FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 551

EUROPAM PAPER & FIBRE CORP.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

December 28, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on December 28, 1977.

IT IS ORDERED, That applicant is authorized to waive collection of $1,300.00 of the charges previously assessed Europam Paper and Fibre Corp.

IT IS FURTHER ORDERED, That applicant shall 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 551, that effective July 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from July 1, 1977, through July 12, 1977, the rate on 'Paper,' waste is $50.00 per 2,240 lbs. Minimum 20 WT per container subject to all applicable rules, regulations, terms and conditions of said rate and this tariff".

IT IS FURTHER ORDERED, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 551

EUROPAM PAPER & FIBRE CORP.

v.

SEA-LAND SERVICE, INC.

Adopted December 28, 1977

Application to waive collection of portion of freight charges granted.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3) of the Shipping Act, 1916, Sea-Land Service, Inc. (Carrier) has filed a timely (within 180 days of July 6, 1977, the date of the involved shipments) application for permission to waive collection of $1,300 aggregate freight charges from the shipper Europam Paper & Fibre Corp. The aggregate freight charges actually collected were $26,000. If not waived, the $1,300 would have to be paid as the 408 Bales of Wastepaper under Sea-Land Bill of Lading 975718009–6, dated July 6, 1977, and the applicable rate would be $13,650 and the 425 Bales of Wastepaper under Sea-Land's Bill of Lading 975718085–6, dated July 6, 1977, and applicable rate would also be $13,650, a total of $27,300. The $26,000 were paid and borne by Europam Paper & Fibre Corp., who attests to same as well as concurring in this application by affidavit executed September 30, 1977, attached to this application.

Sea-Land Service, Inc. Tariff No. 168–B—FMC–73 is the applicable tariff. The application for waiver states these facts in support:

Effective May 9, 1977, special rates were established on Wastepaper in both Section 1 (France and Italy) and Section 2 (Spain) of Sea-Land Tariff 168–B. Special rate was $50.00 W, minimum of 20 WT per container through June 30, 1977.

On June 28, 1977, it was Sea-Land's intent to extend this special rate in Section 1 only through July 7, 1977. However, due to a clerical error, this extension was made in Section 2 on proposal #4482.

[1] This decision became the decision of the Commission December 28, 1977.

On July 13, 1977, we realized our error and immediately published a $50.00 rate in *Section 1 through August 11, 1977.*

The shipper on whose behalf we are filing this application, moved their shipment on July 6, 1977, and would have been afforded a $50.00 rate had it not been for our error.

The freight under B/L referred to above shipped from Charleston, S.C., to Livorno, Italy, on Sea-Land's vessel *S.S. Baltimore/Market 083E,* the rate applicable at the time of shipment was $52.50 per 2,240 lbs., minimum 20 WT per container, Sea-Land Tariff 168B—FMC–73, Item 5860; the rate sought to be applied is $50.00 per 2,240 lbs., minimum 20 WT per container.

Attention is called to page 2, paragraph (3) of the application: "There are additional shipments which moved via respondent during the same period of time at the rates set forth in (1) above. Special Dockets Applications will be filed for relief concurrent with this application."

Upon consideration of the above, the Presiding Administrative Law Judge deems the application for permission to waive collection of portions of the freight changes comports with Rule 92, Special Docket Application, Rules of Practice and Procedure, and section 15(b)(3) of the Shipping Act, referred to above, and the error is one within their contemplation.

Therefore, upon consideration of the documents presented herein, it is found:

1. There was an error of a clerical or administrative nature (corrected by effective tariff before this application was filed), which resulted in having freight charge due if not waived.

2. The waiver requested will not result in discrimination as between shippers.

3. The application, having been timely filed and having shown acceptable cause, should be granted.

Wherefore, it is

Ordered

The application be and hereby is granted.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
December 5, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 550

U. S. INFORMATION AGENCY

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

December 28, 1977

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on December 28, 1977.

IT IS ORDERED, That applicant is authorized to refund $2,841.38 of the charges previously assessed the U. S. Information Agency.

IT IS FURTHER ORDERED, That applicant shall 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 550, that effective March 28, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from March 28, 1977 through April 14, 1977, the rate on 'Scenery and Wardrobes, Theatrical' is $98.51 cm subject to all applicable rules, regulations, terms and conditions of said rate and this tariff".

IT IS FURTHER ORDERED, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 550

U. S. INFRMATION AGENCY

v.

SEA-LAND SERVICE, INC.

Adopted December 28, 1977

Application granted.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARIS, ADMINISTRATIVE LAW JUDGE

Sea-Land Service, Inc. (Sea-Land), makes a timely (within 180 days from April 4, 1977, the date of the involved shipment) application for permission to refund $2,841.38, a portion of the $12,008.00 aggregate freight charges actually collected, to the complainant U. S. Information Agency.

The involved shipment was of Scenery & Wardrobes, Theatrical in four containers weighing 25,987 lbs., measuring 86.51 cm on April 4, 1977, from Portland, Oregon, via Houston to Antwerp, Belgium. The rate applicable at the time of the shipment was 131.35 cm (Group 2 Service A) Eastbound Pacific Coast European Joint Container Freight Tariff No. 1 ICC No. 1 FMC No. 1, Item 655, 4670. The rate sought to be applied is the 131.35 less 25% = $98.51 cm.

The 25% reduction, as set out in the circumstances in the application in support of refund, was agreed to at a March 17, 1977, meeting of Agreement 10052 and PCEC, for the U. S. Government Bicentennial Exhibit, effective March 28, 1977, through June 30, 1977. The PCEC published the new freight rate effective March 28, 1977, but, due to an Agreement 10052 staff administrative error the change was not issued and made effective in the Eastbound Pacific Coast European Joint Container Freight Tariff No. 1 until April 15, 1977. Second Revised Page 264 of the said tariff on file shows the change effective April 15, 1977.

It is deemed the application for refund comports with Rule 92, Special Docket Applications, Rules of Practice and Procedure, 46 CFR 502.92(a)

[1] This decision became the decision of the Commission December 28, 1977.

and section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817 (as amended by Public Law 90–298. The administrative error recited in the instant application should be accepted as warranting granting the application.

Therefore, upon consideration of the documents presented herein, it is found:

1. There was an error of an administrative nature (corrected by effective tariff before this application was filed), which resulted in the failure to apply the discount now sought to be applied.

2. The refund requested will not result in discrimination as between shippers.

3. The application, having been timely filed, should be granted.

Wherefore, it is,

Ordered,

The application be and hereby is granted.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
December 1, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 541

A. E. STALEY MFG. CO., DECATUR, ILLINOIS

v.

MAMENIC LINE

NOTICE OF ADOPTION OF INITIAL DECISION

January 11, 1978

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

It is ordered, that the application herein for permission to waive collection of a portion of freight charges is denied.

It is further ordered, that Mamenic shall file an affidavit of compliance with the terms of the initial decision within thirty days of service of this order.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 541

A. E. STALEY MFG. CO., DECATUR, ILLINOIS

v.

MAMENIC LINE

Adopted January 11, 1978

Application denied. Respondent ordered to collect balance of freight charges.

INITIAL DECISION OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE[1]

By application filed August 15, 1977,[2] respondent Mamenic Line, requested permission to refund a portion of the freight charges collected on a shipment of Dextrine, in bags, from New Orleans, Louisiana, to Puerto Limon, Costa Rica. The shipment, weighing 20,200 pounds and measuring 600 cubic feet was shipped under a bill of lading dated March 11, 1977.

The application states that the tariff rate applicable at the time of shipment was $70 weight (W)[3] or measurement (M),[4] whichever yielded the greater revenue. There was also a $3.75 bunker surcharge applicable to either W or M, depending on which of those standards was used in rating the commodity. The freight charges paid by the complainant, shipper, A. E. Staley Mfg. Co.,[5] was computed on the measurement basis, because measurement yielded the greater revenue, and amounted to $1,106.25.[6]

The rate sought to be applied is $70 W plus bunker surcharge of $3.75

[1] This decision became the decision of the Commission January 11, 1978.
[2] The Secretary of the Commission returned an incomplete filing made May 4, 1977.
[3] W = per ton of 2,000 pounds.
[4] M = per unit of 40 cubic feet.
[5] Daniel F. Young, a licensed freight forwarder, paid the freight charges as agent for and on behalf of Staley.
[6] The calculation follows:

15 units × $70 = $1,050
15 units × $3.75 = 56.25
Total = $1,106.25

W. At this rate the charges would amount to $774.87.[7] Permission is sought to refund the difference of $361.38.

The following explanation appears in the application:

On Feb. 15, 1977, Mamenic Line, through their agent in Chicago, U. S. Navigation Inc., was asked by Staley to establish a rate of $70.00 on Dextrine to Puerto Limon, Costa Rica. Request was granted and shipment was made. Freight was then assessed on original rate of $111.00 W/M. Mamenic Line advised they had failed to use new rate which they had established at $70.00 W/M rather than $70.00 W. Staley complained to Mamenic that the original agreed upon rate was not the rate they published. They were asked to review the matter and let us know if there was any means to recover our losses and they suggested this approach.

The documentation attached to the application clarifies the attenuated explanation. The parties mean to say: Prior to the time of shipment there was no line item for Dextrine in Mamenic's tariff. Consequently, absent other arrangements the shipment would have carried the tariff N.O.S. rate of $111 W/M. In advance of the shipment, an agreement was reached whereby Mamenic would publish and file a tariff revision listing Dextrine as a line item carrying a rate of $70 W.[8] However, through clerical error, the published tariff bearing an effective date of February 28, 1977, showed a rate of $70 W/M for Dextrine.[9] Thereafter, Mamenic issued an initial billing to Staley reflecting the N.O.S. rate of $111 W/M. Later a corrected bill showing a rate of $70 W/M was issued by Mamenic and was paid by Staley. When the clerical error in the tariff was called to Mamenic's attention, it published another tariff revision bearing the effective date of April 18, 1977, showing a rate of $70 W for Dextrine.[10]

The application fails to state whether there were shipments made by shippers, other than Staley, of the same or similar commodity which were carried by Mamenic during approximately the same period of time at the $70 W/M rate, as required by Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in

[7] The calculation follows:

10.1 tons × $70 = $707
10.1 tons × $3.75 = 37.87
Total = $744.87

[8] A written statement from Mamenic's agent confirming the agreement is in the record.

[9] Freight Tariff No. 21, FMC No. 17, Correction No. 92, 1st revised page 30.

[10] Freight Tariff No. 21, FMC No. 17, Correction No. 94, 2nd revised page 30. Physically, the tariff is printed in a way which might lead to the erroneous conclusion that Dextrine, in bags, would not be entitled to the $70 rate. As pertinent, the line items of commodities appears as follows:

Detergent Alkylates, in bulk, in drums
[R] Dextrine
Dry Goods . . .

From the foregoing, at first glance it would appear that Dextrine is a type of Detergent Alkylate and had to be shipped in drums to be rated at $70. But, Dextrine is a polysaccaride and not a Detergent Alkylate. The indentation of Dextrine after [R] (for reduction) is bad form but is substantively immaterial.

failing to file a new tariff is derived from the provisions of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 17(b)(3).[11] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides as pertinent:

Provided, however, That the Federal Maritime Commission may in its discretion and for good cause shown 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 would be based: *Provided further,* That the carrier on 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.

These facts would seem to satisfy all the requirements for relief under section 18(b)(3), but one essential ingredient is missing in connection with both 1st and 2nd revised pages 30. An examination of the tariffs on file with the Commission discloses that neither of those revisions was ever filed with the Commission and that original page 30 is still in effect.[12]

The upshot of the failure to file the two revisions requires the findings that (1) this Special Docket application must be denied because it fails to satisfy the requirements of section 18(b)(3), and (2) the shipment must be rated and charges must be collection at the N.O.S. rate of $111 W/M, the effective rate at the time of shipment.

It will be recalled that Dextrine is a polysaccaride. Assuming, but not deciding, that this polysaccaride shipment may be entitled to a rating other than N.O.S. under Mamenic's tariff, finding (2), above, is without prejudice to the filing of a complaint by Staley pursuant to section 22 of

[11] The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a).

[12] The Commission has fashioned a procedure designed to protect against clerical or administrative error, in processing filed tariffs, on the part of the Commission's staff. That procedure is published at 46 CFR 536.2(e), which provides:

(e) All tariffs filed with the Commission, except temporary filings as permitted hereinafter in § 536.6(c)(1) shall be accompanied by a letter of transmittal which shall clearly identify the tariff and pages involved. If the sender desires a receipt, a duplicate of such letter must be furnished together with an envelope approximately $4^1/_2$ by $9^3/_4$ inches completely blank except for the name and address of the sender. The duplicate will be stamped with the date of receipt by the Commission and returned to the sender. If a duplicate and an envelope are not submitted, a receipt will not be furnished.

Telephone conversations with Mamenic's general agent, United States Navigation, Inc., reveal that it is the agent's practice to submit a duplicate letter of transmittal and a self-addressed envelope with all correction notices, but that a search of its records fails to reveal a stamped receipt by the Commission applicable to correction Nos. 92 and 94.

the Shipping Act, 46 U.S.C. 821, setting forth a violation of section 18(b)(3) (misclassification) or any other provision of the Shipping Act.

Therefore, it is ordered that:

1. Mamenic shall collect the additional amount of $615[13] from Staley for the shipment.

2. Mamenic shall file an affidavit of compliance with the terms of this order within thirty days. The affidavit shall state whether the additional freight charges have been collected or shall describe the steps taken to effect collection.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
December 19, 1977.

[13] At $111 W/M, the charges amount to $1,721.25. It is noted that the initial billing, rated at $111 W/M, shows total charges of $1,728.32. But the latter amount includes a figure of $7.07 representing wharfage charges. Wharfage charges are not included in Mamenic's tariff. However, if Mamenic advanced wharfage charges for Staley and has not been repaid, Mamenic shall collect those charges, as well, from Staley.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 543

HENRY I. DATY, INC.

v.

PACIFIC WESTBOUND CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION

January 11, 1978

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

It is ordered, that the application herein for permission to refund a portion of freight charges is denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 543

HENRY I. DATY, INC.

v.

PACIFIC WESTBOUND CONFERENCE

Adopted January 11, 1978

Application denied.

INITIAL DECISION OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE[1]

The Pacific Westbound Conference (PWC) and its member line, Yamashita-Shinnihon Line (Y-S), seek permission to refund a portion of the freight charges on a shipment of Clay—N.O.S., Ground from Savannah, Georgia, to Tokyo, Japan. The shipper who paid the freight charges was Henry I. Daty, Inc. (Daty). The application was filed August 24, 1977.

According to the documentation furnished by PWC, 46,822 kilograms (103,224 pounds) of ground clay in 3 containers[2] was delivered to Southern Railway System at Savannah on April 20, 1977,[3] and was transported by railroad surface carriers to Oakland, California, where it was loaded aboard a Y-S vessel on May 6, 1977. The applicable tariff is PWC Westbound Intermodal Tariff No. 8.[4]

The aggregate freight charges collected from Daty by Y-S were $4,588.56. The basis on which those charges were collected was Item 276.2100.50 of the tariff which carried a rate of $98.00 per 1,000 kilograms. The rate sought to be applied is $56 per 1,000 kilograms. Thus, Y-S seeks

[1] This decision became the decision of the Commission January 11, 1978.

[2] The railroad waybill shows a weight of 141,000 pounds for the 3 containers. The weight discrepancy is not explained but probably reflects the weight of the clay, containers and bogies. However the application places reliance on the weight which appears on the Y-S bill of lading, that is, 103,224 pounds. As will be seen, Daty confirms the latter to be the correct weight. The size of the containers is not disclosed in the application, but as also will be seen, the containers were 20 footers.

[3] The application states that the date of delivery was April 6, 1977, but the date shown on the railroad waybill is April 20, 1977.

[4] I.C.C. No. 1, F.M.C. No. 15.

to charge $2,622.03 for the shipment and to refund $1,966.53.[5] The reason given by PWC in support of the lower rate is oversight in increasing the rate on less than 30 days notice.

The application recites that there are shipments of others than Daty, of unknown quantity, of the same or similar commodity, which moved via PWC carriers during approximately the same period of time at the $98 per 1,000 kilograms rate. The record does not indicate whether the other shippers were notified. Although section 18(b)(3) does not appear to require that notice be given individually to all shippers similarly situated prior to filing an application to make refund (appropriate notice is required only if the application is approved), elemental fairness dictates that PWC members should notify similarly situated shippers who paid charges based on rates which were increased on less than 30 days notice.

PWC furnished the following statement in support of the application to refund charges:

> Effective February 21, 1977, second revised page 374, Pacific Westbound Conference Intermodal Tariff No. 8, FMC No. 15, contained a rate for clay, N.O.S., Ground of $56.00 Wt. to Group 1 Ports in special rate Item 276.2100.60. This rate was subject to a minimum weight of 45,000 pounds per 40 ft. container when shipped by American President Lines and a minimum charge of $1300.00 per 40 ft. container when shipped by Nippon Yusen Kaisha. In all other instances, regardless of container size, the applicable rate to Group 1 ports was $56.00 Wt. This condition prevailed until March 23, 1977 when, in fourth revised page 374 issued March 22 and effective March 23, Conference adopted the previously independent $56.00 Wt. rate and 40' container minimum of 45,000 lbs. This action, however, caused the rate previously applicable for cargo loaded in 20 and 35 foot containers to increase from $56.00 to $98.00 Wt. on less than 30 days notice as required by the Federal Maritime Commission. This condition, through oversight, continued until May 20, 1977 with the effectiveness of seventh revised page 374. Revisions two through seven of page 374 are attached to this application.
>
> Through this application the Pacific Westbound Conference is respectfully seeking permission to refund a portion of freight charges to Henry I. Daty, Inc. in the amount of $1,966.53, the difference between the rate of $98.00/kilo ton improperly contained in the tariff and $56.00/kilo ton, the rate which should have been assessed for Ground Clay, N.O.S. in other than 40 ft. containers between March 23 and May 20, 1977.
>
> Also attached is a copy of Yamashita-Shinnihon Line on Board Bill of Lading #SVOT-507 indicating the charge of $4,588.56 was paid by the complainant on June 6, 1977.

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges 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 is derived from the provisions of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 17(b)(3).[6] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified

[5] The railroad waybill shows a per container rate for 3 containers on flat cars and total railroad charges of $1,764.00. Ms. Flo of Y-S informed me by telephone that the amount shown is incorrect. The amount paid to the railroad by Y-S was $1,614 ($538 per container).

[6] The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

in tariffs on file with the Commission, section 18(b)(3) provides, as *pertinent:*

Provided, however, That the Federal Maritime Commission may in its discretion and for good cause shown 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 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.

This application turns on the second proviso of section 18(b)(3), which requires the carrier, *prior* to applying for authority to make refund, to file a new tariff with the Commission *which sets forth the rate on which such refund or waiver would be based.* This proviso "is jurisdictional and cannot be waived." *Louis Furth, Inc., v. Sea-Land Service, Inc.,* 17 SRR 1171, 1172 (1977).

The record reveals that PWC failed to file a new tariff setting forth a rate which would permit the requested refund to be made prior to applying for authority to make refund. Although the explanation offered by PWC appears to imply that seventh revised page 374, a new tariff provision filed prior to the filing of this application, sets forth a rate on which refund would be based, in fact the new tariff provision does not.

Accepting as correct that second revised page 374, effective February 21, 1977, contained a rate of $56.00, weight, regardless of container size for all PWC members except American President Lines (APL) and Nippon Yusen Kaisha (NYK),[7] and giving effect to the candid admission by PWC that fourth revised page 374 issued March 22, 1977, effective as to ground clay on March 23, 1977, caused the rate previously applicable to that commodity to be increased on less than 30 days notice when applied to 20 foot containers,[8] it is nevertheless clear that insofar as this

[7] I do not intend this to be a finding that $56.00 was the rate in all other instances. Item No. 276.2100.60 on second and third revised pages 374 was published as a special rate of $56.00 and is susceptible of being construed as applying independently only to NYK and APL. Should it be determined in a later proceeding, if one is instituted, that Item 276.2100.60 applied only to NYK and APL shipments, the applicable rate would appear to be the rate shown in Item No. 276.2100.50 in effect on the date the shipment was made. As noted earlier, it is not clear whether the shipment was made on April 6 or April 20, 1977. On April 6, 1977, the effective rate was $85.00, per second revised page 374. Third revised page 374 became effective April 15, 1977, and it shows a rate of $98.00 for Item 276.2100.50.

[8] Section 18(b)(2) of the Shipping Act, 1916, 46 U.S.C. 817(b)(2) prohibits rate changes which result in an increase of cost to the shipper in less than 30 days after filing unless Commission approval is obtained. There is no evidence that such approval was either sought or given.

shipment is concerned, Item No. 276.2100.50 on seventh revised page 374, which became effective May 20, 1977, does not satisfy the jurisdictional requirement that a new tariff set forth a rate on which the proposed refund could be granted.

Item No. 276.2100.50 on seventh revised page 374 shows two rates for ground clay. The first is a rate of $98 per 1,000 kilograms and the second is a rate of $56 per 1,000 kilograms. As pertinent, the $56 rate applies only to shipper stuffed containers subject to a minimum weight for 20 footers of 40,000 pounds per container.

As indicated earlier, the documentation accompanying this application shows the total weight of the clay in all containers to be 103,224 pounds. From this, alone, it is manifest that the minimum of 40,000 pounds could not have been reached by each container in the shipment.

To supplement the record and to ascertain the actual size of the containers and the weight of the contents of each container, I spoke to representatives of Y-S and Daty by telephone.

Ms. Flo of Y-S advised that each of the containers was a 20 footer. Mr. Daty stated that the weight of a bag of clay was 50.6 pounds. His records showed the following:

NYKU289730—670 bags—33,902 pounds
NYKU290027—700bags—35,420 pounds
NYKU278610—670 bags—33,902 pounds
Total—2,040 bags—103,224 pounds

Obviously, none of the 3 containers met the 40,000 pounds minimum weight requirement for the $56 rate appearing in seventh revised page 375 for Item No. 276.2100.50.[9]

I find that the jurisdictional requirement for Special Docket relief under section 18(b)(3) has not been satisfied in that neither PWC nor Y-S filed a new tariff setting forth a rate which would permit the requested refund to be made prior to filing this application for authority to make refund.[10] This finding necessitates denial of the application to make refund.

The denial of the application is without prejudice to Daty, the nominal complainant in this proceeding, filing a complaint pursuant to section 22 of the Shipping Act, 1916, 46 U.S.C. 821, setting forth a violation of section 18(b)(2) or other provisions of the Shipping Act, 1916, and asking reparation for the injury, if any, caused thereby. However, because the

[9] Although not referred to in the Application, it is noted that in 8th revised page 374, effective June 15, 1977, and in subsequent revisions effective prior to the filing of this application, the 20 foot container minimum weight was reduced to 16,783 kilos per container—36,999.8 pounds. Even with this reduction, none of the containers would qualify for the $56 rate. It has been suggested by PWC that, for the purpose of this application, the shipment could still be rated at $56 by computing charges on the basis of the minimum container weight shown in the tariff. PWC means by this that under eighth revised page 374, charges could be computed by multiplying $56 times 50.349 kilo tons (3 × 16,783 kilograms). This approach suffers from two defects. At the threshold, there must be an enabling tariff provision authorizing this method of computation. However, no such tariff provision has been cited. Second, even if the tariff did contain such enabling provision, the resulting charges would be greater than the shipper should have paid, assuming that Daty was entitled to a $56 rate based on the actual weight of the shipment, as the application recites.

[10] Therefore, it is not necessary to decide whether or under what circumstances relief may be afforded pursuant to section 18(b)(3) to shipments made under intermodal tariffs. See Judge Kline's discussion of this issue in Special Docket No. 535, *Farr Co. v. Seatrain Lines* (Initial Decision issued December 14, 1977, at pp. 10–11).

record before me in this proceeding is incomplete, nothing contained in this decision should be construed as a finding that there has been a violation of section 18(b)(2) or any other provision of the Shipping Act.

Accordingly, permission is denied to PWC and Y-S to refund a portion of the freight charges collected from Daty.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
December 15, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 553

ABIKATH EXPORT CORP.
C/O FRANLIG FORWARDING CO., INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

January 11, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

It is Ordered, That applicant is authorized to refund $803.54 of the charges previously assessed Abikath Export Corp.

It is further Ordered, That applicant shall 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 553 that effective July 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from July 1, 1977, through July 12, 1977, the rate on 'Paper, Waste' is $50.00 per 2,240 lbs, Minimum 20WT per container, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 553

ABIKATH EXPORT CORP.
C/O FRANLIG FORWARDING CO., INC.

v.

SEA-LAND SERVICE, INC.

Adopted January 11, 1978

Application for permission to refund a portion of freight charges granted.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Sea-Land Service, Inc., pursuant to Rule 92(a), Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3)of the Shipping Act, 1916, as amended, has filed a timely (within 180 days of July 6, 1977, the date of the involved shipments) application to refund an aggregate of $803.20, a portion of $16,867.04 aggregate freight charges actually collected by Sea-Land on September 26, 1977, from Franlig Forwarding Co., Inc.

Sea-Land's Bill of Lading No. 975718125–4, dated July 6, 1977, shows the shipper Abikath Export Corp., the freight forwarder Franlig Forwarding Co., Inc., and the shipment, freight prepaid, of nine (9) 35 ft. containers said to contain 288 bales Waste Paper for Recycling, gross weight 405,040 lbs. as 406,060 lbs. on Sea-Land's vessel *Baltimore/Market 083E* from Charleston, S.C., to Naples, Italy. The rate is shown as $52.50 per 2,240 lbs. for 406,060 lbs. and the charge is shown as $9,517.04. (The arithmetic of the situation is 406,060 lbs. ÷ 2,240 lbs. = 181.27. 181.27 × $52.50 = $9,516.67, a difference of 37 cents.)

Sea-Land's Bill of Lading No. 975718113–6, dated July 6, 1977, shows same shipper and freight forwarder as above, shipment freight prepaid of seven (7) 35 ft. containers said to contain 203 bales Waste Paper for Recycling, gross weight 305,230 lbs. as 313,600 lbs. on Sea-Land's vessel *Baltimore/Market 083E* from Charleston, S.C., to Leghorn, Italy. The rate is at $52.50 per 2,240 lbs. for 313,600 lbs. and the charge is shown as

[1] This decision became the decision of the Commission January 11, 1978.

$7.350.00. (The arithmetic checks: 313,600 lbs. ÷ 2,240 lbs. = 140. 140 × $52.50 = $7,350.00.)

The application submitted the following facts in support:

Effective May 9, 1977, special rates were established on Wastepaper in both Section 1 (France and Italy) and Section 2 (Spain) of Sea-Land Tariff 168–B. Special rate was $50.00 W, minimum 20 Wt. per container thru June 30, 1977.

On June 28, 1977, it was Sea-Land's intent to extend thru special rate in Section 1 only thru July 7, 1977. However, due to a clerical error, this extension was made in Section 2 on proposal #4482.

On July 13, 1977, we realized our error and immediately published a $50.00 rate in Section 1 thru August 11, 1977.

The shippers on whose behalf we are filing this application, moved their shipments on July 6, 1977 and would have been afforded a $50.00 rate had it not been for our error.

This application was concurred in by Franlig Forwarding Co., Inc., as agents for Abikath, and in the affidavit executed October 21, 1977, attached to the application, Franlig Forwarding certifies that charges of $16,867.04 on the shipments involved herein were paid and borne by it as agents for Abikath Export Corp.

The application also states "There are additional shipments which moved via respondent during the same period of time at the rates set forth in (1) above. Special Dockets applications will be filed for relief concurrent with this application."

The tariff applicable herein is Sea-Land Tariff 168–B—FMC–73, Item 5860. Under that tariff and facts similar to those herein, see Special Dockets No. 551 and 552 in which Initial Decisions were served December 5 and December 7, 1977, respectively.

Under B/L No. 975718125–4, correction of error becomes 181.27 × rate of $50.00 = $9,063.50. Under B/L No. 975718113–6, correction of error becomes 140 × rate of $50.00 = $7,000.00. Total, $9,063.50 + $7,000.00 = $16,063.50. The actual amount paid for freight charges was $16,867.04. Amount to be refunded ($16,867.04 minus $16,063.50) is $803.54.

Upon consideration of the documents presented herein and of the above, the Presiding Administrative Law Judge deems the application for permission to refund a portion now shown to be $803.54 of the $16,867.04 freight charges collected comports with Rule 92, Special Dockets Application, Rules of Practice and Procedure, and section 18(b)(3) of the Shipping Act, as amended, referred to above, and the error asserted is explained within the contemplation of Rules and statutes applicable.

The Presiding Administrative Law Judge *finds and concludes* in addition to the findings and conclusions hereinbefore stated:

(1) There was an error of a clerical or administrative nature (corrected by effective tariff before this application was filed), which resulted in payment of an overcharge.

(2) The permission to refund requested will not result in discrimination as between shippers.

(3) The application, having been timely filed and having shown acceptable cause, should be granted.

Wherefore, it is

Ordered

The application to refund a portion of the freight charges be and hereby is granted. The amount to be refunded is $803.54.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
December 12, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 549

U. S. POST OFFICE

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

January 11, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

It is Ordered, That applicant is authorized to waive collection of $2,831.59 of the charges previously assessed the U. S. Post Office.

It is further Ordered, That applicant shall 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. 549 that effective April 15, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period April 15, 1977, through August 9, 1977, the rates on 'U. S. Mail, Mail Freight, Mail Express, Including Mail Bags' are determined pursuant to negotiated contracts with the U. S. Postal Service, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 549

U. S. POST OFFICE

v.

SEA-LAND SERVICE, INC.

Adopted January 11, 1978

Application to waive collection of a portion of freight charges granted.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

On June 22, 1976, the Commission issued Amdt. 6 to General Order 13, exempting mail rates from the tariff filing provisions of the Shipping Act.

By reason of inadvertence and administrative error, the Pacific Westbound Conference Local and Overland Freight Tariff No. 5, FMC No. 13, was not amended to conform to General Order 13, Amdt. 6, until August 10, 1977.

During the period April 18, 1977—June 1, 1977, the United States Post Office made three mail shipments, aggregate weight 54,460 lbs., from Oakland, California, to Bangkok, Thailand, on ships of Sea-Land Service, Inc., F/B 993–730733, F/B 993–732075, F/B 993–732583.

The tariff in effect at the time of shipment, 2nd Revised Page 748, Item 983–0002–00, had an applicable rate of 16 cents per pound. At such rate, the aggregate charges would total $8,713.60.

By 4th Revised Page 748, effective August 10, 1977, the tariff was revised to conform to the General Order 13, Amdt. 6, whereby it provided that member lines could contract with the Postal Service rather than by a tariff rate. The Postal Contracting Manual provides that contracts for the carriage of mail for Distance (Nautical Miles) 7500–7999 shall be at the Rate (c/lb.) 10.8 cents.

At such rate the 54,460 lbs. carried in the three shipments would be charged $5,882.01.

The application for waiver of freight charges requests permission to

[1] This decision became the decision of the Commission January 11, 1978.

waive $2,831.59, being the difference between $8,713.60 (charges at 16 cents per pound) and $5,882.01 (charges at 10.8 cents per pound).

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce 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 an inadvertence in falling to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.

The administrative error of not promptly conforming the tariff to the regulations is an appropriate basis for waiving the tariff rate and permitting the lower rate to prevail.

It is therefore found that:

1. There was an error of an administrative nature in failing to delete the rate in question.

2. The waiver of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive a portion of the freight charges, the Pacific Westbound Conference filed a new tariff which sets forth the basis by which such waiver would be computed.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive a portion of the freight charges represented by $2,831.59.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
December 12, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 548

NAN FUNG TEXTILES, LTD.

v.

PACIFIC WESTBOUND CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION

January 11, 1978

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.*

It is ordered that applicant's request for permission to refund a portion of freight charges is denied.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

*The Administrative Law Judge by order served January 5, 1978, reiterated his initial decision. This order was prompted by a letter from the agent of NYK Line requesting reconsideration by the Administrative Law Judge of the initial decision. Nothing in the January 5, 1978, order serves to alter our determination here. We note, however, that the appropriate avenue of seeking relief from an initial decision would be to file exceptions to the Commission and not to petition the Administrative Law Judge for reconsideration (See 46 CFR 502.227).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 548

NAN FUNG TEXTILES, LTD.

v.

PACIFIC WESTBOUND CONFERENCE

Adopted January 11, 1978

Application for permission to refund a portion of the freight charges denied.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

Pacific Westbound Conference has filed an application for permission to refund $752.54, being a portion of the freight charges totalling $66,591.84 on 8 shipments of Raw Cotton Other Than Linters, totalling 1,012,298 lbs. from Galveston, Texas, to Hong Kong during the period April 13, 1977-June 5, 1977, carried on vessels of NYK line.

The freight charges were collected pursuant to Item 265-1000-21 of Pacific Westbound Conference Westbound Intermodal Tariff No. 8, F.M.C. No. 15.

On January 28, 1977, NYK by letter confirmed to the Pacific Coast Traffic Bureau its intent for the Bureau "to file the lowest independent rate on our behalf in the new P.W.C. Intermodal Tariff Number 8. This action is only on rate that will be filed in new tariff between February 1, 1977 through February 4, 1977."

However, by teletype TKSK 1918, dated February 3, NYK advised "we finally came up with a conclusion to file additional items in addition to 52 items previously filed per TKSF 1362/1715/1728 as our independent rate matched with the lowest filed rates *rather than to give blanket authority to PWC* bearing in mind the climate surrounding us. *In accordance with above conclusion please file following rates* at the lowest level. . . ." (Emphasis added.)

The items instructed to be filed at the lowest level did *not* include item 263-1000-21.

The specific instruction in TKSF not to give blanket authority thus

[1] This decision became the decision of the Commission January 11, 1978.

replaces and withdraws the intent set forth in the letter of January 28, 1977, "to file the lowest independent rate."

NYK contends that they had a letter on file from PWC showing that the NYK rate level should have been at the lowest filed rate as of February 4, 1977. Significantly, however, no such letter is supplied by NYK in support of the application.

Even if such letter exists, it is difficult to understand how PWC could have considered it had blanket authority in view of the TKSF 1918 specifically negating blanket authority and filing only for specified items.

The narrative setting forth the basis for requesting permission to refund is as follows:

> On February 4, 1977, NYK informed the Pacific Westbound Conference that they intended to follow the lowest filed rate in the new PWC Intermodel Tariff No. 8 to all port areas other than Japan. These rates would be effective on February 21, 1977. The lowest rate shown for cotton (263.1000.01/21) on February 4 was $4.60 CWT to Hong Kong. NYK negotiated their business informing the Consignees that on the 21st of February our rate would be $4.60 CWT. We carried our first shipment in April. We also had further shipments in May and June. We were informed by the PWC in June that NYK was not a party to the $4.60. The rate that should be charged is $4.65 CWT. NYK protested this ruling to the PWC stating that they had a letter on file from us showing that NYK rate level should have been at the lowest filed rate as of February 4, 1977. NYK feels that the Consignees (since they paid the charges) are entitled to a refund of $752.54 which is the difference between the $4.60 rate and the $4.65 rate. For your ready reference, we are attaching copies of the bill of lading plus our letter to the PWC showing the action we wanted them to take on our behalf.

It is noted that on February 4, 1977, communication is included with the application for permission to refund a portion of the freight charges. The letter of January 28, 1977, is time stamped received by PWC January 31, 1977. The teletype is dated February 3, 1977. If the date "February 4, 1977" is intended to refer to the teletype of "February 3, 1977" the teletype still does not support the statement that NYK "intended to follow the lowest filed rate in the new PWC Intermodal Tariff No. 8 . . ." inasmuch as the teletype specifically rescinds blanket authority and is for the "lowest filed rate" for items specifically dated therein, which list does not include Item 263.1000.01–21.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] 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 an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission

is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

Thelegislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly discribed:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The statute while forgiving is to be strictly construed lest there by any suspicion that it could be utilized as a vehicle for improper rebating.

The evidence supplied in this application does not sufficiently warrant granting the application.

Permission to refund a portion of the freight charges denied.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
December 12, 1977.

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Status Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 428(I)

KRAFT FOODS

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

January 12, 1978

Notice is hereby given that the Commission on January 12, 1978, determined not to review the decision of the Settlement Officer in this proceeding served January 5, 1978.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 428(I)

KRAFT FOODS

v.

SEA-LAND SERVICE, INC.

Reparation Denied.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Kraft Foods (complainant) claims $159.38 as reparation from Sea-Land Service, Inc. (respondent) for an alleged overcharge on a shipment that moved from New York, New York to Port-au-Prince, Haiti via the S/S HOUSTON on bill of lading 289604 dated December 12, 1975. Complainant specifically alleges a violation of Section 18[(b)(3)] of the Shipping Act, 1916. Complainant submitted the claim to respondent on April 4, 1977. On May 12, 1977, respondent denied the claim citing Item 45(b) of the United States Atlantic & Gulf-Haiti Conference S.B. HTI 9, Freight Tariff F.M.C. No. 1, i.e.:

"Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment.. . ."[2]

The shipment consisted of:

Chill Cargo 35 to 40 degree F		
750 Ctns. Proc. Cheese	24,000# (12 wt tn)	458 cft (11.45 mt)
75 Ctns. Cream Cheese	1,500# (.75 ft tn)	55 cft (1.375 mt)
825	25,500#	

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Notice of determination not to review January 11, 1978.)

[2] The complaint was filed with this Commission within the time limit specified by statute; and it has been well established by the Commission that carrier's so-called "six-month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

General Cargo		
170 Ctns. Proc. Cheese FD.	2,465# (1.233 wt tn)	80 cft (2 mt)
25 Ctns. Salad Dressing	275# (.138 wt tn)	7 cft (.175 mt)
195	2,740#	

Respondent rated the shipment as follows:

825 Ctns. Refrigerator Cargo, N.O.S. 25,500# or 12.75 wt tn ($146.00)	$1,861.50
195 Ctns. Canned Goods, N.O.S. 87 Cft or 2.175 mt ($86.00)	187.95[3]
	$2,048.05[4]
Port Improvement Charge 600 Cft or 15 mt ($1.71)	25.65
Wharfage 600 Cft or 15 mt ($4.57)	68.55
Landing & Delivery to Customs 600 Cft or 15 mt ($2.00)	30.00
Customs Handling Charge 600 Cft or 15 mt ($4.11)	61.65
Total	$2,234.40

Complainant's claim is directed solely to the 825 cartons weighing 25,500 pounds of processed cheese and cream cheese which moved as Refrigerator Cargo, N.O.S., at a rate of $146.00 per weight ton—$1,861.50. It alleges that the charges should have been $133.50 per 2,000 pounds per Item 294, 14th Revised Page 21A or $1,702.12. An overcharge of $159.38 is claimed. However, complainant errs as the rate in Item 294 on Refrigerated Cargo N.O.S. is $146.00 per weight ton of 2,000 pounds or $133.50 per measurement ton of 40 cubic feet, whichever produces the higher revenue.

Respondent counters by stating that the ocean freight of $1,861.50 on the 825 cartons of processed cheese and cream cheese moving under refrigeration was based only on the measurement instead of weight or measurement, whichever produced the greater revenue. Recalculation showed that the 750 cartons of processed cheese should have been moved on a weight basis, while the remaining 75 cartons of cream cheese should have moved on a measurement basis. Referring back to the first description of cargo at page 2 herein it will be noted that the 750 cartons of processed cheese (Refrigerated Cargo, N.O.S.) weighed 12 tons of 2,000 pounds and measured 11.45 measurement tons of 40 cubic feet. Therefore the weight basis rate of $146.00 per ton of 2,000 pounds was correct. However, the 75 cartons of cream cheese (Refrigerated Cargo, N.O.S.) weighed .75 tons of 2,000 pounds and measured 1.375 measurement tons of 40 cubic feet. Therefore, the measurement basis rate of $133.50 per measurement ton of 40 cubic feet would have applied only on the 75 cartons.

[3] There is no disagreement on the rate assessed the 195 cartons of processed cheese and salad dressing. The rate assessed thereon was the Canned Goods, N.O.S. Class 5 rate found on 8th Revised Page 31, of $86.00 per ton of 40 cubic feet or 2,000 pounds, whichever produces the greater revenue. This portion of the shipment weighed 2,740# and measured 87 cubic feet so was properly rated on the higher measurement ton basis.

[4] Transportation charges appearing on freight bill. However, in computing total transportation charges, respondent used the sum of $2,048.55.

Respondent alleges that the transportation charges that should have been assessed were:[5]

750 Ctns. Refrigerator Cargo, N.O.S. 12 wt tn ($146.00)	$1,752.00
75 Ctns. Refrigerator Cargo, N.O.S. 1.375 mt ($133.50)	183.56
195 Ctns. Canned Goods, N.O.S. 2.17 mt ($86.00)	187.05
Total	$2,122.61

Complainant paid transportation charges of $2,048.55, therefore, respondent is correct in its position that an undercharge has been assessed, i.e.:

Revised computation	$2,122.61
Original transportation paid	2,048.55
Balance due respondent	$ 74.06

This undercharge of $74.06 should be promptly adjusted between the parties with evidence of such adjustment furnished the undersigned to complete the record.

(S) JUAN E. PINE,
Settlement Officer.

[5] The 750 cartons of processed cheese weigh 24,000 pounds (12 weight tons of 2,000 pounds) and measure 458 cubi feet (11.45 measurement tons of 40 cubic feet). As the 12 weight tons produce the higher revenue thereon a weigh basis rate is assessed. However, as the service charges found in Item 11 at 14th Revised Page 8 and Original Page 8 A of the subject tariff are based on a ton of 2,000 pounds (12 weight tons) or a measurement ton of 35 cubic feet—45 35—(13.086 measurement tons), said service charges are all assessed on the higher revenue measurement basis. Ite 11 covering the various port charges indicates a charge per 35 cubic feet or 2,000 pounds and a higher equivalen charge per 40 cubic feet. The balance of the commodities on the bill of lading are assessed a transportation rate pe measurement ton of 40 cubic feet; therefore, service charges on these commodities are also assessed per measuremer ton of 40 cubic feet.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 535

FARR CO.

v.

SEATRAIN LINES

NOTICE OF ADOPTION OF INITIAL DECISION

January 11, 1978

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

It is ordered, that the application herein for permission to waive collection of a portion of freight charges is denied.

It is further ordered, that Seatrain shall take steps to recover the full amount of the lawful applicable rate which applies to the shipment in question.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 535

FARR CO.

v.

SEATRAIN LINES

Adopted January 11, 1978

Application for waiver of a portion of freight denied.

A misquotation or misreading of a lawfully filed tariff by a carrier's rating clerk gives rise to no cause of action under P.L. 90–298, amending section 18(b)(3) of the Shipping Act, 1916, since it constitutes neither an error in a filed tariff nor an inadvertent failure to file an intended, new rate in a tariff conforming to an agreement between carrier and shipper.

Tariffs have the force and effect of law and must be adhered to strictly unless the limited type of mistake or failure to file a tariff envisioned by P.L. 90–298 applies under the circumstances.

Such applications involving a joint intermodal landbridge tariff must show that the requested refund or waiver will apply only to the water portion of the through rate and should also indicate whether any other shippers of the same or similar commodities are involved.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

This proceeding was commenced by an application filed by Seatrain Lines, S.A., pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), 46 U.S.C. 817(b)(3), as amended by P.L. 90–298, and to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a). In its application filed August 12, 1977, Seatrain states that it wishes to waive collection of a portion of freight charges on a shipment of mechanical air cleaners which were transported under a bill of lading dated March 28, 1977, from Los Angeles, California, to Bilbao, Spain.

The subject shipment moved under a "landbridge" tariff from Los Angeles to Charleston, South Carolina, and was rated at $83.25 W/M per cubic meter as provided in the tariff in effect at the time.[2] Seatrain wishes to waive collection of a portion of the freight and wishes instead to apply

[1] This decision became the decision of the Commission January 11, 1978.

[2] Seatrain International, S.A., Eastbound Pacific Coast European Joint Container Freight Tariff No. 704, FMC No. 23—ICC No. 3, 31st Revised Page 92, effective March 23, 1977.

a rate of $43.00 per cubic meter. If its application is granted, the amount which Seatrain would forego would be $1,113.54, according to its application. For reasons discussed below, this waiver cannot be allowed.

As Seatrain states the matter, on or about March 22, 1977, a Ms. Ruth Odian, assistant export traffic manager of the Farr Company, the complainant in this case, called Seatrain's local office, asked to book a container of mechanical air cleaners, and inquired about the applicable rate. Seatrain's rate person quoted her a rate of $43.00 per cubic meter. This rate was published in the Eastbound Pacific European Joint Container Freight Tariff, F.M.C. No. 1, on 3rd revised page 296. This tariff page bore an effective date of March 28, 1977, on the upper right hand corner of the page. However, at the bottom of the page appeared a notation indicating that the rate would not be effective as to Seatrain until April 1, 1977.[3] As Seatrain states: "Our rate person apparently referred to the effective date at the top of the page (March 28) without referring to the small print at the bottom (April 1).

On the basis of this quotation, according to Seatrain, Ms. Odian loaded the container and tendered it to the inland carrier at Los Angeles on March 28, 1977, receiving a bill of lading issued by Seatrain bearing that date. However, when the container reached Charleston, it was inspected by an independent cargo inspection entity known as "TAG" which determined that the $43 rate was incorrect. A corrected invoice based upon the $83.25 rate was then submitted to the Farr Company, the shipper on the bill of lading. "TAG" indicated in its corrected invoice that the proper tariff rate effective at the time of shipment was the $83.25 rate published in the Seatrain tariff, cited above, which bore an effective date of March 23, 1977.

Discussion and Conclusions

Seatrain acknowledges that its rating person erred by misreading the tariff in effect at the time of shipment. Seatrain acknowledges furthermore that the shipper booked and shipped its container on the basis of what this person told the shipper. Seatrain obviously has no desire to capitalize on its agent's mistake and wishes to assess only the $43.00 rate. Indeed, some time after the shipment moved, the shipper requested a tariff change which was published in the pertinent Conference tariff, effective June 17, 1977, for shipments occurring on or after that date, at the rate of $43.00. However, despite the obvious mistake and the fact that the shipper had been misled, Seatrain's application cannot be granted under the special-docket procedure established by P.L. 90—298 and Rule 92(a) because the

[3] The notation at the bottom of the tariff page reads as follows:

Issued by: R. A. Valez, Secretary, AGREEMENT FMC 10052, 417 Montgomery Street, San Francisco, California 94104, for participating carriers: Italian Line, Sea-Land Service, Inc. *Seatrain International, S.A. (from April 1, 1977)*, United States Lines, Inc. and Zim Israel Navigation Co, Ltd. (from April 7, 1977) (Emphasis added.)

mistake involved in this case was not an error in the tariff or an error on the part of the carrier in inadvertently failing to file a new tariff.

It has long been established that tariffs have the force and effect of law and that carriers must adhere to them strictly. *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965), and cases cited therein; *Penna. R.R. Co. v. International Coal Co.*, 213 U.S. 184, 197 (1913); *State of Israel v. Metropolitan Dade County, Florida*, 431 F. 2d 925, 928 (5th Cir. 1970); *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16, 19–20 (1970). In recognition of the fact that this hard and fast doctrine could result in inequities and hardship on shippers who may have relied upon a carrier's representation that an agreed-upon reduced rate would be assessed, Congress passed P.L. 90–298. See discussion in *United States v. Columbia S.S. Company*, 17 F.M.C. 8, 19–20 (1973). The legislative history to P.L. 90–298 illustrates the type of mistake which the statute was designed to remedy as follows:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.[4]

The Senate Report states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.[5]

Accordingly, section 18(b)(3) of the Act, 46 U.S.C. 817(b)(3), was amended in pertinent part to read as follows:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] 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 an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The applicability for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The question to be decided in this case is whether the type of mistake committed by Seatrain's rating person was the type contemplated by the above statute. In my opinion it was not.

It may be true that Seatrain's rating person misled the shipper and that

[4] House Report No. 920, 90th Cong. 1st Sess., November 14, 1967 [to accompany H.R. 9473], pp. 3, 4.
[5] Senate Report No. 1078, 90th Cong. 2d Sess., April 5, 1968 [To accompany H.R. 9473], p. 1.

both parties thought that the applicable rate would be only $43. However, to be subject to the remedial provisions of P.L. 90–298, more is required than merely a mutual misunderstanding. It is not every case of mistake which this statute is designed to cover. Rather the statute is designed to cover only two situations: (1) "where there is an error in a tariff of a clerical or administrative nature," or (2) where there is "an error due to an inadvertence in failing to file a new tariff . . ." The legislative history illustrates the types of mistake contemplated in the first category, for example, when a carrier publishes a new tariff page which, through typographical error, changes a $37 rate to a $73 rate. House Report No. 920, 90th Congr. 1st Sess., p. 4. Another example which might fall under the first category (if not the second) is the example of a tariff republication which unintentially deletes a specific commodity rate thereby causing a shipper to be assessed the usually much higher general cargo NOS rate. Senate Report No. 1078, 90th Congr. 2d Sess., p. 4.

The example of the second category of error relating to inadvertent failure to file a new tariff is that situation in which "a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates." House Report, cited above, pp. 3, 4. The critical elements surrounding the second category of error contemplated by the statute appear to be a mutual understanding between the shipper and carrier prior to the time of shipment that a different, lower rate will be charged which will be filed in a new tariff and that the new tariff rate is intended to be filed by the carrier prior to the shipment. As noted above, the Senate Report in stating the purpose of the bill which became P.L. 90–298, refers to the situation "where through inadvertence there has been a failure to file a tariff reflecting an *intended* rate." Senate Report, cited above, p. 1. (Emphasis added.)

In this case, there is no mistake in the tariff which Seatrain's rating person consulted, thus eliminating the first category covered by P.L. 90–298. Nor is there any showing on the facts submitted that Seatrain's rating person, after mistakingly quoting an incorrect rate, intended to file a new tariff reflecting the lower rate and advised the shipper of such intention. Indeed, there would be no such advice from the rating person since he thought that the applicable rate was already on file. In short, the error committed was simply a misquotation or misreading of a correctly filed tariff. I have searched the legislative history to P.L. 90–298 and can find absolutely no mention of any congressional intention to apply this law to such misquotations by rating clerks. Not only is there nothing in that history regarding such mistakes or misquotations by rating clerks but there are indications that the types of mistakes contemplated by the framers of P.L. 90–298 were limited to such things as typographical errors in tariffs, inadvertent deletions of lower rates in republished tariffs and failures to consummate agreements for lower rates between shipper and

carrier by neglecting to carry out the intended tariff filings. Furthermore, there were definite warnings expressed to Congress that P.L. 90–298 should be used by the Commission with great care so that the anti-rebating provisions of section 18(b)(3) would not be subverted and that the carrier's inadvertent failure to file a new tariff would be truly related to a good-faith promise to a shipper made prior to booking the shipment which the carrier intended to honor by filing a new tariff containing the agreed, lower rate prior to the date of shipment.[6]

Consistent with the above, the Commission has specifically refused to grant special-docket relief in cases in which the error is merely one of misquotation of rates, regardless of reliance by shippers on the rating clerk's errors. In *Commodity Credit Corp. v. Delta Steamship Lines, Inc.*, 14 SRR 1207 (1974), the carrier had erroneously quoted a $32 rate instead of the properly applicable $36 rate on file at the time of shipment. When notified of the misquotation, Delta attempted to make good on the mistake by filing a conforming tariff. The Commission denied the application, stating:

> We do not believe this to be "an error in a tariff of a clerical or administrative nature" or "an error due to inadvertence in failing to file a new tariff." Rather, it appears that what is involved here is an erroneous quotation of a rate, not an error in the tariff of a clerical or administrative nature or inadvertent failure to file an anticipated tariff. 14 SRR at pp. 1208, 1209.

See also *Perkins-Goodwin Co., Inc. v. Lykes Bros. Steamship Co., Inc.*, 16 SRR (1975), where the presiding officer denied the application because it involved a misquotation. This case, however, also involved a jurisdictional defect regarding failure to file a conforming tariff within the statutorily prescribed time period and was affirmed on those grounds. 16 SRR 444 (1975).[7]

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[6] Both the Senate and House Reports, cited above, provide illustrations of typographical errors in tariffs, errors in republished tariffs, and inadvertent failures to file agreed rates in new tariffs which solicitors had promised to do prior to shipment. These situations are discussed furthermore by several witnesses who appeared at the congressional committee hearings. See Hearings before the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries, 90th Congr. 1st Sess., August 15, 16, 1967, pp. 85–110, containing statements and testimony of Chairman Harllee of the F.M.C. and Mr. John Mahoney. Mr. Mahoney provided illustrations of the type mentioned above (pp. 104–109) and further cautioned the committee against giving relief too broadly lest the anti-rebating provisions of section 18(b)(3) be subverted. For example, Mr. Mahoney warned against zealous carrier solicitors who made promises to shippers on the solicitors' own initiative where there was no intention by the carrier to file a conforming tariff and consequently no right of the shipper to demand the lower, promised rate under a special-docket procedure. Hearings, p. 109. Mr. Mahoney cautioned the committee as follows:

> We can see the possibility that relief in the inadvertence cases could be used to subvert the rebate provisions and recognize that the Commission has to guard against this. . . . This possibility arises because in the inadvertence cases the question of relief swings on the question of the intent of the particular carrier and the shipper applying for relief. . . . If the Commission gets this power, it must be made clear that carriers and shippers alike will have a very heavy burden to show good cause for relief under these conditions. *Id.*, p. 103. See also p. 95.

Chairman Harllee agreed with Mr. Mahoney on the need to limit special-docket relief cases to clerical or administrative error or inadvertent failure to file and further agreed to the limiting language suggested by Mr. Mahoney, which became part of P.L. 90–298. *ID.*, pp. 109–110. Chairman Harllee also cautioned against permitting rebating and agreed that the situations to be covered by the statute related to "typographical error or a failure on the part of a carrier to submit a tariff which they intended to submit and promised the shipper they would submit. . . ." *Id.*, pp. 87, 88.

[7] There is a curious confusion in Seatrain's application regarding the new tariff filed to correct the misquotation problem. In its application, Seatrain states that it wishes to apply the lower $43 rate but states that the conforming tariff which "must be on file with the Commission prior to application" is the Seatrain Tariff No. 704, FMC 23. But this named tariff contains the higher $83.25 rate which Seatrain does not wish to assess. The $43 rate which Seatrain

Accordingly, I must conclude that a mere misreading of a tariff or misquotation by a carrier's rating clerk does not fall under P.L. 90–298 since it constitutes neither an error in a filed tariff nor an inadvertent failure to file a new rate in a tariff which the rating clerk or carrier had intended and promised to do prior to date of shipment. Therefore, regardless of equities, the application must be denied. As the Commission stated in *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191 (1977):

> [I]t is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment. While we recognize that should the application be denied the consequences of the carrier's consecutive errors would fall upon the shipper, nevertheless the authority granted by P.L. 90–298 to depart from the rigid requirements of section 18(b)(3) of the Act and to make a rate applicable retroactively is strictly limited and in our opinion would not extend to approve a rate which was never agreed upon or intended to be filed. 17 SRR at p. 1193.[8]

Since the only lawful rate in effect at the time of shipment, namely $83.25 per cubic meter, must still be applied in its entirety, as the independent cargo inspection company has determined, Seatrain must seek full recovery of the total amount of freight based on that lawful rate. Cf. *United Nations et al. v. Hellenic Lines Ltd. et al.*, 3 F.M.B. 781, 786 (1952). Seatrain shall therefore take steps to recover this amount and report to the Commission as to how it has complied with this order within such time as the Commission may direct, if this Initial Decision is affirmed.

Although the application must be denied for the reasons stated above, the fact that it concerned a "landbridge" tariff but failed to show that the desired waiver applied only to the water portion of the joint, through intermodal rate requires some remarks in case Seatrain or any other water

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wishes to apply, however, is published in two tariffs, both of which were on file on or after the date of shipment. See Eastbound Pacific Coast European Joint Container Freight Tariff No. 1, F.M.C.–I.C.C. 1, effective March 28, 1977, but effective for Seatrain on April 1, 1977, 3rd. rev. page 296, and same tariff, 5th rev. page 296, effective June 17, 1977. If this application were to otherwise have qualified, which of these tariffs was intended to be the conforming tariff filed prior to the application?

[8] As noted above, the traditional and longstanding policy regarding tariffs is that they have the force and effect of law and demand strict adherence. The primary purpose of this strict requirement, of course, is to prevent discrimination among shippers. See *United States v. Columbia S.S. Company*, cited above, 17 F.M.C. at page 19; *Martini & Rossi et al. v. Lykes Bros. S.S. Co.*, 7 F.M.C. 453, 456 (1962). This strict policy prevails even if in some cases hardship will result. *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915); *Midstate Co. v. Penna. R. Co.*, 320 U.S. 356, 361 (1943). Furthermore the filed rate is considered to be the only lawful rate which can be charged and the shipper is charged with notice of it. Ignorance of the rate or even misquotation is not considered to be an excuse justifying departure from the published rate. In *Louisville & Nash. R. R. v. Maxwell*, cited above, the Supreme Court enunciated these principles in connection with comparable tariff-filing provisions of the Interstate Commerce Act as follows:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted under any pretext. *Shippers and travelers are charged with notice of it*, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. *Ignorance or misquotation of rates is not an excuse for 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. (Emphasis added.) 237 U.S. at page 97.

The Commission has followed this strict policy (except, of course, where all the requirements of P.L. 90–298 are met). See *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965), *Ocean Freight Consultants, Inc. v. Bank Line Ltd.*, 9 F.M.C. 211, 215 (1966).

carrier publishing a joint F.M.C.–I.C.C. intermodal tariff seeks special docket relief.

Had Seatrain otherwise qualified under P.L. 90–298 and provided a water portion breakout of it through, joint rate as the Commission's General Order 13 had required, 46 CFR 536.16(b), it might have been possible to verify that the amount of the waiver applied only to the water portion of the through movement. However, Seatrain has not provided such a breakout nor furnished proof that the waiver would apply only to the water portion. It is therefore impossible to determine whether the waiver would affect the inland portion as well. It is recognized that this Commission will not interfere with inland rates which are under the jurisdiction of the Interstate Commerce Commission.[9] That Commission has no special-docket procedure permitting the filing of retroactively effective tariff pages designed to remedy inequities. Since the application must be denied in any event, however, there is no point in seeking further proof from Seatrain on this particular matter.

However, for future reference, Seatrain should take care to show that any desired refund or waiver pertains to the water portion of the joint F.M.C.–I.C.C. tariff.[10]

Finally, since P.L. 90–298 permits a waiver or refund to be granted "where it appears that such refund or waiver will not result in discrimination among shippers," Seatrain's application should have contained a statement as to whether any other shippers of the same or similar commodity were involved around the time of shipment. The application makes no reference whatsoever to the existence of any such shippers on the standard form submitted pursuant to Rule 92(a), 46 CFR 502.92(a).

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
December 14, 1977.

[9] The cited regulation which appears to have been in effect at the time of shipment during 1977 requires a port-to-port breakout of a through intermodal rate. The regulation states that this breakout will be treated "as a proportional rate subject to the provisions of the Shipping Act, 1916." The Commission explained when issuing the regulation that its jurisdiction over rates did not extend beyond port areas. See *Filing of Through Rates and Through Routes*, 1 SRR 574, 579 (1970). Since that time there has been an understanding between this agency and the I.C.C. that each agency would confine its regualtion to its respective spheres. See *Commonwealth of Pennsylvania v. I.C.C.* (D.C. Cir. June 20, 1977), slip opinion, pp. 27–29; *Ex Parte 261*, 351 I.C.C. 490 (1976); *Interpretations and Statements of Policy*, F.M.C., April 12, 1976; *Order Approving Rules of the Interstate Commerce Commission, etc.*, F.M.C., April 12, 1976. Regulation of several agencies over the same party under their respective statutes in which the regulation is confined to each respective sphere of jurisdiction is not unprecedented. Cf. *Baton Rouge Port Commission v. United States*, 287 F. 2d 86, 92 (5 Cir. 1961), cert. den. 368 U.S. 985; *Municipal Electric Utilities Association v. F.P.C.*, 485 F. 2d 967, 971 (D.C. Cir. 1973); *Modern Intermodal Traffic Corporation-Investigation*, 344 I.C.C. 557, 565–56 (1973); *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82, 89 (1970).

[10] In previous special-docket proceedings involving joint "landbridge" tariffs, the carrier has stated that the waiver or refund "would affect only the ocean carrier's portion." Special Docket No. 492, *Toei Kogyo Co. Ltd. v. Sea-Land Service, Inc.*, 17 SRR 427 (1977); Special Docket No. 495, *Universal Molin v. Sea-Land Service, Inc.*, 17 SRR 45 451 (1977); Special Docket No. 505, *Kuhne & Nagel v. Sea-Land Service, Inc.*, 17 SRR 383, 388 (1977).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 378(I)

LORD EXPORT CO., A DIVISION OF LORD CORP.

v.

UNITED STATES NAVIGATION, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

January 13, 1978

Notice is hereby given that the Commission on January 13, 1978, ietermined not to review the decision of the Settlement Officer in this ›roceeding served January 6, 1978.

By the Commission.

SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 378(I)

LORD EXPORT CO., A DIVISION OF LORD CORP.

v.

UNITED STATES NAVIGATION, INC.

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Lord Export Company, a Division of Lord Corporation (complainant) alleges that it was overcharged $445.50 by United States Navigation, Inc., General Agent for Marina Mercante Nicaraguence S.A. (respondent) as a result of misdescription of cargo on the bill of lading for the subject shipment.[2] Complainant states that on July 21, 1975 respondent issued its bill of lading 12 covering the movement of "5 PALLETS (50 PCS.)—SHOCK ABSORBERS 12735# 5777K" from New York, New York to Acajutla, El Salvador on the vessel COSTA RICA.

The applicable tariff is the Atlantic & Gulf West Coast of Central America and Mexico Conference S.B. CA–8 Freight Tariff F.M.C. No. 1. Respondent assessed the Cargo, N.O.S., Harmless, Class 1 rate of $152.50 per ton of 40 cubic feet or 2,000 pounds, whichever produces the greater revenue. The shipment weighed 12,735 pounds and measured 396 cubic feet as indicated on the bill of lading/freight bill. Therefore, the weight was $\frac{12,735}{2,000} = 6.368$ weight tons and the measurement was $\frac{396}{40} =$ 9.9 measurement tons, the latter being the higher applies. Respondent assessed the rate and charges as follows:

5 Pallets Cargo, N.O.S.	9.9 mt ($152.50)	$1,509.75
Bunker Surcharge	9.9 mt ($7.00)	69.30
Manifest Fee		.50
		$1,579.55

[1] *Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.*

(Note: Notice of determination not to review January 13, 1978.)

[2] Although no violation of the Shipping Act, 1916, is alleged, it is assumed to be a violation of section 18(b)(3) thereof.

Complainant alleges that the correct rate should have been that for fenders, ship or dock—Class 7 at a rate of $107.50 per 40 cubic feet as contained in the same tariff plus surcharges for a total of $1,134.05. The overcharge claim was filed with respondent on September 21, 1976 who refused to honor the claim stating that the shipment was rated per the description on the bill of lading and export declaration and that the claim would be considered only when submitted within six months per Item 7b of the tariff, i.e.:

"Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight bases on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found."[3]

In its claim to the Commission, complainant alleges that the shipment consisted of 5 Pallets Fenders or Bumpers, Boat or Dock Rubber, O/T cut from Old Rubber Tires and Steel Comb. as shown on the original collect bill of lading. [motor carrier's bill of lading]

With regard to claims involving cargo misdescription, past Commission policy and judicial precedent have unquestionably declared that a shipper's misdescription of cargo can still afford a basis for later reparation relief, and that in cases involving alleged overcharges under section 18(b)(3)of the Act the controlling test is what the complainant shipper actually shipped, and is not limited to how cargo was described on the bill of lading. *Union Carbide Inter-America* v. *Venezuelan Line*, 17 F.M.C. 181, 182 (1973); *Abbott Laboratories* v. *Moore-McCormack Lines, Inc.*, 17 F.M.C. 191, 192 (1973); where the shipment has left the custody of the carrier and the carrier is thus prevented from personally verifying the complainant shipper's (new) description, the Commission has held that the complainant has a "heavy burden of proof" and must establish, with reasonable certainty and definiteness, the validity of the claim. *Western Publishing Co.* v. *Hapag Lloyd A.G.*, 13 SRR 16, 17 (1973); *Johnson & Johnson Intl.* v. *Venezuelan Lines*, 16 F.M.C. 87, 94 (1973); *Colgate Palmolive Peet* v. *United Fruit Co.*, 11 SRR 979, 981 (1970).

It is usually the case, as it is here, that the carrier in classifying and rating a shipment must look to the information supplied him by the shipper or freight forwarder. Accordingly, one cannot "fault" the carrier for relying on descriptions set forth on the bill of lading. However, in determining whether reparation should be awarded in a given case, i.e., whether section 18(b)(3) has been violated vis-a-vis the filed tariffs, "a

[3] The complaint was filed with this Commission within the time limit specified by statute; and it has been well-established by the Commission that carrier's so called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

tariff is a tariff" and the controlling test is finally what the complainant shipper can prove was actually shipped.[4]

Complainant had the shipment transported from Erie, Pennsylvania via motor carrier to a freight forwarder in New York, New York prior to the port-to-port movement. The motor carrier's bill of lading dated July 15, 1975, describes the cargo as:

"5 Pallets Fenders or Bumpers, Boat or Dock Rubber, O/T cut from Old Rubber Tires and Steel Comb. 12,735#"

It was further indicated on the motor carrier's bill of lading that the dock receipt described the cargo as "5 PALLETS (60 PCS.)—SHOCK ABSORBERS 12735#" and contained a further partial clarification "UNHARDENED VULCANIZED RUBBER ARTICLES, N.E.C., AS: SHOWN ABOVE."

Complainant also submitted its Invoice No. 55002 dated July 15, 1975 covering the shipment. From the above submissions it did not appear that a definite description of the commodity moved could be developed. On June 27, 1977, in response to my request of June 7, 1977, complainant submitted a copy of the export declaration and an advertising brochure (Bulletin No. 800) covering the subject commodity.

The export declaration contained the same commodity description and clarification as the dock receipt. The Schedule B Commodity No. thereon was 629.9860 which covers:

"Unhardened vulcanized rubber articles, n.e.c. (including plates, sheets, and strips cut to nonrectangular shapes and/or worked more than surface worked, and profile shapes worked more than surface worked) except specially fabricated for vehicles and aircraft (formerly 6298850 and part of 6298869)."

Complainant's invoice covers the shipment of 60 items of Lord Part Number 1F4 180. Part 1F4 180 is shown on page 6 of complainant's advertising brochure and is described as a marine fender. The item is further described on the title page of the brochure as:

"High-strength, bonded-rubber fenders bring greater shock-absorbing efficiency and economy to marine fendering systems. Facilitate smoother berthing with optimum safety to both vessel and pier. Permit lighter construction in new facilities, and adapt easily to existing piers, increasing their capabilities for handling today's highest-tonnage ships. . . ."

Respondent's allegation that the shipment consisted of Fenders, Ship or Dock at the Class 7 rate [as indicated on 10th Revised Page 46 of the subject tariff] has been verified. It has been verified singularly by some of the documentation and collectively by some of the documentation. Said documents consist of the original motor carrier bill of lading, the dock receipt, the export declaration, the invoice and the advertising brochure. The proper rate and charge assessment thereon is:

[4] "Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit a deviation from the rates, rules and regulations in the carrier's filed tariff" *Kraft Foods v. Moore-McCormack Lines*, 14 F.M.C. 320, 323 fn. 4 (1974).

5 Pallets Fenders, Ship or Dock	9.9 mt ($102.00)	$1,009.80
Bunker Surcharge	9.9 mt ($7.00)	69.30
Manifest Fee		.50
		$1,079.60

The difference between what respondent paid and the applicable charges is $499.95:

Transportation rate and charges paid	$1,579.55
Applicable rate and charges	1,079.60
Overcharge	$ 499.95

Complainant alleged a lower overcharge of $445.50.[5] However, this was based on a Class 7 rate of $107.50 which did not become effective until March 15, 1976 per 9th Revised Page 31 of the subject tariff. According to complainant, as verified by the dock receipt, respondent received the shipment on July 21, 1975. The Class 7 rate then in effect was $102.00 per 8th Revised Page 31 of the subject tariff effective January 27, 1975.

Complainant has furnished documentation enabling ascertainment of the actual commodity that moved. It has borne the heavy burden of proof. Reparation of $499.95 is awarded complainant.

(S) JUAN E. PINE,
Settlement Officer.

[5] Complainant's computation of a lower overcharge follows:

Transportation rate and charges paid			$1,579.55
5 Pallets Fenders, Ship or Dock	9.9 mt ($107.50)	$1,064.25	
Bunker Surcharge	9.9 mt ($7.00)	69.30	
Manifest Fee		.50	1,134.05
Overcharge alleged by complainant			$ 445.50

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 540

SALENTINE & CO., INC.

v.

EUROPE CANADA LAKES LINES

NOTICE OF ADOPTION OF INITIAL DECISION

January 11, 1978

No exceptions having been filed to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 540

SALENTINE & CO., INC.

v.

EUROPE CANADA LAKES LINE

Adopted January 11, 1978

Application withdrawn. Respondent ordered to collect balance of freight charges.

INITIAL DECISION OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE[1]

By application filed August 4, 1977, respondent, Europe Canada Lakes Line, by Ernst Russ-North America, Inc., its general agent, requested permission to waive collection of a portion of freight charges for the benefit of Salentine & Co., Inc., in connection with a shipment from Hamburg, Germany, to Milwaukee, Wisconsin.

The application recites that under bill of lading issued June 18, 1977, respondent carried a shipment consisting of one case of "Machine, Bottle Labelling," weighing 600 kilograms and measuring 1.39 cubic meters. The application goes on to say that the rate applicable at the time of shipment was $91.50 per 1,000 kilograms or cubic meter and that the rate sought to be applied is $63 per 1,000 kilograms or cubic meter. Respondent collected charges of $87.57 from Schenker & Co., Hamburg, and permission is sought to waive the amount of $39.62, representing the difference between what was charged and what should have been charged.[2] The application also states that there were no shipments of the same or similar commodity for shippers other than complainant during approximately the same period of time at the $91.50 rate.

The following explanation was offered:

[1] This decision became the decision of the Commission January 11, 1978.

[2] The computation follows:

1) $91.50 × 1.39 = $127.19
2) $63.00 × 1.39 = 87.57

$39.62

We received Telex instructions from Ernst Russ (Europe Canada Lakes Line) on June 16, 1977 to file on that day Tariff Amendments with the Federal Maritime Commissions to become effective on June 16, 1977 until July 16, 1977. Unfortunately the clerk in charge of the telex machine misplaced the telex from Ernst Russ, Hamburg and we only located it after Ernst Russ, Hamburg sent another telex on June 21, 1977 asking for confirmation of the filing with the F.M.C. The rate was then filed on June 21, 1977. (copy of Bill of Lading and telex exchanges are attached hereto)

Contrary to what was said in the explanation, no documentation was attached to the application.

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges 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 is derived from the provisions of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3).[3] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides, as pertinent:

Provided, however, That the Federal Maritime Commission may in its discretion and for good cause shown 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 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.

Pursuant to Rule 92(c), 46 CFR 502.92(c), I telephoned Ernst Russ, requesting the documentation referred to in the application. Werner Scholtz, President of Ernst Russ, agreed to furnish the missing material. He also agreed to submit copies of the tariff pages showing the rate applicable at the time of shipment and the rate sought to be applied, as required by the second proviso of section 18(b)(3).[4]

Inasmuch as the nominal complainant (i.e., the party for whose benefit

[3] The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a) of the Commission's Rules of Practice and Procedure.

[4] The application did not specify the tariff pages applicable to the shipment. There was only a general reference to a tariff publication—"FMC-10."

the freight charges were sought to be waived) is Salentine & Co., Inc., but the freight charges were actually paid by Schenker & Co., I also asked Mr. Scholtz to supply documentation showing Salentine's entitlement to benefit from the waiver or, in the alternative, to substitute Schenker as complainant. Mr. Scholtz declined to do either, stating that it was not worth the effort, in view of the small amount involved, to communicate with Schenker. Instead, he asked that the application be dropped.

Under the circumstances, I must consider the application to waive a portion of the freight charges to be withdrawn. However, the matter does not end there.

A tariff has the force and effect of law. *Pennsylvania R.R. Co. v. International Coal Co.*, 213 U.S. 184, 197 (1913). The tariff rate in effect and having the force and effect of law, at the time the shipment was made, was $91.50 M. Europe Canada Lakes Line and Schenker & Co. must comply with the law.[5] Therefore, Europe Canada Lakes Line is ordered to collect the additional amount of $39.62 from Schenker for the shipment.

The respondent is further ordered to file an affidavit of compliance with the terms of this order within thirty days. The affidavit shall state whether the additional freight charges have been collected or shall describe the steps taken to effect collection.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
December 15, 1977.

[5] Because Schenker is not a party to the proceeding, the principles of "*res judicata* to enforce repose" (*Cf. Safir v. Gibson*, 432 F.2d 137, 142–143 (2 Cir. 1970) may not be applicable to a subsequent proceeding in another forum. This, of course, highlights the vice of failing to have the real party in interest submit itself to the jurisdiction of the Commission in a Special Docket proceeding.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 411(F)

SUPREME OCEAN FREIGHT CORPORATION
FMC—1331

v.

ALL CARIBBEAN, INC.

ORDER ON REVIEW OF DISMISSAL

January 24, 1978

An order of dismissal was served November 28, 1977, by the Administrative Law Judge in this proceeding. Dismissal was based on the fact that settlement has been reached and counsel for both sides have jointly moved for dismissal of the proceeding.

The Administrative Law Judge stated that the Commission is without power to force a complainant to litigate his claim. We note, however, that Rule 93 of the Commission's Rules of Practice states that satisfied complaints will be dismissed in the *discretion* of the Commission. The parties here apparently feel that settlement is more prudent than bearing the expense of further litigation. Considering this fact and the fact that it is not even clear that respondent is subject to our jurisdiction, we have determined to uphold the order of dismissal.

The terms of the settlement have not been furnished to the Commission. Accordingly, our action should not be construed as a determination regarding the propriety of these terms. However, section 18(b)(3) of the Shipping Act, 1916, requires strict adherence to published tariff rates of common carriers, and parties who settle section 18(b)(3) rate disputes are charged with knowledge of the requirements of that section and the penalties for violation thereof.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-48

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 161—J. T. STEEB & COMPANY, INC.

ORDER OF DISCONTINUANCE

January 30, 1978

This proceeding was instituted by Commission Order to Show Cause requiring respondent freight forwarder to demonstrate why its license should not be revoked because of the existence of a shipper relationship prohibited by section 44 of the Shipping Act.

Subsequently the shipper relationship was severed by transfer of ownership. Transfer of the license in question was then approved by the Managing Director under delegated authority. On this basis, Hearing Counsel have now moved for discontinuance of the proceeding.

Transfer of ownership has rendered the issues herein moot. Accordingly, the motion to discontinue is hereby granted.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 517

TEXACO EXPORT, INC.

v.

AMERICAN WEST AFRICAN FREIGHT CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION

March 1, 1978

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same notice is hereby given that the initial decision became the decision of the Commission on March 1, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 517

TEXACO EXPORT, INC.

v.

AMERICAN WEST AFRICAN FREIGHT CONFERENCE

February 2, 1978

Application denied.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

By this application the American West African Freight Conference seeks to refund to Texas Export, Inc., $4,569.55 as an overcharge on a shipment of "Lubricating Oil and Grease" from Port Arthur, Texas, to Conakry, Republic of Guinea. The shipment weighing 2,250,258 lbs. and measuring 53,918 cubic feet, was carried aboard Delta Lines' "*Del Sol*" under a bill of lading dated December 20, 1976. On January 14, 1977, Delta collected $165,047.21 in aggregate freight charges from Texas Export under the Conference's Eastbound Tariff No. 15 (FMC No. 16). The rate applicable at the time was $103.75 W/M. The rate sought to be applied is a 15% discount from that rate.

On August 4, 1976, Texas Export telexed the Conference office requesting a 15% discount from the rate on Lubricating Oil and Grease in Drums, Pails and Cases from Port Arthur to Conakry. The discounted rate was to be applicable only to 2,000 long ton shipments with a minimum 1,000 long tons per vessel. At a meeting on August 5, 1976, the Conference agreed to the rate subject to all other charges in effect at the time of shipment. The effective date of the new rate was to be established upon the written acceptance of Texas Export. On August 10, 1976, Texas Export telexed the Conference requesting that the Conakry Port Detention Charge be waived on its shipments of Oil and Grease. On August 30, 1976, Texas Export by telex accepted the discounted rate "without prejudice" to further consideration of its request to waive the Conakry

[1] This decision became the decision of the Commission March 1, 1978.

Port Detention Charge. The Conference took no action on the acceptance pending decision on the waiver request. On September 2, 1976, at a Conference meeting the request for waiver of detention charges was denied and Texas Export was notified of the denial by letter on September 7, 1976.

From this point on an administrative error in the Conference office resulted in future correspondence from the Conference and the shipper referring only to Lubricating Oil in Drums to Conakry. No further reference was made to shipments of Grease in Drums, Pails and Cases even though the Conference had agreed to apply the discount to Grease as well as Lubricating Oil. This error was further compounded when the Conference filed an amendment to its Eastbound Tariff (Correction No. 1594 to Page 142A) which was to effectuate the discount agreed upon—the amendment itself was limited to "Lubricating Oil in Drums to Conakry" and no mention was made of Grease. Thus, it would appear that the error was of the kind that would afford a basis for relief. There is, however, an insurmountable barrier to granting that relief.

Section 18(b)(3) in authorizing the Commission to grant relief such as requested here requires as a condition precedent to the grant, "That the 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 Commission which sets forth the rate upon which such refund or waiver would be based." The required filing has not been made here. The last correction to be filed was the above mentioned No. 1594.

The requirement that the rate upon which the refund or waiver is to be based must be filed prior to making application is statutory and there is no discretion to waive it. *Oppenheimer International Corp. v. South African Marine Corp.*, 15 F.M.C. 49 (1971).

Accordingly, the application is denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
February 2, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–35

PUBLICATION OF INACTIVE TARIFFS BY CARRIERS IN FOREIGN COMMERCE

Persons not actively carrying cargo (or clearly committed to commence carrying cargo) between ports named in a published tariff at the rates stated therein are not common carriers by water within the meaning of Shipping Act section 18(b) and Part 536 of the Commission's Rules, and their tariffs in such unserved trades are subject to cancellation.

Stanley O. Sher, John R. Attanasio, for Concordia Line.

Edward Aptaker, for Farrell Lines, Inc.

John Robert Ewers, Paul J. Kaller, Bert I. Weinstein, Hearing Counsel.

REPORT AND ORDER

February 6, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day, and Clarence Morse, *Commissioners*)

This proceeding was commenced by an Order directing some 338 common carriers by water in the foreign commerce of the United States (Respondents) to show cause why 752 specified tariffs published by them and maintained on file with the Commission should not be cancelled on the grounds that said tariffs do not reflect an active, *bona fide* offering of common carrier service.

Fifty-nine Respondents filed amendments expressly cancelling 170 of the subject tariffs, thereby mooting any need to inquire further into their status.[1] Another group of 246 Respondents either did not reply to the Show Cause Order and its invitation to submit supporting affidavits of fact and memoranda of law, or consented to cancellation insofar as another 484 tariffs were concerned.[2] In light of these Respondents' failure to contest cancellation and failure to amend the subject tariffs for at least 18 months, it is concluded that the tariffs in question do not describe an

[1] This group of tariffs and their cancellation dates are listed in Appendix "A" hereto.

[2] Some carriers in this group did raise objections concerning other of their tariffs, however.

active common carrier service and should be cancelled as contrary to section 18(b) of the Shipping Act, 1916, and the Commission's tariff filing regulations (46 C.F.R. Part 536). *Publication of Inactive Tariffs*, 17 SRR 471, 472 (1977); *Sugar From Virgin Islands to United States*, 1 U.S.M.C. 695, 699–700 (1938); *Intercoastal Schedules of Hammond Shipping Co., Ltd.*, 1 U.S.S.B. 606, 607 (1936); *Intercoastal Investigation, 1935*, 1 U.S.S.B. 400, 449 (1935).

A total of 40 Respondents opposed the cancellation of 68 different tariffs, some by filing a timely affidavit as required by the Commission's Show Cause Order, but most by submitting unsworn written communications or tariff amendments.[3] A Reply Memorandum was filed by the Commission's Bureau of Hearing Counsel, and seven carriers responded to that Memorandum.[4] These submissions contain sufficient evidence of common carrier activity or of oversights in the Show Cause Order to warrant the continued publication of 29 of the subject tariffs by their respective carriers.[5] We turn now to those relatively few tariffs whose status remains a matter of controversy.

Twelve Respondents filed brief, unsworn statements asserting that certain tariffs were indeed active.[6] Their letters do not even suggest that actual cargo carryings, regularly scheduled voyages, or ongoing cargo solicitation were being provided. No recent bills of lading, sailing schedules, agency contracts, trade advertisements or other evidence of serious and continuing commercial activity were furnished. Such a meager response is insufficient to overcome the presumption that active common carrier service has ceased which is created by Respondents' failure to amend the subject tariffs for the last two to eight years. Accordingly, the tariffs of these twelve carriers will be cancelled.

A. P. Moller-Maersk Line (Maersk) asserts that trade to the Red Sea/

[3] Alcoa Steamship Company; Baltic Shipping Company; Blue Star Line, Ltd.; British M/V "Dram Buoy"; British M/V "Fendo"; British M/V "Mary Ann Kate"; British M/V "Primavera"; Central Gulf Contramar Line; Central Gulf Lines, Inc.; Compagnie Generale Maritime; Compania Maritime Del Nervion, S.A.; Concordia Line; Constellation Line; Dart Containerline, Inc.; Deppe Line; The East Asiatic Company, Ltd.; Farrell Lines, Inc.; Hapag-Lloyd, A.G.; Thos. & Jas. Harrison, Ltd.; Hellenic Lines, Ltd.; Japan Line, Ltd.; Koninklijke Nedlloyd; Koninklijke Nedlloyd (Nedlloyd, Inc.); Koninklijke Nedlloyd, B.V.; Kirkpride Shipping Co., Ltd.; Leonard Cephas; Bernard W. Roberts; Jugolinja-Rijeka, Yugoslavia; Jugoslavenska Oceanska Plovidba; A. P. Moller-Maersk Line; Maritime Company of the Philippines; Marcella Shipping Company, Ltd.; Navimex, S.A.; Orient Overseas Lines; Regent Line; Spanish North American Line; Torm Lines; Valocean Line; Victoria Line; Sands Construction & Shipping Co., Inc.

[4] Dart Containerline, Inc.; Hellenic Lines, Ltd.; Farrell Lines, Inc.; A. P. Moller-Maersk Line; Concordia Line; and Torm Lines. The filing of answers was permitted by Order of the Commission served October 21, 1977.

[5] The tariffs of the following 22 carriers shall not be cancelled:

Central Gulf Contramar Line (FMC–25); Central Gulf Lines (FMC–12 and FMC–14); Compania Sud American De Vapores, S.A. (FMC–6); Concordia Line (FMC–20); Constellation Line (FMC–22); Dart Containerline, Inc. (FMC–11); Deppe Line (FMC–32 and FMC–33); The East Asiatic Company, Ltd. (FMC–7); Blue Star Line, Ltd. (FMC–5); Hapag-Lloyd, A.G. (FMC–43); Thos. & Jas. Harrison, Ltd. (FMC–2, FMC–3 and FMC–6); Japan Line, Ltd. (FMC–9); Jugolinja-Rijeka, Yugoslavia (FMC–39); Jugoslavenska Oceanska Plovidba (FMC–10); Marcella Shipping Company, Ltd. (FMC–1); Maritime Company of the Phillippines (FMC–14); Navimex, S.A. (FMC–1, FMC–3, FMC–4); Orient Overseas Line (FMC–30); Spanish North American Line (FMC–1); Torm Lines (FMC–23 and FMC–26); Valocean Line (FMC–2); and Victoria Line (FMC–1).

[6] Hellenic Lines, Ltd. (FMC–3, FMC–8, FMC–9, FMC–11, FMC–12 and FMC–23); Leonard Cephas (FMC–1); Bernard W. Roberts (FMC–1); Koninklijke Nedlloyd (FMC–1); Koninklijke Nedlloyd (Nedlloyd, Inc.—FMC–11); Koninklijke Nedlloyd, B.V. (FMC–19 and FMC–53); Kirkpride Shipping Co., Ltd. (FMC–1); British M/V "Dram Buoy" (FMC–1); British M/V "Fendo" (FMC–3); British M/V "Mary Ann Kate" (FMC–12); British M/V "Primavera" (FMC–1); and Sands Construction & Shipping Co., Inc. (FMC–1).

Gulf of Aden, and to India, Pakistan and Ceylon is heavily one-sided inbound from the United States. Such a situation might sufficiently explain some 18 months of tariff inactivity by Maersk if Maersk had actually been serving the inbound trades during the same period (thereby providing regular outbound cargo capacity). Maersk admits, however, that its vessels only "pass through the Red Sea," and come within "geographical proximity of India, Pakistan, and Ceylon." This standing-in-the-wings arrangement cannot be considered a *bona fide* common carrier service to the Near East ports listed in the subject tariffs. Accordingly, Maersk's Tariff Nos. FMC–67, FMC–68 and FMC–69 will be cancelled.

Alcoa Steamship Company, Inc. (Alcoa), also admits that it does not serve Haiti or the Netherlands Antilles, but, unlike Maersk, it further claims to be actively soliciting Haitian business through a "long-standing relationship" with a shipping agency in Port-au-Prince, while maintaining regular voyages to nearby Caribbean islands. Alcoa did not present evidence of recent cargo carryings or other factors which would demonstrate that the subject tariff represents a commercially realistic offer of transportation service. A tariff maintained solely for the purpose of obtaining a competitive edge over carriers who have not filed tariffs in a given trade—by avoiding the 30 days' notice or FMC Special Permission requirements of Shipping Act section 18(b) prior to entering a trade—is a "paper tariff." Paper tariffs do not contain rates which are commercially attractive to ordinary shippers, but do allow the carrier to quickly reduce rates whenever a large enough shipment is tendered to make a vessel call profitable. The Commission does not permit the filing of such tariffs because they are essentially misleading to the shipping public, potentially unfair to smaller shippers and carriers attempting to maintain regular schedules in the trade, encourage misunderstandings and sharp practices (if not actual malpractices), and impose an unnecessary administrative burden upon the Commission's staff. Accordingly, Alcoa's Tariff No. FMC–15 will be cancelled.

Baltic Shipping Company (Baltic); Torm Lines; Farrell Lines, Inc.; Concordia Line; Hapag-Lloyd, A.G. (Hapag); Compagnie Generale Maritime (French Line); and Compania Maritima Del Nervion, S.A. (Nervion Line), present essentially the same arguments as Maersk and Alcoa. They wish to retain tariffs to areas not now receiving vessel service in order to facilitate prompt entry into trades geographically related to those in which they do offer regular voyages. In each instance, actual common carrier service is in fact conditioned upon the appearance of sufficient quantities of cargo to make a special vessel call worthwhile. The Commission will therefore cancel Baltic's Tariff No. FMC–3; Farrell Line's Tariff Nos. FMC–27, FMC–31 and FMC–32; Torm Lines' Tariff Nos. FMC–27, FMC–34 and FMC–35; Concordia Lines' Tariff Nos. FMC–1, FMC–12 and FMC–14; Hapag's Tariff No. FMC–102; French Line's Tariff No. FMC–16 and Nervion Line's Tariff Nos FMC–6, FMC–7 and FMC–8.

Maritime Company of the Philippines (MCP) opposed the cancellation of its tariffs from Hawaii and Puerto Rico to the Far East because "pending sugar mill movements" make them "potentially active," despite the absence of vessel calls at Hawaii and Puerto Rico in recent years. Without further information establishing that the "pending sugar movements" are reasonably imminent and likely to result in actual vessel calls at the rates stated in MCP's tariffs, MCP Tariff Nos. FMC–6 and FMC–10 must also be deemed "paper tariffs," subject to cancellation for not reflecting a *bona fide* common carrier service.

Farrell and Concordia further argue that because the Shipping Act, 1916, does not require a carrier to maintain service with a "prescribed regularity" the Commission may not prohibit carriers from publishing tariffs which provide for vessel calls on a "by inducement" basis. This proposition is untenable. Shipping Act section 18(b) applies only to common carriers by water and the Commission has held that carriers who serve a trade "by inducement only" are not common carriers by water for the purpose of publishing a tariff covering that trade.[7] It has, in effect, defined common carriage for tariff filing purposes as commercial activity which demonstrates a clear intention to move cargo under the proffered tariff within a commercially reasonable period of time subsequent to filing. It is unnecessary to find that Respondents have actually refused cargoes tendered for carriage at their published tariff rates as occurred in *Ghezzi Trucking, Inc.*, 13 F.M.C. 253 (1970) and *Intercoastal Charters*, 2 U.S.M.C. 154 (1939).[8] It is enough that there has been an extended period within which no common carrier service has been provided to the subject trades.

Concordia also claims that the instant proceeding is unfair because it challenges the legitimacy of only those tariffs which have not recently been amended and does not include (1) tariffs which have been so amended, but are nonetheless inactive, or (2) tariffs which list "ranges" clof ports served, without noting that the publishing carrier customarily withholds vessel calls from one or more ports within the specified range.

The Commission is not favoring form (mere tariff amendment) over substance (carrier inactivity). Suffice it to say, the present method of proceeding was chosen for the sake of administrative convenience as a rational first step dictated by the difficulty of gathering current and detailed operating data on the almost 1,000 different common carriers by water operating under FMC tariffs. When carrier inactivity is in fact established, appropriate action will be taken without regard to the length of time which has elapsed between tariff amendments. See discussion of

[7] Cases cited above. Respondents attempt to distinguish three of these decisions on the grounds that they dealt with domestic offshore rather than foreign commerce, but this distinction is without present significance. The fact that 30 days' notice must be given before section 2 tariffs may be cancelled is not relied upon therein, and there is no substantive difference between the requirements of Intercoastal Shipping Act section 2 and Shipping Act section 18(b) concerning common carrier status.

[8] Both *Ghezzi* and *Intercoastal Charters* do, however, reflect the governing principle that tariffs may not hold out services which are not routinely performed by the carrier.

Trans-Globe Shipping in *Publication of Inactive Tariffs, supra,* at 472. Moreover, the Commission's revisions to its foreign commerce tariff filing regulations (General Order 13, 42 F.R. 59265) which take effect January 1, 1978 will curb the practice of calling at individual ports within a stated range of ports on a "by inducement only" basis.[9] 42 F.R. 59269; 46 C.F.R. 536.5(a)(4)(i). This practice has never been permitted in domestic offshore commerce under 46 C.F.R. 531.5(a)(c).

THEREFORE, IT IS ORDERED, That the designated tariffs of the Respondent carriers listed in Appendix "B"[10] hereto are cancelled effective immediately; Provided, however, that this cancellation is without prejudice to said carriers filing new tariffs covering the subject trades at such time as they actually commence common carrier service in those trades.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

[9] These regulations were first adopted in October 1975 (40 F.R. 47770), but were stayed pending disposition of reconsideration petitions. Newly effective section 536.5(a)(4) does not, however, preclude a carrier from placing commercially reasonable restrictions upon its service to a port within a given range, provided that the restriction is specifically stated in its tariff. See subsection (4)(ii) thereof.

[10] Appendix A & B not included.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 530

EME NORLETT AB

v.

SEA-L AND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 1, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 1, 1978.

It is Ordered, That applicant is authorized to waive collection of $150.00 of the charges previously assessed EME Norlett AB.

It is further Ordered, That applicant shall 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 530 that effective February 11, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 11, 1977 through March 13, 1977, the rate on 'Equipment, Garden Care Supplies/Outdoor Power' in House/House containers, minimum 10 WT per container is $179.00W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 530

EME NORLETT AB

v.

SEA-LAND SERVICE, INC.

Adopted February 1, 1978

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant), has applied for permission to waive collection of a portion of the freight charges on a shipment of garden equipment (riding mowers) that moved from Houston, Texas, to Stockholm, Sweden, under a Sea-Land bill of lading dated February 24, 1977. The application was filed August 1, 1977.

The subject shipment moved under Sea-Land Tariff 162–A, FMC–137, 2nd revised page 59, effective February 11, 1977, under the rate for "Equipment, Garden Care Supplies/Outdoor Power, viz: Mowers, Riding Mowers . . . in House/House containers, minimum 10WT per container." (Item 2015) The aggregate weight of the shipment was 21,896 pounds. The rate applicable at time of shipment as $194 W (per 2,240 lbs.) in house-to-house containers, with a minimum of 10 WT per container. The rate sought to be applied is $179 W, in same containers and with same minimum, per Sea-Land Tariff 162–A, FMC–137, 3rd revised page 59, effective March 14, 1977 (Item 2015).

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $1,948.21 (including wharfage). Aggregate freight charges at the rate sought to be applied would be $1,798.21 (including wharfage). The difference sought to be waived is $150. The

[1] This decision became the decision of the Commission February 1, 1978.
[2] 46 U.S.C. 817, as amended.

Applicant is aware of one other shipment of the same commodity which moved via Sea-Land during the same period of time at the rates involved in this shipment. That other shipment is the subject of a separate Special Docket proceeding (Special Docket No. 529), which was filed simultaneously with this one.

Sea-Land offers the following as grounds for granting the application:

Mr. F. E. Hague, Traffic Manager for XM World Trade, Inc., agents for the consignor, corresponded with Mr. R. Van Dijk of Sea-Land's Atlantic Pricing in New Orleans by letter dated August 31, 1976 concerning the publication of a rate on garden tractors and attachments. By letter dated September 15, 1976, Mr. Van Dijk confirmed to Mr. Hague of Sea-Land's intention to publish a rate of $179.00 W/T, minimum 10 W/T per container on Garden Tractors and attachments, not subject to September 23, 1976 General Rate Increase of 8-1/2%, in Sea-Land Tariff 162–A, FMC–137.

A Publication Request as properly prepared by Atlantic Pricing in New Orleans and sent to Sea-Land's Tariff Publication Department on September 14, 1976 requesting the confirmed rate of $179.00 W/T to be published. Upon receipt of the Publication Request, Tariff Publications made telegraphic filing to the FMC on September 22, 1976 to publish the confirmed rate. Publication appeared on 1st Revised Page 59 of Sea-Land Tariff 162–A, FMC–137, item 2015.

Sea-Land's Atlantic Pricing in New Orleans prepared a Publication Request, dated January 18, 1977 to update various pages in Sea-Land Tariff 162A to include the September 23, 1976 G.R.I. Included in this Publication Request was 1st Revised Page 59. Unfortunately, due to a clerical error, Sea-Land tacked on the 8-1/2% GR.I. to the $179.00 rate, which was flagged from the G.R.I., and increased the rate in item 2015 to $194.00 on 2nd Revised Page 49, effective February 11, 1977.

When Sea-Land became aware of this error, Atlantic Pricing in New Orleans sent a Publication Request to Tariff Publications requesting to reinstate the $179.00 rate. The $179.00 rate was reinstated on 3rd Revised Page 59, effective March 14, 1977. Meantime, the shipment involved herein had moved on February 24, 1977 and was assessed the then applicable rate of $194.00 W/T. . . . Payment was made on the basis of the $179.00 rate by Complainant.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . .Commission may in its discretion and for good cause show permit a common carrier by water in foreign commerce 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 an 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 . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the correct special rate for shipments of the subject commodity (without the general rate increase), as had been promised the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application as filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $150. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
January 6, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 533

CATHOLIC RELIEF SERVICE

v.

PACIFIC WESTBOUND CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 8, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 8, 1978.

IT IS ORDERED, That applicant is authorized to waive collection of $5,018.89 of the charges previously assessed Catholic Relief Service.

IT IS FURTHER ORDERED, That applicant shall 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 533 that effective February 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 1, 1977 through February 15, 1977, the Group 4 rate on 'Medicinal and Pharmaceutical Products—N.O.S.' Donated for Relief or Charity Ordinary Stowage is $133.00, subject to all applicable rules, regulations, terms and conditions of said rates and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 533

CATHOLIC RELIEF SERVICE

v.

PACIFIC WESTBOUND CONFERENCE

Adopted February 8, 1978

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), the Pacific Westbound Conference (Conference or the Applicant) has applied, with the concurrence of Sea-Land Service, Inc. (Sea-Land), and the Catholic Relief Service (shipper), for permission to waive collection of a portion of the freight charges on a shipment of medicinal and pharmaceutical products that moved from New York, N.Y., to Keelung, Taiwan, via rail from Kearny, N.J., to Oakland, California, then via ocean carrier to Taiwan (joint rail-water intermodal service). The bill of lading was dated February 10,[3] 1977, and the application was filed August 5, 1977.

The subject shipment moved under Pacific Westbound Conference westbound intermodal Tariff No. 8, ICC No. 1, FMC No. 15, original page 475, effective February 1, 1977, under the rate for "Medicinal & Pharmaceutical Products" (Group 4 ports), item No. 540 0000 00. The shipment measured 35.595 cubic meters. The rate applicable at time of shipment was $274 per cubic meter (greatest of W/M). The rate sought to be applied is $133 per cubic meter plus $8 "CFS" (Origin Freight Station Container Stuffing charge), pursuant to Pacific Westbound Conference westbound intermodal Tariff No. 8, ICC No. 1, FMC No. 15, revised

[1] This decision became the decision of the Commission February 8, 1978.

[2] 46 U.S.C. 817, as amended.

[3] The application gives February 18 as the date of shipment, but the bill of lading shows February 10. This latter is consistent with the narrative portion which states the shipment was received at the rail origin (Sea-Land) on February 7, 1977.

page 485, effective February 16, 1977, under the rate for "Medicinal & Pharmaceutical Products—N.O.S., Donated for Relief or Charity, Ordinary Stowage" (Group 4 ports), item no. 541 8000 00.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $10,037.79. Aggregate freight charges at the rate sought to be applied amount to $5,018.90. The difference sought to be waived is $5,018.89.[4] The Applicant is not aware of any other shipment of the same commodity which moved via Sea-Land or any other Conference carrier during the same time period at the rates involved in this shipment.

The Pacific Westbound Conference offers the following grounds for granting the application:

(A) When the Pacific Westbound Conference was provided with intermodal authority in their Basic Agreement 57 it was the intent of the Conference to publish the Far East Conference all-water rates, less the $3.00 dollars per revenue ton cargo administrative charge for shipper loaded container cargo, (CY origin cargo), (See Exhibits H and I–1 page 5 and further on I–2, page 6) where individual carriers did have independent rates in their intermodal tariffs on certain commodities and desired to retain the independent rate in the new Conference tariff, each carrier was to submit a list of those rates and tariff items on the independent publications which was to be retained, (See Exhibit H)

(B) Relief or charity shipments were not on any special independent actions, however, in the Far East Conference Freight Tariff No. 27 Page 363, (See Exhibits A, A–1 and A–2) does provide for Tariff Items 541 8000 00 and 541 80000 03 which would cover the involved shipment covered by F/B 901 839134.

(C) Based on the belief that there would be no drastic increase in ocean freight charges when the Pacific Westbound Conference Tariff 8 superceded Sea-Land Westbound Intermodal Tariff 234 on February 1, 1977 the shipper tendered the involved shipment to Sea-Land Service and was received at the rail origin rail freight station on February 7, 1977. When the papers involving the shipment were to be rated it was discovered ocean freight rates were not available to Taiwan under items 541 8000 00 or 541 8000 03 on original page 485 of Pacific Westbound Conference Westbound Intermodal Tariff 8 (See Exhibit B)

(D) Refer Exhibit C, R. C. Palmros' teletype message 1040 of February 15, 1977 to Oakland M. R. Cook outlining the apparent oversight and requesting that the both items be added to the Conference Intermodal Tariff at the earliest possible time.

NOTE—(In the message there is an error on the referenced Item numbers ie: 541 8003 should have been 541 8000 30.

(E) The Pacific Westbound Conference Westbound Intermodal Tariff 8 corrected the error in both tariff items by publishing the metric scale of rates $3.00 per revenue ton under the Far East Conference all-water structure. (See Exhibit D also comparison of FEC rate Exhibits A through A–2 and D will indicate the Pacific Westbound publication met the all-water levels). The publication was published on short notice with an issue date of February 15, 1977 and an effective date of February 17, 1977.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

[4] The application states $5,018.*90*; however, deducting the requested (new) total charges of $5,018.90 from the originally billed $*10,037.79* leaves a *balance of* $*5,018.89*, a negligible difference due to "rounding off" several decimal places.

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce 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 an 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 . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[5]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to carry forward in the tariff filings the special rate for relief or charity shipments from the Sea-Land Westbound Intermodal Tariff and the original Far East Conference tariff to the new Pacific Westbound Conference tariff, as had been intended by Sea-Land and the Conference and as promised to the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, the Pacific Westbound Conference filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to the Pacific Westbound Conference (and Sea-Land) to waive collection of a portion of the freight charges, specifically the amount of $5,018.89. An appropriate notice will be published in the Pacific Westbound Conference tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
January 11, 1978.

[5] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 529

S. C. SORENSEN

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 8, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 8, 1978.

It is Ordered, That applicant is authorized to waive collection of $300.00 of the charges previously assessed S. C. Sorensen.

It is further Ordered, That applicant shall 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 529 that effective February 11, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 11, 1977 through March 13, 1977, the rate on 'Equipment, Garden Care Supplies/Outdoor Power' in House/House containers, minimum 10 WT per container is $179.00W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 529

S. C. SORENSEN

v.

SEA-LAND SERVICE, INC.

Adopted February 8, 1978

Application granted.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant), has applied for permission to waive collection of a portion of the freight charges on two shipments of garden equipment that moved from Houston, Texas, to Aarus, Denmark, under two Sea-Land bills of lading dated February 24, 1977. The application was filed August 1, 1977.

The subject shipments moved under Sea-Land Tariff 162–A, FMC–137, 2nd revised page 59, effective February 11, 1977, under the rate for "Equipment, Garden Care Supplies/Outdoor Power, viz: Mowers, Riding Mowers . . . in House/House containers, minimum 10WT per container." (Item 2015) The aggregate weight of the shipments was 43,316 pounds. The rate applicable at time of shipment was $194 W (per 2,240 lbs.) in house-to-house containers, with a minimum of 10 WT per container. The rate sought to be applied is $179 W. in same containers and with same minimum, per Sea-Land Tariff 162–A, FMC–137, 3rd revised page 59, effective March 14, 1977 (Item 2015).

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $3,596.24 (including wharfage). Aggregate freight charges at the rate sought to be applied would be $3,896.24 (including wharfage). The difference sought to be waived is $300. The Applicant is aware of one other shipment of the same commodity which

[1] This decision became the decision of the Commission February 8, 1978.
[2] 46 U.S.C. 817, as amended.

moved via Sea-Land during the same period of time at the rates involved in this shipment. That other shipment is the subject of a separate Special Docket proceeding (Special Docket No. 530), which was filed simultaneously with this one.

Sea-Land offers the following as grounds for granting the application:

> Mr. F. E. Hague, Traffic Manager for XM World Trade, Inc., agents for the consignor, corresponded with Mr. R. Van Dijk of Sea-Land's Atlantic Pricing in New Orleans by letter dated August 31, 1976 concerning the publication of a rate on garden tractors and attachments. By letter dated September 15, 1976, Mr. Van Dijk confirmed to Mr. Hague of Sea-Land's intention to publish a rate of $179.00 W/T, minimum 10 W/T per container on Garden Tractors and attachments, not subject to September 23, 1976 General Rate Increase of 8½%, in Sea-Land Tariff 162–A, FMC–137.
>
> A Publication Request was properly prepared by Atlantic Pricing in New Orleans and sent to Sea-Land's Tariff Publication Department on September 14, 1976 requesting the confirmed rate of $179.00 W/T to be published. Upon receipt of the Publication Request, Tariff Publications made telegraphic filing to the FMC on September 22, 1976 to publish the confirmed rate. Publication appeared on 1st Revised Page 59 of Sea-Land Tariff 162–A, FMC–137, item 2015.
>
> Sea-Land's Atlantic Pricing in New Orleans prepared a Publication Request, dated January 18, 1977 to update various pages in Sea-Land Tariff 162A to include the September 23, 1976 G.R.I. Included in this Publication Request was 1st Revised Page 59. Unfortunately, due to a clerical error, Sea-Land tacked on the 8½% G.R.I. to the $179.00 rate, which was flagged from the G.R.I., and increased the rate in item 2015 to $194.00 on 2nd Revised Page 49, effective February 11, 1977.
>
> When Sea-Land became aware of this error, Atlantic Pricing in New Orleans sent a Publication Request to Tariff Publications requesting to reinstate the $179.00 rate. The $179.00 rate was reinstated on 3rd Revised Page 59, effective March 14, 1977. Meantime, the shipment involved herein had moved on February 24, 1977 and was assessed the then applicable rate of $194.00 W/T. . . . Payment was made on the basis of the $179.00 rate by Complainant.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce 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 an 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 . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the correct special rate for shipments of the subject commodity (without the general rate increase), as had been promised the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipments.

Accordingly, permission is grated to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $300. An appropriate notice will be published in Sea-Land's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
January 11,1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 528

JUILLARD ALPHA LIQUOR CO.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 8, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review the same, notice is hereby given that the initial decision became the decision of the Commission on February 8, 1978.

IT IS ORDERED, That applicant is authorized to waive collection of $203.60 of the charges previously assessed Juillard Alpha Liquor Co.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision in Special Docket 528 that effective February 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 1, 1977 through May 1, 1977, the Group 1 rate on 'Liquors and Spirits' in cartons or cases in containers moving pier to house or house to house is $134.00W subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 528

JUILLARD ALPHA LIQUOR CO.

v.

SEA-LAND SERVICE, INC.

Adopted February 8, 1978

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land has requested permission to waive a portion of the freight charges on one shipment of liquor from Leghorn, Italy, to Oakland, California. The shipment weighing 22,432 lbs. moved under bill of lading dated February 11, 1977. The rate applicable at the time of shipment was $154.00 per 1000 kilos. The rate sought to be applied is $134.00 per 1000 kilos.

In attempting to provide for a "Special Rate" on tariff item 02–050[2] a "rough draft" of 26th Revised page 93 was prepared.[3] This draft was made by penciled or penned notations on the existing tariff page. Unfortunately the penmanship of the revisor left something to be desired and the intended "house to house" rate was transcribed as "house to pier." The error was discovered on May 2, 1977, and the rate of $134.00 was republished to apply to house to house shipments. Freight charges under the $154.00 rate would have been $1,623.71. Freight charges under the $134 rate would have been $1,420.11.[4] Permission to waive $203.60 is granted.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

[1] This decision became the decision of the Commission February 8, 1978.

[2] "Liquors and Spirits," Sea-Land Service, Inc., Freight Tariff No. 205, ICC No. 73, FMC No. 77.

[3] A copy of the rough draft was attached to the application.

[4] Freight charges were computed: applicable rate 10,180 at 154 = 1567.72 + 55.99 (handling) = 1623.71; Rate sought 10,180 at 134 = 1364.12 + 55.69 (handling) = 1420.00; the difference being $203.60. Through arithmetical error the application sought to waive $142.50. The error was corrected by letter dated December 5, 1977.

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce 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 an 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 . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[5]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in the tariff of a clerical or administrative nature.
2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.
3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.
4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $203.60. An appropriate notice will be published in Sea-Land's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
January 11, 1978.

[5] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92 (a) & (c).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 536

THE A.W. FENTON CO.

v.

EUROPE CANADA LAKES LINE

NOTICE OF ADOPTION OF INITIAL DECISION

March 29, 1978

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 29, 1978.

It is ordered that applicant shall refund charges, publish the appropriate notice in its tariff and notify the Commission of its action as required by the ordering paragraphs of the initial decision.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 536

THE A.W. FENTON CO.

v.

EUROPE CANADA LAKES LINE

February 27, 1978

Application for permission to refund a portion of freight charges granted.
Carrier found, through inadvertence, to have failed to file a new tariff in time to assess a lower rate on a movement of fork lift trucks from Hamburg, Germany, to Cleveland, Ohio.
Application, as clarified and supplemented by additional supporting information, found to qualify for the relief requested under section 18(b)(3), as amended by P.L. 90-298..

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

This proceeding was commenced by an application filed by Europe Canada Lakes Line (ECLL)[2] pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), 46 U.S.C. 817(b)(3), as amended by P.L. 90-298, and Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a). In its application filed August 4, 1977[3] (the date it was received by the Commission's Office of the Secretary), ECLL stated that it wished to waive collection of a portion of freight charges payable by the consignee Fenton on a shipment of "Forklifts" which were transported under a bill of lading dated June 18, 1977, from Hamburg, Germany, to Cleveland, Ohio.

This application further stated that the shipment was rated at $63.50 per 1000 kos. but that the rate applicable at the time of shipment was $76.50 per 1000 kos., as provided by the tariff in effect.[4] Hence, ECLL

[1] This decision became the decision of the Commission March 29, 1978.

[2] ECLL is the name of the carrier operated by "Ernst Russ located in Hamburg, Germany. The application was filed by its general agent, Ernst Russ-North America, Inc. Although the documentation frequently refers to "Ernst Russ—Hamburg," to avoid confusion, I have used the term "ECLL" instead of "Ernst Russ—Hamburg."

[3] ECLL had filed an earlier application which was returned because it was not filed by an attorney or F.M.C. practitioner. (See letter dated January 17, 1978, addressed to me by Werner E. Scholtz, counsel for ECLL.)

[4] See ECLL Tariff No. 2—Continent (FMC 10), original page 78, and 1st rev. page 59, effective May 6, 1977.

wished to waive the excess portion of freight which would have been assessed at the higher rate. This portion amounted to $449.80.

The application, as submitted, appeared to be deficient in several respects. It did not furnish supporting documentation, such as a copy of the bill of lading, paid freight bills, pertinent tariff pages, etc., required by paragraph (4) of the Commission's prescribed form. As authorized by Rule 92(c), 46 CFR 502.92(c), I notified counsel for ECLL of the deficiencies and advised him to furnish the missing documentation. (See letter dated December 21, 1977.) The missing information was furnished by letter of January 17, 1978, together with additional information regarding other deficiencies in the application. The application, as supplemented by the information furnished at my direction, establishes the following situation.

On June 16, 1977, ECLL sent telex instructions to its wholly owned subsidiary and general agent, Ernst Russ-North America, Inc. (ERNA) directing ERNA to file a tariff amendment with the Commission to become effective on June 16, 1977. This tariff amendment would have published a special rate on "Trucks, Fork Lift—Hamburg/Cleveland" in the amount of $63.50 W/M plus half H.L. extras. However, the amendment was not filed because the clerk in charge of the telex machine misplaced the telex from ECLL in Hamburg. When the agent did not confirm the filing with ECLL in Hamburg by telex, as was customary, ECLL in Hamburg sent another telex on June 21, 1977, inquiring as to the status of the filing. The agent ERNA then discovered that a mistake had been made and on the same day (June 21, 1977) filed the tariff amendment.[5] However, the vessel carrying the fork lift trucks had sailed in the meantime. Since, on the date of shipment, the original tariff rate was still in effect, ERNA notified ECLL in Hamburg that the original, higher rate had to be charged the American consignee, as required by section 18(b)(3) of the Act. ECLL through ERNA thereupon issued a "manifest corrector," and the additional freight was collected. Thereafter ECLL filed its applications, the first returned, the second received, as mentioned above. Although the situation called for a refund of a portion of the total freight collected, the second application, which initiated this proceeding, mistakenly requested a waiver. Counsel for ECLL advised me orally and by letter that the application was intended to request a refund but was typed mistakenly. (See letter of Werner E. Scholtz, addressed to me, dated January 17, 1978.) I am therefore considering the application as one for refund rather than waiver.[6]

Although the application, as supplemented by the additional information, appeared to qualify under applicable law, a further deficiency

[5] See ECLL Tariff No. 2—Continent (FMC 10), 2nd revised page 59, effective June 21, 1977.

[6] A clarification of a pleading which commences a proceeding has been held to relate back to the time of the original filing of the pleading especially where the pleading erred only in the type of relief requested. See *Heterochemical Corp. v. Port Line, Ltd.*, 12 SRR 223 (1971); *Chr. Sahesen Ltd. v. West Michigan Dock & Market Corp.*, 9 SRR 1154 (1968); 12 F.M.C. 135, 141 (1966).

appeared which rendered it impossible to verify the validity of the figures showing freight actually collected and that which ECLL wished to retain. Consequently, it was impossible to determine the validity of the amount of refund ($449.80) which ECLL desired to make to the consignee Fenton. The problem arose because the "manifest corrector," the document used by ECLL to recompute freight owed, failed to include the figure showing what the shipment measured. Without such figure, the data on the "manifest corrector" showing weight in kilos and the applicable rates could not be used to substantiate the amounts of freight which ECLL claimed to have collected. I telephoned a representative of ERNA requesting clarification and confirmed the request by letter. (See letter to Werner Scholtz, Esq., ATTN: Mr. William L. MacKay, January 26, 1978.) The deficiency was corrected to show that the shipment measured 34.6 cubic meters and was rated on a measurement basis. (See letter to me from William L. MacKay, dated January 31, 1978.)[7] A copy of the original bill of lading dated June 18, 1977, showing the computation of freight on a measurement basis was submitted to confirm this fact.[8]

Discussion and Conclusions

The question to be decided in this case is simply whether the application for refund establishes that the type of error contemplated by P.L. 90–298 occurred and that the application meets all other requirements established in that law regarding the time of filing the application and the corrective tariff and the assurance that no discrimination among shippers will result if the line is permitted to grant the refund. In my opinion, the application, as supplemented and clarified, qualifies in all respects.

P.L. 90–298, which amended section 18(b)(3) of the Act, was designed to remedy inequities and financial harm visited upon shippers which resulted from inadvertent errors in tariff-filing by carriers. Thus, when a carrier intended to apply a lower rate on a particular shipment but failed to file an appropriate tariff conforming to the carrier's intention and usually the shipper's understanding, prior to the enactment of P.L. 90–298, the carrier was bound to charge the higher, unintended rate even if the shipper had relied upon the carrier's representations that a lower rate would be charged and that an appropriate tariff would be filed. Or, if the

[7] The letter itself caused a little confusion. It explained that the correct measurement figure for the shipment was "34,600 cubic meters." This is an obvious error. If the shipment were truly of such size, at a rate of $76.50 per cubic meter, as ECLL's tariff provided, ECLL would have had to collect $2,646,900 in freight, instead of $2,646.90, which was actually collected. The refund would amount to $449,800 instead of $449.80, as requested. I telephoned ERNA in Chicago to clarify this matter and was informed that the correct measurement was indeed 34.600 cubic meters. The confusion was caused by the fact that the German custom is to use commas in place of decimal points under the metric system. (See also letter from Werner E. Scholtz dated February 15, 1978.) The letter also attached pertinent tariff pages explaining the source of the rate of $76.50 W/M which was applied to the forklift truck shipment.

[8] ECLL, in the apparent belief that the lower rate had been filed as per its instructions, rated the shipment at the lower rate on the original bill of lading. Subsequently, the "manifest corrector" submitted for the record shows that ECLL rebilled the consignee at the higher rate still in effect at the time of the shipment. The rated bill of lading and "manifest corrector" show that ECLL assessed the base rate plus seaway tolls but not heavy lift charges, which are not assessed for containerized cargo. (See letter from Werner E. Scholtz, dated February 15, 1978.) ECLL's Tariff Rule No. 50 pertaining to heavy lift charges (Original page 8) assesses heavy lift charges only if there are any extra costs for loading and discharging. (See Tariff Rule cited.)

carrier, through inadvertence, republished a tariff and caused the tariff to reflect an unintended, higher rate, prior to the enactment of this remedial law, the carrier nevertheless was compelled to charge the higher rate, again causing shippers to suffer financial loss. These inequitable results were unavoidable because of the governing principles of law requiring strict adherence to tariffs effective at the time of shipment regardless of equities. See *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *United States v. Columbia S.S. Company*, 17 F.M.C. 8, 19–20 (1973).

In recognition of the fact that this hard and fast doctrine could result in inequities and hardships, Congress passed P.L. 90–298. The legislative history to P.L. 90–298 illustrates the types of mistakes which the statute was designed to remedy as follows:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he as may be required to give notice of the rate on which such refund or waiver would be to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.[9]

The Senate Report states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.[10]

Accordingly, section 18(b)(3) of the Act, 46 U.S.C. 817(b)(3), was amended in pertinent part to read as follows:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] 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 an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

In the instant case, it is clear that there was "an error due to an inadvertence in failing to file a new tariff." The documentation supports ECLL's contention that it fully intended to have a special reduced rate filed with the Commission to be effective prior to the date of shipment but that its intentions were not carried out because its instructions were misplaced. As soon as the mistake was recognized, however, ECLL's

[9] House Report No. 920, 90th Cong. 1st Sess., November 14, 1967 [to accompany H.R. 9473], pp. 3, 4.
[10] Senate Report No. 1078, 90th Cong. 2d Sess., April 5, 1968 [to accompany H.R. 9473], p. 1.

American agent filed the intended tariff. These facts establish that a bona fide mistake occurred, which resulted in the shipper's having to pay a higher, unintended rate. Furthermore, the critical element in all special-docket cases, namely, the fact that it was the carrier's intention prior to the time of shipment to apply the lower rate, is present here. As the legislative history to P.L. 90–298 illustrates, this element is essential.[11] See also *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191, 1193 (1977), in which case the Commission stated:

> [I]t is clear that the "new tariff" is expected to reflect a *prior intended rate*, not a rate agreed upon after the shipment. (Emphasis added.)

I therefore find that:

1. There was an error due to inadvertence in failing to file a new tariff, within the meaning of P.L. 90–298.

2. There is no evidence that any other shipment of the same or similar commodity (fork lift trucks) moved during the time within which the desired, lower rate would be made effective retroactively (June 18, 1977 through June 20, 1977). Even if there were such shipments, however, ECLL's publication of a tariff notice, as ordered below, will mean that any other shipments would be entitled to the same rate during this period of time. Therefore, payment of the refund requested will not result in discrimination among shippers.

3. ECLL filed a new tariff on June 21, 1977, prior to the filing of its application on August 4, 1977, as required by the statute.

4. The application was filed well within the 180-day period prescribed by the statute (date of shipment occurring on June 18, 1977).

Accordingly, the application for permission to refund a portion of the freight to the consignee (The A.W. Fenton Co.) who paid the freight is granted.

It is ordered that upon adoption of this decision by the Commission:

1. ECLL shall refund $449.80 to the above-named consignee, in connection with the shipment of fork lift trucks which moved under bill of lading dated June 18, 1977.

2. ECLL shall promptly publish the following notice in an appropriate place in its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 536, that effective June 18, 1977, and continuing through June 20, 1977, inclusive, the rate on Trucks, Fork Lift, Hamburg/Cleveland," is $63.50 W/M plus half H.L. extras, subject to all applicable rules, regulations, terms and conditions in this tariff, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during this period of time.

3. Refund of the charges shall be effectuated within 30 days of service of the Commission's notice of adoption of this decision (if adopted) and

[11] Thus, the Senate Report, cited above, at page 1, refers to the situation "where through inadvertence there has been a failure to file a tariff reflecting an *intended* rate." (Emphasis added.) See also Hearings before the Subcommittee on Merchant Marine and Fisheries, etc., 90th Cong. 1st Sess., August 15, 16, 1967, p. 103, in which a witness stated that "in the inadvertence cases the question of relief swings on the question of the intent of the particular carrier and the shipper applying for relief."

ECLL shall within 5 days thereafter notify the Commission of the date and manner of effectuating the refund.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
February 24, 1978.

20 F.M.C.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 489

WILLIAMS, CLARKE COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

February 22, 1978

No exceptions having been taken to the supplemental initial decision in this proceeding and the commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 22, 1978.

It is Ordered, That applicant is authorized to refund $292.32 of the charges previously assessed Williams, Clarke Company, Inc. as agent for Goodyear Tire and Rubber Company: Williams, Clark Company, Inc. is ordered to remit said amount directly to Goodyear Tire and Rubber Company and to submit proof to the Commission of such payment no later than 45 days from the date of this notice.

It is further Ordered, That applicant shall 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 489 that effective June 6, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from June 6, 1975 through September 10, 1975, the Group 1 rate on 'Tires or Tubes, pneumatic,' TL Minimum 1600 cu. ft. is 68 cents per cu. ft., subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 489

WILLIAMS, CLARKE COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

Adopted February 22, 1978

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to sections 18(a)[2] and 22 of the Shipping Act, 1916, as amended, section 2 of the Intercoastal Shipping Act, 1933, as amended, and section 502.92(b) of the Commission's Rules of Practice and Procedure (46 CFR 502.92(b)), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to refund a portion of the freight charges on a shipment of rubber pneumatic tires, which moved from Long Beach, California to San Juan, Puerto Rico, as reparation for an inadvertent unjust, unreasonable charge for that shipment. The shipment moved under Sea-Land bill of lading dated September 9, 1975. The application was filed October 13, 1976.

The shipment measured 2088 cubic feet and weighed 15,952 pounds. The rate applicable at time of shipment was the ocean rate of 82 cents per cubic foot. Sea-Land Tariff No. 8–C, FMC–F No. 29, original page 154, item 3460 effective June 6, 1975. The rate sought to be applied is 68 cents per cubic foot, per 1st revised page 154 of the above tariff, effective September 11, 1975, same item 3460 but under the "TL" or truckload rate for shipments having a minimum of 1600 cubic feet.

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to $1930.67. Aggregate freight charges at the rate sought to be applied amount to $1638.35. The difference sought to be refunded is $292.32. The Applicant is not aware of any other shipment of

[1] This decision became the decision of the Commission February 22, 1978.
[2] 46 U.S.C. 817(a).

the same commodity which moved via Sea-Land during the same time period at the rates involved in this shipment.

Sea-Land offers the following as grounds for granting the application:

Freight charges were calculated on an ocean rate of 82 cents per cubic foot, per Item 3460 on Original Page 154 of Sea-Land Tariff No. 8–C, FMC–F No. 29 (Attachment No. 1). Total charges of $1930.67 were paid to the carrier on September 16, 1975 by Williams, Clarke Co., the shipper's freight forwarder (Attachment No. 2).

Tariff No. 8–C became effective June 6, 1975 and cancelled Tariff No. 8–B per its Original Title Page (Attachment No. 3). It was a reissue of Tariff 8–B to incorporate in the rates a general increase of 30% plus a bunker surcharge of 11%. At the time of its cancellation, Item 3460 on 1st Revised Page 142 of Tariff No. 8–B (Attachment No. 4) named a rate on truckloads of 68 cents per cubic foot (47 cents plus 30% per Supplement No. 20, plus 11% per Item 155 on 3rd Revised Page 33).

However, when bringing Item 3460 forward to Original Page 154 of Tariff No. 8–C (Attachment No. 1) the "TL" rates in the "Per Cu. Ft." column were omitted by clerical error. As was the case throughout the tariff, it was fully intended that the same rates in Item 3460 be brought forward without change. The entry in the descriptive part of the item, reading "TL, Minimum 1600 cu. ft." was properly brought forward. As a result, effective June 6, 1975 only the LTL rates of 82 cents per cubic foot and 442 cents per 100 Lbs. were legally in effect on pneumatic tires.

As soon as this clerical mistake was discovered, it was corrected by reinstating the TL rate of 68 cents on 1st Revised Page 154 (Attachment No. 5), issued August 5 and effective September 11—only two days after the shipment was tendered to the carrier. Item 530 of Tariff No. 8–C provides that changes in rates become effective on shipments received at the terminal on and after the effective date of the tariff change; therefore, the LTL rate of 82 cents was the only legally applicable rate for the shipment. Sea-Land believes the rate of 82 cents was unjust and unreasonable for TL shipments during the period from June 6 to September 10 inclusive since it did not intend that rate to be any different than the TL rate of 68 cents that was in effect prior to June 6 and on and after September 11.

Section 18(a) of the Shipping Act, 1916, 46 U.S.C. 817(a) provides, *inter alia:* "That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications and tariffs, . . . (and that) No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the (Commission)." The section further provides that: "Whenever the (Commission) finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice."

Section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92) provides in subsection (b):

(b) Common carriers by water in interstate or intercoastal commerce . . . may file application for permission to refund a portion of freight charges collected from a shipper or waive collection of a portion of freight charges from a shipper. All such applications shall be filed within the 2-year statutory period referred to in § 502.63. . . . Such applications will be considered the equivalent of a complaint and answer admitting the

facts complained of. If allowed, an order for payment or waiver will be issued by the *Commission.*

The reference in the above section to § 502.63 is to the statute of limitation provided for reparation actions. § 502.63, in turn, refers to section 22 of the Shipping Act, 1916, which provides the authority for the Commission to accept and act upon reparation complaints based upon *any* violation of the Shipping Act. *Inter alia,* section 22 provides that:

> . . . If the complaint is not satisfied (by the respondent) the (Commission) shall investigate it in such manner and by such means, and make such order as it deems proper. (It), if the complaint is filed within two years after the cause of action accrued, may direct the payment . . . of full reparation to the complainant for the injury caused by such violation.

The investigation referred to in section 22 ("in such manner and by such means . . . as it deems proper") may be fulfilled in cases where there is no dispute by a review of the application and documentation provided for in the shortened Special Docket section of the Commission's Rules (46 CFR 502.92(b)). Thus, the Special Docket procedure for obtaining permission for refunds gives the Commission and the parties an expeditious and less costly alternative for determining reparation merits where the facts are not in dispute—in effect, "submitting the case on the pleadings" without the necessity of a lengthy investigation and formal evidentiary hearing.

We turn now to a consideration of the merits of this, in effect, joint request for refund permission. It is customary in the shipping industry to grant substantially lower rates for truckload ("TL") shipments than for less-than-truckload ("LTL") shipments. It is evident in hundreds of other items throughout the subject tariff pages that wherever there are specific truckload rates, they are always substantially lower than the less-than-truckload rates. (This is a custom not only in the shipping industry but in all modes of cargo transportation.) The reasons for this custom and practice in the trade are quite obvious—truckloads and trailerloads of a single commodity reduce the problems of mixing and segregation at departure and destination points. From a labor standpoint, it is less costly and more efficient to handle large shipments of the same commodity, than a myriad of smaller, diversified loads of different sizes, shapes, weights and degrees of fragility. The preference for handling and moving larger unit loads impel the carriers to offer volume discounts that will encourage shippers and freight forwarders to tender cargo in truckload lots.

With this background in mind, and reviewing the consistent tariff history of this particular commodity item (its constant truckload vs. less-than-trickload differential), I find that to charge a shipment offered in truckload lots the same high rate applicable to less-than-truckload shipments would be unjust and unreasonable, and therefore unlawful. I further find that in view of the 82 cents per cubic foot rate on less-than-truckload shipments of tires, and the 68 cents per cubic foot rate on

truckload shipments having a minimum of 1600 cubic feet, which existed both before and after the shipment in question, the only just and reasonable maximum rate for that shipment was 68 cents per cubic foot for truckload lots measuring a minimum of 1600 cubic feet. § 18(a) Shipping Act, 1916, 46 U.S.C. 817(a). The 82 cents per cubic foot rate varied so greatly from the usual truckload rate for pneumatic tires as to be clearly unreasonable.[3] See *Oxenberg Bros. v United States*, 3 F.M.B. 583, 584 (1951).

Therefore, upon due consideration of the application submitted, it is found that:

1. For purposes of this proceeding and with regard to this particular shipment, Sea-Land operated as a common carrier by water in interstate or intercoastal commerce, within the meaning of section 18(a) of the Shipping Act, 1916, as amended; section 2 of the Intercoastal Shipping Act, 1933, as amended; and 46 CFR § 502.92(b) of the Commission's Regulations.

2. The application to refund a portion of the freight charges as reparation for the admitted, but unintentional, unjust and unreasonable charge, was made within the 2-year statutory period prescribed in section 22, Shipping Act, 1916, as amended, and 46 CFR §§ 502.92(b), 502.63.

3. The charging of the less-than-truckload rate on a truckload size shipment measuring a minimum of 1600 cubic feet was unjust, unreasonable and unlawful, in violation of section 18(a)[4] of the Shipping Act, 1916.

4. The charging of any rate higher than the truckload rate of 68 cents per cubic foot for truckload shipments measuring at least 1600 cubic feet, which rate existed immediately before and immediately after the shipment in issue, was unjust, unreasonable and therefore unlawful.

5. A refund of a portion of the freight charges, representing the difference between the truckload and less-than-truckload tariff rates, which existed immediately before and immediately after the subject shipment, should be allowed as appropriate reparation for the unjust, unreasonable and unlawful charge.

6. Prior to applying for permission to refund a portion of the freight charges as reparation for the admitted unjust and unreasonable charge, the Applicant filed a new tariff setting forth the rate on which such refund would be based.

7. Such a refund of a portion of the freight charges will not result in discrimination among shippers.

Accordingly, permission is granted to Sea-Land Service, Inc. to refund a portion of the freight charges, specifically, the amount of $292.32 to the

[3] Even today, the present tariffs display a differential between less-than-truckload and truckload shipments of this same commodity, as well as for a large number of other commodities. Furthermore, notwithstanding the steady upward march of inflation for over 18 months, the tariff rate for truckload lots of tires still has not reached 82 cents per cubic foot. Sea-Land Tariff No. 8-C, FMC-F No 29, 3rd revised p. 154, effective October 8, 1976 (Oakland or Long Beach, Cal. to Puerto Rico).

[4] An alternative statutory basis for relief, under the facts in this case, would appear to be under § 16 First of the Shipping Act, 1916 (46 U.S.C. 815, First), as an "undue or unreasonable prejudice or disadvantage." *Cf. Valley Evaporating Co. v. Grace Line Inc.*, 14 F.M.C. 16 (1970), and *General Mills v. Hawaii*, 17 F.M.C. 1 (1973).

party which paid those charges. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 4, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 526

JTH TENG PRINTING INK FACTORY

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

March 29, 1978

No excpetions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 29, 1978.

IT IS ORDERED, That applicant is authorized to refund $69.32 of the charges previously assessed Jth Teng Printing Ink Factory.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision in Special Docket 526 that effective January 18, 1977, for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from January 18, 1977, through February 20, 1977, the rate on 'Carbon Black' to Kaohsiung/Keelung is $116.00/1,000 kgs. subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 526

JTH TENG PRINTING INK FACTORY

v.

SEA-LAND SERVICE, INC.

March 3, 1978

Application for permission to refund $69.32 of freight charges granted.

INITIAL DECISION[1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

By application timely filed on July 25, 1977, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), applicant Sea-Land Service, Inc., seeks authority to refund a portion of the freight charges on a containerized shipment of carbon black, in bags, in rail-water intermodal service from New Orleans, Louisiana, via the rail service of the Southern Pacific Co., to Los Angeles, California, thence via the ocean service of Sea-Land Service, Inc., to Keelung, Taiwan, as per bill of lading number 031–135196 issued at New Orleans, dated January 26, 1977.

Disposition of this application was delayed for two reasons. First, the supporting exhibits attached to the application were in large part illegible. Applicant provided legible exhibits on December 15, 1977. Second, the applicant promised the signature of the complainant located in Taiwan, and this concurrence of the complainant was received on February 21, 1978.

Rule 92(b) of our Rules of Practice and Procedure states that applications under this rule shall be made in accordance with the form prescribed in Appendix II(7) of these rules. In that form, the respondent water carrier or conference of water carriers submits a notarized application, and the form also provides for the notarized signature of the complainant under his statement that he concurs in the application and certifies that

[1] This decision became the decision of the Commission on March 29, 1978.

the charge of $_____ on the shipment involved were paid and borne by _____ and no other.

However, a close check of the law, section 18(b)(3) shows that Rule 92(b) goes beyond the law in requiring the concurrence of the complainant. There is no requirement in the law that complainant concur in the application under section 18(b)(3).

It is concluded that the purpose of the form in Appendix II(7) may well be justified for other types of special docket applications which ante-date section 18(b)(3) applications, such as applications under the two-year statute of limitations in the domestic trade.

In the present situation we have a 180-day limitation on the filing of this type of application and there is no dispute as to who paid and bore the freight charges.

In these circumstances, the fact that the complainant's signature was obtained much later than the 180 days following the date of shipment is immaterial. It is concluded that the application was properly filed within the 180 days from the date of shipment, regardless of the date of the complainant's signature.

From the amount of the requested refund or waiver of a portion of the freight charges in relation to the amount of the total rail-water intermodal charges, it is concluded that the requested refund or waiver will apply only to the ocean portion of the through charges. The applicant did not so state, but should so state on future applications, because our authority to sanction waivers or refunds under section 18(b)(3) relates only to the ocean portion of the through rate.

A competitor (Seatrain International, S.A.) of the applicant Sea-Land had a rate of $105 W (ton of 2,000 pounds) on carbon black from New Orleans to Keelung. Sea-Land in order to induce the shipment herein promised to publish the same rate. It was intended that Sea-Land publish the $105 W rate to Keelung and to Kaohsiung, Taiwan. However, because of clerical error the rate of $105 was published to Hong Kong, but not to those two Taiwan destinations.

The rate of $119 W was published in error to Keelung and Kaohsiung. This was the rate charged or the rate that should have been charged because of the tariff error.

The rate sought to be charged on which waiver or refund of a portion of the charges would be based is $105 W. In actual fact, Sea-Land has not published the $105 rate as such because the applicable tariff has been converted from imperial tons of 2,000 pounds to metric tons of 1,000 kilograms.

The shipment or shipments moved on January 26, 1977, when the erroneous $119 W (imperial) rate applied. This error was corrected effective February 21, 1977, in the Pacific Westbound Conference Tariff No. 8 (F.M.C. No. 15, I.C.C. No. 1) by the publishing of a rate of $116 W (metric ton of 1,000 kilograms, using the conversion factor of 2,204.62 pounds per 1,000 kilograms), with Sea-Land participating in this confer-

ence rate, circle reference Sea-Land, item No. 513–2700–00. On February 1, 1977, Sea-Land's tariff 234 (with the erroneous $119 W rate) was canceled and superseded by the conference tariff.

The imperial rate of $105 using the conversion factor becomes a metric rate of $115.74 and this when rounded off becomes the actual tariff metric rate of $116 W.

Further calculations herein are based on the imperial rates of $119 and of $105, with imperial weights.

This special docket application No. 526 is one of three interrelated applications. The other two are special docket No. 524 and No. 525. Carbon black was shipped in all three of these cases, but to three different complainant-consignees, all on freight collect bases. For convenience, these three complainants will be designated by their special docket numbers, as complainant–524, etc.

Two forty-foot containers were utilized by Sea-Land for the shipments of the three complainants. The consignor put all of complaint–524's 7,210 pounds of carbon black in the first container, SEAU–106776. This same container also had on it 22,660 pounds of complainant–525's carbon black, or a total of 29,780 pounds. In the second container, SEAU–100431, the consignor put 15,300 pounds of complainant–525's carbon black, and all of complainant–526's 5,050 pounds of carbon black. In this second container was a total of 20,350 pounds.

Because the applicable tariff provided for a minimum of 40,000 pounds of carbon black for forty-foot containers, there were deficit poundages in each container. The deficit in SEAU–106776 was 10,130 pounds, and the deficit in SEAU–100431 was 19,650 pounds. In billing the three complainants Sea-Land prorated these deficits. These billings were as follows:

Complainant—524 =	$ 506.85
Complainant—525 =	$3,594.83
Complainant—526 =	$ 590.45
Total	$4,692.13

The billing was based on a rate of $119 W (imperial ton of 2,000 pounds). The billing was mathematically incorrect. Each container of 40,000 pounds, or of 20 imperial tons, when billed at the $119 rate should have produced charges of $2,380, or a total for the two containers of $4,760. This does not jibe with the total billed charges above of $4,692.13, even with the addition of $67.58 of charges sought to be waived regarding complainant–524. The difference in computations with this adjustment is only 29 cents.

The correct basis of charges, at the $119–W rate, and also at the $105–W rate sought by these applications, both depend on the precise computations of tons moved and of deficit tons under the minimum container tons, all as provided to each of the three complainants. The correct mathematics follows:

Complainant–524 shipped 7,210 pounds, or 3.605 tons. There were 29,870 pounds in the container he used, and there were 10,130 pounds deficit, or 5.065 deficit tons. Complainant–524 shipped 24.13793 percent (7210 ÷ 29,870) of the carbon black shipped in container SEAU–106776. This percent times the deficit tons of 5.065 results in 1.2226 deficit tons attributable to complainant–524. (In error Sea-Land used the deficit figure 1.2221 tons.) Complainant–524's total tonnage for proper charges is 3.605 plus 1.2226, or 4.8276 tons. This tonnage times the $119 rate produces charges of $574.48. At the $105 rate the charges are $506.90.

The application states that Sea-Land collected charges of $506.85[2] from complainant–524 and seeks to apply corrected charges, at the $105 rate, of $506.85, and to waive a portion of the charges at the $119 rate, amounting to a waiver of $67.58.

It is found and concluded that at the sought basis for complainant–524 the corrected charges are $506.90. Inasmuch as $506.85 was collected according to Sea-Land, it should collect an additional 5 cents. Since this is an insignificant amount, waiver of collection of this 5 cents is granted.

Complainant–525 shipped 22,660 pounds, or 11.330 tons in container SEAU–106776. There were 29,870 pounds in this container, and there were 10,130 pounds deficit, or 5.065 deficit tons. Complainant–525 shipped 75.86207 percent (22,660 ÷ 29870) of the carbon black shipped in container SEAU–106776. This percent times the deficit tons of 5.065 results in 3.8424 deficit tons attributable to complainant–525. (In its computation Sea-Land used the deficit figure of 3.8423 tons.) Complainant–525's total tonnage for proper charges on its carbon black in container SEAU–106776 is 11.330 plus 3.8424, or 15.1724 tons. This tonnage times the $119 rate produces charges of $1,805.52. At the $105 rate the corrected charges for complainant–525 for his carbon black in container SEAU–106776 are $1,593.10 ($105 times 15.1724).

Complainant–525 shipped 15,300 pounds, or 7.650 tons, of carbon black in container SEAU–100431. There were 20,350 pounds in this container, and there were 19,650 pounds deficit, or 9.825 deficit tons. Complainant–525 shipped 75.18427 percent (15,300 ÷ 20,350) of the carbon black in this second container SEAU–100431. Thhis percent times the deficit tons of 19.825 results in 7.3869 deficit tons attributable to complainant–525. (Sea-Land used the deficit figure of 7.3864 tons.) Complanant–525's total tonnage for proper charges on its carbon black in the second container, SEAU–100431 is 7.650 plus 7.3869, or 15.0369 tons. This tonnage times the $119 rate produces charges of $1,789.39. At the $105 rate the corrected charges for complainant–525 for his carbon black in container SEAU–100431 are $1,578.87 ($105 times 15.0369).

The total corrected charges for complainant–525 are $1,593.10 plus $1,578.87, or $3,171.97. (Sea-Land's sought basis was $3,171.91.)

[2] In a paper filed on February 21, 1978, the complainant–524 says he paid charges of $524.43, which contrasts with Sea-Land's statement in the application of $506.85 collected. Sea-Land's statement is accepted herein as correct.

Complainant–526 shipped 5,050 pounds, or 2.525 tons. There were 20,350 pounds in the container he used, and there were 19,650 pounds deficit, or 9.825 deficit tons in this container, SEAU–100431. Complainant–526 shipped 24.81572 percent (5,050 ÷ 20,350) of the carbon black in this second container. This percent times the deficit tons of 9.825 results in 2.4381 deficit tons attributable to complainant–526. (Sea-Land used a deficit tonnage of 2.4375.) Complainant–526's total tonnage for proper charges is 2.525 plus 2.4381 or 4.9631 tons. This tonnage times the $119 rate produces charges of $590.61. At the $105 rate the corrected charges for complainant–526 for his carbon black in container SEAU–100431 are $521.13 ($105 times 4.9631).

The recapitulation of corrected charges are:

Complainant—524	$ 506.90
Complainant—525	3,171.97
Complainant—526	521.13
Total—3 Complainants	$4,200.00

This recapitulation of corrected charges comports with the minimum charge of $2,100 per container, based upon the rate of $105 and minimum of 20 tons (40,000 pounds) per container.

It is ultimately concluded and found that there was an error of an administrative or clerical nature in the tariff of Sea-Land in that it failed to publish the $105 W rate to Keelung which it promised to publish prior to the movement of the shipment herein; that the authorization of a refund of a portion of the freight charges in the amount of $69.32 ($590.45 − $521.13) will not result in discrimination among shippers; that prior to applying for authority to refund a portion of the charges collected, Sea-Land through its participation in the Conference's tariff filed a new tariff which sets forth the correct imperial basis of $105 W, albeit that the conference publishes the new tariff on a metric basis with the metric rate of $116 W; and that the application was timely filed.

In accordance with section 18(b)(3) of the Act, permission is granted to refund $69.32 to the complainant of the freight charges collected.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
March 3, 1978.

FEDERAL MARITIME COMMISSION

FPECIAL DOCKET NO. 525

YAH SHENG CHONG YUNG KEE CO. LTD.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

MARCH 29, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 29, 1978.

IT IS ORDERED, That applicant is authorized to refund $422.86 of the charges previously assessed Yah Sheng Chong Yung Kee Co. Ltd.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision in Special Docket 525 that effective January 18, 1977, for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from January 18, 1977, through February 20, 1977, the rate on 'Carbon Black' to Kaohsiung/Keelung is $116.00/1,000 kgs. subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 525

YAH SHENG CHONG YUNG KEE CO. LTD.

v.

SEA-LAND SERVICE, INC.

March 3, 1978

Application for permission to refund $422.86 of freight charges granted.

INITIAL DECISION[1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

By application timely filed on July 25, 1977, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3) of the Shipping Act, 1916 (the Act), applicant Sea-Land Service, Inc., seeks authority to refund a portion of the freight charges on two lots of carbon black, in bags, shipped, one lot in one container, and the other lot in another container, in rail-water intermodal service from New Orleans, Louisiana, via the rail service of the Southern Pacific Co., to Los Angeles, California, thence via the ocean service of Sea-Land Service, Inc., to Keelung, Taiwan, both lots as per single bill of lading number 031–135197 issued at New Orleans, dated January 26, 1977.

Disposition of this application was delayed for two reasons. First, the supporting exhibits attached to the application were in large part illegible. Applicant provided legible exhibits on December 15, 1977. Second, the applicant promised the signature of the complainant located in Taiwan, and this concurrence of the complainant was received on February 21, 1978.

Rule 92(b) of our Rules of Practice and Procedure states that applications under this rule shall be made in accordance with the form prescribed in Appendix II(7) of these rules. In that form, the respondent water carrier or conference of water carriers submits a notarized application, and the form also provides for the notarized signature of the complainant under his statement that he concurs in the application and certifies that

[1] This decision became the decision of the Commission March 29, 1978.

the charge of $_____ on the shipment involved were paid and borne by _____ and no other.

However, a close check of the law, section 18(b)(3) shows that Rule 92(b) goes beyond the law in requiring the concurrence of the complainant. There is no requirement in the law that complainant concur in the application under section 18(b)(3).

It is concluded that the purpose of the form in Appendix II(7) may well be justified for other types of special docket applications which ante-date section 18(b)(3) applications, such as applications under the two-year statute of limitations in the domestic trade.

In the present situation we have a 180-day limitation on the filing of this type of application and there is no dispute as to who paid and bore the freight charges.

In these circumstances, the fact that the complainant's signature was obtained much later than the 180 days following the date of shipment is immaterial. It is concluded that the application was properly filed within the 180 days from the date of shipment, regardless of the date of the complainant's signature.

From the amount of the requested refund or waiver of a portion of the freight charges in relation to the amount of the total rail-water intermodal charges, it is concluded that the requested refund or waiver will apply only to the ocean portion of the through charges. The applicant did not so state, but should so state on future applications, because our authority to sanction waivers or refunds under section 18(b)(3) relates only to the ocean portion of the through rate.

A competitor (Seatrain International, S.A.) of the applicant Sea-Land had a rate of $105 W (ton of 2,000 pounds) on carbon black from New Orleans to Keelung. Sea-Land in order to induce the shipment herein promised to publish the same rate. It was intended that Sea-Land publish the $105 W rate to Keelung and to Kaohsiung, Taiwan. However, because of clerical error the rate of $105 was published to Hong Kong, but not to those two Taiwan destinations.

The rate of $119 W was published in error in Keelung and Kaohsiung. This was the rate charged or the rate that should have been charged because of the tariff error.

The rate sought to be charged on which waiver or refund of a portion of the charges would be based is $105 W. In actual fact, Sea-Land has not published the $105 rate as such because the applicable tariff has been converted from imperial tons of 2,000 pounds to metric tons of 1,000 kilograms.

The shipment or shipments moved on January 26, 1977, when the erroneous $119 W (imperial) rate applied. This error was corrected effective February 21, 1977, in the Pacific Westbound Conference Tariff No. 8 (F.M.C. No. 15, I.C.C. No. 1) by the publishing of a rate of $116 W (metric ton of 1,000 kilograms, using the conversion factor of 2,204.62 pounds per 1,000 kilograms), with Sea-Land participating in this confer-

ence rate, circle reference Sea Land, item No. 513–2700–00. On February 1, 1977, Sea-Land's tariff 234 (with the erroneous $119 W rate) was canceled and superseded by the conference tariff.

The imperial rate of $105 using the conversion factor becomes a metric rate of $115.74 and this when rounded off becomes the actual tariff metric rate of $116 W.

Further calculations herein are based on the imperial rates of $119 and of $105, with imperial weights.

This special docket application No. 525 is one of three interrelated applications. The other two are special docket No. 524 and No. 526. Carbon black was shipped in all three of these cases, but to three different complainant-consignees, all on freight collect bases. For convenience, these three complainants will be designated by their special docket numbers, as complainant–524, etc.

Two forty-foot containers were utilized by Sea-Land for the shipments of the three complainants. The consignor put all of complainant–524's 7,210 pounds of carbon black in the first container, SEAU–106776. This same container also had on it 22,660 pounds of complainant–525's carbon black, or a total of 29,780 pounds. In the second container, SEAU–100431, the consignor put 15,300 pounds of complainant–525's carbon black, and all of complainant–526's 5,050 pounds of carbon black. In this second container was a total of 20,350 pounds.

Because the applicable tariff provided for a minimum of 40,000 pounds of carbon black for forty-foot containers, there were deficit poundages in each container. The deficit in SEAU–106776 was 10,130 pounds, and the deficit in SEAU–100431 was 19,650 pounds. In billing the three complainants Sea-Land prorated these deficits. These billings were as follows:

Complainant—524 =	$ 506.85
Complainant—525 =	$3,594.83
Complainant—526 =	$ 590.45
Total	$4,692.13

The billing was based on a rate of $119 W (imperial ton of 2,000 pounds). The billing was mathematically incorrect. Each container of 40,000 pounds, or of 20 imperial tons, when billed at the $119 rate should have produced charges of $2,380, or a total for the two containers of $4,760. This does not jibe with the total billed charges above of $4,692.13, even with the addition of $67.58 of charges sought to be waived regarding complainant–524. The difference in computations with this adjustment is only 29 cents.

The correct basis of charges, at the $119–W rate, and also at the $105–W rate sought by these applications, both depend on the precise computations of tons moved and of deficit tons under the minimum container tons, all as prorated to each of the three complainants. The correct mathematics follows:

Complainant–524 shipped 7,210 pounds, or 3.605 tons. There were 29,870 pounds in the container he used, and there were 10,130 pounds deficit, or 5.065 deficit tons. Complainant–524 shipped 24.13793 percent (7210 ÷ 29,870) of the carbon black shipped in container SEAU–106776. This percent times the deficit tons of 5.065 results in 1.2226 deficit tons attributable to complainant–524. (In error Sea-Land used the deficit figure of 1.2221 tons.) Complainant–524's total tonnage for proper charges is 3.605 plus 1.2226, or 4.8276 tons. This tonnage times the $119 rate produces charges of $574.48. At the $105 rate the charges are $506.90.

The application states that Sea-Land collected charges of $506.85[2] from complainant–524 and seeks to apply corrected charges, at the $105 rate, of $506.85, and to waive a portion of the charges at the $119 rate, amounting to a waiver of $67.58.

It is found and concluded that at the sought basis for complainant–524 the corrected charges are $506.90. Inasmuch as $506.85 was collected according to Sea-Land, it should collect an additional 5 cents. Since this is an insignificant amount, waiver of collection of this 5 cents is granted.

Complainant–525 shipped 22,660 pounds, or 11.330 tons in container SEAU–106776. There were 29,870 pounds in this container, and there were 10,130 pounds deficit, or 5.065 deficit tons. Complainant–525 shipped 75.86207 percent (22,660 ÷ 29870) of the carbon black shipped in container SEAU–106776. This percent times the deficit tons of 5.065 results in 3.8424 deficit tons attributable to complainant–525. (In its computation Sea-Land used the deficit figure of 3.8423 tons.) Complainant–525's total tonnage for proper charges on its carbon black in container SEAU–106776 is 11.330 plus 3.8424, or 15.1724 tons. This tonnage times the $119 rate produces charges of $1,805.52. At the $105 rate the corrected charges for complainant–525 for his carbon black in container SEAU–106776 are $1,593.10 ($105 times 15.1724).

Complainant–525 shipped 15,300 pounds, or 7.650 tons, of carbon black in container SEAU–100431. There were 20,350 pounds in this container, and there were 19,650 pounds deficit, or 9.825 deficit tons. Complainant–525 shipped 75.18427 percent (15,300 ÷ 20,350) of the carbon black in this second container SEAU–100431. This percent times the deficit tons of 9.825 results in 7.3869 deficit tons attributable to complainant–525. (Sea-Land used the deficit figure of 7.3864 tons.) Complainant–525's total tonnage for proper charges on its carbon black in the second container, SEAU–100431 is 7.650 plus 7.3869, or 15.0369 tons. This tonnage times the $119 rate produces charges of $1,789.39. At the $105 rate the corrected charges for complainant–525 for his carbon black in container SEAU–100431 are $1,578.87 ($105 times 15.0369).

The total corrected charges for complainant–525 are $1,593.10 plus $1,578.87, or $3,171.97. (Sea-Land's sought basis was $3,171.91.)

[2] In a paper filed on February 21, 1978, the complainant–524 says he paid charges of $524.43, which contrasts wit Sea-Land's statement in the application of $506.85 collected. Sea-Land's statement is accepted herein as correct.

Complainant–526 shipped 5,050 pounds, or 2.525 tons. There were 20,350 pounds in the container he used, and there were 19,650 pounds deficit, or 9.825 deficit tons in this container, SEAU–100431. Complainant–526 shipped 24.81572 percent (5,050 ÷ 20,350) of the carbon black in this second container. This percent times the deficit tons of 9.825 results in 2.4381 deficit tons attributable to complainant–526. (Sea-Land used a deficit tonnage of 2.4375.) Complainant–526's total tonnage for proper charges is 2.525 plus 2.4381 or 4.9631 tons. This tonnage times the $119 rate produces charges of $590.61. At the $105 rate the corrected charges for complainant–526 for his carbon black in container SEAU–100431 are $521.13 ($105 times 4.9631).

The recapitulation of corrected charges are:

Complainant—524	$ 506.90
Complainant—525	3,171.97
Complainant—526	521.13
Total—3 Complainants	$4,200.00

This recapitulation of corrected charges comports with the minimum charge of $2,100 per container, based upon the rate of $105 and minimum of 20 tons (40,000 pounds) per container.

It is ultimately concluded and found that there was an error of an administrative or clerical nature in the tariff of Sea-Land in that it failed to publish the $105 W rate to Keelung which it promised to publish prior to the movement of the shipment herein; that the authorization of a refund of a portion of the freight charges in the amount of $422.86 ($3,594.83 – $3,171.97) will not result in discrimination among shippers; that prior to applying for authority to refund a portion of the charges collected, Sea-Land through its participation in the Conference's tariff filed a new tariff which sets forth the correct imperial basis of $105 W, albeit that the conference publishes the new tariff on a metric basis with the metric rate of $116 W; and that the application was timely filed.

In accordance with section 18(b)(3) of the Act, permission is granted to refund $422.86 to the complainant of the freight charges collected.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
March 3, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 524

PAI TAI INDUSTRIAL CO., LTD.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

March 29, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 29, 1978.

IT IS ORDERED, That applicant is authorized to waive $67.63 of the charges previously assessed Pai Tai Industrial Co., Ltd.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision in Special Docket 524 that effective January 18, 1977 for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from January 18, 1977, through February 20, 1977, the rate on 'carbon black' to Kaohsiung/Keelung is $116.00/1,000 kgs. subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 524

PAI TAI INDUSTRIAL CO. LTD.

v.

SEA-LAND SERVICE, INC.

March 3, 1978

Application for permission to waive $67.63 of freight charges granted.

INITIAL DECISION[1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

By application timely filed on July 25, 1977, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), applicant Sea-Land Service, Inc., seeks authority to waive collection of a portion of the freight charges on a containerized shipment of carbon black, in bags, in rail-water intermodal service from New Orleans, Louisiana, via the rail service of the Southern Pacific Co., to Los Angeles, California, thence via the ocean service of Sea-Land Service, Inc., to Keelung, Taiwan, as per bill of lading number 031–135195 issued at New Orleans, dated January 26, 1977.

Disposition of this application was delayed for two reasons. First, the supporting exhibits attached to the application were in large part illegible. Applicant provided legible exhibits on December 15, 1977. Second, the applicant promised the signature of the complainant located in Taiwan, and this concurrence of the complainant was received on February 21, 1978.

Rule 92(b) of our Rules of Practice and Procedure states that applications under this rule shall be made in accordance with the form prescribed in Appendix II(7) of these rules. In that form, the respondent water carrier or conference of water carriers submits a notarized application, and the form also provides for the notarized signature of the complainant under his statement that he concurs in the application and certifies that

[1] This decision became the decision of the Commission March 29, 1978.

the charge of $_____ on the shipment involved were paid and borne by _____ and no other.

However, a close check of the law, section 18(b)(3) shows that Rule 92(b) goes beyond the law in requiring the concurrence of the complainant. There is no requirement in the law that complainant concur in the application under section 18(b)(3).

It is concluded that the purpose of the form in Appendix II(7) may well be justified for other types of special docket applications which ante-date section 18(b)(3) applications, such as applications under the two-year statute of limitations in the domestic trade.

In the present situation we have a 180-day limitation on the filing of this type of application and there is no dispute as to who paid and bore the freight charges.

In these circumstances, the fact that the complainant's signature was obtained much later than the 180 days following the date of shipment is immaterial. It is concluded that the application was properly filed within the 180 days from the date of shipment, regardless of the date of the complainant's signature.

From the amount of the requested refund or waiver of a portion of the freight charges in relation to the amount of the total rail-water intermodal charges, it is concluded that the requested refund or waiver will apply only to the ocean portion of the through charges. The applicant did not so state, but should so state on future applications, because our authority to sanction waivers or refunds under section 18(b)(3) relates only to the ocean portion of the through rate.

A competitor (Seatrain International, S.A.) of the applicant Sea-Land had a rate of $105 W (ton of 2,000 pounds) on carbon black from New Orleans to Keelung. Sea-Land in order to induce the shipment herein promised to publish the same rate. It was intended that Sea-Land publish the $105 W rate to Keelung and to Kaohsiung, Taiwan. However, because of clerical error the rate of $105 was published to Hong Kong, but not to those two Taiwan destinations.

The rate of $119 W was published in error to Keelung and Kaohsiung. This was the rate charged or the rate that should have been charged because of the tariff error.

The rate sought to be charged on which waiver or refund of a portion of the charges would be based is $105 W. In actual fact, Sea-Land has not published the $105 rate as such because the applicable tariff has been converted from imperial tons of 2,000 pounds to metric tons of 1,000 kilograms.

The shipment or shipments moved on January 26, 1977, when the erroneous $119 W (imperial) rate applied. This error was corrected effective February 21, 1977, in the Pacific Westbound Conference Tariff No. 8 (F.M.C. No. 15, I.C.C. No. 1) by the publishing of a rate of $116 W (metric ton of 1,000 kilograms, using the conversion factor of 2,204.62 pounds per 1,000 kilograms), with Sea-Land participating in this confer-

ence rate, circle reference SL , item No. 513–2700–00. On February 1, 1977, Sea-Land's tariff 234 (with the erroneous $119 W rate) was canceled and superseded by the conference tariff.

The imperial rate of $105 using the conversion factor becomes a metric rate of $115.74 and this when rounded off becomes the actual tariff metric rate of $116 W.

Further calculations herein are based on the imperial rates of $119 and of $105, with imperial weights.

This special docket application No. 524 is one of three interrelated applications. The other two are special docket No. 525 and No. 526. Carbon black was shipped in all three of these cases, but to three different complainant-consignees, all on freight collect bases. For convenience, these three complainants will be designated by their special docket numbers, as complainant–524, etc.

Two forty-foot containers were utilized by Sea-Land for the shipments of the three complainants. The consignor put all of complainant–524's 7,210 pounds of carbon black in the first container, SEAU–106776. This same container also had on it 22,660 pounds of complainant–525's carbon black, or a total of 29,780 pounds. In the second container, SEAU–100431, the consignor put 15,300 pounds of complainant–525's carbon black, and all of complainant–526's 5,050 pounds of carbon black. In this second container was a total of 20,350 pounds.

Because the applicable tariff provided for a minimum of 40,000 pounds of carbon black for forty-foot containers, there were deficit poundages in each container. The deficit in SEAU–106776 was 10,130 pounds, and the deficit in SEAU–100431 was 19,650 pounds. In billing the three complainants Sea-Land prorated these deficits. These billings were as follows:

Complainant—524 =	$ 506.85
Complainant—525 =	$3,594.83
Complainant—526 =	$ 590.45
Total	$4,692.13

The billing was based on a rate of $119 W (imperial ton of 2,000 pounds). The billing was mathematically incorrect. Each container of 40,000 pounds, or of 20 imperial tons, when billed at the $119 rate should have produced charges of $2,380, or a total for the two containers of $4,760. This does not jibe with the total billed charges above of $4,692.13, even with the addition of $67.58 of charges sought to be waived regarding complainant–524. The difference in computations with this adjustment is only 29 cents.

The correct basis of charges, at the $119–W rate, and also at the $105–W rate sought by these applications, both depend on the precise computations of tons moved and of deficit tons under the minimum container tons, all as prorated to each of the three complainant. The correct mathematics follows:

Complainant–524 shipped 7,210 pounds, or 3.605 tons. There were 29,870 pounds in the container he used, and there were 10,130 pounds deficit, or 5.065 deficit dons. Complainant–524 shipped 24.13793 percent (7210 ÷ 29,870) of the carbon black shipped in container SEAU–106776. This percent times the deficit tons of 5.065 results in 1.2226 deficit tons attributable to complainant–524. (In error Sea-Land used the deficit figure of 1.2221 tons.) Complainant–524's total tonnage for proper charges is 3.605 plus 1.2226, or 4.8276 tons. This tonnage times the $119 rate produces charges of $574.48. At the $105 rate the charges are $506.90.

The application states that Sea-Land collected charges of $506.85[2] from complainant–524 and seeks to apply corrected charges, at the $105 rate, of $506.85, and to waive a portion of the charges at the $119 rate, amounting to a waiver of $67.58.

It is found and concluded that at the sought basis for complainant–524 the corrected charges are $506.90. Inasmuch as $506.85 was collected according to Sea-Land, it should collect an additional 5 cents. Since this is an insignificant amount, waiver of collection of this 5 cents is granted.

Complainant–525 shipped 22,660 pounds, or 11.330 tons in container SEAU–106776. There were 29,870 pounds in this container, and there were 10,130 pounds deficit, or 5.065 deficit tons. Complainant–525 shipped 75.86207 percent (22,660 ÷ 29870) of the carbon black shipped in container SEAU–106776. This percent times the deficit tons of 5.065 results in 3.8424 deficit tons attributable to complainant–525. (In its computation Sea-Land used the deficit figure of 3.8423 tons.) Complainant–525's total tonnage for proper charges on its carbon black in container SEAU–106776 is 11.330 plus 3.8424, or 15.1724 tons. This tonnage times the $119 rate produces charges of $1,805.52. At the $105 rate the corrected charges for complainant–525 for his carbon black in container SEAU–106776 are $1,593.10 ($105 times 15.1724).

Complainant–525 shipped 15,300 pounds, or 7.650 tons, of carbon black in container SEAU–100431. There were 20,350 pounds in this container, and there were 19,650 pounds deficit, or 9.825 deficit tons. Complainant–525 shipped 75.18427 percent (15,300 ÷ 20,350) of the carbon black in this second container SEAU–100431. This percent times the deficit tons of 9.825 results in 7.3869 deficit tons attributable to complainant–525. (Sea-Land used the deficit figure of 7.3864 tons.) Complainant–525's total tonnage for proper charges on its carbon black in the second container, SEAU–100431 is 7.650 plus 7.3869, or 15.0369 tons. This tonnage times the $119 rate produces charges of $1,789.39. At the $105 rate the corrected charges for complainant–525 for his carbon black in container SEAU–100431 are $1,578.87 ($105 times 15.0369).

The total corrected charges for complainant–525 are $1,593.10 plus $1,578.87, or $3,171.97. (Sea-Land's sought basis was $3,171.91.)

[2] In a paper filed on February 21, 1978, the complainant–524 says he paid charges of $524.43, which contrasts with Sea-Land's statement in the application of $506.85 collected. Sea-Land's statement is accepted herein as correct.

Complainant–526 shipped 5,050 pounds, or 2.525 tons. There were 20,350 pounds in the container he used, and there were 19,650 pounds deficit, or 9.825 deficit tons in this container, SEAU–100431. Complainant–526 shipped 24.81572 percent (5,050 ÷ 20,350) of the carbon black in this second container. This percent times the deficit tons of 9.825 results in 2.4381 deficit tons attributable to complainant–526. (Sea-Land used a deficit tonnage of 2.4375.) Complainant–526's total tonnage for proper charges is 2.525 plus 2.4381 or 4.9631 tons. This tonnage times the $119 rate produces charges of $590.61. At the $105 rate the corrected charges for complainant–526 for his carbon black in container SEAU–100431 are $521.13 ($105 times 4.9631).

The recapitulation of corrected charges are:

Complainant—524	$ 506.90
Complainant—525	3,171.97
Complainant—526	521.13
Total—3 Complainants	$4,200.00

This recapitulation of corrected charges comports with the minimum charge of $2,100 per container, based upon the rate of $105 and minimum of 20 tons (40,000 pounds) per container.

It is ultimately concluded and found that there was an error of an administrative or clerical nature in the tariff of Sea-Land in that it failed to publish the $105 W rate to Keelung which it promised to publish prior to the movement of the shipment herein; that the authorization of a waiver of a portion of the freight charges in the amount of $67.63 ($574.48 − $506.85) will not result in discrimination among shippers; that prior to applying for authority to waive a portion of the charges not collected, Sea-Land through its participation in the Conference's tariff filed a new tariff which sets forth the correct imperial basis of $105 W, albeit that the conference publishes the new tariff on a metric basis with the metric rate of $116 W; and that the application was timely filed.

In accordance with section 18(b)(3) of the Act, permission is granted to waive $67.63 of the freight charges not collected.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
March 3, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 564

COMMODITY CREDIT CORPORATION

v.

DELTA STEAMSHIP LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

April 12, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 12, 1978.

IT IS ORDERED, That applicant is authorized to waive collection of $8,453.35 of the charges previously assessed Commodity Credit Corporation.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision in Special Docket 564 that effective September 16, 1977, for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from September 16, 1977 through January 8, 1978, the rate on 'Rice in Bags' from Houston to Banjul, Gambia is $70.00 per 2,240 lbs. subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 564

COMMODITY CREDIT CORPORATION

v.

DELTA STREAMSHIP LINES, INC.

March 13, 1978

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Delta Steamship Lines, Inc. (Delta or Applicant), has applied for permission to waive collection of a portion of the freight charges on a shipment of rice, which moved from Houston, Texas, to Banjul, Gambia, West Africa, under Delta bill of lading dated September 16, 1977. The application was filed February 13, 1978.

The subject shipment moved under American West African Freight Conference (AWAFC) Eastbound Tariff No. 15, FMC No. 16, 12th revised page 22, effective September 15, 1977, under the rate for "Rice, in bags (Tariff Item No. 4030)." The aggregate weight of the shipment was 2,209,510 pounds (1002 gross metric tons). The rate applicable at time of shipment was $78.57 per ton of 2240 pounds, plus harbor dues of 72 cents per ton. The rate sought to be applied is $70 per ton of 2240 pounds, plus harbor dues of 72 cents per ton, pursuant to AWAFC Eastbound Tariff No. 15, FMC No. 16, original page 500C, effective January 9, 1978, correction 286, under the "Open Rate Authorization" for Tariff Item No. 4000, "Rice in Bags—From Houston to Banjul, Gambia."

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $78,210.74. Aggregate freight charges at

[1] This decision became the decision of the Commission April 12, 1978.
[2] 46 U.S.C. 817, as amended.

the rate sought to be applied amount to $69,757.39. The difference sought to be waived is $8,453.35. The Applicant is not aware of any other shipment of the same commodity which moved via Delta during the same time period at the rates involved in this shipment.

The documents submitted by Delta establish that there was a prior agreement between the carrier (Delta) and the shipper (U.S. Department of Agriculture, Commodity Credit Corporation) to move this particular shipment of over 1,000 tons of rice in bags, from Houston, Texas to Banjul, Gambia, at a special rate ("Open Rate Authorization") of $70 per 2240 pounds plus 72 cents per 2240 pounds harbor dues, instead of the AWAFC eastbound tariff page 22 rate of $78.57 per 2240 pounds plus 72 cents harbor dues. (Although the application states that the majority of prior negotiations with the shipper were verbal "except for attached telex between Delta Nola and Washington office," there are two attached documents that clearly establish the pre-existence of the mutual agreement for the specific rate—the U.S. Department of Agriculture "Cargo Booking Confirmation" forms issued August 25 and August 31, 1977, both of which give the ocean freight rate as $70[3] and both of which are signed by representatives of both the carrier and the shipper.) However, the carrier's clerical people inadvertently failed to notify the Conference (AWAFC) to process and file the new tariff publishing the new, special rate for this one shipment, before the bill of lading was issued on September 16, 1977. The Department of Agriculture, Commodity Credit Corporation (CCC), brought this mistake to the attention of the carrier, and Delta collected only the agreed amount of $69,757.39 from CCC on December 19, 1977, and thereupon began the process of gathering the necessary documentation to submit with its application to the Commission for permission to waive collection of the difference. The originally-intended "Open Rate Authorization" page was finally filed in the AWAFC tariff effective January 9, 1978. (Original page 500C, correction 286.)

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce 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 an 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 . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be

[3] The second of these two executed forms merely adds the harbor dues amount of 72 cents per long ton, which ha been inadvertently deleted from the first form.

based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[4]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the special rate for this particular shipment of rice, as had been agreed upon in advance by the carrier and the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3 Prior to applying for authority to waive collection of a portion of the freight charges, Delta filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to the Delta Steamship Lines, Inc., to waive collection of a portion of the freight charges, specifically the amount of $8,453.35. An appropriate notice will be published in the tariff of the American West African Freight Conference (Eastbound Tariff No. 15, FMC No. 16).

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 13, 1978.

[4] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–10

FREIGHT FORWARDER BIDS ON GOVERNMENT SHIPMENTS AT UNITED STATES PORTS—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916, AND GENERAL ORDER 4

PETITION FOR DECLARATORY ORDER DENIED

March 13, 1978

The General Services Administration (GSA) has filed a "Petition for Declaratory Order" setting forth the rates it has accepted for freight forarding services in 11 ports for its fiscal year commencing July 1, 1977 and requests the Commission to "confirm the lawulness of the rates" under section 510.24(b) of the Commission's Rules and the standards recently articulated in Docket No. 74–10, 17 S.R.R. 285, 681 (1977).[1]

A joint "Reply" was filed by the National Customs Brokers and Forwarders Association of America, Inc., and the New York Foreign Freight Forwarders and Brokers Association, Inc., which is not in fact a "reply" to GSA's statements, but rather a renewal of its twice rejected proposal for a rule limiting GSA rates to the average of a forwarder's commercial rates during the preceding year.

The 19 freight forwarders listed in the Petition have either performed forwarding services for GSA at the stated rates since July 1, 1977 or offered to perform such services. Although all 19 forarders certified to GSA that their rates ere compensatory, equitable and nondiscriminatory vis-a-vis commercial shippers—the standard established by the Commission's Report in Docket No. 74–10, 17 S.R.R. at 300—some of the rates and bids are so low as to appear on their face to violate section 510.24(b). It is not possible, however, to ascertain whether any of the stated rates and bids in fact violate section 510.24(b) without inquiry to the services provided, the commercial rates of the forwarder involved, and that forwarder's cost structure. GSA's Petition must therefore be denied to the extent it requests an immediate "confirmation" of the lawfulness of

[1] These rates range from one cent ($1.00 minus a 99-cent discount for payment within GSA's normal payment period) to $16.47 per shipment. All bidders certified to GSA that their rates were compensatory, equitable and nondiscriminatory vis-a-vis commercial shippers—the standard established by the Commission's Report in Docket No. 74–10.The one cent rate is that of L. F. Surillo Co., Inc. (Surillo), for the Port of New York. GSA has further requested the Commission to ascertain which of eight alternative bids should be accepted for its New York shipments if Surillo's bid is violative of section 510.24(b). The alternative bids range from $3.25 to $37.50.

the 1977–1978 rates and the alternative bids for Port of New York. The Commission shall, however, take steps to institute an appropriate investigation into the probable violations revealed by the instant petition.

THEREFORE, IT IS ORDERED, That the "Petition for Declaratory Order" of the General Services Administration is denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 566

DAVID ULLMAN

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND AND WAIVER OF CHARGES

April 12, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 12, 1978.

IT IS ORDERED, That applicant is authorized to waive collection of $1,832.70 and refund $100.00 of the charges previously assessed David Ullman.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision in Special Docket 566 that effective October 7, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 7, 1977 through December 31, 1977, the rate on 'Sail Boats, 470 Class—U.S. Olympic Yachting Team' from Yokohama to Long Beach is free of charge subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund and waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 566

DAVID ULLMAN

v.

SEA-LAND SERVICE, INC.

March 14, 1978

Application for permission to refund portion of freight charges collected and waive balance of freight charges granted.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land Service, Inc. (Sea-Land), by application dated February 24, 1978, has applied for permission to refund and waive collection of freight charges aggregating $1,932.70 in connection with one shipment of boats by the U.S. Olympic Yachting Team.[2] The shipment in question was from Yokohama, Japan, to Long Beach, California, on October 7, 1977 (as per Bill of Lading No. 937–998062). The tariff involved is the Trans-Pacific Freight Conference of Japan/Korea, Tariff No. 35, FMC–6, Item No. 5400–60, 17th Revised page 291, effective January 1, 1978.

The facts are as follows:

In the early summer of 1977, Sea-Land Service was approached by the U.S. Olympic Yachting Team to donate the ocean transportation for the boats to be used by the Olympic Team in yachting races to be held in Japan in September of 1977. Sea-Land was willing to do so and, accordingly, on August 5, 1977, Sea-Land's Westbound Pricing Manager, M. R. Cook, wrote to the Pacific Westbound Conference seeking conference action to publish a charitable free-of-charge rate item covering the ocean move from California to Japan. On the blind carbon copy of the letter, instructions were given to Sea-Land's Tokyo Conference Representative (D. F. Robinson) requesting similar action to be taken in the homebound Trans-Pacific Freight Conference Japan/Korea freight tariff. Mr. Robinson, however, inadvertently failed to bring this matter to

[1] This decision became the decision of the Commission April 12, 1978.

[2] Complainant is a member of the U.S. Olympic Yachting Team.

the attention of the Trans-Pacific Freight Conference Japan/Korea. On October 7, 1977, after the races were concluded, the U.S. Olympic Team forwarded one container (containing the sailboats) for the homebound voyage on Sea-Land 937-998062. Sea-Land's administrative failure in failing to petition the conference to publish a free transportation item in the Eastbound TPFC J/K tariff became apparent when the Olympic Team attempted to claim the container in Long Beach. The Olympic Team was informed ocean charges of $1,932.70 were due; Sea-Land collected $100, balance due $1,832.70.

When the oversight was brought to its attention on November 18, 1977, Sea-Land petitioned the TPFC J/K to establish a free provision covering the movement from Yokohama to Long Beach.

On December 14, 1977, the Conference Rate Committee recommendation to the TPFC J/K was to publish Sea-Land's request for a free-of-charge item and the free-of-charge item was published in the TPFC J/K tariff effective January 1, 1978.

Sea-Land petitions the Federal Maritime Commission to permit the refund of the freight charges paid ($100) and waive the collection of the remaining freight charges ($1,832.70) in view of Sea-Land's inadvertence in failing to request the Conference publish the appropriate tariff provision which would have permitted the free movement for the Olympic Team.

DISCUSSION

The documents submitted in support of the petition clearly establish that it was the intention of the parties to file tariffs which would permit the carriage of the U.S. Olympic Yachting Team boats to Japan and return free of charge as a charitable item. This intention was fully carried out for the westbound carriage by appropriate tariff filing but inadvertently through administrative error and oversight not carried out for the eastbound carriage.

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges 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 is derived from the provisions of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 17(b)(3).[3]

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[3] Section 18(b)(3) provides, as pertinent,

Provided, however, That the Federal Maritime Commission may in its discretion and for good cause shown 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 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

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[4] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

It is concluded that:

The inadvertent failure to extend the free carriage for a charitable item to the tariff governing the eastbound carriage falls within the intended ground for waiver or refund; that authorization to refund and waive collection will not result in discrimination against shippers similarly situated;

That a new tariff was filed prior to the filing of the application for permission to refund and waive collection of freight charges;

That the application was filed within 180 days from the date of shipment.

Wherefore: In accordance with section 18(b)(3) of the Act, permission is granted to refund $100 of the freight charges collected and to waive collection of $1,832.70 of the freight charges.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 14, 1978.

refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.*

*The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

[4] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 534

CUTLER-HAMMER DENVER

v.

LYKES BROS. STEAMSHIP CO., INC.

ORDER ON REMAND

March 14, 1978

The Commission by notice served February 14, 1978, determined to review the initial decision in this proceeding. The Administrative Law Judge had granted a request for waiver under section 18(b)(3) based on his finding that a specific rate had been agreed to but inadvertently incorrectly filed.

Upon review, the record discloses no evidence to support the Administrative Law Judge's finding. Lykes states that a verbal agreement had been reached in March 1976 with a freight forwarder for a lump sum rate to cover a particular shipment of printing press parts to move on a particular vessel from Houston and New Orleans. On November 30, 1976, Lykes filed such a lump sum rate but failed to include Houston as a port of loading. On February 10, 1977, a shipment from Houston was effected.

No evidence has been furnished which would substantiate that a prior agreement was reached to establish a rate to include Houston as a loading port or that the exclusion of Houston from the tariff was inadvertent. We think more should be required than the mere allegation of the carrier concerning the nature of the agreed rate. This is especially true in this case because the wide lapse of time between the alleged agreement and the date of shipment casts doubt on the allegation that the agreement was to cover a specific shipment on a particular vessel. Even though the agreed rate is said to have been reached "verbally", evidence of such agreement likely exists in the form of confirmation by the forwarder to the shipper or instructions to the tariff filer, etc. If not, affidavits of those involved in the rate negotiations and agreement could serve as a

substitute.* As stated in a previous decision adopted by the Commission in SD–467 *Union Engineering v. Iran Express Lines,* 16 SRR 610, if freight charges are to be waived solely on the basis of conclusory statements, the applicant for waiver becomes the arbiter instead of the Commission.

Accordingly, it is ordered that proceedings in this matter are remanded to the Administrative Law Judge for the purpose of allowing the parties an additional opportunity to furnish evidence of the nature described herein, and for issuance of a supplemental initial decision within 45 days of the date of this order.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

* We are aware that the application is submitted under the sworn statement of applicant's Director of Seabee Marketing. Nonetheless, we think that under the circumstances of this case independent evidence should be required and if it is necessary to resort to sworn statements, it is appropriate that such statements indicate they are from persons who were involved in forming the alleged agreement which is sought to be proven.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-79

HOUSEHOLD GOODS FORWARDERS ASSOCIATION OF AMERICA, INC., ET AL.

v.

AMERICAN EXPORT LINES, INC.
SEA-LAND SERVICE, INC.,
UNITED STATES LINES, INC.

ORDER DENYING RECONSIDERATION

March 14, 1978

The Commission has before it for decision a petition filed by the Household Goods Forwarders Association of America, Inc. (HGFA), seeking reconsideration of our May 18, 1977 decision (Report) in the above-captioned proceeding. Therein we held that certain United States flag carriers (Respondents) had not violated Shipping Act section 17 by charging different rates for household goods shipped by the Military Sealift Command (MSC) as "Military Cargo, N.O.S." than for household goods shipped by nonvessel operating common carriers (NVO's) and by civilian shippers under specific "Household Goods" tariff items.[1] HGFA now argues that this conclusion is erroneous because: (1) the Report does not contain adequate findings of fact; (2) the absence of injury in fact is irrelevant in a section 17 proceeding; (3) the record nonetheless shows injury in fact to be present; and (4) the stipulated facts establish a section 17 violation as a matter of law—*i.e.*, that cargo distinguishable only by the identity of the shipper is moving at different rates.

A section 17 violation does not necessarily require a finding that a shipper has been commercially injured and, to the extent our use of the phrase "—to the detriment of one of them—" (Report, at 6, line 15) implies such a finding is mandatory, we retract it. It does not follow, however, that HGFA's present arguments warrant reconsideration of our decision. The burden of proof in this proceeding is squarely on HGFA,

[1] Respondents each maintain two specific tariff items for household goods—a "U.S. Government" item and a "commercial" (or "civilian") item—and charge different rates for each. HGFA members may, and presumably do, ship under both rates upon occasion, but complain only of the "U.S. Government" rate as being violative of section 17.

and, like the complainant in *Port of New York Authority v. A. B. Svenska,* 4 F.M.B. 202 (1953), HGFA has failed to establish that Respondents's practice of transporting household goods for MSC and HGFA under different rate items constitutes *unjust* discrimination.[2]

HGFA's argument that a *per se* Shipping Act violation has occurred relies primarily upon the summary exposition of section 17's potential breadth contained in *North Atlantic Mediterranean Freight Conference,* 11 F.M.C. 202 (1967), the Commission decision reversed by the Court of Appeals in *American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commission,* 409 F.2d 1258 (2nd Cir. 1969). Even without the *American Export* precedent, however, it is clear that section 17 is not as simplistic and dogmatic as HGFA contends. Congress did not intend to adopt a rule of absolute uniformity. The existence of unjust discrimination is a factual question which depends upon more than a bare difference in rates on similar commodities. *Nashville Ry. v. Tennessee,* 262 U.S. 318, 322 (1923); *National Gypsum Co. v. United States,* 353 F. Supp. 941, 947–948 (W.D.N.Y. 1973). An examination of all attendant transportation circumstances is permitted. See *L. T. Barringer Co. v. United States,* 319 U.S. 1, 8–9 (1943); *Koppers Co., Inc. v. United States,* 166 F. Supp. 96, 102–103 (W.D. Pa. 1958); *Coal to New York Harbor Area,* 311 I.C.C. 355, 365–368 (1960). The decided cases reveal that a variety of rate discriminations are permissible in the presence of justifying transportation conditions. *E.g., L. T. Barringer Co. v. United States, supra,* different loading charges on cotton shipments bound for different destinations; *Texas & Pacific Ry. Co. v. Interstate Commerce Commission,* 162 U.S. 197 (1896), different rates for import and export cargos; *Interstate Commerce Commission v. Baltimore & Ohio Ry. Co.,* 145 U.S. 263, 271-273 (1892), different passenger rates for parties of 10 or more persons; *Investigation of Overland/OCP Rates,* 12 F.M.C. 184, 219–222 (1969), *aff'd sub nom, Port of New York Authority v. Federal Maritime Commission,* 429 F.2d 663 (5th Cir. 1970), *cert. den.* 401 U.S. 909 (1971); different rates for overland/OCP and local cargos; *Port of Houston Authority v. Lykes Bros. Steamship Co.,* 16 S.R.R. 1069 (1976); different charges for handling baled cotton at different loading ports; *Coal From Kentucky,* 308 I.C.C. 99 (1959) and *Coal to New York Harbor Area, supra,* different rates for shippers of a minimum volume within one year; *Eastern Coal to Chicago,* 306 I.C.C. 195 (1959) and *Molasses from New*

[2] The Commission's reference to MSC's increased reliance on direct procurement since 1971 (Report, at 4) was not a finding of fact, but a recapitulation of MSC's arguments. HGFA's alternative assertion that it has suffered actual injury is based solely upon its own March 19, 1974 submission to the Department of Defense (DOD), stating that DOD's direct procurement of household goods transportation increased from an average of 8–10 percent of DOD's total shipments during 1962–1966 to a 35–38 percent average during an unspecified period subsequent to 1966. This statement deserves little weight. It not only omits total tonnage and revenue data, but the Affidavit of Frank G. Lazzari (Appendix B to MSC's "Memorandum of Law", at 4–5) indicates that rates for through NVO shipments also tended to be *higher* than those for direct procurement shipments during the 1962–1966 period, and that it was the introduction of new technology (intermodal shipping containers) rather than the existence of a rate differential which has altered household goods transportation patterns since the early 1960's.

Orleans, 235 I.C.C. 485 (1935), different rates for multiple rail car shipments.

Legally, the instant dispute arises because Respondents' "Military Cargo, N.O.S." rate permits, but does not require, a mixture of freight items to be loaded in a single shipping container.[3] MSC May ship full containers of household goods, or beer, or paper towels at the same "N.O.S." rate. It may also ship containers mixed with several different commodities in the nature of a "Freight, All Kinds" (F.A.K.) tariff item. Whether the commercial rate used as a basis for comparison is an "N.O.S.", "F.A.K.", or specific commodity item, MSC's use of competitive bidding techniques to obtain rates for its cargo offerings generally assures that "military cargo" is assessed at a different (usually lower) rate than comparable civilian commodity items.[4]

Practically, the instant dispute involves an effort by HGFA to obtain a larger share of the Department of Defense's (DOD) household goods business, and by Respondents to achieve higher freight rates for MSC shipments. Toward this end, a brief, conclusory Stipulation of Facts was prepared which states, *inter alia,* that: (1) both MSC and HGFA "tender household goods for shipment in steamship-furnished containers"; (2) the ocean transportation performed for HGFA and MSC is "substantially similar"; (3) transportation circumstances and conditions do not warrant a "substantial differential" in MSC and HGFA rates for household goods; (4) Respondents' rates for U.S. Government Household Goods are discriminatory, but not "unreasonably high" or otherwise unreasonable; and (5) the determination of whether a shipment is to move via MSC or via an NVO is made by DOD.[5]

These facts do not establish that MSC invariably tenders "full container loads" of household goods, or that it ever tenders containers packed exclusively with household goods—although the Commission does not doubt such shipments occasionally occur. In any event, MSC retains the option to submit containers of mixed freight. Absent proof to the contrary, this option alone defeats the contention that MSC and HGFA are shipping "identical commodities". The record is also noticeably silent concerning the exact carrier costs and other transportation conditions prevailing for any of Respondents' three types of household goods shipments. Evidence that there are no special economies associated with the handling of MSC cargo would be particularly relevant.

[3] "N.O.S" is an abbreviation for "Not Otherwise Specified". MSC accepts bids for (and Respondents publish) only two other military commodity rates—"Military Cargo, Refrigerated," and "Military Cargo, Vehicles."

[4] Since 1967, MSC shipments have been rated on the premise that "military cargo" comprises a distinct commodity for rate making and other Shipping Act purposes. The repeal of former section 6 of the Intercoastal Shipping Act in 1974 (P.L. 93-487) now precludes discounts for government cargos which are not based upon accepted transportation factors and has generated considerable controversy concerning the continued validity of several MSC procurement practices. The Commission's staff has been directed to prepare a study of present military cargo operations in light of P.L. 93-478's requirements.

[5] DOD's present policy is to ship via both MSC and HGFA with a preference for the method which is "most practical" in a particular situation. That is, cost effectiveness is not the sole determinant. Affidavit of Lt. Col. Coleman, at 2. HGFA has apparently opposed recent DOD proposals to ship household goods on a cost effectiveness basis. *Id.*

The present tripartite rating system for household goods is unusual, but does contain checks and balances of its own which reasonably protect the interests of the instant parties. Unless the household belongings of DOD employees have transportation characteristics distinguishing them from those of civilians, Respondents could refuse to establish a special "U.S. Government" rate for household goods. They should, however, have little incentive to take such action. Generally speaking, the more DOD business HGFA members attract at a rate *greater than* the "Military Cargo, N.O.S." rate, the larger the total revenues received by Respondents. If there were no "U.S. Government" rate, DOD would either have to pay NVO's to handle its household goods at Respondents' higher "commercial" rate[6] or, more realistically, rely exclusively upon direct MSC shipments. We consider it likely that Respondents will strive to set their "U. S. Government" rates at levels which will make NVO utilization "cost effective" for MSC. Should they do otherwise, the net result might well be a lessening of gross revenues realized by HGFA members and Respondents alike.

Unless and until it is clearly demonstrated that the ocean rates available to MSC do not reflect *bona fide* differences in carrier costs, value of service, competition or other recognized transportation factors, we believe the most appropriate course is to permit the RFP system employed over the past decade to continue. Whatever adjustment P.L. 93–487 may eventually require in MSC's current procurement methods can probably be best accomplished by amending the Commission's General Order 29 regulations (46 C.F.R. Part 549) and not by *ad hoc* rulings on an incomplete record designed to benefit a special interest group.[7] At this time, we are without sufficient information available to permit the sound formulation of guidelines which will accommodate the several competing interests involved—including those of the Armed Services Procurement Act. 10 U.S.C. 2301, *et seq.*[8], and the nongovernment shippers now paying the "commercial" rate for the transportation of their household goods—and are unwilling to prescribe a piece-meal remedy which could entirely eliminate MSC's present procurement system.

MSC once negotiated the "U.S. Government" rates paid by NVO's directly with the Respondent carriers (Affidavit of Frank G. Lazzari, *supra*), and could presumably do so again. If DOD's voluntary failure to include NVO rates in its present RFP program results in higher costs to DOD in those instances when it chooses to employ NVO's, the Commission is not prepared to proclaim that this conscious government

[6] As indicated at page 2, note 1, of the Report, exact comparison of the "commercial" and "U.S. Government" rates is not possible on the present record. The "commercial" rate is presumed to be higher because otherwise the NVO's would be employing it or complaining of its unavailability.

[7] General Order 29 assures that MSC's competitive procurement methods will not drive Respondents' rates below fully distributed costs.

[8] We do not imply that the Procurement Act takes precedence over the Shipping Act. The former statute does express a national policy favoring competition to the "maximum practicable" extent in the procurement of military supplies and services, however, and is entitled to consideration in the development of Shipping Act policy. See *Southern Steamship Co. v. Labor Board*, 316 U.S. 31, 47 (1942).

procurement policy represents unjust discrimination within the meaning of Shipping Act section 17.[9] The complained of "U.S. Government Rates" exist only as an integral part of DOD's transportation system and appear, on the present record, as likely to benefit HGFA's members as to injure them. Under these circumstances, we cannot find that different amounts have been charged to contemporaneous shippers of the *same commodities* over the same line between the same points under the *same transportation circumstances and conditions*.

THEREFORE, IT IS ORDERED, That the "Petition for Reconsideration" of the Household Goods Forwarders Association of America, Inc., is denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[9] The Report did not find, and is not dependent upon a finding, that HGFA members are "agents" of the Defense Department. HGFA's attempt to distinguish the holding in *American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commission, supra*, where two government agencies were the shippers, from the present dispute was rejected because the differences between HGFA members and MSC as shippers are insufficient to result in unjust discrimination. It could alternatively be stated, that insofar as the equalitarian purposes of section 17 are concerned, MSC and HGFA must be considered as though they were a single shipper. The *American Export* decision supports our conclusion that the existing discrimination between the rates assessed for the MSC and NVO methods of transporting DOD household goods is not "unjust".

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 523

MITSUI AND CO. U. S. A. INC.,

v.

PACIFIC WESTBOUND CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

March 9, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 9, 1978.

IT IS ORDERED, That applicant is authorized to refund $882.80 of the charges previously assessed Mitsui and Co. U. S. A. Inc.

IT IS FURTHER ORDERED, That applicant shall 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 523 that effective January 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped from January 1, 1977 through February 16, 1977, the local rate on 'Helium, Gas or Liquid, Not Including Mixtures' is $109.00 to Japan base ports, subject to all applicable rules, regulations and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 523

MITSUI AND CO. U.S.A. INC.

v.

PACIFIC WESTBOUND CONFERENCE

Adopted March 9, 1978

Application for permission to refund $882.80 of freight charges granted.

INITIAL DECISION[1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

By application timely filed on July 8, 1977, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3) of the Shipping Act, 1916 (the Act), the Pacific Westbound Conference seeks authority to refund a portion of the freight charges collected for to shipments of liquid helium, bills of lading dated January 11, 1977, from Los Angeles, California, one shipment to Tokyo, Japan, and the other to Kobe, Japan. The application is concurred in by the complainant Mitsui And Co. U.S.A., and by the participating ocean carrier, Mistui O.S.K. Lines, Ltd.

The two shipments each had gross weights of 4,990 pounds and measurements of 542 cubic feet. The Conference's tariff, PWC No. 5, FMC–13 with rates on the metric system (1,000 kilograms or 2,204.62 pounds (W), or one cubic meter or 35.314 cubic feet (M) equals one ton) took effect on January 1, 1977. The Conference's prior tariff, PWC No. 4, FMC–12 provided rates on the imperial system (2,000 pounds (W) or 40 cubic feet (M) equals a ton).

The old rate on liquid helium in tariff No. 4 was $123 W/M imperial system. In converting this imperial rate to the metric rate, the Pacific Westbound Conference applied a stowage factor based on the weight of this cargo. The old $123 imperial rate times the stowage factor of 1.10230 resulted in a new metric rate of $135.58 rounded to $136 W/M, which was the rate charged on the two shipments herein.

However, the measure of this cargo exceeds its weight, and the

[1] This decision became the decision of the Commission March 9, 1978.

conversion from the imperial rate to the metric rate should have been made with a lower stowage factor. The correct new rate results from the old rate of $123 times the stowage factor of .88285, which gives a new metric rate of $108.59 rounded to $109 W/M.

It was not until February 17, 1977, (which was after the two shipments herein moved) that the Pacific Westbound Tariff Circular 12–77 announced a correction of the rate in issue to $109 W/M. There are no known similar shipments, other than these two, of liquid helium which moved during the same period of time.

Aggregate charges were collected totalling $4,343.48 on these two shipments, based on the rate of $136 per metric ton and 15.348 metric tons per shipment, or $2,087.33 per shipment, plus a terminal receiving charge of $84.41 per shipment.

The sought basis of charges is $109 per metric ton times 15.348 metric tons per shipment or $1,672.93 per shipment, or aggregate sought charges for both shipments of $3,345.86. The sought basis of charges does not factor in the terminal receiving charges of $84.41 per shipment, or $168.82 for the two shipments.

Recomputing the sought basis of charges so as to include the terminal receiving charges results in an aggregate sought basis of $3,345.86 plus $168.82 or $3,514.68.

The aggregate charges collected of $4,343.48 exceed the recomputed sought charges above of $3,514.68 by $828.80.

It is concluded that respondent, acting for its participating ocean carrier or said ocean carrier (Mitsui O.S.K. Lines, Ltd.) should be authorized to refund $828.80 to the complainant Mitsui And Co. U.S.A. Inc.

It is concluded and found that there was an error of an administrative or clerical nature in the conversion of the tariff item in issue from the imperial to the metric system; that the authorization of a refund of a portion of the freight charges collected will not result in discrimination among shippers; that prior to applying for authority to refund a portion of the charges collected, the Pacific Westbound Conference filed a new tariff which sets forth the correct metric rate basis, on which the refund of a portion of the charges collected would be computed; and that the application was timely filed.

In accordance with section 18(b)(3) of the Act, permission is granted to refund a portion of the charges collected. The refund authorized is $882.80.

(S) Charles E. Morgan,
Administrative Law Judge.

WASHINGTON, D.C.,
February 8, 1978.

FEDERAL MARITIME COMMISSION

DOCKET No. 77-48

SEA-LAND SERVICE, INC.
GENERAL INCREASE IN RATES IN THE U. S. WEST COAST/PUERTO RICO TRADE

DISCONTINUANCE OF PROCEEDING

March 15, 1978

This proceeding was instituted by order of the Commission served September 28, 1977, to determine the lawfulness of a rate increase by Sea-Land Service, Inc. applicable to the U. S. West Coast/Puerto Rico trade.

Sea-Land has since terminated its all water service in this trade and has cancelled its tariff which is the subject of the proceeding. Based on the cancellation Sea-Land has moved for discontinuance of this proceeding. Hearing Counsel replied in support of the motion to discontinue. The subject matter of this proceeding having been withdrawn no purpose would be served by continuing the proceeding.

IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–15

MATSON NAVIGATION COMPANY

v.

PORT AUTHORITY OF GUAM

DOCKET NO. 77–16

UNITED STATES LINES, INC.

v.

PORT AUTHORITY OF GUAM

NOTICE OF ADOPTION OF INITIAL DECISION

March 10, 1978

No exceptions having been filed to the initial decision in these proceedings and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 10, 1978.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 77–15

MATSON NAVIGATION COMPANY

v.

PORT AUTHORITY OF GUAM

No. 77–16

UNITED STATES LINES, INC.

v.

PORT AUTHORITY OF GUAM

Adopted March 10, 1978

Respondent found to have established, assessed, and collected a terminal service charge not provided for in tariff in violation of section 17 of the Shipping Act, 1916. Reparation awarded.

Edward D. Ransom for complainants Matson Navigation Company and United States Lines, Inc.

Edward S. Terlaje for respondent Port Authority of Guam.

Aaron W. Reese as Hearing Counsel, intervenor.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

These proceedings began with the filing of "Complaints and Petitions for Declaratory Orders" by Matson Navigation Company in No. 77–15 and United States Lines, Inc., in No. 77–16. Since both cases were virtually identical, they were consolidated for hearing and decision pursuant to Rule 148 of the Commission's Rules of Practice and Procedure (46 CFR 502.148). Hearing Counsel was granted leave to intervene under Rule 72 (46 CFR 502.72). After the scheduling of a prehearing conference the parties presented a stipulation which would eliminate the need for a prehearing and hearing. I approved the stipulation, cancelled the prehear-

[1] This decision became the decision of the Commission March 10, 1978.

ing, and set up a procedural schedule. Basically the stipulation provided that the cases were to be submitted for decision on the basis of the pleadings and briefs.[2]

The gravamen of the complaints[3] is that the Port Authority of Guam has established a charge for electric power furnished to refrigerated containers when plugged into "reefer slots" which is in violation of section 17 of the Shipping Act, 1916, (46 U.S.C. 816(b)) because the Port's tariff failed to provide for the charge.[4]

The findings of fact which are set forth below are not contested by the respondent. They are taken from the complaints and the respondent's answers to the interrogatories of Hearing Counsel.[5]

Findings of Fact

Matson and U. S. Lines are common carriers by water serving the Territory of Guam and use the Port Authority of Guam's terminal facilities at Apra Harbor (the Port). The Port Authority was established under Title XV, Government Code of Guam.

The Port Authority is engaged in carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in operating the Port in connection with common carriers by water. The Port is, therefore, "an other person" subject to the Shipping Act, 1916 (46 U.S.C. 801).

The Port has on file with the Commission a terminal tariff entitled "Commercial Port of Guam Terminal Tariff" which became effective on September 1, 1973. This tariff names "Rates, Charges, Rules and Regulations Applying at Apra Harbor."[6] The Port's tariff has from its effective date applied to refrigerated cargo in containers.

From the inception of Matson's and U. S. Lines' services to Guam, the Port has received, delivered, and stored their refrigerated containers, and has furnished electric power to all those containers while in storage in the Port's reefer slots.

The complaints specifically allege that:

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[2] "Pleadings" as used in the stipulation, include the complaint and petition filed in each docket together with their attachments, the answer filed in each docket with attachments, Hearing Counsel's petition to intervene, the interrogatories propounded by Hearing Counsel and Guam's answers to those interrogatories, and the various orders issued by the Acting Secretary and myself. The stipulation also provided for official notice of the Guam tariff on file with the Commission.

[3] "Complaints" as used in this decision include the petitions for declaratory order.

[4] Other violations are alleged which would result from projected actions of either complainants or respondent, i.e., should respondent make good its threat to cut off electric power to Matson's and U. S. Lines' refrigerated containers, they assert that respondent would be guilty of an unjust and unreasonable practice under section 17. Complainants go so far as to allege that even the threat to cut off the power is a violation of section 17. Additionally complainants assert that should they enter into an agreement to pay the charges assessed by the Port for electric power they would be in violation of section 15 of the Shipping Act (46 U.S.C. 816).

[5] The complaints of Matson and U. S. Lines are in all material respects identical.

[6] The tariff provides, "The rates, charges, rules, regulations, revisions or supplements named in this tariff apply on all freight received at the terminal or wharves at port."

The wharfage charge in the Port's filed tariff covers the use of its terminal facilities by containers and includes the furnishing of electric power to refrigerated containers located on the Port's facilities, prior to loading or subsequent to unloading from the vessel during free time. At the expiration of free time the demurrage charge covers and includes the furnishing of electric power to refrigerated cargo. When a container remained at the port for a substantial period of time arrangements were made for those containers at a charge provided in the tariff for "open storage on paved area per square foot per month."[7]

The Port's tariff consistently states with specificity any special rates or charges which are to be assessed in addition to the basic charges for general services such as wharfage, e.g., the tariff has long specifically stated charges for electric, telephone, water and heavy lift services when provided to vessels during stevedoring.

On May 4, 1976, the Port sent to "All Agents" a memorandum the subject of which was "Reefer Slots." It said:

Effective May 5, 1976,[8] all refrigerated containers plugged in the Port's Reefer Slots will be charged Ten Dollars ($10.00) per container per day. When computing the aforementioned charges, halves of plugged in periods shall be considered and assessed in the following manner:

(1) Twelve (12) hours or less shall be charged at one-half the rate per 24 hour period.

(2) Over twelve (12) hours and not more than 24 hours shall be charged at the full rate per 24 hour period.

Your cooperation in this regard is appreciated.

Prior to May 5, 1976, the Port furnished electric power to refrigerated containers of complainants when they were plugged into the reefer slots, but no charge over and above the rates and charges stated in the Port's tariff for wharfage, demurrage or storage, was assessed for electric power furnished these containers.

The charge of $10.00 a day for power to reefer slots was instituted as a result of public meetings of the Board of Director's of the Port,[9] at which the Board adopted a resolution by majority vote to assess the charge.

After the May 4th memo the Port began assessing the $10.00 charge for power furnished complainants when their containers were in reefer slots. The assessment against Matson for the period to and including May 1, 1977, amounts to some $66,000. The assessment against U. S. Lines for the same period amounts to approximately $12,000. Except for $75.00 paid by Matson for the period June 1–8, 1976, and $540.00 paid by U. S. Lines for the period June 20-July 7, 1976, complainants have refused to pay the charges for power supplied to the reefer slots.[10] The Port has

[7] Rule 64 of the Rules of Practice provides that "recitals of material and relevant facts in a complaint . . . unless specifically denied in the answer thereto shall be deemed admitted as true. . . ." (46 CFR 502.64). Complainants insist that the proposed findings in this paragraph are of fact and should be accepted as true. There is a question, however, as to whether the proposals are indeed findings of fact or questions of proper tariff interpretation, which latter would present issues of law. However, in view of an argument made on brief and its disposition later in this decision, it is unnecessary to resolve this question.

[8] The Port's answer would set the effective date at June 1, 1976. However this discrepancy is not material to the disposition of these cases.

[9] Pursuant to the Government Code of Guam, the Board has the power to fix all rates, dockage, rentals, tolls, pilotage, wharfage and charges applicable to Apra Harbor.

[10] Both Matson and U. S. Lines have been and are continuing to escrow funds sufficient to meet the assessments of the Port.

threatened to withhold electric power from Matson and U. S. Lines but *has not as yet done so.*

On August 10, 1977, the Port filed with the Commission an amendment to its tariff which became effective September 10, 1977. Original Page 15 of the tariff was amended to provide for a charge for furnishing electric power to containers plugged into reefer slots. Item No. 6 of the amended page 15 reads:

6. The daily charge for plugged in refrigerated containers will be at cost as determined by the Guam Power Authority. As of November 1974 the cost was $9.00 per container per day.

DISCUSSION AND CONCLUSIONS

As cast by the complainants the sole issue presented in these cases is:

Since the Port failed to file a tariff amendment with the Commission or to amend its tariff, can it enforce and collect an additional charge for furnishing electric power to refrigerated containers previously furnished and covered under general charges in its tariff.[11]

In resolving this issue [in favor of complainants, of course], the following relief is requested:

1. That the Commission hear and resolve the controversy between complainants and the Port with respect to such special extra charges for furnishing electric power to refrigerated containers and determine the lawfulness of the Port collecting such charges from complainants, in excess of the rates and charges for the terminal services stated in the Port's tariff.

2. That the Commission by its order determine:

(a) that the only charges which complainants are obliged to pay to the port are those set forth in the Port's tariffs;

(b) that the furnishing of electric power to refrigerated containers is included in wharfage, demurrage, storage or other basic charges in such tariffs and;

(c) that the special extra charges for such electric power, over and above such tariff, are unlawful charges which complainants are not obligated to pay.

3. That the Commission determine whether complainants and the Port can, in the absence of a section 15 agreement, lawfully agree upon payment of, or otherwise pay, the special extra electric service charges assessed by the Port but not set forth in its tariff.

4. That the Commission issue a cease and desist order to the Port ordering the Port not to carry out its threat to withhold terminal facilities from complainants and in particular, not to withhold the furnishing of electric power to complainants' refrigerated containers at the Port's facilities, and not to refuse to accept their refrigerated cargo or not to penalize or otherwise retaliate against them.

5. That the Commission determine that the threat to withhold terminal services from complainants is in itself a practice which is unlawful under section 17 of the Shipping Act.

6. That in the event complainants should be compelled by the Port to pay special extra charges for electric power, as alleged, the Commission order reparations to complainants by the Port in the amount of such excess charges imposed and paid, plus costs, interest and attorney's fees.

[11] Complainants would, perhaps from a desire for symmetry, state the converse: ". . . can Matson and U. S. Lines refuse to pay on the grounds that it is an unlawful and invalid charge."

As an other person subject to the Act, respondent must adhere to the requirements of the Commission's General Order 15 (46 CFR 533.1 et seq.) which establishes the rules and regulations governing the filing and content of tariffs by persons engaged in furnishing wharfage, dock or other terminal facilities to common carriers by water. The relevant provisions of General Order 15 are:

Section 533.2—Purpose. The purpose of this part is to enable the Commission to discharge its responsibilities under section 17 of the Shipping Act, 1916, by keeping informed of practices and rates and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices.

Section 533.3—Persons Who Must File. Every person . . . carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities as described in section 533.1, including, but not limited to terminals owned or operated by states and their political subdivisions; . . . shall file in duplicate . . . a schedule or tariff showing *all* its rates, charges, rules, and regulations related to or connected with the receiving, handling, storing and/or delivering of property at its terminal facilities. (Emphasis mine.)

Since the inception of complainants' service to Guam respondent has furnished electric power to containers which were received by respondent and placed in "reefer slots" to await delivery to consignees or transshipment. Prior to May 5, 1976, respondent made no attempt nor did it claim any right to assess or collect special charges for electric power furnished to refrigerated containers while they were in the "reefer slots." Nor did respondent's tariff contain any specific provision for a change for power furnished to containers while in those slots. However, respondent now claims that there is a provision which has all along authorized the assessment and collection of that charge. That provision is said to be Rule P of the tariff which is a part of a section entitled "Stevedoring Services" and which reads in part [the part selected by respondent]:

At the request of the Shipping Line, or their agent, electric power may be supplied for at the same rates that the Guam Power Authority would charge for the service if supplied directly. . . .
(a). . . .
(b). . . .
(c). . . .
(d). . . .[12]

According to respondent this "section expressly and explicitly authorized the Port to assess charges for electric power supplied, although such rate must be at the same rate that the Guam Power Authority would charge." Respondent continues:

It is manifest from a reading of these provisions that the Commercial Port of Guam clearly intended the 1973 terminal tariff to include specific rates for electric power supplied to shipping lines over and above rates and charges.

While respondent admits that subparagraphs (a) through (d) of the rule govern the rate for electric power provided to vessels, but nevertheless

[12] This is how respondents reproduced Rule P in its Opening Brief. The subparagraphs (a)-(d) speak exclusively of electric power supplied to the vessel. No mention whatever is made of power to be supplied to *containers* whether or not in reefer slots.

continues to say that ". . . the language contained in the first paragraph of said rule indicates that the electric power rate stated therein may be assessed separately and in addition to those outlined in section (a) through (d) [and that] . . . the electric power rate described in the first paragraph of Rule P is applicable to refrigerated cargo in containers when said containers are placed at rest in the port's container yard." [13]

Even the most cursory examination of Guam's tariff belies such a construction. Indeed in some respects the tariff is a model of organization. It begins with a section devoted to the general rules and regulations applicable to the whole tariff and then proceeds through those rules and regulations and charges governing the specific services offered by the Port. In the "General Rules and Regulations" section such disparate matters as "notices to the public," Right to Withhold Delivery of Freight, loss and damage claims and Whalebacks are dealt with. [14] The "General Rule" section is followed by other sections which deal specifically with "Wharfage," "Docket and Dockage," "Stevedoring Service," "Cargo Handling Services," "Container Stevedore and Handling Services," "Equipment Rental," "Free Time and Demurrage," and "Rentals." Thus, the tariff has a specific section which contains the particular rules, regulations, rates and charges governing each service offered by the Port. Each section begins with a definition of the particular service covered by it and each section includes the rates or charges for that service.

Rule P itself is in the section of the tariff entitled "Stevedoring Services" and the section is devoted exclusively to those services. Stevedoring is defined in that section as:

> Services rendered by the Port in removing or handling cargo from the end of the vessel's tackle or place of rest on pier to the vessel's hold, dock, 'tween decks and deep tanks or to any spaces in the vessel, and from any space in the vessel, remove and handle cargo, including on deck, 'tween decks, holds, and deep tanks, and land said cargo at place of rest on pier.

When dealing with the proper application of the definition of wharfage in a terminal tariff, the Commission in *Sacramento-Yolo Port Dist. v. Fred V. Noonan Co. Inc.*, 9 F.M.C. 551 (1966), laid down the following general principles:

> . . . It is a basic principle in the law of tariff construction that tariffs must be clear and unambiguous to avoid possible discrimination among users of tariff services. When a tariff is clear on its face, no extrinsic evidence may be used to vary its "plain meaning." Tariffs are, moreover, drawn unilaterally and must therefore be construed in the case of ambiguity against the one making and issuing the tariff, and "it is the meaning of express

[13] Complainants argue that the Port's contentions on Rule P are directly contrary to the stipulated record and the Port is precluded from making any argument about the meaning of Rule P citing Rule 64 again. While 64 is quite explicit and provides clear ground for rejecting any argument about Rule P it is unnecessary to base rejection of the Port's contentions exclusively on Rule 64.

[14] For those of more than idle curiosity a "whaleback" is "a steel pallet specifically constructed by ocean carriers, which is not larger than eight (8) feet by twelve (12) feet and is suitable for forklift handling." Presumably the pallet's shape resembles the back of a whale, although information of record does not confirm this.

language employed in the tariff and not the unexpressed intention . . . which controls. . . . " *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 608. . . . (9 F.M.C. at 558)[15]

Of course, a tariff must be read as a whole and not in part and neither side (here the carrier or the terminal) may resort to a strained or unnatural construction. *Storage Practices at Longview, Wash.*, 6 F.M.B. 178, 182 (1960); *U. S. v. Farrell Lines, Inc.*, 16 F.M.C. 42 (1912).

The Port's tariff is admirably clear in its overall organization. It is divided into sections—one for each service offered by the Port. Each section is self-contained. For example, the section (Original page 5–13) begins with a definition of wharfage, deals with limitations and exemptions, explains when wharfage will not be charged and concludes with the rates for the service. In other words all a potential user of the service needs to know about wharfage can be found, not so suprisingly, in the section of the tariff entitled "Wharfage." The section on "Dock and Dockage" is structured similarly. The same can be said for "Stevedoring" and the other sections dealing with specific services. The most significant feature of the format of the Port's tariff is that in none of the sections could I find any cross-referencing to other sections.[16] The charges contained in the "Wharfage" section are for wharfage, just as the rates in the "Dock and Dockage" section are for dockage. The question, of course, now becomes, how can a provision for an electric power charge appearing in the "Stevedoring Services" section be made to apply to a service which is rendered after stevedoring either ends or begins? The simple answer is that it cannot. The power charge contained in Rule P is for the furnishing of power to the vessel during stevedoring operations only—no other interpretation is reasonable. To adopt the Port's interpretation would be to create an ambiguity where none now exists.

Respondent, however, argues that, "It is manifest from a reading of these provisions that the Commercial Port of Guam clearly intended the 1973 terminal tariff to include specific rates for electric power supplied to shipping lines over and above rates and charges in the Port's tariff for wharfage, demurrage, storage, and stevedoring services."[17] There are naturally several things wrong with this statement. In the first place the intentions of the Commercial Port of Guam, whatever in fact they may have been, cannot work to change the clear meaning of a tariff provision. Secondly, if it indeed was the intention in 1973 to impose a charge for power in addition to the rates or charges for wharfage, demurrage,

[15] Although I have not found a case which specifically states that the same principles of construction apply to terminal tariffs as well as carrier tariffs, the *Sacramento* case, *supra*, and others make it clear that they do.

[16] By this I mean cross-referencing between those tariff sections dealing with the specific services offered. There is at least one actual cross-reference to the General Rules Section from the specific services sections and it would sometimes be necessary to resort to the General section to find the definitions of terms used in the specific sections. This does not however detract from the all inclusive nature of the sections dealing with specific services offered by the port.

[17] If the meaning of Rule P was so "manifest" why was there no mention of it in the May 4th memo? That memo creates the impression that it is dealing with a *new* charge and not with the belated imposition of an already existing and authorized charge. Quite often when an advocate uses "manifest," and its kindred terms like "it is axiomatic," I have found behind the "logic" of an argument a rather unhappy lawyer doing his best to save a bad situation for his client.

storage, or stevedoring services why did the Port wait until 1976 to do it?[18] Finally, the argument that Rule P expressly and explicitly authorized the charge is belied by the manner in which the Port amended its tariff to specifically provide for the charge. In its brief the Port says:

> Notwithstanding the clear meaning of Rule P . . . the Port's board of directors, in its desire to avoid confusion in the future relating to its intention to commence charging for electric power supplied to shipping lines, amended its tariff.[19]

Once having determined to amend the tariff the logical expectation of a user of the Port's services—in view of the Port's understanding of Rule P—would be that Rule P itself would be amended. Not so, however, Original page 14 entitled "Cargo Handling Services" was amended by, among other things, the addition of a new sentence which reads:

> 6. The daily charge for plugged in refrigerated containers will be at cost as determined by the Guam Power Authority. As of November 1974 the cost as $9.00 per container per day.

The amendment to the *Cargo Handling* section of the tariff does nothing to further the Port's cause for Rule P. In fact it can only be interpreted as an indication of the confusion which would have been created had the Port amended Rule P to provide for the power charge.

The tariff of the Commercial Port of Guam did not provide for an electric power charge to be assessed for containers plugged into reefer slots; and the complainants were not obligated to pay that charge. The attempted establishment, assessment, and collection of the charge without a proper amendment to the tariff was an unjust and unreasonable practice in violation of section 17 of the Shipping Act, 1916.

At this point a small digression seems warranted in an attempt to avoid further confusion which could lead to more litigation over the charge at issue here.

As noted the amendment which was intended to avoid just such confusion was made to the Cargo Handling section of the tariff. That section defines "Cargo handling" as:

> Services rendered for the benefit of *non-containerized cargo,* including cargo from the Container Freight Station, during the period the cargo is in the care and custody of the Port, when received at the place of rest assigned to the cargo by the Port, and from which cargo may be delivered to/from consignee/shipper trucks within the Port premises.

There just doesn't seem to be any rhyme or reason for the inclusion of a charge for a service to be rendered exclusively to containers in a section of the tariff which by its very definition excludes those services. There is even less reason for the inclusion of the charge in this section when by simply turning to the next page of the tariff (Original page 15) you find a

[18] If this argument is accepted it could well follow that the Port had been operating illegally prior to May 5, 1976, by providing free a service for which the Port required the assessment and collection of a charge.

[19] It cannot be determined from this record whether there are any containers plugged into reefer slots that belong to shippers or consignees and not to "shipping lines," but if there are, the intention of the Port to "commence" charging shipping lines is discriminatory if there is no intent to "commence" charging shippers and consignees as ell. The amendment is, however, not so worded.

section entitled "Container Stevedoring and Handling Services." In view of the overall structure and format of the tariff it would seem that the amendment should be made here not in the "Cargo Handling" section.

The present amendment needlessly adds confusion to an otherwise well organized tariff, creates an ambiguity and could well foment further dispute as to the applicability of the charge. This seems almost inevitable since complainants have specifically reserved the right to object to the current amendment for, among other things, vagueness, although just when and to whom these objections will be made is not stated.

The present provision authorizing the electric power charge provides that the cost for power "will be as determined by the Guam Power Authority." Then it simply states that as of November 1974 the cost as $9.00 per container per day. While the cost of power in November 1974 might well be of interest to a scholar of Guam's economic history, it does not apprise a user of the Port's reefer slots of the current charge for power—unless of course the cost has remained the same all these years.[20] In any event the amendment in question requires the user of the service to look beyond the Port's tariff to ascertain what the cost to him for electric power on any given day will be. This places upon the user an "onerous burden not imposed by law" and such a practice "cannot be too strongly condemned." *Intercoastal Investigation 1935*, 1 U.S.S.B. 400, 415–416 (1935); *Matson Nav. Co.—Container Frt. Tariffs*, 7 F.M.C. 504, 508 (1963).

In addition to requesting a determination that the Port's assessment and collection of the electric power charge is unlawful complainants have made a series of requests for further relief. These requests create somewhat of a dilemma which stems primarily from their coupling the complaints in these cases with petitions for declaratory orders. Thus, at the time the complaints and petitions were filed it would appear that the Port was actively pursuing the collection of the challenged charge and was threatening to cut off electric service if payment was not made. This gave rise to requests for such relief as a declaration by the Commission that the simple threat to cut off power was a violation of section 17 and that in the absence of an approved section 15 agreement complainants

This amendment is not of course an issue in this complaint proceeding. However, the Port in due regard to its duties and obligations under section 17, to say nothing of avoiding future controversy, should review the current rule in the light of the comments above, and, if the need should arise, consult with the Commission's staff with a view to coming up with a provision that will meet with the requirements of the law.

[20] It would not appear to have remained the same since the Port had argued throughout this case that it was always its intention to supply power at the same cost as if it were obtained from the Power Authority. If the memo of May 4, 1976, was in furtherance of this intention then the cost of power from the Power Authority as of that date was $10.00 per day, not $9.00.

could not "agree upon payment of, or otherwise pay, the special extra electric service charge."

In one sense these issues can be considered as moot. The power was never cut off and no agreement, section 15 or otherwise, was ever entered into. If these were simple complaint cases there would be no occasion to deal with them. Indeed, I cannot see how they could have been framed as issues in a complaint. But does the inclusion of a petition for a declaratory order make it necessary for me to resolve those issues and provide the essentially declaratory relief requested? I think not.

The fundamental purpose of a declaratory order is the resolution or removal of a controversy or uncertainty (46 CFR 502.68). Here the controversy or uncertainty do not appear to exist. Moreover, the putative controversies presented by complainants are not so refined as to be capable of any definitive resolution or even helpful prognostication absent the projection of hypothetical situations which of course may and probably won't arise. Take for instance the threat of the Port to cut off electric power to the reefer slots. If this decision had gone the other way and the validity of the charge upheld, would it not have been right of the Port as a part of its pre-complaint efforts to collect its lawful charges to announce its intention to withhold power if payment wasn't made? Does the announced intention depend upon the outcome of the case? Does it depend upon the precise terms of the threat and the conditions under which it was made? There simply isn't a sufficient record here to afford the declaratory relief requested. Needless to say the resolution of this issue is not necessary to the disposition of these cases. Consider next the requested determination under section 15. The first and most obvious question here is, What were the terms of the agreement to have been? Without the answer to that question, no determination under section 15 is possible. The Port has at no time objected to the Commission's jurisdiction over this matter, nor has it indicated that it would not abide by the Commission's decision on it. Thus there does not appear a sufficient degree of probability that a controversy will arise to warrant the exercise of the discretion to issue a declaratory order. Under these circumstances to do so would in my opinion serve no useful purpose, would unduly complicate what is essentially an uncomplicated case, and could quite possibly serve to create the very future uncertainty which declaratory orders are designed to avoid.

Respondent has violated section 17 by its establishment, assessment, attempted, and actual collection of a charge for electric power furnished to containers plugged into reefer slots which was not authorized and provided for in its tariff. Accordingly, the respondent Port Authority of Guam is hereby ordered to cease and desist from all efforts to collect that charge for power furnished to the reefer slots prior to September 10, 1977. Respondent is further ordered to pay reparation to Matson Navigation Company in the amount of $75.00 and to United States Lines

in the amount of $540.00. These amounts represent the sums collected from complainants as payments of a portion of the unlawful charges.

(S) John E. Cograve,
Administrative Law Judge.

WASHINGTON, D.C.,
February 9, 1978.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 448(I)

AMERICAN IMPORT CO.

v.

JAPAN LINE (U.S.A.) LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

March 10, 1978

Notice is hereby given that the Commission on March 10, 1978, etermined not to review the Settlement Officer's decision in this roceeding served February 24, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 448(I)

AMERICAN IMPORT CO.

v.

JAPAN LINE (U.S.A.) LTD.

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

American Import Co., (complainant) alleges that Japan Line (U.S.A.) Ltd., (carrier) applied incorrect rates or charges on each of several (eight) individual shipments, resulting in combined overcharges of $309.17 in violation of section 18(b)(3) of the Shipping Act, 1916. This section prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

The carrier, in response to the served complaint, stated that the involved shipments were made on January 19 and April 8, 1976, but that the claims were not filed until February 11, 1977. Rule 512 of the Conference tariff[2] prohibits the payment of overcharge claims not presented to the carrier in writing before the cargo leaves the carrier's possession, in cases of alleged errors in description; and within six months after the date of the shipment for all other claims. The carrier did not dispute the claimant's contentions of rate misapplication.

Claim No. AI–20 involves five (5) separate intermodal bills of lading, each dated January 19, 1976. These documents purport to evidence the water transportation of 355 bales of "Bamboo Poles of Japanese Origin" weighing 34.954 revenue tons aboard the YAMASHIN MARU from Kobe, Japan, to Los Angeles, California. Each bill of lading was rated $72.55 per revenue ton plus a 1.5 percent currency surcharge ($2,535.91 plus $38.04 equals $2,573.95). The claimant contends that the involved cargo actually was "fishing poles," value not exceeding $1,000.00 per revenue ton and should properly have been rated as "Fishing Tackle" under Item 5840–05, 7th Revised Page 223 of the Conference tariff. (See footnote 2). The published effective date of this page is January 1, 1976;

[1] Both parties having consented to the informal procedure of 46 CFR 502.301–304 (as amended), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] Transpacific Freight Conference of Japan/Korea, Eastbound Intermodal Tariff No. 1, ICC No. 1/FMC No. 4.

the published effective rate was $68.55 per revenue ton plus 1.5 percent currency surcharge ($2,396.10 plus $35.94 equals $2,432.04). The resultant combined overcharge is $141.91.

Claim No. AI–21 involves three (3) separate intermodal bills of lading, each dated April 7, 1976. These documents purport to evidence the water transportation of 507 bales of "Bamboo Poles of Japanese Origin" weighing 34.399 revenue tons aboard the JAPAN ACE from Kobe, Japan, to Los Angeles, California. Each bill of lading was rated $82.75 per revenue ton plus 1.5 percent currency surcharge ($2,812.11 plus $42.18 equals $2,854.29). The claimant contends that the involved cargo actually was "fishing poles," value not exceeding $1,000.00 per revenue ton and should properly have been rated as "Fishing Tackle" under Item 5840–05, 9th Revised Page 223 of the Conference tariff. (See footnote 2). The published effective date of this page is April 1, 1976; the published effective rate was $76.75 per revenue ton plus 1.5 percent currency surcharge. ($2,640.12 plus $39.60 equals $2,679.72). The resultant combined overcharge is $174.57.

In support of its claims, the complainant submitted the following documentation:

1. Price list for bamboo fishing poles from Jarmain, Harrisons & Crossfield Ltd.;
2. Copy of page 4 from catalog of American Import Co., showing picture of bamboo fishing poles;
3. Invoice covering shipment on the YAMASHIN MARU;
4. Custom entry for same shipment;
5. Bills of lading J060–01055, 57, 58, 59 and 60;
6. Invoice covering shipment on the JAPAN ACE;
7. Bills of lading J060–01240, 41 and 42; and
8. Custom entry for same shipment.

A review of the supporting documentation in conjunction with the corresponding effective tariff pages leaves no doubt as to the validity of the complainant's claims.

The complaint was filed with this Commission within the time limit specified by statutes[3] and it has been well-established by the Commission that a carrier's published tariff rule may not act to bar recovery of an otherwise legitimate overcharge claim in such instances.

Section 18(b) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled to under its effective tariff. Accordingly, the complainant hereby is awarded reparation in the amount of $141.91. for Claim No. AI–20; and $174.57 for Claim No. AI–21[4] for a total of $316.48.

(S) WALDO R. PUTNAM,
Settlement Officer.

[3] The shipments were made in January and April 1976; the claim was filed with the Commission in October 1977.

[4] This represents an increase of $7.31 over the reparation sought by the claimant due to a mistake by the complainant in transferring certain numbers from the bills of lading to the complaint. On B/L J060–01240, the total charges are listed as $2,378.01 but appear on the complaint as $2,370.01. On B/L J060–01241, the revenue tons appear as 3.608; on the complaint as 3.600.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–54

ALLIED CHEMICAL INTERNATIONAL CORP.

v.

ATLANTIC LINES

NOTICE OF ADOPTION OF INITIAL DECISION

March 9, 1978

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 9, 1978.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 77-54

ALLIED CHEMICAL INTERNATIONAL CORP.

v.

ATLANTIC LINES

Adopted March 9, 1978

Violation of section 18(b)(3) found and reparation awarded.
William Levenstein for complainant.
Tallman Bissell for respondent.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Allied Chemical International Corp. alleges that it was overcharged by Atlantic Lines on a shipment of Toluene Diisocyanates carried by Atlantic from New York to Georgetown, Guyana. Allied requested that the case be handled under the Shortened Procedure provided for in Rules 181–187 of the Commission's Rules of Practice and Procedure (46 CFR 502.181–187). The shortened procedure is designed to do away with oral hearings, and if the respondent consents to it, the case is decided upon a record consisting of (1) the complaint and a memorandum of facts and arguments together with any supporting documents such as bills of lading, etc.; (2) the respondent's answering memorandum and supporting documents; (3) the complainant's memorandum of reply.[2] The respondent is given 25 days to file his answering memorandum.

Atlantic failed to respond to the complaint and while Rule 64 would have allowed me to decide this case on the record as presented by complainant (if found sufficient) past experience with the uncertainty of the mails led me to contact respondent. A phone call[3] to respondent's counsel elicited the fact that since the claim of Allied, when presented to the conference, was rejected solely on the basis of the so-called six-month rule, Atlantic thought it was not necessary to respond to the complaint

[1] This decision became the decision of the Commission March 9, 1978.
[2] The filing of the reply memorandum closes the record unless the Presiding Officer deems the record insufficient and requires additional evidence.
[3] Complainant did not object to the use of the telephone and was informed of the conversation.

and was merely awaiting an order from the Commission so that it could repay Allied the amount of the claimed overcharge.[4] Subsequently, Atlantic submitted a letter stating:

> . . . Atlantic Lines does contest the overcharge in the amount of $2,368.08 as alleged in the complaint and upon issuance of your order providing for such reimbursement Atlantic Lines will proceed accordingly.
>
> We enclose a copy of the applicable freight tariff and the bill of lading showing the recomputation of the freight.

The circumstances leading to the overcharge as set out in the complaint are as follows:[5]

> IIIA. On October 31, 1975, respondent issued its bill of lading No. 87 to cover complainant's shipment described thereon as 120 (x–550 lb. ea.) STEEL DRUMS TOLUENE DIISOCYANATES (NACCONATE 80), weighing 71760 pounds and measuring 1272 cubic feet (10.6 x 120), for carriage from New York to Georgetown, Guyana.
>
> B. For its service respondent billed, and complainant paid on December 4, 1975, total charges of $5361.41, based upon a rate of $138 per weight ton, plus surcharges and accessorial charges as shown on the rated bill of lading.
>
> C. At the time of this shipment respondent's tariff, Leeward and Windward Islands & Guianas Conference Freight Tariff F.M.C. No. 1, published a class 6 rate of $72 W/M for TOLUENE DIISOCYANATE (21st Rev. Page 67 and 9th Rev. Page 38) for this same service.
>
> D. On this basis the proper charges for this shipment should be as follows:

71,760 lbs. (35.88 tons) at $72/ton	=	$2,583.36
L.R. & S.—31.8 M/T at $10.88 (1)	=	345.03
Surcharge—35.88 W/T at $1.60 (2)	=	57.41
Tonnage Dues—35.88 W/T at .21/ton (3)	=	7.53
		$2,993.33

> (1) 14th Rev. Page 14, Item 110 (3)(a)
> (2) 14th Rev. Page 14, Item 110 (3)(b)
> (3) 25th Rev. Page 15, Item 110 (3)(b)
> Paid $5,361.41—Should be $2,993.33 Overpaid $2,368.08

Attached to the complaint are: (1) a copy of the bill of lading showing the cargo to be Toluene Diisocyanates in Steel Drums; (2) a copy of the freight invoice showing freight paid of $5,361.41; (3) a copy of 21st Rev. Page 67 of the Leeward & Windward tariff showing Toluene Diisocyanate as a Class 6 commodity; (4) a copy of 9th Rev. Page 38 showing the Class 6 rate as $72.00; (5) copies of 14th Rev. Page 14 and 25th Rev. Page 15 showing certain additional charges applicable to the shipment; and (6) a copy of a letter from the agent of Atlantic showing that the overcharge claim was rejected because it was filed too late.

The letter from counsel for Atlantic had as enclosures copies of 21st Rev. Page 6 and 9th Rev. Page 38 and a copy of the bill of lading in which the freight, recomputed on the basis of the $72.00 rate, is shown as $2993.33.

[4] More will be said about this later.
[5] Quotation marks have been omitted.

The record here clearly establishes an overcharge by Atlantic. The only thing the record does not establish is the reason for the overcharge.

The commodity was Toluene Diisocyanate. The tariff had a specific rate for Toluene Diisocyanate. That rate was not charged. Thus, respondent violated the express provisions of section 18(b)(3) of the Shipping Act, 1916,[6] by not applying the proper rate to the shipment.

As already mentioned, Atlantic's failure to respond in any way to Allied's complaint was due to the misplaced notion that response was unnecessary. This notion was the product of a misreading of *Kraft Foods v. FMC*, 538 F. 2d 445 (D.C. Cir. 1976). Atlantic apparently read *Kraft* as outlawing the six-month rule; thus, Atlantic appears to have felt that even if it answered the complaint the decision was a foregone conclusion. So Atlantic did nothing in the expectation of an order directing the refund of the overcharge.

Kraft did not deal with the six-month rule and of course did not outlaw it.[7] Moreover, even if the court in *Kraft* had done as Atlantic thought that was no reason or excuse for failing to respond to the formal process of the Commission.

In an earlier decision (*Ocean Drilling & Exploration Co. v. Kawasaki Kisen Kaisha, Ltd.*, Docket No. 77–36, served December 20, 1977; Notice of Adoption served January 16, 1978), I had occasion to comment on the confusion apparently attendant to the six-month rule in its invocation in overcharge claims.[8] There, I suggested that the Commission institute a rulemaking proceeding leading to a rule which would require that every tariff containing the six-month rule must also contain a statement that the rule does bar a shipper from seeking redress from the Commission. The situation here leads me to suggest also that when the six month rule is invoked every notice to the shipper that his claim has been denied should also contain the statement of his rights before the Commission. Had this been done here perhaps Atlantic would have answered the complaint.[9]

Accordingly, respondent Atlantic lines shall pay as reparation to Allied Chemical International Corp. $2998.33 within 30 days from the date of the Commission's final order in this case.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
February 9, 1978.

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[6] That section provides that a carrier may only charge the rates and charges which are specified in its tariff on file with the Commission at the time of the shipment.

[7] For the status of the six-month rule under the Shipping Act, 1916, see *Proposed Rule Covering Time Limit on Filing Overcharge Claims*, 12 F.M.C. 298 (1969); *Polychrome Corp. v. Hamburg-America Line*, 15 F.M.C. 221 (1972).

[8] Docket No. 77–36, page 5, footnote 8.

[9] I realize that there would appear to be some inconsistency between the belief that the rule was outlawed and its retention in the tariff, but this might be due to the inability of Atlantic to sell its view to the Conference.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-55

IN RE: TRAILER MARINE TRANSPORT CORPORATION—JOINT SINGLE FACTOR RATES, PUERTO RICAN TRADE

Common Carriers by water engaged in joint through transportation in conjunction with ICC regulated rail carriers, between points in the mainland United States and the Commonwealth of Puerto Rico, are subject to the Shipping Act, 1916 and Part 531 of the Commission's Rules.

Joint rail/water carriers in the Puerto Ricam trade must file tariffs in conformity with section 531.8 of the Commission's Rules, identifying both the through rates charged to shippers and the exact rate division received by the water carriers.

Part I of the Interstate Commerce Act (ICA) was modified by the Transportation Act of 1940 which enacted ICA Part III. Part III precludes exclusive Interstate Commerce Commission jurisdiction over joint rail/water transportation in domestic offshore commerce.

In domestic offshore commerce, as in foreign commerce, once export cargo is "transshipped" to an ocean-going vessel, the transportation is subject to full FMC regulation.

Respondent has violated section 2 of the Intercoastal Shipping Act by not filing a tariff with the Commission which properly describes its joint rail/water service to Puerto Rico.

Respondent has violated section 21 by failing to produce information duly requested by the Commission.

John Cunningham for Respondent Trailer Marine Transport Corporation.

John Robert Ewers, Joseph B. Slunt, and *John C. Cunningham,* Hearing Counsel.

C. C. Guidry, for the Board of Commissioners of the Port of New Orleans.

G. B. Perry, for New Orleans Traffic and Transportation Bureau, Inc.

Neal M. Mayer and *Paul D. Coleman,* for Seatrain Gitmo, Inc.

Donald J. Brunner, for Sea-Land Service, Inc.

John L. Hill, David Kendall, David Hughes, Marilynn Poole, for the State of Texas.

REPORT AND ORDER

March 15, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Clarence Morse, *Commissioners*)

PROCEEDING

Trailer Marine Transport Corporation (TMT), is a common carrier by water in interstate commerce subject to the jurisdiction of the Federal Maritime Commission (FMC or Commission).[1] On November 18, 1977, the Commission ordered TMT to show cause why its operation of an intermodal joint through rail/water transportation service (Rail/Water Service) between mainland states and the Commonwealth of Puerto Rico without an appropriate tariff on file with the FMC did not violate section 2 of the Intercoastal Shipping Act (46 U.S.C. 844) and the Commission's domestic offshore tariff filing regulations (46 C.F.R. Part 531).[2] TMT was also ordered to produce certain information concerning the Rail/Water Service pursuant to Shipping Act section 21 (46 U.S.C. 820).

Fifteen persons were granted leave to intervene herein,[3] but only five of the Intervenors actually participated,[4] and one (the Government of Puerto Rico) has formally withdrawn. Oral argument was not held nor was it requested by any party.

TMT responded to the Show Cause Order by submitting a copy of a 40 page memorandum it had filed with the ICC on August 30, 1977 asserting that Section 1(1)(a) of the Interstate Commerce Act (ICA) confers *exclusive* jurisdiction over all aspects of joint through rail/water transpor-

[1] TMT has operated an all-water service between Puerto Rico and Jacksonville and Miami, Florida under FMC Tariffs since February 11, 1975. Tariff No. FMC–F–2.

[2] The Rail/Water Service commenced November 8, 1977 pursuant to a tariff filed only with the Interstate Commerce Commission. TMT Freight Tariff No. 6, ICC No. 2. This tariff, as amended through March 6, 1978, has expanded considerably in scope during the pendency of this proceeding, and now includes TMT and eight participating rail carriers—Louisville and Nashville Railroad Company, Seaboard Coast Line Railroad Company, Southern Pacific Transportation Company, Kansas City Southern Railway Company, Louisiana and Arkansas Railway Company, Missouri Pacific Railroad Company, Winston-Salem Southern Railway, and Southern Railway System—and offers transportation between ports in Puerto Rico and points in the states of Alabama, Arkansas, California, Georgia, Illinois, Indiana, Kentucky, Louisiana, North Carolina, Ohio, South Carolina and Tennessee and Texas. Rates are quoted as lump sum amounts for the through transportation. The tariff contains no breakout of the division or share of the through rate actually retained by the individual participating carriers. TMT was advised by the Commission's staff prior to the effective date of ICC Tariff No. 2 that the proposed Rail/Water Service was subject to the Shipping Act's tariff filing requirements. Telex dated October 28, 1977.

[3] Those granted intervention rights were the Commonwealth of Puerto Rico, Puerto Rico Manufacturers Association, Chamber of Commerce of Puerto Rico, Eric E. Dawson (Senator-Virgin Islands), Alabama State Docks Department, Board of Commissioners of the Port of New Orleans, New Orleans Traffic and Transportation Bureau, Inc., State of Texas, Sea-Land Service, Inc. (Sea-Land), Seatrain Gitmo (Seatrain), Southern Railway Company, Southern Pacific Transportation Co., Seaboard Coast Line, Louisville and Nashville Railroad Company, and Roldan International, Inc.

[4] Seatrain, Sea-Land, the State of Texas, and the two Port of New Orleans organizations replied to TMT's arguments, as did the Commission's Bureau of Hearing Counsel (Hearing Counsel). In view of the remaining Intervenors' unexplained and unsanctioned failure to participate, they shall be dismissed as parties to this proceeding.

tation between the U.S. mainland and Puerto Rico upon the ICC.[5] TMT also claimed that the ICC's acceptance of its Rail/Water Service tariff substantiates its "exclusive ICC jurisdiction" argument.

It is well established that mere tariff acceptance does not constitute agency adjudication of the lawfulness of the service ordered thereunder, *e.g., Davis v. Portland Seed Co.*, 264 U.S. 403, 425 (1924). Moreover, the ICC has also accepted joint through rail/water tariffs from Sea-Land Service, Inc., which do contain water and rail carrier rate divisions and are filed at both the FMC and ICC.[6] An ICC investigation into the service described by Sea-Land's tariffs was ordered on January 20, 1978.[7]

TMT responded to the Commission's Section 21 Order by providing a copy of its publicly filed ICC Tariff No. 6. It refused to reveal the rate divisions received by participating carriers on the questionable grounds that such information is irrelevant to the jurisdictional question presented by the Show Cause Order. TMT flatly ignored the language at page 2 of the Order wherein the Commission stated that the rate divisions were to be used to help "determine the reasonableness of TMT's *all water* rates from Jacksonville to Puerto Rico," *i.e.*, the service already being offered under its FMC Tariff No. F-2.[8] TMT has, therefore, plainly violated section 21 since December 16, 1977 by refusing to furnish the rate divisions applicable to the Rail/Water Service, which violation will be referred to the Office of General Counsel for preparation of an appropriate enforcement claim.

POSITION OF THE PARTIES

TMT's arguments in support of a continuous and exclusive ICC jurisdiction over joint through rail/water transportation to Puerto Rico can be summarized as follows:

1. ICA section 1(1)(a) states *inter alia*, that carriers providing joint through rail/water transportation from a state to: (1) a foreign country; (2) another state; or (3) a territory, are subject to Part I. 49 U.S.C. 1(1)(a); 24

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[5] ICA Section 1(1)(a) states, in pertinent part, that:

(1) [Part I of the ICA] *shall* apply to common carriers engaged in—

(a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or . . . from any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

[6] In granting Sea-Land authority to file rail/water tariffs in the dual FMC/ICC format employed in foreign commerce, *Ex Parte 261*, 351 I.C.C. 490 (1976), the ICC's Division 2 expressly reserved judgment on whether the ICC possessed exclusive jurisdiction over the proposed service. Special Permission Order No. 78-750.

[7] Investigation No. 36810 into the "lawfulness" of Sea-Land's Freight Tariff No. 289, ICC No. 122 and Freight Tariff No. 290, ICC No. 123 (FMC Nos. 45 and 46, respectively). These tariffs offer service between the U.S. West Coast and both Puerto Rico and the U.S.-Virgin Islands, and took effect January 22, 1978. The ICC's Order of Investigation was supplemented on February 13, 1978 to specify issues relative to the nature and extent of the ICC's jurisdiction over joint rail/water common carrier service to Puerto Rico.

[8] The FMC is also responsible for the identification and prevention of unfair and unreasonable rates and practices by Shipping Act carriers. The extent to which intermodal rate divisions can be employed to injure all water shippers or other persons protected by the Shipping Act—and the power and practices of the ICC to prevent such injuries—is relevant in ascertaining the extent of the Commission's jurisdiction over through transportation arrangements made between domestic offshore carriers and ICC regulated carriers.

Stat. 379 (1887). The relevant provisions of this statute have not significantly changed since they were first enacted.

2. Puerto Rico was ceded to the United States by the Treaty of Paris (ratified in 1889, 30 Stat. 1754). Between the adoption of the first Puerto Rico Organic Act in 1900 (Foraker Act, 31 Stat. 77), and the commencement of Commonwealth status in 1952 (64 Stat. 319), the island possessed a locally elected government and was treated as if it were a "territory" by courts construing federal statutes. See generally, *Porto Rico v. American R. Co.*, 254 F. 369 (1st Cir. 1918), *cert. den.*, 249 U.S. 600 (1919). The Safety Appliance Acts (45 U.S.C. 1, *et seq.*), which were then administered by the ICC, were held applicable to Puerto Rico in 1913. *American R.R. v. Didricksen*, 227 U.S. 145, 148–149.

3. Section 28 of the Puerto Rico Organic Act of 1917 (39 Stat. 964) is still in effect. It states that:

> The Interstate Commerce Act [as amended], the Safety Appliance Acts [as amended], and section 19a of Title 49 [valuation of carrier property] shall not apply to Puerto Rico. 48 U.S.C. 751.

This statute was enacted to negate the effect of the *Didricksen* decision, *supra*, on Puerto Rican railroads, and to prevent the ICA in general and section 19(a) in particular from interfering with purely internal concerns which Congress had delegated to the Legislative Assembly of Puerto Rico. The sole purpose of 48 U.S.C. 751 is to exempt local, intra-island transportation from federal regulation. See 53 *Cong. Rec.* 8474–8475 (1916); *Safety Appliances on Railroads in Porto Rico*, 37 I.C.C. 470 (1915); *Porto Rico v. American R. Co., supra*, at 373–375; and *Benedicto v. West India & Panama Tel. Co.*, 256 F. 417 (1st Cir. 1919).

4. The ICC is not precluded by 48 U.S.C. 751 from regulating transportation between the mainland and Puerto Rico. In *Benedicto v. West India & Panama Tel. Co., supra*, the court held that the Puerto Rico Public Utilities Commission could not establish rates for cable communications service beyond the island's three mile territorial limit.[9] There is no substantive difference under the ICA between the through telegraph service involved in *Benedicto* and TMT's present rail/water transportation service. Section 1(1)(a) therefore applied to Puerto Rican rail/water traffic just as much after the adoption of section 751 as it did before.

5. The ICC's statement in *Fernandez & Co. v. Southern Pacific R.R.*, 104 I.C.C. 193 (1925), that 48 U.S.C. 751 barred *all* ICC regulation of transportation to Puerto Rico was (1) dicta and (2) erroneous. The error was probably caused by the absence of any reference to the seminal *Benedicto* decision during the proceeding.[10] TMT further asserts that no subsequent ICC decision has interpreted section 751 in this limiting manner.

[9] Telegraph communications were then subject to ICC regulation under Part I.

[10] TMT furnished virtually the entire *Fernandez* record as an attachment to its present opposition. ICC Docket No. 15,045.

6. Puerto Rico's elevation to Commonwealth status did not generally affect the applicability of federal statutes there; Congress did not intend to alter the scope of existing legislation by creating the Commonwealth. *E.g., Moreno Rios v. United States*, 256 F.2d 68, 71 (1st Cir. 1958), holding that the Federal Narcotics Act continued to apply to Puerto Rico after July 25, 1952, even though it was not a "territory." It follows, therefore, that Part I continues to apply to Puerto Rico in the manner contemplated by *Benedicto*. See generally, *Liquilux Gas Services v. Tropical Gas Co.*, 303 F.Supp. 414, 420 (D.P.R. 1969).

7. Should the establishment of the Commonwealth mean that Puerto Rico is no longer a territory within the meaning of section 1(1)(a), then it must be considered a "state." Puerto Rico has been treated as *though it were* a state when such a result was consistent with the purpose of a particular piece of federal legislation. Most prominent of such cases are those construing 28 U.S.C. 2281.[11] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672–674 (1974); *Mora v. Mejias*, 206 F.2d 377, 386–388 (1st Cir. 1953).

A. The ICC's General Counsel has relief upon the above cases in concluding that Puerto Rico is a "state" within the meaning of section 1.[12]

In response to TMT, Hearing Counsel took the position that:

1. It is irrelevant whether Puerto Rico is best described as a "territory" or a "state," because any and all ICC regulation of transportation to and from the island is prohibited by 48 U.S.C. 751. This result is evident from the plain meaning of that statute, and the *Benedicto* decision provides no authority to the contrary. The reference to section 751 in *Benedicto* is merely dicta. The court held only that the Puerto Rico Public Utilities Commission could not regulate beyond the island's three-mile limit, *not* that the ICC could regulate up to that limit. Moreover, the subject matter of the *Benedicto* litigation was telegraph communications, not transportation.

A. The FMC lacks authority over joint through rail/water transportation to domestic offshore destinations *other than Puerto Rico*. ICA section 1(1)(a) would preempt all FMC regulation in this field, if the ICC were not excluded from Puerto Rico by 48 U.S.C. 751. This conclusion is supported by the statements of two witnesses testifying during 1933 and 1938 House Committee hearings on the Intercoastal Shipping Act.[13]

2. The ICC's disclaimer of Puerto Rican jurisdiction in *Fernandez &*

[11] 28 U.S.C. 2281 requires convention of a three judge district court when injunctive relief is sought against a *state* statute or official.

[12] The FMC was furnished a copy of this memorandum (GC No. 401–77, dated October 19, 1977) subsequent to the November 7, 1977 meeting between Chairman O'Neil and Chairman Daschbach concerning the rail/water service, but it is not part of the record in the instant proceeding.

[13] *Regulation of Intercoastal Water Carriers (S. 4491)*, 72d Cong., 2d Sess. (January 19, 1933), at 402; *Amending Merchant Marine Act, 1936 (H.R. 8532)*, 75th Cong., 2d and 3d Sess. (January 12, 1938), at 247–248. The Commission notes, however, that these references actually pertain to those portions of the Panama Canal Act of 1912 (37 Stat 560, 568) set forth in former ICA section 6(13) between 1912 and 1940. See 1933 Hearings, *supra*, at 401. Section 6(13)(b) authorized the ICC to establish joint rail and water rates in interstate commerce and to regulate the maximum level of such rates. See Appendix "A" hereto.

Co., supra, represents the correct view of 48 U.S.C. 751. Contrary to TMT's contentions, the ICC continues to adhere to this "total exclusion" theory, and stated in *Trans-Caribbean Motor Transport, Inc.,* 66 M.C.C. 593, 596 (1956), that: "[B]y specific legislative enactment, it was declared that [the ICA] shall not apply to Puerto Rico, 48 U.S.C. 751."

The five participating Intervenors advanced the following additional arguments against exclusive ICC jurisdiction over the Rail/Water Service and in favor of the applicability of Intercoastal Act section 2:

1. Prior to 1952, Puerto Rico was not a "territory" for ICA purposes. When section 1(1)(a) was first enacted, Puerto Rico belonged to Spain and the United States had no insular possessions of any type. The "territories" contemplated by Congress were the continental territories of Utah, New Mexico, Washington, Dakota, Montana, Arizona, Idaho, and Wyoming.

2. Puerto Rico is neither a state nor a territory; it is an unique, semi-autonomous body politic.[14] Judicial decisions treating it as though it were a state for 28 U.S.C. 2281 purposes, can and should be limited to the particular objectives of that statute. The modern ICA is not subject to a geographically expansive interpretation. If Puerto Rico were deemed a state, then *all water* carriage between the island and the mainland would be subject to ICA Part III and not the Shipping Act—a result clearly unintended by Congress.

A. If Puerto Rico were a "state" within the meaning of section 1(1)(a), then TMT is subject to ICA Part III and requires a certificate of public convenience and necessity pursuant to ICA section 309. TMT has not only failed to procure such a certificate, but the ICC recently ruled that FMC regulated carriers engaged in through routes with ICC carriers cannot be certificated. *Joint Rail Water Rates to Hawaii (Matson Navigation Co.),* 351 I.C.C. 213, 217–218 (1975).

3. The plain meaning of Shipping Act section 1 confers the FMC with jurisdiction over the ocean portion of domestic offshore transportation. This jurisdiction is preserved and clarified by the Transportation Act of 1940, which defines "interstate commerce" in such a manner as to exclude Puerto Rico. 49 U.S.C. 902(i)(j)(k). Joint rail/water transportation to Puerto Rico is "foreign commerce" for purposes of ICA Part III, and, as such, is beyond the reach of the ICC once transshipment to an ocean-going vessel has occurred.

A. The Transportation Act of 1940 (54 Stat. 898) repealed prior inconsistent provisions of the ICA and the Shipping Acts. The jurisdictional limitations of ICA section 302(i)(2) and not those of section 1(1)(a) govern ICC regulation of the Puerto Rican trade.

B. National policy disfavors regulation of the ocean shipping industry by the ICC. See House Committee on Merchant Marine and Fisheries,

[14] *Fonesca v. Prann,* 282 F.2d 153, 155 (1st Cir. 1960); *Guerrido v. Alcoa Steamship Company, Inc.,* 234 F.2d 349, 352 (1st Cir. 1956); *Sanchez v. United States,* 376 F. Supp. 239, 241 (D.P.R. 1974); *Alcoa Steamship Co. v. Perez,* 295 F. Supp. 187, 196–197 (D.P.R. 1968).

Merchant Marine Act, 1938 (H.R. 10315), H.R. Report No. 2168, 75th Cong., 3d Sess. (1938), at 27, SR 52:124.

4. The legislative history of the 1962 "Rivers" amendments to the ICA wherein the House Committee stated that "statutory authority clearly exists" for ICC acceptance of joint rail/water rates to Alaska and Hawaii under ICA section 1(1)(a),[15] does not resolve the "exclusivity" oi jurisdiction question, and is distinguishable from the instant case because Alaska and Hawaii had actually become states in 1959, thereby coloring Congressional attitudes towards transportation to these areas.

CONCLUSIONS

Shipping Act section 33 (46 U.S.C. 832) precludes the Commission from "concurrently" regulating the same transportation functions as the ICC. In order to construe section 2 of the Intercoastal Shipping Act, it becomes both necessary and proper to construe the Interstate Commerce Act as well.

The critical issue in this proceeding concerns the scope of the ICC's Part I authority over joint through rail/water rates in *domestic offshore commerce.* Unless 49 U.S.C. 1(1)(a) vests the ICC with exclusive jurisdiction over certain port-to-port operations of ocean carriers *not subject to ICA Part III,* TMT must submit to Shipping Act regulation. Although the section 1(1)(a) question is a matter of first impression whose resolution is clouded by time and legislative ambiguity, the answer is fairly discernible from the recent *Ex Parte 261* controversy defining the ICC's authority over *international* through routes and joint rates.[16] We therefore conclude that the Joint Service is not within the exclusive province of the ICC. The rate "divisions" received by the participating rail carriers are subject to rate regulation by the ICC and TMT's rate divisions are subject to full FMC regulation.

There is no conflict between ICA section 1(1)(a) and the tariff and rate making provisions of the Shipping Acts. The conflict is between section 1(1)(a)—which took its present form in 1920[17]—and ICA section 302—adopted with ICA Part III in 1940.[18] The latter section contains the following critical definitions:

(j) The term "United States" means the States of the United States and the District of Columbia.

(k) The term "State" means a State of the United States or the District of Columbia.

(i) The term "interstate or foreign transportation" or "transportation in interstate or foreign commerce," as used in this part, means transportation. . . .

(3) wholly by water, or *partly by water and partly by railroad or motor vehicle,*

[15] House Committee on Interstate and Foreign Commerce, *Water Carrier Through Routes and Joint Rates,* H.R. Report No. 1769, 87th Cong., 2d Sess. (1962), at 2. See also Senate Committee on Commerce, *Alaska and Hawaii Through Routes and Joint Rates,* Sen. Rep. No. 1799, 87th Cong., 2d Sess. (1962), at 2. These committee reports were cited by the ICC General Counsel in his October 19, 1977 memorandum to the Section on Tariffs.

[16] 351 I.C.C. 490 (1976), *aff'd. Commonwealth of Pennsylvania v. Interstate Commerce Commission,* 561 F.2d 275 (D.C. Cir. 1977).

[17] Transportation Act of 1920 (41 Stat. 456, 474).

[18] Transportation Act of 1940 (54 Stat. 898, 930-931), 49 U.S.C. 902.

from or to a place in the United States to or from a place outside the United States, but only (A) insofar as such transportation by water takes place from any place in the United States to any other place therein *prior to transshipment* at a place within the United States for movement to a place outside thereof. . . . ((Emphasis supplied).

ICA Part III represented a major adjustment in national transportation policy concerning water carriers; it was intended to modify both the Shipping Acts and ICA part I. 49 U.S.C. 920(a). If not the case prior to 1940, subsequent to that date all territories and possessions were unquestionably to be treated as places "outside the United States" for purposes of ICC *water carrier* regulation. When rail/water transportation moves between states (or the District of Columbia), it is exclusively an ICC matter. When such transportation moves from the mainland United States and a place *other than a state* as defined by section 302, the ICC has "exclusive" jurisdiction only before the cargo is transshipped to the ocean vessel.[19]

The language from the Transportation Act of 1920 now found in section 1(1)(a) is not separate and independent grant of ICC authority over water carriers. As the later, more comprehensive expression of legislative intent on the subject, section 302 preempts the vestigial rail/water provisions of section 1(1)(a) which might otherwise be construed to allow substantive regulation of the ocean rate division by the ICC.[20]

Section 1(1)(a) was part of the original ICA adopted in 1887. That statute—now ICA Part I—was not designed to subject water carriers to substantive rate regulation. Its purpose was to regulate railroad transportation; water lines were only incidentally included to prevent rail carriers from evading ICC control through such obvious devices as participating in joint rail/water rates. Part I is therefore not entitled to the liberal construction ordinarily afforded "remedial legislation" insofar as water carriers are concerned. See *United States v. Munson Steamship Lines*, 37 F.2d 681, 683–684 (4th Cir. 1930).

The Supreme Court has stated that ICA section 1 applies only to the *railroad* aspects of a joint rail/water service, *United States v. Pennsylvania R. Co.*, 332 U.S. 612, 622 (1944), and an ICC chairman has testified before Congress that:

"Under the Transportation Act of 1940, [the ICC's] jurisdiction over water carriers was limited to commerce between the States. Jurisdiction over waterborne traffic between the States and what were then the Territories of Alaska and Hawaii, as well as between the States and other areas, was continued in the Federal Maritime Commission."[21]

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[19] The word "primarily" more accurately describes the nature of such jurisdiction than does "exclusively." Today's intermodal transportation requires some "secondary inquiry" by both the ICC and FMC into the effects of the through rate. For instance, the ICC has "exclusive jurisdiction" over the rail division of the Joint Service, but the ocean carrier must identify the rail division in its FMC tariff and the FMC may consider the rail division's impact on the total movement in analyzing the lawfulness of the ocean division. See *Disposition of Container Marine Lines*, 11 F.M.C. 476, 491–492 (1968).

[20] This construction requires a finding that (a) Puerto Rico is a "state" or "territory," and (b) the "within the United States" proviso has no application to domestic offshore transportation.

[21] House Committee on Interstate and Foreign Commerce, *Hearing on H.R. 7297 and 7343*, 87th Cong., 2d Sess. (1962), at 13.

A recodification of United States Code Title 49 now pending before the House and Senate Judiciary Committees (H.R. 9777, S. 2361, 95th Cong., 1st Sess.), verifies that Part III was intended to limit Section 1(1)(a). The House Committee's draft report expressly states that Section 1(1)(a) is qualified by other sections of the ICA.[22]

Domestic offshore commerce was to be treated as foreign commerce under the original ICA. The framers of the ICA did not contemplate rail/water service to areas now defined as domestic offshore commerce. With the exception of Alaska, the United States had no offshore possessions in 1887. Water carriers were viewed as either serving foreign destinations or *mainland* United States destinations in the coastal, Great Lakes or inland rivers trades. See *Jurisdiction Over Water Carriers,* 15 I.C.C. 205, 212 (1909), where only foreign and mainland water carriers were discussed, despite the acquisition of Puerto Rico and Hawaii in 1899 and 1900, respectively, and the increased settlement and accessibility of Alaska.[23]

Section 1(1)(a) originally defined foreign commerce transportation as that moving from:

". . . any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a *port of transshipment,* or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country." 24 Stat. 379. (Emphasis supplied).

The Transportation Act of 1920 amended section 1 to apply the transshipment limitation to all types of transportation covered by Part I.[24] Two legislative developments occurred in the interim which related to the 1920 amendment. One was the adoption of the Shipping Act, 1916 (39 Stat. 728) which defined carriers subject to the FMC's domestic commerce jurisdiction as those:

". . . engaged in transportation . . . on the *high seas* or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession." (Emphasis added).

[22] Committee Print No. 10, *Revision of Title 49,* House Committee on the Judiciary, 95th Cong., 1st Sess. (1977), at 43. The draft report also indicates that "territories" ordinarily means "territories and possessions," but the term does not include Puerto Rico insofar as section 1(1)(a) is concerned. *Id.* at 3; H.R. 9777, section 10501(a)(2), sections 10102(21) and (24), and section 10541(a)(3). As a recodification, the bill is intended to make no change in existing law. *House Committee Print,* at 1.

[23] When first confronted with the prospect of domestic offshore traffic, the ICC asserted that it lacked jurisdiction over a water carrier's complaint against the railroad line in Alaska because Alaska was not a territory. *Jurisdiction over Rail and Water Carriers Operating in Alaska,* 19 I.C.C. 81 (1910). The Supreme Court reversed this determination. *Interstate Commerce Commission v. Humboldt Steamship Co.,* 224 U.S. 474 (1912). The ICA's impact in Alaska was weakened in 1914, however, when the United States acquired the Alaskan Railroad, entrusted its administration to the Secretary of Interior, and removed it from ICC jurisdiction. (38 Stat. 305). See 34 Attorney General's Opinions 232, 236 (1924).

[24] ". . . from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or . . . from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, *but only insofar as such transportation takes place within the United States.*" 41 Stat. 456, 474. (Emphasis supplied).

The term "high seas" is equivalent to "mean high tide" and was intended to *exclude* carriers operating on navigable rivers.

The second major development, and one which is responsible for much of the present confusion concerning section 1(1)(a), was the adoption of the Panama Canal Act of 1912 (37 Stat. 560, 568). Between 1912 and 1940, section 11 of this Act materially extended the ICC's jurisdiction with respect to rail/water transportation in interstate commerce. Codified as ICA section 6(13)(b), section 11 expressly provided for exclusive authority in the ICC to *establish* and regulate rail/water routes and fix the maximum rates charged thereon for traffic moving from "point-to-point in the United States" to an extent not obtainable under section 1(1)(a). See *Chicago, R.I., & P. Ry. v. United States,* 274 U.S. 29, 34–36 (1927).[25] It was former ICA section 6(13)(b) and not section 1(1)(a) which led this Commission to state on several occasions prior to 1940 that it lacked jurisdiction over joint rail/water rates. *E.g., Intercoastal Investigation,* 1 U.S.M.C. 455, 457 (1935); *Commodity Rates Between Atlantic and Gulf Ports,* 1 U.S.M.C. 642, 645 (1937); *Rates, etc., for Cotton, Bags, and Grain,* 2 U.S.M.C. 42, 44 (1939).[26]

But for the 1912 Panama Canal Act amendments, there would have been no conflict between ICA Part I and Shipping Act section 18 (39 Stat. 728, 735) of a nature which would have prevented the FMC from regulating domestic water carrier rate divisions following the latter statute's adoption in 1916.[27] Effective ICC scrutiny of railroads was possible by applying tariff filing requirements to the joint service; it was unnecessary to subject the participating water carrier to full Part I regulation.

Former ICA section 6(13)(b) was repealed by the Transportation Act of 1940 (54 Stat. 898, 910). The legislative history of the 1940 Act does not expressly state why section 6(13)(b) was repealed. What is revealed is a deliberate attempt to create a fair and balanced interstate transportation system by equalizing the regulatory climate in which the newly evolved motor and water transportation modes compete for traffic with the older, financially troubled railroads. *E.g.,* 49 U.S.C. prec. 1; 84 *Cong. Rec.* 6130–6131 (Sen. Wheeler), 6136 (Sen. Bailey), 6148–6149 (Sen. Wheeler); 86 *Cong. Rec.* 5868–5869 (Rep. Cole), 5872–5873 (Rep. Van Zandt), 5878 (Rep. Wolverton), 11286 (Sen. Wheeler), 11544 (Sen. Reed), 11545–11546 (Sen. Truman).

Also of importance, was the fact that Congress had amended the

[25] Former section 6(13) stated that the jurisdiction conferred therein was "in addition to" that otherwise given by ICA Part I. See Appendix "A" hereto.

[26] Recognition that the ICC's primary authority to regulate joint rail/water rates was not derived from section 1(1)(a) is reflected in the remarks of Senator Wheeler during floor debate on the Transportation Act of 1940, wherein he noted that this power was not conferred by the original 1887 legislation. 84 *Cong. Rec.* 6123, 6130 (1939).

[27] It is also noteworthy that the 1933 and 1938 Intercoastal Act testimony cited by Hearing Counsel, note 13, *supra,* contemplates a lack of conflict between ICC regulation of the through rate and FMC regulation of the water portion thereof. It does not support the notion that the Commission cannot require joint through rail/water tariffs to be filed at the FMC as well as at the ICC—especially in light of the United States Court of Appeals' recognition that a joint through rate is not to be doctrinairly treated as an indivisible whole. *Commonwealth of Pennsylvania, supra,* at 292.

Intercoastal Shipping Act in 1938 (52 Stat. 963) to extend the FMC's rate making powers to all domestic commerce carriers as then defined by Shipping Act section 1,[28] and had included within the Merchant Marine Act of 1936 (49 Stat. 1975) provisions strengthening the Commission's procedural powers. Given this background of increased legislative reliance upon an independent ocean shipping board, it is not surprising that few issues caused greater controversy during the pendency of the 1940 Act than the proposal to shift mainland water carriers from FMC to ICC supervision through the adoption of ICA Part III. *E.g.*, 84 *Cong. Rec.*, 6119–6120 (Sen. Shipstead), 6133–6135 (Sen. Bailey), 6148 (Sen. Borah); 86 *Cong. Rec.* 5866–5867 (Rep. Wadsworth), 5875–5878 (Rep. Brand), 5881–5882 (Rep. Dondero), 10180–10182 (Rep. Brand), 10621–10622 (Sen. White), 11544–11545 (Sen. Reed).[29]

The principal of regulatory equality eventually prevailed, but the extensive floor debate clearly indicated that water carriers were not to be subjected to any greater ICC regulation than was necessary to achieve the overriding purpose of rationalizing competition between mainland transportation modes.[30] The need for "intermodal equality" is present only in situations where water carriers actually compete with other interstate transportation systems. Such situations basically occur only on the U.S. mainland, and involve coastal, inland and Great Lakes water carriers exclusively. See 86 *Cong. Rec.* 5874 (Rep. Halleck); 11286 (Sen Wheeler). No interstate railroad ever competed with a steamship line for cargo transported from New York to Puerto Rico (or other domestic offshore destination). It follows that Congress repealed former ICA section 6(13)(b) for the express purpose of limiting the ICC's exclusive jurisdiction over rail/water rates to transportation which would be covered by ICA Part III.[31] Domestic offshore carriers were thereafter to be governed by ICA Part I when and to the same extent that foreign commerce water carriers—also regulated by the FMC—were subject to these same provisions.

Section 1(1)(a) encompasses rail/water transportation to both foreign countries and territories "only in so far as such transportation takes place within the United States". This limiting provision has been construed to prohibit the ICC from regulating anything other than the domestic portion of through rail/water routes involving *foreign commerce. Commonwealth*

[28] The rate making authority provided for by the 1933 Intercoastal Shipping Act (47 Stat. 1425) significantly extended that conferred by the original Shipping Act.

[29] Particularly troublesome to the Congressional minority opposing Part III was its elimination of a system of free entry into water trades in favor of a route certification system.

[30] Congress has consistently shown concern for the special problems of ocean carriers. More than once it has refused to enact legislation which would have entrusted maritime regulation to the ICC. *E.g.*, Committee on Merchant Marine and Fisheries, *Report on Shipping Act, 1916*, H.R. No. 659, 64th Cong., 1st Sess. (1916), P & F Shipping Regulation, at 51:51; Committee on Merchant Marine and Fisheries, *Merchant Marine Act, 1938, H. R. 10315*, H. R. Report No. 2168, 75th Cong., 3rd Sess. (1938), P & F Shipping Regulation, at 52:124.

[31] At one point, the principal Senate Conferee stated that the final proposal "did not change the intent and purpose of the Panama Canal Act." 86 *Cong. Rec.* 11269–11270 (Sen. Wheeler). This statement, however, was directed exclusively to certain hotly debated conference committee amendments which had been seized upon by those opposing the legislation for the purpose of raising a point of order. The amendments referred to then existing ICA sections 5(19), (20) and (21) limiting railroad ownership of water carriers, and not to section 6(13)(b).

of Pennsylvania, supra, at 285; *Armour Packing Co. v. United States, 209 U.S. 56, 78–79 (1908). Assuming, arguendo,* that Puerto Rico is a "territory" for Part I purposes,[32] logic and legislative history dictate that section 1(1)(a)'s proviso clause be given identical effect regardless of whether foreign or domestic offshore transportation is involved.[33] It would be arbitrary and impractical to base a drastically different interpretation of Part I solely upon the fact that domestic offshore *destinations* are possessions of the United States.[34]

A coherent national transportation policy does not require *exclusive* ICC jurisdiction over the filing and level of domestic offshore water carrier rates whenever the water carrier participates in a joint through arrangement with a railroad. The "dual authority" approach to joint through rates adopted in *Ex Parte 261, supra,* is reconcilable with both the ICA and the Shipping Act. In domestic offshore commerce, as in foreign commerce, it suffices that the ICC regulate the rail division as a proportional rate.

To interpret ICA section 1(1)(a) as permitting the ICC to regulate the ocean rate divisions of water carriers not regulated by that agency under Part III would be contrary to law,[35] and disserve the public by aggravating existing regulatory anomalies and creating new ones. A "carrier's choice" system of regulation already exists for certain through intermodal rates in the Alaska and Hawaii trades by specific (and limited) legislative enactment.[36] This situation tends to obscure the Commission's

[32] Whether Puerto Rico is in fact a "state", a "territory" or something else following the creation of the commonwealth in 1952 is largely a red herring. Given the absence of any express legislative pronouncement on the subject, and the continued effect of 48 U.S.C. 751, there is no indication that the change to commonwealth status altered the manner in which the ICA applies to the island. Cases construing statutes other than the ICA, *e.g., Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974), are irrelevant to the proper interpretation of section 1(1)(a). We consider the suggestion that Congress now views Puerto Rico as a "state" for Part I purposes to border on the frivolous. If section 1(1)(a) did apply to the Joint Service, nothing of substance would be affected by whether Puerto Rico was considered a "state" or a "territory"—at least as far as ICA Part I was concerned.

We further note that except for the *Benedicto* ruling, *supra* (which has certain characteristics distinguishable from the instant case), no decision directly applying the ICA to Puerto Rico on a "territorial" theory appears to exist. The Safety Appliance Acts were never a part of the ICA, although they were administered by the ICC at one time. As late as 1930, the ICC stated that it considered the "territorial question" unsettled. *Conf. Ruling No. 201,* Appendix to 45 I.C.C. See also *Fernandez Co. v. Southern Pacific R.R. Co.,* 104 I.C.C. 193 (1925).

[33] In the case of foreign commerce, ICC jurisdiction over export movements does not persist until the vessel arrives at a foreign port. Nor does it continue until the vessel crosses into a foreign country's territorial waters, or even until the United States' territorial waters are left behind. The ICC's Part I jurisdiction stops *at the point at which cargo is transshipped to an ocean going vessel.* In 1939, an FMC predecessor agency advised Congress that the "within the United States" limitation applied to domestic offshore as well as foreign commerce, and indicated that it was the equivalent of the "transshipment" limitation contained in the bill which became ICA Part III. 84 *Cong. Rec.* 6141, 6144 (Table).

[34] We are mindful of decisions such as *United States v. Pennsylvania R. Co., supra,* holding that the ICC does not *lose* Part III jurisdiction over transportation from *one state to another* merely because a joint rail/water service makes an intermediate call at a foreign port or otherwise passes outside of territorial waters. Such decisions do not negate this Commission's jurisdiction over the intermediate *ocean portion* of a mainland/foreign or mainland/offshore movement.

[35] *Commonwealth of Pennsylvania, supra,* decides the matter as to foreign commerce carriers.

[36] Rate divisions established in joint Part II motor/FMC water and Part III water/FMC water routes to Alaska and Hawaii are regulated by the ICC pursuant to 49 U.S.C. 316(c) and 905(b), which state, *inter alia,* that:

> . . . [The] through routes and joint rates so established and all classifications, regulations, and practices in connection therewith shall be subject to [Part II or III, as the case may be].

On February 13, 1978, the ICC decided it lacked exclusive jurisdiction over joint motor/water rates to domestic offshore destinations other than Alaska and Hawaii. *Rejection of Trailer Marine Transport Corporation Tariff MF-I.C.C. No. 4 (No. 36791).*

view of a participating carrier's true operating condition, but has not caused undue difficulties to date. The problem is one of degree, however. The presence of additional ICC regulated cargo traveling on the same vessels and routes as FMC regulated cargo could complicate, and perhaps frustrate domestic commerce rate making functions—especially because the ICC does not require carriers participating in joint rates to disclose their respective rate divisions to the public.[37] Any increase in non-FMC regulated carryings in the domestic offshore trades offers ocean carriers a greater opportunity to evade effective rate regulation, and induce both the FMC and the ICC to seek greater financial information of an overlapping or duplicative nature from domestic offshore water carriers in order to more accurately analyze those rates which happened to be within their respective jurisdictions.

The ICC may not order Part II or Part III carriers to establish through routes with FMC carriers.[38] Such through intermodal arrangements are voluntarily established; they appear and disappear at the option of the participating carriers. The ICC's express authority to regulate the rate divisions of FMC carriers participating in through movements to Alaska and Hawaii is the result of specialized legislation passed three years after these states joined the Union.[39] This legislation was sponsored by certain motor carriers which had served the Alaska trade before statehood as FMC regulated nonvessel operating common carriers, and took the form of amendments to ICA sections 216(c) and 305(b).[40] The motor carriers advised Congress that the FMC and ICC had both rejected a Part II/FMC water tariff filed by Consolidated Freightways—purportedly because neither agency could lawfully accept a tariff unless it possessed sole jurisdiction over the entire movement—and further stated that the establishment of voluntary through route arrangements in the Alaska and Hawaii trades would be advantageous to shippers.[41]

The Rivers Bill purported to clarify uncertainty as to whether joint through Part II and Part III/FMC water carrier tariffs could be filed at the ICC, but its provisions went considerably beyond mere tariff filing. The Senate Committee Report stated that the legislation's purpose was to

"[E]xtend to the users of motor-water services between Alaska or Hawaii and the

[37] TMT is attempting to exclude its rate divisions from the FMC as well, see pages 4–5, *supra*, and may have obtained a short-run competitive advantage over other water carriers serving Puerto Rico in the process.

[38] ICA sections 216(c) and 305(b), 49 U.S.C. 316(c) and 905(b). Part II carriers have no duty to form through routes with any type of carrier. Part III carriers have a duty to form through rates with other Part III carriers and with Part I rail carriers.

[39] The Alaska and Hawaii Statehood Acts expressly preserved the FMC's "*exclusive jurisdiction*" over water transportation to those areas and excluded acquisition of ICC jurisdiction over such transportation. 72 Stat. 339, 48 U.S.C. Prec. 21, and 73 Stat. 4, 48 U.S.C. prec. 491, respectively.

[40] These amendments are commonly known as the Rivers Act (76 Stat. 397), and rendered obsolete a 1960 grandfather provision in ICA Part III pertaining to such Alaska trade "NVO's." (74 Stat. 382, 49 U.S.C. 903(e)).

[41] *Hearing on H.R. 7297 and H.R. 7343, supra*, 87th Cong., 2d Sess. (1962), at 18–19. Hereinafter cited as "*Hearings*." The ICC held that specific statutory authority such as that found in section 1(1)(a) was necessary before it could accept Consolidated Freightways' tariff. This tariff was later submitted to the FMC in a form which satisfactorily identified the port-to-port rate and remained on file until voluntarily canceled on November 24, 1961.

other 48 States the *full benefits* of coordinated service which are now available to users of motor-water service among the other 48 States." [Emphasis supplied].[42]

Among the "benefits" discussed was the placement of all aspects of cargo loss and damage claims under the ICA. *Senate Report*, at 3.[43] This factor may have alone motivated Congress to remove through water carriage involving Part II and Part III carriers from the FMC's jurisdiction, but it is also noteworthy that "[t]he Alaska Carriers Association . . . expressed a preference for ICC jurisdiction." *Senate Report*, at 2. Whatever the reason, it was unnecessary for the Rivers Bill to have provided for exclusive ICC jurisdiction over FMC water carrier rate divisions in order to permit the filing of intermodal tariffs to Alaska and Hawaii at that agency.

Testimony gathered in the brief hearings conducted by the House Committee indicates only that joint rail/water tariff filings were possible because section 1(1)(a) *permitted* the filing of such rates, and not because the ICC possessed exclusive jurisdiction over the through movement.[44] The same understanding is reflected in the Senate Report. Moreover, the House Committee recognized that a reasonable interpretation of ICA section 216(c) would have permitted the filing of joint through routes between Part II carriers and FMC carriers without an amendment.[45] That section's reference to "water carriers could not reasonably be limited to Part III carriers because it was adopted *prior* to the adoption of Part III (49 Stat. 543, 558). The only "clarification" problem lay with ICA section 305(b), which stated that Part III carriers could form through routes with *other Part III carriers* (not "water carriers" in general), Part I railroads and Part II motor carriers (54 Stat. 898, 934–935). Yet, the Rivers Bill sponsors indicated that the inclusion of Part III water carriers in their legislation was only a "collateral" concern. 108 *Cong. Rec.* 11419 (1962). Under these circumstances, the statement in the House Report implying that section 1(1)(a) had long authorized exclusive ICC regulation of FMC

[42] Committee on Commerce, *Alaska and Hawaii Through Routes and Joint Rates*, Sen. Rep. No. 1799, 87th Cong., 2d Sess. (1962), at 1. Hereinafter cited as "*Senate Report*."

[43] Uniform treatment of loss and damage claims benefited the participating carriers as much as their shippers given the common law liability of joint venturers. The cause of action already existed, and ICA section 20(11) expressly permitted water carriers to employ the more favorable disclaimer of liability permitted under the Harter Act. 49 U.S.C. 20(11),319; 46 U.S.C. 183. The Congressional sponsors also held out the possibility that the joint rates established under the amendments would be lower than rates otherwise prevailing in the Alaska and Hawaii trades. *Id.*, at 3. Without suggesting that this has not to some extent occurred, we are also aware that residents of these states still perceive an unfavorable comparison between joint through rates applicable to them and joint through rates over similar distances in the contiguous United States. *E.g.*, *Letter from Senator Stevens*, May 12, 1976; *Letter to Representative Young*, July 9, 1976.

[44] Representative Rivers of Alaska testified that:

"[T]he continental railroads and waterborne carriers operating in the Alaska trade were allowed to voluntarily establish joint rates under authority prescribed in Part I of the Interstate Commerce Act. This limited authorization has prevailed as to the continental railroads and the Alaska waterborne carriers notwithstanding the fact that each has been and still is regulated by a different Federal regulatory agency, as I have above indicated." *Hearings*, at 8.

See also testimony of ICC Chairman Murphy, quoted at page 15, *supra*. *Hearings*, at 13–14. The same statement is found in *Senate Report*, at 4, *House Report*, at 5, and 107 *Cong. Rec.* 7763 (1961).

[45] Committee on Interstate and Foreign Commerce, *Water Carrier Through Routes and Joint Rates*, H.R. Rep. No. 1769, 87th Cong., 2d Sess. (1962), at 2. Hereinafter cited as "*House Report*."

carrier rate divisions is best viewed as "legislative dicta."[46] It is also incorrect and inconsistent with its own premise. If exclusive ICC jurisdiction flowed simply from the through route language of section 1(1)(a), the Rivers Amendments were far broader than necessary.[47] They need only have stated that ICA sections 216(c) and 305(b) applied to through routes with water carriers subject to Part III and water carriers regulated by the FMC.

The House Report also ignored the comments of the ICC and other hearing witnesses who noted that through routes formed with FMC carriers under ICA Part I are voluntarily established. *Hearings* at 7, 8, 14. The voluntary nature of such through arrangements is critical, because through routes between rail carriers and Part III water carriers are subject to the same Part I provisions, but are *not* voluntary. The ICC may order Part III carriers to form and adhere to certificated joint through rail/water routes.[48]

ICA section 1(4) places a duty to establish through routes upon "all carriers subject to Part I," while ICA section 15(3) authorizes the ICC to form through routes between "carriers subject to Part I" and also between railroads and water carriers subject to Part III. Any persisting doubts concerning section 1(1)(a)'s inapplicability to domestic offshore carriers following the adoption of ICA section 302 should be dispelled by the ICC's administration of section 15(3).

If the ICC did possess exclusive jurisdiction over rail/water carriage, it would necessarily be empowered to compel TMT and other domestic offshore water carriers to form joint rail/water routes in trades they do not presently serve. Exercise of true through route authority over FMC regulated carriers would allow the ICC to completely control the FMC's performance of its statutory responsibilities and effectively end the "freedom of the seas" deliberately preserved for domestic offshore carriers by the Shipping Act. See *Lucking v. Detroit and Cleveland Nav. Co.*, 265 U.S. 346 (1924); *McCormick Steamship Co. v. United States*, 16 F.Supp. 45 (N.D. Calif. 1936); 84 *Cong. Rec.* 6120 (1939). The ICC has recognized that such a result is incompatible with ICA Part III and

[46] The House Committee stated:

"H.R. 11643 treats of the problem in a direct, feasible, and simple manner by giving the Interstate Commerce Commission the same jurisdiction over through-route and joint-rate arrangements between motor and water carriers which it has had for many years over such arrangements between rail and water carriers in the Alaskan and Hawaiian trade and has had over such arrangements between rail, motor and water carriers in the other 48 States." *House Report*, at 3.

[47] The House Committee may not have been fully informed concerning the scope of section 1(1)(a) because of the narrowness of the proposal before the Congress and lack of debate thereon. The Rivers Bill was described as "wholly noncontroversial in the committee," 108 *Cong. Rec.* 11419 (1962), and as attracting "no opposition" beyond the perference of the FMC, Department of Commerce, and Bureau of Budget for an approach which would not have precluded FMC oversight of water carrier rate divisions. *Id.*, *House Report*, at 1; *Hearings* at 5. When subsequently called upon to interpret the scope of the Rivers Act, one court described its legislative history as "inconclusive." *Alaska Steamship Company v. Federal Maritime Commission*, 399 F.2d 623, 626, note 2 (9th Cir. 1968).

[48] The Rivers Bill testimony of ICC Chairman Murphy included the statement:

"The only carriers of different modes subject to our jurisdiction which may be compelled to establish through rates and joint rates with each other are railroads and water common carriers subject to Parts I and III of the [ICA], respectively." *Hearings*, at 14.

has never attempted to control a non-Part III water carrier's free entry or exit from a trade, even when the exit was made upon less than the required 30-day statutory notice required by both the ICA and the Shipping Act. *Joint Rail Water Rates to Hawaii (Matson Navigation Company)*, 351 I.C. 213 (1975).[49]

THEREFORE, in view of the fact that the ICC does not possess exclusive jurisdiction over the Joint Service, that TMT is required to file an FMC tariff describing the Joint Service, and that TMT's failure to file an FMC tariff prevents the Commission from performing its regulatory functions under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933,

IT IS ORDERED, That Trailer Marine Transport Corporation cease and desist from violating Intercoastal Act section 2 and Part 531 of the Commission's Rules by refusing to file a tariff with the Commission which describes the joint rail/water service it presently operates to Puerto Rico pursuant to ICC Tariff No. 2; and

IT IS FURTHER ORDERED, That the effective date of the above ordering paragraph is suspended for a period not to exceed thirty (30) days from the service date of this Report to enable Trailer Marine Transport Corporation to file with the Commission a tariff describing the aforesaid joint service which conforms fully with Intercoastal Act section 2 and Part 531 of the Commission's Rules and particularly including a break-out of its port-to-port rate divisions as required by section 531.8 of said Rules; and

IT IS FURTHER ORDERED, That Trailer Marine Transport Corporation cease and desist from violating section 21 of the Shipping Act, 1916, by refusing to file with the Commission the information concerning the port-to-port rate divisions collected for the aforesaid joint service as required by the Commission's Order served November 18, 1977; and

IT IS FURTHER ORDERED, That the Puerto Rico Manufacturers Association, Chamber of Commerce of Puerto Rico, Eric E. Dawson, Alabama State Docks Department, Southern Railway Company, Southern Pacific Transportation Co., Seaboard Coast Line, Louisville and Nashville Railroad Company, and Roldan International, Inc., are dismissed as parties to this proceeding.

By the Commission.

[49] Ever since 1906, when the Hepburn Act first authorized the ICC to prescribe through routes (34 Stat. 584, 590), section 15(3) has been subject to a "Catch-22" limitation whenever non-Part III water carriers are involved. Section 1(1)(a) includes rail/water carriage only if the carriers are under common control or management or have entered into an arrangement for the continuous carriage of cargo. The ICC may therefore "regulate" non-Part III water carriers only so long as they voluntarily maintain a joint through route, and only as to the particular route which has been established. *Jurisdiction Over Water Carriers*, 15 I.C.C. 205, 209, 217–218 (1909). This is hardly the type of irreconcilable, "concurrent" regulation required to oust the FMC of its Shipping Act jurisdiction over the reasonableness of water carrier rates and practices. *Commonwealth of Pennsylvania v. Interstate Commerce Commission, supra*, at 292.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

APPENDIX "A"

PORTION OF 1912 PANAMA CANAL ACT FORMERLY CODIFIED AS ICA SECTION 6(13)(b)

(13) *Jurisdiction of commission over transportation by rail and water.*—When property may be or is transported from point to point in the United States by rail and water through the Panama Canal *or otherwise,* the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission *shall have jurisdiction* of such transportation and of *the carriers, both by rail and by water,* which may or do engage in the same, in the following particulars, in addition to the jurisdiction otherwise given by this chapter:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passenger or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided,* That construction required by the commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this chapter.

(b) *To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.*

(c) To establish proportional rates or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has

been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to this chapter enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country. (Feb. 4, 1887, c. 104, § 6, 24 Stat 380; Mar. 2, 1889, c. 382, § 1, 25 Stat. 855; June 29, 1906, c. 3591, § 2, 34 Stat. 586; June 18, 1910, c. 309, § 9, 36 Stat. 548; Aug. 24, 1912, c. 390, § 11, 37 Stat. 568; Aug. 29, 1916, c. 417, 39 Stat. 604; and Feb. 28, 1920, c. 91, §§ 409–413, 41 Stat. 483.)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 537

SALENTINE & CO., INC.

v.

EUROPE CANADA LAKES LINE

SPECIAL DOCKET NO. 538

SALENTINE & CO., INC.

v.

EUROPE CANADA LAKES LINE

SPECIAL DOCKET NO. 539

M.E. DEY & CO., INC.

v.

EUROPE CANADA LAKES LINE

NOTICE OF ADOPTION OF INITIAL DECISION

April 12, 1978

No exceptions having been filed to the initial decision in these proceedings and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 12, 1978.

It is ordered that the parties shall refund charges, publish and mail the appropriate tariff notices and notify the Commission of their actions as required by the initial decision.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 537

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v.

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SPECIAL DOCKET NO. 538

SALENTINE & CO., INC.

v.

EUROPE CANADA LAKES LINE

SPECIAL DOCKET NO.539

M.E. DEY & CO., INC.

v.

EUROPE CANADA LAKES LINE

March 16, 1978

Applications for permission to refund portions of freight charges granted.

Carrier found, through inadvertence, to have failed to file new tariffs in time to assess lower rates on movements of goods from Hamburg, Germany, to Milwaukee, Wisconsin.

Applications, as clarified and supplemented by supporting information and by the submission of affidavits of the nominal complainants promising to refund moneys to the actual shippers, found to quality for the relief requested under section 18(b)(3), as amended by P.L. 90–298.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

[1] This decision became the decision of the Commission April 12, 1978.

These three proceedings were commenced on August 4, 1977, by the filing of applications by Europe Canada Lakes Line (ECLL)[2] pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), 46 U.S.C. 817(b)(3), as amended by P.L. 90-298, and Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a). The applications sought permission to waive portions of freight charges. Since they all involved the same factual scenario relating to shipments on the same vessel, as well as the same problem regarding the appearance of nominal complainants who were not the shippers who paid the freight, the three proceedings were consolidated for decision, as provided by Rule 148, 46 CFR 502.148. (See Order of Consolidation, January 18, 1978.)

The same error in failing to file a new tariff which occurred with respect to the shipments involved in the three applications also occurred in two other cases. These are Special Docket No. 536, *The A. W. Fenton Co. v. Europe Canada Lakes Line,* Initial Decision, February 27, 1978, and Special Docket No. 540, *Salentine & Co., Inc. v. Europe Canada Lakes Line,* Initial Decision adopted, January 24, 1978. A full description of the error is contained in the *Fenton* case. Briefly, it is as follows.

On June 16, 1977, ECLL sent telex instructions to its wholly owned subsidiary and general agnet, Ernst Russ-North America, Inc. (ERNA), located in Chicago, Illinois, directing ERNA to file tariff amendments with the Commission to become effective on June 16, 1977. These tariff amendments would have provided special rates for "machines, bottle labelling—from Hamburg/Bremen to . . . Milwaukee at dllrs 63.00 W/M" and a special rate for "catalyst, automobile emission in 40' containers—Hamburg/Milwaukee at dllrs 1800.00 per 40' cont."[3] However, the instructions were not followed because the telex was misplaced in Chicago. On further inquiry from ECLL in Hamburg, however, ERNA discovered the error and on June 21, 1977, the tariff amendments were filed.[4] However, between June 16 and June 21, the three shipments involved in the present applications were carried on the *Tilly Russ* which departed Hamburg on June 19, 1977. ECLL was therefore unable to charge the lower special rates and was required by law to charge the higher rates in effect at the time of the shipments. In order to collect the full amount required by law, ECLL issued a billing document called a "manifest corrector" in each case. Thereafter, despite some initial

[2] ECLL is the name of the carrier operated by "Ernst Russ" located in Hamburg, Germany. The applications were filed by its general agent, Ernst Russ-North America, Inc. Although the documentation frequently refers to "Ernst Russ-Hamburg," to avoid confusion, I have used the term "ECLL" instead of "Ernst Russ-Hamburg."

[3] See telex dated June 16, 1977, from Hamburg to Chicago.

[4] See telex from Hamburg to Chicago, dated June 21, 1977; see also telex from Chicago to F.M.C. dated June 21, 1977, filing the various tariff amendments. Further explanation is contained in a letter from Werner Scholtz, counsel for ECLL, to me, dated January 17, 1978.

confusion and difficulties, ECLL filed the applications which commenced these proceedings.[5]

Special Docket No. 537 involved a shipment of 2 cases of spare parts for bottle labelling machines, measuring 2.748 cubic meters. The shipper was a company known as Roehlig & Co. in Hamburg, Germany, and the consignee, a customs house broker and freight forwarder known as Salentine & Co., Inc., located in Milwaukee, Wisconsin, who appears as the nominal complainant. In Special Docket No. 538, the shipment involved 1 case of spare parts for bottle labelling machines measuring 1.373 cubic meters. The shipper was a company known as Lassen GMBH in Hamburg and the consignee was again Salentine & Co., Inc. In Special Docket No. 539, the shipment involved a 40-foot container loaded with 80 drums of automotive emission catalysts, weighing 12,235.3 kilos. The shipper was a company known as Hachemie-Spedition in Hamburg and the consignee, a customs house broker, M.E. Dey & Company, Inc., located in Milwaukee, Wisconsin, who is the nominal complainant.

In all three cases, the shipments moved on bills of lading dated June 18, 1977, and were prepaid by the shippers in Hamburg.[6]

Although the applications which commenced these proceedings did not contain attached documentation, as in the *Fenton* case, ECLL furnished documentation and other information on my request, as provided by Rule 92(c), 46 CFR 502.92(c). This documentation establishes that ECLL wishes to refund a portion of the freight charges to the shippers in Hamburg on the basis of the following computations as shown in the "manifest corrector" in each case.

In Docket No. 537, ECLL collected $251.44, based on the applicable tariff rate of $91.50 per cubic meter[6] times 2.748 cubic meters. ECLL wishes to retain only $173.12 of this freight based upon the special rate of $63 W/M times 2.748 cubic meters. The difference, $78.32, is the amount of the refund which ECLL seeks permission to make.

In Docket No. 538, ECLL collected $125.63 based on the applicable tariff rate of $91.50 per cubic meter times 1.373 cubic meters. ECLL wishes to retain only $86.50 of this freight based upon the special rate of

[5] The applications which commenced these three proceedings were preceded by earlier applications which were rejected apparently because they were not filed by a proper representative or employee of ECLL or attorney as required by the Commission's rules. See letter from Werner Scholtz, representing ECLL, to me, dated January 17, 1978, p. 2, and letter from Werner Scholtz to Mr. Joseph C. Polking, dated August 8, 1977. Further problems concerning deficiencies in the applications which were filed on August 4, 1977, will be discussed later in this decision.

[6] The copies of the submitted bills of lading are either barely legible or not legible as to the date of issuance in Hamburg. The date clearly appears in the bill of lading submitted in Special Docket No. 536, a shipment which moved on the same voyage of the *Tilly Russ*. The applications state that the bills of lading were dated June 18, 1977. The affidavits submitted by the customs house brokers and nominal complainants in these cases, i.e., Salentine and Dey, state that the bills of lading were dated June 18, 1977. Legible copies of dated bills of lading should, of course, be submitted with the application. I find corroborative evidence of these dates in the affidavits furnished by the nominal complainants. Even if I could not make such finding, however, the original intention of ECLL in Hamburg to file a new tariff effective June 16, 1977, is clearly shown in the relevant telex. If there were any doubts as to the date on the bills of lading, the retroactive tariff notice to be published could simply be published dating back to June 16, 1977, to prevent discrimination among shippers. However, I see no need to take this extra step.

[6] See ECLL Tariff No. 2—Continent (FMC 10), 9th rev. page 43, effective June 14, 1977, showing a rate of $91.50 W/M for "Machinery, n.o.s. and Parts and Accessories."

$63 W/M times 1.373 cubic meters. The difference, $39.13, is the amount of the refund which ECLL seeks permission to make.

In Docket No. 539, ECLL collected $1,982.23 based on the applicable tariff rate of $162 W[7] times 12.236 kilo tons (i.e., metric tons).[8] ECLL wishes to retain only $1,800 of this freight based upon the special lump-sum rate of $1,800, which had not been timely filed. The difference, $182.23, is the amount of the refund which ECLL seeks permission to make.

The Problem of Compliance with the Current Regulation

The issuance of a decision in these cases has been impeded by the initial failure of ECLL to furnish supporting documentation. Another major reason for the delay, however, is the fact that under the current regulation of the Commission, Rule 92(a), 46 CFR 502.92(a), it is not sufficient for the carrier to file the application with supporting documentation unless the application contains the concurrence of the shipper or consignee who actually paid the freight. If the original application did not contain the concurrence of such person and his appearance as "complainant" but rather the name of a consignee or other person who did not pay the freight as a "complainant," the Commission permitted the application to be amended to allow the actual shipper to substitute his name for that of the nominal complainant. See Special Docket No. 513, *Velsicol Chemical Corporation v. Sea-Land Service, Inc.*, July 29, 1977. Later the Commission further liberalized the procedure to permit the nominal complainant who did not pay the freight to file an affidavit stating that he would act as the shipper's agent and remit the refund or benefit to the actual person who had paid the freight. See Special Docket No. 519, *Buckley & Forstall, Inc. v. GEFA*, December 16, 1977.

Although this gradual liberalization of the rule has enabled the Commission to effectuate the remedial purposes of P.L. 90–298, delay nevertheless can result because of the present structure of the regulation. In these cases, before being advised of the decision in Special Docket No. 519, which permitted the nominal complainants in this case, three American customs house brokers and forwarders, to file affidavits promising to transmit the refunds to the actual shippers, ECLL had indicated its intention to withdraw the applications.[9] The Commission's decisions liberalizing its procedures under Rule 92(a) obviously have been helpful. Nevertheless, the requirement that someone appear as "complainant" and concur in the application seems to impose a technicality which

[7] See ECLL Tariff, 1st rev. p. 27, which shows a rate of $162.00 W for "Chemicals, harmless, n.o.s., in bags or casks . . . value up to $1980 per freight ton."

[8] The manifest corrector shows that ECLL collected freight based upon 12.236 metric tons (1,000 kilos). The bill of lading shows the measurement to be 12,235.3 kilos. It is not clear why ECLL rounded off that figure for collection purposes. In any event, the matter is not significant since the 12.236 figure was used to collect the full amount and ECLL wishes to refund a portion of that amount so as to retain only $1,800 as originally intended.

[9] See letter of Werner Scholtz to me, cited above, p. 3. In Special Docket No. 540, *Salentine & Co., Inc. v. ECLL*, cited above, ECLL did in fact withdraw its application rather than go through the process of obtaining the concurrence of a shipper located in Germany.

leads to delay although the underlying statute does not indicate that such a requirement is necessary. See Special Docket Nos. 524, 525, 526, *Pai Tai Industrial Co. Ltd. v. Sea-Land Service, Inc.*, etc. Initial Decisions, March 3, 1978.[10]

Nevertheless, in conformance with current case law on the subject, ECLL furnished affidavits from the nominal complainants in the three cases, Salentine & Co., Inc., and M.E. Dey & Co., Inc., who stated that they would transmit any refunds which might be permitted to the shippers in Germany who paid the freight. With that technicality out of the way, it became possible to concentrate on the merits of these cases.

Discussion and Conclusions

The factual situation in these cases is exactly the same as that discussed in Special Docket No. 536, *The A.W. Fenton Co. v. Europe Canada Lakes Line,* Initial Decision, February 27, 1978. As discussed more fully in that case, it is clear that ECLL committed "an error due to an inadvertence in failing to file a new tariff" within the meaning of P.L. 90–298, amending section 18(b)(3) of the Act. The record clearly shows an intention on the part of ECLL to apply lower special rates in each case and to file appropriate tariff amendments with the Commission. It also shows that this intention was not executed because of inadvertence on the part of ECLL's agent who misplaced ECLL's instructions. As soon as the mistake was discovered, however, ECLL's agent filed the intended tariff. These facts establish, as they did in the *Fenton* case, that a bona fide mistake occurred, which but for the remedial amendment to section 18(b)(3), would have required the shipper to pay a higher, unintended rate. Since the evidence of a bona fide error in tariff filing is clear and the purpose of the statute is remedial, I believe that the applications should be granted despite ECLL's initial shortcomings in preparing them. Denial of the applications on the other hand would reward ECLL at the expense of the shippers for whose benefit the applications were filed.[11] Accordingly, in my opinion, the applications should be granted.

I therefore find that:

1. There was an error due to inadvertence in failing to file a new tariff, within the meaning of P.L. 90–298.

[10] In the cited cases, Judge Charles E. Morgan noted that delay in ruling on applications resulted in part because of the fact that under Rule 92(a) the carrier had to obtain the concurrence of consignees located in Taiwan, although, as Judge Morgan noted, the statute makes no mention of any such requirement.

[11] I note also that these applications and those in Special Docket Nos. 536 and 540 seem to be the first ones filed by ECLL, which may account for the various shortcomings in them. ECLL has never refused to furnish supplemental information and has compiled with the order in No. 540 to file an affidavit of compliance after its application for a waiver was withdrawn. In the future we should expect ECLL's applications, if any are filed, to be free of the problems encountered in these cases.

2. ECLL filed new tariff amendments on June 21, 1977, prior to the filing of its applications on August 4, 1977, as required by the statute.

3. The applications were filed well within the 180-day period prescribed by the statute (dates of shipment occurring on June 18, 1977).

No discrimination among shippers must be found if the applications are granted. This finding is required under P.L. 90–298. There are two problems in this regard.

First, as I have noted, the applications, as originally filed, were deficient in several respects, mainly in the failure to furnish supporting documentation. However, they contained additional errors on the forms themselves. They erroneously asked for waivers instead of permission to refund which the supporting documentation shows to be the appropriate relief under the circumstances. However, they contained additional errors with regard to paragraphs (2) and (3) of the standard form. Paragraph (2) required ECLL to list other special docket proceedings which involved the same rate situation. ECLL's application stated "N/A." Paragraph (3) required ECLL to state whether there were other shipments of the same or similar commodity which moved during approximately the same period of time. ECLL responded by stating "NONE." In fact, however, these cases are part of five cases stemming from the same error (Special Docket Nos. 536, 537, 538, 539, and 540). Three of these other proceedings involved the same commodity, bottle labelling machines or parts thereof, namely, NOS. 537, 538, and 540. Yet none of the applications in each case refers to these other situations.

It may be that ECLL is unfamiliar and inexperienced in filing out special-docket applications, as I have noted. Furthermore, ECLL obviously did not attempt to conceal the fact that its error had affected all five shipments since it filed applications in all five instances to seek relief on behalf of each shipper or consignee. Therefore, it appears more probable that ECLL was merely careless or confused in filling out the forms rather than guilty of deliberately attempting to discriminate among shippers.

A second problem concerns the fact that in Special Docket No. 540, *Salentine & Co., Inc. v. ECLL,* ECLL has withdrawn its application and retained the full amount of freight paid by the German shipper for reasons explained above. Granting the applications in the present three cases will, in effect, require ECLL to make a similar refund to the shipper in No. 540, in order to prevent discrimination among shippers. Since special-docket proceedings involve tariff corrections affecting all shippers during a particular period of time, however, if one application is granted, all similarly situated shippers are entitled to similar relief. This situation again

points out the need to simplify the Commission's regulation to eliminate *unnecessary technicalities regarding nominal complainants, assignments* of claims, or designation of agents for shippers.[12]

Therefore, I find that no discrimination among shippers will occur since: 1) there is no evidence that other shipments of the same or similar commodities moved besides those involved in Special Docket Nos. 536, 537, 538, 539, and 540; and 2) an appropriate tariff notice plus specific instruction to ECLL to notify the shipper involved in Special Docket No. 540 who may claim a similar refund will insure that all shippers will be treated similarly.

Accordingly, the three applications for permission to refund a portion of freight to the shippers in Germany who paid the freight are granted.

It is ordered that upon adoption of this decision by the Commission, and subject to any modification to this decision or to the following orders which the Commission may make:

1. ECLL shall refund $78.32 to the Salentine & Co., Inc., who shall remit this amount to the shipper, Roehlig & Co. in connection with a shipment of 2 cases of bottle labelling machinery parts which moved under bill of lading dated June 18, 1977.

2. ECLL shall refund $39.13 to the Salentine & Co., Inc., who shall remit this amount to the shipper, Lassen GMBH, in connection with a shipment of 1 case of bottle labelling machinery parts which moved under bill of lading dated June 18, 1977.

3. ECLL shall refund $182.23 to M.E. Dey & Company, Inc., who shall remit this amount to the shipper, Hachemie-Spedition, in connection with a shipment of one 40-foot container of automotive emission catalysts which moved under bill of lading dated June 18, 1977.

4. ECLL shall promptly publish the following notices in an appropriate place in its tariff:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket Nos. 537 and 538, that effective June 18, 1977, and continuing through June 20, 1977, inclusive, the rate on "Machines, bottle labelling, Hamburg/Bremen to Cleveland is $62.50 W/M and to Milwaukee is $63.00 W/M," subject to all applicable rules, regulations, terms and conditions in this tariff, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during this period of time.

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 539, that effective June 18, 1977, and continuing through June 20, 1977, inclusive, the rate on "Catalyst, Automobile emission in 40' containers, Hamburg/Milwaukee, is $1,800.00 per 40' container," subject to all applicable rules, regulations, terms and conditions in this tariff, for purposes of refund or

[12] For example, let us suppose that five shipments of widgets moved on the same voyage during the month of June 1977 and all five shippers involved are entitled to refunds because of carrier error in tariff filing. If only one application is filed and granted, the other four shippers are also entitled to refunds since the tariff notice published in the one proceeding will have retroactive effect during the month of June 1977. This leads to two conclusions: 1) that it is not really necessary to file five separate special-docket applications if the first shipment in time is covered by an order of the Commission making the new tariff retroactive; and 2) the need to appoint an agent, assignee, nominal complainant, or other such person to represent the shipper is not shown. Once the first refund is permitted, the other four will also have to be made although no special-docket application had to be filed at all. The carrier will simply make refunds to the other four shippers directly.

waiver of freight charges on any shipments which may have been shipped during this period of time.

5. ECLL shall mail copies of the tariff notice involving bottle labelling machinery to the shipper involved in Special Docket No. 540 plus any other shippers not included in the present cases who may have shipped and paid the freight on bottle labelling machinery or parts thereof during the period of time specified and shall mail copies of the tariff notice concerning automobile emission catalysts to any other shipper who paid the freight on such commodity which moved during the specified period of time. (See similar order in Special Docket No. 542, *Alcoa International, Inc. v. Gulf European Freight Association,* Initial Decision, January 4, 1978, adopted by the Commission, January 31, 1978.)[13]

6. ECLL shall effectuate refunds of the charges in question within 30 days of service of the Commission's Notice of Adoption of this Initial Decision, if the decision is adopted, and shall within five days thereafter notify the Commission of the date and manner of effectuating the refunds.

7. The nominal complainants, Salentine & Co., Inc., and M.E. Dey & Co., Inc., shall notify the Commission of the date and manner in which they have remitted the refunds to the actual shippers involved within 45 days from the date of the Commission's Notice of Adoption of this Initial Decision, if so adopted.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
March 16, 1978.

[13] All of the applications filed by ECLL affected by the tariff-filing error appear to have occurred on one voyage no. 41 wb of the *Tilly Russ*, and these cases may have taken care of all affected shippers. However, in view of th many errors in the applications and the specific mistakes concerning failure of ECLL to provide references to othe shippers in paragraphs (2) and (3) despite the fact that other shippers were involved, it is possible that still additiona shippers might have escaped the notice of ECLL. To guard against any possible oversight which might lead t inadvertent discrimination among shippers, this particular order is being issued. P.L. 90-298 specifically provides the if permission is granted by the Commission, the carrier "agrees that . . . [in addition to publishing an appropriat tariff notice] . . . such other steps . . . [will be] taken as the Federal Maritime Commission may require, which giv notice,. . . ."

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 412(F)

C.S.C. INTERNATIONAL, INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF ADOPTION OF INITIAL DECISION

April 4, 1978

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is given that the initial decision became the decision of the Commission on April 4, 1978.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 412(F)

C.S.C. INTERNATIONAL, INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

March 22, 1978

Nitropropane found properly classified as Chemicals, NOS, 2-Amino-2-Methyl-1-Propanol, found improperly classified as Chemicals, NOS. Reparation awarded. Complainant failed to show that respondent improperly assessed surcharge.

Herbert Levenstein and *William Levenstein* for complainant C.S.C. International, Inc.

Brian M. Dolan for respondent Lykes Bros. Steamship Co., Inc.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

C.S.C. International claims that it was overcharged $782.41 on two shipments carried by Lykes Bros. Steamship Co., Inc., from New Orleans to South Africa.[2] The claim stems from a quarrel over the proper tariff classification of two commodities, nitropropane and 2-Amino-2-Methyl-1-Propanol (AMP). Lykes classified both as "Chemicals NOS" (Item No. 0170, page 181, United States/South and East Africa Conference Southbound Freight Tariff No. 2, FMC No. 4). C.S.C. says that nitropropane is a petroleum solvent which should have been classified under Item 2720 and that AMP is a surface active emulsifier which should have been classified under Item 860.

C.S.C. is engaged in the manufacture and sale of chemicals and chemical products and has a dual rate contract with the United States/South and East Africa Conference. Lykes is a member of that conference. The two shipments moved under Lykes' bills of lading Nos. 111 and 129. On bill of lading No. 111 the shipment was described as "60 Drums: Chemicals NOS Flammable Liquids (Nitropropane) Flash Point Tag Open

[1] Under Rule 318 (46 CFR 502.318) this decision became the decision of the Commission April 4, 1978.

[2] This case was referred to the Office of Administrative Law Judges under Rule 304(f) of the Commission's Rules of Practice and Procedure (46 CFR 502.304(f)).

Cup 100° F. "Bill of lading No. 129 described the second shipment as "75 Drums (Nitropropane) Chemical NOS Flammable Liquids Flash Point Tag Open Cup 100° F" and "1 Drum (AMP) Chemicals NO1, 2-Amino 2-Methyl 1-Propanol." The commodity description on both bills was of complainant (claimant).

Discussion and Conclusions

There are but two questions to be answered here: (1) Is Nitropropane a petroleum solvent within the meaning of Item 2720? and (2) Is AMP a "Compound, surface active (Emulsifier . . .)" within the meaning of Item 860?

Item 2720 reads as follows:[3]

PETROLEUM SOLVENTS, VIZ.:

Distillates N.O.S.
Heptane
Hextane
Mineral Spirits N.O.S.
Naptha (Nonhazardous, no label required)
Solvents, petroleum N.O.S.
Toluol (Toluene)
Zylol (Zylene)

C.S.C. thinks that nitropropane fits the description "Solvents, petroleum N.O.S." Lest through paraphrase I do violence to C.S.C.'s demonstrations that nitropropane is a solvent petroleum, NOS, I offer that demonstration verbatim:[4]

"Item 2720 of the carrier's tariff lists, under the generic heading 'Petroleum Solvents' a number of chemicals including 'Solvents, Petroleum NOS.' Since petroleum itself is not a solvent, the listed articles must be those made from petroleum or another petrochemical. Naptha and mineral spirits are natural gas and coal tar derivatives. (See pages 602 and 588 of the *Chemical Dictionary*.) Toluol and Zylene (should read Xylene) are petroleum and coal tar derivatives. (See pages 877 and 942 of the *Chemical Dictionary*.)"

"Nitropropane is a solvent. C.S.C., NP division, Technical Bulletin No. 20, attached, shows that Nitropropane is sold by C.S.C. as a solvent. It states that, 'NiPAR brand solvents are of great utility and widespread use in the protective coating industry, the printing ink industry, and in the solvent extraction processes.' The *Chemical Dictionary* lists nitropropane. That chemical is shown to be derived 'By reaction of propane with nitric acid under pressure.' Under 'Uses,' the *Dictionary* shows that nitropropane is used as a solvent. This dictionary expression is exactly the same as the statement by C.S.C. in its Bulletin No. 20. The *Chemical*

[3] The rates have been omitted since the dispute is over the meaning of the item's descriptive language.

[4] For ease in reading I have not indented and single spaced C.S.C.'s argument, the generally accepted way of citing an extended quote. Instead I have placed quotation marks at the beginning of the first sentence and at the end of the last of each paragraph.

Dictionary shows that propane is derived from 'Petroleum and natural gas' Page 123. On page 608 of the *Dictionary*, natural gas is shown as occurring in petroleum-bearing areas throughout the world. Page 672 of the *Dictionary* shows that propane is one of a long list of 'petrochemicals.' It is stated there, 'At least 175 substances are designated as petrochemicals . . . even though some of their commercial production is from sources other than petroleum.' "

"Whether the propane used in making nitropropane is derived from petroleum or natural gas, it is known as a petrochemical in the chemical industry. Petrochemicals are defined in the *Dictionary* as 'An organic compound for which petroleum or natural gas is the ultimate raw material.' See page 672. Since the list of Petroleum Solvents in the carrier's tariff contains articles derived from sources known collectively as petrochemicals (propane, toluene, naptha, etc.) and since nitropropane is a well known petrochemical solvent, it is obvious that Item 2720 of the carrier's tariff, construed in accordance with the chemical industry understanding reasonably describes the article shipped. We are not attempting to dissect the molecular structure of this commodity. We are showing through the use of a recognized chemical authority, that nitropropane is actually a petroleum solvent. . . ."[5]

Lykes, an apparent believer in brevity as a virtue, counters simply by saying that "acting as a solvent is only one use of nitropropane" and that "a commodity cannot lawfully be rated or classified according to the different uses to which it is put."

In *United States v. Pan American Mail Line, Inc.*, 359 F. Supp. 728 (S.D. New York 1972), the Court set forth the general principles of law which provide the background for the Commission's specific principles of tariff construction. The Court said: ". . . the only rate a carrier may charge is that rate appearing in the carrier's filed tariff [citations omitted]. This rate must be charged and paid regardless of seemingly innocent justifications for departure such as mistake, inadvertence, or contrary intention of the parties. . . ." (359 F. Supp. at page 733). The Court recognized that such "strict interpretation may work hardship . . . and may require decisions which are the reverse of those which would have obtained had the principles of equity been applied to the suit . . . Yet the courts have adhered consistently to their strict reading of the tariffs in question in order to effectuate the Congressional scheme against rebating and collusive pricing" (359 F. Supp. at 733). This prescription for "strict reading of tariffs" has led to some "specific" principles to be applied when interpreting tariff language.

[5] "The *Dictionary*" referred to throughout the above is the *Condensed Chemical Dictionary*, Eighth Edition. The Bulletin No. 20 cited by C.S.C. does indeed characterize nitropropane as a solvent. The bulletin also lists the physical property of NiPAR which is the trademark for C.S.C.'s nitropropane solvent. Nowhere in the list is there any reference to petroleum.

Tariffs are "but forms of words."[6] *Intercoastal Investigation 1935,* 1 U.S.S.B. 400, 432 (1935); and these words are to be interpreted according to "the reasonable construction of [the tariff's] language; neither the intent of the framers nor the practice of the carrier controls, for the shipper cannot be charged with knowledge of such intent or with carrier canons of construction." *Natl. Cable & Metal Co. v. Amer. Hawaiian S.S. Co.,* 2 U.S.M.C. 470–473 (1941). A "fair and reasonable" construction must be given the terms in a tariff; and "the terms in question must be construed in the sense in which they are generally understood and accepted commercially." As a corollary "shippers should not be permitted to avail themselves of a strained and unnatural construction," *Thomas G. Crowe v. Southern S.S. et al.,* 1 U.S.S.B. 145, 147 (1929). A tariff when in dispute is ordinarily to be construed "as any other document." *Gt. No. Ry. v. Merchant's Elev. Co.,* 259 U.S. 285, 291. *Himala International v. Fern Line,* 3 F.M.C. 53, 55 (1948). This rule means that "a tariff having been written by the carrier is vulnerable against the carrier if the tariff's meaning is ambiguous." *Rubber Development Corp. v. Booth S.S. Ltd.,* 2 U.S.M.C. 746, 748 (1945). It does not mean that other rules of documentary construction necessarily apply to the construction of tariffs, i.e., When interpreting a statute or contract a proper inquiry is the intent of the legislature or the parties; however, when construing a tariff the "express language" of the tariff governs not the "unexpressed intention" of the author of the tariff. *Sacramento-Yolo Port District v. Fred F. Noonan,* 9 F.M.C. 551, 558 (1966); *Aleutian Homes Inc. v. Coastwise Line,* 5 F.M.C. 602, 608 (1959).

So far all of the principles of tariff interpretation seem to assume that recourse to the tariff document itself alone can provide the proper "meaning" to be assigned to the words in dispute.[7] However, "proper" definitions are notoriously slippery things and words themselves have the often irritating habit of changing their meanings according to context. There are, therefore, allowances made for consideration of matters outside the tariff. Resort to extrinsic evidence or "matters outside the express language of the tariff" may be had in "only three instances: (1) where the language of the tariff is itself vague; (2) where the tariff contains technical words which require interpretation because their meaning is not generally known [*Aleutian Homes Inc. v. Coastwise Line,* 5 F.M.B. 602, (1959); *Thomas G. Crowe v. Southern S.S. Co.,* 1 U.S.S.B. 145 (1929)]; or (3) there exists a custom or usage of a trade or a

[6] The full sentence reads: "Tariffs are but forms of words and that in the exercise of its powers to administer the shipping acts the [Commission] can look beyond the forms [meanings?] to what caused them *and what they were intended to cause* is well established. *Int. Com. Comm. v. Balt. & Ohio R.R.,* 225 U.S. 325, 326" (1 U.S.S.B. 400 at 432). (Emphasis supplied.)

[7] I am here unavoidably reminded of one version of a "lawyer's paradise," which is a world "where all words have a fixed, percisely determined meaning; where men may express these purposes, not only with accuracy, but with fullness; and where, if the writer has been careful, a lawyer, having the document in front of him, may sit in his chair, inspect the text, and answer all questions without raising his eyes.

course of dealing of the parties which although not specified in the tariff, is such that it would be applied." Despite the seeming limitation of the phrase "only three instances," close examination of the occasions on which recourse to matters outside the tariff may be had demonstrates that in virtually every case coming before the Commission extrinsic evidence not only can but must be considered if the language in dispute is to be given a "reasonable" construction and one which is "generally understood and accepted commercially." The first instance—where the language is vague—covers every case I have been able to find and all that a perhaps limited imagination can conjure. The very existence of a dispute between a shipper (or his professional freight auditor) and a carrier would seem to present an arguable case of vague tariff language, and where tariff language is vague resort may be had to extrinsic evidence. In fact, if extrinsic evidence means resort to or consideration of *any* matters other than the language of the tariff itself, extrinsic evidence is routinely considered in virtually all cases involving tariff construction when the dictionary is consulted for the "proper meaning" of words. This is done so routinely that mention of the rule which allows resort to extrinsic evidence in the form of a dictionary is no longer even made. But resort to extrinsic evidence while including reference to dictionaries obviously encompasses a good deal more. For it is the rare case which can be decided on dictionary meanings alone.[8] This is amply demonstrated by the dispute in this case, where resort to the dictionary only gives rise to the problem of alternative meanings which only poses the further problem of which alternative to choose. The proper choice of course is that meaning of the word or phrase which is "generally understood and accepted commercially." Examination of dictionary definitions no matter how exhaustive cannot show which meaning is the one that those engaged in the particular line of commerce generally understand, accept and use.

Complainant's extrinsic evidence consists of the bills of lading covering the two shipments, two technical bulletins issued by complainant, a number of pages from respondent's tariff, and a number of pages from the *Chemical Dictionary* all of thich are attached to the complaint. From this basis complainant's argument as I understand it is that (1) Under the generic heading "Petroleum Solvents" a number of chemicals are listed including "Solvents, Petroleum N.O.S."; (2) Petroleum itself is not a solvent therefore the listed chemicals must be those made from either petroleum or another petrochemical;[9] and (3) Nitropropane is a petrochemical which is a solvent; therefore, it is a Solvent, petroleum, NOS

[8] "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing. . . . But it is one of the surest indexes of a mature and developed jurisprudence [and theory of tariff interpretation] not to make a fortress out of the dictionary. Judge L. Hand, *Cabell v. Markham*, 148 F. (2d) 737, 739 (CA 2, 1945).

[9] Complainant still using dictionary definitions shows further that Naptha and Mineral Spirits can be derived from natural gas and coal tar and Toluene and Zylene (Xylene) can be derived from petroleum and coal tar and that these are petrochemicals. Since propane is derived from "petroleum and natural gas" nitropropane is a petrochemical like naptha, mineral spirits, Toluene and Zylene.

under Item 2720.[10] Admittedly, this is one way of constructing a "definition" of nitropropane; but there is another way, a way that does less violence to the use of "Petroleum Solvents" as a generic heading in Item 2720.

To begin with, as complainant states there are "At least 175 substances designated as petrochemicals even though some of their commercial production is from *sources other than petroleum.*" (*Dictionary,* page 672). If we adopt complainant's reasoning then a "petrochemical" which is neither derived from nor bears any real relation to petroleum would become a "Solvent, Petroleum, NOS" and classifiable under Item 2720. This is hardly a reasonable construction of the item. More importantly a closer examination of the chemical products listed under the generic heading of Item 2720 leads to a different, and in my view, a far more reasonable construction of the item.

The first article is "Distillates, NOS." A "distillate" is a "distilled liquid."[11] So it would be reasonable to conclude that as used in Item 2720, "Distillates NOS" is any product made from the distillation of Petroleum which is not included in the list of specific products found in the item. Heptane is derived from "(a) the fractional distillation of petroleum." (*Dictionary,* page 470).[12] For a definition of "Mineral Spirits" we are directed to "Naptha." (*Dictionary,* page 588.) The word "Naptha" "usually applies to a narrow boiling range fraction of petroleum." (*Dictionary,* page 602.) The derivation of Toluene is "(a) By catalytic reforming of petroleum." (*Dictionary,* page 877.) Zylene (Xylene) like Heptane is derived by the "fractional distillation of petroleum." As is readily seen all of the specific articles or chemical products listed under Item 2720 are or can be obtained by a chemical operation on petroleum itself—either distillation or catalytic reforming. Thus they are all compatible with the generic heading "Petroleum Solvents." This is not true of nitropropane.

Again using complainant's method of assembling dictionary definitions, we find: (1) Nitropropane is derived from "a reaction of propane and nitric acid under pressure," (*Dictionary,* page 625); (2) Propane is derived "from petroleum and natural gas," (*Dictionary,* page 672); and (3) "Natural gas" is, "A mixture of the low molecular weight paraffin hydrocarbons (methane (85%) ethane (10%) *propane* and butane with

[10] In his *Tyranny of Words* Stuart Chase demonstrates some of the pitfalls awaiting the user of the syllogism. The three laws of formal logic are: "(1) *The law of identity.* A is A. Pigs is Pigs; (2) *The law of the excluded middle.* Everything is either A or not A. Everything is either pigs or not pigs; and (3) *The law of contradiction.* Nothing is both A and not A. Nothing is both pigs and not pigs." Chase goes on to say: "Observe that there are no referrents (specific objects referred to). For symbols in our heads the laws are incontrovertible. But the instant we turn to the world outside and substitute an actual grunting animal, the laws collapse. They collapsed to the vase perplexity of the station agent in Ellis Parker Butler's famous story *Pigs is Pigs,* where the animals involved were guinea pigs. Then there is the story . . . of the bewildered porter in *Punch* who had to arrange the subtleties of nature according to the unsubtle tariff schedule of his company. 'Cats is dogs and guinea pigs is dogs, but this 'ere tortoise is a hinsect.' "

[11] Distillation is "the process of separation consisting of vaporizing a liquid and collecting the vapor which is usually condensed to a liquid."

[12] In each instance the primary or most common derivation of the article is used. There is no definition of "Hextane" in the *Chemical Dictionary.* This helps neither side. Hextane could be a trade name. The reasonable assumption here is that it is some kind of derivative of petroleum.

small amounts of higher hydrocarbons and other gases). (Emphasis complainant's.)[13] Complainant pointing out that natural gas occurs in "Petroleum-bearing areas throughout the world," concludes:

> Whether the propane used in making nitropropane is derived from propane or natural gas, it is known as a petrochemical in the chemical industry. Petrochemicals are defined in the Dictionary as an organic compound for which petroleum or natural gas is the ultimate raw material. See page 672. Since the list of Petroleum Solvents in the carrier's tariff contains articles derived from sources known collectively as petrochemicals (propane, toluene, naptha, etc.) and since nitropropane is a well known solvent, it is obvious that Item 2720 of the carrier's tariff, construed in accordance with the chemical industry understanding reasonably describes the article shipped."

I cannot agree that Item 2720 "reasonably" describes the article shipped. To begin with the proposition that some of the Petroleum Solvents listed in Item 2720 can also be designated petrochemicals does not carry with it the conclusion that all petrochemicals are petroleum solvents. To accept this conclusion, as already pointed out, could result in the inclusion under the generic head Petroleum Solvents, of a petrochemical solvent which is neither based on or derived from petroleum, certainly a strained and unnatural construction.

Complainant is incorrect when it implies that it really makes no difference whether nitropropane is derived from petroleum or natural gas. If nitropropane is derived from natural gas it is not derived from petroleum, and if nitropropane is not derived from petroleum then only a strained and unnatural interpretation could classify nitropropane under a generic heading which clearly speaks of petroleum derivatives. Furthermore, the specific petroleum derivatives listed in Item 2720 do not insofar as this record shows include products which are produced by the combination of petroleum with another chemical. They are all produced or derived by operations on petroleum itself. Here, even if we assume that the "propane" comes from petroleum, nitropropane is produced only by the reaction of the propane with nitric acid. This alone makes nitropropane distinct from the other solvents listed in Item 2720; and this distinction leads to the conclusion that nitropropane cannot reasonably be included in that group of solvents classifiable under Item 2720.

If complainant is urging that what we have here are "technical words which require interpretation because their meaning is not generally known," *Aluetian Homes* case, *supra,* and that his interpretation of those words is the one "generally understood and accepted" in the chemical industry, then he falls considerably short of the mark.

The manipulation of dictionary definitions can never establish that a

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[13] Complainant would also direct special attention to the following which appears in the *Dictionary* under "natural gas":

> Shipping regulations (ICC, CG, IATA) Redgas label. Not acceptable on passenger planes. *Legal label name (ICC, CG, IATA) Liquified petroleum gas.* (Emphasis complainant's; *Dictionary*, page 608.)

I can find no significance in the fact that the Interstate Commerce Commission, the Coast Guard and the International Air Transport Association declare the "Legal label name" for natural gas to be "Liquified petroleum gas." Nothing has been offered to show the reason for this legal label designation and it may well have nothing to do with tariff classifications, and it certainly has nothing to do with Item 2720.

particular meaning of a "technical term" or a particular description of a product is *the* meaning or *the* description generally attributed to it by those in a particular industry or commercial endeavor. Indeed, it is by no means clear that C.S.C. itself generally understands and accepts the meaning of nitropropane it now asserts. In *Johnson & Johnson International v. Venezuelan Lines,* 16 F.M.C. 87 (1973), another case involving tariff interpretation, the Commission while concluding that a shipper was not forever bound by his bill of lading description of the commodity, went on to say at page 94:

> Claimant's original interpretation of the tariff at a time when the controversy had not yet arisen may be given weight in deciding the correct description and rate now to be applied to the goods in question. This is in accord with accepted principles and is in no sense inconsistent with the Commission's holding that the description on the bill of lading should not be the controlling factor.

Here C.S.C. a manufacturer and exporter of chemical products, originally classified nitropropane under Item "Chemicals NOS." It is reasonable to conclude that C.S.C. had access to the tariff to chose that, and not some other, classification. This record does not disclose the circumstances which led C.S.C. to abandon its original classification and adopt the present one. Whatever those circumstances, the fact that C.S.C. originally did not view nitropropane as a "petroleum solvent" casts considerable doubt on the proposition that the chemical industry generally understands and accepts the notion that nitropropane is indeed a "petroleum solvent."

I cannot accept complainant's interpretation of Item 2720. Only by a strained and unnatural construction of the language could nitropropane be classified as a petroleum solvent under Item 2720; and complainant has not shown that nitropropane is a technical term with a peculiar meaning and that the chemical industry generally understands, accepts, and uses that meaning.[14] Therefore, I conclude that respondent properly classified nitropropane under Item 0170, Chemicals, NOS.

The second question presented here is somewhat easier to answer. 2-Amino-2-Methyl-1-Propanol-AMP is according to complainant a surface active emulsifier and as such should have been classified under Item 860, "Compounds, viz.: Surface Active (Emulsifiers, Wetting Agents)." C.S.C. says:

> AMP is manufactured and sold as a "very efficient emulsifying agent," See NP Technical Bulletin (NPTB No. 31) issued by the claimant. Page 45 of the *Chemical Dictionary* lists 2-amino-2-methyl-1-propanol and states that that chemical is issued as an emulsifying agent. There seems to be no question that AMP is manufactured, sold, *and understood in the chemical industry* to be an emulsifier. Item 860 of the carrier's tariff provides a Capetown rate of $107 for "Compounds, viz.: Surface Active (Emulsifiers, Wetting Agents)." That description completely covers AMP an emulsifier as shown above. (Emphasis, mine.)

[14] The burden of proof is on complainant and he must show with reasonable certainty and definiteness that his description of the commodity is the correct one. See *Johnson & Johnson Int'l. v. Venezuelan Lines, supra.*

Lykes, replying to this argument, asks that I take "judicial cognizance" of the Commission's decision in Docket No. 75–31, *C.S.C. International v. Waterman Steamship Corp.*, served February 15, 1977. As Lykes says, "In that proceeding, the same complainant (C.S.C.) contended that a shipment of 2-Amino-2-Methyl-1-Propanol should have been rated as Detergents, Liquid or Dry, non-hazardous, NOS.," while here ". . . the complainant is asserting that the same commodity should be rated differently depending upon the use made of it which would most certainly lead to discrimination. *Atchison Leather Products Co. v. Atchison T & S.F. Ry. Co.*, 274 I.C.C. 328, 329." Lykes continues, "The . . . Commission clearly stated in Docket No. 75–31 that in the making of rates and ratings there is no better entrenched rule than the one that states that a commodity cannot lawfully be classified according to the different uses to which it is put." To this C.S.C. responds:

> Respondent . . . argues that we are attempting to classify the two commodities here involved by "use." It supports this argument by referring to Docket No. 75–31. In that case the complainant sought the detergent rate for AMP because the tariff there involved . . . contained no rate for Surface Active Emulsifiers. Complainant argued unsuccessfully, that Surface Active Emulsifiers *were in fact detergents* and were thus covered by the tariff description for detergents. Here the tariff of respondent provides a rate for "Compounds, Surface Active (Emulsifiers, Wetting Agents). Our evidence, which respondent has not refuted, shows that AMP is in fact an emulsifier. (Emphasis mine.)

I suppose that is one way to characterize complainant's position in Docket No. 75–31. But the difficulty presented by it is that in order to show that AMP *was* a detergent it was necessary to show that AMP was sold and *used* as a detergent. I know that, at first, this seems inconsistent with the idea that, "There is no better entrenched rule in the making of rates and ratings than the one that a commodity cannot lawfully be rated or classified according to the different uses to which it may be put. *Food Machinery Corp. v. Alton & S.R.*, 269 I.C.C. 603 (606)." However, the use for which a product is manufactured and sold can indeed be a most important factor in deciding the proper tariff classification of the product.

In *Hazel-Atlas Co.—Misclassification of Glass Tumblers*, 5 F.M.B. 515 (1958), the articles in question were "packer's tumblers" which could be used first as a kind of jelly jar and then as drinking glasses. In deciding whether the articles should have been classified "Bottles, Jars, Empty Glass" or "Tumblers, viz.: Glass," the Commission said:

> Although we agree that the purpose for which a thing is manufactured—the controlling use—determines its classification tariffwise, we do not agree that its controlling use is necessarily its first use in point of time (at 518).

When "use" is a factor in deciding the proper tariff designation of an article, it is the "controlling use" that determines the nature and character of the shipment at the time tendered and the fact that an article may have other subordinate or secondary uses does not alter the nature of the product. See, *Continental Can Co. v. U.S.*, 272 F. 2d 312 (CA 2, 1959.)

It is true that in Docket 75–31 C.S.C. tried to argue that AMP was a detergent, and Judge Morgan found that AMP was not a detergent. In doing so Judge Morgan referred to Docket 75–50 in which C.S.C. sought to have AMP classified as "Compounds, Surface Active (Wetting Agents or Emulsifiers)," the same classification sought here. In that case the finding was that AMP was an emulsifier. The initial decision was made on the merits, but it was not adopted by the Commission because it was found that the complaint was untimely filed. However, the reasoning of the initial decision remains valid to my mind. There as here C.S.C. attached "documentation" to show that AMP is an emulsifier.

Attachment 12 to the complaint is an "NP Technical Bulletin" which announces that the use of AMP is, "To Prepare Clear Emulsions of Polyethylene or Wax." AMP is further identified as "a very efficient emulsifying agent for the emulsifiable polyethylenes and waxes in today's floor polish formulations. . . ."[15] It is clear that C.S.C. manufactures, markets and sells AMP as an emulsifier. The reasonable assumption is that AMP is also purchased and used as an emulsifier. No question is presented as to the chemical makeup or derivation of AMP. Accordingly AMP should have been classified under Item 860, "Compounds, viz,: Surface Active (Emulsifiers, Wetting Agents)." By classifying AMP under "Chemicals NOS" respondent Lykes has violated section 18(b)(3).[16] Complainant is entitled to reparation for the improper classification of AMP. The amount of reparation, however, poses somewhat of a problem.

Complainant has lumped together the charges for the entire shipment on bill of lading No. 129 in a way that makes it somewhat difficult to determine the precise amount of reparation claimed and due. On bill of lading No. 129, the 75 drums of nitropropane measured 804 c. ft. and weighed 37,725 lbs. and the 1 drum of AMP measured 11 c. ft. and weighed 448 lbs. The shipment was shown on the bill as follows:

804′ (37,725#) at 108.50/40′	= 2,180.85	(the nitropropane)
11′ (448#) at 133.00/40′	= 36.58	(the AMP)
Plus 40% S.C.	886.97	
BF 815′ at 17.00/40′	= 346.38	
Toll	11.45	
	3,462.23[17]	

In its complaint C.S.C. computes the amount of reparation due on the shipment under bill of lading No. 129 as follows:

[15] The *Chemical Dictionary* at page 45 lists as uses of AMP: "Emulsifying agent (in soap form) for oils, fats and waxes; absorbent for acidic gases; chemical synthesis."

[16] A finding of violation is necessary to an award of reparation under section 22 of the Shipping Act, 1916, even where, as here the respondent would seem to have been perfectly justified in relying on the shipper's own description of its own product on the bill of lading.

[17] No commodity item numbers appear on the bill of lading.

Bill of Lading No. 129	
804 cu. ft. at $98.75/MT (1)	$1,984.88
11 cu. ft. at $108.50/MT (2)	29.84
Port detention surcharge—25% (3)	503.68
Bunker surcharge at $17/MT (4)	346.38
Tolls (as billed)	11.45
	$2,876.23

(1) Capetown rate $97.25—plus $1.50 Dif.—Rules 18, page 115
(2) Capetown rate $107—plus $1.50 dif.—Rule 18
(3) Port Detention—25%—Rule 24a, 4th Rev. page 124–A
(4) Bunker surcharge $17/MT—Rule 25, page 124–c

On the basis of the above C.S.C. claims reparation of $585.50 for the shipment covered by bill of lading No. 129. This amount is, as shown, based (1) on the difference between the billed rate ($2180.35) and the sought rate ($1984.88) on nitropropane; (2) the difference between the billed rate ($36.58) and the sought rate ($29.84) on AMP, and (3) the difference between the 40% surcharge billed by Lykes ($886.97) and the 25% surcharge which is apparently claimed to be the proper surcharge by C.S.C. ($503.68).

The difference between the rates on nitropropane has been disallowed. The difference between the rate on AMP is $6.74 and this will be allowed. The remaining claim is based upon an apparent assertion that a "port detention surcharge" was improperly computed. I say that this assertion is apparent because it consists solely of the reference in C.S.C. computations in (3) above to 4th Rev. Page 124–A of the tariff. This page is attached and shows that effective June 2, 1975 a port detention surcharge of 25% per ton was to be assessed on shipments to Durban. This is the total evidence offered by complainant that Lykes improperly assessed the surcharge. There is not a single mention of the surcharge in the text of the complaint.

The complaint here reads in part: "On May 26, 1975, the carrier issued its prepaid bill of lading No. 129 to cover claimant's shipment, described thereon as 75 drums (Nitropropane) Chemical NOS and 1 drum (AMP) Chemical NOI, 2-Amino-2-Methyl-1-Propanol, from New Orleans to Durban, South Africa." The bill of lading simply lists "Plus 40% S.C." The evidence before me, such as it is, leaves too many questions unanswered and complainant, upon whom the burden of proof rests, spends not a single word of exposition or argument on the surcharge issue. Indeed, it is not even framed as an issue in the complaint.[18]

The bill of lading is dated May 26, 1975—and this is the only date in the complaint—and the effective date of the tariff page cited by complainant is June 2, 1975. Thus it is not clear that the surcharge would apply to the shipment. It is not even clear that complainant and respondent have the same surcharge in mind. Complainant has failed to

[18] In its answers, Lykes makes no reference to the surcharge and its entirely possible that it escaped Lykes' attention as it very nearly did mine.

establish that Lykes improperly assessed the surcharge imposed in bill of lading No. 129.

Since, the one drum of AMP was improperly classified, C.S.C. is entitled to the difference between the rate charged and the proper rate. Accordingly, C.S.C. is awarded reparation in the amount of $6.74.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
March 22, 1978.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NOS. 400(I), 401(I) AND 402(I)

KAISER ALUMINUM & CHEMICAL CORP.

v.

ATLANTIC CONTAINER LINE

Reparation awarded.

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Clarence Morse, *Commissioners*)

REPORT

March 23, 1978

In the three complaints filed in Informal Docket Nos. 400(I), 401(I) and 402(I) Complainant Kaiser Aluminum and Chemical Corporation seeks reparation from Respondent, Atlantic Container Line, for alleged freight over-charges on ten shipments described in the bills of lading as "Aluminum Can Stock (In Coils)" carried by Respondent from Baltimore to Rotterdam, the Netherlands.

Respondent charged a rate of $67.25 W/M, apparently under Item No. 692.2201.00 "Aluminum cans K.D. Packed (Body blanks and ends)".[1] Complainant contends that the shipments should have been classified as "Aluminum Sheets Flat or in Coils, up to/incl. 13,440 lbs. Minimum 40,320 lbs. per container" for which the applicable rate at the time of shipment was $61.00 per 2,240 pounds. Computed on that basis, the charges would amount to $25,085.43 or $11,981.16 less than that collected by Respondent. In support of its claims, Complainant submitted copies of bills of lading, dock receipts, factory invoices, shipping notices, load and tally sheets.

The Settlement Officer denied reparation. Except for three dock receipts which showed the same container marks as appeared in three of the bills of lading, the Settlement Officer failed to see any common

[1] For unexplained reasons, the charges amounting in the aggregate to $37,066.59 were assessed in some instances on a weight basis and in others on a measurement basis.

numerical reference between the bills of lading and the other documents filed and concluded that the evidence was insufficient to determine freight overcharges.

We disagree with this conclusion. By cross-checking the dock receipts against the bills of lading, it becomes evident that the booking numbers, export, shipper's and freight forwarder references, container marks and numbers are the same in the ocean bills of lading as in the dock receipts. Likewise, the factory invoices, shipping lists and load and tally sheets contain information which links them to the ten shipments involved in these proceedings. This refutes the Settlement Officer's finding that there is no common numerical reference between the documents offered in evidence.

As to the proper classification of the shipments, both the dock receipts and bills of lading specify that the aluminum can stock was *in coils*. We believe therefore that the tariff classification urged by Complainant "Aluminum Sheets Flat or in Coils" more accurately describes the cargo than "Aluminum cans K.D." and that Respondent should have collected freight charges on the basis of $61.00 per long ton, rather than on the $67.25 W/M rate it charged. The misclassification of the cargo and resulting overcharges violated section 18(b)(3) of the Shipping Act, 1916.

The decision of the Settlement Officer is therefore reversed. Complainant is awarded reparation as follows:

Docket 400(I) 2 shipments	$4,865.53
Docket 401(I) 3 shipments	4,880.90
Docket 402(I) 5 shipments	2,234.73
For a total of	$11,981.16

It is so ordered.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 531

MITSUBISHI INTERNATIONAL CORPORATION

v.

FAR EAST CONFERENCE AND AMERICAN PRESIDENT LINES, LTD.

ORDER

March 24, 1978

By application filed pursuant to section 18(b)(3) of the Shipping Act, 1916, and Rule 92 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92), the Far East Conference and American President Lines, Ltd., applied for permission to refund $11,793.02 of the $58,250.34 freight charges collected from Mitsubishi International Corporation on two shipments of nuclear fuel elements, unirradiated, carried from Charleston, South Carolina, to Kobe, Japan, via Oakland, California, under bills of lading dated January 17, 1977, and February 2, 1977. Respondents maintained that in the course of converting the Conference tariff to the metric system an error made in the tariff item applying to these shipments caused the assessment of charges higher than intended.[1]

Administrative Law Judge Thomas E. Reilly determined that, based on the dates on the two bills of lading, the application received by the Secretary of the Commission on August 2, 1977 had not been filed within 180 days from the dates of shipment as required by section 18(b)(3) of the Act. While the Presiding Officer denied the application on that ground, he nevertheless found that the error in the Conference tariff was of a type contemplated in section 18(b)(3).

Respondent filed a Petition to Reopen for the purpose of introducing evidence on the mailing date of the application. As the Petition was received within the time provided for filing exceptions under Rule 227 of the Commission's Rules of Practice and Procedure, it will be treated as exceptions. The manner of our disposition of this case obviates any need

[1] See Conference Notice of September 27, 1976 to contract shippers and tariff subscribers on the issuance of a new tariff based on the metric system, and the Conference's Tariff Circular No. 57 approving the reduction of the rate on the product shipped here, both attached to the application.

to reopen the proceeding for the admission of additional evidence as to the mailing date.

We note at the outset that while the application was not received in the Office of the Secretary until August 2, 1977, it bears a stamp showing that it was received at the Commission on August 1, 1977.[2] Therefore, with respect to the shipment which moved under bill of lading No. 9441 dated February 2, 1977 the application was in fact filed with the Commission within 180 days from that date, as required by section 18(b)(3). However, even considering August 1, 1977, as the filing date, recovery on the shipment which moved under bill of lading No. 9457 dated January 17, 1977 is time barred.

With respect to the merits of the claim, we agree with the Presiding Officer's conclusion that the error which occurred in the course of the conversion of the Conference tariff to the metric system was an administrative error of the type covered by section 18(b)(3).

Therefore, that portion of the Presiding Officer's decision denying permission to refund a portion of the freight charges collected on the shipment which moved under bill of lading No. 9457, dated January 17, 1977, is adopted and made a part hereof. The denial of permission to refund a portion of the freight charges collected on the shipment which moved under bill of lading No. 9441, dated February 2, 1977, is reversed and Respondents are granted permission to refund $6,254.71 of the freight charges collected on that shipment to complainant Mitsubishi International Corporation.

THEREFORE, IT IS ORDERED, That Respondents Far East Conference and American President Lines, Ltd., are authorized to refund $6,254.71 of the charges collected from Mitsubishi International Corporation.

IT IS FURTHER ORDERED, That Respondents shall publish promptly in the appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 531 that effective January 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped from January 1, 1977 through March 1, 1977, inclusive, the contract rate on 'Nuclear Fuel Elements, Unirradiated' from United States Atlantic and Gulf ports to Kobe, Japan, is $263.00 W/M, subject to all applicable rules, regulations and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund of the charges shall be effectuated within 30 days of service of this notice and Respondents shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[2] Section 18(b)(3) specifies that the application must be filed *with the Commission.*

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 387(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

MOORE-McCORMACK LINES, INC.

Respondent properly classified and rated the transported goods.
Reparation denied.

William Levenstein for Complainant Pan-American Health Organization.

A.C. Hidalgo for Respondent Moore-McCormack Lines, Inc.

REPORT

March 30, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman:* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Clarence Morse, *Commissioners*)

The Commission determined to review the decision of the Settlement Officer in this proceeding awarding reparation to Complainant Pan American Health Organization, Inc., for alleged freight overcharges by Respondent Moore-McCormack Lines, Inc., on a shipment described in the bill of lading as "8 skids SAID TO CONTAIN Office Stationery of paper and paper board n.e.c. except correspondence goods", carried by Respondent from Baltimore to Rio de Janeiro, Brasil.

Respondent assessed the rate of $147.50 per measurement ton provided in the tariff of the Inter-American Freight Conference under the tariff classification "Stationery." Complainant contends that the proper description was "PAPER, VIZ.: Bond, Sulphite or Sulphite and rag mixed—see PRINTING PAPER". Printing paper, defined in turn as "BOND, MIMEOGRAPH, LEDGER, TABLET AND ENVELOPE", carries a rate of $118 WT. Computed on that basis, Complainant claims freight overcharges in the amount of $1,778.77.

The Settlement Officer, satisfied with the evidence introduced by the Complainant found that the paper shipped, Mead Bond, is in fact a No. 1

grade watermarked sulphite pulp bond paper, covered by the above quoted description and granted reparation in the amount requested.

We find the decision of the Settlement Officer to be in error.

Although Complainant has shown that the paper shipped was sulphite pulp bond, it never denied that it was office stationery, nor did it assert that it was printing paper. Moreover, the description urged by Complainant is not a N.O.S.* tariff description but lists the precise types of paper covered by this tariff item, that is "Bond, Mimeograph, Ledger, Tablet and Envelope", thereby excluding all other types not specifically mentioned therein. While various types of paper may be made of sulphite pulp bond, we are of the opinion that "stationery" is a more specific description than "PAPER, VIZ.: Bond, Sulphite or Sulphite and rag mixed—see PRINTING PAPER." and, inasmuch as Complainant has not shown that the paper was for printing, we believe the carrier properly classified and rated the shipment.

The decision of the Settlement Officer granting reparation is therefore reversed, reparation is denied, and the complaint dismissed.

IT IS SO ORDERED.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*"Not Otherwise Specified."

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-29

BATON ROUGE MARINE CONTRACTORS, INC.

v.

CARGILL, INCORPORATED

ORDER REMANDING PROCEEDING

April 4, 1978

This proceeding arose from a complaint filed by Baton Rouge Marine Contractors, Inc. (BARMA or Complainant), alleging that Cargill, Inc. (Cargill or Respondent) had violated and continued to violate sections 15, 16, and 17, Shipping Act, 1916 (the Act), by unilaterally modifying a lease agreement between Cargill and the Greater Baton Rouge Port Commission (Port), which agreement had previously been approved by the Commission. BARMA contended that the subject modification resulted in the imposition of unlawful charges and conditions upon stevedores conducting business at the marine grain elevator at Port Allen, Louisiana, and was not filed with the Commission as required by section 15 of the Act.

After hearing, Initial Decision, exceptions and oral argument, the Commission served its Report and Order (Report) in this proceeding. 18 F.M.C. 140. In its Report, the Commission found that Cargill's imposition of charges and conditions did not constitute an unfiled modification of the lease agreement between Cargill and the Port. While the Commission did not find a violation of section 16, it did find that certain charges and conditions imposed by Cargill on stevedores, such as BARMA, were not reasonably related to the economic or commercial benefit of the stevedores derived by them from their use of the facilities and services provided by the Cargill terminal and thus constituted unjust and unreasonable practices in violation of section 17 of the Act. The Commission ordered the proceedings remanded to achieve a resolution of the proper allocation formula with regard to the actual benefits derived by stevedores from the use of Cargill's terminal facilities and for arriving at a proper charge against stevedores based thereon.

Administrative Law Judge William Beasley Harris has now served a "Supplemental Decision on Remand" wherein he concludes that the

record developed before him was inadequate to resolve the issues raised by the Commission's Order of Remand, and that the proceeding should be reopened.

Both Cargill and BARMA except to the Presiding Officer's finding that the record should be reopened. Although Hearing Counsel also oppose the reopening of the proceeding, they agree with the Presiding Officer that the "very deficiencies which cause the remand still exist."

This proceeding was remanded for the formulation of a proper allocation formula based on the relative benefits derived from the use of Cargill's terminal facilities. If the Administrative Law Judge who presided at the reception of the evidence is of the opinion that the record is inadequate to permit him to make the necessary directed findings, then it remains his responsibility to take whatever action, including reopening of the record, to assure the development of a record sufficient to resolve the issues remanded. Indeed, given the Presiding Officer's determination as to the sufficiency of the record, we would have expected him *sua sponte* to reopen the proceeding rather than issuing a "Supplemental Decision" based on an admittedly "deficient" record. In any event, we are vacating the "Supplemental Decision" and remanding this proceeding for whatever further hearing the Presiding Officer deems appropriate.

THEREFORE, IT IS ORDERED, That the request for oral argument is denied.

IT IS FURTHER ORDERED, That the Supplemental Decision on Remand is vacated.

IT IS FURTHER ORDERED, That this proceeding be remanded and reopened for such further hearings as may be determined by the Presiding Officer.

IT IS FURTHER ORDERED, That the Presiding Officer shall serve his supplemental decision within 120 days from the date of this Order.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 510(I)

SWIFT & COMPANY

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

April 5, 1978

Notice is hereby given that the Commission on April 5, 1978 determined not to review the decision of the Settlement Officer in this proceeding served March 24, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 510(I)

SWIFT & COMPANY

v.

SEA-LAND SERVICE, INC.

March 24, 1978

DECISION OF EDGAR T. COLE, SETTLEMENT OFFICER[1]

Swift & Company (complainant) claims $182.13 as reparation from Sea-Land Service, Inc. (respondent) for an alleged overcharge on a shipment of frozen beef tongues that moved from the port of New Orleans, Louisiana to the port of Felixstowe, England on bill of lading number E 69455 dated September 30, 1976. Complainant specifically alleges a violation of Section 18(b)(3) of the Shipping Act, 1916. Complainant submitted the claim to respondent on August 1, 1977. Respondent concurs in the fact that an incorrect rate was applied, however, denys the claim citing Rule 30, page 38 entitled "Overcharges: Claims for Refunds of Freight Charges" published in the Gulf/United Kingdom Conference which states:

". . . . claims for adjustment of freight charges must be presented to the Carrier in writing within six months after date of shipment."

A review of the complaint, supporting documentation and the involved tariff confirms the complainant's overcharge allegation. The complainant seeks reparation in the amount of $182.13, computed as follows:

Charges assessed by Sea-Land	$2,349.09
Correct Charges (40,790 lbs. [18.20982 wt. tons] times $119.00 = $2,166.96)	2,166.96
Total overcharge	$ 182.13

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

The complaint was filed with this Commission within the statutory time limit specified by statute; and it has been well established by the Commission that a carrier's so-called "six month" rule cannot act to bar recovery of an otherwise legitimate claim in such cases.

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled under its applicable tariff. Accordingly, the complainant hereby is awarded reparation in the amount of $182.13. Evidence should be furnished the undersigned that the reparation has been made to complete the record.

(S) EDGAR T. COLE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 480(I)

MITSUBISHI INTERNATIONAL CORP.

v.

Y.S. LINE

NOTICE OF DETERMINATION NOT TO REVIEW

April 6, 1978

Notice is hereby given that the Commission on April 6, 1978, determined not to review the decision of the Settlement Officer in this proceeding served March 24, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 480(I)

MITSUBISHI INTERNATIONAL CORP.

v.

YAMASHITA-SHINNIHON LINE

March 24, 1978

Reparation awarded in part.

DECISION OF DONALD F. NORRIS, SETTLEMENT OFFICER

By a complaint filed with the Commission on December 27, 1977 pursuant to 46 CFR 502.301 et seq.,[1] the Mitsubishi International Corp. (Mitsubishi) makes claim for a refund in the amount of $105.93 with respect to a shipment of "fishing tackle" transported by the Yamashita-Shinnihon Line (Y.S. Line) from Yokohama to Boston via Tokyo under the Y.S. Line's bill of lading YYBS-003, dated December 23, 1975.[2]

The basis of the claim is as follows. At the time of shipment, the merchandise involved was rated upon its FOB value in accordance with the applicable tariff, that of the Japan/Korea-Atlantic and Gulf Freight Conference, Tariff No. 35, FMC-6 (the Tariff). That Tariff stipulated that fishing tacjle valued at $1,150 per revenue ton or less should be assessed a freight rate of $73 per 2,000 pounds or 40 cubic feet whichever earned the transporting carrier the greater revenue. Similarly, the same merchandise valued above $1,150 per revenue ton was to be rated at $90. The Tariff's Rule No. 8 requires shippers to submit commercial invoices, and Rule No. 11 explains how the FOB valuations are determined when necessary—either item by item or, in some instances, by the total valuation declared in the invoice divided by the total revenue tonnage. Mitsubishi submitted an item by item accounting. The Y.S. Line determined that the entire shipment amounted to slightly more than 3.4

[1] The respondent carrier having agreed to this informal procedure pursuant to 46 CFR 502.304(e), this decision will be final unless reviewed by the Commission within fifteen (15) days of the date of service.

[2] This shipment went forward in the "JAPAN AMBROSE", Voy. 23-A, which, according to the Lloyd's Shipping Index of January 19, 1976, transited the Panama Canal enroute to Baltimore on January 16. As the physical delivery of the merchandise encompassed by B/L YYBS-003 could only have occurred after this date, the Settlement Officer (S.O.) considers the claim filed within the two year statute of limitations specified in 46 CFR 502.302.

short tons and 12.7 measurement tons (508 cubic feet) and that the appropriate basis of assessment was the latter but at $90 per measurement ton. Mitsubishi contends that 6.65 measurement tons should have been rated at $90 and the remainder (6.04 measurement tons) at $73 because the FOB value of that portion of the shipment amounted to $1,150 per ton or less. Affected, too, is the application of the currency surcharge which then amounted to 3% of the freight rate plus the bunker surcharge of $3 per revenue ton.

The Y.S. Line's sole defense is that it is precluded from honoring the claim because of the presence of the Tariff's Rule No. 59. This rule proscribes the Conference's lines from honoring claims such as this if not submitted within six months of the date of shipment. The S.O. is compelled to join a legion of others who have held that no rule such as No. 59 can serve to subvert the Commission's jurisdiction in matters such as these. E.G., see *Time Limit on the Filing of Overcharge Claims,* 10 FMC 1 (1966); *Proposed Rule—Time Limit on Filing Overcharge Claims,* 12 FMC 298 (1969). Accordingly, the defense is rejected.

The S.O. has reviewed the matter thoroughly and has found that the volume of the shipment was slightly understated[3] and that 4.9925 revenue tons should have been rated at $73 and the remainder at $90. The value of 23 cartons of fishing tackle (Nos. 6924 through 6946) amounting to 42.2 cubic feet (1.055 measurement tons) is calculated to have been $1,151.09 per 40 cubic feet and was rated correctly at $90 per measurement ton. Accordingly, the correct assessment of freight and charges is as follows:

4.9925 tons × $73./ton	$ 364.45
7.7225 tons × $90./ton	695.02
12.715 tons × $3./ton (bunker surcharge)	38.14
Sub-total	$1,097.61
Currency surcharge—3%	32.93
12.715 tons × $2.50./ton (delivery charge)	31.79
Grand Total	$1,162.33

As the Y.S. Line assessed Mitsubishi $1,248.28 in freight and charges, the latter is entitled to a refund of $85.95. So ordered.

(S) DONALD F. NORRIS,
Settlement Officer.

[3] According to the "Certificate and List of Measurement and/or Weight" prepared by the Japan Marine Surveyers & Sworn Measurers Association, an organization employed by the Conference to perform such services, the volume of the shipment totalled 508.6 cubic feet or 12.715 measurement tons of 40 cubic feet.