that ". . . every common carrier by water or other persons subject to [the Act]" file with the Commission for approval certain kinds of agreements made with another such carrier or person subject to the Act. Under section 1 of the Act, 46 U.S.C. § 801, a "common carrier by water" means, *inter alia*, a common carrier by water in foreign commerce, which in turn, is defined as:

... a common carrier ... engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories or possessions and a foreign country, whether in the import or export trade

It is clear that the conferences' member lines are persons subject to the Act and that the agreements—which envisage joint ratemaking action by persons subject to the Act—fall squarely within the Commission's jurisdiction under section 15. Thus, the only question which could possibly be raised regarding the Commission's jurisdiction to approve the agreements is that they contemplate through transportation arrangements which would include inland carriage in the United States. It is apparently the view of Freight Forwarders Institute that because any person providing any inland transportation service in the United States comes under the exclusive jurisdiction of the ICC such a person may not enter into any arrangement with a carrier subject to the Shipping Act. This view is patently wrong. In the absence of a showing that the two sister agencies claim jurisdiction over the same particular activity, the two agencies may exercise concurrent jurisdiction over the same *persons*. (See, e.g., *Alabama Great Southern Railroad Company v. Federal Maritime Commission*, 126 US App. DC 323, 379 F. 2d 100, 102 (1967)). Approval of the modifications or even of the conferences' subsequent through intermodal arrangements would leave unimpaired the jurisdiction of each agency over the matters assigned to its care.

There is nothing unusual about a situation in which arrangements for through transportation service are filed with more than one regulatory agency and each such agency limits its jurisdiction to a particular segment of the through transportation. There are any number of examples of carriers who hold authority from the ICC to operate as freight forwarders in inland transportation and file inland tariffs with the ICC while filing ocean tariffs with the Commission. (See, e.g., *Determination of Common Carrier Status*, 6 F.M.B. 245 (1961)). As the Court of Appeals for the District of Columbia Circuit has recently noted :

Where a person performs functions some of which are subject to regulation under the Shipping Act and others under the Interstate Commerce Act, the same person might be subject to the jurisdiction of one or the other Commissions depending upon the subject matter to be regulated. *Alabama Great Southern Railroad Company v. Federal Maritime Commission, supra*, at 102.

In a related case arising under the Act and the Intercoastal Shipping Act, 1933, the Commission has held that it is not precluded from asserting jurisdiction over a service offered by a common carrier subject

to the Act merely because a portion of that service is subject to the regulation of another agency.

We are merely subjecting to regulation a service authorized by the provisions of the Shipping Act offered by a common carrier subject to that Act. If a portion of that service is conducted by a carrier subject to another agency's regulation and the carrier performs that service in violation of the laws administered by that agency, that is a matter for the agency concerned. Practical difficulties and problems may arise but jurisdictional conflicts should not. *Matson Navigation Company—Container Freight Tariffs*, 7 F.M.C. 480, 491-492 (1963).

3. *Acceptance of intermodal rates.*

We published in the Federal Register the following proposed rule on October 18, 1969 (34 F.R. 16880) :

§ 536.16 Filing of Through Rates and Through Routes

Every common carrier by water in the foreign commerce of the United States, as defined in the Shipping Act, 1916, or conference of such carriers, shall file with the Commission tariffs of any through rates, charges, rules, and regulations governing the through transportation of freight between ports or points in the United States and ports or points in a foreign country in which such carrier or confrence participates. Such tariffs shall include the names of all participating carriers, the established through route, a description of the service to be performed by each participating carrier, and shall clearly indicate the division, rate, or charge that is to be collected by the water carrier subject to the Shipping Act, 1916, for its port-to-port portion of the through service, which division, rate or charge shall constitute a proportional rate subject to the provisions of the Shipping Act, 1916. Such tariffs will be filed and maintained in the manner provided in Section 18(b) of the Shipping Act, 1916, and this Part. A memorandum of every arrangement to which a carrier or conference of carriers subject to the jurisdiction of the Shipping Act, 1916, is or becomes a party, for transportation between a port or point in the United States and a port or point in a foreign country, establishing any joint rate which is offered in connection with any other carrier, shall be filed with this Commission concurrently with the filing of the through rate tariffs.*

At present we believe that the Federal Maritime Commission has the authority and regulatory responsibility to accept such rates for filing; but to avoid any uncertainty or confusion and to establish coordination of regulation, we instituted our rulemaking proceeding. Consequently, the determination of this issue must await the outcome of that proceeding.

4. *The extent of the antitrust immunity stemming from approval of the agreements.*

Section 15 of the Act provides that "Every agreement, modification, or cancellation lawful under this section . . . shall be excepted from the provisions" of the antitrust laws.

*Arrangements subject to Section 15 of the Act must also be filed and approved in accordance with the requirements of General Order 24 (46 CFR 522).

As we have already noted, before the conferences' member lines may take the joint action contemplated by the agreements with immunity from challenge, either under the Act or under the antitrust laws, the agreements herein must be approved by the Commission under section 15 of the Act.

The only agreements now before us would, on the one hand, prohibit individual conference members from entering into intermodal arrangements on their own, while on the other, permitting the conferences to do so as a whole. The antitrust immunity which would flow from the approval of these particular agreements presents no novel or difficult problems. In its simplest terms it is merely an agreement among competing carriers to regulate the terms of competition among themselves. Thus, the conferences and their member lines would be exempt from the antitrust laws so long as they engaged in the concerted activity authorized under the approved agreements.

The question of the extent of the antitrust immunity which would flow from the actual intermodal arrangements which would be arrived at under the authority of the agreements before us now presents a different question, one which in large measure would appear to depend upon the precise terms of a particular arrangement. While both the conferences and Hearing Counsel would appear to argue that all parties to such arrangements would upon our approval of them be immune from prosecution under the antitrust laws, such a determination must await the filing of such arrangements.

For the foregoing reasons, we will approve the amendments to the agreements as proposed by the respondents for an 18-month period; provided, however, that if during the first 12 months of approval no results are achieved from negotiations as contemplated by the modifications then the individual members shall be free to enter into their own negotiations.

Any argument not specifically dealt with in this report has been considered and found to be either irrelevant, immaterial, or unnecessary to our decision herein.

JAMES V. DAY, *Commissioner*, dissenting:

Hearing Counsel, charged as we know with an advocacy for the public interest, had said that the Commission could simply disapprove the agreements as filed as being too vague in that they do not apprise an interested person of the scope of the activity contemplated thereunder, or approve them with modifications; coupling, however, any such approval with a strict interpretation of the meaning of the agreements so as to delineate precisely the activities which may be legally accomplished under them.

There are, indeed, questions preferably surveyed now; better explored early than late. The majority recognize this in their own choice of one possible answer with respect to safeguarding progressive carriers from frustration because of the manner in which such agreements might be implemented. The Freight Forwarders Institute is concerned about the effects on forwarders and seeks, therefore, the opportunity to develop underlying information and factual data.*

Hence, I would support an expedited hearing before the Examiner to ascertain the impact of such agreements with regard to the above-noted. An expedited examination will not unduly interfere with the general objectives of the agreements. The parties themselves are not unaware of the possible ramifications. Precipitous approval now can later cause greater delay to this, a most significant transport development—the intermodal concept.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

*As the Court stated in *Marine Space Enclosures*, "antitrust issues do not lend themselves to disposition solely on briefs and argument. Even though there may be no disputed 'adjudicatory' facts, the application of the law to the underlying facts involves the kind of judgment that benefits from ventilation at a formal hearing." *Marine Space Enclosures, Inc. v. FMO et al.* (No. 22,936) United States Court of Appeals for the District of Columbia, D.C. Circuit 420 F. 2d 577 (July 30, 1969).

FEDERAL MARITIME COMMISSION

DOCKET No. 69-33

ATLANTIC & GULF/WEST COAST OF SOUTH AMERICA CONFERENCE
AGREEMENT No. 2744-30, ET AL.

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 the modifications to the agreements under consideration in this proceeding are hereby approved subject to their amendment to provide that such arrangements shall continue only for a period of 18 months from the date hereof and if during the first 12 months of the initial approval period, the conferences do not achieve any results from their negotiations (which will have to be filed with this Commission), then at the end of the first 12-month period, the prohibition in the modifications against negotiation by an individual member shall be null and void.

It is further ordered, That such agreements shall be null and void unless the parties thereof submit appropriate modifications within 60 days of the date hereof.

By the Commission.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 419

MESSRS. DA PRATO—FLORENCE AS BUYING AGENT OF MESSRS.
UNITED CHINA AND GLASS CO.—NEW ORLEANS

v.

MED-GULF CONFERENCE ON BEHALF OF MESSRS.
LYKES BROS. STEAMSHIP CO.

December 16, 1969

Lykes Bros. Steamship Company permitted to waive collection of a portion of the freight charges on a shipment of glassware from Leghorn, Italy to New Orleans, Louisiana.

G. Ravera for applicant.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER¹

The Med-Gulf Conference, on behalf of Lykes Bros. Steamship Company, a conference member and a common carrier by water, has filed an application for permission to waive collection of a portion of the freight from United China and Glass Company of New Orleans, Louisiana, on a shipment of glassware from Leghorn, Italy to New Orleans.

Public Law 90-298, 75 Stat. 764, authorizes the Commission in its discretion and for good cause shown to:

permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further*, That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver

¹This decision became the decision of the Commission December 16, 1969.

would be based: *Provided further*, That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further*, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

The file submitted to the examiner necessitates an examination of the circumstances incident to the filing of the application in order to determine whether it was filed within the statutory period of 180 days. The shipment was made on April 14, 1969 and the application originally transmitted to the Commission from the conference office in Italy by letter dated August 1, 1969, well within the 180-day period. The application was submitted on the form prescribed by the Commission's Rules and Regulations but was not signed by the complainant, Lykes Bros., and the signature of the conference secretary was not notarized. The conference letter of transmittal stated that notarization was not "the local procedure, usually, and because you are so familiar with the signature of the undersigned, we feel that you may have no difficulty in accepting these documents as they are presented also inasmuch as the facts are true and proper."

On August 13, 1969, the Commission returned the application to the conference, stating that if notarization was a "local" problem, the application could be forwarded to the carrier, Lykes, in New Orleans for the notarized signature of an official of that company. Applicant, however, secured the signature of the New Orleans complainant, but complied with the notarization suggestion by having the signature on the original application notarized in Italy. The notary's certificate was dated October 27, 1969, subsequent to the expiration of the 180-day period. The corrected application was promptly forwarded to the Commission.

Although the application in its final form was not transmitted to the Commission until after the expiration of the 180-day period, it was originally filed well within that period. It has been held that failure to verify a complaint filed under section 22 of the Shipping Act, 1916, may be cured by verification prior to hearing and that the Commission was not deprived of jurisdiction if the unverified complaint was timely filed although the verification was made subsequent to expiration of the statutory limitation. Docket 66-46, *Henry Gillen's Sons Lighterage, Inc., et al. v. American Stevedores Inc., et al.*, 12 FMC 325 (1969). Public Law 90-298 does not require verification or signature of the complainant, only that a common carrier by water or con-

ference of such carriers file within 180 days of the date of shipment. The Commission assumed jurisdiction over the application as of the date of the original filing and the fact that the application was returned to the applicant for compliance with formalities set forth in a Commission rule, would not alter the original date of filing. It is concluded that the application was timely filed.

Prior to the date of shipment (April 14, 1969), complainant submitted a request to the conference for a reduction in the rate on Glassware, N.O.S. which was at that time, \$99 W. The conference advised complainant that they would consider reducing the rate to \$90 W provided the minimum quantity loaded aboard a conference vessel was 90 tons, and requested complainant to reply and state whether the reduction was satisfactory and when the first shipment would be made. On April 10, 1969, complainant wrote the conference that the first shipment at the reduced rate would be moving on April 14, 1969, however, due to a strike involving the Italian Post Offices, the letter did not reach the conference until April 23, 1969. The conference then filed the new rate with the Commission, effective April 28, 1969, and Lykes made a manifest correction to assess the shipment at the new rate, collecting \$11,373.31, \$1,137.33 less than would have been charged under the \$99 rate.

Applicant has filed a tariff setting forth the rates here sought to be applied prior to submission of the application. No other shipments were made of the commodity here involved during the approximate time period complainant's shipment was carried. The rate applied to complainant's shipment was late filed by reasons beyond the control of the parties and this late filing is properly considered as resulting from inadvertence. Good cause appearing, Lykes Bros. Steamship Co. is authorized to waive collection from United China and Glass Co. the sum of \$1,137.33. Applicant shall publish the appropriate notice referred to in the statute above set forth and in 46 C.F.R. 502.9.

HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C., November 24, 1969.

It is ordered, That Lykes Bros. Steamship Co. is authorized to waive collection of \$1,137.33 from United China and Glass Co.;

It is further ordered, That applicant publish promptly in its appropriate tariff the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 419, that effective April 14, 1969, the rate on glassware, N.O.S. from Leghorn, Italy to New

Orleans, Louisiana, for purposes of refund or waiver of freight charges during the period from April 14, 1969, until April 28, 1969, is \$90 W. subject to all other applicable rules, regulations, terms, and conditions of the said rate and this tariff.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

13 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 68-29

U.S. PACIFIC COAST/AUSTRALIA, NEW ZEALAND, SOUTH SEA ISLANDS TRADE—UNAPPROVED AGREEMENTS

December 16, 1969

Respondents' failure to file for approval their agreement of June 4, 1965, authorizing the payment of brokerage in the Pacific Coast/Australia, New Zealand, and South Sea Islands trade, and their tariff rules pursuant to such agreement, violated section 15 of the Shipping Act, 1916. The payment of brokerage under the rules was the unlawful carrying out of an unapproved agreement.

Respondents' agreement of December 9, 1965, prohibiting the payment of brokerage, and the tariff rules pursuant thereto, not having been filed for approval, were in violation of section 15.

Respondents' agreement of February 1, 1966, to cancel all tariff references to brokerage, and the tariff rules pursuant thereto, not in violation of section 15 since cancellation was at Commission's request and no evidence of impropriety surrounds such cancellation.

Respondents not found to have operated under an unfiled agreement or understanding not to pay brokerage between February and May 1966 inasmuch as no express agreement is produced and individual member action is logically explained as sound business practice.

The payment of brokerage by respondents between May 1966 and February 28, 1968, on shipments to Australia found to have been pursuant to an unfiled agreement or understanding because evidence demonstrates that parallel action question is not explainable as conduct of individual judgment.

Respondents found to have not agreed to ban brokerage on shipments to New Zealand and the lesser islands between June 1965 and August 15, 1968, inasmuch as no express agreement is produced and individual action is logically explained as sound business practice.

The Commission is not estopped from making findings with respect to respondents' tariff rules which were to have become effective February 15, 1966, prohibiting the payment of brokerage inasmuch as proceeding on which such estoppel is alleged to be based did not consider same questions.

Robert L. Harmon for respondents.

J. Richard Townsend for Pacific Coast Customs and Freight Brokers Association, and *Gerald H. Ullman* for New York Foreign

Freight Forwarders and Brokers Association, Inc., and National Customs Brokers & Forwarders Association of America, Inc., interveners.

Robert H. Tell, G. Edward Borst, and Donald J. Brunner, Hearing Counsel.

REPORT

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

We ordered this investigation to determine whether the member lines of the Pacific Coast Australasian Tariff Bureau (Conference or respondents) entered into and carried out understandings or arrangements fixing, controlling, or limiting compensation to freight forwarders, without Commission approval, in violation of section 15 of the act. The time period under investigation was June 1965 to March 1968. By amended order, the time period was extended to August 15, 1968.

New York Foreign Freight Forwarders and Brokers Association, Inc., National Customs Brokers & Forwarders Association of America, Inc., and Pacific Coast Customs and Freight Brokers Association intervened. Hearing counsel also participated.

Hearings were held before examiner C. W. Robinson who issued an initial decision. Exceptions to the initial decision were filed and we heard oral argument.

FACTS

The conference operates under Agreement No. 50, as amended, in the trade from U.S. Pacific coast ports and Hawaii to ports in Australia, New Zealand, and the lesser South Sea islands.

Of the conference members, Australasia Line, Ltd., Japan Line, Ltd., and Transatlantic Steamship Co., Ltd., serve or formerly served Australia only; Crusader Shipping Co., Ltd., and New Zealand Pacific Line serve New Zealand only; and Columbus Line, The Oceanic Steamship Co., and Peninsular & Oriental Steam Navigation Co. serve Australia and New Zealand. Pacific Shipowners Ltd. and Australasia Line were not operating in the trade at the time of the hearing (Dec. 10-11, 1968). Except as to Oceanic Steamship Co., the record does not show which of the lines serve the lesser islands, either direct or by transshipment.

In June 1965, the member lines of the Conference were operating pursuant to Agreement No. 50 approved under section 15 of the

*Chairman Helen Delich Bentley did not participate.

act. The agreement covered the establishment, maintenance, and regulation of "agreed rates and charges" for transportation of cargo in vessels of the member lines. No article in the agreement contained any specific provision with respect to the payment of brokerage or compensation to forwarders. Prior to June 1965, no carriers in the Conference paid brokerage to forwarders in the trade area covered by the agreement.

Effective June 1, 1965, Columbus Line announced that it would pay brokerage on shipments to Australia and New Zealand. At a special meeting on June 4, the Conference voted to include a brokerage rule in its tariffs, effective June 14. Such a rule was published in both the overland and local tariffs, permitting the payment of brokerage not exceeding $1\frac{1}{4}$ percent on all cargo except heavy lift and long length, open-rated commodities, and certain named commodities. Neither the agreement of June 4 nor the subsequent tariff rules were filed for section 15 approval. Brokerage was paid in accordance with the tariff rules.

The Commission's staff requested the Conference by letter of October 19, 1965, to cancel the brokerage rules inasmuch as the staff could find no authority in the organic agreement permitting the Conference to agree upon limitation, regulation, or prohibition of brokerage. The Conference did not cancel its rules. Rather, at its meeting of December 9, 1965, the Conference unanimously agreed that brokerage would be prohibited. This action was not filed for section 15 approval. The pertinent tariff rules were amended to prohibit the payment of brokerage, effective February 15, 1966. These amendments likewise were not filed for section 15 approval.

On February 2, 1966, the Commission served on respondents an order to show cause (Docket No. 66-5) why the proposed tariff rules prohibiting the payment of brokerage should not be stricken from the tariffs since they appear contrary to the order of the Commission in *Practices & Agreements of Common Carriers*, 7 F.M.C. 51 (1962) (Docket No. 831) in which it was determined that concerted prohibition of brokerage payments is detrimental to the commerce of the United States. On the day before the service of the show cause order, the Conference had agreed to cancel the tariff rules prohibiting brokerage payments. The cancellation was effective February 4. Amended tariff rules to this end were filed, but not for section 15 approval. Docket No. 66-5 was discontinued on February 16.

Although the rules prohibiting payment of brokerage were canceled before their effective date, the member lines nonetheless discontinued paying brokerage after approximately February 15, 1966.

Having heard that Japan Line intended to enter the Australian trade and would pay brokerage of $1\frac{1}{4}$ percent, the Conference held a special meeting on May 24, 1966, at which the matter of brokerage was discussed. At about this time, the lines resumed the payment of brokerage to Australia only. The resumption of such payments by each of the members corresponded with their first sailing after the May 24 meeting. The lines also exempted the same specific commodities which had been exempted in the June 1965 tariff rule.

Japan Line became a member of the Conference in March 1967. On September 14, 1967, the Conference voted to amend its organic agreement in such manner as to enable it to publish brokerage rules in its tariffs. The amendment then was submitted for Commission approval. Correspondence between the Conference and the Commission's staff as to the intent and meaning of certain provisions of the amendment resulted in a statement by the Conference Chairman that the lines intended to pay brokerage of $1\frac{1}{4}$ percent to Australia only, on all commodities except lumber. The amendment (Agreement No. 50-17) was approved by the Commission on February 28, 1968, and the overland and local tariffs were amended accordingly, effective March 8. Brokerage continued to be paid on shipments to Australia up to the time of the hearing, except on lumber. Brokerage payments were not resumed on shipments to New Zealand and the lesser islands.

Additional facts are set forth where pertinent in the discussion portion of this report.

DISCUSSION

The examiner concluded that the Conference had violated section 15 in respect to certain arrangements or agreements concerning payment of brokerage. We are in partial agreement with the examiner. Our discussion of each of the alleged violations of section 15 will demonstrate the areas of agreement or disagreement between our conclusions and those of the examiner.

1. *Agreement of June 4, 1965.*

As mentioned above, the Conference on June 4, 1965, in response to Columbus Line's decision to pay brokerage to Australia and New Zealand, voted to include a brokerage rule in its tariffs. The rule permitted the payment of brokerage not exceeding $1\frac{1}{4}$ percent on all cargo except heavy lift, long length, open-rated commodities, and certain specifically named commodities.

The examiner concluded that since there was no reference to brokerage in the Conference organic agreement, this action of the Conference clearly was an agreement requiring section 15 approval and

the Conference's failure to file this agreement constituted a violation of section 15. The examiner also found that failure to file the tariff rules effectuating the unfiled agreement for approval also was a violation of section 15 and that since the lines paid brokerage under the rules the lines were unlawfully carrying out the unapproved agreements.

On exception, the Conference repeats the argument it made to the examiner to the effect that no specific reference to brokerage is required in the organic agreement before rules relating thereto may be adopted. The Conference states that no authority has been cited to support the examiner's decision to the contrary.

We have previously held that brokerage agreements among common carriers regulate competition and that such agreements are within the plain compass of section 15. *Practices and Agreements of Common Carriers*, 7 F.M.C. 51, 57 (1962). Being within the compass of section 15, such agreements are required to be filed for approval.

We further held in *Investigation, Practices, Etc., N. Atlantic Range Trade*, 10 F.M.C. 95, 109 (1966):

* * * that while an agreement fixing or regulating the amounts of brokerage was an agreement within the meaning of section 15 that had to be filed for approval, once a conference agreement had been approved, conference arrangements regarding brokerage payment to forwards were permissible without separate section 15 approval.

Contrary to respondents' contention, the intended meaning of this statement is that once a conference agreement which fixes or regulates the amounts of brokerage has been approved, further conference arrangements regarding brokerage are permissible without separate section 15 approval. It does not mean that once any organic agreement has been approved, further arrangements regarding brokerage are permissible.

It follows then that unless approval of a specific provision regarding the fixing or regulating of amounts of brokerage has been obtained, further arrangements regarding brokerage payments, such as by tariff rule, are prohibited without separate section 15 approval.

The Conference also contends that we have previously permitted the regulation of brokerage matters through rules and tariffs alone. They argue that our predecessor's statement in *Agreements and Practices Re Brokerage*, 3 U.S.M.C. 170, 177 (1949) to the effect that respondents in that proceeding were required to remove brokerage prohibitions "* * * whether contained in their basic conference agreements, the rules and regulations of their tariffs, or both

* * *” recognizes that the practice of regulating brokerage through tariff rules alone had been in effect.

Our predecessor, in the above-cited case, in no way passed upon the question of whether such tariff rules were unlawful for failure to have authority in the organic agreement. Rather, the case concerned whether tariff rules prohibiting the payment of brokerage had been correctly and adequately found to be detrimental to the commerce of the United States and contrary to the public interest.

The Conference alternatively argues that since its organic agreement contains broad authority to regulate matters which affect the establishment, maintenance, and regulation of agreed rates and charges, conference action regarding brokerage payments comes within the terms of the agreement. The Conference’s point is that payment of brokerage to freight forwarders is a factor in ratemaking and, accordingly, it should be dealt with, as are other ratemaking matters, by tariff rules under the authority conferred in the Conference organic agreement.

The Conference’s argument would be well taken if it had specific authority in its organic agreement to regulate brokerage similar to the authority to regulate rates. While we recognize that payment of brokerage might in some way ultimately affect the ratemaking process, we want to reemphasize that specific reference to payment of brokerage must be contained in an approved conference agreement before regulation of brokerage by a conference of carriers can be accomplished by tariff rules.

The Conference has also argued that section 15 filing and Commission approval were not necessary for its agreement of June 4, 1965, because the agreement did not require the parties thereto to do anything different from that which they already were entitled to do under the law without such an agreement. More specifically, the Conference argues that since section 15 of the Shipping Act, 1916, requires the filing of agreements which control, regulate, prevent, or destroy competition, an agreement permitting the payment of brokerage which the parties thereto are free to disregard cannot control, regulate, prevent, or destroy anything. A closer scrutiny of the agreement shows that the conference members were not free to disregard the agreement. The agreement provided that when the conference members paid brokerage, their payments could not exceed 1¼ percent and payments could not be made on heavy lift and long length cargo, open-rated commodities or certain specified commodities. Such restrictions and prohibitions clearly control, regulate, prevent or destroy competition. Therefore the agreement of June 4, 1965, and the resulting tariff rules

were subject to filing for approval under section 15 and the failure to file is a violation of section 15.

As the examiner found, it is undisputed that the lines paid brokerage under the tariff rules. This constituted an unlawful carrying out of an unapproved agreement.

2. Agreement of December 9, 1965.

As stated above, the Conference on December 9, 1965, agreed to prohibit the payment of brokerage, and filed an amendment to its tariff rules to this effect, to be effective February 15, 1966. The examiner concluded that the Conference's failure to file the amendment for approval resulted in a violation of section 15. The rules were subsequently canceled before their effective date.

The Conference has excepted to the examiner's findings in respect to the December 9, 1965, agreement. It is contended that the agreement was contingent on Commission approval and was not intended to be effective until February 15, and since it never in fact became effective, no violation of section 15 can be found.

The Conference argues on exception that its action of December 9, was taken subject to Commission approval. The Conference recognizes that no evidence was introduced at the hearings held in this matter to demonstrate that Commission approval was sought for the rule in question. The Conference, however, seeks to show on exception that its counsel initiated correspondence with the Commission to determine the necessity of additional section 15 authority. This correspondence is said to show that Commission approval was intended to be obtained and that the agreement in question was pending approval at the date of its cancellation.

We find no support in the record for the proposition that the agreement of December 9, 1965, and the tariff rules pursuant thereto were pending section 15 approval. The only way in which they could have been submitted for approval was pursuant to the procedure for filing agreements with the Commission under section 15. The Conference and its counsel were obviously familiar with this procedure, since agreements of the Conference had previously been filed for the Commission's approval. However, the only filing received by the Commission staff was an amendment to the Conference's tariff rules which shows the Conference agreed to prohibit brokerage payments. This filing does not constitute a filing which could be construed as a section 15 filing seeking approval of the Conference action. The correspondence which the Conference submitted on exception further demonstrates that the only filing received by the Commission was the amendment to the tariff rules. That the agreement in question had

not been filed for approval is demonstrated by the reply of the Commission staff which cautions the Conference that implementation of the filed tariff rules would be an effectuation of an unapproved modification of the conference agreement. However, the agreement had already been reached, and no approval had been sought.

In answer to the Conference's contention that no section 15 violation can be found because the tariff rules never became effective, we need only repeat what we have already said in *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966), wherein we stated at page 301 that:

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 * * ** Secondly, section 15 makes it unlawful to carry out "in whole or in part, directly or indirectly" an unapproved agreement. [Emphasis supplied].

Thus, while the Conference canceled the December 9, 1965, agreement prohibiting payment of brokerage, it nevertheless failed to file it immediately for approval as required by section 15.

3. *The agreement of February 1, 1966.*

On February 1, 1966, the Conference agreed to cancel the brokerage rules in their entirety and amended its tariff to this end, effective February 4. The examiner found the February 1, 1966, cancellation to constitute an unfiled agreement in violation of section 15.

The Conference takes violent exception to this conclusion, characterizing it as "unreasonable and unjust." The Conference asserts that its brokerage rules were canceled in compliance with requests of the Commission's staff. The staff sought cancellation because the basic conference agreement contained no authority to regulate brokerage. There is no question that the Commission staff actively sought to have the Conference remove all tariff rules relating to brokerage inasmuch as the basic conference agreement contained no authority to regulate brokerage. It appears that the Conference action to remove the brokerage rules was undertaken as a result of the staff's efforts. There is no evidence that the Conference undertook the action for its own benefit and no evidence of any impropriety on the part of the Conference in respect to such action.

In view of the circumstances surrounding the Conference action, we find that no violation of section 15 can attach to the Conference's failure to file the agreement in question.

4. *Agreement not to pay brokerage after February 15, 1966.*

As mentioned above, all references in the Conference tariffs to bro-

kerage were removed February 4, 1966. The record shows, however, that brokerage ceased to be paid by the Conference lines after approximately February 15, 1966, with the date for a particular line depending upon the position of the individual vessels.

The intervening forwarder associations and hearing counsel took the position before the examiner that in spite of the cancellation of all reference to brokerage in the tariff rules, the Conference members agreed to carry out the February 9, 1965, agreement to discontinue brokerage payments effective February 15, 1966. They argued that even though no express understanding to this effect has been shown, the parallel action of all the members sufficiently demonstrates the existence of such an agreement or understanding.

The examiner found that the lines did not operate under an unfiled agreement or understanding not to pay brokerage after February 14, 1966. He recognized that the lines fully intended, as of December 9, 1965, to stop paying brokerage. He reasoned, however, that on February 4, 1966, when all reference to brokerage was removed from the tariff rules, the groundwork already had been laid not to pay brokerage, and no further collective steps were needed for the lines to individually return to the practice which had existed in the trade for years prior to June 1965. The examiner also observed that having been checked up sharply by the Commission's staff for not having any basic authority for brokerage, the Conference would not likely be so foolish as to undertake an informal agreement not to pay brokerage. He stated that whereas the lines inquired among themselves as to whether brokerage was being paid, this is further indication that there was no agreement or understanding not to pay brokerage.

Intervenors have excepted to the examiner's findings in this respect. They argue that an agreement is shown to exist by virtue of a particular sequence of events. The carriers, all of which were paying brokerage, got together and agreed on December 9, 1965, that effective February 15, 1966, they would discontinue the payment of all brokerage. The Federal Maritime Commission notified the Conference that this appeared to be an unlawful agreement. Intervenors state that although the Conference then agreed to cancel the agreement, each of the carriers proceeded to discontinue the payment of brokerage effective on the previously agreed date of February 15, 1966, or with their next sailing thereafter. Intervenors conclude that the carriers were obviously carrying out their supposedly canceled agreement.

Intervenors also attack the examiner's reasoning. Intervenors state that almost every line of the examiner's statement of reasoning sup-

ports rather than negates the finding of an unlawful agreement. Interveners point to the examiner's acknowledgment of the intent of the lines, concertedly reached on December 9, 1965, to stop paying brokerage. They allege that no subsequent action was taken by the Conference to nullify this agreement. Interveners characterize the examiner's acknowledgment that the December 9, 1965, agreement laid the groundwork for discontinuance of brokerage payments as fortifying a finding of an unlawful agreement. They suggest that after the lines jointly laid the groundwork, it is not believable that subsequent conduct was arrived at individually. Interveners also state that when the examiner says that no further collective steps were needed to put the policy of discontinuing brokerage payments into effect, he should have recognized that the member lines had taken all the collective action required to effectuate their unlawful agreement and that nothing further needed to be done. Interveners wonder how the examiner could have logically concluded that no agreement existed and that the subsequent conduct was arrived at individually.

We agree with the examiner that no unlawful agreement or understanding is shown to exist in respect to the conference lines' decision to discontinue payment of brokerage. We find the arguments on exception to be unpersuasive.

While the sequence of events outlined by interveners, taken alone, would portray a picture of concerted action or agreement by the Conference members, we conclude that in the absence of evidence of an express agreement, the counter explanations offered by the Conference cast sufficient doubt on the existence of such an agreement. Accordingly, we conclude that the record will not support a finding of a section 15 violation in respect to the alleged agreement.

It is indeed plausible that the Conference members acted individually. For some 20 years prior to June 1965, brokerage had never been paid by the Conference members. When the Conference first commenced paying brokerage and adopted a rule permitting such payment, it did so in response to the institution of brokerage payments by Columbus Line. In December 1965, the Conference members agreed to prohibit the payment of brokerage and issued a rule to that effect. It did so on the basis that experience under the previous rule permitting payment had demonstrated no real advantage to be gained by payment of brokerage. The Conference had repeatedly been warned by the Commission staff of its lack of authority to issue such a rule. When, in response to this pressure, the Conference canceled all of its tariff rules and reference to brokerage, it is not too surprising that the Conference members individually would revert to the practices

which had been in effect before the Conference had any rules relating to brokerage, i.e., no brokerage would be paid. This is especially true in view of the experience gained by the lines that payment of brokerage had not been beneficial, and in view of the fact that commonsense would dictate each line to remove the burden of brokerage payment in the absence of any compelling need for such payments.

Intervenors cite *Unapproved Sect. 15 Agreements—S. African Trade*, 7 F.M.C. 159 (1962) for the proposition that proof of an express agreement is not necessary to find a violation when evidence of obvious parallel action on the part of the parties to the alleged agreement indicates an understanding or agreement is being carried out. Intervenors ask us to apply the *South African* case to this situation and to conclude that the Conference members were in fact carrying out an agreement to discontinue brokerage payments.

We fully agree with the principle of the *South African* case. However, we think that fairness would not permit its application to this fact situation.

In the *South African* case, as here, the examiner had concluded that the respondents had not entered into or carried out any agreement in violation of section 15. In reversing this conclusion the Commission at page 187 said:

The examiner likewise had difficulty in this respect. His report acknowledges that respondents held numerous rate discussions and conferences and that these covered various rate matters including the 15 percent general increase that all of them put into effect on March 1, 1955 and the plan for 48 hours' advance notice of a rate change. The examiner further found that respondents' discussions and conferences "generally, but not always, resulted in the quotation of similar rates," and by February 1956 had resulted in Robin, Farrell, Lykes, Dreyfus, Nedlloyd and Safmarine having rates "on most items [that] were identical." In our view, such findings logically lead to a conclusion just the opposite from the one the examiner reached.

We cannot regard obvious anticompetitive activity as though it were normal business conduct. Nor can we regard the use of parallel rates following joint rate discussions as though it were the fortuitous product of "independent judgment" or just the result of "business economics." Both law and reason demand of us a considerably more realistic approach than this. Persons subject to the act who expect us to give credence to such claims should conduct their activities in a way that is consistent with the claims. * * *

The *South African* case involved the setting of identical specific rates by several carriers on several specific items. It is indeed difficult to fathom how such action could be the fortuitous product of independent judgment. In this case, however, we have several carriers, each deciding to discontinue a single practice of paying brokerage

and reverting back to the previous practice of 20 years' standing. The two situations are similar but not comparable.

While an inference of concerted activity can be drawn from the action of the Conference members, we think that the possibility of individual determination is sufficiently plausible so as to render unwarranted a finding of concerted activity and to preclude a finding of a violation. As mentioned above, this conclusion is supported by the evidence that the Conference members, individually and collectively, were not satisfied with the results of their experiment in paying brokerage.

Intervenors stress that brokerage payments were discontinued by all the lines on or about the same date and that this discontinuance corresponded with the date that the Conference members previously had agreed would be the cutoff date for payment of brokerage.

It cannot be denied that the Conference members had intended to concertedly discontinue brokerage payments effective February 15, 1966. They had done so on the basis of agreed dissatisfaction with their recent experience of paying brokerage. When the rules relating to brokerage were canceled at the insistence of the Commission staff, and it was then up to the individual Conference members to decide whether to continue brokerage payments, could we expect that the individual lines would ignore what they had learned about the experience of all the Conference members in respect to lack of benefit from brokerage payments? We think not. To so conclude would place the lines in a true dilemma. They could continue to make the unprofitable and undesirable brokerage payments and avoid accusations of carrying out an unapproved agreement or they could discontinue such payments and be subject to accusations of violating section 15. We do not think that when it became incumbent on the individual lines to decide about brokerage they could be expected to act as if they did not have the benefit of the experience of their fellow members in relation to the profitability of paying brokerage.

5. Payment of brokerage commencing May 1966.

As mentioned above, in May 1966, Japan Line announced its future entry into the Australian trade and the payment by it of brokerage. The Conference held a special meeting on May 24, at which brokerage was discussed. The payment of brokerage by the member lines was resumed on shipments to Australia at about that time. Payments were withheld on the same specific commodities previously exempted by rule. While payments by the member lines did not start simultaneously the evidence shows that the payments started for each member line

on the first sailings after the announcement by Japan Line and the meeting of the Conference members.

The examiner concluded that the persuasive evidence negatives the idea of any concerted action on the part of the lines. He relied substantially on interoffice memoranda and letters of Conference members which indicated that each line recognized that it would decide on its own as to the payment of brokerage. He stated that the fact that there was uniform exclusion of brokerage on the specific commodities did not necessarily reflect uniform action, for those commodities had been exempt as far back as June 1965. He stated that the lines individually were doing just what they did collectively between June 1965 and February 1966, and that whatever payments were made at this time were by the individual lines for competitive reasons alone, taking into consideration their best interests.

He concluded that during the period under consideration, there was no agreement or understanding by the conference lines, either direct or implied, to pay brokerage and hence there was nothing for them to file for section 15 approval.

Interveners except to this conclusion and urge that the unanimous resumption of payment of brokerage was pursuant to an agreement among the Conference members. They state that at the Conference meeting of May 24, concerted agreement was reached inasmuch as all of the lines proceeded to take uniform action in resuming the payment of brokerage; all of them proceeding to pay brokerage of $1\frac{1}{4}$ percent of the freight, only to Australia and not to New Zealand, and excluding brokerage on the specific commodities which had previously been excluded in the Conference tariff effective June 14, 1965. Interveners state that such uniformity of action could not possibly have been sheer coincidence and that it shows that the lines were successful in reaching an agreement on brokerage.

We agree with interveners and conclude that the evidence relating to the action of the Conference members in respect to their resumption of brokerage payments leads to the conclusion that concerted action was taken.

The circumstances surrounding the resumption of brokerage payments in this instance are more similar to those in the *South African* case discussed above. In this instance, the entire Conference membership took precisely the same action in very minute detail. As pointed out by the interveners, each line resumed payment of brokerage, at the same specific level, in respect to a single particular trade, excluding payments on the same specific commodities. As was indicated in the *South African* case, such obvious parallel action follow-

ing joint discussion could not be the fortuitous product of independent judgment or merely the result of business economics.

The Conference maintains, however, that it was a matter of business economics since freight forwarders maintain a powerful position in the shipping industry, and any line which did not respond to another line's announcement that it would pay brokerage by also commencing the payment of brokerage would soon find itself out of business.

We understand the stated justification for instituting payment of brokerage. However, it is not readily apparent that if left to individual determination, each line would feel compelled to resume brokerage payments, especially in view of the recent experience of the lines that brokerage payments were not so beneficial. What we find unlawful is not the decision to meet competition but the manner in which it was accomplished. In order to meet the competition of Japan Line, the Conference members reached an understanding, unauthorized under the approved agreement, to resume payments of brokerage on shipments to Australia. However lawful the objective, it may not be accomplished unlawfully.

Additionally, we think much of the correspondence upon which the examiner relies for his conclusion will equally support our conclusion.

The examiner quotes from a letter written by Columbus Line to its New York agent the day before the Conference met to discuss brokerage. Columbus Line informed its agent that two carriers already "indicated a willingness to pay brokerage" and that two others would "not follow suit," and that another carrier "will undoubtedly eventually agree."

On the same day, prior to the May 24 meeting, Oceanic Steamship Co. advised its local representatives that some of the Conference members had advised that they would pay brokerage and that therefore Oceanic would follow suit.

Then on May 27, 3 days after the Conference meeting, Crusader Shipping Co., Ltd.'s California agent informed its principal in London that the matter of brokerage had been discussed at the Conference meeting and that they believed brokerage payments would be limited to Australia.

The correspondence written the day before the Conference meeting indicates the lines were conferring with each other on the matter of brokerage, at least to get an idea as to what each line was doing on the matter and most likely with a view toward reaching agreement of all members. The descriptions that certain lines will "follow suit" and other "will eventually agree" indicate cooperation among the

lines was intended. Then, when the lines uniformly institute the practice of paying brokerage, it is logical to conclude that the lines succeeded in reaching the agreement which the correspondence indicates they were trying to reach.

6. *Brokerage to New Zealand and the lesser islands.*

It had been alleged by hearing counsel and interveners that the Conference members agreed to discontinue or prohibit payment of brokerage on shipments to New Zealand and the lesser islands. The decision to ban such brokerage payments was said to have been reached on December 9, 1965. As discussed above, the Conference on that date amended its tariff to prohibit payment of brokerage. The prohibition was to apply on shipments to New Zealand as well as to Australia. It was alleged that the December 9, 1965, prohibition was put into effect around February 15, 1966, and has continued in effect up to the time of hearing.

The examiner stated that the evidence regarding brokerage payments on shipments to New Zealand is meager. He concluded that there was no evidence of an agreement by the Conference not to pay brokerage to New Zealand and the lesser islands during the periods under investigation in this proceeding.

Technically, the examiner is incorrect. The record is clear that the December 9, 1965, agreement to prohibit payment of brokerage was to apply on both shipments to Australia and New Zealand. In this sense, the Conference did agree to prohibit payments on shipments to New Zealand. We have found that this agreement was entered into unlawfully. However, as is also indicated above, the rules accomplishing this prohibition were canceled prior to their effective date and we have also concluded that when the Conference members in February 1966 individually discontinued payments of brokerage to Australia, they were not concertedly carrying out their canceled agreement. There is no evidence that the discontinuance at the same time of such payments on shipments to New Zealand was reached in a different fashion.

Intervenors suggest that in June 1966, when the Conference resumed payments in shipments to Australia, the Conference agreed to continue the prohibition on shipments to New Zealand. Again, there is no evidence to this effect. Having determined that the original discontinuance of such payments was arrived at individually, and there being no competitive reason for the Conference to change that policy, we can only conclude that it is not shown that the continued prohibition was by concerted action.

The Conference agreement was amended in September 1967, to permit publication of brokerage rules in the Conference tariffs. While the Conference tariff rules were amended, effective March 8, 1968, to permit payment of brokerage on shipments to Australia and New Zealand, brokerage payments on shipments to New Zealand have not been resumed. However, again there is no evidence that the continued failure to make such payments is by concerted action. Therefore, we can find no illegal section 15 agreement and no violation of our decision in Docket No. 831 which would prohibit concerted Conference prohibition of brokerage payments.

7. *Estoppel to redetermine issue.*

The Conference had maintained that the Commission is estopped from determining whether the tariff rules to become effective February 15, 1966, prohibiting the payment of brokerage, were in violation of section 15, inasmuch as Docket No. 66-5, referred to hereinabove, is dispositive of the issue.

The examiner observed that Docket No. 66-5 involved an order to show cause why the rules proposed to become effective February 15, should not be stricken from the tariffs on the ground that they appeared to be in violation of the order in Docket No. 831 which found concerted prohibition of brokerage payments to be detrimental to commerce. Docket No. 66-5 was terminated after the Conference removed from the rules all reference to brokerage. The order of discontinuance stated that "the issues involved herein have been mooted." The examiner concluded that the question of whether respondents violated section 15 by not filing the rules for approval was not in issue in Docket No. 66-5 and was not considered in that proceeding. He stated that the question is in issue in the present proceeding and concluded that the Conference's position on the point is not well taken.

The Conference takes exception to this conclusion. The Conference's position is that in Docket No. 66-5 the Commission's real intent and concern was not simply to force the Conference to cancel the tariff rules prohibiting payment of brokerage, but to require it to delete all reference whatsoever to the payment of brokerage in its tariffs. The Conference suggests that in view of contemporaneous Commission attempts to require the Conference to delete all reference to brokerage rules in its tariff, the examiner erroneously concluded that the question of whether the Conference violated section 15 by not filing the rules for approval was not in issue in Docket No. 66-5.

The Conference feels that since Docket No. 66-5 has been discon-

tinued, the Commission is estopped on equitable principles from re-opening matters which were declared to have been mooted.

We are not estopped from considering the question of section 15 violations for the simple reason that nothing is being redetermined here which was determined in Docket No. 66-5. Docket No. 66-5 was dismissed without investigating or determining the question of lawfulness of the rules because the Conference had canceled the rules.

The examiner correctly concluded that the order to show cause in Docket No. 66-5 did not raise the question of whether the rules were in violation of section 15 of the Shipping Act. Consequently, the Commission's order discontinuing that docket cannot possibly be said to be a determination that the brokerage rules were not in violation of section 15.

(Signed) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 69-51

AGREEMENT No. 9810—STOCK PURCHASE AGREEMENT BETWEEN PRUDENTIAL LINES, INC., AND W. R. GRACE & CO., AND SALE AND TRANSFER OF PRUDENTIAL ASSETS AND OBLIGATIONS TO GRACE LINE, INC.

Decided December 19, 1969

Agreement No. 9810 providing for the purchase by Prudential Lines, Inc. of all of the outstanding capital stock of Grace Lines, Inc. and the sale of Prudential's operating assets to Grace Line approved under section 15 of the Shipping Act, 1916.

George N. McNair for Respondents Grace Line, Inc., and W. R. Grace & Co.

David Simon and *Martin F. Richman* for Prudential Lines, Inc.

Mark K. Neville for intervener Mark K. Neville.

J. B. H. Carter and *Alfred Cortise, Jr.* for intervener Sun Shipbuilding and Dry Dock Company.

Donald J. Brunner and *Paul J. Fitzpatrick*, Hearing Counsel.

REPORT

BY THE COMMISSION (Helen Delich Bentley, *Chairman*; James F. Fansen, *Vice Chairman*; Ashton C. Barrett, James V. Day, George H. Hearn, *Commissioners*):

THE PROCEEDINGS

We instituted this proceeding to determine whether Agreement 9810, a stock purchase agreement between Prudential Lines, Inc., and W. R. Grace & Co. should be approved under section 15 of the Shipping Act, 1916. Notice of the agreement was published August 6, 1969. The usual 20-day period for filing comments or protests was extended to September 12, 1969. No protests or comments were received. On September 30, 1969, we issued our order of investigation primarily to secure additional information about the circumstances and conditions

prompting the proposed agreement and the impact of the agreement, if approved, upon the relevant trades in our foreign commerce. In the order, we invited "persons desiring to be heard on the proposed agreement [to] indicate whether they desired an evidentiary hearing, and if so to provide a clear and concise statement of the matters upon which they desire to adduce evidence * * *." Only two persons requested an evidentiary hearing—Sun Shipbuilding Co. and one Mark K. Neville, neither of which filed a comment or protest to the proposed agreement when it was noticed in the Federal Register even though the notice period was extended some 15 days. We have rejected both requests. Neither due process nor a full and fair hearing on the merits of this case require an evidentiary hearing on the grounds suggested either by Sun or Neville, and before turning to the merits of Agreement No. 9810, we shall dispose of this threshold question.

Sun alleges that it is a creditor of Grace Line with a claim outstanding of some \$7 million. According to Sun, this claim arises under the Uniform Fraudulent Conveyance Act as enacted in New York, Pennsylvania, Connecticut, and Delaware. The claim is based on the construction of six vessels for Grace Line by Sun. In requesting an evidentiary hearing, Sun simply states that it has asked Grace Line for additional information (apparently of a financial nature) and that if this information should not be forthcoming or if it discloses substantial impairment of Grace Line's ability to meet the claim, Sun intends to "pursue the judicial and administrative remedies available to it." Appended to its request is a copy of an amended complaint filed in United States District Court for the Eastern District of Pennsylvania. Reduced to its essentials, this amended complaint merely alleges that the consummation of the purchase and sale agreement will violate the secured rights of Sun under the laws of New York, Pennsylvania, Connecticut, and Delaware.

Our jurisdiction over agreements such as 9810 is found in section 15 of the Shipping Act. That section requires the filing with us of agreements between common carriers by water which fix or regulate transportation fares; give or receive special rates, accommodations, or other special privileges or advantages; control, regulate, prevent, or destroy competition; pool or apportion earnings, losses, or traffic; allot ports or restrict or otherwise regulate the number and character of sailings between ports; limit or regulate in any way the volume or character of freight or passenger traffic to be carried; or in any manner provide for an exclusive, preferential, or cooperative working arrangement. Under section 15 we are required to approve such agreements unless the agreement 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 operates to the detriment of the commerce of the United States; or is contrary to the public interest or in some way violates some other provision of the Shipping Act, 1916.

Sun's request for an evidentiary hearing does not ask us to receive evidence bearing upon a violation of any provision of the Shipping Act; rather, it asks that we take evidence which presumably would show that the consummation of Agreement 9810 would somehow run contrary to the provisions of the Uniform Fraudulent Conveyance Act as passed in several of the States. Obviously, the proper forum for such an action is the one in which Sun already has an action, the U.S. District Court. We are simply without jurisdiction to decide such a claim. Thus, the evidentiary hearing requested by Sun could serve no useful purpose under the Shipping Act, since the request would involve the taking of evidence on matters beyond our jurisdiction and which bear no real relevance to the issues before us.

The request of Mark K. Neville for an evidentiary hearing is based on an alleged "offer" by Neville to purchase Grace Line for \$50 million. In requesting an evidentiary hearing, Neville lists some 11 matters upon which he would adduce evidence. They fall into three categories: (1) Those which are irrelevant to any proper consideration under section 15; (2) those which should be directed to the Maritime Administration; and (3) those which are so vague as to not meet the criteria of the order instituting this proceeding. Thus, the question of why Grace & Co., rejected Neville's "offer" in favor of Prudential's lower offer is, in our opinion, not a proper consideration under the tests of section 15 as they apply to this proceeding. While it is conceivable that there might arise a situation where we would be called upon to decide which of two potential purchasers of a common carrier should be allowed to prevail, such is not the case here.¹ Furthermore, there remains the more than considerable doubt concerning the financial capability of Neville to purchase Grace Line for \$50 million. Correspondence in the record shows that although requested by Grace Line to show evidence of financial responsibility, Neville failed to do so.

All things being equal, Grace is free to select among offers using such criteria as it feels will best insure such things as its own financial well being, the continued reputation of its corporate image, etc. Simi-

¹ Such a situation could perhaps arise if, as between two potential buyers one of them if allowed to acquire the carrier up for sale would establish a monopoly in the relevant market, while such a result would not flow from a sale to the other potential buyer.

larly, the question of "why is a recipient of large governmental subsidies entitled to still additional subsidies to the exclusion of others" is one properly addressed to the Maritime Administration.² Finally, the question of whether the "merger" constitutes a "restraint of trade" is so vague as to fail totally to meet the criteria set forth in our own order of investigation.

THE AGREEMENT

Reduced to its essentials, the stock purchase agreement provides for the purchase by Prudential of all the capital stock of Grace Line, Inc., from W. R. Grace & Co. The purchase price is \$44,500,000. Immediately after acquiring the stock of Grace Line, Prudential will sell its vessels and other operating assets to Grace Line, which will assume the related obligations of Prudential. Thereafter, Grace Line will be the sole operating company. Prudential will be a holding company owning all of Grace Line's stock, and W. R. Grace will no longer own any interest in Grace Line. The sale and transfer of Prudential's assets and obligations to Grace Line will be at the fair market value, as determined by the Maritime Administration, of Prudential's vessels, vessel and barge contracts, and other operating assets.

Prudential and Grace Line, both subsidized carriers, now serve entirely different and unrelated trade routes:

Prudential operates a fleet of five ships on a single trade route (Trade Route 10) which covers U.S. east coast ports and ports in the Mediterranean. Its present fleet consists of five ships—three victory ships 24 years old and two C-4's built in 1966. Prudential's subsidy contract requires it to make a minimum of 28 and a maximum of 35 sailings a year.

Grace Line operates a fleet of 22 ships on five trade routes (Nos. 2, 4, 23, 24, and 25) covering U.S. east and west coast ports and ports in Central and South America and the Caribbean. Grace's fleet is composed of two 300-passenger combination passenger/cargo ships (11 years old), four 121-passenger combination passenger/cargo ships (5 years old), six new cargo ships (built in 1966-67), and 10 cargo ships (all more than 25 years old). Grace's subsidy contracts require it to make an aggregate of at least 212 sailings but no more than 269 sailings a year.

DISCUSSIONS AND CONCLUSIONS

In our order instituting this proceeding, we requested specific information on a number of matters concerned with the results which

² The question refers to the fact that Prudential and Grace Line are both recipients of subsidy under the Merchant Marine Act of 1936, the relevant provisions of which are administered by the Maritime Administration.

would flow from any approval we might grant Agreement 9810 under section 15. The requests and a summary of the responses are set forth below in the order in which they appeared in the order of investigation.

A. Provide a list of all potential savings

The respondents anticipate that the combining of the Grace Line staff and the Prudential staff will, through the elimination of overlapping areas, result in economies estimated at \$1,600,000 per year. The combined operation should afford better service to the shipping public at reduced cost, e.g., Prudential's accounting services can be tied into Grace Line's existing computer tape system at a very small initial cost with resultant savings through increased efficiency. Additionally, considerable savings will result from the combined use of terminal facilities. Early savings will come from consolidating the present facilities of Grace Line and Prudential in the Port of New York which represents Prudential's major terminal expense. These savings are estimated at \$420,000 per year. There will be additional economies when the LASH operation is introduced in Grace Line's service to South America since then existing LASH terminal facilities would be utilized in U.S. east coast ports.

The LASH concept is perhaps Prudential's major argument for approval of Agreement 9810. The LASH system can be considered a major new development in the maritime industry. It promises great advantages to shippers, shipowners, and ports. Basically, LASH—Lighter Aboard Ship—consists of a vessel designed to carry barges or lighters, the lighters themselves, and a gantry crane which on- and off-loads the lighters.³ The LASH vessel is capable of carrying bulk cargoes, containerized cargoes, palletized cargoes, or mixed cargoes consisting of almost any combination of cargo in lighters, cargo in containers, palletized cargo, and bulk cargo.⁴ Since Prudential is already committed to LASH in the Mediterranean, future economies from approval of Agreement 9810 will be in the form of operational savings which will result from the future conversion of Grace Line's South American service to a LASH operation. A common pool of LASH lighters could then be used both for the South American service and the Mediterranean. It appears that shippers can expect to benefit from LASH through reduced loading and unloading time, increased frequency of calls, and a broader range of port calls.

³ Normally, the lighters would be towed to and from the mother vessel, but they could be made self-propelled quite easily.

⁴ The Maritime Administration has backed the promise of the LASH system by direct subsidy investment of \$120 million.

Finally, it would appear that ports in the United States and their terminal operators will also benefit from the introduction of LASH. There should be reduced congestion at piers and increased service to more local shippers.⁵

B. Provide details of all improvements from alleged strengthened management

Among the improvements in the management and financial structure of the combined company that would result from Prudential ownership of Grace Line is the ability of the two companies to pool earnings and thereby accelerate Prudential's present LASH replacement program and provide for the eventual program of LASH replacement for Grace Line's existing vessels. Grace Line's present ownership continues to defer its obligation to further vessel replacements under its subsidy contract, while Prudential intends to pursue an accelerated replacement program to the maximum extent possible.⁶ Savings should also result from combined cargo and passenger solicitation through the elimination of overlapping areas.

C. Provide an estimate of administrative economies, including but not limited to, proposed payroll reductions combined equipment usage, and effect on the labor force

Included in the estimated overhead through combined administrative services are payroll reductions of about \$800,000 (see A above). The savings to be achieved through combined equipment usage are dealt with in B above.

While there is some expected contraction of the two companies' administrative force, crews of Prudential and Grace Line vessels will not be affected by the consummation of the stock purchase agreement because the existing fleets of Grace Line and Prudential will continue to serve their respective trades.⁷

D. Provide all plans for initiation and implementation of improved transportation methods of operations and expenditures needed to accomplish such proposals for each trade area

Prudential's plan for the complete replacement of its fleet in the Mediterranean service with LASH vessels has been underway for

⁵ This would stem from the fact that the lighter with its shallower draft would not be restricted to the "deep water" portion of a port area as are oceangoing liners.

⁶ Grace Line has become only a minor part of the assets and business of W. R. Grace, which is a major diversified company, and W. R. Grace desires to divest itself of Grace Line, a condition hardly conducive to vigorous operation and timely replacement of vessels.

⁷ Both the National Maritime Union and the Sailors Union of the Pacific have confirmed to respondents that they have no objection to the combination of Grace Line and Prudential.

some time. Under the agreement, Grace Line will take over Prudential's contracts. Total construction cost involves some \$124 million (including 50 percent construction differential subsidy by the United States under the Merchant Marine Act, 1936). Prudential's share is being financed 75 percent by bond issues insured by the United States under title XI of the Merchant Marine Act, and the balance will be paid out of the capital reserve fund and operating revenues.

On the South American routes, Grace Line's present fleet of 22 ships in active service includes 10 overage cargo ships which will need early replacement. Prudential has announced its commitment to seeking replacement as early as possible using LASH vessels. However, exact plans depend upon Maritime Administration approvals and the availability of construction differential subsidy.

E. Explain the effect upon competing carriers in the trades involved and submit separately for each trade route, a listing of all competing carriers, including fleet sizes and foreign and American flag lines. Provide also, for each trade route, statistical data comparing tonnages carried by respondents and competing carriers (if available) for the preceding 3 calendar years

Since Prudential and Grace Line will continue their respective operations as before the agreement, there is no change in the competitive posture vis-a-vis each other. The statistical data furnished on other lines in the trade indicates that Prudential carries from 5 to 8 percent of the lines' tonnages in the Mediterranean trade while Grace Line carries widely varying percentages of the lines' tonnages depending upon the particular country involved. It does not appear that the approval of Agreement 9810 would substantially alter this picture.

F. Submit copies of any complaints, protests and/or comments, if any, received by respondents with respect to the proposed agreement

Aside from Sun Shipping and Neville dealt with above, American Export Isbrandtsen Lines, Inc., after first indicating a tentative opposition to the proposed agreement later stated that there would be no objection provided that the Maritime Subsidy Board, Maritime Administration, would enter an addendum to Grace Line's operating subsidy contract providing that the present Prudential fleet and the present Grace Line fleet would each continue to serve the respective trade routes presently served by each fleet. The Maritime Administration acceded to the request of Prudential to add such an addendum and America Export Isbrandtsen withdrew its objection. (See Letter of Approval dated December 5, 1969, Maritime Administration to Prudential.)

G. Provide details of conditions in the trades involved which are considered justification for the proposed agreement

The purchase of Grace Line will allow Prudential to introduce the LASH system into the South American trades now served by Grace Line with the resultant increased economy and efficiency of service. The eventual introduction of LASH to the South American trades served by Grace would go a long way to alleviate what would appear to be a major problem throughout South American ports—port congestion. A brief résumé of port conditions at Grace Line's ports of call is offered to illustrate the benefits which would flow from the approval of the stock purchase agreement.

In Venezuela, La Guaira and Puerto Cabello are the most important general cargo ports serving the United States. Both are congested because of too few piers and manpower problems.⁸ Since a LASH vessel itself does not require a regular berth—it can remain at a safe anchorage offshore while barges are towed to and from shoreside facilities—the introduction of LASH should avoid those delays caused by slow cargo handling, thereby allowing the fleet, among other things, to cover additional ports.

Equador's major port is Puerto Maritimo. It now takes some 8 hours to travel up and down the Guayas River in order to serve Puerto Maritimo. It is estimated that with LASH vessels, this time will be cut in half because operations⁹ will be handled at Puna Island, located at the mouth of the Guayas River. It is also asserted that even further time will be saved because bananas that now take 36 to 48 hours to load will have been preloaded into LASH barges before the mother ship arrives. This would result in a time savings of some 24 to 36 hours.

In Peru, port congestion, labor difficulties, and other delays are common. Even at so-called "lighter ports" delays are encountered because of insufficient floating equipment and labor force to handle the large shipments of fishmeal which is the major commodity handled by such lighter ports. LASH should permit Grace Line to alleviate the problem by evening out the workloads and minimizing the amount of floating equipment required at lighter ports.

In Chile the situation is much the same. There is considerable port congestion compounded by labor problems and other delays. Here, too LASH operations should help alleviate the problems. Much the

⁸ Maracaibo is a major port serving the oil industry and although not affected by port congestion, delays are encountered because labor is not available from noon Saturday until 8 a.m. Monday. Numerous holidays compound the delays. Because of this, Grace Line has had to omit calls at Maracaibo in order to maintain a fortnightly service to La Guaira and Puerto Cabello.

⁹ Presumably, the off and on loading of lighters from the mother ship.

same can be said for Argentina and Brazil. Indeed, it is asserted that port congestion is a way of life in the two countries. LASH would have the same beneficial effect here as in the areas already discussed.

The foregoing demonstrates that our approval of Agreement 9810 should provide an impetus to the technological advancement of Grace Line operations in the South American trades. The assertions of Prudential concerning their intentions and plans for the introduction of the LASH system into Grace Line's operations is unchallenged by any party to the proceeding and we have no reason to doubt those intentions and plans. As we have already noted, section 15 calls for the approval of such agreements unless it is shown that the particular agreement in question would work one of the four proscribed results set out in section 15 of the Shipping Act.

The record before us shows that the purchase by Prudential of Grace Line would not operate in a way which is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters of the United States and their foreign competitors. To the contrary, shippers, exporters, and importers should, as result of our approval of Agreement 9810, realize a more efficient and economical service in the relevant trades. It is also probable that service in those trades will in the future be expanded to include more ports and shippers.

That approval of the agreement would not operate to the detriment of the commerce of the United States has been more than amply demonstrated. Even the least sanguine forecast would indicate that Prudential ownership of Grace Line will result in the enhancement of the operations of both carriers with a resultant benefit to the shippers, exporters, and consumers, all of whom are such an important part of our foreign commerce. We think it equally clear that approval of the agreement would not be contrary to the public interest.¹⁰ Quite the opposite, the encouragement of sound business practices and technological improvements in the maritime industry is in the public interest and the record before us indicates that just these results will flow from our approval of Agreement 9810. Finally, it is

¹⁰ Whether or not consideration of the public interest requires us to protect the merely asserted rights of a creditor like Sun Shipbuilding when approving an agreement under section 15, the question has been rendered moot by certain conditions attached to the Maritime Administration's approval of the proposed agreement. Thereunder, Prudential is required to arrange for a Letter of Credit for \$11,500,000 in favor of Grace Line while the net purchase price of Prudential assets by Grace is to be met by \$10 million withdrawn from Grace's capital reserve fund and notes of \$7,101,490 which are subordinate to all other obligations of Grace Line. Moreover, see paragraph XX of the Maritime Administration's letter of approval dated December 5, 1969, wherein the "litigation agreement" is discussed.

patently clear that Agreement 9810 in no way violates any other provision of the Shipping Act, 1916.

On the basis of the foregoing, we shall approve Agreement 9810. An appropriate order will be issued.

By the Commission.

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; Therefore:

It is ordered, That, pursuant to the Commission's authority under section 15 of the Shipping Act, 1916, Agreement No. 9810 between Prudential Lines, Inc., and W. R. Grace & Co. be, and it hereby is, approved, and this proceeding be, and it hereby is, discontinued.

By the Commission.

(Signed) FRANCIS C. HURNEY
Secretary.

13 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 69-2

A. P. ST. PHILIP, INC.

v.

THE ATLANTIC LAND AND IMPROVEMENT COMPANY AND SEABOARD COAST
LINE RAILROAD COMPANY

Decided December 23, 1969

Contract whereby terminal operator purports to condition vessel access to its facilities upon the exclusive use of a designated tugboat operator is an unjust and unreasonable practice within the meaning of section 17 of the Shipping Act, 1916, and constitutes undue and unreasonable prejudice and disadvantage in violation of section 16 of the Act.

J. Alton Boyer and Michael Joseph for complainant.

Ralph C. Dell and Harvey E. Schlesinger for respondents.

Joseph B. Cofer and Richard A. Bokor for intervener, Tampa Bay Towing Company.

Donald J. Brunner and Paul M. Tschirhart, Hearing Counsel.

REPORT

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

This proceeding was initiated by the complaint of A. P. St. Philip, Inc., against the Atlantic Land and Improvement Co. and the Seaboard Coast Line Railroad Co. alleging that respondents had violated sections 15, 16, and 17 of the Shipping Act, 1916, by entering into and honoring the provisions of an exclusive contract with Tampa Bay Towing Co. to furnish all tugboat services for the phosphate elevator at Port Tampa, Florida. Complainant sought reparation in the amount of \$100,000¹ and an order requiring respondents to cease and desist

*Chairman Helen Delich Bentley did not participate.

¹ Complainant's request for reparation was withdrawn at the prehearing conference held in conjunction with this proceeding.

from engaging in activities allegedly violative of the act. Tampa Towing, a Florida corporation engaged in the business of providing tugboat service to vessels in the Port Tampa area, and hearing counsel intervened in the proceeding. The case is now before us on exceptions taken to the initial decision of the examiner Herbert K. Greer.

FACTS

St. Philip is a Florida corporation which since 1961 has been providing tugboat service to vessels docking and undocking at terminals in the general area of the Port of Tampa, Florida. St. Philip competes with intervenor Tampa Towing.

Respondent Atlantic, a Virginia corporation, is the owner of lands and terminal facilities along a navigable body of water known as Port Tampa Canal which is part of, and extends into, Old Tampa Bay, a navigable body of water situated in the general area of the Port of Tampa, Florida.² All of Atlantic's outstanding stock is owned by respondent Seaboard R.R., also a Virginia corporation, and the principal offices of both corporations are held by the same individuals.

Included in the terminal properties owned by Atlantic are certain phosphate elevator facilities used to load phosphate rock shipped to the port via railroad cars by Seaboard R.R.³ The phosphate elevator facilities are terminal facilities used in connection with common carriers by water in the interstate and foreign commerce of the United States within the meaning of section 1 of the Shipping Act, 1916. Although a lease between respondents, which was in effect at all times material herein grants to Seaboard R.R. *inter alia*, "the sole and exclusive right, power, and authority to hold, occupy, use, enjoy, and operate" the phosphate elevators, Atlantic and Seaboard R.R. have stipulated that they both "carry on the business of furnishing the phosphate elevator facilities, . . . with [Seaboard] Railroad engaged in their day-to-day operation pursuant to a lease."

Prior to 1958, Atlantic owned and operated a tugboat that handled all vessels needing tug assistance at Port Tampa. When this operation became unprofitable, Atlantic entered into a contract with one Roy E. Leonardi, then operating as Tampa Bay Towing Co. (no relation to intervenor), under which Leonardi agreed to furnish tugboat services to vessels using Port Tampa Canal. This contract by its terms expired

² The Port Tampa Canal and the immediate surrounding area are known as "Port Tampa," as distinguished from the "Port of Tampa" which constitutes the general area.

³ Phosphate rock comprises an excess of 50 percent of all the export cargo from Port of Tampa. The Port of Tampa phosphate elevator is one of the two principal phosphate facilities at Port of Tampa.

in 1963, and was followed by another contract dated April 17, 1963, between Atlantic and the intervener Tampa Towing.⁴

The latter contract presently remains in effect and commits the 90-foot tug *Montclair*⁵ to provide adequate and satisfactory tug service operations for Atlantic, for which Tampa Towing is given "an exclusive contract for handling all vessels requesting tugboat service at Port Tampa during the period of . . . [the] contract, except . . . barges for which the tugboat service is provided."⁶

On or about December 30, 1967, St. Philip began to furnish tugboat services to vessels using the Port Tampa Canal, including vessels docking and undocking at the phosphate elevator. Tampa Towing demanded that St. Philip cease and desist from handling ships at Port Tampa and that ship's agents not employ St. Philip's tugs for that purpose. St. Philip, however, continued to furnish these services to vessels at the Port Tampa phosphate elevator whereupon Tampa Towing instituted in the Circuit Court of the 13th Judicial Circuit of the State of Florida, a suit against St. Philip and Atlantic, seeking, *inter alia*, to have complainant enjoined from interfering with the contract between Atlantic and Tampa Towing and asserting its exclusive right to serve vessels using the Port of Tampa Canal.

The State Court, in a decision rendered on November 22, 1968, interpreted the contract as bestowing an exclusive franchise on Tampa Towing and permanently enjoined St. Philip, during the term of the Atlantic-Tampa Towing contract, from contracting with any vessel to provide tugboat service to or from the phosphate elevators in the Port Tampa Canal.⁷ Further, Atlantic was enjoined from permitting or allowing any tug owned by anyone, other than a tug owned or supplied by Tampa Towing, to handle any vessel coming and going to or from the phosphate elevators on the Port Tampa Canal. The court, however, found that it was without jurisdiction to pass on the defenses raised by St. Philip concerning alleged violations of the Shipping Act, 1916, since the Federal Maritime Commission has original jurisdiction to construe that act. Although the court did not consider such issues adjudicated in its order, it nevertheless declined to stay its proceedings.

⁴ Roy Leonardi no longer has any connection with Tampa Towing. Since 1963, however, he has continued to operate at locations in Port of Tampa, other than Port Tampa, as an individual.

⁵ In performing this contract, Tampa Towing uses other tugs in addition to the *Montclair* and these tugs are kept at Port Tampa Canal so that prompt service may be provided to vessels using the canal.

⁶ In 1964 when W. O. Savage requested of Atlantic the right to provide tug services at Port Tampa, Atlantic advised W. O. Savage that it had an exclusive contract with Tampa Towing to provide all tugboat services for vessels using Port Tampa Canal.

⁷ *Tampa Bay Towing Company v. A. P. St. Philip, Inc. and the Atlantic Land and Improvement Company*, Civil No. 166238, Division D (Cir. Ct. Fla. 1968).

pending a determination by the Commission on the issue of the Shipping Act violations. St. Philip subsequently posted a supersedeas bond, in the amount of \$42,000, and appealed from the court's order, which appeal remains pending.

Following the posting of the bond, St. Philip has continued to furnish tugboat service to vessels docking and undocking at the phosphate elevator. Tugboat service is, and customarily has been, requested of St. Philip and other tugboat operators⁸ in the Tampa area by vessel operators directly and by local ship's agents representing the operators. Since St. Philip began furnishing tugboat services at Port Tampa, approximately 10 to 12 vessels per month have requested St. Philip to perform such services in connection with docking and undocking at the phosphate elevator. In addition, both Tampa Towing and another tugboat operator in the Tampa area have subcontracted to St. Philip certain of their contract obligations to furnish tug service at the phosphate elevator.

Both Tampa Towing and complainant are competent and have the equipment necessary to furnish tug assistance to vessels moving through the Port Tampa Canal and docking and undocking at the phosphate elevator. At the present, St. Philip owns eight tugs and charters an additional tug, all fully equipped. St. Philip leases a docking facility for a tug in Old Tampa Bay, approximately 7 minutes steaming time for the Port Tampa Canal. Tampa Towing has three tugs, which are all docked at Port Tampa.

Seaboard R.R., the operator of the phosphate elevator terminal, has not at any material time refused to handle vessels serving the phosphate elevator because they employed tugboat operators other than Tampa Towing. Tugboat companies inquiring about furnishing such service were advised of the Tampa Towing-Atlantic contract and it appears that they then made no attempt to compete with Tampa Towing. During December 1967, St. Philip was advised by Seaboard R.R. that the exclusive contract existed but Seaboard R.R. did not refuse to permit any vessel using St. Philip's tug service to dock or undock at the elevator. As a result of the Florida State court's injunction, Seaboard R.R. intends to honor Tampa Towing's exclusive contract with Atlantic.

In its complaint, St. Philip alleged (1) that the exclusive contract between Atlantic and Tampa Towing is prima facie unduly prejudicial to St. Philip and to vessels desiring to utilize its tugs in violation of section 16 of the Shipping Act, 1916; (2) that the exclusive contract

⁸ In addition to the parties to this proceeding. Port of Tampa is served by Leonardi Towing Co. and Gulf Towing Co., who operate two and one tugs, respectively.

requiring the use of Tampa Towing tugs is an unreasonable regulation and practice for a terminal facility in violation of section 17 of the act; and (3) Atlantic and Seaboard R.R. have entered into a tacit agreement regarding the operation of the phosphate elevator, which agreement, although subject to section 15, is being carried out without prior Commission approval in violation of that section.

DISCUSSION AND CONCLUSIONS

In his initial decision, the examiner found that the "exclusive right" granted Tampa Towing to furnish tugboat service to all vessels docking and undocking at the Port Tampa phosphate elevators gives to Tampa Towing an undue or unreasonable preference or advantage in violation of section 16 First of the Shipping Act, 1916. The examiner rejected the contention that the exclusive towing arrangement also violated sections 15 and 17 of the act. In dismissing the complaint the examiner declined to issue a cease and desist order on the ground that Seaboard R.R., the only party found by him to be subject to the act, had not yet in fact prevented any tugboat operator from servicing vessels at the phosphate elevators.

For reasons set forth below, we concur in the examiner's finding that the exclusive towing arrangement in question violates section 16 of the act, but disagree with his disposition of the other major issues raised in this proceeding.

Persons engaged in the business of "furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" are, by section 1, made subject to the Shipping Act, 1916. Section 16 First thereof makes it unlawful for any such person to subject "any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 17 of that act imposes upon such persons the obligation of establishing and observing "just and reasonable practices relating to or connected with the receiving, handling, transporting, storing, or delivering of property."

The threshold question to be resolved in this proceeding is whether respondents are "persons" subject to the Shipping Act, 1916. The examiner was manifestly correct in concluding that "[Seaboard] Railroad, operating a facility which provides a dock where common carriers by water take on cargo, is . . . a person subject to the Act." Seaboard R.R. clearly is such a person. It operates all of the terminal facilities along the Port Tampa Canal, including the phosphate elevators in question, and, consistent therewith, has terminal tariffs on file with this Commission.

Atlantic, as lessor of the phosphate elevators, on the other hand, was found by the examiner to have "abandoned any function it may have previously had as the furnisher of terminal facilities" and, accordingly, was held not subject to the Commission's jurisdiction as set forth in section 1 of the act. We cannot agree. To exclude Atlantic from the jurisdiction of the Shipping Act would be to ignore the effect of Atlantic's own admissions and its actual activities which are more than sufficient to make it a "person" subject to the Shipping Act. Although the lease in effect between respondents grants to Seaboard R.R. the exclusive right to operate the phosphate elevators, respondents have in fact stipulated at the commencement of this proceeding that both "Atlantic and [Seaboard] Railroad carry on the business of furnishing the phosphate elevator facilities, with Railroad engaged in their day-to-day operation pursuant to a lease." Thus, by its own admission, Atlantic is a "person" subject to the act. Under these circumstances, and in view of the intercorporate relationship between Atlantic and Seaboard, it is necessary to go beyond the specific provisions of the lease.

Atlantic's participation in the operation of the phosphate elevators is more than amply borne out by Atlantic's own activities with regard to those facilities. What ever the lease in effect between respondents may provide as to the *control* of the terminal facilities, it is clear, as St. Philip contends, that Seaboard R.R. did not acquire the exclusive right to operate and control the phosphate elevators since Atlantic exercised a measure of that control by entering into a contract with Tampa Towing conditioning the availability of such phosphate elevators to vessels who employed Tampa Towing. The contract between Tampa Towing and Atlantic precludes any finding that Atlantic has relinquished all control over the facility in question.

The examiner, however, felt that any finding of retained control by Atlantic "presupposes that the providing of tugboat services to vessels docking and undocking at a terminal is an activity covered by section 1 of the act." He concluded that the furnishing of tugs ". . . concerns the operation of the vessels as distinguished from services related to the terminal." Thus, the examiner not only found that Atlantic was not a person subject to the act, but he rejected the contention that any violation of section 17 had occurred since the service involved did not concern the "receiving, handling, transporting, storing or delivery of property." We cannot agree with the examiner's conclusions.

Normally, it is true that the selection of the tugboat operator is within the exclusive province of the carrier and that terminals themselves do not become involved in the actual docking and undocking of

vessels or in the arrangements therefor. We would, therefore, ordinarily agree that tugboat service does not constitute a terminal function within the scope of section 17. Where, as here, however, the terminal operator has usurped the normal function of the carrier and made the very access to the terminal facilities dependent upon a commitment to Tampa Towing for tug service under the terms of an exclusive-right contract, the furnishing of tugboat service has, in effect, been transformed into a terminal function intimately related to the "receiving, handling, transporting, storing, or delivering of property."

We see no relevant distinction between the situation here and that existing in *Truck and Lighter Loading and Unloading*, 9 F.M.C. 505 (1966). In that case, we required terminal operators who maintained and operated lighters, an operation normally without the function of a terminal, to adopt just and reasonable lighter detention rules or regulations because:

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. 9 F.M.C. at 514 (1966).

Thus, by the execution of the exclusive contract with Tampa Towing, Atlantic has through its participation in the operation and control of the terminal facility subjected itself to the jurisdiction of the Shipping Act, and the question now becomes whether the practice of conditioning the availability of the terminal facilities only to vessels who utilize the services of a designated tugboat operator, is unreasonable or unjust within the meaning of section 17 of that act.

In *Calif. S. & B. Co. v. Stockton Port Dist.*, 7 F.M.C. 75, 82 (1962), the Commission considered and struck down an arrangement whereby a grain elevator operator granted to the Port of Stockton an exclusive right to perform *all* stevedoring services at those facilities. In finding this arrangement "both unjust and unreasonable" in violation of section 17, we stated therein that:

Such a practice runs counter to the antimonopoly tradition of the United States, upsets the long-established custom by which carriers pick their own stevedoring companies, deprives complainants and other stevedoring companies of an opportunity to contract for stevedoring work on ships using Elevators' facilities, and opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs.

Such a practice is *prima facie* unjust, not only to stevedoring companies seeking work, but to carriers they might serve, and the general public which is entitled to have the benefit of competition among stevedoring companies serving

ships carrying goods in which the public is interested as shipper or consumer ; for the same reasons it is *prima facie* unreasonable.⁹

The principle announced in the *Stockton Port* case, *supra*, applies with equal force to a situation where a vessel owner's right to select a tugboat operator is denied by exclusive contract. The arrangement before us now also eliminates competition and is *prima facie* unjust and unreasonable, not only to tugboat companies seeking to render service to vessels docking and undocking at the phosphate elevators, but also to the carriers that they might serve. Thus, unless justified, the arrangement must be struck down, and it is incumbent upon respondents to furnish the justification. Moreover, as we stated in the *Stockton Port* case, however, "the burden of sustaining such practices as just and reasonable is a heavy one."

Respondents have totally failed to sustain this burden. Neither Atlantic nor Seaboard R.R. has made any attempt to justify the exclusionary arrangement as being necessary to the operation of the terminal, preferring rather to challenge the Commission's jurisdiction over the parties and the arrangement with Tampa Towing. Intervener sought justification for the arrangement in that its purpose was "to provide a competitive posture for Port Tampa vis-a-vis other terminal facilities in the port of Tampa." This justification, based on the size and geographical location of the phosphate elevators in relation to the other facilities at Port Tampa, was found singularly unpersuasive by the examiner who found and concluded quite the contrary :

Tampa Towing and complainant both have the equipment and operational efficiency to serve vessels using the Port Tampa Canal. While at one time, Tampa Towing was the only operator with a tug immediately available at all times at the canal, that situation no longer exists. Complainant also has a tug available for prompt service when called upon. * * *

* * * * *

Cases cited and argument offered by intervener in support of the exclusive arrangement have been considered but nothing is found contrary to the principle that such an arrangement must be fully justified. It is concluded that the burden of justifying the giving of a preference and advantage to Tampa Towing by permitting only its tugs to serve vessels docking and undocking at the phosphate-elevator terminal facility has not been met. No transportation need or public-benefit has been demonstrated which would warrant Railroad giving the preference nor does it appear that a valid regulatory purpose would thereby be served. Justification for depriving the master of a vessel who is responsible for the vessel's safety, of the right to select tugs to assist in moving through the canal and docking and undocking at the phosphate elevator is not disclosed.

⁹ See also *Agreements 8225 and 8225-1*, 5 F.M.B. 648 (1959) which holds that where the responsibility for the vessel's safety is with the master, strong justification must appear to warrant depriving him of the right to select persons who perform services relating thereto.

We concur fully with the examiner that the record demonstrates no present justification for the exclusive towing arrangement and adopt this finding as our own.

The examiner's conclusion that the subject towing arrangement violates section 16 of the act is also proper and well founded. The manifest purpose of section 16 of the Shipping Act is to impose upon "persons subject to this Act" the duty to serve the public impartially. In no other area is this requirement of equality of treatment between similarly situated persons more important than in the terminal industry. The reason is obvious. Terminals are for all practical purposes public utilities. *Transportation of Lumber Through Panama Canal*, 2 U.S.M.C. 143 (1939). Thus, the operation of terminal facilities imposes upon those who furnish them the same duties and obligations as attach to any other public utility. Or as we explained in *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966) :

While not always specifically franchised, [terminals] 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 contract between Atlantic and Tampa Towing effectively denies access to the docking facilities at the phosphate elevators to all tug operators but Tampa Towing and to any vessel who desires to employ the service of a competing tugboat company. This arrangement not only unlawfully prefers Tampa Towing to the prejudice of complainant and other tugboat operators at Port Tampa, but also unlawfully prejudices those vessels using the services of tugboat companies other than Tampa Towing.

Section 16 does not forbid all preferential or prejudicial treatment; only that which is undue or unreasonable. *Intercoastal Cancellations and Restrictions*, 2 U.S.M.C. 397, 400 (1940). As we have heretofore indicated, however, no justification for the exclusive towing arrangement in question has been demonstrated on the record. In fact, the evidence is quite to the contrary. Complainant, as well as Tampa Towing, has the equipment and expertise to provide excellent service. Accordingly, we find that the exclusive towing arrangement existing between Atlantic and Tampa Towing results in undue and unreasonable preference and prejudice in violation of section 16 of the act.

Since neither of the parties is presently engaging in the conduct here found unlawful, there is of course no reason to issue a cease and desist order. Consequently, no such order will be issued now. However, should either party at some future time attempt to effectuate the exclusive arrangement we have declared unlawful under sections 16 and

17 of the act, all the complainant need do is to petition us for the issuance of such an order and one will be issued.

Having found that the exclusive towing arrangement violates sections 16 and 17 of the act, we find it unnecessary to consider whether the arrangement also violates section 15.

By the Commission.

(Signed) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 405

HARRISONS & CROSFIELD (PACIFIC) INC.

v.

NEDLLOYD & HOEGH LINES

Adopted December 30, 1969

Respondent is permitted to refund to complainant the sum of \$165.55 as part of the freight charges assessed and collected for the transportation of boom boats from Portland, Oreg., to Tawau, East Malaysia, in May 1969.

W. W. Litch for applicant/respondent.

John Porel, Jr., for complainant.

INITIAL DECISION OF C. W. ROBINSON, PRESIDING EXAMINER ¹

By application filed on June 6, 1969, concurred in by complainant, Transpacific Transportation Co., as agent for Nedlloyd & Hoegh Lines (Nedlloyd), a joint service of Nedlloyd Lines and Hoegh Lines, requests permission to refund to complainant the sum of \$165.55 as part of the charges assessed and collected by Nedlloyd for the transportation of the cargo referred to in the next paragraph.²

Pursuant to bill of lading number PO-1, dated at Portland, Oreg., on May 20, 1969, complainant delivered to Nedlloyd, at Portland, two skid-mounted boom boats for transportation on Nedlloyd's vessel *Hoegh Elan* to Tawau, East Malaysia, with transshipment at Singapore, consigned to order of complainant. The boats weighed 15,500 pounds and measured 1,892 cubic feet. Freight charges of \$3,452.90 were assessed in accordance with the rate of \$73 per cubic foot applicable on "BOATS AND LAUNCHES", published in Item 295 of 7th Revised Page 46 of Pacific-Straits Conference Local Freight Tariff No. 7, FMC-1, effective April 1, 1969 (other charges also were assessed but are not here involved). The charges were collected May 29, 1969.

¹ This decision became the decision of the Commission Dec. 30, 1969.

² Public Law 90-298, 90th Congress, 75 Stat. 764, approved Apr. 29, 1968.

Between December 1, 1966, and March 31, 1969, the rate on the articles under consideration was \$65.75 per ton, weight or measurement. It was the intention of the conference to increase the rate on April 1, 1969, to \$69.25, weight or measurement (7 percent), but through error of the conference staff the published increase was 12 percent, or \$73. Effective May 26, 1969, or 6 days after the boats were loaded, Item 295 of the Tariff was amended to read as follows:

BOAT AND LAUNCHES :

Measuring up to and including 20 feet overall :	
Contract -----	\$35. 75
Noncontract -----	41. 00
Measuring over 20 feet and including 30 feet overall :	
Contract -----	48. 25
Noncontract -----	69. 50
Over 30 feet overall :	
Contract -----	60. 50
Noncontract -----	69. 50

The failure to publish the rate which the conference had agreed upon was an administrative error which justifies relief. Having complied with all of the preliminary requirements of the statute, applicant hereby is authorized to refund to complainant the sum of \$165.55, which is the difference between the charges collected and the charges which would have been collected under the amended rate. Applicant shall publish the appropriate notice referred to in the statute; refund shall be made within 30 days of such notice; and within 5 days thereafter applicant shall notify the Commission of the date of the refund and of the manner in which payment has been made.

(Signed) C. W. ROBINSON,
Presiding Examiner.

Washington, D.C.
 December 3, 1969

It is ordered, That Nedlloyd and Hoegh Lines refund to Harrisons and Crosfield (Pacific), Inc., the sum of \$165.55.

It is further ordered, That Nedlloyd and Hoegh Lines publish promptly in its appropriate tariff the following notice:

“Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 405, that, effective May 20, 1969, the rate on boats and launches from Portland, Oregon to Tawau, East Malaysia for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of Nedlloyd and Hoegh Lines during the period from May 20, 1969, until May 26, 1969, is \$69.50 per 40

cu. ft., subject to all other applicable rules, regulations, terms, and conditions of the said rate and this tariff."

It is further ordered, That Nedlloyd and Hoegh Lines notify the Secretary on or before January 30, 1970, of the date and manner in which the refund herein ordered was made.

BY THE COMMISSION.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

13 F.M.C.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 416

GHISELLI BROS., INC.

v.

MICRONESIA INTEROCEAN LINE, INC.

Application to refund, deposited in United State mails within 180 days of date of shipment, found timely "filed".

Proceeding remanded to Hearing Examiner for consideration on the merits.

Kai Angermann for Applicant.

REPORT*

BY THE COMMISSION: (HELEN DELICH BENTLEY, *Chairman*; JAMES F. FANSEEN, *Vice Chairman*; ASHTON C. BARRETT, JAMES V. DAY, and GEORGE H. HEARN, *Commissioners*.)

This is an application, filed pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure (46 CFR 509.92) by Micronesia Interocean Line, Inc. (Micronesia), for an order authorizing it to refund to Ghiselli Bros., Inc. (Ghiselli) the sum of \$84.61 in connection with a shipment of bagged potatoes from San Francisco, California, to Majuro, Trust Territory of the Pacific Islands.

Examiner C. W. Robinson issued an Initial Decision in which he denied the application as being time barred. This proceeding is now before us on our motion to review the Examiner's decision.

FACTS

For some time prior to the shipment in question an agreement has existed between Micronesia and the Trust Territory of the Pacific Islands, whereby the former agrees to assess rates at a level no higher than those in effect for shipments moving via Pacific Far East Line to the Trust Territory by way of Guam, or moving on vessels of

*Initial Decision on remand adopted by the Commission January 6, 1970.

various other carriers serving the Trust Territory via Japan. When issuing its Tariff No. 1, FMC No. 1, in September 1968, Micronesia listed only rates on commodities known to it to be moving in the trade, being somewhat handicapped by reason of the destruction of certain statistical records by Typhoon Jean. Although other carriers in the trade had commodity rates on bagged potatoes, a rate for this commodity was "erroneously omitted" from Applicant's tariff.¹

On November 5, 1968, Ghiselli delivered to Micronesia, at San Francisco, a shipment of 30 bags of potatoes for carriage aboard Applicant's vessel GOLDEN SWAN to Majuro, Trust Territory of the Pacific Islands. An on-board bill of lading was issued therefor on November 8, 1968. Since at the time of shipment Applicant had no commodity rate for potatoes, Micronesia's N.O.S. rate of \$94.50 per cubic foot for nonhazardous cargo was applied to the cargo. Weighing 3,030 pounds and measuring 90 cubic feet, the shipment was assessed freight charges of \$212.63. The charges were paid by Ghiselli to Micronesia on November 21, 1968.

If, at the time of shipment Applicant's tariff had accurately reflected its agreement with the Trust Territory, the rate of \$84.50 per 2,000 pounds would have applied. This would have resulted in a total charge of \$128.02, of \$84.61 less than was actually assessed and collected. As a result of the foregoing, Micronesia on May 5, 1969, submitted to the Commission's West Coast office in San Francisco, California, an application for permission to refund to Ghiselli the sum of \$84.61, which application was transmitted to the Office of the Secretary in Washington, D.C. on or about May 5, 1969, and received there on May 8, 1969.

DISCUSSION AND CONCLUSION

Public Law 90-298, pursuant to which present Rule 6(b) of the Commission's Rules of Practice and Procedure was promulgated, authorizes the Federal Maritime Commission to permit a common carrier by water in foreign commerce, or conference of such carriers, to refund a portion of the freight charges collected from a shipper or waive the collection of a portion of such charges where it appears that there is an error in a tariff of a clerical or administrative nature, or where through inadvertence, there has been a failure to file a particular tariff reflecting an intended rate. After setting forth the requirements that a carrier or conference must meet before an application for refund

¹ When Micronesia discovered that certain commodities moving in the trade had been omitted, it revised its tariff to include rates on these commodities. Accordingly, a rate on bagged potatoes was established, effective March 13, 1969.

or waiver may even be considered, the statute provides: "That application for refund or waiver *must be filed* with the Commission within one hundred and eighty days from the date of shipment." (Emphasis added). The sole question presented in this proceeding is whether the application for refund submitted by Micronesia was "filed" within 180 days of the shipment date as specified in the statute.

The Examiner, in his Initial Decision, determined that the application in question had not been timely "filed" within the meaning of P.L. 90-298 and accordingly denied it. In so concluding, the Examiner relied on the definition of "filed" as used in Commission General Order 13, governing the filing of tariffs by common carriers in the foreign commerce of the United States. Under section 536.2 of General Order 13, a tariff is "filed with the Commission" only when *actually received* by it at its offices in Washington. On the basis of this interpretation, the Examiner found that, since Micronesia's special docket application was not *actually received* by the Commission in Washington until May 8, 1969, 181 days after the shipment date of November 8, 1968, it was time barred. We do not agree. The Examiner's conclusion requires an unnecessarily strict construction of the word "filed".

The "filing" of a schedule with the Commission evidences that the rates and charges contained therein have been put in force or established for the future. The purpose of requiring the submission of tariff schedules under section 18(b) of the Shipping Act, 1916,² and regulations promulgated pursuant thereto, is to secure uniformity and equality of treatment in rates and services to all shippers. Requiring the public establishment of tariff schedules prevents special and secret agreements thereby suppressing unjust discrimination and undue preferences. As the court explained in *United States v. Illinois Terminal R. Co.*, 168 Fed. 546, 549 (1909), in discussing section 6 of the Interstate Commerce Act, after which our own section 18(b) was patterned:

Carriers, being engaged in a public employment, must serve all members of the public on equal terms. This was the doctrine of the common law. It has been explicitly stated and strengthened by the successive acts to regulate commerce. The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discriminations. If this portion of the act is not strictly enforced, the entire basis of effective regulation will be lost. Secret rates will inevitably become discriminat-

² Section 18(b) in part requires:

. . . every common carrier by water in foreign commerce . . . [to] file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established.

ing rates. Whenever discriminating rates or practices are made public, a thousand forces of self-interest and of public policy will be set at work to reduce them to fairness and equality.

In order for this Commission to effectively enforce and administer section 18(b), as well as other sections of the Act, especially those relating to unjust discrimination and undue preferences, tariff schedules required to be "filed" must be actually received by the Commission before there can be compliance, since section 18(b) makes the only legal charge for the transportation of goods the rate duly on file with the Commission. To hold otherwise would not only effectively frustrate the purpose of section 18(b), but would also invariably result in confusion and controversies.

While the very nature and purpose of regulations requiring the filing of tariffs demand that nothing less than actual receipt of the rate schedules by the Commission shall constitute a "filing" within the meaning of those regulations, there is no reason to impose such a strict interpretation to the filing of "special docket" applications. P.L. 90-298 itself is permissive and affords the Commission wide latitude of discretion in the granting of special docket applications. Moreover, proceedings under Rule 6(b) of the Commission's Rules of Practice and Procedure are nonadversary in nature and, therefore, the individual interests and the legal rights of the parties would not be prejudiced by adopting a more liberal attitude towards "filings" in "special docket" situations. In short, as pertains to applications submitted pursuant to P.L. 90-298 and Commission Rule 6(b), we see no regulatory purpose to be served by equating "filed" with "received". All that is required is that the application be deposited in the United States mails for delivery to the Commission in Washington within the time specified by statute; the postmark date shall be considered the "filing" date.

Applying these principles to the factual situation before us, it is clear that Micronesia's application was timely "filed". The shipment in question was made on November 8, 1968, and the subject application was mailed on either May 5, May 6, or the latest, May 7, 1969, the elapsed time between shipment date and "filing" date being, in any event, no more than 180 days.³

³ The envelope containing the Micronesia application has been lost and we have no actual indication as to the exact postmark date. Since the application was mailed from California and received by the Commission in Washington on May 8, however, it is reasonable to assume that the application could not have been mailed later than May 7.

The Examiner in denying Micronesia's application on the ground that it was time barred never reached the substantive issues in this proceeding. We are, therefore, remanding the proceeding to the Examiner for consideration of the application on the merits.

By the Commission.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

13 F.M.C.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 416

GHISELLI BROS., INC.

v.

MICRONESIA INTEROCEAN LINE, INC.

Application to refund to complainant the sum of \$84.61 as part of the freight charges assessed and collected for the transportation of a shipment of bagged potatoes from San Francisco, Calif., to Majuro, Trust Territory of the Pacific Islands, in November 1968, granted.

Kai Angermann for applicant/respondent.

INITIAL DECISION ON REMAND OF C. W. ROBINSON, HEARING EXAMINER

The facts and background of this proceeding are fully set forth in the initial decision¹ of the Examiner issued September 26, 1969, and the report of the Commission issued December 1, 1969. Suffice it to say that the Commission disagreed with the conclusion of the Examiner that the application for refund had not been timely filed within the wording and the intent of the statute.² The matter was remanded to the Examiner "for consideration of the application on the merits."

The failure to have on file a rate for potatoes was an administrative error which justified relief. Having complied with all of the preliminary requirements of the statute, applicant hereby is authorized to refund to complainant the sum of \$84.61, which is the difference between the charges collected and the charges which would have been collected under the rate as published subsequent to the movement of the commodity. Applicant shall publish the appropriate notice referred to in the statute; refund shall be made within 30 days of such notice; and within five days thereafter applicant shall notify the Commission of the date of the refund and of the manner in which payment has been made.

WASHINGTON, D.C.,
December 9, 1969

(Signed) C. W. ROBINSON,
Presiding Examiner.

¹ 13 FMC 186.

² Public Law 90-298, 90th Congress, 75 Stat. 764, approved April 29, 1968.

It is ordered, That Micronesia Interocean Line refund to Ghiselli Bros., Inc., the sum of \$84.61.

It is further ordered, That Micronesia Interocean Line publish promptly in its appropriate tariff the following notice:

"Notice is hereby given as required by the decision of the Commission in Special Docket No. 416 that effective November 8, 1968, the rate on bagged potatoes from San Francisco, California, to Majuro, Trust Territory of the Pacific Islands for purposes of refund or waiver of freight charges on any shipments which may have been shipped on vessels of Micronesia Interocean Line during the period from November 8, 1968, until January 1, 1969, was \$84.50 per ton of 2,000 pounds, subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff."

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before February 7, 1970, of the date and manner in which the refund herein ordered was made.

By the Commission.

(Signed) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 416

GHISELLI BROS., INC.

v.

MICRONESIA INTEROCEAN LINE, INC.

Application to refund to complainant the sum of \$84.61 as part of the freight charges assessed and collected for the transportation of a shipment of bagged potatoes from San Francisco, Calif., to Majuro, Trust Territory of the Pacific Islands, in November 1968, denied.

Kai Angermann for applicant/respondent.

INITIAL DECISION OF C. W. ROBINSON, PRESIDING EXAMINER ¹

This is an application filed May 8, 1969, by Micronesia Interocean Line, Inc. (applicant), concurred in by complainant, for permission to refund to complainant the sum of \$84.61 as part of the charges assessed and collected by applicant for the transportation of the cargo referred to below.

On November 5, 1968, complainant delivered to applicant, at San Francisco, Calif., a shipment of 30 bags of potatoes for carriage on applicant's vessel *Golden Swan* to Majuro, Trust Territory of the Pacific, consigned to order of shipper. An on-board bill of lading was issued therefor on November 8, 1969. Weighing 3,030 pounds and measuring 90 cubic feet, the shipment was assessed freight charges of \$212.63 in accordance with the rate of \$94.50 per 40 cubic feet contained in Item 140 of applicant's Tariff No. 1, FMC No. 1, applicable to nonhazardous cargo, NOS. The charges were paid by complainant to applicant on November 21, 1968.

By agreement between applicant and the Trust Territory of the Pacific Islands, the former's rates are to be no higher than those in effect for shipments moving via Pacific Far East Line to the Trust Territory by way of Guam, or moving on vessels of various other

¹ The Commission remanded this proceeding to the Examiner for reconsideration of the application.

carriers serving the Trust Territory via Japan. At the time of the shipment applicant had no commodity rate for potatoes, hence the assessment of the rate for cargo, NOS. Other carriers in the trade had commodity rates for potatoes, which prompted applicant to amend its tariff to publish a rate on that commodity of \$84.50 per ton of 2,000 pounds, effective January 1, 1969. The difference between the charges assessed at the measurement rate of \$94.50 (\$212.63) and the weight rate of \$84.50 (\$128.02) is \$84.61.

Public Law 90-298, 90th Congress, 75 Stat. 764, approved April 29, 1968, under which this application is filed, provides, among other things, that an application for refund "must be *filed with the Commission* within one hundred and eighty days from the date of shipment." (Italic supplied) Transportation may be said to begin either when the merchandise is placed in the possession of a carrier or when the merchandise actually starts in the course of transportation. *Coe v. Errol*, 116 U.S. 517, 525 (1886); *So. Pac. Terminal Co. v. Int. Comm. Comm.*, 219 U.S. 498, 527 (1911); *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U.S. 111, 123 (1913); *Penna R. Co. v. P. U. Comm'n.*, 298 U.S. 170, 175 (1936); *Continental Oil Co. v. Kansas City Southern Ry. Co.*, 311 I.C.C. 288, 289 (1960).

Giving applicant the benefit of the alternative dates (shipment commencing on November 8, 1968, as against delivery to applicant on November 5, 1968), time began to run as of November 9, 1968. Whether the application was received within 180 days from date of shipment depends upon whether, for the purposes of the statute, the date of the mailing of the application or the date received by the Commission controls. The application was transmitted on May 5, 1969, and was received by the Commission on May 8, 1969. If the transmission date is to be considered as the date of filing with the Commission, then the application has been filed in time. On the other hand, if the date of receipt is to be considered as the date of filing, then the application is time-barred.

The statute is explicit: the application must be *filed* with the Commission, which means that it must be *received* by the Commission within 180 days of shipment.² Rule 8(f) of the Rules of Practice and Procedure (46 CFR 502.116) does not come into play for that Rule refers to the *service* of papers by parties. Applicant is not required to

² General Order 13, governing the filing of tariffs by common carriers in the foreign commerce of the United States, states in section 536.2: "Where used in this part, the words 'filing', 'filed', or 'file' when used with respect to time of filing with the Commission shall mean actual receipt by the Federal Maritime Commission at its offices in Washington, D.C., United States of America."

serve the application upon any one, but he must *file* the application *with* the Commission within 180 days of shipment.

Under the circumstances, the application was not filed within 180 days from the date of shipment; accordingly, the application hereby is denied.

(Signed) C. W. ROBINSON,
Presiding Examiner.

WASHINGTON, D.C.,
September 25, 1969.

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FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 413

ANSOR CORPORATION

v.

MICRONESIA INTEROCEAN LINE, INC.

Refunds authorized of portions of freight charges collected because of errors due to inadvertences in failure to file new tariff items on two shipments from San Francisco, California, to Yap, Western Caroline Islands, and to Majuro, Marshall Islands. Application to refund portion of freight charges on shipment to Saipan, Mariana Islands barred because not timely filed.

Kai Angermann for respondent.

INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER ¹

January 19, 1970

This application under section 18(b)(3) of the Shipping Act, 1916, (the Act), was mailed on or about May 5, 1969, and was received by the Commission on May 8, 1969. The respondent seeks permission to refund to the complainant portions of the freight charges collected on three shipments of various articles from San Francisco, California, to Saipan, Mariana Islands on September 27, 1968, to Yap, Western Caroline Islands on November 8, 1968, and to Majuro, Marshall Islands on November 8, 1968. Insofar as the shipment to Saipan is concerned it is barred because it was not timely filed within 180 days from the date of shipment.

An agreement between the Trust Territory of the Pacific Islands and the respondent calls for freight rates no higher than those in effect on shipments on vessels of the Pacific Far East Line via Guam or on vessels of various other carriers via Japan, to the Trust Territory. The two other shipments herein were charged on the basis of a cargo

¹This decision became the decision of the Commission January 19, 1970.

N.O.S. rate of \$94.50 a ton W/M, whereas they apparently could have been moved at rates via other carriers, of \$80.25 a ton W/M to Yap, and of \$66.25 a ton W/M to Majuro, applying respectively on toys and games, and on kitchenware. The \$80.25 rate on toys and games is a combination of the rate of Pacific Far East Line, Inc. to Guam of \$63.25, plus Micronesian Lines' rate of \$17.00 from Guam to Yap. The rate of \$66.25 on kitchenware applied via Micronesian Lines and several other lines.

Based on the respondent's newly established rates of \$80.25 W/M on toys and games and \$66.25 W/M on kitchenware and cooking utensils, both effective March 13, 1969, the freight charges would be \$88.28 and \$101.03, respectively, instead of the charges actually collected of \$103.95 and \$144.11. The refundable differences are \$15.67 and \$43.08, or a total of \$58.75. No other shipments of toys and games, and of kitchenware and cooking utensils moved on respondent's line during this period in issue, and the authorization of the refund will not discriminate among any shippers. Section 18(b)(3) of the Act permits the Commission in its discretion and for good cause shown to permit refunds of portions of the freight charges collected as in the circumstances herein provided that, among other things, the carrier shall publish in its tariff the appropriate notice referred to in statute, giving notice of the rates on which the refunds are based. This notice shall be as follows:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 413, that effective November 8, 1968, the rate on toys and games from San Francisco, California, to Yap, Western Caroline Islands for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of the respondent from November 8, 1968, until March 12, 1969, inclusive is \$80.25 a ton W/M, and the rate on kitchenware and cooking utensils from San Francisco, California to Majuro, Marshall Islands for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of the respondent from November 8, 1968 to March 12, 1969, inclusive is \$66.25 a ton W/M, both rates subject to all other applicable rules, regulations, terms and conditions of the said rate and of this tariff.

Good cause shown, the respondent hereby is authorized to refund to the complainant the total of \$58.75, provided that the respondent upon receiving final permission to make this refund publishes in its tariff

the appropriate notice required by the statute. The respondent shall notify the Commission within 30 days after the date of final decision herein of the date and manner in which the refund herein authorized was made.

(Signed) CHARLES E. MORGAN,
Presiding Examiner.

WASHINGTON, D.C., *December 30, 1969.*

IT IS ORDERED, That Micronesia Interocean Line refund to Anso Corporation the sum of \$58.75.

IT IS FURTHER ORDERED, That Micronesia Interocean Line publish promptly in its appropriate tariff the notice set forth in the Examiner's initial decision.

IT IS FURTHER ORDERED, That Micronesia Interocean Line notify the Secretary on or before February 18, 1970, of the date and manner in which the refund herein ordered was made.

By the Commission.

(Signed) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 69-52

JOHNS-MANVILLE PRODUCTS CORPORATION PETITION FOR DECLARATORY ORDER

Decided January 27, 1970

Carrier's specific commodity description "conduit or pipe, cement containing asbestos fibre" sufficiently descriptive to include an asbestos fibre-cement air duct.

Commission need not consider use of product or manufacturer's description for sales purposes when product clearly falls within specific commodity description.

H. S. Ray for Johns-Manville Products Corporation.

R. E. Gregory and *Gordon O. Mason* for Dillingham Line, Inc.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; James F. Fanseen, *Vice Chairman*; Ashton C. Barrett, James V. Day, George H. Hearn, *Commissioners*):

Johns-Manville Products Corporation has petitioned the Commission seeking a declaratory order to terminate a controversy between Johns-Manville and Dillingham Line, Inc. The controversy involves the application of a specific commodity description in Dillingham's tariff No. 1, FMC-F No. 1.

By order dated October 15, 1969, the Commission limited the proceeding to filing of affidavits of fact and briefs of law with provision for evidentiary hearing upon request of either party. Hearing has not been requested. Affidavits of fact and memoranda of law have been submitted.

FACTS

In September 1968, Johns-Manville tendered three shipments of asbestos-cement air ducts to Dillingham. Bills of lading were prepaid by Johns-Manville at the rates specified in Dillingham's tariff in Item

407 "Conduit or pipe, cement, containing asbestos fibre." In January 1969, Dillingham submitted balance due bill totaling \$5,161.68 alleging misdescription of the three shipments and basing the balance due on Item 5 of the tariff "Merchandise, cargo or freight, N.O.S."

The allegation of misdescription is based on Dillingham's belief that Johns-Manville's air ducts do not fall within the specific commodity description of "conduit or pipe, cement, containing asbestos fibre."

Johns-Manville contends that the article shipped falls within the specific description.

Johns-Manville has sworn to the following facts which are undisputed by Dillingham.

Johns-Manville manufactures and ships asbestos cement pipe at eight locations in Canada and the United States including Long Beach, Calif. The product is sold under the name "TRANSITE" which is the registered Johns-Manville trademark for its brand of asbestos cement products including pipe. Johns-Manville "TRANSITE" pipe is manufactured by a process of laminating a precise mixture of asbestos fibre, portland cement and silica sand to a polished steel mandrel. It is made in sizes from 4 to 36 inches and is sold for use in water supply systems, sewerage lines, irrigation systems, conveyance of cold and warm air, industrial waste systems both gaseous and liquid, encasing telephone and electrical distributions systems and a myriad of other applications. Sales are to Federal, State, and municipal governments contractors, water districts suppliers and home owners. Approximate prices range from under \$15 per foot for 36 inches of duct pipe to over \$40 per foot for pressure pipe. The shipment herein involved consisted of *the lowest valued* pipe in the diameter manufactured and contained identical ingredients as all other classes of asbestos cement pipe only in lesser quantities.

Johns-Manville's asbestos cement pipe products are invariably described for transportation purposes as "pipe or conduit cement containing asbestos fibre". This description appears in domestic rail and truck tariffs on file with the Interstate Commerce Commission as well as State regulatory agencies and the Federal Maritime Commission.

These descriptions with slight variations have been in common use for many years at all Johns-Manville's shipping locations as well as those of its competitors and have never been challenged by any regulatory agency or carrier.

DISCUSSION

Johns-Manville contends that the article shipped comes within the tariff description; that it cannot be disputed that Transite Air Duct

is a pipe or conduit, cement, containing asbestos fibre; that the commodity shipped is no different than other transite products such as irrigation, house connection or sewer pipe insofar as composition is concerned, all being specifically ratable per Item 407. Johns-Manville feels that the words "duct", "conduit" and "pipe" could be used interchangeably and that their description of the product as an air duct instead of pipe or conduit does not bring it without the commodity description. We agree with Johns-Manville.

Our predecessors long ago recognized that tariff terms should be interpreted reasonably. In *National Cable and Metal Co. v. American Hawaii S. S. Co.*, 2 U.S.M.C. 471, 473 (1941), the former Commission stated:

In interpreting a tariff the terms used must be taken in the sense in which they are generally understood and accepted commercially, and neither carriers nor shippers should be permitted to urge for their own purposes a strained and unnatural construction. Tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carriers controls, for the shipper cannot be charged with knowledge of such intent or with carrier's canons of construction. A proper test is whether the article may be reasonably identified by the tariff description.

We think it reasonable to interpret the specific commodity description "conduit or pipe, cement containing asbestos fibre" to include an air duct made of cement and asbestos fibre. In fact, to conclude otherwise would result in a strained and unnatural construction. As suggested by Johns-Manville, its air duct is manufactured by the same process as its other products which are used in water supply systems, sewerage lines, irrigation systems etc. The composition of the articles is similar varying in quantities of asbestos and cement. Since the other asbestos cement products are carried under the specific description, the air duct should be similarly carried.

Additionally, we think the accepted meaning of the terms "conduit", "pipe" and "duct" is such that the terms could be used interchangeably for rating purposes. Webster's Dictionary¹ defines a duct as a "pipe, tube or channel by which a substance (as water, gas, air) is conveyed." Thus it is shown that under common construction a duct is a pipe and can be used to carry water, gas, or air. The words could therefore be used interchangeably.

A simple reading of Webster's definition also refutes Dillingham's contention that the commodity description in question applies only to a conveyor of liquids whereas Johns-Manville's product is used as a conveyor of air. *Kelly Pipe Co. v. Amer. Hawaiian S. S. Co.*, 286 I.C.C.

¹ See *Webster's Third New International Dictionary*, Unabridged (1964).

328 (1952) which stands for the proposition that it is the nature or character of a commodity and not its *use* which determines the applicable rate additionally refutes Dillingham's contention.

Dillingham contends, however, that since Johns-Manville advertises its product as an air duct and since in its description of the product attempts to convey the impression that the product is a higher or different grade material than either common asbestos cement pipe or ordinary asbestos cement conduit, commodity Item No. 407 is not applicable.

Dillingham cites several ICC cases² for the proposition that the manufacturer's description of a commodity for sales purposes can be accepted as determinative of its identity for transportation purposes.

We find that it is sufficiently clear that the nature or character of a cement-asbestos fibre air duct is such that it comes within the commodity tariff description "conduit or pipe, cement, containing asbestos fibre". Accordingly, it would be unnecessary to look to the use of the commodity or the manufacturers' description of the commodity for sales purposes to determine its identity for transportation purposes. The principle of the cited ICC cases only comes into play when it is not clear whether a commodity would be carried under a specific description or when there are two rather specific descriptions under which the commodity might be carried and it must be determined which is more applicable. In this case, the alternative to the specific description is a cargo N.O.S. rate and it simply is not necessary to consider the manufacturer's description of the product to determine which rate would be more applicable.

Finally, Dillingham points out that FMC Tariff Circular No. 3 provides that "commodity rates must be specific and shall not apply by implication on analogous articles". Dillingham contends, therefore, that the commodity rate applicable to "pipe" and "conduit" cannot be applied by analogy to a "duct" in the absence of the word "duct" in the commodity description.

We think what has been said above disposes of this contention. A fair and reasonable reading of the terms of the tariff lead to the conclusion that Johns-Manville's air duct clearly falls within the specific commodity description. We do not think it involves a question of applying the commodity description by implication to analogous articles.

² See *Markstein v. Missouri Pac. R. Co.*, 243 I.C.C. 345, at page 348 (1941); *Mead Johnson & Co. v. Atlantic Coast Line R.* 171 I.C.C. 5 (1930); *Northern Pump Co. v. Chicago, M. & St. P. & P. R. Co.*, 190 I.C.C. 421 (1932); *Ford Co. v. M.C.R.R. Co.*, 19 I.C.C. 507 (1910); and *Bull Dog Floor Clip Co. v. Chicago R. I. & P. Ry. Co.*, 225 I.C.C. 313 (1937).

CONCLUSION

We conclude that Johns-Manville's shipments in question of asbestos-cement air ducts were properly billed per Item 407 of Dillingham's tariff. The bills of lading having been prepaid at the rates specified in Item 407, no additional sum is owing to Dillingham.

By the Commission.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

13 F.M.C.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 420

ROBERT S. OSGOOD, INC., LOS ANGELES

v.

NORTON, LILLY & CO., INC., AS AGENTS
SHIPPING CORP. OF INDIA, LTD. (SCI LINE)

February 17, 1970

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER AUTHORIZING REFUND

No exceptions having been taken to the initial decision of the Examiner in this proceeding served January 20, 1970, the Commission having determined not to review same, notice is hereby given, in accordance with Rule 13(g) of the Commission's Rules of Practice and Procedure, that the decision became the decision of the Commission on February 17, 1970.

It is ordered, That respondent refund to Robert S. Osgood, Inc., Los Angeles, the sum of \$178.33.

It is further ordered, That respondent publish promptly in its appropriate tariff the notice set forth in the Examiner's initial decision.

It is further ordered, That respondent notify the Secretary on or before March 23, 1970, of the date and manner in which the refund herein ordered was made.

By the Commission.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

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FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 420

ROBERT S. OSGOOD, INC., LOS ANGELES

v.

NORTON, LILLY & Co., INC., AS AGENTS
SHIPPING CORP. OF INDIA, LTD. (SCI LINE)

Adopted February 17, 1970

Respondent permitted to refund the sum of \$178.32 as a portion of freight charges collected on a shipment of plywood and veneer from Calcutta, India to Los Angeles, Calif.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER ¹

This application under section 18(b)(3) of the Shipping Act, 1916 ² (the Act), seasonably filed by respondent on December 18, 1969 and concurred in by complainant, seeks permission to refund to complainant \$178.32 as a portion of the freight charges collected on a shipment of plywood and veneer in crates from Calcutta, India, to Los Angeles, Calif., on a bill of lading issued July 17, 1969.

On June 18, 1969, agent Norton, Lilly & Co., Inc., was instructed by its principal, Shipping Corp. of India, Ltd., owners and operators of SCI Line, to file a temporary rate reduction with the Commission reducing the then existing rate of \$30.50 per cubic meter (\$43.18 per 50 cubic feet) to \$33 per 50 cubic feet to be effective July 1, 1969, through July 31, 1969. As a result of clerical oversight, Norton, Lilly failed to do so until December 11, 1969.³

Charges for the above shipment billed at the original rate totaled \$756.13. Had the billing been at the reduced rate the charges would have totaled \$577.81 or \$178.32 less.

¹ This decision became the decision of the Commission February 17, 1970.

² 46 USC 817(b)(3), as amended by Public Law 90-298, 75 Stat. 764, approved April 29, 1968.

³ See SCI Tariff No. 1, FMC-16.

No other shipment of plywood and veneer in crates moved on respondent's line during the period in question, and the authorization of the refund will not otherwise result in discrimination between shippers. Section 18(b) (3) of the Act permits the Commission in its discretion to permit a refund of a portion of freight charges collected because of error due to inadvertence in failing to file a new tariff. This section further provides that when such permission is granted, the carrier shall publish in its tariff appropriate notice of the rate on which the refund is based. This notice shall be as follows:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 420, that effective July 1, 1969 the rate on plywood and veneer in crates from Calcutta, India to Los Angeles, California for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of the SCI Line from July 1, 1969 through July 31, 1969 is \$33.00 per 50 cu. ft., subject to all other applicable rules, regulations, terms and conditions of said rate and of this tariff.

Good cause appearing, respondent is hereby authorized to refund to complainant the sum of \$178.32. The carrier shall publish the above notice in its tariff and respondent shall notify the Commission within 30 days after the date of final decision herein of the date and manner in which refund was made.

(Signed) JOHN MARSHALL,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-60

REJECTION OF TARIFF FILINGS OF SEA-LAND SERVICE, INC.

Decided March 24, 1970

Rejection of tariffs filed on behalf of Sea-Land Service, Inc. found improper under section 18(b) of the Shipping Act, 1916.

John Mason for Sea-Land Service, Inc.

Howard A. Levy for American Export Isbrandtsen Lines, Inc.

Ronald A. Capone for the North Atlantic Westbound Freight Association.

Donald J. Brunner, and *Norman D. Kline*, Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; James F. Fansen, *Vice Chairman*; Ashton C. Barrett, James V. Day, *Commissioners*.)

On December 9, 1969, the Secretary of the North Atlantic Westbound Freight Association (NAWFA or the Conference), filed at the direction of Sea-Land Service, Inc., one of the Conference's member lines, a reduction of the then applicable rates on wines and spirits moving from the Port of Grangemouth, Scotland, to Elizabeth, N.J.; Baltimore, Md.; and Norfolk, Va. The rates previously charged by Sea-Land had been those fixed by the Conference. On December 12, 1969, these reduced rates were rejected by the Commission's Bureau of Compliance because: (1) They were contrary to the terms of NAWFA's basic conference agreement to the terms of which Sea-Land was bound by virtue of its membership in NAWFA; and (2) they were contrary to the terms of NAWFA's wines and spirits' dual rate agreement to which Sea-Land is a party.

Sea-Land appealed the Bureau's rejection to us urging that the Bureau's action exceeded any authority granted by section 18(b) of

the Shipping Act, 1916. As a result of this appeal and because it presented novel questions involving the proper interpretation of section 18(b), we issued the order instituting this proceeding. In that order we directed Sea-Land to show cause why its reduced rates on wines and spirits should not have been rejected under section 18(b) as contrary to the terms of NAWFA's basic agreement and its dual rate agreement and thus unlawful under sections 14b and 15 of the Shipping Act and the rules and regulations promulgated by the Commission.

American Export Isbrandtsen Lines, Inc. intervened in support of the rejection and NAWFA intervened as its interests might appear. Hearing Counsel became a party under our rules of practice and procedure.

Our order limited the proceeding to affidavits of fact, memoranda of law and oral argument but provided that any party feeling that such a procedure was inadequate could request an evidentiary hearing by setting forth the facts to be proven and their relevance to this proceeding. No such request was received. We heard oral argument on January 20, 1970.

DISCUSSION AND CONCLUSIONS

The basic issue present in this proceeding is whether section 18(b) (4) of the Shipping Act authorizes the rejection of the tariff on the ground that it violates some other substantive provisions of the Act; in this case, sections 14b and 15. Section 18(b) (4) provides:

The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

Sea-Land's argument challenging the validity of the Bureau's rejection runs as follows:

The Bureau's rejection was not grounded upon any lack of conformity with the requirements of section 18(b)—the express and only grounds for rejection—rather it was based upon alleged violations of section 14b and 15. Thus, the Bureau undertook to find a violation of the Shipping Act in direct contravention of the terms of section 23 of the act which specifically requires that violations of the act can only be found after full hearing. Thus, the rejection was unlawful as a matter of law and there is no need to consider the merits of the rejected filings under the Conference agreement, the dual rate agreement or sections 14b and 15.

Hearing Counsel, who present the best reasoned argument in support of the rejection, contend that the Commission must necessarily have the power under 18(b) to reject a tariff which is "obviously" unlawful under a substantive provision of the Act. If it were otherwise, "we would have the impossible situation wherein the agency entrusted with enforcing compliance with the Shipping Act must tolerate an obvious infraction of the law it administers while undertaking the burden in formal proceedings of indefinite duration before making an obvious finding." Export argues much the same thing substituting "per se" violations for Hearing Counsel's "obvious" violations. The difficulty which inheres in this position is best demonstrated by a consideration of the violations asserted in support of the rejection in this case.

The supporters of the rejection contend that Sea-Land's independently reduced rates were unauthorized by NAWFA's basic agreement approved under section 15 and thus are in violation of section 15. Sea-Land, however, points to Article 10 of that agreement as authorizing its rates. Article 10 provides:

In the event of competition by vessels not owned, managed or controlled by the parties to this Agreement, the Lines at the port directly affected shall have liberty, by unanimous agreement at that port, to meet the competition; the Lines at the other ports to be advised immediately through the Secretaries and to be kept advised as to the rates quoted and/or accepted or arrangements made and the periods covered. The Lines operating from any other port may, by unanimous agreement at that port, modify their rates similarly or make similar arrangements, if they consider such action necessary, upon similar advice through the Secretaries to all the other parties to this Agreement.

Without going into the circumstances which prompted Sea-Land to independently reduce its wines and spirits rates, the reduction poses several questions of fact under Article 10, i.e., Is the competition to be met by vessels not owned, managed, or controlled by a party to the Agreement? Is Grangemouth the port directly affected by this competition? and Was the reduction only that which was necessary to meet this competition? ¹ Moreover, the provisions of Article 10 of the Conference agreement are difficult to reconcile with the language of clause 10 of the wines and spirits dual rate agreement which Sea-Land contends disposes of the assertion that its reduced rates violate section 14b. Clause 10 provides:

Nothing in the AGREEMENT shall prohibit the Carriers from reducing the stipulated rates, provided that any reduced rate shall be effective for not less than 30 days from date of notice and due notice shall be given to the National Association of Alcoholic Beverage Importers, Inc., and further provided that

¹ Sea-Land's reduced rates were intended to meet the competition of Export (itself a member of NAWFA), and is but the most recent outbreak in a long standing dispute between the two lines. For a discussion of the particular operation of Export to which Sea-Land objects, see our decision in *Disposition of Container Marine Lines*, 11 F.M.C. 476 (1968).

Contractors will at all times be accorded the lowest rate at which any Wines or Spirits are carried by the Carriers in the trade covered by this AGREEMENT.

Both sides rely on the language of this clause to support their position and neither of their arguments exceeds the bounds of reason. Again, possible factual questions are posed.

From the foregoing it should now be clear that even were we to accept the criteria of the supporters of the rejection, the violations asserted in support of that rejection are neither obvious nor per se.²

Our order in this case posed the further question of whether Sea-Land's reduced rates were in violation of any rule or regulation promulgated under section 18(b). It is alleged that Sea-Land's filing violates section 532.2(c) of our General Order 13 which provides:

No carrier or conference shall publish and file any tariff or modification thereto which duplicates or conflicts with any other tariff on file with the Commission to which such carrier is a party whether filed by such carrier or by an authorized agent.

It is alleged that Sea-Land's reduced rates are in conflict with the NAWFA tariff, but since the success of this charge depends upon whether NAWFA's basic agreement authorizes an independent filing by Sea-Land, we have come full circle and cannot in this proceeding conclude that a violation has been established.

We conclude that the rejection of Sea-Land's reduced rates at issue in this proceeding was improper and that the tariffs were valid and properly filed.

While we are reluctant to do so, we feel compelled to comment on the conduct of certain counsel in this proceeding. This conduct is best illustrated by two extra-record letters which we received after we heard oral argument. Each letter refers to statements made during that argument.

Counsel for Sea-Land in a letter dated January 20, 1969, the purpose of which was to instantly require the immediate correction of the record, characterizes the challenge by counsel for Export to "veracity of certain Sea-Land officials" as "reckless, malicious and irresponsible". We are urged to take immediate steps to maintain the responsibility and dignity that should prevail at Commission proceedings. In his reply of January 26, 1969, counsel for Export defends his statements as constituting "an oral rebuttal to the irrelevant 'facts' Sea-Land has spread upon the instant record." There is neither the need nor is this a proper proceeding to comment upon the merits of either side of this

² In all fairness to Hearing Counsel, they realize and state in culling out the obvious violations upon which a rejection may be based "precise lines of demarcation cannot be drawn." And while we do not here decide that a rejection under section 18(b) may not be supported by a violation of another section of the Shipping Act, we are well aware of the difficulties and dangers in such a course.

dispute because it is solely concerned with statements, assertions and allegations the content and import of which are totally irrelevant to the issues presented in this proceeding.³ The penchant for departing from the issues—displayed by both sides—was not confined to oral argument. Counsel for NAWFA considered it necessary to comment on some reprehensible statements made on brief because they dealt not with the overt actions of his client but the covert intentions behind those actions—what appeared particularly distressing was that the assertions in question had no real relevance to the issues in this case. There is an unseemly contrast between the paucity of cogent analysis of the issues and the abundance of irrelevant factual assertions. This penchant for departing from the issue afflicts both sides of the dispute.

We are urged to take action to prevent the recurrence of this situation in order to preserve our dignity, but our dignity is not so much dependent upon the conduct of those who appear before us as it is upon the extent to which we are able to justify and fairly resolve the controversies brought to us. As we are entrusted with the duty of determination so, equally, are counsel entrusted with the advocacy of a particular side of any controversy in the way best suited to insure that justice is done. Acrimony and innuendo have no place before an administrative tribunal and any attempt to intrude them there can only prejudice the cause in whose behalf they are summoned. While more could be said, we trust this is sufficient to preclude any recurrence of this type of situation again.

We would, however, express our concern over the failure of NAWFA to implement the through route authority we approved for it some 6 months ago. The establishment of such a series should resolve or at least alleviate the unseemly dispute between Sea-Land and Export. If it is the failure to obtain unanimity among all the members of NAWFA which prevents the effectuation of the through route authority, we would remind NAWFA and its members that they need only properly demonstrate that the Conference unanimity is operating in a way which is detrimental to Conference efforts to achieve stable, efficient and progressive service in the trade and we will assist the Conference or any member in achieving a just solution to the problem. We urge NAWFA to continue and strengthen its efforts to restore harmony and fair competition to the trade.

³ Hearing Counsel, who were not involved in the dispute, nevertheless properly identified their cause when they urged that in order to prevent future occurrences we include in show cause orders a clause "reminding the parties to confine themselves to the issues * * * and to refrain from making allegations of fact and disputing facts before the Commission." We should hope that the future should render it unnecessary to remind counsel appearing before us to do that which the hallmark of their profession requires.

Finally, we will on our own motion institute an investigation to resolve those issues raised by the Bureau's rejection but undetermined by our disposition of this case.

This proceeding is hereby discontinued.

Commissioner Hearn Dissenting

The rejection of tariffs filed on behalf of Sea-Land Service, Inc., was not improper.

First, I believe the Commission has the authority to reject the filing. Contrary to Sea-Land's assertion, grounds for rejection of a tariff filing can be found elsewhere than in section 18(b), e.g., sections 14(b) and 15. If such authority did not exist it would be impossible for the Commission to reject tariff filings which, for example, include rates for dual-rate contracts filed on less than 90 days' notice, contain dual rates with more than a 15 percent spread, or bar consideration of shipper complaints. At least in such cases, I cannot imagine the Commission being without authority to reject the filings. Specific cases must be determined on their own facts and circumstances when they are before us.

Here I find Sea-Land's tariff subject to rejection for the following reasons. Sea-Land relies in part on Article 10 of the basic NAWFA agreement as authority for its tariff. That article contains three criteria for permitting a conference member or members to meet certain competition by rate or arrangement. We need go no further than the first criterion: That the competition be "by vessels not owned, managed or controlled by the parties to this Agreement." This cannot be read as anything other than a reference to completely independent carriers, and not to a carrier such as AEIL which is a conference member. That AEIL may operate in a dual capacity does not divest AEIL of ownership, management or control of their vessels in the trade in question. Such must have been the intended meaning of the words when they were written, because the situation involving AEIL could not then have been envisioned. Although the Commission can and does permit flexibility of interpretation when warranted, this is not such a case. Conference agreements cannot be construed so as to leave the Commission and the public at the conference's mercy when it chooses to apply provisions in a manner not consistent with the accepted interpretation when the Commission granted initial approval. Consequently, Sea-Land's tariff filing is not authorized by the conference agreement, is duplicative of the conference tariff and is in violation of General Order 13 and subject to rejection.

Sea-Land here is trying to have its cake and eat it too. If Sea-Land wishes to meet AEIL's competition, Sea-Land may do so. The competition must, however, be on equal terms. Sea-Land feels discriminated.

against because AEIL's through intermodal tariff filings were not given similar treatment in 1968. It should be recalled, however, that AEIL's tariffs were not accepted as filed. Only after much revision by the Commission, were the tariffs accepted.

I do not think the Commission should be in the position of protecting the trade position of one or another innovative carrier. Nevertheless, the Commission should not permit competition for its own sake when it is premised on unlawful tariffs. If Sea-Land wishes to meet AEIL's competition with an AEIL-type tariff, I would be amenable to accepting it if, under current circumstances and all things considered, it is unlawful. As matters stand, Sea-Land's tariffs are unacceptable for filing and should be rejected.

Further, it appear to me that appropriate conference action would have made it unnecessary for Sea-Land to file its tariff, and still further, that the issues of the filing's acceptability or validity could quickly be rendered moot by Commission action. In its report in docket 68-8 the Commission said that conferences "should be at the forefront in stimulating and encouraging improvements in transportation" and that "the Commission does not intend to create or permit impediments to the improvement of shipping services." *Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs*, 11 F.M.C. 476, 482 and 489 (1968).

In June, 1969 the Commission approved an amendment to the NAWFA agreement authorizing the conference to establish a through service. NAWFA has not yet exercised this authority, but if they had done so without such delay, this proceeding would have been avoided. With this in mind and there appearing no end to the delay, I think the Commission can and should take expeditious action to obtain the immediate elimination of any internal conference obstacles to the establishment of a conference through service.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

13 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 68-9

FREE TIME AND DEMURRAGE CHARGES ON EXPORT CARGO

Decided April 9, 1970

Practice of granting unlimited free time on export cargo at Ports of New York and Philadelphia found to be unjust and unreasonable within the meaning of section 17, Shipping Act, 1916, and rules and regulations determined, prescribed and ordered enforced which provide:

(1) Free time for export cargo at such ports shall not exceed 10 working days, except upon U.S. Government cargoes and cargoes in the Australian and African trades, where, upon request, free time up to a total of 15 working days may be granted. Up to 5 working days consolidation time after the expiration of free time may also be granted upon request on consolidated shipments.

(2) Demurrage at compensatory levels shall be assessed for first period following demurrage-free time, and at penal levels for later periods.

(3) Demurrage shall be assessed against the vessel in case of vessel delay. In case of vessel cancellation, with respect to cargo not on demurrage, compensatory level demurrage runs against the vessel from time of receipt of cargo at terminal to announced date of sailing, with earlier termination if shipper has another vessel nominated for loading, removes cargo from the terminal or stores cargo. Cargo on demurrage on announced date of canceled sailing remains on demurrage for account of shipper until shipper has another vessel nominated, removes cargo from terminal, or stores cargo.

(4) Additional time free of demurrage shall be granted for cargo not on demurrage and assessment of demurrage at compensatory level for cargo on demurrage shall be made in case of factors preventing vessel loading by immobilizing pier facility or facilities in all or in part.

(5) Storage facilities may be provided at the terminal subject to certain conditions.

Joseph A. Byrne for intervener, the New York Terminal Conference and constituent members.

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

Michael Westgate for intervener, the Department of Marine and Aviation of the City of New York.

Gerald H. Ullman for intervener, the New York Foreign Freight Forwarders & Brokers Association, Inc.

Justin Stern for intervener, E. Miltenberg, Inc.

C. Buchthal and *Curt Dreifuss* for intervener, Pana International Corp.

Francis A. Scanlan for intervener, Port of Philadelphia Marine Terminal Association.

George E. Pratt and *Thomas V. LeFevre* for intervener, Greater Philadelphia Chamber of Commerce.

Morris Duane, *Martin A. Heckscher*, and *George F. Mohr* for intervener, Delaware River Port Authority.

Joseph J. Connolly and *Chester H. Gourley* for intervener, Port of Boston Marine Terminal Association.

Neil J. Lynch, *Chester H. Gourley*, and *George W. Stuart* for intervener, Massachusetts Port Authority.

Philip G. Kraemer for intervener, the Maryland Port Authority.

Ernest E. Ball for intervener the Norfolk Marine Terminal Association.

Blair P. Wakefield, *J. Robert Bray* and *Arthur W. Jacocks* for intervener, the Virginia State Ports Authority.

Cyrus C. Guidry and *John Cunningham* for intervener, the Board of Commissioners of the Port of New Orleans.

C. W. Herbert for intervener, the Greater Baton Rouge Port Commission.

D. C. Davis for intervener, the Port of Lake Charles, Lake Charles Harbor and Terminal District.

Burton H. White and *Elliott B. Nixon* for interveners, the North Atlantic Baltic Freight Conference, the North Atlantic Continental Freight Conference, the North Atlantic French Atlantic Freight Conference, the North Atlantic Mediterranean Freight Conference, and the North Atlantic United Kingdom Freight Conference.

Marcus E. Rough for intervener, the U.S. Atlantic and Gulf/Australia-New Zealand Conference.

E. W. Norberg, *John K. Cunningham*, and *Seymour H. Kligler* for intervener, the American West African Freight Conference.

Warren Price, Jr., *Frank Hiljer*, and *R. L. Dausend* for intervener, Sea-Land Service, Inc.

Joseph A. Ryan, *John J. Hudgins*, *John C. Kennedy*, *Charles W. Bucy*, *Karl C. Brannan*, *Earl L. Saunders*, *Harold M. Carter*, *William A. Imhof*, and *Neal A. Jackson* for intervener, the Secretary of Agriculture of the United States.

Donald J. Brunner, *Norman D. Kline*, *Robert H. Tell*, and *James N. Albert* as Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; Ashton C. Barrett, George H. Hearn, *Commissioners*.)

We instituted this proceeding, pursuant to sections 17, 22, and 43 of the Shipping Act, 1916, to determine the reasonableness of the free time practices on export cargo at the Ports of New York, New York, and Philadelphia, Pa., and to determine whether rules and regulations governing those practices were necessary.¹ Numerous parties, including forwarder, shipper, ocean carrier, marine terminal, and port authority interests, most of whom actively participated in the proceeding, intervened. Examiner Charles E. Morgan issued his Initial Decision, finding that the practice of offering unlimited free time on export cargo at the Ports of New York and Philadelphia was unreasonable, and prescribing certain regulations to govern free time and demurrage practices at those ports. The proceeding is before us now on exceptions to Examiner Morgan's decision.

THE SITUATION AT NEW YORK AND PHILADELPHIA

A shipment in the export trade normally requires land transportation to the port. Presently at the Ports of New York and Philadelphia the export cargo destined for one ship cannot, as a general matter, all be delivered to a pier, in trucks, railroad cars, or by other means, in any one day. Because of the physical limitations of, and the limited access to, the piers, about half of it arrives more than 3 days prior to departure of the vessel. Cargo is usually booked by an ocean carrier for a particular sailing well in advance of the vessel's scheduled arrival; the cargo arrives about a week more or less before the vessel and is accepted for that sailing. Some cargo, however, arrives at the pier under an indefinite booking and is not designated for any sailing. Such cargo bears the instructions of the exporter, which are passed on by the carrier to the terminal operator, to hold the cargo and await further instructions. Such cargo is known as hold-on-dock cargo. Cargo may be designated hold-on-dock for various reasons, such as consolidation with other lots, completion of necessary export documentation, and even, in many instances, utilization of free storage on the piers. Depending on the exporter's instructions, such cargo may be held on the piers for weeks, months, or even up to a year without limitation, and without any specific charge for the use of the pier space.

¹ Notice of proposed rulemaking and hearing was published in the Federal Register on Feb. 16, 1968.

New York and Philadelphia are the only major ports in the United States which afford export cargo unlimited "free time", i.e., a period during which cargo may remain on the piers or docks without incurring demurrage charges.

In 1963, the Commission examined the effect of free storage of export cargo in the Port of New York in its Fact Finding Investigation No. 4, and found that the terminal operators were deprived of valuable and limited work areas on the piers. Additional moneys had to be spent for the handling, care and protection of export cargo stored for long periods on the piers. This waste and inefficiency continues at the present time. In fact, the conditions in 1968, if anything, have worsened in comparison to conditions in 1963, and the record in this proceeding shows that millions of pounds of export cargo may be present at one time on a single pier, and that the average length of time that hold-on-dock export cargo remains on the piers exceeds 30 days. Instances in which such cargo occupies valuable transit space for as much as a year are not unknown. The record further shows that the presence of hold-on-dock export cargo greatly aggravated pier congestion following the 2-week longshore work stoppage in March 1968.

About 90 percent or more of all export cargoes moving through the Port of New York is received within 10 working days before the sailings of the ships on which these cargoes move, and the same is generally true at Philadelphia. It is predicted by a knowledgeable witness that if the Commission were to promulgate a regulation limiting free time to 10 working days, adjustments could be made by shippers, with the result that only 2 or 3 percent of outbound cargoes would be adversely affected. From an operational standpoint, the terminals at New York and Philadelphia generally do not need any more than 10 days to load a vessel with its export cargo, including the time needed to admit the cargo onto the pier.

In recent years more and more cargo is being delivered to marine terminals in carrier- or shipper-owned containers or trailers. Increasingly large quantities of cargoes shipped through the Ports of New York and Philadelphia are in this containerized category. Speedy handling is one of the primary benefits derived from containerization, and the high value of the containers and trailers make it economically imperative that their movement be expedited. Additionally, on-pier assembly of such cargo may be avoided. Although the evidence and testimony developed in this proceeding did not generally relate to containerized cargo, it seems clear that less time may be needed for the admission to and transit of the pier by such cargo than is usually the case in break-bulk cargo.

Although the matter of unlimited free time on export cargo at the Ports of New York and Philadelphia has been a matter of concern to the Commission and its staff since the days of Fact Finding Investigation No. 4, we preferred, if possible, to have the terminal operators solve this problem themselves. Thus, in *Agreement No. 8005-4—Modification of Conf. Agreement*, 10 F.M.C. 314 (1967), we approved a modification of the agreement of the New York Terminal Conference specifically empowering its members (marine terminal operators, contract stevedores, and common carriers by water who furnish marine terminal facilities and services in the Port of New York and vicinity) to establish free time limitations on export cargo. However, no limitation on free time on export cargo became effective. The many ocean carrier and terminal interests in these two ports could not agree on free time restrictions and failed to act unilaterally to establish them, because of the concern that some competing steamship line or terminal in the same port might obtain a competitive advantage with the shipper-exporters by reason of allowing more free time on export cargo or by having a less restrictive rule. Generally speaking and notwithstanding the fact that New York has the advantage of more frequent sailings than Philadelphia, the terminal operators of the Port of Philadelphia, felt, and still feel, that they could go along with almost any reasonable rule established at the Port of New York, but that they could not establish a rule for the Port of Philadelphia unilaterally because of the competition between the Ports of New York and Philadelphia.

At the major ports of the United States other than New York and Philadelphia, a charge, generally called demurrage, is imposed after the expiration of a free time period. Such charge is imposed at New York and Philadelphia with respect to cargo in the import trade. One purpose of demurrage is to compensate the owner or operator of the terminal facility for the use by the cargo of the pier space, and for the costs of furnishing watchmen, fire protection, and other services for the safekeeping of the cargo. An additional and more important purpose of such charge, however, is to encourage the prompt removal of the cargo. The area occupied by cargo moving across the piers prior to the loading of a ship in the export trades or the removal from the terminal facility by truck or rail in the import trades is that adjacent to the waterfront (called generally transit space) and is not designed for long periods of storage. It is essential to the efficient operation of terminal facilities that this area be kept as fluid as possible. It is, therefore, the standard practice at most of the major ports (including New York and Philadelphia with respect to import cargo) after the assess-

ment of demurrage at a level designed to compensate the terminal for the use of the pier space and the services rendered the cargo (called compensatory demurrage) to assess demurrage at a higher level (called penal demurrage) to discourage the extended use of pier transit space for warehousing or storage.

Presently, the ocean carriers, other than those few who operate their own terminals, pay the terminals certain rates or fees for stevedoring and other expenses in connection with export cargo, including the expense of providing pier space.² The export freight rates of the ocean carriers are intended to reimburse them for their various costs, including expenses incurred with respect to export cargo by reason of payments made to the terminal operators.

The free time and demurrage regulations originally proposed by the Commission and set forth in the notice of proposed rulemaking in this proceeding would have established a free time period on export cargo at New York and Philadelphia of 10 days (exclusive of Saturdays, Sundays, and legal holidays), beginning at 12:01 on the day after cargo is received at the terminal facility and ending at 11:59 on the final day of free time. When a vessel is delayed beyond the announced date of arrival through no fault of its own, up to 5 days additional free time beyond the 10 days was proposed. No penalty demurrage was to be assessed in such delay situations. At the expiration of free time, demurrage charges in successive periods were proposed, the first period charge to be assessed at a compensatory level, and charges for subsequent periods to be assessed at penal levels. No demurrage charges were to be levied on or after the day a vessel has commenced to load. Finally, if the loading of the vessel is prevented or delayed by a strike or work stoppage involving longshoremen or terminal or water carrier personnel, cargo on free time was to be granted additional free time and cargo on demurrage was to be assessed demurrage charges at first period levels until the situation is remedied.

During the course of the hearings and on brief many suggestions were made with respect to the proposed rules.

THE EXAMINER'S DECISION

In his Initial Decision, the Examiner established 10 working days³ as the basic free time period on export cargo at New York and Philadelphia, but provided for the extension of this free time up to 21 calen-

² Generally speaking, these rates or fees are on a tariff basis at Philadelphia and a negotiated basis at New York.

³ "Working days" are all days other than Saturdays, Sundays, and legal holidays.

dar days for U.S. Government or charitable cargoes and cargoes in certain trade areas. A total of 21 days free time was granted shipments consolidated on the piers.

The Examiner ordered the assessment of demurrage at a compensatory level immediately after the expiration of free time and penal demurrage during subsequent periods.

The Examiner required the assessment of demurrage against the vessel in some cases of cancellation and, after the extension of 5 additional days free time, in case of vessel delay.

In situations where a vessel is prevented from loading because of immobilization of the pier facility, the Examiner ordered the extension of free time to cargo on free time and the grant of compensatory demurrage to cargo on demurrage.

Finally, the Examiner required the designation of the vessel at the time of delivery of cargo to the pier facility, and allowed for the establishment of storage facilities.

DISCUSSION AND CONCLUSIONS

1. *The General Free Time Limitation*

All parties excepting or replying to exceptions to the Initial Decision agree that a limitation on free time should be placed on export cargo at the Ports of New York and Philadelphia, and all but two of them agree with the Examiner that such limitation should in general be 10 working days. Virginia State Port Authority and Norfolk Marine Terminal Association (Virginia) seek a limitation of 5 working days and U.S. Atlantic and Gulf/Australia-New Zealand Conference (Australia Conference) seeks free time on a "next available sailing" or "sailing following the first available one" basis, with a 15-working day maximum.

Free time is not a gratuity to be granted or denied at the whim of the provider of ocean transportation—"it is required as a necessary part of the carrier's transportation obligation." (*Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 539 (1966); see also *American President Lines, Ltd. v. Federal Maritime Board*, 317 F. 2d 887, 888 (D.C. Cir 1962).) The free time obligation must be met through the provision of terminal facilities adequate to render such free time meaningful and realistic, and may be fulfilled either by the carrier itself or through an agent. Where, as is generally the situation at the Ports of New York and Philadelphia, the required terminal facilities are furnished by terminal operators rather than the carriers, the operators become the agents of the carriers with respect to such

services and are bound by the same obligations that apply to the carriers with respect to them. *Baltimore & O. R. Co. v. United States*, 201 F. 2d 795, 796-7 (3rd Cir. 1953); *Penna. Motor Truck Ass'n v. Phila. Piers, Inc.*, 4 F.M.B. 192, 197 (1953). Nor is the extent of such obligation nebulous. "[T]he reasonableness of the free time period is fixed, broadly speaking, by determining the period necessary for the shipper to assemble [in the export trade] or the consignee to remove his cargo [in the import trade] prior to loading the goods on the ship or after discharge of the goods from the ship." (*Investigation of Free Time Practices—Port of San Diego, supra*, at 539). The period established must also be realistically designed to allow a consignee sufficient time to deliver his cargo, taking into account the transportation necessities of the particular port or terminal, including, inter alia, the physical limitations of the terminal facilities, transportation delays, frequency of sailings, availability of truck, and other modes of inland transportation, and number of freight forwarders in the port area. (Cf. *Investigation of Free Time Practices—Port of San Diego, supra*, at 527-541.)

Because of the limited pier space available at New York and Philadelphia, it is, as has been noted, impossible for all cargo destined for a particular ship to be deposited on the piers at the same time. Generally, several days are necessary for this process, the record herein indicating that 90 percent of the export cargo moving out of these ports presently is received no more than 10 working days prior to the sailing of the ships onto which it is loaded. The record further shows that all but 2 or 3 percent of such cargo can move across the piers within 10 days of receipt at the terminal, including the time needed to admit the cargo to the pier. It thus appears that in general no more than 10 working days free time is needed. On the other hand, while it is true that some cargo destined for a particular ship will not use the full 10 working days, e.g., that cargo which is able to be admitted to the terminal and loaded aboard ship within a day or two before a ship sails, it is obvious that the physical limitations of the terminal facilities are such that some cargo destined for that ship will be forced to use the pier space for a time approximating the full free time period. It would be unfair, therefore, to fix a maximum free time period at less than 10 working days. The request of the Australia Conference for a maximum of 15 working days is unnecessarily generous in light of the need demonstrated on this record for a general limitation of free time of only 10 working days, while the 5 working days suggested by Virginia is not sufficiently generous to satisfy the requirements shown to exist at the Ports of New York and Philadelphia.

The evils of extending more free time than is necessary for the accomplishment of its purpose have been enumerated often in our earlier decisions and are almost self-evident. Valuable transit space may be used without compensation, thus threatening the economic soundness of terminal operations.⁴ To the extent that other cargo, such as import cargo at New York and Philadelphia which is subject to demurrage charges, pays for the use of terminal space and services while export cargo occupying adjacent space and receiving identical services escapes the obligation to pay for them, the import cargo is being unduly and unreasonably prejudiced within the meaning of section 16. First of the Shipping Act, 1916, and the terminal operator has engaged in an unreasonable practice with respect to the receiving, handling, and storing of property within the meaning of section 17 of that Act.⁵ Further, such prejudice may occur even between exporters when certain exporters obtain more free time than is necessary while others are unable to do so.⁶ When it is recalled that pier space at New York and Philadelphia is limited, the possibility of unreasonable and prejudicial practices is accentuated.

More than just these inherent problems with excessive free time exist at New York and Philadelphia, however. The dominant factor in establishing free time limitations must be "the public interest, which requires that congestion of ports be minimized in the interest of efficient water transportation"⁷ and as has been seen, the problem of congestion has grown worse with the passage of time, and this congestion has been aggravated by the presence on the piers of cargo enjoying unlimited free time benefits.

We, therefore, find that the granting of unlimited free time at the Ports of New York and Philadelphia constitutes an unjust and unreasonable practice with respect to the receiving, handling, and storing of property within the meaning of section 17, Shipping Act, 1916, and that, except as herein noted, 10 working days is the reasonable maximum free time period for export cargo at the Ports of New York and Philadelphia. Although we realize that competitive pressures may tend, as they have in the past, to convert the maximum into a fixed period, the operators of terminal facilities are free to establish lesser

⁴ *Investigation of Free Time Practices—Port of San Diego, supra*, at 549.

⁵ See *Storage of Import Property*, 1 U.S.M.C. 676, 682 (1937); *Storage Charges Under Agreements 6205 and 6215*, 2 U.S.M.C. 4S, 52-53 (1939). The unreasonableness of such practice is magnified, of course, if the burden of defraying the cost of providing terminal facilities and services for export cargo is actually shifted to the import cargo. See *San Diego case, supra*, at 549; see also *Practices, Etc. of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588, 603 (1941).

⁶ Cf. *Storage of Import Property, ibid*; *San Diego case, supra*, at 544.

⁷ *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89, 103 (1948).

periods if they can fulfill the necessary free time obligation in fewer than 10 working days and are encouraged to do so in the interests of efficiency of pier operations and the maintenance of transit area fluidity. This is particularly true in regard to containerized cargo, which may by nature require less free time than other cargo and with respect to which some parties have in fact indicated a desire to establish shorter free time periods.

2. Exceptions to the General Limitation

The Examiner granted three exceptions to the basic 10 working day maximum free time provision to which objections have been voiced by several parties.

A. The Government/Charitable Exception

The Examiner provided for free time not to exceed 21 calendar days upon the request of the U.S. Government, or for charitable purposes such as relief cargoes.

This exception was designed to be responsive to the request for additional free time by the Department of Agriculture (Agriculture). The type of cargo for which Agriculture seeks extended time is cargo which it moves in connection with CARE and voluntary relief agencies, and Public Law 480 shipments. The programs involved are generally humanitarian endeavors in which food, medicine, clothing and other basic items are shipped to various parts of the world. Although such cargo generally needs only 10 to 15 working days of free time, the record herein does indicate that in some instances it is impossible for supplies which originate in various points in the country to be assembled and inspected within such time period. Furthermore, Agriculture's policy in purchasing processed and packaged commodities often is based upon utilizing the excess capacity of producers, so as to keep the cost to the Government reasonable. This factor of purchasing excesses of production tends to require a flexible assembly period at U.S. ports. Agriculture fears that the imposition of demurrage under a 10-day free time rule would reduce its volume of shipments, require more funds from the U.S. Treasury, and possibly divert cargoes away from New York and Philadelphia.

The major objection to this exception for U.S. Government and charitable cargoes is made by the New York Terminal Conference.⁸ The Terminal Conference contends that to allow such exception is unreasonable inasmuch as the 10-day period is adequate. No other transportation interest, it maintains, is required to make or does make such humanitarian sacrifices, and the result will be greater pier congestion.

Strictly speaking, neither the time needed for cargo inspections nor the flexible assembly period required for the most efficient utilization of a program based on the utilization of a supplier's excess capacity appears to be a transportation condition which would be sufficient to support extended free time for an ordinary shipper.

The time needed for cargo inspection has been rejected by this agency and its predecessors as a basis for additional free time,⁹ and such rejection seems particularly sound, where, as here, there has been no showing that such inspection either could not normally be completed within 10 working days of receipt of cargo at the piers or could not adequately be made at a place other than the piers.¹⁰ Insofar as efficient utilization of a supplier's excess capacity is concerned, it has often been held that damage to merchandizing programs is not in itself sufficient to justify extended free time.¹¹

When the Government is the shipper, however, it is not necessary to make a strict showing of transportation necessity to establish the lawfulness of extended free time.

The policy of special allowances for governmental cargo is embodied in the shipping statutes¹² and has been recognized by the Commission

⁸ The Maryland Port Authority (Maryland) maintains that the exception should not be granted because the railroads already grant 30 days free time to Government cargo. Insofar as this contention is concerned, it is sufficient to note that the free time afforded by the ocean carrier or his agent is a transportation obligation separate and distinct from that of inland carriers, and its proper duration must be determined by applying the appropriate principles of maritime regulatory law to the circumstances pertaining to the ocean transportation and ocean terminal facilities. The Board of Commissioners of the Port of New Orleans (New Orleans) does not specifically except to this special allowance for Government and charitable cargoes, but suggests an alternative rule which does not provide for it.

⁹ See, e.g., *Free Time and Demurrage Practices, at N.Y. Harbor*, 11 F.M.C. 238, 259-260 (1967).

¹⁰ Cf. *Free Time and Demurrage Charges—New York*, *supra*, at 95-101.

¹¹ See, e.g., *Storage of Import Property*, *supra*, at 682-3; *American Paper and Pulp Asso. v. B & O R.R. Co.*, 41 I.C.C. 506, 507, 512 (1916); *Investigation of Free Time Practices—Port of San Diego*, *supra*, at 541.

¹² Section 6 of the Intercoastal Shipping Act, 1933, an amendment to the Shipping Act, 1916, provides:

"That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or municipal governments, or for charitable purposes."

as supporting the allowance of additional time for such cargo. (See Docket 68-13, *Assembly Time—Port of San Diego* (13 FMC 1), July 23, 1969.) Special treatment in favor of the Government is an advantage to all the people and benefits the public by relieving them of part of their burdens.¹³ Other transportation interests, pursuant to section 6 of the Intercoastal Shipping Act, 1933, or the policy of section 22 of the Interstate Commerce Act (40 U.S.C. 22) upon which it was patterned,¹⁴ may offer concessions to U.S. Government cargoes and the record in this proceeding shows that some of them do so.¹⁵ Additionally, many ports offer extended free time on such cargoes, and the terminal operators at the Port of Philadelphia have no objection to the Examiner's recommendation of such extension in the present proceeding. Moreover, the free time extension recommended by the Examiner and permitted by the Commission in Docket 68-13 is not mandatory but requires for its application a request by the cargo and the consent of the operator of the terminal facility.

The only significant problems, in light of the lawfulness in principle of an extension of free time of the type given by the Examiner, are the amount of extended time to be prescribed, the precise type of cargo to which it is to be granted, and the conditions which should apply to such grant.

As the Examiner has properly maintained, in the interests of remedying the evils present at the ports here under consideration, all shippers must adopt procedures which will keep the piers fluid. Moreover, as he observed, "the United States Government should set an example for other shippers by doing all that it can to avoid situations which may contribute to the undue congestion on the piers of the Nation's ports." Pursuant to this suggestion, Agriculture has dropped its original request for 30 days free time and is now willing to accept the 21 calendar days fixed by the Examiner. In the case of the U.S. Government export cargoes at the subject ports, the extension of 5 additional working days free time does not appear improper.¹⁶ Very little Govern-

¹³ See *Tennessee Products & Chemical Corp. v. L. & N. R.R.*, 319 I.C.C. 497, 503 (1963).

¹⁴ The policy of section 22, which relates to rail carriers, has been extended to apply to motor carriers, water carriers, and forwarders subject to the Interstate Commerce Act. (See 49 U.S.C. §§ 317(b), 906(c) and 1005(c), respectively.)

¹⁵ Some rail carriers offer extended free time on inland movements, some ocean carriers publish reduced rates for ocean carriage, and individual forwarders may charge only ocean brokerage, waiving regular forwarding fees.

¹⁶ Fifteen working days is roughly the equivalent of 21 calendar days and is used throughout as the maximum period for exceptions to the basic free time period rather than the 21 calendar days suggested by the Examiner since the basic period is expressed in terms of working days, and we feel that uniformity of terminology will lead to the more efficient administration of the free time rules. The substitution of working for calendar days was originally suggested by the Australia Conference.

ment export cargo moves through the Ports of New York and Philadelphia, such cargo accounting for only about 1.2 percent and 0.8 percent, respectively, of the total export tonnages at these ports.

In light of the facts that at least in some cases 15 working days may be necessary for admittance of Government cargo to and transit off the piers, that very little Government cargo moves out of the subject ports, and that such cargo has not been shown to be an important factor in contributing to congestion at these ports, we find that a maximum 15 working days free time is a reasonable allotment for U.S. Government cargoes.

The U.S. Department of Agriculture was the only governmental or charitable body that sought an extension of free time, and it does not appear from the record in this proceeding that other such groups either desire or need extended free time. Accordingly, the exception which we will establish shall be limited to U.S. Government cargo, i.e., commodities shipped for the account of the U.S. Government.

Finally, it appears appropriate for us to maintain surveillance over the grants of extended free time to insure that the Government's privilege is not abused. Virginia has urged that requests for extended free time be made in writing and a record kept of the requests. While we see no need to require that such requests be made in writing, it does appear necessary to us to require that the ports maintain records for 2 years of all grants of extended free time, including the commodity, its tonnage, the consignee and the additional free time used.¹⁷ We realize, in directing that the terminal operators keep such records, we are, at least insofar as New York is concerned, requiring them to assume an obligation with respect to a privilege that they did not wish to grant in the first place. We would remind the terminal operators, however, that the grant of the privilege is voluntary, and that, even if competitive pressures tend to make it mandatory, there is no showing on this record that 5 more working days free time on the minimal amount of Government cargo moving out of the subject ports has had or is likely to have an appreciable effect on pier congestion. Furthermore, the keeping of such records will not only tend to prevent the use of additional free time by cargo not entitled to it, but more importantly is the best way to document the New York terminal operators' fears that the grant of additional free time to Government cargo will aggravate pier congestion. The privilege of extended free time to Government cargoes is not an absolute one, as the Government itself has

¹⁷ We imposed a similar requirement with respect to the grant of extended free time on U.S. Government cargoes at the Port of San Diego in docket No. 68-13.

realized in accepting less free time than it originally sought, and may be further curtailed if it appears necessary in the public interest of maintaining efficient terminal facilities at the subject ports.

B. The Consolidated Shipment Exception

The Examiner provided for 21 calendar days free time for consolidated shipments provided that they were designated as such on the shipping documents and that the cargo comprising them was actually consolidated.

The cargo involved in this exception originates at two or more supply points and is consolidated on the docks for shipment. Such shipments move under a single bill of lading, and thus avoid the imposition of minimum bill of lading charges, handling charges and customs and forwarding fees which would otherwise be imposed on the packages comprising the shipments. Consolidations on the docks are frequently made pursuant to the instructions of a foreign consignee who has placed orders with different American suppliers. Consolidated shipments account for less than 5 percent of the total export tonnage handled through the Port of New York.

The Examiner's allowance of extended free time on consolidated shipments is opposed by several parties on the grounds that it is in many cases not necessary, and to the extent consolidations cannot be made within the ordinary 10-day period, the reasons relate to the commercial convenience of the consolidator or export shipper. Since they maintain that these consolidators can show no transportation obligation of the terminal operator or carrier with respect to their cargoes which cannot be performed within 10 days, these parties contend that the extension of free time would require the terminal operators to provide free warehousing, weaken the financial security of terminal operators, discriminate against other users of the facilities not afforded additional free time and increase pier congestion without justification. Hearing Counsel, rather than request the total removal of the exception for consolidated shipments, as have the other parties objecting to its allowance by the Examiner, take what they characterize as a middle ground and suggest that the 21-day free time period be allowed to consolidators, but that such special privilege terminate in 2 years. They maintain that although the practice of extending free time on consolidated shipments could, as a matter of law, be curtailed immediately, it is not unreasonable to allow a 2-year phasing out period to prevent a disruption in the flow of exports. The 2-year period, they feel, will be sufficient to allow exporters to adopt alternative means of exporting which will not involve extended use of the piers.

The most extensive argument in favor of the granting of additional free time on consolidated shipments is made by the New York Freight Forwarders & Brokers Association, Inc. (forwarders), who contend that there is a transportation obligation of carriers and terminal operators which cannot be performed within 10 days—namely, the allowance of the time necessary to exporters to assemble their cargo prior to loading on the vessels.¹⁸ The record demonstrates, they maintain, that at least 21 days are needed because of cargo to be consolidated comes from many points of varying distances from the port of export. The alternative methods of shipment suggested by Hearing Counsel are impractical, and the 2-year limitation on the extension of free time, they assert, is supported only by mere speculation as to what pier conditions will be like 2 years from now. Lastly, the forwarders contend, that since less than 5 percent of the export tonnage handled at the Port of New York moves as consolidated shipments, an allowance with respect to such traffic will have a minimal effect.

There is evidence of record that 10 working days free time may not be sufficient to satisfy the needs of exporters utilizing consolidated shipments, and that the majority of them need additional time. There is also indication that most consolidated shipments can and do transit the piers within 15 working days of the arrival of their component parts at the piers. The record indicates that once all of the components of a consolidated shipment have been admitted to the piers, they can typically be loaded into a vessel for export within 10 working days. It is then the consolidation itself which gives rise to the need for additional time.

Because consolidated shipments originate from inland supply points, which are often numerous and widely scattered and may move via many different inland carriers, there are difficulties in coordinating the various inland movements to insure the arrival of all cargo to be consolidated in time for assembly on the dock prior to a ship's sailing. These problems include the varying times required for the inland transportation itself, depending upon mileage from the port of export, and variations in the regularity, frequency and dependability of the service of the inland carriers. As we have observed, the physical limitations of the piers are such that it generally takes about a working week just to admit all the cargoes which are to move on a particular ship to the piers. When the delays attendant in admitting each component of the shipments to be consolidated to the piers are added

¹⁸ The extension of free time on consolidated shipments is also supported by several water carrier conferences, the port and terminal interest at Philadelphia, and the Port of New York Authority.

to the delays occasioned by the difficulties in coordinating all of the inland movements to those piers, the need for additional time free of demurrage becomes more readily understandable.

However, the mere fact that the component parts of consolidated shipments come from many diverse origins for export, does not indicate that a suitable inland consolidation point could not be found or would be inappropriate. The forwarders maintain that even if such places could be found, the costs of utilizing off-pier warehouses to consolidate would be prohibitive. The record is inconclusive on this point. Many of the merchants who export their cargoes in consolidated shipments are small businessmen who, as uncontradicted testimony of record plainly shows, are unable to afford the use of warehouses in the New York area to perform consolidation. There is some indication, too, that consolidations at warehouses in other inland locations may also be costly because shippers would have to bear the expense of transportation to the warehouse as well as to the piers and additional costs would be incurred by the movements in and out of the inland warehouses. However, the possibilities of the utilization of inland consolidation places other than warehouses in the immediate vicinity of the ports do not appear to have been explored in any detailed or systematic fashion. Inland containerization of shipments, a phenomenon which, as we have observed, is becoming more and more common and important in ocean transportation, may also provide an economical alternative to on-pier consolidation.

Thus, there is no real indication that consolidations of export cargoes could not physically be made at off-dock locations, and that such consolidations could not be admitted to and deposited on the docks in a condition ready for shipment within the ordinary 10 working days free time period. The primary purpose of consolidating shipments on the piers is admittedly that of commercial convenience,¹⁹ a purpose which has consistently been rejected as a basis for the extension of free time to nongovernmental or charitable shippers, even in situations where some economic injury may be caused by the imposition of more restricted free time.²⁰ We are, therefore, unable to allow additional

¹⁹ Some of the smallest exporters also fear that, because of the slim profit margins on which they operate, they could not absorb the costs of demurrage for the use of the piers if additional time for consolidation were not allowed, and that difficulties may arise in passing on the demurrage expenses to inland suppliers and foreign consignees.

²⁰ See, e.g., *Storage of Import Property*, *supra*, at 682-683; *Free Time and Demurrage Charges—New York*, *supra*, at 103; *Free Time and Demurrage Practices, at N.Y. Harbor*, *supra*, at 241-42; *American Paper & Pulp Association v. B. & O. R.R. Co.*, *supra*, at 507, 512; *Plymouth Coal Co. v. D.L. & W. R.R. Co.*, 36 I.C.C. 76, 77-78 (1915); *Plymouth Coal Co. v. L.V. R.R. Co.*, 36 I.C.C. 140 (1915); *Turner, Dennis & Lowry L. Co. v. Chicago, M. & St. Paul Ry. Co.*, 2 F. 2d 291, 295-6 (W.D. Mo. 1924), *aff'd* 271 U.S. 259, 262 (1926); *United States v. Union Pacific Railroad Company*, 173 F. Supp. 397, 408 (S.D. Iowa 1959), *aff'd* 362 U.S. 327 (1960); *Merchants & Planters Co. v. G., H. & H. R.R. Co.*, 129 I.C.C. 477, 480 (1927).

time, usually known as free time, for shipments consolidated on the piers.

This is not to say, however, that cargoes consolidated on the piers should not or cannot be allowed additional time free of demurrage. Although on-pier consolidations are made for the commercial convenience of exporters, as that term is used in our cases relating to the free time obligation, problems are encountered in such consolidations, which, as has been noted, are due to transportation conditions for which the exporter is not responsible, e.g., delays in inland transportation and in admittance of the component parts of the consolidated shipments to the piers. Under such circumstances, although additional free time, strictly defined, based upon these delays is improper since they cannot be said to be related to the transportation obligation of the carrier or terminal operator, the grant of some additional time on the piers free of demurrage is allowable when a terminal operator desires to provide it and where it is not otherwise unlawful.

Docket 68-13, *supra*, is a case in point. In that case, in addition to the grant of extended free time for U.S. Government cargo, we allowed additional processing time on the piers free of demurrage charges to accommodate the bagging of chemical fertilizers for export. Although the bagging time was not assembly time in the sense in which that expression is used to describe the transportation obligation of the carrier or terminal operator to provide sufficient time for an exporter to deposit his cargo on the pier and assemble it for shipment, the evidence adduced in docket No. 68-13 indicated among other things that the need for extra time for the bagging operation was in part due to the problems of delays encountered in the movements to the piers of both the bags and the commodities to be bagged and the difficulties in coordinating their movements to the piers.²¹ Recognizing that the grant of such extended time is allowable, however, only where a terminal operator desires to provide it and where it is not otherwise unlawful, we allowed 10 additional days processing time because the allowance of such time was not shown to operate to the detriment of the efficiency, economy, and financial soundness of terminal operators.

The record in this proceeding fails to show that the terminal operations at the Ports of New York and Philadelphia will be materially affected by the grant of 5 additional working days free of demurrage to exporters making consolidations on the piers for consolidation time. The record herein shows that the allowance of such additional time

²¹ The ports of discharge had no bulk unloading facilities; thus the fertilizer could only be shipped in bags.

will be sufficient to allow the admission to the piers and loading aboard vessels of a majority of consolidated shipments, and port and terminal interests at Philadelphia and the Port of New York Authority are not opposed to such concession. The New York Terminal Conference fears the consequences of extended time free of demurrage to allow on-pier consolidations. It reasons that since at the present time only about 10 percent of the cargo moving through the Port of New York uses the piers for more than 10 working days and consolidations account for about 5 percent of the New York export tonnage, the results of an allowance of extended time to consolidators will be disastrous. The fallacy of this reasoning is that it assumes that one half of the cargo which has caused the pier congestion has been that of the exporters who consolidate on the piers. Persuasive evidence of record, however, indicates that most of the cargo consolidated on the piers for shipment occupies transit area space for no more than 15 working days, and the evidence of record which relates to the problems of congestion generally deals with cargo which has been on the piers for 1 or more months.

In any event, as we have stated, we will not compel the terminal operators to grant additional time for on-pier consolidations, and if they seriously fear that the efficiency, economy and financial soundness of their operations will be endangered by the grant of such time, they should not do so. The possibility, that if some terminal operators grant extended time for on-pier consolidations all will have to do so because of competitive pressures, seems rather remote. The need to extend free time which in the past was caused by competitive pressures will, with the promulgation of a 10 working day free time limitation applying to nearly all the cargo exported from the subject ports, no longer exist. Terminal operators have up till now been unwilling to make limitations on free time because they feared that substantial amounts of cargo would be lost to those other terminal operators who did not impose such limitation. Now, however, when practically all of the cargo will already be subject to the 10 working day limitation, competitive pressures should loom less large.

Finally, there is a type of consolidated shipment which will not be appreciably affected by the allowance of a few more working days free of demurrage. This is the so-called project shipment or project consolidation which is typically composed of materials intended to be used for foreign construction projects such as plants, dams, and irrigation facilities. It differs from the usual consolidated shipment in that it is larger, made up of many more component parts and is assembled over much longer periods of time, generally occupying the

piers for months and sometimes years. The Examiner refused to make any special allowances for such shipments insofar as free use of the piers is concerned, and no exception to his determination in this regard has been made. We agree with the Examiner. It is unreasonable to permit the conversion of piers which are designed to be used as transit areas into long-term warehouses and then to deny the terminal operator compensation for the use of such property. The unreasonableness of the free use of the piers by project shipments is magnified by the fact that cargoes remaining on the piers for long periods of time are already seriously aggravating the problem of pier congestion. We have, however, attempted to accommodate the desires of the exporters of project consolidations for on-pier storage space by prescribing regulations under which such space may be furnished to them.²²

The forwarders suggest that the cargo which is to be allowed extended time free of demurrage should be designated on the shipping document as "hold-on-dock for consolidation" since the words hold-on-dock are known in the terminal industry and will be sufficient to prevent premature export while the word consolidated may not be. No objection has been voiced to this form of designation, and since it appears reasonable we will incorporate the hold-on-dock for consolidation designation into our rules.²³

Although, as we have indicated, the exporters of consolidated shipments will not, insofar as appears from the record in this proceeding, substantially contribute to the problem of pier congestion by being allowed a few extra days on the piers free of demurrage, especially since the terminal operators are free to deny the extra time if in their business judgment it appears necessary to do so, such exporters should, in the public interest, do everything possible to lessen the problems of pier congestion. To further this end, exporters should explore at length and attempt to utilize off-pier consolidation, inland containerization, and partial shipments as alternatives to on-pier consolidation. To encourage exporters to explore and utilize these alternatives, and to prevent extensions from becoming automatic, we will require that those exporters desiring them, or their agents, request them as a condition precedent to their grant.

²² See p. 49, *infra*.

²³ The New York terminal operators fear that the extended time free of demurrage may be obtained by exporters who stamp their shipments hold-on-dock for consolidation but do not consolidate them. The likelihood of this seems slim. Cargo must actually be consolidated to allow exporters to avail themselves of the privilege, and since the consolidations are made on the terminals and terminal personnel might reasonably be expected to know the status of cargo on the piers in their daily operations anyway, it should not prove too difficult to keep track of shipments received with the critical designation to ascertain if they become parts of a legitimate consolidation. If, however, the terminal operators feel that this task is unduly burdensome or too difficult to administer, the simple answer is that they need not extend additional time to consolidated shipments.

To enable review of the problem of extended time for consolidated shipments if such appears necessary, we will require, as in the case of extensions to U.S. Government cargo, that records be kept for a 2-year period of all grants of consolidation time made by the terminal operators in the exercise of their business judgment for the purpose of on-pier consolidation. Such records should include the name of the export shipper as shown on the bill of lading, the tonnage of the consolidated shipment, the consignee, and the additional time used.

In conclusion, we find that the voluntary grant, upon request, of up to 5 additional working days consolidation time for shipments actually consolidated on the piers and exported under a single bill of lading, is, on the basis of the present record, a reasonable practice at the Ports of New York and Philadelphia and will provide for it in our rules promulgated herein.

C. The Australian and African Trade Exception

Because of the infrequency of sailings, the Examiner provided for up to 21 calendar days free time to cargo transported in the trades served by the Australia Conference and the American West African Freight Conference (African Conference) provided that such cargo is deposited on the piers within 21 calendar days of the first available sailing and either moves on that sailing or is prevented from moving thereon by a fault or design not imputable to the exporter.

Opposition to the exception for such cargoes is raised by several of the port and terminal operating interests and Hearing Counsel, who maintain that no reason has been shown why 10 days' free time is insufficient for the delivery and loading of cargo in these trade areas, and that the exception promotes congestion, encourages inefficient booking practices and wastes the terminals' resources. The real purpose of the exception, these parties maintain, is to equalize the intraconference competition which might otherwise exist because of variations of sailing frequencies as between the different members of the conferences. This, the opponents charge, is not a legitimate function of free time rules.

The conferences, on the other hand, contend that the charges of increased congestion are based upon sheer conjecture. The fact that equalizing intraconference competition may not be a normal function of free time rules is irrelevant, they maintain, as long as the period of 21 calendar days has not been shown to be unreasonable. Moreover, prior case law, they contend, supports their position that concessions based on trade areas served are proper.

The trade areas served by the Australia and African Conferences, and to which these conferences appear to provide virtually all of the regularly scheduled liner service, are among the most removed from U.S. ports. The membership of these conferences, moreover, is smaller than is typical of conferences sailing in our foreign trades. The result of this is that sailings tend to be infrequent in the African and Australia Conference areas.

The Australia Conference serves Australia and New Zealand. From the Port of New York, it maintains only seven sailings a month to Australia by the six member carriers calling there, one carrier making roughly two sailings a month, and the other five carriers offering approximately monthly sailing. These lines have a total of only two sailings monthly to New Zealand. Sailings by the Australia Conference out of Philadelphia are less frequent. The African Conference also has infrequent service. Although some of its 13 member lines may have weekly sailings, many of them sail only once in 3 or 4 weeks. It further appears that most of the member lines concentrate on certain particular segments of the trade area, it appearing that only one actually serves all of it. As in the case of the Australia Conference, sailings from Philadelphia are less frequent than from New York. Much of the cargo carried by the African Conference is shipped for the account of the U.S. Government.

The record tends to show that while most of the cargoes in these trade areas arrives within 10 working days on the piers in a condition ready for loading, a substantial amount of such cargo arrives about 15 working days before the loading of the ship on which it is to move.

In *Practices, Etc. of San Francisco Bay Area Terminals, supra*, at 597-598, while the Commission prescribed a general 7 working day limitation on free time for foreign export cargo at San Francisco Bay Area terminals, it permitted such terminals, in their discretion, to allow up to 21 calendar days free time on petroleum products destined to trans-Pacific ports where the evidence in the proceeding showed that the limitations of the terminals' facilities may have prevented handling of such cargo within the regular free time period. Although terminals were not obligated to make such extension of free time, they were permitted to do so since the additional time was not shown to be destructive of the efficiency and financial soundness of the terminals' operations.

As has been indicated in *Investigation of Free Time Practices—Port of San Diego, supra*, at 531-2, and has been acknowledged in this proceeding by the New York Terminal Conference and Hearing Counsel, the frequency of sailings from a certain port is a transportation

condition which may be taken into consideration in establishing free time regulations, and as we further noted in *San Diego*, sailings to certain trade areas may be considered.

San Diego was forbidden to offer unlimited free time to attract cargo which would otherwise have moved through other West Coast ports merely on the basis that it had fewer sailings than the other ports. Such competitive device is not a legitimate use of free time. Where, however, as in the Australian and African trades, the infrequency of service may have an impact upon the demurrage assessed against shippers in these trades, it is not improper to make allowance for such infrequency of service in free time regulations. A shipper who, for example, exports products to a remote part of Africa to which sailings may be available only once a month, or to New Zealand where there is a total of only two Conference sailings from New York in a month, may time his shipments to allow for a few days leeway so as not to miss his sailing. This may account for the fact that cargoes in these trades often occupy the docks for about 15 working days. We cannot say it would be unreasonable in such circumstances for the terminal operators to allow these shippers a few extra days free time. We will not require that they do so, but merely allow the extension, as was done in the *San Francisco Bay* case with respect to the petroleum products.

There is no evidence that cargo carried by the Australia and African Conferences constitutes anything but a tiny fraction of the cargo moving out of the Ports of New York and Philadelphia or that it has contributed in any appreciable way to the problem of port congestion which this proceeding is designed to remedy or has damaged the financial stability of terminal operations. As we have noted, the cargo which the record indicates has been the main irritant in the congestion situation has been cargo which has occupied the piers for a month or more. While there is evidence that cargo in the areas served by the Conferences may be on the docks a few days beyond the 10-working-day period, there is no evidence that it is held on dock for extended time periods and, testimony of record indicates that "very little [of such] cargo would be on the dock for 30 days * * *" Even if cargo moving in these trade areas had in the past contributed appreciably to congestion, however, the limitation of a maximum 15 working days free time which we shall apply to such cargo should help to prevent such results in the future, and the port and terminal interests at Philadelphia as well as the New York Port Authority do not oppose the allowance of additional free time for such cargo. If, however, the terminal operators at New York, who represent the major opposition to the exception, feel that it is injurious to their interests to grant additional time, they need not and should not do so.

One of the main criticisms of the extension of free time for the Conferences in these trade areas is that its real purpose is to equalize intraconference competition, which is not a legitimate function of free time rules. Since there is a legitimate transportation justification for the extension of free time, the fact that it may have been motivated in the first place by factors unrelated to such justification is irrelevant.

However, the use of extended free time to equalize intraconference competition is indeed not a legitimate function of free time rules. To prevent its use for this purpose, and because the extension is intended for the benefit of the exporters, we will require that the discretionary grant by the terminal operators be conditioned upon a prior request by the exporters or their agents.

The Examiner had conditioned the grant of extended time upon the depositing of the cargo on the piers within 21 calendar days (15 working days) of the first available sailing. The practice in these trades, however, is to book cargoes to move on specific lines, rather than to follow the more usual procedure of booking for the next available sailing. In many cases, at least in the African area where lines tend to concentrate their services on particular segments of the trade area, booking by line may in fact amount to the same thing as booking for next available sailing. At any rate, we are unable to find that the practice of booking by line has had any unlawful effects and accordingly will not require that it be modified. We shall formulate a rule with respect to cargo carried in trades served by the African and Australia Conferences which will allow a maximum of 15 working days free time for such cargo if it is deposited on the piers within 15 working days of the sailing for which it is booked. Since, however, there appears no reason of record why shipments cannot be placed on the docks within 15 working days of the loading of the vessel for which it is booked, we will deny, as did the Examiner, extended free time to any shipper who fails to have his cargo on the docks within such time period or who holds his cargo beyond such period. In such cases the usual 10-working-day limitation will apply. Exporters are further exhorted to coordinate the movements of their cargoes to the dock as closely as possible with vessel sailings and not to seek any more time than they in good faith believe to be necessary.

Finally, to enable both the terminal operators and the Commission to maintain adequate surveillance over the practice of extending free time to cargo carried in the trade areas served by the Australia and African Conferences and to provide information which may be utilized as the basis for determining if action with respect to such practice should be taken in the future to protect the economy and efficiency of

terminal operations, we will require that records be kept for 2 years of all grants of extended time to such cargo, including the name of the shipper as shown on the bill of lading, the commodity, its tonnage, the consignee and the amount of additional free time used.

We, therefore, find that the voluntary grant to the exporter or his agent upon request of up to 15 working days free time to cargoes carried in the trades served by the Australia and African Conferences is a reasonable practice, provided such cargo is deposited on the docks within such time period and is not held, through any fault or design of the shipper or his agent, beyond such period.

We accordingly find the following to be a just and reasonable regulation prescribing the free time and consolidation time periods on export cargo at the Ports of New York and Philadelphia and will order it enforced:

(a) Free time on export cargo at the Ports of New York and Philadelphia shall not be more than 10 days (exclusive of Saturdays, Sundays, and legal holidays) except:

1. Upon request of the U.S. Government, free time not to exceed 15 days (exclusive of Saturdays, Sundays, and legal holidays) may be granted. This exception shall apply only to commodities shipped for the account of the U.S. Government.

2. Upon the request of export shippers or their agents, free time not to exceed 15 days (exclusive of Saturdays, Sundays, and legal holidays) may be granted to cargoes moving in the trades served by the U.S. Atlantic and Gulf/Australia-New Zealand Conference and the American West African Freight Conference, provided that such cargoes are delivered to the terminal not more than 15 days (exclusive of Saturdays, Sundays, and legal holidays) prior to the sailing for which they are booked, and provided further that they are not held beyond such 15-day period through any fault or design of the export shipper or his agent. In either such case, demurrage charges shall apply after the passage of 10 days (exclusive of Saturdays, Sundays, and legal holidays) following the date of delivery to the terminal.

(b) On consolidated shipments, upon the request of export shippers or their agents, consolidation time not to exceed 5 days (exclusive of Saturdays, Sundays, and legal holidays) may be granted in addition to the 10 days free time provided in subsection (a). Cargo upon which such consolidation time has been granted shall be designated on dock receipts and on other appropriate shipping documents as hold-on-dock for consolidation. Cargo not so designated and cargo not actually consolidated on the piers will not be entitled to the grant of consolidation time. As used herein, consolidated shipments shall mean shipments which are made up of commodities originating from two or more supply points and which move under a single bill of lading to overseas consignees.

3. *Timing of Free Time*

The Examiner formulated the following provision for computing the free time period:

(c) Free time on export cargo shall commence at 12:01 a.m. on the day after the said cargo is received at the terminal facility and terminate at 11:59 p.m. on the final day of free time.

This provision reflects the traditional practice at many U.S. ports and is not opposed by any party to this proceeding. We find it to be just and reasonable and will prescribe it and order it enforced.²⁴ A similar provision will be promulgated with respect to consolidation time.

4. *Level of Demurrage Charges and General Pattern of Assessment*

The Examiner formulated the following regulation with respect to the level of demurrage charges and the general pattern of assessment:

At the expiration of the free time period, demurrage charges in successive periods shall be assessed. The first period of demurrage shall be assessed at a compensatory level. Penal demurrage shall be assessed during subsequent periods. No demurrage shall be assessed after the vessel has commenced to load, except as provided in connection with cargo on demurrage when an immobilizing factor, such as a strike, prevents the continuance of loading into a vessel after the vessel already had commenced to load. Except as otherwise provided in these rules, demurrage shall be for the account of the cargo.

Virginia excepts to this provision, urging that the parties be allowed an option to assess penal demurrage immediately upon expiration of free time, rather than compensatory demurrage if they choose. Maryland and New Orleans also except, maintaining that demurrage should in all cases be assessed against the vessel rather than the cargo, asserting that once cargo is delivered to the pier any charges with reference to it become the carrier's responsibility.

The assessment of first period demurrage at compensatory rather than at penal levels is traditional at the subject ports on import property,²⁵ and is the practice followed by many other ports. Although we

²⁴ The North Atlantic Baltic Freight Conference, the North Atlantic Continental Freight Conference, the North Atlantic French Atlantic Freight Conference, the North Atlantic Mediterranean Freight Conference, and the North Atlantic United Kingdom Freight Conference (North Atlantic Conferences) suggest an addition to this provision which is discussed in section 7, *infra*.

²⁵ See e.g., *Free Time and Demurrage Charges—New York*, 3 U.S.M.C., *supra*, at 109; *Free Time and Demurrage Practices at N.Y. Harbor*, *supra*, at 241.

cannot say that the assessment of penal level demurrage immediately upon the expiration of free time must necessarily in all cases be improper as a matter of law, we see no necessity to provide for it, especially where the port and terminal interests at New York and Philadelphia have indicated their desires that their traditional practice be retained.

The assessment of demurrage we feel should generally be made against the cargo at the Ports of New York and Philadelphia. The assessment of demurrage against the vessel may well be appropriate at ports like New Orleans where the carrier in effect leases the pier from the terminal operator, assumes responsibility to the port for collection of demurrage, and is permitted to pass the charge on to the shipper under the port's tariff. In such cases the vessel is in a real sense responsible for the demurrage, and it does not appear inappropriate for the port to assess it against the vessel. Where, however, as is the case at the ports here under consideration, as well as many other ports, the vessel does not lease the wharf but rather contracts with a terminal operator or pays established tariff charges for services rendered to it, and assumes no responsibility to the ports for the collection of demurrage charges, the contention that demurrage charges should be assessed against the vessel is without foundation. While cargo is on the docks, valuable services are being rendered for its benefit, and, as a general proposition, it is the cargo which should pay for such services. The agency and court decisions sanctioning the usual assessment of charges against the cargo after the expiration of free time are numerous,²⁶ and the practice is followed at many ports.

The requirement that no demurrage be assessed after the vessel has commenced to load is unopposed and is just and reasonable since it prevents the penalization of cargo for the vessel's loading time. Since no demurrage under the rules which we here promulgate (or which the Examiner suggested) is in any case assessable after the vessel has begun to load, we will delete the proviso in the rule recommended by the Examiner to avoid the impression that demurrage after the commencement of vessel loading may be proper.

The determination of the dollar mounts of demurrage to be assessed was beyond the scope of this proceeding. We note that the current practice at the subject ports with respect to import cargo is to assess

²⁶ See, e.g., *Free Time and Demurrage Charges—New York*, supra; *Free Time and Demurrage Practices, at N.Y. Harbor*, supra; *Investigation of Free Time Practices—Port of San Diego*, supra; *Practices, Etc. of San Francisco Bay Area Terminals*, supra; *American President Lines, Ltd. v. Federal Maritime Board*, supra; *The Boston Shipping Assoc., Inc. v. Port of Boston*, 10 F.M.C. 409 (1967); *Penna. Motor Truck Ass'n v. Phila. Piers, Inc.*, supra, aff'd sub nom. *Baltimore & O. R. Co. v. United States*, 208 F. 2d 734 (3rd Cir. 1953).

demurrage at levels which remain constant for a period of 5 days.²⁷ Since such demurrage periods have worked reasonably well with respect to keeping the movement of inbound cargo on the piers in a fluid condition, and since no objection was raised to our suggestion at oral argument that the rules promulgated herein state that demurrage periods shall consist of 5 days, we shall incorporate such a provision into our rules. The advantage of such a provision is that it will prevent the employment by a terminal of an unreasonably long period of demurrage at a compensatory or low level which competitive conditions might force the other terminals to meet, and which could result in just the sort of congestion which this proceeding is designed to alleviate.

Finally, we will adjust the wording of the rules to reflect the fact that where consolidation time is granted, demurrage does not begin until it has expired.

We therefore find that the following is a just and reasonable regulation with respect to the level of demurrage charges and the general pattern of assessment and prescribe it and will order it enforced:

(d) At the expiration of the free time period, or if consolidation time has been granted, the consolidation time period, demurrage charges in successive periods of 5 days shall be assessed. The first period of demurrage shall be assessed at a compensatory level. Penal demurrage shall be assessed during subsequent periods. No demurrage shall be assessed after the vessel has commenced to load. Except as otherwise provided, demurrage shall be for the account of the cargo.

5. *Assessment of Demurrage in Cases of Vessel Cancellation or Delay*

The Examiner suggested the following provision with respect to the assessment of demurrage in cases of vessel cancellation or delay:

Except as provided * * * below, when the vessel for any reason fails to meet the announced date of sailing, cargo on free time shall be granted additional free time up to 5 days beyond the time it would normally expire. Any demurrage accruing after that time shall be for the account of the vessel at first-period rates. Cargo on demurrage on the announced date of sailing shall continue on demurrage after said date when demurrage shall be for the account of the vessel at first-period rates. In no event shall demurrage be assessed on or after the day the vessel has commenced to load, except as provided. * * *

In the case of vessel cancellation, cargo on free time on the announced date of sailing shall be subject to first-period demurrage assessed against the vessel commencing on the day when the cargo was received at the terminal facility and terminating on the said announced date of sailing unless the shipper on or before that date nominates another vessel for loading, removes the cargo from the terminal, or elects storage as provided by * * * these rules, provided further that if no storage facilities are made available by the terminal to the shipper in

²⁷ See *Free Time and Demurrage Practices, at N.Y. Harbor, supra*, at 241. The applicable tariffs at Philadelphia also provide for the assessment of demurrage at levels graduated by 5-day periods.

this instance, demurrage shall be for the account of the vessel until the shipment can be rebooked.

If the shipper takes none of the aforementioned actions, and provided that storage facilities were made available by the terminal to the shipper, demurrage at first-period rates shall be assessed against the shipper after the vessel's liability for demurrage has expired. Such demurrage shall likewise terminate upon the shipper's action as aforementioned. For cargo on demurrage on the canceled date of sailing, demurrage shall continue for the account of the shipper until such time as he takes one of said actions. In the event the shipper nominates another vessel, the provisions of paragraphs (a) and (c)* shall apply, with the free time for the other vessel commencing on the date that the shipper nominates this other vessel.

The announced date of sailing shall be that date of sailing appearing in the Journal of Commerce or the Shipping Digest, or any other appropriate publication of general circulation, as designated in the applicable tariff.

The purpose of this provision is to authorize the assessment of demurrage against the vessel in instances of vessel cancellation or delay. Basically, the rule, as suggested by the Examiner, provides that in case of vessel delay, compensatory level demurrage will be assessed against the vessel for cargo on free time at the announced date of the delayed sailing after 5 additional days of free time. Cargo on demurrage on the announced date of the delayed sailing would continue on compensatory level demurrage to be assessed after such date against the vessel. In case of vessel cancellation, the vessel would be assessed compensatory level demurrage for cargo on free time at the announced date of the canceled sailing from the time of receipt of the cargo at the terminal to the announced date of the canceled sailing. Cargo on demurrage at the announced date of the canceled sailing would remain on demurrage, to be assessed after such date for the shipper's account. Demurrage against the vessel would terminate prior to the announced date of the canceled sailing if the shipper nominates another vessel, removes the cargo from the terminal, or places it in storage if the terminal provides storage.

The provision is excepted to by the North Atlantic and Australia Conferences, which maintain that it is unnecessary and unfair. They contend that vessels calling at New York already bear the costs of delayed or canceled sailings, either through the operation of their own terminals or, more commonly, through the contracts entered into with terminals for the operation of the piers.

The New York Terminal Conference, Maryland, Virginia, and New Orleans, while generally in agreement with the objective of this provision, would delete the 5 days additional free time in case of vessel delay and assess demurrage against the vessel as soon as it missed its

*Now paragraph (d).

announced sailing.²⁸ These parties assert it is unfair to make the terminal operator bear the burden of canceled or delayed sailings, for which he is not responsible.

Maryland, New Orleans, Virginia, and the North Atlantic and Australia Conferences further suggest that the rule is confusing and burdensome and difficult to enforce.

The most extensive argument in support of the rule in the form suggested by the Examiner is made by Hearing Counsel.²⁹ They assert that the rule merely imposes upon carriers the obligation to pay demurrage admittedly due terminal operators when they are responsible for the fact that cargo remains on the piers. The fact that carriers may to some extent bear the expenses for canceled or delayed sailings now through their negotiated contracts with the terminal operators is not controlling because such negotiations are imprecise, while the rule would allow carriers to know precisely what charges they would be required to bear. The 5-day grace period for delayed sailings may be sufficient to cover most situations of vessel delay, is extended only to cargo of diligent shippers (i.e., those whose cargo is still on free time when the vessel is delayed), and is a part of a compromise which allows terminal operators at New York and Philadelphia to assess demurrage against vessels directly for the first time. West Coast ports customarily allow 10 days free time for vessel delay. There is no undue burden on shippers since it is incumbent, they contend, upon the diligent shipper to take action in case of vessel delay or cancellation to rebook the cargo on another vessel, remove it, or store it elsewhere. The rule is not confusing or difficult to administer, they assert, and they point out that it is supported by the parties at Philadelphia and New York,³⁰ who will directly administer it.

It is clear that when cargo is brought to or remains on the piers because of circumstances for which the water carrier is responsible, the water carrier must compensate the terminal operator for the use made of his facility. The case law is clear that the cargo may not lawfully be assessed in such situations,³¹ and since the terminal is entitled to compensation for the use of its services and facilities,³² the inescapable

²⁸ Maryland and New Orleans, as noted above, would assess all demurrage against the vessel.

²⁹ The rule in this form is also supported by the port and terminal operating interests at Philadelphia, the freight forwarders, and the Port of New York Authority, who urge that we adopt it.

³⁰ The New York Terminal Conference, as noted, excepts only to the 5-day extension of free time on delayed sailings.

³¹ See, e.g., *Penna. Motor Truck Ass'n v. Phila. Piers, Inc.*, *aff'd sub nom. Baltimore & O. R. Co. v. United States*, *supra*.

³² Cf. *American President Lines, Ltd. v. Federal Maritime Board*, *supra*.

conclusion is that the vessel which has caused the cargo to be brought to or to remain on the facility must bear the demurrage charges. As the Examiner found, the assessment of demurrage against the vessel in cases of vessel cancellation or delay also accords with the practice at many ports. The fact that vessel cancellations or delays may not be deliberate acts by the carrier but may be due to circumstances beyond its control is irrelevant. The carrier has the responsibility for the demurrage because it was its act, intentional or not, rather than anything that could in any way be imputed to the exporter, that causes the cargo in such situations to remain on the piers.³³

The only problems with respect to the assessment of demurrage against the vessel in the case of cancellation or delay relate to the manner in which it should be assessed. We do not feel that the mere fact that carriers may to some extent bear the terminals' costs for delayed or canceled sailings through the contracts that they enter into with the terminals for the operation of the piers is a sufficient reason not to require that demurrage be assessed directly against the vessel in cases of cancellation or delay. First of all, it is doubtful that at Philadelphia, where the terminals' charges for services performed for the ship are on a tariff basis, the tariff charges take expenses due to delay and cancellation into consideration. To the extent that they do, moreover, they would seem to be unfair. All of the same type ships using the same terminal facility would necessarily be assessed the same rate for each service performed, in spite of the fact that some of these ships may be responsible for more delayed or canceled sailings than others. Secondly, the admittedly imprecise nature of the contractual negotiations for the furnishing of terminal facilities at New York may result on the one hand in the failure adequately to compensate terminal operators for expenses due to vessel cancellation or delay or, on the other hand, the penalization of the vessel for cancellations and delays for which another ship was responsible. Lastly, it is not really clear that expenses due to cancellation and delay generally in fact do enter into negotiations for terminal services. The requirement, which we will impose, that the specific demurrage charges contained in the terminal operators' tariffs be assessed against the vessel in situations for which it bears the responsibility to pay, will benefit both the terminal operators and the ocean carriers. The former will be assured of compensation for the use of their facilities, and the

³³ Cf. *The Boston Shipping Assoc., Inc. v. Port of Boston*, *supra*, where we held that vessels should pay storage charges during a longshoremen's strike for which they bore no fault on cargo with respect to which time had not expired, or stated another way, cargo with respect to which they still had a transportation responsibility.

latter will be assessed only those charges which they should be made to bear.

The Conferences have expressed concern over the possibility that the assessment of demurrage against the ship may upset existing business relationships at New York. We sympathize with this concern and wish to make it clear that our regulations will not alter or amend existing contractual relationships between the ocean carriers and terminal operators. It will merely enable the parties to such contracts to renegotiate them, when the time for renegotiation arrives, without reference to the nebulous charges for demurrage which might or might not otherwise be included in such contracts.³⁴

We agree with those parties who except to the Examiner's allowance of the 5-day extension of free time on delayed sailings.

It is true that there is a distinction between vessel cancellation and delay insofar as the obligation to extend time on the docks free of demurrage is concerned. In the case of cancellation, no demurrage can be assessed for any of the time the cargo has been on the piers. Since the whole concept of time without demurrage is based upon the assumption that there will be a vessel into which, at the end of such time, the cargo can be loaded, the cancellation of the vessel necessarily renders meaningless any preceding period of time without demurrage. In the case of vessel delay, on the other hand, the assumption remains that the vessel will eventually call, so that the prior use of the facility by the cargo without payment of demurrage was proper until the time when the vessel missed its sailing.

The difficulty, however, is that this distinction indicates no reason why demurrage should not be assessed against the vessel in the case of vessel delay for the whole period of the use of the terminal's facility for which it bears the responsibility, as is done in the case of vessel cancellation. The suggestion that 5 days may be sufficient to cover most situations of vessel delay is without support in the record herein. Even if it could be shown to be true, however, that delayed sailings usually are made within 5 days of the time for which they were scheduled, this appears to be immaterial insofar as the use of the terminal operator's property in the interval is concerned. We agree with the New York Terminal Conference that any time its property is used beyond the period of its obligation to extend time free of demurrage charges, it is entitled to compensation. The fact that West

³⁴ This seems to us to be the fairest and most reasonable method of handling the matter. It is true that if we were to order the immediate renegotiation of terminal contracts, disruption and confusion in the business relationships between the carriers and terminal operators might result. On the other hand, if we were to allow the present practice to remain in effect, we would be perpetuating its inherent inequities.

Coast ports customarily allow a 10-day grace period before assessment of demurrage against the vessel in case of vessel delay does not indicate that such a grace period must be prescribed at New York and Philadelphia. The grace period is something which the West Coast ports extend, not because they are required to do so, but merely because they desire to do so. There is no basis in law for the imposition of a grace period in the case of vessel delay upon the terminal operators, and Hearing Counsel themselves really appear to acknowledge this when they admit that the 5-day grace period is a compromise between the West Coast's 10 days and the present situation at New York and Philadelphia, where no demurrage is assessed. Although compromise may be proper where both cargo and ship bear some responsibility for the presence of cargo on the piers at a particular time³⁵ and the question is one of who is to pay demurrage which is admittedly due, compromise has no place in a situation where the demurrage is due and the responsibility for it is clear.³⁶ Lastly, the contention that under the 5-day grace period time is extended only with respect to cargo of diligent shippers is true but should have no significance insofar as vessel liability is concerned. It seems arbitrary to place the vessel in the position of the cargo so that it gains or is denied free time depending upon the efficiency of the booking practices of the exporters of the cargo.³⁷

The limitation to first-period levels of demurrage to be assessed against the ship in case of delayed sailings appears reasonable at first glance, but would not be so in certain circumstances. If a vessel

³⁵ See, e.g., the distinction made, *infra*, with respect to cargo free of demurrage and cargo on demurrage in the case of vessel cancellation.

³⁶ We recognize that it could be argued that since we have made allowances for the voluntary extension of additional time free of demurrage for delays which exporters experience with respect to the movements of their cargoes, similar allowances should be made, in the interests of fairness, for delays which occur with respect to the movement of the vessel. We feel, however, that the situations are really not comparable. The extension for cargoes moving in the Australian and African trade areas was based, *inter alia*, upon the transportation conditions at the ports (i.e., sailing frequency) and a showing that the additional time would in most cases be sufficient to accomplish its purpose. The extension for consolidated shipments was also supported upon evidence of record that the 5 additional days would be sufficient to allow for the movement of most consolidated shipments over the piers. There has been no showing that vessel delays are in any way related to transportation conditions at the ports or that vessel delays generally involve any ascertainable time periods. Additionally, although there is no hard evidence that vessel delays have been a major problem at the Ports of New York and Philadelphia, an extension of time for such delays would apply to all of the ships carrying export cargo rather than to the tiny fraction of export cargo to which the consolidated shipment and trade area exceptions apply, and its effect upon terminal efficiency and stability is potentially much greater. We, therefore, decline to provide for the voluntary extension of additional time free of demurrage for cases of vessel delay.

³⁷ It must be borne in mind that under the 5 days grace period in case of vessel delay, free time would have been extended to the vessel, not the cargo which, regardless of its status with respect to demurrage, would pay no demurrage in situations of vessel delay.

is delayed for a short period of time and then calls at the facility and the cargo on which demurrage was assessed is loaded into it, it can be said that the demurrage assessment against the ship has served its purpose—the terminal has been compensated and the cargo has been removed. It may happen, however, that the vessel will be delayed for a long period of time or, having been delayed, may not call at all. If a vessel which has been delayed cannot call, or the vessel owner decides that it should not call, the sailing should be canceled to avoid hardships to the exporter who has left his cargo on the piers in reliance that the vessel would call soon to remove it and to allow him to rebook it on another ship. Additionally, as we have observed with respect to demurrage free time on canceled sailings, demurrage is also a meaningless concept with respect to cargo which is not to be loaded into a ship. The rationale behind demurrage is that it encourages removal of cargo from the docks. It also seems unfair to allow a vessel to arrive months later and to pay only compensatory level demurrage. Some means should be available to the terminal operator to encourage the vessel operator who can have his ship call and who intends to do so to act with dispatch, and the most appropriate means of doing so appears to be the means that is traditionally used to encourage removal of cargo from the piers—i.e., the imposition of penal-level demurrage.

We will, therefore, modify the rule suggested by the Examiner to provide that in case of delayed sailings, demurrage in successive periods shall be assessed against the ship, beginning on the day after the announced date of the delayed sailing and terminating on the day the vessel begins to load.

Insofar as demurrage in the case of vessel cancellation is concerned, a distinction is made between cargo on demurrage-free time at the time of cancellation and cargo on demurrage at time of cancellation. With respect to the former, as has been seen, demurrage is assessed against the ship from the time of the cargo's arrival on the piers, while as to the latter, the respective interests are left as they are found and the cargo continues to pay demurrage. This distinction is the result of the kind of compromise which we feel is appropriate.³⁸ Although a literal application of the principle behind the free time regulations would dictate the assessment of demurrage against the vessel with respect to cargo on demurrage from the time of its arrival on the piers since the reason for that demurrage has ceased, such result is inequitable for two reasons. First of all, since the cargo has

³⁸ See p. 238, *supra*.

already paid demurrage, the terminal operator would be collecting twice for the same service. Secondly, it is proper to assess demurrage against the cargo exporter because he should be made to bear some responsibility for the cargo's presence on the piers at the time of the cancellation, having improperly booked the cargo so that it arrived at the piers too early and used valuable transit space which it did not need.

We agree with Hearing Counsel and the other parties supporting the Examiner that demurrage against the vessel in situations of vessel cancellation should be limited to first-period levels. It seems unfair to make the vessel bear penal demurrage on cargo which some exporter may have left on the piers for several months' time.

The Conferences attempt to give the impression that the provision suggested by the Examiner relating to the termination of demurrage against the vessel in the case of canceled sailings places them at someone else's mercy. This provision, however, far from being detrimental to the carriers' interests, in fact extends a privilege to them whereby the time for which they are liable for demurrage may be cut short. Insofar as cargo on demurrage at the time of a canceled sailing is concerned, the vessel is never liable for demurrage. Ordinarily, with respect to cargo which was on free time when the vessel was canceled, the vessel would be liable for demurrage from the time of arrival of the cargo at the pier facility to the announced date of the canceled sailing. The period of vessel liability may be cut short if the exporter has his cargo rebooked for another vessel, removes it from the terminal facility, or places it in storage on the facility (if such is available). Although these actions are within the exporter's control, he will probably wish to take them as soon as possible since, if he fails to take them until after the announced date of the canceled sailing, he will be assessed demurrage. Even if the exporter fails to take such actions, however, the carrier cannot be heard to complain, since his liability for demurrage could have been imposed through the announced date of the canceled sailing because that was the date upon which the exporter could be said to have reasonably relied in sending his cargo to the piers.

The Conferences are correct, however, in maintaining that the rule as formulated by the Examiner does appear to place an unreasonable condition upon their liability for demurrage. It provides "that if no storage facilities are made available by the terminal to the shipper * * * demurrage shall be for the account of the vessel until the shipment can be rebooked," and that demurrage shall be assessed against the export shipper after the announced date of the canceled

sailing, "provided that storage facilities were made available by the terminal to the shippers." The result of the condition above quoted is that if no storage facilities are made available by the terminal, demurrage will continue to run against the vessel even though the date marking the end of the ship's liability (the announced date of the canceled sailing) has passed, and even though the export shipper should have terminated the demurrage by rebooking his cargo or removing it from the facility. The respective duties of the export shipper and the vessel should not be made to depend upon the availability of resources which the terminal is not obligated to offer and in fact may not offer.³⁹ We will omit the conditions imposed by the Examiner on the availability of storage space with respect to the tolling of demurrage against the vessel.

Although the record herein does not indicate that it has been a problem at the subject ports, we recognize that, as some parties indicate, announced dates of sailing may be changed in later publications, and that an exporter may rely upon a publication other than the original one in booking his cargo. For this reason we will leave the terminal operators free to specify in their tariffs that the announced date shall be that date originally published in the particular journal designated in the tariff or a later date published in such journal if an exporter relied on such later date.

Lastly, the rule with respect to demurrage in cases of vessel delay or cancellation is not confusing, unfair, or difficult to administer. It apportions demurrage on the basis of relative responsibility for the presence of the cargo on the piers. The terminal operator is compensated for the use of his property, and the vessel operator is at most assessed for demurrage only up until the time his vessel begins to loan (delay) or would have called (cancellation). Export shippers are relieved of demurrage in cases of vessel delay because the continuing failure to call at the terminal in such cases is something for which the vessel owner is responsible. In cases of vessel cancellation, cargo which has been booked by the exporter so as to use the piers for more free time than it needs is made to assume the responsibility for its presence on the piers. Export shippers are relieved of liability for demurrage in case of vessel cancellations as soon as they take one of three actions which commercial judgment would seem to dictate anyway; i.e., have the cargo rebooked on another vessel, remove it from the facility, or store it on the terminal facility. If, however, the exporters fail to take

³⁹ This is particularly true in New York where, we are told by the attorney for the New York Terminal Conference, the likelihood of storage facilities on the piers being made available is almost nonexistent because of the lack of sufficient space.

one of these actions and simply leave their cargo on the terminals' transit space, they cannot be heard to complain if they are assessed for the use of that property, and if such assessment is made at the levels, compensatory or penal, which apply to other cargo which has been on the piers for similar time periods.

Although comments have been made by several parties to this proceeding that the rules respecting vessel cancellation and delay are confusing and will prove difficult to administer, no such comments significantly have been made by the parties at New York and Philadelphia who will be charged with administering them. The terminal operators at both of these ports feel that a period of education may be necessary, but that the rules can and will be properly administered.⁴⁰

Therefore, for the reasons discussed above, we find the following to be a reasonable regulation with respect to the assessment of demurrage in cases of vessel cancellation or delay at the Ports of New York and Philadelphia.

(e) When the vessel for any reason fails to meet the announced date of sailing, any demurrage accruing after such date shall be assessed in successive periods for the account of the vessel until the vessel commences to load.

In the case of vessel cancellation, cargo on free time or, if a vessel has been designated, cargo on consolidation time, on the announced date of sailing shall be subject to first-period demurrage assessed against the vessel commencing on the day when the cargo was received at the terminal facility and terminating on the said announced date of sailing unless the export shipper on or before that date has another vessel designated for loading, removes the cargo from the terminal, or elects storage as provided in paragraph (h).

If the export shipper takes none of the aforementioned actions, demurrage charges in successive periods shall be assessed against the export shipper after the vessel's liability for demurrage has expired. Such demurrage shall likewise terminate upon the export shipper's action as aforesaid. For cargo on demurrage on the cancelled rate of sailing, demurrage shall continue for the account of the export shipper until such time as he takes one of said actions. In the event the export shipper has another vessel designated, the provisions of paragraphs (a), (b) and (d) shall apply, with the free time for the other vessel commencing on the date that the export shipper has this other vessel designated.

The announced date of sailing shall be that date(s) appearing in the Journal of Commerce or the Shipping Digest, or any other appropriate publication of general circulation, as designated in the applicable tariff.

⁴⁰ We note in this regard that regulations which are more detailed and involve more contingencies have been in effect for some time with respect to import cargo at the Port of New York and have not proved to be impractical in administration.

6. *Factors Preventing Loading of Vessel*

The Examiner suggested the following regulation with respect to free time and demurrage in case of factors preventing loading of a vessel:

When the loading of cargo into a vessel is prevented by any factor immobilizing the pier facility or facilities in all or in part, such as weather conditions, strike, or work stoppage of longshoremen or personnel employed by the terminal operator or water carrier, cargo affected thereby shall be granted additional free time to cover the delay if the cargo is on free time when such condition arises. If cargo is on demurrage, first-period demurrage charges shall be assessed against such cargo.

The purpose of this provision is to allow the extension of free time to cargo on free time when factors arise which prevent the loading of the vessel, and to provide for the assessment of compensatory level demurrage in such situations for cargo on demurrage.

The provision is excepted to by Maryland and New Orleans, which would grant free time to all cargo whenever vessel loading is prevented.⁴¹

Hearing Counsel and the Port of New York Authority maintain that the distinction between cargo on free time and cargo on demurrage for the purpose of assessing demurrage during a period of terminal immobilization is supported by FMC, ICC, and court decisions, that terminal operators provide a service to cargo during such a period for which they are entitled to compensation, and that less diligent cargo, i.e. cargo booked so that it is on demurrage at the time of immobilization, should be required to bear its share of the expense of these services.

We agree with Hearing Counsel and the Port of New York Authority. The provision suggested by the Examiner is patterned after the import rules at New York as well as free time and demurrage regulations approved by the Commission at Boston.⁴² It is designed to be an equitable way of dealing with situations in which a vessel which is at a pier facility cannot be loaded. The fairest treatment of the situation would seem to be, as we have done at Boston and at New York with respect to import cargo, to require that the demurrage expenses be borne by the shipper or the terminal operator, depending upon which one has a responsibility with respect to the cargo at the time of the factor immobilizing the pier facility. None of the port or

⁴¹ Although not excepting to the Examiner's position, the freight forwarders would grant free time in all cases where vessel loading is prevented, and the Australia Conference would allow free time to the extent required in case of work stoppages.

⁴² See *Free Time and Demurrage Practices, at N.Y. Harbor, supra*; *The Boston Shipping Assoc., Inc. v. Port of Boston, supra*.

terminal operating interests at New York and Philadelphia objects to the Examiner's apportionment of free time and demurrage obligations in this regard.

The regulation suggested by the Examiner, modified to allow demurrage-free time to cargo with respect to which the terminal facility has exercised its option to allow consolidation time, we find to be just and reasonable and will prescribe it and order it enforced.

7. *Designation of Vessel*

The Examiner suggested the following provision with respect to the time and manner in which the vessel on which export cargo is to move is to be designated :

At the time the cargo is delivered to the pier facility, the shipper shall designate the name of the vessel on which the cargo is to move ; this designation of the name of the vessel is made for the purposes of determining the application of paragraphs (d) and (e) ⁴³ of these rules.

The purpose of the provision is to provide a means of determining the cargoes affected by the paragraphs of the regulations relating to vessel cancellation or delay and pier immobilization. It is opposed by the Australia and North Atlantic Conferences which indicate that shippers often neither know nor care the name of the vessel on which their goods are to be transported. The North Atlantic Conferences suggest the deletion of this paragraph and the insertion of the following at the end of section (c) :

At the time export cargo is received by the pier facility, a dock receipt shall be issued evidencing receipt of the cargo, which shall show the date of receipt and shall identify the vessel on which the goods are to move.

The forwarders contend that the rule should contain an exception for hold-on-dock shipments.

Although we see no need to place the language in paragraph (c), the suggestion of the North Atlantic Conferences has merit and we will adopt it.

Insofar as the contention of the forwarders is concerned, an exception will be made for cargoes designated as "hold-on-dock for consolidation, since it may not be practical to identify the vessel on which such cargoes are to move at the time of their receipt at the pier facility. It does not appear appropriate to us, however, to allow cargoes to be designated as hold-on-dock as a general proposition. Although the forwarders may be correct in contending that the time free of demurrage can be calculated whether or not the vessel is designated on the dock receipt, the designation of the vessel on the shipping documents

⁴³ Now paragraphs (e) and (f), respectively.

should make such computation easier. There, furthermore, appears to be no reason why the name of the vessel could generally not be identified on the shipping documents at the time of cargo receipt at the terminal. The indiscriminate use of the hold-on-dock designation has been a major cause of pier congestion in the past, and its use should not be encouraged.

We therefore, find that the following is a just and reasonable regulation with respect to vessel designation and will prescribe it and order it enforced:

(g) At the time export cargo is received by the pier facility, a dock receipt shall be issued evidencing receipt of the cargo, which shall show the date of receipt and, except for cargo designated on dock receipts or other appropriate shipping documents as hold-on-dock for consolidation, shall identify the vessel on which the goods are to move. The identification of the vessel is made for the purposes of determining the application of paragraphs (e) and (f).

8. *Storage Rule*

The Examiner suggested a regulation designed to accommodate project or other consolidated shipments by providing long-term storage for them on the piers away from valuable transit space at reasonable cost. The provision is permissive and would be applicable only where suitable storage facilities are available and where storage will not contribute to undue congestion. Storage charges are required to be assessed at reasonably compensatory levels so as to prevent detriment to the financial soundness of terminal operations, and shippers electing to utilize the storage facilities are required to have their cargo removed to a separate storage area to prevent pier congestion. The requirement that election to use the storage facilities must be made at or prior to receipt of cargo at the terminal or, in the case of cancelled sailings, no later than the announced date of the canceled sailing will also help to minimize pier congestion. No party excepted to the Examiner's suggestion.

Although the provision would under present conditions appear not to have much likelihood of application at New York, it may be of some use at Philadelphia in providing a reasonable means of handling project shipments, with which it has indicated some problems, and may prove helpful at New York in the future.

We, therefore, find the following permissive storage rule just and reasonable and will prescribe it and order it enforced:

(h) Nothing in these rules shall prevent the establishment of reasonable storage provisions provided that the terminal has suitable facil-

ities available, that storage will not contribute to undue congestion, that storage charges will be assessed at reasonably compensatory levels, and that export shippers elect to utilize the terminal's storage services on or before the day the cargo is received at the terminal facility, except that in the event of vessel cancellation the time the export shipper must elect to exercise his option to utilize storage services is no later than the date of sailing announced as per paragraph (e). When storage services are elected, the cargo must be removed physically from the pier transit area and placed in a separate storage area, and if cargo is not so removed demurrage charges must be applied. The provisions of the other paragraphs of these regulations shall to the extent appropriate, apply when cargo in storage is released by the export shipper or his agent for loading on a particular vessel.

9. *Suggested Alternative Rules*

Three of the parties, Maryland, New Orleans, and the Australia Conference, have suggested alternative rules to those formulated by the Examiner. Basically, the Maryland and New Orleans rules provide for 10 working days free time with no exceptions and the assessment of demurrage against the vessel.⁴⁴ The Australia Conference rules provide for a basic maximum provision of 15 working days free time limited by vessel sailing frequency, 15 working days free time without regard to vessel sailing frequency for the Government and charitable cargo and consolidated shipment exceptions granted by the Examiner, and the extension of free time in the case of vessel delay or work stoppage, to the extent required. The freight forwarders, while not endorsing the specific provisions of the Australia Conference rules, suggest that the Commission consider the possibility of promulgating a simplified rule designed to cover the general problems of free time on export cargo, rather than attempt to provide for extraordinary contingencies.

We appreciate the efforts of the parties who have offered alternative rules to assist us. However, the suggested alternatives are unfair and often fail to come to grips with many of the problems involved with respect to the handling of export shipments. More specifically, the Maryland and New Orleans rules, by assessing demurrage against the vessel, merely transfer the practice at New Orleans to New York and Philadelphia where, as we have seen, it is inappropriate. Further,

⁴⁴The New Orleans rule also provides for waiver of expenses at the terminals' option during a longshoremen's strike, and requires the terminal operator to bear the expenses of strikes of its own personnel. Expenses of strikes of third parties are to be borne by the vessel but may be passed on to the cargo.

these alterantive rules fail adequately to recognize the right of a terminal operator to be compensated for the use of his property by consignees whose booking practices result in their cargoes being on demurrage at the time of pier immobilization. In not allowing for more than 10 working days free of demurrage in any situation, the suggested rules improperly ignore the important transportation and policy considerations which have prompted us to provide herein for additional time for certain cargoes.

The suggested rules of the Australia Conference, on the other hand, in providing generally for a maximum of 15 working days free time would establish more free time than has been shown to be necessary to accomplish its purpose. The allowance of free time to the extent required in case of vessel delay or work stoppage which these rules would provide, moreover, fails to consider all of the factors that might prevent vessel loading (e.g., weather conditions, vessel cancellation), could lead to the granting of free time to unworthy recipients (e.g., consignees in penal demurrage or vessel owners who should have canceled their sailings because they are unable or do not intend to call at the facility), and lends itself to administration in a discriminatory fashion since it furnishes no standard to aid in the determination of the extent required. Although the objective of simplified rules is certainly a proper one, it cannot be allowed to control where its result would be the imposition of an inadequate and unfair regulation.⁴⁵

There has been some fear on the part of the port and terminal operating interests at Philadelphia that the rules promulgated herein may not accomplish their purpose because of lack of enforcement. These interests acknowledge that our enforcement of regulations has in the past given them no cause for concern, and we assure them that, as is our duty under section 17 of the Shipping Act, 1916, we intend to see that our regulations promulgated in this proceeding are equitably and virogously enforced. An appropriate order will be issued, and the free time and demurrage rules established herein will be published in the Federal Register.

JAMES V. DAY, COMMISSIONER, CONCURRING AND DISSENTING

I concur with the majority except that I hold with the Examiner for a rule which provides that when a vessel doesn't depart on schedule, it will be charged demurrage for all cargo on the pier; except that the vessel should not be charged for cargo then enjoying free pier time

⁴⁵ Any exceptions to the Initial Decision not specifically treated herein have been considered and rejected as immaterial or otherwise without merit, or on the basis that a ruling upon them is unnecessary to the decision herein.

until after an extra period of grace—up to 5 days (and the vessel will not be charged after it commences loading). The majority does not provide the extra grace period.

The main discourse of this proceeding has been in the determination of just what extensions should be made in a basic 10-day free time rule. In making such determination a balancing of interests has been involved.

I note, for example, the allowances made for additional time free of demurrage charges by the terminals so that exporters to Africa may enjoy 5 extra days leeway for their cargo to be on the pier so as not to miss (because of third party fault, for example) an infrequent sailing. In such situations, we have here decided that a balance may be struck between the terminal operator and the shipper—to achieve a fair and reasonable result.

In the case of vessel delays I would adopt the rule allowing extra days (up to 5) free of demurrage charges by the terminals where exporters' cargo is not loaded due to failure of the vessel (because of another's fault, for example) to meet the announced date of sailing.

In this latter instance, also to be fair, I would strike a balance between the terminal operator and the vessel as does the Examiner and as would Hearing Counsel. Here, I would point out further, the terminal operator could absorb 5 extra days of demurrage but, in return, he would get the right for the first time to assess demurrage directly, and precisely, against the vessel after the extra day period.

This represents a moderate step really in support of stable and efficient terminal operations. The expectation that 5 days would possibly cover most cases of vessel delay has not been negated by the record. Certainly, and in view of the West Coast practice of permitting 10-days additional free time for vessel delay, the 5-day rule approaches a fair, reasonable, and practical balancing. It is supported, additionally, by the freight forwarders, the Port of New York Authority, and by the parties at Philadelphia—the Philadelphia Marine Terminal Association and the Delaware River Port Authority.

JAMES F. FANSEEN, VICE CHAIRMAN, CONCURRING AND DISSENTING

With exception to one issue pertaining to the assessment of demurrage against the vessel, I concur in the conclusions of the majority on the free time and demurrage rules and regulations.

In those instances where vessel delay is involved, I would support a rule which allowed for cargo on free time an additional free time of 5 days. I feel this extension of free time would more equitably cover most situations which create vessel delay. Any demurrage accruing after this time would be for the account of the vessel at first-period rates.

(S) FRANCIS C. HURNEY,
Secretary.

[SEAL]

13 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 68-9

FREE TIME AND DEMURRAGE CHARGES ON EXPORT CARGO

ORDER

This proceeding was instituted by order published in the Federal Register, and extensive hearings were held before an Examiner in which all interests which are affected by the rules and regulations herein promulgated actively participated. Following these hearings briefs were filed with, and an Initial Decision was issued by, the Examiner. Exceptions and replies to this Initial Decision have been considered, and we have heard oral argument. The Commission has this day issued its report in this proceeding, which is hereby incorporated herein by reference, in which it determined that the present practice of granting unlimited free time with respect to export cargo at the Ports of New York and Philadelphia would, if continued in the future, be unjust and unreasonable within the meaning of section 17 of the Shipping Act, 1916, and that just and reasonable rules and regulations as outlined herein should be prescribed and ordered enforced.

Therefore, it is ordered, That Title 46 CFR is amended by adding a new part 541, to read as follows:

Part 541—Free Time and Demurrage Charges on Export Cargo

§ 541.1—Free time, consolidation time and demurrage at the Ports of New York and Philadelphia

(a) Free time on export cargo at the Ports of New York and Philadelphia shall not be more than 10 days (exclusive of Saturdays, Sundays, and legal holidays) except:

1. Upon the request of the U.S. Government, free time not to exceed 15 days (exclusive of Saturdays, Sundays, and legal holidays) may be granted. This exception shall apply only to commodities shipped for the account of the U.S. Government.

2. Upon the request of export shippers or their agents, free time not to exceed 15 days (exclusive of Saturdays, Sundays, and legal holidays) may be granted to cargoes moving in the trades served by the U.S. Atlantic and Gulf/Australia-New Zealand Conference and the American West African Freight Conference, provided that such cargoes are delivered to the terminal not more than 15 days (exclusive of Saturdays, Sundays, and legal holidays) prior to the sailing for which they are booked, and provided further that they are not held beyond such 15-day period through any fault or design of the export shipper or his agent. In either such case, demurrage charges shall apply after the passage of 10 days (exclusive of Saturdays, Sundays, and legal holidays) following the date of delivery to the terminal.

(b) On consolidated shipments, upon the request of export shippers or their agents, consolidation time not to exceed 5 days (exclusive of Saturdays, Sundays, and legal holidays) may be granted in addition to the 10 days free time provided in subsection (a). Cargo upon which such consolidation time has been granted shall be designated on dock receipts and on other appropriate shipping documents as hold-on-dock for consolidation." Cargo not so designated and cargo not actually consolidated on the piers will not be entitled to the grant of consolidation time. As used in this section, consolidated shipments shall mean shipments which are made up of commodities originating from two or more supply points and which move under a single bill of lading to overseas consignees.

(c) Free time on export cargo shall commence at 12:01 a.m. on the day after the said cargo is received at the terminal facility and terminate at 11:59 p.m. on the final day of free time. Consolidation time on export cargo shall commence at 12:01 a.m. on the day following the last day of free time and terminate at 11:59 p.m. on the final day of consolidation time.

(d) At the expiration of the free time period, or if consolidation time has been granted, the consolidation time period, demurrage charges in successive periods of 5 days shall be assessed. The first period of demurrage shall be assessed at a compensatory level. Penal demurrage shall be assessed during subsequent periods. No demurrage shall be assessed after the vessel has commenced to load. Except as otherwise provided in this section, demurrage shall be for the account of the cargo.

(e) When the vessel for any reason fails to meet the announced date of sailing, any demurrage accruing after such date shall be assessed in successive periods for the account of the vessel until the vessel commences to load.

In the case of vessel cancellation, cargo on free time, or, if a vessel has been designated, cargo on consolidation time, on the announced date of sailing shall be subject to first-period demurrage assessed against the vessel commencing on the day when the cargo was received at the terminal facility and terminating on the said announced date of sailing unless the export shipper on or before that date has another vessel designated for loading, removes the cargo from the terminal, or elects storage as provided in subsection (h).

If the export shipper takes none of the aforementioned actions, demurrage charges in successive periods shall be assessed against the export shipper after the vessel's liability for demurrage has expired. Such demurrage shall likewise terminate upon the export shipper's action as aforesaid. For cargo on demurrage on the canceled date of sailing, demurrage shall continue for the account of the export shipper until such time as he takes one of said actions. In the event the export shipper has another vessel designated, the provisions of subsections

(a), (b) and (d) shall apply, with the free time for the other vessel commencing on the date that the export shipper has this other vessel designated.

The announced date of sailing shall be that date(s) appearing in the Journal of Commerce or the Shipping Digest, or any other appropriate publication of general circulation, as designated in the appropriate tariff.

(f) When the loading of cargo into a vessel is prevented by any factor immobilizing the pier facility or facilities in all or in part, such as weather conditions, strike, or work stoppage of longshoremen or personnel employed by the terminal operator or water carrier, cargo affected thereby shall be granted additional time free of demurrage to cover the delay if the cargo is on free time or consolidation time when such condition arises. If cargo is on demurrage, first-period demurrage charges shall be assessed against such cargo.

(g) At the time export cargo is received by the pier facility, a dock receipt shall be issued evidencing receipt of the cargo, which shall show the date of receipt and, except for cargo designated on dock receipts or other appropriate shipping documents as hold-on-dock for consolidation, shall identify the vessel on which the goods are to move. The identification of the vessel is made for the purpose of determining the application of subsections (e) and (f).

(h) Nothing in these rules and regulations shall prevent the establishment of reasonable storage provisions provided that the terminal has suitable facilities available, that storage will not contribute to undue congestion, that storage charges will be assessed at reasonably compensatory levels, and that export shippers elect to utilize the terminal's storage services on or before the day the cargo is received at the terminal facility, except that in the event of vessel cancellation, the time the export shipper must elect to exercise his option to utilize storage services is no later than the date of sailing announced as per subsection (e). When storage services are elected, the cargo must be removed physically from the pier transit area and placed in a separate storage area, and if cargo is not so removed, demurrage charges must be applied. The provisions of the other subsections of this section shall, to the extent appropriate, apply when cargo in storage is released by the export shipper or his agent for loading on a particular vessel.

(i) The rules and regulations promulgated herein shall be binding upon all common carriers by water in foreign commerce with respect to regulations and practices affecting free time, consolidation time and demurrage on export property at the Ports of New York and Philadelphia ; and

(j) On or before, and from the effective date of this order, all tariffs of such carriers shall contain provisions with respect to such cargo which conform to the regulations and practices prescribed in these rules and regulations ; and

(k) Records shall be kept for 2 years of all grants of extended free time and consolidation time authorized by these rules and regulations in the form and manner required herein ; and

It is further ordered, That the rules and regulations promulgated herein shall become effective on the 90th day following their date of publication in the Federal Register.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 69-44

GHEZZI TRUCKING, INC.—CANCELLATION OF INACTIVE TARIFF

Adopted May 19, 1970

Tariff of Ghezzi Trucking, Inc., for the transportation of cargo between Pacific coast ports of the United States and Alaska shall be canceled for lack of performance thereunder, without prejudice to the filing of a new tariff should conditions warrant.

Richard J. Howard for respondent.

Paul J. Kaller and *Donald J. Brunner*, as Hearing Counsel.

INITIAL DECISION OF C. W. ROBINSON, PRESIDING EXAMINER¹

By order served August 21, 1969, the Commission directed Ghezzi Trucking, Inc. (Ghezzi or respondent), to show cause why its inactive tariff, covering transportation between Pacific coast ports of the United States and Alaska, should not be canceled.² Ghezzi thereafter requested an evidentiary hearing, which was granted by order served October 2, 1969.

BASIC FACTS

1. Ghezzi's initial tariff, FMB No. 1, was issued in 1962. After prodding by the Commission's staff a new tariff, FMC No. 2, was filed on November 12, 1969, but at the hearing on the following day, Mr. Ghezzi, president of respondent, was advised that this tariff had been rejected by the Commission. A third tariff, FMC-F No. 3, was filed on January 16, 1970, effective February 18, 1970.³

2. Respondent has sought to obtain cargo by various means but has not had a sailing since April 1962. Annually, a large number of shippers in Seattle and in Alaska have been contacted, and proposed sail-

¹ This decision became the decision of the Commission May 19, 1970.

² A tug and barge operation.

³ Although subsequent to the hearing, official notice is taken of this filing.

ings have been posted in local newspapers, the last of which was in August 1968. A great deal of reliance has been placed upon word-of-mouth dissemination among possible shippers of Ghezzi's service. Military Sea Transportation Service authorizes Ghezzi to transport cargo for the Navy but none has been carried.

3. Ghezzi is a wholly owned subsidiary of Western Barge, Inc. (Western Barge), organized in 1965, both having the same officers and directors. Mr. Ghezzi is president of both companies. Western Barge recently received authority from the Interstate Commerce Commission to operate between the Gulf of Mexico and Portland and Seattle. A director of Western Barge was salaried by Ghezzi for the year 1966 to solicit cargo for the latter in the Seattle area.

4. The tariff under consideration has a prescribed minimum of 250 pounds per shipment. In the early years of its operation Ghezzi would have been willing to perform with as little as 500 tons of cargo per sailing, but increased costs have raised this minimum to 1,500 tons. The inability to secure this minimum has been Ghezzi's main problem. Even when there has been a possibility of obtaining less than 1,500 tons from one shipper, Ghezzi has been unable to secure additional cargo to justify acceptance of the base offer. As an example of the company's predicament, a sailing on September 7, 1968, from Portland to Anchorage, was advertised on the anticipation that an Anchorage lumber company could furnish a block of lumber around which additional cargo could be secured to form a barge load. Although the additional cargo was obtained and a preliminary arrangement for a tug and barge was made, the deal was canceled because the estimate for the base lumber turned out to be unwarranted.

5. Throughout the years Mr. Ghezzi has contacted the tug and barge market to keep informed of the availability of such equipment and the cost thereof. Without assistance from Western Barge, however, Ghezzi would be unable financially to complete any arrangements for equipment.

6. In spite of his inability to secure cargo, Mr. Ghezzi is optimistic about the future in view of the recent oil strike and the expanding oil industry in Alaska. As of the time of the hearing in November 1969 he saw the possibility of a barge load by March 1970 (the Examiner does not know the outcome of this prophecy), but there are no reliable assurances of participation by Ghezzi in the Alaska trade in the near future.

7. For some time there has been no Seattle telephone listing for Mr. Ghezzi himself, Ghezzi Trucking, or Western Barge. An accounting firm acts as Ghezzi's answering service and supplies office space for Mr. Ghezzi. The Commission is kept advised of Mr. Ghezzi's

whereabouts by the return addresses on his communications to the agency, but since 1962 three letters from the Commission to Mr. Ghezzi and/or Ghezzi Trucking have been returned as undeliverable; this may be accounted for by the fact that Ghezzi has moved six times in that period.

DISCUSSION AND CONCLUSIONS

Ghezzi's position is that its tariff should not be canceled inasmuch as it is willing and able to perform, when and if sufficient need arises. It also argues that cancellation of the tariff would be prejudicial to the company. Hearing Counsel maintains that Ghezzi's operations have, in effect, been discontinued and that its tariff should be canceled.

There can be little doubt that Ghezzi is willing to perform, but that is not here the determining factor. The opportunity afforded Ghezzi to perform the service advertised in its tariff has been to no avail, and continued correspondence between Ghezzi and the Commission's staff has produced nothing more than physical changes in the company's tariff. The shipping public in general—possibly unknowingly—has been and continues to be misled by a meaningless offer of service. The end result is the same as if Ghezzi had formally suspended its service as a common carrier. Under the circumstances, the tariff should be canceled. See, generally: *Sugar from Virgin Islands to United States*, 1 U.S.M.C. 695 (1938); *Intercoastal Charters*, 2 U.S.M.C. 154 (1939); *Intercoastal Schedules of Hammond Shipping Co., Ltd.*, 1 U.S.S.B.B. 606 (1936).

There would be no prejudice to Ghezzi if its tariff is canceled. Should the company hereafter be able to secure bookings in the volume deemed necessary by it for a profitable venture, the tariff-filing provisions of the Intercoastal Shipping Act, 1933, and the Commission's rules pertaining thereto are sufficiently viable to permit prompt filing of a new tariff.

ULTIMATE CONCLUSIONS

Ghezzi is not performing a service advertised in its tariff, and as it has not carried any cargo since 1962, its tariff should be canceled within 30 days of the service of this decision, in the manner provided in rule 18(g) of the Commission's Tariff Circular No. 3, as amended. This action shall be without prejudice to the filing of a new tariff should conditions warrant.

(S) C. W. ROBINSON,
Presiding Examiner.

No. 69-44

GHEZZI TRUCKING, INC.—CANCELLATION OF INACTIVE TARIFF

NOTICE OF ADOPTION OF INITIAL DECISION

No exceptions having been filed to the initial decision of the Examiner in this proceeding, and the Commission having determined not to review same, notice is hereby given, in accordance with rule 13(g) of the Commission's Rules of Practice and Procedure (46 CFR 502.227), that the initial decision became the decision of the Commission on May 19, 1970.

It is ordered, That Ghezzi Trucking, Inc., cancel its tariff in accordance with rule 18(g) of the Commission Tariff Circular No. 3 on or before June 22, 1970.

It is further ordered, That this proceeding is discontinued.
By the Commission.

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 418

CARLTON J. SIEGLER

v.

MICRONESIA INTEROCEAN LINE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

May 28, 1970

In his initial decision of October 15, 1969 in this proceeding the Examiner recommended that the application of Micronesia Interocean Line, Inc. for permission to refund be granted in the sum of \$48.79 in respect to two of the three shipments in question. By order of December 22, 1969, the Commission remanded the proceeding to the Examiner for reconsideration of the application. In his initial decision on remand served May 4, 1970, the examiner endorsed his previous findings in respect to two shipments stating that the issues "have been resolved". The Examiner recommended that refund in the amount of \$54.50 be permitted as to the third shipment.

No exceptions having been taken to the May 4, 1970 decision on remand, and the Commission having determined not to review same, notice is hereby given, in accordance with rule 13(g) of the Commission's Rules of Practice and Procedure, that the initial decision became the decision of the Commission on May 28, 1970.

It is ordered, That Micronesia Interocean Line, Inc. is authorized to refund to Carlton J. Siegler the sum of \$103.29 (\$48.79 plus \$54.50).

It is further ordered, That applicant publish promptly in its appropriate tariff the following notice,

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 418, that effective September 2, 1968 and during the period of September 2, 1968 until March 13, 1969, (1) the rate on cabinets N.O.S. from San Francisco, California to Ponape, East Caroline Islands is

\$75.25 W/M; (2) the rate on plastic ware from San Francisco, California to Yap, Western Caroline Islands is \$82.75 W/M; (3) the rate on brooms, mops and parts from San Francisco, California to Majuro, Marshall Islands is \$65.00 W/M; and (4) the rate on toys and games from San Francisco, California to Ponape, East Caroline Islands and Majuro, Marshall Islands is \$80.25 W/M. The above rates are for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of Micronesia Interocean Line and are subject to all applicable rules, regulations, terms, and conditions of the said rates and this tariff.

It is further ordered, That refund shall be made within 30 days of this notice and Micronesia Interocean Line shall within 5 days thereafter notify the Commission of the date of the refund and of the manner in which payment has been made.

By the Commission.

[SEAL]

S/ FRANCIS C. HURNEY,
Secretary.

ORDER OF REMAND

By application filed on May 8, 1969, pursuant to rule 6(b) of the Commission's rules of practice and procedure (46 C.F.R. 509.92), Micronesia Interocean Line, Inc. (Micronesia) requested permission to refund to Carlton J. Siegler the sum of \$339.42, in connection with three shipments of toys, plastic ware, cabinets, and mops/parts from San Francisco, Calif., to various ports in the trust territory of the Pacific island.

In his initial decision served October 15, 1969, Examiner C. W. Robinson granted Micronesia's application as to two of the three shipments in question and permitted refunds in the amount of \$48.79. Micronesia's request to refund certain charges assessed and collected on a shipment of toys made November 1968 on the vessel M/V *Golden Swan* was denied on the grounds that the application as to this shipment was time-barred under Public Law 90-298, since it "was not filed within 180 days from the date of shipment." This conclusion was based on the examiner's determination that an application is "filed" within the meaning of Public Law 90-298 only when it is actually received by the Commission in its offices in Washington, D.C., within 180 days of the date of shipment.

No exceptions to the Initial Decision were filed but, since the Initial Decision raised issues of statutory interpretation, the Commission on November 6, 1969, served its Notice of Determination to Review its Initial Decision.

Subsequent to the Initial Decision and the Notice of Determination to Review, the Commission in *Ghiselli Bros., Inc. v. Micronesia Interocean Line, Inc.* 13 FMC 179 December 1, 1969, had occasion to

interpret the word "filed" as used in Public Law 90-298. The Commission determined therein that an application is to be considered "filed" within the meaning of Public Law 90-298 if it is "*deposited* in the United States mails for delivery to the Commission in Washington within the time specified by statute [180 days]." (Emphasis added.) This interpretation renders the application here in question timely filed. We will remand it to the Examiner for consideration on the merits.

Therefore, it is ordered, That this proceeding be remanded to the examiner for consideration of the application in light of our recent decision in *Ghiselli Bros., Inc. v. Micronesia, supra*.

By the Commission.

[SEAL]

S/ FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 418

CARLTON J. SIEGLER

v.

MICRONESIA INTEROCEAN LINE, INC.

May 28, 1970

Respondent permitted to refund to complainant the sum of \$54.50 as part of the freight charges assessed and collected for the transportation of toys from San Francisco, California, to places in the Trust Territory of the Pacific Islands in November 1968.

Kai Angermann for applicant/respondent.

Carlton J. Siegler for himself as complainant.

INITIAL DECISION ON REMAND OF C. W. ROBINSON, PRESIDING EXAMINER¹

This proceeding originally involved shipments on three vessels. The issues as to two vessels have been resolved, leaving only those pertaining to the *M/V Golden Swan*. In his initial decision served October 15, 1969, the examiner stated:

M/V Golden Swan. Two bills of lading covering 13 cases and cartons of toys were issued to complainant on November 8, 1968, for carriage to Ponape, Eastern Caroline Islands, and Majuro, Marshall Islands, respectively, consigned to order of shipper, at the rate of \$94.50 per ton, weight or measurement. The rate sought to be applied is \$80.25, weight or measurement. It is not possible to determine, from the application, the total charges collected or sought to be refunded since other commodities moved under the same bills of lading, plus the fact that claims other than the present ones are included in the application and the supporting documents therefor are missing. In view of the conclusions hereinafter, however, the indefiniteness of the amounts of the claims is immaterial.

The examiner concluded that the foregoing claims were time-barred. The Commission disagreed with this finding and remanded the matter to the examiner for a decision on the merits of the claims. Applicant was then requested to furnish further information, which it has done.

¹ This decision will become the decision of the Commission May 28, 1970.

CONCLUSIONS

By agreement between applicant and the Trust Territory of the Pacific islands, the former's rates are to be no higher than those in effect for shipments moving via Pacific Far East Line to the Trust Territory by way of Guam, or moving on vessels of other carriers serving the Trust Territory via Japan. When its tariff was issued in September 1968, applicant chose to use the same commodity items as shown in Trust Territory of the Pacific Agreement Tariff, Freight Tariff No. 2, applicable to the Trust Territory via Japan. In constructing its tariff applicant had attempted to obtain statistics showing commodities, etc., moving in the trade, but was unable to do so partly because of the destruction of records in Saipan as the result of Typhoon Jean. Applicant thereafter learned that commodities other than those for which there were rates in its tariff were moving to the Trust Territory, whereupon new rates were established as applicant became aware of such shipments.

At the time of the shipments here involved, there was no specific rate thereon, hence the rate of \$94.50 applicable to nonhazardous cargo, NOS, was applied. Upon ascertaining that the commodity could move via another carrier at a lower rate, applicant amended its tariff to publish the rate here sought to be applied (\$80.25). The failure to have on file the lower rate was, under the circumstances, an administrative error.

Applicant has complied with all the preliminary requirements of Public Law 90-298 as to the particular shipments. Permission to refund to complainant the sum of \$54.50 (\$17.45 plus \$37.05) hereby is given, and applicant shall publish in its tariff the appropriate notice referred to in the statute. Refund shall be made within 30 days of such notice. Within five days thereafter, applicant shall notify the Commission of the date of the refund and of the manner in which payment has been made.

S/ C. W. ROBINSON,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-65

BALLMILL LUMBER & SALES CORPORATION

v.

THE PORT OF NEW YORK AUTHORITY, WEYERHAEUSER COMPANY,
ATLANTIC TERMINALS, INC., AND MAHER LUMBER TERMINAL CORP.

RULING ON COMPLIANCE

June 9, 1970

In our report in this proceeding we found that the Port of New York Authority had violated sections 16 First and 17 of the Act in connection with its leasing arrangements at Port Newark with Weyerhaeuser Co. and Ballmill Lumber & Sales Corp. (both wholesale dealers of lumber). It was found that Weyerhaeuser had been preferred and that Ballmill and other lumber lessees at Port Newark had been prejudiced as a result of the Port Authority's leasing arrangements inasmuch as Weyerhaeuser was permitted to perform its own backhandling of lumber and to operate a public terminal while all other lessees were required to use the backhandling services of the Port Authority's independent contractor.

In a subsequent report on reconsideration we ruled that if the Port Authority chooses to remove the preference by affording Ballmill the same privileges as Weyerhaeuser, the Port Authority is required to do more than to permit Ballmill to perform such services under the confines of its present leasehold. We emphasized that the Port Authority must place Ballmill in a position comparable to Weyerhaeuser in respect to the operation of a public lumber terminal and the backhandling of lumber.

Subsequent to this order, the Port Authority advised the Commission of an offer it had made to Ballmill in respect to the leasing of berth and transit areas and additional inland areas to be used for these purposes.

We ruled on the adequacy of this offer concluding that the offer met the requirements of our prior order in certain respects. We also stated certain additional requirements which should be contained in the Port Authority's offer. Finally, we urged the parties to reach agreement on the remaining points of contention, and failing to do so, to submit statements of justification for their respective claims. The parties had not agreed on and had failed to submit justification regarding their respective positions on the amount of inland area needed by Ballmill to perform its own backhandling and to operate a public terminal. There also was disagreement as to how the rate of compensation for the lease would be affected by improvements Ballmill desired to construct.

In spite of our urging the parties apparently were still unable to agree, and accordingly each submitted a statement purporting to justify its position on the remaining points of contention. Each party has replied to the other party's statements. The Port Authority has moved to dismiss and Ballmill has opposed this motion.

As a result of the various papers submitted, further accord has been reached by the parties. In respect to amount of inland area to be leased by Ballmill, the Port Authority offered 4.42 acres in addition to the premises embodied by Ballmill's present basic lease. Ballmill stated it needs 3.16 acres in addition to the 4.42 acres offered by the Port Authority. The Port Authority has now indicated it is willing to offer the additional space to Ballmill. Accordingly, no dispute remains as to amount of space to be offered, and we find the total agreed upon to be satisfactory and reasonable.

The only area of controversy remaining then is the consideration to be given improvements in determining a level of compensation for the premises to be leased to Ballmill.

In our latest ruling we stated that the Port Authority's offer to lease the premises at 17 cents per square foot was a fair and reasonable offer as judged by prevailing rate standards and that Ballmill's demands for 1953 rate levels were unjustified. We further stated, however, that Ballmill should be permitted to make necessary improvements on the leased premises and that the amount of improvements should be a factor in finally determining the rental just as it was in the Weyerhaeuser lease.

In its most recent statements, the Port Authority agrees to permit Ballmill to make improvements, but suggests that any requirement for adjustment in compensation as a result of improvements is unjustified. The Port Authority suggests that while Weyerhaeuser was required to make improvements, there is no evidence in the record that Weyerhaeuser's rental was adjusted as a result. The Port Authority feels, therefore, that the Weyerhaeuser lease provides no basis for reducing the compensation required of Ballmill if improvements are made. The Port Authority states that it will not benefit from such improvements and, as a standard condition in its leases, the removal of improvements upon termination of the lease, at the lessee's expense, is required. Finally, the Port Authority states that it does not require any improvements by Ballmill and that it has not followed and does not follow a policy of reducing rentals to amortize improvements desired only by the lessee.

In its motion to dismiss, the Port Authority has included an affidavit of the Director of Marine Terminals Department of the Port of New York Authority to the effect that no concession or reduction in rental was made because of improvements required by the Port Authority when it executed the Weyerhaeuser lease in 1953.

Ballmill claims it needs to improve the proposed leased area by installing fencing and lighting, workmen's facilities, a supervisory personnel office, and additional warehouse space. Ballmill estimates these improvements will amount to at least \$100,000.

Ballmill seeks to amortize this investment over the 6-year period of the lease which would run to 1976. Ballmill seeks to amortize on a straight mathematical basis which would reduce the 17-cent-per-square-foot figure to 11.95 cents per square foot. Ballmill alternatively seeks a 20-year lease which it states would result in a 15.49-cent-per-square-foot rental with improvements amortized over the longer period.

Ballmill claims that lessees normally are obligated by a provision in their lease to make improvements where improvements are necessary to conduct a business, and that those improvements become the property of the lessor at the termination of the lease, with the improvements being amortized over the lease period.

Ballmill disputes the statement that, as a standard clause in the Port Authority's leases, it requires removal of improvements at the termination of a lease. Rather, Ballmill points out that the standard clause (included in the Weyerhaeuser lease) gives the Port Authority a choice of keeping the improvements or having them removed; but in any event the fact that the Port Authority has such a choice does not bear on the question.

Ballmill concludes that the Commission has already decided that improvements should be taken into consideration in fixing the rental, that the Port Authority has not offered a valid reason for altering this ruling, and that therefore the motion to dismiss should be denied and the Port Authority be required to determine the rental on the basis of amount of improvements made by Ballmill.

The president of Ballmill has submitted an affidavit purporting to counter the position of the Port Authority regarding consideration given for improvements in negotiating lumber leases.

Our previous statement to the effect that the Port Authority must take into consideration improvements in determining a fair rental was predicated on the belief that the same had been taken into consideration in the execution of the Weyerhaeuser lease. Upon consideration of the various subsequent submissions of the parties, we conclude that our earlier assumption regarding improvements in the Weyerhaeuser lease is not supported by the record. The Port Authority has denied that the level of rental in the Weyerhaeuser lease was adjusted for improvements. Indeed, the Port Director has stated in affidavit that no concession or reduction in rental was made because of improvements required by the Port Authority. Ballmill's arguments to the contrary do not specifically refute the Port Authority's position. For instance, the affidavit of the president of Ballmill speaks of the general policy of the Port Authority that improvements are a factor in determining level of rent, and specifically refers to a previous lease of its own, a lease of Dreifus Lumber Co., and a lease of Blanchard Lumber Co.; but no specific mention is made of the Weyerhaeuser lease. The Port Authority's position therefore is not contradicted. In reaching this conclusion we are also mindful of the fact that the Port Authority, as a party to the Weyerhaeuser-Port Authority lease, is in a better position than Ballmill to know whether the rental was adjusted for improvements.

It may be noted that the Dreifus and Blanchard leases cited by Ballmill seem to have involved required improvements, as is true of the Weyerhaeuser lease. In the case of Ballmill, however, the lessor is not requiring the improvements. We are ordering equality of treatment for Ballmill vis-a-vis Weyerhaeuser, but this can be accomplished only to the extent the conditions of the two leases are comparable. Where different circumstances obtain, it is not possible, nor would it be just, to compel the lessor to accept lease terms not related to creating the parity required in this case.

Inasmuch as we are requiring equality of treatment for Ballmill, we conclude that the Port Authority's offer to Ballmill need not con-

sider improvements in determining rental. Ballmill, however, is not to be denied the right to make improvements.

In view of the resolution of the remaining areas of controversy,

It is ordered, That the Port Authority will now be required to effect compliance in this proceeding by tendering within 30 days of service of this order and leaving open for a period of 30 days an offer to Ballmill for the lease of premises, with such offer embodying all the terms and conditions either agreed upon by the parties or ordered by this Commission.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET 69-59

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE
APPLICATION L.T.C. AIR CARGO, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

June 15, 1970

By order served December 29, 1969, the Commission instituted this proceeding to determine (1) whether L.T.C. Air Cargo, Inc., had violated section 44 (a) of the Shipping Act, 1916, in connection with the unauthorized performance of independent ocean freight forwarding services without a license, (2) to determine whether, in view of the past activities of its principal, L.T.C. Air Cargo, Inc., is "fit" to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, within the meaning of that statute, and (3) whether its application should be granted or denied.

Examiner Richard M. Hartsock in an initial decision served March 23, 1970, found on the evidence presented that L.T.C. Air Cargo, Inc., is "fit" to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, within the meaning of the statute, and that the application should be granted. Hearing Counsel filed exceptions to the examiner's conclusions. Applicant excepted on a "contingent basis" to certain findings and conclusions of the examiner. Both parties have replied to exceptions. Applicant requested oral argument with respect to matters raised by the exceptions of Hearing Counsel but later withdrew its request for oral argument.

Hearing Counsel in their exceptions argued that the examiner overlooked Federal Maritime Commission decisions and misinterpreted its

regulations relating to freight forwarder licensing and that, in considering the evidence of record, the examiner placed undue emphasis on unreliable testimony. Hearing Counsel urged the Commission to reverse the initial decision of the examiner and find that the license application of L.T.C. Air Cargo, Inc., should be denied.

Upon reviewing Hearing Counsel's exceptions, we conclude that they are but a restatement of the contentions already advanced before the examiner, and that the examiner's findings and conclusions on these contentions were proper and well founded. Accordingly, we hereby adopt the initial decision.

By the Commission.

S/ FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 69-59

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION—
L.T.C. AIR CARGO, INC.

Adopted June 15, 1970

Respondent found on two occasions to have performed unauthorized independent ocean freight forwarder services without a license in violation of section 44(a), Shipping Act, 1916, but is "fit" to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, within the meaning of that statute. Application granted.

Louis I. Haffer and Robert N. Meiser for respondent.
Donald J. Brunner and Paul J. Kaller as Hearing Counsel.

INITIAL DECISION OF RICHARD M. HARTSOCK, PRESIDING EXAMINER¹

By letter dated November 24, 1969, L.T.C. Air Cargo, Inc., South Ozone Park, N.Y., was notified of the Federal Maritime Commission's intent to deny its application for an independent ocean freight forwarding license. Applicant in reply requested a hearing to show that denial of a license is unwarranted.

By order served December 29, 1969, the Commission instituted this proceeding to determine (1) whether L.T.C. Air Cargo, Inc., had violated section 44(a) of the Shipping Act, 1916, in connection with the unauthorized performance of independent ocean freight forwarding services without a license, (2) to determine whether in view of the past activities of its principal,² L.T.C. Cargo, Inc., is "fit" to carry

¹ This decision became the decision of the Commission June 15, 1970.

² The Commission's Notice of Hearing alleges that "a principal of L.T.C. Air Cargo, Inc., may willfully have given incorrect information to a Commission representative on at least two occasions in connection with the license application of L.T.C. Air Cargo, Inc."

on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, within the meaning of that statute, and (3) whether its application should be granted or denied.

Hearings were held on February 5 and 6, 1970, at New York, N.Y. Briefs were filed on behalf of the respondent and the Bureau of Hearing Counsel on March 5, 1970.

BACKGROUND

Thomas D. Murray, Valley Stream, N.Y., is a principal owner and president of L.T.C. Air Cargo, Inc., and at present is operating as a domestic and international air freight forwarder licensed by the Civil Aeronautics Board since September 1969. Mr. Albert C. Grippo is vice president of the company, has been engaged in ocean freight forwarding for a number of years, and is presently employed by applicant company.

Upon discharge from the military service in 1957, Mr. Murray attended Wright Junior College in Chicago, Ill. Upon graduation from there in 1959, he attended the College of Advanced Traffic at Chicago, Ill., where he studied the whole realm of traffic management and distribution. During the day he was employed by Trans World Airlines and went to school at night, graduating from the College of Advanced Traffic in 1960. Terminating his employment with TWA after graduation from the college he went to work full time for Imperial Air Freight, an air freight forwarder, at Midway Airport in Chicago. There he worked for approximately a year and a half when he was requested to move to Los Angeles to manage an office for them there. He remained with Imperial Air Freight for a year and a half when, in 1963, he began his own business with two companies: Murray Air Freight and World Wide Messenger Services. He operated these companies from 1963 to 1969 when he merged Murray Air Freight with Eagle General Corp., a public company at that time. This venture apparently was unsuccessful and a settlement was arranged whereby Mr. Murray cashed in his stock and went back into business under the name L.T.C. Air Cargo, Inc. It is under this name that it was licensed as a domestic and international air freight forwarder by the Civil Aeronautics Board.

At the present time, L.T.C. has recently opened a Los Angeles, Calif., and Chicago, Ill., office and is collectively grossing some \$35,000 per month, although in past months it has operated in the red. Throughout its past air freight forwarder operations it has found that without consolidation of traffic one cannot make money nor serve

its customers. Approximately 99 percent of its current domestic operations involve consolidated shipments and some 95 percent of its international operations involve such shipments. Some 5 to 10 percent of its international air shipments are as agent for the International Transport Association in which case freight is either consolidated or sent directly and the company cuts the waybill or draws the documents in proper order and the airline pays back a 5-percent commission. In air freight forwarding operations tariffs are filed with the Civil Aeronautics Board and Mr. Murray is required to charge the published rates therein.³ Throughout his air freight forwarding career Mr. Murray has been investigated periodically by the enforcement staff of the Civil Aeronautics Board and has had no problems with that agency. With respect to the competitive situation in the air freight forwarding industry insofar as a Federal Maritime Commission license is concerned, Mr. Murray believes it essential that to stay competitive and sell their freight forwarding service he must be able to provide ocean freight forwarding as a necessary companion service. Since filing the application, Mr. Murray has been studying the Shipping Act himself, has retained counsel with respect to its application as to L.T.C. operations, proposes to seek the counsel of the Commission's Atlantic Division in New York as to any questions which may arise and proposes to present any questions about operations to the Atlantic Division in writing. Legal counsel has been arranged for, employing the services of counsel whose appearances have been noted.

THE INVESTIGATION

While Mr. Murray was operating Murray Freight Service, Inc., at Los Angeles, Calif., he filed an application with the Federal Maritime Commission for an independent ocean freight forwarder license. In correspondence dated February 25, 1966, the Commission informed Mr. Murray of its intention to deny the application because, among other reasons, applicant may have knowingly and willfully operated as an independent ocean freight forwarder without a license or other lawful authorization in violation of section 44(a) of the Shipping Act, 1916, thus apprising Mr. Murray of the fact that to knowingly and willfully operate as an independent ocean freight forwarder without a license constitutes a violation of section 44(a).⁴ The Commission's letter also advised Mr. Murray that within twenty days of receipt

³ There was a colloquy on the subject of "Commission" versus "compensation" developed on the record, however, it is clear from the exhibits that a "fee" for the services rendered was included on each invoice discussed later.

⁴ Whether Mr. Murray did so operate was not developed on this record and no inferences to this effect may be drawn.

thereof Murray Freight Service, Inc., could request the opportunity to show at a formal hearing that the intended denial of its license is unwarranted. By correspondence dated March 1966, the Commission advised that inasmuch as the firm had failed to request a hearing within the time allotted or otherwise respond to the Commission's letter of February 25, 1966, its application was denied. At the time of the Commission's first letter, Mr. Murray had left Los Angeles and had opened an office in Chicago. He had moved his family from the West Coast to Chicago with him. With respect to the Commission's proposed hearing on the subject, Mr. Murray was advised that the hearing would be held in San Francisco.

On July 8, 1969, Mr. Murray, for L.T.C. Air Cargo, Inc., at the current address, filed an application with the Commission for a license as an independent ocean freight forwarder stating the reason therefor being to enable it to supply a complete forwarding service including air freight, ocean freight, pickup and delivery, packing, etc., which will accord customers a better and more efficient service. The Commission on July 28, 1969, acknowledged receipt of the application and recited that section 44 of the Shipping Act, 1916, provides:

No person shall engage in carrying on the business of forwarding * * * unless such person holds a license issued by the Federal Maritime Commission to engage in such a business.

It further advised that were applicant to engage in the business of forwarding before receiving a license it would be subject to penalties and that such activities may also prejudice the issuance of a license.

On June 6, 1969, at the request of Mr. David Eskin, operator of David Eskin International Sales, an exporter of phonograph records, respondent handled nine cartons of long-playing records weighing some 371 pounds from New York, N.Y., to São Paulo, Brazil, on the SS *Mormaccape* under Moore-McCormack Lines, Inc., bill of lading No. 75. By invoice dated June 30, 1969, respondent billed David Eskin \$98.55 for the handling of this shipment which included charges for consular fees, ocean freight, chamber of commerce certificate, insurance, export declaration and messenger service, shipping, handling, a forwarding charge of \$20 and banking fees. On August 1, 1969, again at the request of Mr. Eskin, respondent handled some 13 cartons of long-playing records weighing some 436 pounds from New York, N.Y., to São Paulo, Brazil, on the SS *Mormacoak* under Moore-McCormack Lines bill of lading No. 119. On August 11, 1969, respondent sent Mr. David Eskin an invoice for a total of \$118.64 for handling this shipment which invoice included charges for consular fees, ocean freight charges, pier delivery, chamber of commerce fees, insurance,

a forwarding fee of \$20, documentation and banking fees. Subsequently, Mr. Eskin had a third shipment, which he handled himself.

David Eskin International Sales is located at 400 Riverside Drive at approximately 112th Street on the West Side of Manhattan. The neighborhood is considered less than desirable and as to security of the vehicle, one would have to lock it and turn on the alarm in making a pickup. Mr. Eskin's business is located on the third floor and pickups would have to be made on the passenger elevator. Despite this, respondent considered Mr. Eskin to have been a good customer and, because of this good customer relationship in air freight forwarding, respondent took it upon himself to serve in the two instances in the transportation of ocean freight. Respondent believes that no other carrier would serve Mr. Eskin. The first time respondent was requested by Mr. Eskin to serve him he was told that respondent used Crane Overseas Shipping, Inc., an F.M.C. forwarder, but when Mr. Murray called Crane Overseas Shipping and asked them to make the pickup for Mr. Eskin, respondent was advised that Crane could not get it.

With respect to the forwarding fees of \$20 for handling the shipments, Mr. Murray referred the matter to Mr. Al Grippo who, based upon his experience, told Mr. Murray that \$20 for handling the shipment would be a reasonable charge and that was the charge assessed. At a cost of \$10 an hour for a truck and a man on the street, Mr. Murray considers that for the services provided in handling these two shipments and the time involved he did not make any money on the transactions. Mr. Murray stated, "I did this as a favor for Mr. Eskin" but "I wasn't in the soliciting business." Had he been soliciting business, there was more lucrative business available. At the time he undertook to handle these shipments he did not really think that he was doing anything unlawful.

In the normal course of processing the L.T.C. Air Cargo application, the application was routinely investigated by one of the Commission's investigators. The investigator contacted Mr. Murray on August 19, 1969, for the purpose of clarifying certain portions of the application form. The application had left a blank the answer to the question: "Approximately how many shipper clients did applicant serve during the period?" Mr. Murray responded that he had made no shipments because he was not licensed to make any shipments. The investigator then routinely questioned Mr. Murray with respect to his air freight forwarding operations and who some of his clients were. Mr. Murray named several, among whom was Mr. Eskin. At the investigator's request that he be permitted to examine the company's files, Mr. Murray referred him over to Mr. Al Grippo, who

showed the investigator a file drawer half full of documents. The investigator made a cursory inspection of them and found various and sundry documents, however, none relating to ocean shipments in general or with respect to the bills of lading and the invoices discussed here.

On September 8, 1969, the Commission's investigator contacted Mr. Eskin and learned for the first time of the two shipments handled by applicant. Upon learning this, the investigator telephoned Mr. Murray and advised him of the facts discovered. Upon this confrontation Mr. Murray explained that he had told the investigator that he had not made any ocean shipments because L.T.C. had only charged the ocean freight and messenger service to Mr. Eskin and had made no profit on the shipment. Further, he stated that he had supplied all copies of the bills of lading that he had to Mr. Eskin. At this point the investigator asked Mr. Murray if he had any files regarding the shipments and Murray replied that he did and would bring them in to the investigator's office. These files contained the information with respect to the two ocean shipments handled. During that conversation the investigator asked Mr. Murray why he had told him that he had not made any ocean freight forwarding shipments. To this he replied that he had only charged ocean freight and messenger service and wanted to minimize the situation because he did not want the Commission to look into it.

In conjunction with these discussions the investigator prepared a statement which summarized the facts recited herein. This statement was offered to Mr. Murray for his signature. At that time Mr. Murray was asked whether the statement was correct and he stated that it was "substantially correct." When Mr. Murray was asked to sign the statement he declined, stating that he did not want to open himself up to a fine or expose himself to a fine for a violation of the law in making shipments without being licensed. With respect to the substance of the statement prepared by the investigator, Mr. Murray has stated that it was true to the best of his knowledge, thus admitting making the shipments and deceiving the investigator.

PROPOSED FINDINGS

On the basis of the foregoing facts Hearing Counsel argues that Mr. Murray knew that it was illegal to act as freight forwarder without a license, knew that penalties could result therefrom, but performed ocean forwarding services for Mr. Eskin nonetheless. As a result thereof, L.T.C. knowingly and willfully performed ocean freight forwarding services without authority to do so in violation of section

44(a), Shipping Act, 1916, 46 U.S.C. 841(b) and General Order 4, 46 CFR § 510.3(a). Additionally, Hearing Counsel proposes that Murray concealed information relative to these shipments and willfully misrepresented facts in an attempt to mitigate the effect of his unlawful conduct. Further, he argues that a license which has already been issued may be revoked (1) because of violations of any provisions of the Shipping Act or any other statute relating to carrying on the business of forwarding; (2) because of the making of willful false statements to the Commission in connection with an application for a license or its continuance in effect. 46 CFR 510.9 (a) and (c). Since such conduct would constitute a basis for revocation of an existing license, it is argued, it certainly warrants denial of a license application since this directly relates to applicant's fitness to properly carry on the business of forwarding and its willingness to conform to the provisions of the Shipping Act and the rules and regulations promulgated thereunder.

With respect to the Presiding Examiner's disposition of the case, Hearing Counsel admonishes that statutes, rules, regulations by which freight forwarders are regulated were not intended to be ignored merely because obeying them may have inconvenienced the forwarder or his company; that the Commission recently has indicated its disfavor with over-lenient treatment of applicants for freight forwarder licenses and that the issue before the examiner is whether these statutes, rules and regulations are going to be effectuated or whether, in the alternative, they will be rendered "meaningless."

Respondent contends that L.T.C. is fit, willing, and able to carry on the business of forwarding, that there was no unlawful forwarding, that the two shipments that L.T.C. "handled" were not substantial enough to constitute carrying on the business of forwarding and that, in any event, there was no intention to violate the act. And further, that the two isolated instances would at most be de minimis insofar as the fitness standard is concerned. Respondent contends further that the acts complained of provided a needed public service and that in fact there were no misrepresentations, willful or otherwise.

DISCUSSION AND CONCLUSIONS

By the Commission's order in this proceeding dated December 29, 1969, the proceeding was instituted to determine "whether, in view of the past activities of its principal, L.T.C. Air Cargo, Inc., is 'fit' to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, within the meaning of that statute; * * *

It is suggested to the examiner that "this record does not support an affirmative finding that applicant is fit to carry on the business of ocean freight forwarding and willing to conform to the Commission's rules and regulations." This proposed conclusion is substantially at odds with the stated purpose of the proceeding. A finding with respect to conformance with the Commission's rules and regulations was not called for.

One of the stated reasons for the intended denial is: "(c) that a principal of L.T.C. Air Cargo may willfully have given incorrect information to a Commission representative on at least two occasions in connection with the license application of L.T.C. Air Cargo, Inc.," and in apparent violation of 46 CFR 510.9(c). This section of the Commission's regulations provides:

A license may be revoked, suspended or modified after notice and hearing for any of the following reasons * * * (c) making any willful, false statement in connection with an application for a license or its continuation in effect.

It is observed that this proceeding is neither a revocation, suspension or modification proceeding but one for an application and, accordingly, the respondent cannot be found to have violated this section of the Commission's regulations. Further, the Commission referred to "incorrect information," not false statements as referred to in the regulation.

Another of the several reasons for intended denial of the application is that applicant had recently forwarded ocean shipments without a license also in apparent violation of section 44(a). With respect to this allegation the record is abundantly clear that on two occasions L.T.C. Air Cargo did handle two shipments for Mr. Eskin, one on June 6, 1969, and the other on August 1, 1969, and in so doing it did operate as an independent ocean freight forwarder without a license in violation of section 44(a). That these violations were done knowingly and willfully is apparent. Knowledge and willfulness embrace acts conscious and intentional, deliberate and voluntary, rather than those merely negligent. *United States v. Eastern Airlines, Inc.*, 192 F. Supp. 187 (1961).

During the interview with the Commission's investigator on August 19, 1969, applicant's principal, when asked approximately how many shipper clients he served during a period, responded that he had made no shipments because he was not licensed to make shipments. This statement was untrue at the time and was known to be untrue by L.T.C.'s principal. While the instance of giving false information to an investigator may not be considered a violation of the Commission's regula-

tions (46 CFR 510.9(c)), the instance may be considered to go to the fitness of applicant as a matter of character, integrity, and veracity.

During the interview the investigator requested to be permitted to examine the company's files and L.T.C.'s principal referred him over to Mr. Al Grippo, who showed the investigator a file drawer half full of documents. The investigator made a cursory inspection of them and found various documents but none relating to ocean shipments or to the bills of lading and invoices discussed herein. When the investigator subsequently asked why he (the investigator) had not located the folders on these shipments when he went through the drawer on August 19, applicant principal's answer was "that they were in a different drawer when he had to go look for them himself to find them to bring them in with him on that day." The examiner does not conceive that this constitutes the giving of incorrect information. It suggests at most that the documents were mislaid.

In this connection it has been held by a sister agency that:

There is no inflexible rule by which an applicant's fitness can be determined. Consideration should be given to the nature and extent of past violations of our safety rules and regulations and of the state and city laws and regulations, the effect of such violations upon uniform regulation, the mitigating circumstances shown to exist or to have existed, whether the carrier's past conduct represents a flagrant and persistent disregard of the provisions of the Act and our Rules and Regulations thereunder, and the extent to which the carrier is attempting to take corrective measures to bring its operations into compliance with the law and regulations. *Riss and Company, Inc., Extension-Explosives*, 64 M.C.C. 299, 350.

Here the circumstances show that although on notice that to do so would violate the Shipping Act, respondent's principal took it upon himself to handle two shipments providing the services of an independent ocean freight forwarder. These transactions were conducted as a favor. Respondent states that he was not in the soliciting business and had he been soliciting business there were more lucrative accounts available. Mr. Eskin lived in a less than desirable neighborhood. His business was located on the third floor and pickups would have to be made by passenger elevator. Respondent believed that no other carrier would serve Mr. Eskin and, even so, when Mr. Eskin first approached him, applicant contacted another freight forwarder which declined to handle the shipment. These are mitigating circumstances. The two instances involved do not represent to the examiner conduct showing a flagrant and persistent disregard of the provisions of the act. Neither do they seem to have had any effect upon uniform regulation when viewed overall. Mr. Murray's conduct seems not to have had as its intent the willful disobedience to law as much as to help out a client.

With respect to having given incorrect information to the Commission's investigator, the surrounding circumstances suggest that L.T.C.'s principal acted rather ludicrously. As seen from the evidence the Commission's investigator inquired whether applicant had served shippers during a period of time and the respondent stated that he had made no shipments because it was not licensed. Shortly thereafter the investigator asked Mr. Murray to name several of his air freight forwarder clients in order that they might be contacted. To this respondent's principal gave the name of the very person from whom it could be established that he had in fact handled shipments as an ocean freight forwarder. While unquestionably the giving of false information or the attempt to deceive the Commission's investigator is a serious matter and reflects adversely on the character, integrity, and veracity of respondent's principal, the examiner does not believe that it should be the basis for a denial of the instant application. As an isolated instance, it is not sufficiently important that it should for all times preclude applicant from the economic opportunity which may flow from a granting of the application.

Since filing the application, Mr. Murray has been studying the shipping act, has retained counsel with respect to its application, and to the L.T.C. operations. He proposes to seek counsel of the Commission's Atlantic division in New York as to any questions which may arise and proposes to present questions about operations to the division in writing. He has retained legal counsel to further advise him. These actions show an attempt on the part of applicant to take corrective measures to assure compliance with the statute and, for that matter, with the rules and regulations of the Commission issued thereunder.

FINDINGS

Upon consideration of all evidence of record the examiner concludes that L.T.C. Air Cargo, Inc., is "fit" to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, within the meaning of that statute; and that its application should be granted.

RICHARD M. HARTSOCK,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 422

DAVIES, TURNER & CO., AS AGENTS
FOR ROBERT S. SHLESINGER, OWNER

v.

ATLANTIC LINES, LTD.

Adopted June 18, 1970

Application for permission to refund portion of charges on shipment of household effects from New York to St. Croix, Virgin Islands, denied.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER¹

This is an application, pursuant to rule 6(b) of the Commission's Rules of Practice and Procedure,² filed by respondent Atlantic Lines, Ltd., for an order authorizing it to refund to complainant, Davies, Turner & Co., the sum of \$611.14 in connection with a shipment of "used household goods" from New York to St. Croix, Virgin Island.

THE FACTS

On September 16, 1969, Fred Sherman, manager of Davies, Turner & Co. of Philadelphia, Pa., telephoned Rice, Unrah & Co., Philadelphia agents for respondent carrier, to inquire as to the freight rate and other charges that would be applicable to the above shipment. After checking the tariff, one Joe Torak of Rice, Unrah & Co.'s export department advised that the total, including the tariff commodity rate for household effects of \$4.50 per hundred pounds, plus landing charges, tonnage dues, wharfage and handling, and a 10-percent surcharge, would be \$221.21. Relying on this question, the cargo was moved under bill of lading dated October 17, 1969. However, the aggregate charges actually billed and collected October 20, 1969, were \$832.35, or \$611.14 more than quoted. This was immediately called to the attention of Torak who called the carrier's New York office only

¹ This decision became the decision of the Commission June 18, 1970.

² Special Docket Applications, 46 CFR 502.92(b).

to be advised that the household effects rate he quoted had been deleted from the tariff the preceding July. Notice had been mailed to but not received by Rice, Unrah & Co.

DISCUSSION AND CONCLUSIONS

The facts, as is always true in these nonadversary Special Docket proceedings, are undisputed. The conclusions, therefore, are necessarily controlled by dictates of law. In *Ludwig Mueller Co., Inc., v. Peralta Shipping Corp., Agents of Torm Lines, et al.*, 8 F.M.C. 361, 365 (1965), a case grounded on a tariff deviation in a "foreign trade," the Commission, citing overwhelming authority, reaffirmed the firmly established principle that "the rate of the carrier as duly filed is the only lawful charge." *Silent Sioux Corp. v. Chicago & North Western Ry. Co.*, 262 F. 2d 474 (1959). The Commission pointed out that Justice Hughes, in *Louisville & N.R.R. Co. v. Maxwell*, 237 U.S. 94 wrote:

Ignorance or a 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.³

But then the Commission proceeded to draw a distinction between the "foreign" trades and the so-called "noncontiguous domestic" or "domestic offshore" trades. It noted that while it had no power to set a "reasonable" rate in a foreign trade, section 4 of the Intercoastal Shipping Act, 1933,⁴ authorizes it to prescribe and enforce reasonable maximum and minimum rates and section 18(a) of the Shipping Act, 1916,⁵ authorizes it to prescribe and enforce reasonable maximum rates, both having regard to domestic offshore trades.

In *The East Asiatic Co., Inc.—Application for Permission to Waive Collection of Undercharges*, 9 F.M.C. 169, 172 (1965), a case involving a domestic offshore trade, the Commission stated:

* * * 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.

The application in this instance, like that in *East Asiatic*, supra, does not even allege that the rate duly applied was unreasonable nor does the record contain facts upon which such a finding can be made. There being no alternative, the application is hereby denied.

(S) JOHN MARSHALL,
Presiding Examiner.

³ This case related to section 6 of the Interstate Commerce Act which is similar to section 18(b) (3) of the Shipping Act, 1916.

⁴ 46 U.S.C. 845a.

⁵ 46 U.S.C. 817.

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

AGREEMENTS UNDER SECTION 15. See also Brokerage; Terminal Leases.

—Intermodal arrangements

Proceeding to determine whether conferences could establish through intermodal arrangements with other modes of transportation did not include "subsidiary issues" such as "the estimated tonnage involved" and "the treatment to be accorded small shippers, the basis on which inland rates will be predicated and the manner in which interline arrangements will be established." Such questions will arise only if the conferences enter into actual intermodal arrangements. Any approval granted would not extend to the particular intermodal arrangements arrived at should those arrangements involve matters subject to section 15. The subsidiary issues are patently premature and an evidentiary hearing on them is not warranted at this time. An appropriate hearing is required prior to approval or disapproval. In the present proceeding, the receipt of memoranda of law and sworn statements and the hearing of oral argument will sufficiently develop the issues. Any arrangements with other modes of transportation will be subject to scrutiny by the Commission under sections 15 and 18(b) of the 1916 Act. Atlantic & Gulf/West Coast of South America Conference Agreement No. 2744-30, et al. 121 (123-124).

Proposal of conferences to establish through intermodal arrangements with other modes of transportation does not require modification to give member lines the right of independent action. That could do more harm than good. Each member has in mind its own economic well-being. The conference is able to exist as an entity only by restricting the individual's right to go his own economic way. Current forms of the intermodal concept are new and their fruition will occur only after some experimentation and much give-and-take among the parties in interest. If each conference member is free to pursue his own way at any point in the midst of conference efforts, the possibility is very real that successful conference action would be frustrated. However, a conference could through foot-dragging, inertia, opposition by a few members, or otherwise, effectively stifle the desires of its progressive members from instituting intermodal service. On the other hand, it is not Commission policy to compel carriers to offer any particular type of service when carriers deem commercial considerations not to warrant it. A balance must be found between the need to prevent inhibitions to progressive service and to not unduly interfere in commercial matters. Id. (126-127).

Agreement whereby conferences are authorized to agree to, and establish, through intermodal arrangements with other modes of transportation is approved for a period of 18 months, provided that if during the first 12 months the conferences do not achieve any results from their negotiations, the prohibition in the agreement against mere negotiations by an individual member will lapse. Id. (127).

Modification of conference agreement to permit conferences to enter into negotiations to establish through intermodal arrangements with other modes of transportation need not be changed to cast the modification in the "affirmative" rather than the "negative" ("No provision of this Agreement shall be deemed to prohibit. . ."). There is nothing inherently wrong with phrasing a modification in the negative. Since approval will be limited to 18 months, the negative casting eliminates the need to engage in extensive remodification should the present modification not receive continued approval. *Id.* (127-128).

Proposal of conferences to establish through rates by arrangements with other modes of transportation need not be modified to provide that the rates must be a combination of the conference port-to-port rate and the rate applicable to the other modes of transportation. The proposal of the conferences merely permits meetings with freight forwarders and carriers of other modes of transportation to discuss arrangements for through routes and the rates and bills of lading related thereto. Any arrangement which might be made would be reflected in agreements and tariffs filed with the Commission and in accordance with other appropriate statutes and rules. The chairman of the conferences unequivocally stated that port equalization or absorption of inland transportation costs was not involved. *Id.* (128-129).

The Commission has jurisdiction over an agreement under which conferences are authorized to establish through intermodal arrangements with other modes of transportation. The parties to the agreements are subject to the 1916 Act and the subject matter is appropriate to section 15. Inclusion of persons not subject to Commission jurisdiction in the actions taken under the agreements does not deprive the Commission of jurisdiction. In the absence of a showing that the FMC and ICC claim jurisdiction over the same particular activity, the two agencies may exercise concurrent jurisdiction over the same persons. Approval of the agreement or of the subsequent arrangements would leave unimpaired the jurisdiction of each agency over the matters assigned to its care. There is nothing unusual about a situation in which arrangements for through transportation service are filed with more than one regulatory agency and each agency limits its jurisdiction to a particular segment of the through transportation. *Id.* (129-130).

At present the Commission believes that it has the authority and regulatory responsibility to accept intermodal rates for filing; but to avoid uncertainty or confusion and to establish coordination of regulation, the Commission instituted a rule making proceeding and determination of the issue must await the outcome of that proceeding. *Id.* (131).

Conferences and their member lines would be exempt from the antitrust laws so long as they engaged in the concerted activity authorized under approved agreements permitting negotiations with other modes of transportation and establishment of through intermodal arrangements by the conferences but not by individual members. The question of the extent of the antitrust immunity which would flow from the actual arrangements presents a different question, the determination of which must await the filing of the arrangements. *Id.* (132).

The North Atlantic Westbound Freight Association should implement the through route authority previously approved for it. If it is the failure to obtain unanimity among members of the conference which prevents effectuation of the authority, the conference and its members need only properly demonstrate that unanimity is operating in a way which is detrimental to conference efforts to achieve stable, efficient and progressive service in the trade and the Commission

will assist in achieving a just solution. Rejection of Tariff Filings of Sea-Land Service, Inc. 200 (204).

—Mergers

The Commission was not required to hold an evidentiary hearing, at the request of Sun Shipbuilding, in connection with an agreement involving the purchase by Prudential Lines of the stock of Grace Line and the sale of Prudential's operating assets to Grace Line. The Commission's jurisdiction over such agreements is found in section 15 of the 1916 Act. Sun's request did not ask the Commission to receive evidence bearing on a violation of any provision of the Shipping Act. Sun alleged that it was a creditor of Grace Line, with the claim arising under the Uniform Fraudulent Conveyance Act. The proper forum for its action was in the federal district court. Request for an evidentiary hearing by an individual who had allegedly offered to purchase Grace Line was also denied. The matters raised were either irrelevant to any proper consideration under section 15, or should have been directed to the Maritime Administration, or were so vague as to not meet the criteria of the order instituting the proceeding. Agreement No. 9810—Stock Purchase Agreement Between Prudential Lines, Inc. and W. R. Grace & Co. 156 (157-158).

Agreement providing for the purchase by Prudential Lines of all of the stock of Grace Line, and sale of Prudential's operating assets to Grace Line was approved under section 15. Among other things, better service should be provided to the shipping public at reduced cost. Ports in the United States and their terminal operators would also benefit from the introduction of LASH vessels. The LASH program would benefit from the pooling of earnings of the two companies. Crews of the companies' vessels would not be affected. There would be no change in the competitive posture of the companies vis-à-vis each other. The purchase would permit Prudential to introduce LASH vessels into the South American trades served by Grace, which would alleviate port congestion. The purchase would not operate in a way which would be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports; or between exporters of the United States and their foreign competitors. Approval would not operate to the detriment of the commerce of the United States or be contrary to the public interest. *Id.* (160-165).

—Self-policing

Legal defect of conference's former self-policing system consisted solely in its lack of a procedural system for a fair and impartial hearing for an accused member. The conference always had the legal right and obligation to investigate malpractices and bring charges where probable cause existed. Not all actions taken under the earlier system were illegal. The method of investigating and bringing formal charges was not challenged and was not at issue. Agreement No. 5200-26 (Pacific Coast European Conference). 16 (22).

Conference never lost the legal right to police its own membership although it was under a legal disability to conduct a valid adjudicatory proceeding under its old self-policing procedures. This temporary disability was removed on approval of an agreement which created a viable set of procedures in accord with a court decision. *Id.* (23).

The validity of an allegation of breach of a conference agreement by a member or a malpractice thereunder is not affected by the illegality of the machinery under which such charges are to be tried. A valid charge stands until adjudicated. Any such adjudication, of course, must await adoption and approval of legal procedures. *Id.* (23).

Contention that the Commission cannot approve an agreement that an amended self-policing procedure shall apply to alleged breaches brought to the attention of the conference prior to approval is erroneous. The conference has done nothing under the agreement and it is not asking the Commission to approve any conduct which has taken place in the past. The only activity contemplated is the future investigation and prosecution of malpractices and the use of newly amended procedures for the adjudication of such allegations. It could be argued that the agreement which makes no substantive changes in the self-policing system is automatically applicable to prior breaches, but in the interest of clarity it is better that it be spelled out in the agreement. *Id.* (23-24).

Argument that the order of investigation should have included the issue of whether an agreement, relating to application of a conference self-policing system, "is discriminatory * * * operates to the detriment of the commerce of the United States, and is contrary to the public interest," was rejected. If the party with an interest in an agreement is dissatisfied with the scope of an order of investigation or is in doubt as to the scope, a timely motion should be filed. Secondly, the issue was a dubious one at best. The order of investigation stated that the legal issue was whether section 15 approval should be given to the agreement and, thus, the issue was approvability under the legal standards imposed by section 15. The only way to urge disapproval was to argue the very issues allegedly precluded. *Id.* (24-25).

If a member of a conference breaches the agreement or engages in an act defined therein as a malpractice it is accountable to its fellow members in accordance with the terms and conditions of the agreement. The fact that a conference member terminates its membership in no way changes the right of the conference members to proceed against it for breaches or malpractices which occurred during the accused member's period of membership. The conference is not barred from seeking judicial aid, but it should do so only after first utilizing the procedural scheme contained in its own basic agreement. *Id.* (26-27).

Where a conference had modified its self-policing system to provide fair and impartial procedures for an accused member, the conference could use such procedures to investigate and prosecute breaches which predated the approval of the amended self-policing procedures, even though the accused member was no longer a conference member and did not "agree" to the amended procedures. *Id.* (27-28).

ASSEMBLY TIME. See Free Time.

BROKERAGE.

Brokerage agreements among common carriers must be filed for section 15 approval. Once a conference agreement which fixes or regulates the amounts of brokerage has been approved, further conference arrangements regarding brokerage are permissible without separate section 15 approval. Specific reference to payment of brokerage must be contained in an approved conference agreement before regulation of brokerage by a conference can be accomplished by tariff rules. U.S. Pacific Coast/Australia, New Zealand, South Sea Islands Trade—Unapproved Agreements 139 (143-144).

Conference contention that section 15 filing and Commission approval were not necessary for an agreement authorizing payment of brokerage because the agreement did not require the parties thereto to do anything different from that which they were already entitled to do under the law without such an agreement, was rejected. The conference members were not free to disregard the

agreement. The agreement provided that when the members paid brokerage, their payments could not exceed $1\frac{1}{4}$ percent and payments could not be made on certain cargo and commodities. Such restrictions and prohibitions clearly controlled, regulated, prevented or destroyed competition. Therefore, the agreement and the resulting tariff rules were subject to filing for approval under section 15 and the failure to file was a violation of section 15. The members paid brokerage under the tariff rules and this constituted an unlawful carrying out of an unapproved agreement. Id. (144-145).

Where the only filing received by the Commission staff was an amendment to a conference's tariff rules which showed the conference agreed to prohibit brokerage payments, the filing did not constitute a filing which could be construed as a section 15 filing seeking approval of the conference action. The only way in which the tariff rules could have been submitted for approval was pursuant to the procedure for filing agreements with the Commission under section 15. The fact that the tariff rules never became effective did not mean that there was no Section 15 violation. An agreement which is made but not filed for approval is unlawful even though no action is taken by the parties under it. Id. (145-146).

Where the Commission staff actively sought to have a conference remove all tariff rules relating to brokerage inasmuch as the basic conference agreement contained no authority to regulate brokerage, failure of the conference to file an agreement cancelling all brokerage rules was not a section 15 violation. Id. (146).

Where a conference agreed not to pay brokerage after a certain date, subsequently, at the urging of the Commission staff, the conference cancelled all brokerage rules inasmuch as the basic conference agreement contained no authority to regulate brokerage, no unlawful agreement was shown to exist in respect to the conference lines' decisions to discontinue payment of brokerage. While the sequence of events, taken alone, would portray a picture of concerted action, in the absence of evidence of an express agreement. The explanations by the conference cast sufficient doubt in the existence of such an agreement. It was plausible that the conference members acted individually to return to a practice of 20 years during which period no brokerage had been paid. A previous rule permitting payment had demonstrated no real advantage to be gained. In the South African case, 7 FMC 159, several carriers had set identical specific rates on several specific items. It was difficult to fathom how such action could have been the fortuitous product of independent judgment. In this case, several carriers decided to discontinue a single practice of paying brokerage. The two situations were similar but not comparable. The conference members had intended to concertedly discontinue brokerage payments. When the rules were cancelled at the staff's insistence, it was up to the individual lines to decide whether to continue payments. They could continue to make the unprofitable payments and avoid accusations of carrying out an unapproved agreement or discontinue payments and be subject to accusations of violating section 15. The individual lines could not be expected to act as if they did not have the benefit of the experience of their fellow members in relation to the profitability of paying brokerage when it became incumbent on them to make their decisions. Id. (147-150).

Where a carrier announced its future entry into the Australian trade and the payment by it of brokerage, and conference members, in order to meet the competition, reached an understanding (unauthorized under the approved agreement) to resume brokerage payments on shipments to Australia except on spe-

cific commodities, concerted action was taken and the conference had entered into an unauthorized agreement. The obvious parallel action following joint discussion could not be the fortuitous product of independent judgment or merely the result of business economics. It was not readily apparent that if left to individual determination, each line would have felt compelled to resume brokerage payments, especially in view of their recent experience that such payments were not beneficial. Id. (150-152).

Conference agreement to prohibit payment of brokerage was to apply to both Australia and New Zealand. However, the rules accomplishing the prohibition were canceled prior to their effective date and when the conference members individually discontinued payments of brokerage to Australia they were not concerted carrying out their canceled agreement. There was no evidence that the discontinuance at the same time of such payments on shipments to New Zealand was reached in a different fashion. Continued failure to make such payments, after the conference agreement was amended to permit payment of brokerage was not shown to be the result of concerted action. Id. (153-154).

The Commission was not estopped from determining whether tariff rules prohibiting payment of brokerage were in violation of section 15, because the Commission had issued an order to the conference to show cause why the rules should not be stricken from the tariff on the ground that they appeared to violate an order in another case which found concerted prohibition of brokerage agreements to be detrimental to commerce. The show cause proceeding had been terminated after the conference removed from the rules all reference to brokerage. The order of discontinuance stated that "The issues involved herein have been mooted." There was no estoppel from considering the question of section 15 violations since nothing was being redetermined which was earlier determined. The show cause proceeding was dismissed without investigating or determining the question of the lawfulness of the rules. The order to show cause did not raise the question of whether the rules were in violation of section 15. Consequently, the order discontinuing that proceeding could not possibly be said to be a determination that the brokerage rules were not in violation of section 15. Id. (154-155).

DEMURRAGE. See Free Time.

DISCRIMINATION. See Terminal Operators.

FREE TIME.

—In general

"Free-time" is limited strictly to that period of time required by the shipper to assemble or the consignee to remove his cargo prior to it being loaded or subsequent to its being discharged from the vessel. It was never intended to encompass the period of time required by the shipper to bag or otherwise process his cargo while on terminal premises. Processing time is not required as a necessary part of the carrier's transportation obligation. An allowance of "processing time" is provided gratuitously to the shipper as a service, and so long as it is not unlawful, it is solely within the managerial discretion of the port. Considered as a terminal practice the validity of providing such service is dependent on its "reasonableness" under section 17 and its "reasonableness" is based on a broad consideration of many factors relating to the conditions existing at the port and the characteristics of the traffic involved. Assembly Time—Port of San Diego. 1 (11-12).

Tariff rule granting 10 days' assembly time, in addition to the present 10 days' free time provided by the Port of San Diego, on commercial bulk cargo bagged on the Port premises moving in single consignments of 10,000 tons or more would not violate section 16 First or section 17. To the extent that chemical fertilizers, which represent at least 95 percent of the total cargo bagged by Freight Handlers at San Diego must be bagged prior to shipment, they constitute a new and unique type of cargo. The facility has been severely taxed to bag and load 10,000 ton lots within the normal free time. The 3,000 ton minimum on single consignment proposed by San Diego is unrealistic and unsupported on the record. Establishment of a 10-days processing period would not operate to the detriment or otherwise adversely affect the efficiency, economy, and financial soundness of port operations. *Id.* (12-14).

Free time is not a gratuity to be granted at the whim of the provider of ocean transportation. It is a necessary part of the carrier's transportation obligations. The free time obligation must be met through the provision of terminal facilities adequate to render such free time meaningful and realistic, and may be fulfilled either by the carrier or through an agent. Where the required terminal facilities are furnished by terminal operators, the operators become the agents of the carriers with respect to such service and are bound by the same obligations that apply to the carriers with respect to them. The reasonableness of the free time period is fixed by determining the period necessary for the shipper to assemble or the consignee to remove his cargo. The period must be realistically designed to allow a shipper sufficient time to deliver his cargo, taking into account the transportation necessities of the particular port or terminal, including, inter alia, the physical limitations of the terminal facilities, transportation delays, frequency of sailings, availability of truck and other modes of inland transportation, and number of freight forwarders in the port area. *Free Time and Demurrage Charges on Export Cargo*. 207 (213-214).

To the extent that other cargo, such as import cargo at New York and Philadelphia which is subject to demurrage charges, pays for the use of terminal space and services while export cargo occupying adjacent space and receiving identical services escapes the obligation to pay for them, the import cargo is being unduly prejudiced within the meaning of section 16 First, and the terminal operator has engaged in an unreasonable practice within the meaning of section 17 of the 1916 Act. Such prejudice may occur even between exporters when such exporters obtain more free time than is necessary while others are unable to do so. *Id.* (215).

Granting of unlimited free time at the ports of New York and Philadelphia constitutes an unreasonable practice within the meaning of section 17 of the 1916 Act, and ten working days is the reasonable maximum free time period for export cargo at the Ports of New York and Philadelphia. Terminal operators are encouraged to establish lesser periods if they can fulfill the necessary free time obligation in fewer than 10 working days. *Id.* (215-216).

Free time afforded by the ocean carrier or his agent is a transportation obligation separate and distinct from that of inland carriers, and its proper duration must be determined by applying the appropriate principles of maritime regulatory law to the circumstances pertaining to the ocean transportation and ocean terminal facilities. *Id.* (217).

Strictly speaking, neither the time needed for cargo inspections nor the flexible assembly period required for the most efficient use of a program based on the use of a supplier's excess capacity appears to be a transportation condition which would be sufficient to support extended free time for an ordinary shipper.

Time needed for cargo inspection has been rejected by the Commission and its predecessors as a basis for additional free time, and such rejection seems particularly sound where there has been no showing that such inspection either could not normally be completed within 10 working days of receipt of cargo at the piers or could not adequately be made at a place other than the piers. As to efficient use of a supplier's excess capacity, it has often been held that damage to merchandising programs is not in itself sufficient to justify extended free time. When the government is the shipper, however, it is not necessary to make a strict showing of transportation necessity to establish the lawfulness of extended free time. *Id.* (217).

There is no real indication that consolidations of export cargoes could not physically be made at off-dock locations, and that such consolidations could not be admitted to and deposited on the docks in a condition ready for shipment within the ordinary 10 working days free time period. The primary purpose of consolidating shipments on the piers is admittedly that of commercial convenience, a purpose which has consistently been rejected as a basis for the extension of free time to nongovernmental or charitable shippers, even in situations where some economic injury may be caused by the imposition of more restricted free time. The Commission is, therefore, unable to allow additional time, usually known as free time, for shipments consolidated on the piers. However, cargoes consolidated on the piers may be allowed additional time free of demurrage. Problems are encountered in consolidations which are due to transportation conditions for which the exporter is not responsible. Under such circumstances, although additional free time, strictly speaking is improper, the grant of some additional time free of demurrage is allowable when a terminal operator desires to provide it and where it is not otherwise unlawful. *Id.* (222-223).

The record fails to show that terminal operators at the Ports of New York and Philadelphia will be materially affected by the grant of five additional working days free of demurrage to exporters making consolidations on the piers for consolidation time. The record shows that allowance of such additional time will be sufficient to allow the admission to the piers and loading aboard vessels of a majority of consolidated shipments. As to alleged disastrous consequences, the record indicates that most of the cargo consolidated on the piers occupies transit area space for no more than 15 working days, and the evidence which relates to pier congestion generally deals with cargo which has been on the piers for one or more months. *Id.* (223-224).

Terminal operators at the Ports of New York and Philadelphia will not be compelled to grant additional time for on-pier consolidations. If they seriously fear that the efficiency, economy and financial soundness of their operations will be endangered, they should not do so. Competitive pressure on an operator to grant free time if other operators do so should loom less large when practically all of the cargo will already be subject to the 10 working day limitation. *Id.* (224).

Special allowances at the Ports of New York and Philadelphia will not be permitted for project shipments or project consolidations. These shipments are assembled over long periods of time, generally occupying the piers for months and sometimes years. It is unreasonable to permit the conversion of piers into long-term warehouses and then to deny terminal operators compensation for the use of such property. Regulations are prescribed under which on-pier storage space may be furnished to exporters of project consolidations. *Id.* (224-225).

Cargo must actually be consolidated to allow exporters to avail themselves of the privilege of extended time free of demurrage. Since consolidations are made on the terminals and terminal personnel might reasonably be expected to know

the status of cargo on the piers, it should not prove too difficult to keep track of shipments designated for consolidation to ascertain if they become parts of a legitimate consolidation. If this task is felt to be too burdensome, the operators need not extend additional time. Id. (225).

Exporters of shipments consolidated on the piers at the Ports of New York and Philadelphia should do everything possible to lessen the problems of pier congestion. They should explore at length and attempt to use off-pier consolidation inland containerization, and partial shipments as alternatives. To encourage such exploration and use, and to prevent extension of time free of demurrage from becoming automatic, exporters or their agents desiring extensions will be required to request them as a condition precedent to grant. Id. (225).

Records must be kept by terminal operators of additional time free of demurrage granted to exporters of shipments consolidated on the piers. Terminal operators may voluntarily, on request, grant five additional working days consolidation time for shipments consolidated on the piers at New York and Philadelphia and exported under a single bill of lading. Id. (226).

Frequency of sailings from a certain port is a transportation condition which may be taken into consideration in establishing free time regulations, and sailings to certain trade areas may be considered. Where, as in the Australian and African trades, the frequency of service may have an impact on the demurrage assessed against shippers in these trades, it is not improper to make allowances for such infrequency of service in free time regulations. A shipper who, for example, exports products to a remote part of Africa to which sailings may be available only once a month may time his shipments to allow for a few days leeway so as not to miss his sailings. It would not be unreasonable in such circumstances for the terminal operators at the Ports of New York and Philadelphia to allow these shippers a few extra days free time. They are not required to do so. There is no evidence that cargo carried by the Australia and Africa Conferences has contributed appreciably to the problem of port congestion or has damaged the financial stability of terminal operations. Id. (227-228).

The use of extended free time to equalize intra conference competition is not a legitimate function of free time rules. To prevent its use for this purpose, and because the extension is intended for the benefit of the exporters, discretionary grant by the terminal operators at the Ports of New York and Philadelphia will be conditioned on a prior request by the exporters or their agents. Id. (229).

Grant of extended time for cargoes moving in the Australian and African trades from the Ports of New York and Philadelphia will not be conditioned on deposit of the cargo on the piers within 15 working days of the first available sailing. It will be conditioned instead on deposit within 15 working days of the sailing for which it is booked. The usual 10 working day limitation will apply if the shipper fails to place his shipment on the docks within 15 working days of the loading of the vessel for which it is booked or holds his cargo beyond such period. Id. (229).

Terminal operators may voluntarily grant to the exporter or his agent, on request, up to 15 working days free time to cargoes carried in the trades served by the Australian and African conferences, provided such cargoes are delivered to the terminal not more than 15 working days prior to the sailing for which they are booked and that they are not held beyond such period through any fault or design of the exporter or his agent. Records must be kept by the operators of all grants of extended time to such cargo. Id. (229-230).

Free time on export cargo at the Ports of New York and Philadelphia shall commence at 12:01 a.m. on the day after the cargo is received at the terminal facility and terminate at 11:59 p.m. on the final day of free time. *Id.* (231).

At the end of the free time period for export cargo at New York and Philadelphia, demurrage charges in successive periods of five days shall be assessed. The first period of demurrage shall be assessed at a compensatory level. Penal demurrage shall be assessed during subsequent periods. Assessment of penal demurrage immediately on expiration of freetime is not necessarily in all cases improper as a matter of law, but there is no need to provide for it, especially where the port and terminal interests at New York and Philadelphia have indicated they want the traditional practice retained. No demurrage shall be assessed after the vessel has commenced to load. *Id.* (231-232).

Assessment of demurrage should generally be made against the cargo at the Ports of New York and Philadelphia. Where, as at these ports, the vessel does not lease the wharf but contracts with a terminal operator or pays established tariff charges rendered to it, and assumes no responsibility to the ports for collection of demurrage charges, the contention that demurrage charges should be assessed against the vessel is without foundation. *Id.* (232).

Requirement that no demurrage be assessed after the vessel commences to load is just and reasonable since it prevents the penalization of cargo for the vessel's loading time. *Id.* (232).

Demurrage periods at the Ports of New York and Philadelphia shall consist of five days. This will prevent the employment by a terminal of an unreasonably long period of demurrage at a compensatory or low level which competitive conditions might force other terminals to meet, and which could result in port congestion. *Id.* (233).

When cargo is brought to or remains on the piers because of circumstances for which the water carrier is responsible, the carrier must compensate the terminal operator for the use made of his facility. The cargo may not lawfully be assessed in such situations. The vessel must bear the demurrage charges. Assessment of demurrage against the vessel in case of vessel cancellation or delay accords with the practice at many ports. *Id.* (235-236).

The mere fact that carriers may to some extent bear the terminals' costs for delayed or cancelled sailings through contracts with the terminals for the operation of the piers is not a sufficient reason not to require that demurrage be assessed directly against the vessel in cases of cancellation or delay. Requirement that the specific demurrage charges contained in the terminal operators' tariffs be assessed against the vessel in situations for which it bears the responsibility to pay, will benefit both the operators and the carriers. *Id.* (236).

Five-day extension of free time on delayed sailings will not be allowed. In the case of cancellation, no demurrage can be assessed for any of the time the cargo has been on the piers. In the case of vessel delay, the assumption remains that the vessel will eventually call, so that the prior use of the facility by the cargo without payment of demurrage was proper until the time when the vessel missed its sailing. This distinction indicates no reason why demurrage should not be assessed against the vessel in the case of vessel delay for the whole period of the use of the terminal's facility for which it bears the responsibility, as is done in the case of vessel cancellation. Grace period granted by West Coast ports is given because they desire to do so. There is no basis in law for the imposition of a grace period in the case of vessel delay upon the terminal operators. Contention that, under the 5-day grace period, time is extended only with respect to cargo of diligent shippers is true but should have no significance insofar as vessel liability is concerned. *Id.* (237-238).

Limitation to first-period levels of demurrage to be assessed against the vessel in case of delayed sailing would not be reasonable in certain circumstances. Demurrage in successive periods shall be assessed against the vessel, beginning on the day after the announced date of the delayed sailing and terminating on the day the vessel begins to load. Id. (238-239).

The Commission will not provide for the voluntary extension of additional time free of demurrage in cases of vessel delay. There has been no showing that vessel delays are in any way related to transportation conditions at the Ports of New York and Philadelphia or that vessel delays involve any ascertainable time periods. An extension of time for such delays would apply to all of the ships carrying export cargo rather than to the tiny fraction of export cargo to which the consolidated shipment and trade area exceptions apply, and its effect on terminal efficiency and stability is potentially much greater. Id. (238).

As to demurrage in the case of vessel cancellation, a distinction is made between cargo on demurrage-free time at the time of cancellation and cargo on demurrage at time of cancellation. Demurrage on the former is assessed against the ship from the time of the cargo's arrival on the piers. As to the latter, the respective interests are left as they are found and the cargo continues to pay demurrage. This distinction is the result of the kind of compromise which is appropriate. Demurrage against the vessel in cases of vessel cancellation is limited to first-period levels. Id. (239-240).

In cases of vessel delay at New York or Philadelphia, demurrage accruing after the date when the vessel fails to meet the announced sailing date shall be assessed in successive periods for the account of the vessel until the vessel commences to load. In cases of vessel cancellation cargo on free time on the announced date of sailing shall be subject to first-period demurrage assessed against the vessel commencing on the day the cargo was received at the terminal facility and terminating on the announced date of sailing unless the export shipper on or before that date has another vessel designated for loading, removes the cargo from the terminal, or elects storage. If the export shipper takes none of these actions, demurrage charges in successive periods shall be assessed against the shipper after the vessel's liability for demurrage has expired. Such demurrage shall terminate on the shipper's aforesaid action. For cargo on demurrage on the announced date of sailing, demurrage shall continue for the account of the shipper until he takes one of said actions. Id. (240-242).

In case the loading of cargo for export at New York and Philadelphia is prevented by any factor immobilizing the pier facility, such as weather conditions or a strike, cargo affected thereby shall be granted additional free time if on free time when the condition arises. If the cargo is on demurrage, first period demurrage charges shall be assessed. Demurrage-free time is allowed to cargo with respect to which the terminal has exercised its option to allow consolidation time. Id. (243-244).

At the time export cargo is received by the pier facility, a dock receipt shall be issued evidencing receipt of the cargo, which shall show the date of receipt and, except for cargo designated on dock receipts or other appropriate shipping documents as hold-on-dock for consolidation, shall identify the vessel in which the goods are to move. The identification of the vessel is made for the purposes of determining application of demurrage in case of vessel delay or cancellation or prevention of vessel loading. Id. (245).

Terminal operators at New York and Philadelphia may establish reasonable storage provisions for export cargo if the terminals have suitable facilities available, storage will not contribute to undue congestion, storage charges are assessed at reasonably compensatory levels, and export shippers elect to

use the storage services on or before the day the cargo is received at the terminal, except in case of vessel cancellation the export shipper must elect to exercise his option to utilize storage service no later than the date of announced sailing. When storage is elected, the cargo must be removed physically from the pier transit area and placed in a separate storage area, otherwise demurrage charges must be applied. *Id.* (245-246).

—*Government cargo*

As to the Commission's jurisdiction generally to authorize additional free time for "government cargo", the argument that while section 6 of the Intercoastal Shipping Act, 1933, authorizes the granting of free or reduced rates to the government, the Shipping Act, 1916, makes no exception for government cargo, ignores the fact that the Intercoastal Act is an amendment to the Shipping Act. This is supported by the legislative history of the 1933 Act, and the preamble to the 1933 Act clearly states that it is an amendment to the 1916 Act. It follows that section 6 of the 1933 Act exempts transportation for the United States from the rate provisions of the 1916 Act with the same force and effect as it does with regard to the provisions of the 1933 Act. *Assembly Time—Port of San Diego 1* (6).

Section 6 of the Intercoastal Shipping Act, 1933, like section 22 of the Interstate Commerce Act after which it was patterned, is merely declaratory of the pre-existing common law principle that the sovereign was entitled to reduced transportation rates. Any denial of reduced rate transportation to the government would have to be based on express statutory language. *Id.* (6-7).

What ever might be said for allowing additional free time on shipments for which the United States does not ultimately incur the cost of transportation on purely humanitarian or political grounds, it is clear that section 6 of the Intercoastal Shipping Act, 1933, cannot be interpreted to allow free time under such circumstances. The Attorney General has declared that the applicability of section 22 of the Interstate Commerce Act, after which section 6 is patterned, depends on whether the government receives the entire benefit of the reduced rate. The benefit must be total and direct. The ICC has historically held that it is improper to permit anyone other than the government to benefit from special rates. Section 6 "free or reduced" rates are applicable on transportation services which are performed for the government so long as it derives the direct, actual and entire benefit of the special rate. *Id.* (7-8).

Only those shipments for which the government bears ultimate responsibility for the transportation costs can qualify for additional free time, beyond the 10 days now provided, at San Diego. *Id.* (8-9).

A tariff rule providing for an additional free time period at the Port of San Diego of 10 days, excluding Saturdays, Sundays and holidays, for commodities shipped for the account of the United States Government, is legally sound. As to P.L. 480 programs, the government will have to support any request for additional free time by demonstrating that the shipments involved are in fact being shipped for its "account" and that it will derive the full benefit of the additional free time. The Port must maintain detailed records for inspection purposes of each extension granted for at least two years. *Id.* (9).

Other than the requirement that an extension of free time at San Diego be granted only on those cargoes shipped for the account of the United States Government, no conditions on the future use of the additional free time are imposed. The rule is not limited to government cargo bagged on the premises but would apply to any cargo shipped for the account of the government. *Id.* (9).

Granting of additional free time for government cargo at San Diego was not shown to be an unjust or unreasonable practice relating to the handling of prop-

erty within the meaning of section 17 of the 1916 Shipping Act. There was no indication that the implementation of an additional free time rule for government cargo would in any way interfere with or disrupt the normal flow of other cargo, otherwise contribute to port congestion, or impose any additional expense on other cargo. Id. (10).

Without deciding whether section 16 First of the 1916 Shipping Act, requiring equality of treatment between "any particular person, locality or description of traffic," could ever be violated by according "free or reduced rates" to government cargo pursuant to section 6 of the 1933 Intercoastal Shipping Act, the Commission finds that there was no evidence to indicate that undue or unreasonable preference or prejudice in violation of section 16 First would result from Port of San Diego tariff rule providing for an additional 10 days' free time for government cargoes. Id. (10).

The policy of special allowances for governmental cargo is embodied in section 6 of the 1933 Intercoastal Act and has been recognized by the Commission as supporting the allowance of additional time for such cargo. Special treatment is an advantage to all the people and benefits the public by relieving them of part of their burdens. Other transportation interests where it is pursuant to section 6, or the policy of section 22 of the Interstate Commerce Act upon which it was patterned, may offer concessions to government cargoes and the record in this case shows that some of them do so. Free time extension is not mandatory and requires a request by the cargo and consent of the terminal operator. In light of the facts that at least in some cases 15 working days may be necessary for admittance of government cargo to and transit off the piers, that very little government cargo moves out of the ports of New York and Philadelphia and that such cargo has not been shown to be an important factor in port congestion, a maximum of 15 working days free time is a reasonable allotment for government cargoes. Ports must maintain records for two years of all grants of extended free time. Free Time and Demurrage Charges on Export Cargo. 207 (217-219).

FREIGHT FORWARDERS.

Applicant for a freight forwarder license was fit, willing and able to properly carry on the business of forwarding and to conform with the law and the rules of the Commission. Her husband had conducted freight forwarding for several years without a license, but the applicant had been in bad health during that period and had had no part in her husband's activities. Applicant represented that her husband would have no part in her freight forwarding business. Violet A. Wilson, d/b/a Transmares, 30 (31-32).

An applicant for a freight forwarder license who knowingly and willfully, on two occasions, operated as a freight forwarder without a license, and who gave false information to an investigator in connection therewith, was "fit" to carry on the business of forwarding and to conform with provisions of the Shipping Act. Applicant's conduct with respect to the two shipments involved was intended to help out a client under circumstances where the applicant believed that no other carrier would serve him. The giving of false information to the investigator was an isolated instance. Applicant had retained counsel to assist him with Shipping Act questions and proposed to seek counsel of the Commission's Atlantic division in New York on problems relating to his operations. L.T.C. Air Cargo, Inc.—Freight Forwarder License. 267 (276-278).

GENERAL ORDER 15. See Terminal Operators.

JURISDICTION.

The lessor of phosphate elevator facilities, as well as the lessee, was a "person" subject to the Shipping Act. The lessor's own admissions and its actual activities were more than sufficient to make it a "person" subject to the Act. Although the

lease granted the lessee exclusive right to operate the elevators, the lessor and lessee had stipulated that they both carried on the business of furnishing the phosphate elevator facilities. The lessor admittedly participated in the operation of the elevators and all of its outstanding stock was owned by the lessee. The lessor exercised a measure of control over the elevator by entering into a contract with a tugboat operator conditioning the availability of the elevators to vessels which employed the operator. *A. P. St. Philip, Inc. v. Atlantic Land and Improvement Co. and Seaboard Coast Line Railroad Co.* 166 (171).

Ordinarily, tugboat service does not constitute a terminal function within the scope of section 17 of the *Shipping Act*. However, where the terminal operator has usurped the normal function of the carrier and has made access to the terminal facilities dependent on a commitment to a tugboat operator for tug services under an exclusive-right contract, the furnishing of tugboat service has, in effect, been transformed into a terminal function. By executing the exclusive contract, the terminal operator subjects itself to the jurisdiction of the *Shipping Act*. *Id.* (172).

PRACTICE AND PROCEDURE.

The Commission reminds counsel who appear before it that acrimony and *innuendo* have no place before an administrative tribunal and attempts to intrude them there can only prejudice the cause in whose behalf they are summoned. *Rejection of Tariff Filings of Sea-Land Service, Inc.* 200 (204).

PREFERENCE OR PREJUDICE. See *Free Time*; *Terminal Operators*.

RATES. See also *Surcharges*.

The purpose of section 18(b) of the 1916 *Shipping Act* is to provide the shipping public with advance notice of rates certain to be charged and which will be charged equally to all shippers for the same services. This does not mean that in all cases and under all circumstances the conditions will prevail which permit strict adherence to these requirements. Congress did not intend to legislate away the traditional and necessary relationships between the shipper and carrier. *C. H. Leavell & Co. v. Hellenic Lines, Ltd.* 76 (85).

REPARATION.

Carrier is permitted to refund a portion of freight charges on shipments in foreign commerce where an erroneous rate was filed with the Commission by reason of administrative error. The carrier had agreed to apply the rates of another carrier and had filed an amended erroneous rate. *Chevron Chemical Co. Ortho Div. v. Nippon Yusen Kaisha Lines Ltd.* 47 (48).

Application for permission to refund a portion of freight rates on shipments in foreign commerce was timely where it was deposited in the United States mail within 180 days of the earliest shipment involved. *Id.* (49).

Carrier was permitted to refund a portion of freight charges on a shipment of asphalt floor tiles from San Francisco to Saipan in the Trust Territory of the Pacific Islands. The carrier had agreed with the Trust Territory that the carrier would assess rates no higher than those in effect for shipment moving on another line to the Trust Territory via Guam. A rate for the commodity was omitted from the tariff inadvertently, and partly due to destruction of certain records by a typhoon. *B. H. Loveless & Co. v. Micronesia Interocean Line, Inc.* 92 (93).

Carrier was permitted to refund a portion of freight charges on a shipment of lamps from Honolulu to Karor, Palau, western Caroline Islands. The carrier had

agreed with the Trust Territory of the Pacific Islands that the rates assessed would be no higher than those in effect for shipments moving on another line to the Trust Territory via Guam. The omission of lamps from the tariff was in the nature of an administrative error, partly due to destruction of certain records by a typhoon. *Hawaii State Steel Co., Ltd. v. Micronesia Interocean Lines, Inc.* 95 (96).

Carrier was permitted to refund a portion of freight charges on a shipment of insecticides and plastic pipe fittings from San Francisco to Saipan in the Trust Territory of the Pacific Islands. The carrier had agreed with the Trust Territory not to charge rates higher than those in effect on shipments moving on another line to the Trust Territory via Guam. Omission of the commodities from the tariff was in the nature of an administrative error, partly due to destruction of records during a typhoon. *B. H. Loveless & Co. v. Micronesia Interocean Line, Inc.* 98 (99).

Carrier was permitted to refund a portion of freight charges on shipments of copper sheets and auto parts from San Francisco to the Trust Territory of the Pacific Islands. The carrier had agreed with the Trust Territory not to charge rates higher than those in effect for shipments moving on another line to the Trust Territory via Guam. When issuing its tariff, the carrier listed only rates on commodities known to it to be moving in the trade, being to a degree handicapped by destruction of records during a typhoon. The rate was omitted from the tariff by reason of administrative mistake. Refund on one shipment was denied since the application was filed more than 180 days subsequent to shipment. *Walter Plunkett & Co. v. Micronesia Interocean Line, Inc.* 101 (103-104).

Carrier was permitted to refund a portion of freight charges on a shipment of brooms from San Francisco to Truk in the Trust Territory of the Pacific Islands. The carrier had agreed with the Trust Territory that it would not charge rates higher than those in effect on shipments moving on another line to the Trust Territory via Guam or moving on other lines to the Territory via Japan. In constructing its tariff the carrier tried to obtain statistics showing commodities moving in the trade via Japan but was unable to do so partly because of destruction of records due to a typhoon. Omission of a rate for brooms in the tariff was in the nature of an administrative error. *Enterprise Shipping Corp. v. Micronesia Interocean Line, Inc.* 105 (106).

Carrier was permitted to refund a portion of freight charges on a shipment of commodities from San Francisco to Majuro, Marshall Islands and Yap, Western Caroline Islands. The carrier had agreed with the trust Territory of the Pacific Islands not to charge rates higher than those in effect on shipments moving on another line to the Trust Territory via Guam. In issuing its tariff the carrier was handicapped by destruction of records by a typhoon. Omission of the commodities from the tariff was in the nature of an administrative error. *Carlton J. Siegler v. Micronesia Interocean Line, Inc.* 107 (109).

Carrier was authorized to refund a portion of freight charges on shipment of insulated copper wire and cable to the Western Caroline Islands from San Francisco. An agreement between the Trust Territory of the Pacific Islands and the carrier called for rates no higher than those in effect on shipments on vessels of another carrier via Guam or on vessels of other carriers via Japan, to the Trust Territory. The shipment was charged on the basis of a cargo N.O.S. rate whereas it could have been moved at a lower rate via another carrier. *I.G.E. Export Division v. Micronesia Interocean Line, Inc.* 111 (112).

Carrier was authorized to refund portion of freight charges on shipment of automotive storage batteries to the Mariana Islands from San Francisco. An agreement between the Trust Territory of the Pacific Islands and the carrier called for rates no higher than those in effect on shipments on vessels of an-

other carrier via Guam or on vessels of other carriers via Japan, to the Trust Territory. The shipment was charged on the basis of a cargo N.O.S. rate whereas it could have moved at a lower rate via another carrier. *Discal Corp. v. Micronesia Interocean Line, Inc.* 114 (115).

Carrier was permitted to refund a portion of freight charges on a shipment of tiles from Los Angeles to Karor, Palau, Western Caroline Islands. The carrier had agreed with the Trust Territory of the Pacific Islands not to charge rates higher than those in effect for shipments moving on another line to the Trust Territory via Guam. In constructing its tariff the carrier was handicapped by loss of records due to a typhoon. Omission of a rate for tiles in the tariff was in the nature of an administrative error. The complaint was timely filed since it was mailed to the Commission within 180 days of the date of shipment. General Order 13 governing the filing of tariffs by common carriers in foreign commerce is not relevant to the filing of special docket applications or any other pleading. *International Materials Corp. v. Micronesia Interocean Line, Inc.* 117 (119).

Application seeking permission to waive collection of a portion of freight charges in foreign commerce was timely filed where it was originally transmitted to the Commission within the statutory period of 180 days from date of shipment. The application was not signed by Lykes and the signature of the conference secretary was not notarized. The application was returned to the conference for the notarized signature of an official of Lykes. Applicant, however, secured the signature of the New Orleans complainant, but complied with the notarization suggestion by having the signature on the original application notarized abroad. The notary's certificate was dated subsequent to the expiration of the 180-day period and the application was forwarded to the Commission. Public Law 90-298, under which the complaint was brought, does not require verification or signature of the complainant, only that a common carrier by water or conference of such carriers file within 180 days of date of shipment. The Commission assumed jurisdiction over the application as of the date of the original filing and the fact that the application was returned for compliance with formalities set forth in a Commission rule would not alter the original date of filing. *Messrs. DaPrato—Florence as Buying Agent of Messrs. United China and Glass Co.—New Orleans v. Med-Gulf Conference on Behalf of Messrs. Lykes Bros Steamship Co.* 135 (136-137).

Carrier was permitted to waive collection of a portion of freight charges on a shipment of glassware from Leghorn, Italy, to New Orleans. The rate applied to the shipment had been filed late due to reasons beyond the control of the parties and the late filing was properly considered as resulting from inadvertence. *Id.* (137).

Carrier is permitted to refund a portion of freight charges on a shipment of boom boats to East Malaysia. Failure of the conference to publish a rate which had been agreed upon by the conference was an administrative error. *Harrisons & Crosfield (Pacific) Inc. v. Nedlloyd & Hoegh Lines.* 176 (177).

An application for refund of freight charges in foreign commerce is timely filed if it is deposited in the United States mails for delivery to the Commission in Washington within 180 days of date of shipment. The postmark date shall be considered the "filing" date. Under General Order 13, a tariff is filed only when actually received by the Commission at its offices in Washington. This requirement is necessary to secure uniformity and equality of treatment in rates and services to all shippers. Requiring the public establishment of tariff schedules prevents special and secret agreements thereby suppressing unjust discrimination and undue preferences. There is no reason to impose

such a strict requirement on the filing of special docket applications. *Ghiselli Bros., Inc. v. Micronesia Interocean Lines, Inc.* 179 (181-182).

Refund of a portion of freight charges on a shipment of bagged potatoes from San Francisco to the Trust Territory of the Pacific Islands was permitted. The carrier and the Trust Territory had agreed that the carrier's rates would be no higher than those in effect for shipments moving on another line to the Trust Territory by way of Guam, or moving on vessels of other carriers serving the Trust Territory via Japan. Failure to file a rate for potatoes was an administrative error which justified relief. *Id.* (184, 186).

Carrier was permitted to refund portions of freight charges on shipments to the Caroline and Marshall Islands. The carrier had agreed with the Trust Territory of the Pacific Islands that the carrier's rates would be no higher than those in effect for shipments moving on another line to the Trust Territory via Guam, or on vessels of other carriers via Japan to the Trust Territory. The shipments were carried at a Cargo N.O.S. rate whereas they apparently could have moved at lower rates via other carriers. Refund on a shipment to the Mariana Islands was barred as untimely filed. *Ansor Corp. v. Micronesia Interocean Line, Inc.* 189 (190).

Carrier was permitted to refund a portion of freight charges on a shipment where, as a result of a clerical oversight, the agent of the carrier failed to file a temporary rate reduction with the Commission. *Robert S. Osgood, Inc. Los Angeles v. Norton, Lilly & Co., Inc.* 197 (198-199).

An application to refund freight charges in foreign commerce is "filed" with the Commission if it is deposited in the United States mails for delivery to the Commission in Washington within the time specified by statute (180 days). *Carlton J. Seigler v. Micronesia Interocean Line, Inc.* 257 (259).

Application of carrier to refund a portion of freight charges on a shipment from San Francisco to places in the Trust Territory of the Pacific Islands was granted. The carrier and the Trust Territory had agreed that the carrier's rates would be no higher than those in effect on shipments moving via another carrier to the Trust Territory by way of Guam, or moving on vessels of other carriers by way of Japan. The carrier was handicapped in obtaining statistics showing commodities, etc. moving in the trade, partly because of destruction of records due to a typhoon. Failure to file a lower rate at which the shipment could have moved via another carrier was an administrative error. *Id.* (261).

Application to refund a portion of freight charges on a shipment of household effects from New York to the Virgin Islands must be denied, where the carrier's agent quoted a rate which had been previously deleted from the tariff. There was no allegation and no record showing that the rate duly applied was unreasonable. *Davies, Turner & Co. v. Atlantic Lines, Ltd.* 279 (280).

STEVEDORING. See Terminal Operators.

STORAGE. See Free Time.

SURCHARGES.

While section 18(b) of the 1916 Shipping Act does not preclude reference to an implementation of emergency language in tariffs and bills of lading, the Commission does not approve unlimited use of such practices. It is not a case of conflict between the tariff filing requirements of section 18(b) and established maritime law. Rather, the Commission is confronted with the matter of the public interest. Consequently, there must be a balancing of the interests of a need for adherence to section 18(b), a recognition of the contingencies of ocean

transportation and an obedience to public interest standards. *C. H. Leavell & Co. v. Hellenic Lines Ltd.* 76 (85-86).

Resort to clauses in tariffs or bills of lading which effect a change in the tariff rate is closely circumscribed by the policy of section 18(b) of the 1916 Act. Only where it is impossible to file a new rate (and seek special permission where required) will a carrier be allowed to depart from the tariff rate pursuant to emergency provisions. For example, this means that the emergency must occur while the vessel is at sea, or at least after the cargo has been loaded. The emergency must be such that it was unforeseeable to a prudent steamship operator in the exercise of a high degree of diligence. *Id.* (86).

A surcharge provided for in a bill of lading was not improperly assessed because it was not provided for in tariff. The specimen bill of lading was filed with the Commission pursuant to section 18(b)(1) of the 1916 Act. By that circumstance it became part of the filed tariff; no additional effect could have been obtained by mentioning it in the title page of the "tariff," i.e., the document showing rates and rules, which in common parlance is usually referred to as the carrier's tariff. *Id.* (87).

Where, due to the closing of the Suez Canal, a carrier diverted scheduled voyages to a Red Sea port via the Cape of Good Hope, surcharges were authorized by a tariff rule expressly directed to closure of the canal and by a provision of the bills of lading entitling the carrier to reasonable extra compensation under various situations, but not by the Baltic Suez Stop Clause allegedly incorporated by reference into the bill of lading. The Clause was not on file with the Commission and did not appear to be readily available to shippers. *Id.* (88-89).

The burden of showing that surcharges were unreasonable was upon complainant, although the fact of substantial surcharges alone was sufficient to require the carrier to come forward with some proof of their propriety. A showing of increased voyage distance and duration was sufficient to overcome any presumption of unreasonableness. Surcharges on shipments which had to be diverted over a longer route, due to closing of the Suez Canal, were reasonable on the basis of the record. *Id.* (89).

Surcharges were not unreasonable because the carrier failed to come forward with dollar-and-cents justification for the level of its surcharges, or because competitive carriers did not assess such surcharges. The fact that competitive carriers, who may or may not have found themselves in similar situations, did not assess emergency surcharges was immaterial. *Id.* (90).

Tariff rule which did not specify a sum certain for the amount of surcharges to be levied in the event of an emergency was not defective because it failed to set forth the surcharge to be applied in the event the Suez Canal was closed. The closing of the Canal was not predictable. *Id.* (90).

TARIFFS. See also Rates; Surcharges.

Specific commodity description "conduit or pipe, cement containing asbestos fibre" included an asbestos fibre-cement air duct. Tariff terms should be interpreted reasonably. It was reasonable to interpret the tariff description to include an air duct made of cement and asbestos fibre. To conclude otherwise would result in a strained and unnatural construction. The accepted meaning of the terms "conduit", "pipe", and "duct" was such that the terms could be used interchangeably for rating purposes. It was not necessary to look to the use of the commodity or the manufacturer's description for sales purposes to determine its identity for transportation purposes. That would only be necessary when it was not clear whether a commodity would be carried under a specific description or

when there were two rather specific descriptions under which the commodity might be carried. Johns-Manville Products Corp.—Petition for Declaratory Order. 192 (194-195).

Rejection of reduced rates of a conference member on wines and spirits moving from Grangemouth, Scotland to east coast ports was improper and the tariffs were valid and properly filed. The Commission does not decide whether a rejection under section 18(b) of the 1916 Act may be supported by a violation of another section of the Act, but is well aware of the difficulties and dangers in such a course. The Commission's Bureau of Compliance had rejected the rates as contrary to the terms of the basic conference agreement and to the terms of the basic conference agreement and to the terms of the conference's wine and spirits' dual rate agreement. Difficulties inhered in the position that the Commission must have the inherent power under section 18(b) (which provides for rejection of any tariff not in conformity with the section and rules prescribed thereunder). The carrier pointed to an article of the basic agreement itself as authorizing its reduced rates, but several questions of fact were posed under the cited article and the provisions thereof were difficult to reconcile with the language of a provision of the wine and spirits' dual rate contract which the carrier contended disposed of the assertion that its reduced rates violated section 14(b) and opponents contended to the contrary. An investigation would be instituted to resolve the issues raised. Rejection of Tariff Filings of Sea-Land Service, Inc. 200 (202-203).

Where a carrier had not performed a service advertised in its tariff, and had not carried any cargo since 1962, although willing to so do, the tariff should be cancelled. The carrier could promptly file a new tariff if conditions changed. Ghezzi Trucking, Inc.—Cancellation of Inactive Tariff. 253 (255).

TERMINAL LEASES.

Lease of public containership terminal was approved. The lease was a non-cancellable ten-year lease, which was admittedly compensatory over the ten-year period on the basis of the total of minimum yearly rentals. However, some limit must be placed on the number of years that the minimum rental may be less than fully compensatory. There was ample justification for the lack of a minimum rental for the first year, particularly because of the substantial investment in terminal equipment to be made by the lessee. The second year's rental, and any succeeding year's rental must be not less than compensatory. Agreement No. T-2214 Between the City of Long Beach, California, and Transocean Gateway Corp. 70 (74-75).

In requiring equality of treatment by a port authority as between two lessees of space, the Commission will not require the port to take into consideration improvements to be made by one of the lessees in determining a level of compensation for the premises to be leased. Earlier assumption that the other lessee's lease was adjusted for improvements was not supported by the record. Also, the Port Authority was not requiring the improvements. Ballmill Lumber & Sales Corp. v. Port of New York Authority. 262 (265).

TERMINAL OPERATORS. See also Free Time; Jurisdiction; Terminal Leases; Truck Loading and Unloading.

The language of section 16 forbidding "any undue or unreasonable prejudice or disadvantage in any respect whatsoever" is specifically directed against every form of unjust discrimination against the shipping public. The principle of equality forbids any difference in charge which is not based on a difference in service.

Where a terminal exacted a "usage charge" of \$1.00 per 1,000 board feet of lumber from a stevedore doing business at the terminal unloading lumber from vessel to place of rest, and the charge applied only to movement of lumber and to no other commodities, it followed that, unless the services and facilities rendered incident to the unloading and handling of lumber justified the charge assessed, discrimination within the contemplation of section 16 of the 1916 Act was established. On the record the terminal had not justified imposition of a "usage charge" on lumber. Therefore, to the extent the charge was unrealistic in terms of the terminal facilities and services furnished, it subjected a "description of traffic", namely lumber, to an "undue and unreasonable prejudice or disadvantage" in violation of section 16. *Pittston Stevedoring Corp. v. New Haven Terminal, Inc.* 33 (35).

The test of whether a "usage charge" of \$1.00 per 1,000 board feet of lumber assessed a stevedore unloading lumber from vessels to place of rest was an unreasonable or unjust rate and practice in connection with the receiving of property, was whether the charge was reasonably related to the services rendered. *Id.* (42).

Where a stevedore was assessed a "usage charge" by a terminal for unloading lumber from vessels to a place of rest; the terminal tariff included a charge for wharfage which was applied against the vessel or the cargo on all cargo conveyed over or onto the wharf; and the stevedore performed the unloading service as contractor or employee of the vessel, the use of the wharf by the stevedore for that purpose could not be considered in determining the reasonableness of the "usage charge", General Order 15 limiting usage charges to those "not otherwise specified." The services or facilities furnished to the stevedore's employees were also used by longshoremen employed by the terminal during its own stevedoring operations. The terminal's intent was to base the usage charge on services provided for longshoremen. A lumber stevedoring gang consists of 16 men. The intermittent use of the facilities or services by 16 men bore no reasonable relationship to the charge made. *Id.* (43).

Justification for a "usage charge" of \$1.00 per 1,000 board feet of lumber assessed by a terminal against a stevedore for unloading lumber from vessels to a place of rest was not found in the position that if a competing stevedore obtained business which the terminal might have obtained, the terminal was deprived of the opportunity to contribute lumber stevedoring profits to overall overhead and gross profit. Granting that the terminal was entitled to a return on its investment in terminal facilities, a rate set forth in a tariff remains subject to the statutory requirement that it be just and reasonable. The fact that the terminal may lose an opportunity to earn revenue and profit thereby does not relieve it from the statutory requirement that it must establish and maintain just and reasonable practices (rates) in connection with receiving property. Nor is that fact justification for escape from the Supreme Court's mandate that a charge must be reasonably related to the services rendered. The terminal may assess a usage charge on persons using its facility for a gainful purpose, but it must desist from the \$1.00 per 1,000 board feet assessment. *Id.* (43-44).

Requirement that a terminal cease and desist from imposing an excessive charge and substitute a charge based on services rendered is clearly within the Commission's authority. *Id.* (44).

The practice of conditioning the availability of terminal facilities only to vessels which utilize the services of a designated tugboat operator is unreasonable or unjust under section 17. The arrangement eliminates competition and is prima facie unjust and unreasonable, not only to tugboat companies seeking

to render service, but also to the carriers they might serve. No attempt was made by the lessor and lessee of the facilities to justify the arrangement as being necessary to the operation of the terminal. Justification based on the size and location of the facilities in relation to other facilities at the port was not persuasive. *A. P. St. Philip, Inc. v. Atlantic Land and Improvement Co. and Seaboard Coast Line Railroad Co.* 166 (172-173).

Arrangement between terminal operator and tugboat operator giving the latter the exclusive right to perform towing services for a phosphate elevator resulted in undue and unreasonable preference and prejudice in violation of section 16. The purpose of section 16 is to impose on persons subject to the act the duty to serve the public impartially. In no other area is this requirement of equality of treatment between similarly situated persons more important than in the terminal industry. Terminals are for all practical purposes public utilities. The arrangement unlawfully preferred one tugboat company to the prejudice of others and also unlawfully prejudiced those vessels using the services of the other tugboat companies. No justification for the arrangement was shown and, in fact, complainant tugboat company had the equipment and expertise to provide excellent service. *Id.* (174).

TRUCK LOADING AND UNLOADING.

Implementation of terminal conference tariff truck loading and unloading definition which includes a charge to the trucker on cargo for movement between transit shed and truck tailgate constitutes an unjust and unreasonable practice under section 17 of the 1916 Shipping Act. *Truck Loading and Unloading Rates at New York Harbor.* 51 (60-61).

The carrier's duty ends at place of rest of the cargo, but the place must be "accessible" to the consignee. The carrier's duty is not fulfilled by bringing cargo to rest in a transit shed when the shed is not accessible to the consignee or cargo receiver. It is the carrier's duty to provide adequate terminal facilities which are convenient and safe for delivery and receipt of cargo, and if, as is the case at the Port of New York, cargo can only be brought to truck tailgate after first being deposited in a transit shed in order to prevent chaos on the piers, the necessary movement to truck tailgate is part of the service required to be provided by the ocean carrier and a separate charge cannot be assessed the cargo receiver. *Id.* (62).

Cargo at rest in a transit shed might be considered to be accessible in that the cargo receiver can simply send in a forklift, hilo, or whatever, and move the cargo to the truck, if the cargo receiver were permitted to so use his own equipment or were not assessed an additional charge for the movement. To say that cargo is accessible because the cargo receiver can send in a terminal operator's truck is not reasonable. Neither is it logical to say cargo is accessible to the receiver when the receiver is required to pay an additional charge to obtain the cargo or to bring the cargo to truck tailgate. Since it is the obligation of the ocean carrier to render the cargo reasonably accessible to the receiver, any service performed by the terminal operator which contributes to fulfilling that obligation is for the account of the carrier. This does not change the rule that the carrier is not required to make delivery to the consignee. *Id.* (62).

The Court's opinion in the American President Line case does not bar the Commission from finding the carrier responsible for movement of cargo to a place adjacent to truck tailgate. The Court was worried about a shift in the free time and demurrage requirements to preclude demurrage payments to a carrier even after it had properly tendered cargo for delivery for the entire free time period.

A carrier must tender goods for delivery, it need not deliver them to consignees. A proper tender is not made at the transit shed at the Port of New York when the cargo receiver has no access to that area. The carrier is not required to load or to provide labor for loading. Id. (63-64).

While the allegations about double payment by the cargo or double compensation for the carrier or the terminal operator may not be conclusively shown to be true, in connection with a terminal tariff truck loading and unloading definition which includes a charge to cargo for movement between transit shed and truck tailgate, the allegations sufficiently point out the potential dangers inherent in the use of the definition in connection with the stevedoring contracts in use at the Port of New York. The existence of these real and potential dangers only accentuates the desirability and necessity of requiring a change in the tariff definitions to properly allocate between carrier and cargo the costs of the various aspects of the loading and unloading service. Id. (65).

A change in the tariff truck loading definition which includes a charge to cargo for movement between transit shed and truck tailgate to relieve the cargo owner or his agent, the truckman, of the cost of the movement would not be a departure from the "user concept" which is that the cost of a service must be borne by the users thereof, and that accordingly the rates charged the users must be sufficient to produce revenues that will meet costs and a reasonable profit. To make carriers bear the cost of the service would not compel them to subsidize all or part of the costs of the service rendered to truckmen. Carriers would not in fact be subsidizing truckmen. The carriers would be paying for a movement to tailgate, a service which is part of their legal obligation to tender for delivery. Id. (65).

The Commission has authority to investigate unlawful rating practices under section 17 of the 1916 Act. With respect to the argument that the Commission's ratemaking authority is limited to carriers, a federal court has held that the power to prescribe just and reasonable rates only with regard to carriers does not preclude the regulation of rates charged by other persons subject to the 1916 Act. Id. (66).