FEDERAL MARITIME COMMISSION

DOCKET NO. 77–47

IN RE: FAR EAST CONFERENCE AMENDED TARIFF RULE REGARDING THE ASSESSMENT OF WHARFAGE AND OTHER ACCESSORIAL CHARGES

The Far East Conference tariff provision (Rule 1(a)(1) to its Tariff FMC No. 10), relating to the assessment of wharfage and other charges against the cargo, found to be in contravention of section 205 of the Merchant Marine Act, 1936 and, therefore, contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916.

Elkan Turk, Jr., Far East Conference, respondents.

C. C. Guidry for Board of Commissioners of the Port of New Orleans.

G. B. Perry for New Orleans Traffic and Transportation Bureau.

Carl S. Parker, Jr. for the Board of Trustees of the Galveston Wharves.

Lamar C. Walter for Georgia Ports Authority.

William H. Vaughan, Jr. for South Carolina State Ports Authority.

Gary E. Koecheler and *Richard A. Lidinsky, Jr.* for Maryland Port Administration.

J. Robert Bray for Virginia Port Authority.

Martin A. Heckscher and *Jared I. Roberts* for Delaware River Port Authority.

Francis A. Scanlan for Port of Philadelphia Marine Terminal Association.

Joseph F. Kelly, Jr. and *Barbara Gard* for Massachusetts Port Authority.

Charles H. Lombard for Alabama State Docks Department.

F.William Colburn for Port of Houston Authority.

G. E. Strange for Houston Port Bureau, Inc., and Brazos River Harbor Navigation District.

Rufus L. Edmister, Attorney General and *George J. Oliver*, Assistant Attorney General for North Carolina State Ports Authority.

Edward M. Shea and *C. Michael Tarone* for Sea-Land Service, Inc.

Howard A. Levy and *Patricia E. Byrne* for North Atlantic Conferences, Intervenors.

John Robert Ewers, C. Douglass Miller and *John C. Cunningham* for Hearing Counsel.

REPORT

June 8, 1978

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

On September 27, 1977, the Commission ordered the Far East Conference (FEC)[1] to show cause why the Commission should not find the provisions of its proposed tariff rule relating to the assessment of wharfage charges against the cargo to be contrary to the public interest and in violation of section 15, to result in the giving of an undue or unreasonable preference or advantage to certain ports and persons shipping through such ports while subjecting other ports and persons to unreasonable prejudice or disadvantage in violation of section 16 First, to result in the assessment of varying rates and charges which are unjustly discriminatory and constitute an unreasonable practice or regulation and violation of section 17, and to be in contravention of section 205, Merchant Marine Act of 1936, and, accordingly, why the FEC should not be ordered to modify its tariff rules to correct such violations.[2] A number of ports, steamship lines and steamship conferences intervened.[3]

The proceeding was limited to affidavits of fact and memoranda of law. Memoranda and/or affidavits were filed by the FEC, the North Atlantic Steamship Conferences, The Board of Trustees of Galveston Wharves, The Board of Commissioners of the Port of New Orleans and New Orleans Traffic and Transportation Bureau, Virginia Port Authority, Massachusetts Port Authority, Maryland Port Administration, South Carolina State Ports Authority, Georgia Ports Authority, Port of Philadelphia Marine Terminal Association and Commission Hearing Counsel.

BACKGROUND

Wharfage charges are presently assessed against the vessel at the majority of North and South Atlantic ports. While the FEC's tariff provides that the rates contained therein are tackle-to-tackle, historically, the practice has been for the FEC to absorb the costs of wharfage at

[1] The FEC, operating under Agreement No. 17, as amended, is a conference of common carriers providing liner service from the United States Atlantic and Gulf ports to ports in the Far East. The FEC is comprised of the following carriers: American Export Lines, Inc., American President Lines, Ltd., Barber Blue Sea Line, Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Maritime Company of the Philippines, Inc., Mitsui OSK Lines, A. P. Moller-Maersk Line, Nippon Yusen Kaisha Line, United States Lines, Inc., Waterman Steamship Corp. and Yamashita-Shinnihon Steamship Co., Inc.

[2] While our Order to Show Cause alleged possible violations of sections 16 and 17, Shipping Act, 1916, we are deciding this matter solely on the basis of the section 15 section 205 issues. Therefore, it is unnecessary to address the section 16 and 17 issues.

[3] Delaware River Port Authority, Virginia Port Authority, Georgia Ports Authority, Maryland Port Administration, Board of Commissioners of the Port of New Orleans and New Orleans Traffic and Transportation Bureau, Alabama State Docks Department, Massachusetts Port Authority, North Carolina State Ports Authority, South Carolina State Ports Authority, Port of Houston Authority and Houston Port Bureau, Board of Trustees of Galveston Wharves, Port of Philadelphia Marine Terminal Association, seven North Atlantic steamship conferences, and Sea-Land Service, Inc.

these ports, except at New York where wharfage is included in the stevedoring contracts. The effect has been to provide uniform rates to shippers at North and South Atlantic ports.

On May 24, 1977, the FEC filed an amendment (Rule 1(a)(1) to its Tariff FMC No. 10) modifying its tariff rules to provide that wharfage and other charges, which are assessed by the terminal operators against the vessel, will be rebilled by the carrier for the account of the cargo.[4] The proposed revision would enable the FEC member carriers to pass along to the shipper any charges assessed by terminal operators against the vessel for services rendered beyond ship's tackle. Because terminal charges generally vary from port to port, the effect of this proposed revision would result in shippers paying a total ocean carrier freight charge which varies at different ports.

Discussion and Conclusions

This proceeding brings to bear the Commission's holding in *Associated Latin American Freight Conferences*, 15 F.M.C. 151 (1972), a case presenting a factual situation significantly similar to the one before us here. In *Associated Latin American Conferences, supra*, the respondent conferences had revised their tariff rules so as to fix wharfage and handling charges and generally to shift their assessment from carrier to shipper at U.S. Atlantic and Gulf ports. The amended provisions would have imposed on the cargo wharfage and handling charges previously assessed against the carriers in port terminal tariffs, except at Baltimore, Philadelphia and New York, where the conferences established their own accessorial charges. As a result, shippers at these ports would have been assessed rates which varied from those assessed at neighboring ports. The question there, as here, was

> "whether the provisions of section 205, of the 1936 Act constitute a blanket prohibition against any conference taking concerted action which results in the assessment of varying rates and charges among federally improved continental U.S. ports, thereby rendering such action 'contrary to the public interest' under section 15 of the 1916 Act, and beyond the power of the Commission to sanction by its approval". (15 F.M.C. 154)

The Commission determined that the Respondents' tariff structure contravened section 205 of the 1936 Act, and concluded that Commission decisions under the Shipping Act must take into consideration the Congressional policy expressed in section 205, and conform to that policy. It was further concluded that section 205 removed from the Commission's

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[4] Specifically, this rule would provide that

> Tolls, wharfage, lighterage, cost of landing, and all other expenses beyond ship's tackle are for account of Owner, Shipper, or Consignee of the cargo; all such expenses levied in the first instance against the carrier will be billed in an equal amount to the Owner, Shipper, or Consignee of the cargo. Relative charges at loading ports will be based on the individual Port Terminal tariffs and reissues thereof on file with the Federal Maritime Commission, as listed on Pages 133–A through 133–C herein.

The effective date of Rule 1(a)(1) has been postponed several times; the most current effective date is September 1, 1978.

jurisdiction all authority to approve, under section 15 of the 1916 Act, any activity proscribed by section 205. As a result, the Commission ordered the respondent conferences to strike the proposed tariff provisions from their tariffs.

The *Associated Latin American Conferences* decision would appear to be controlling here. Certainly, we see no reason or basis either to distinguish or to retreat from our holding in that case.

FEC here is apparently of the view that section 205 has no application to its filing because that section "talks about the prevention, by agreement, of a carrier from serving an improved port 'at the same *rates* which it charges at the nearest port already served by it.' " According to the FEC, the rates quoted by the Conference in its tariff are the same regardless of port of loading and only the *charges* assessed by the terminal operator are to be passed on to the cargo interests. The FEC argues that it should not be held in any way responsible for any differences that may exist between port terminal charges established without the FEC's slightest participation, let alone power to control.

Alternatively, FEC claims that even assuming section 205 has application to this type of situation, the facts here can be distinguished from those obtaining in *Latin American Conferences*. In this connection, FEC points out that in *Latin American Conferences* the tariff established different levels of accessorial charges at Baltimore, Philadelphia and New York which, when added to uniform tackle-to-tackle rates, would produce different total conference charges at different ports, whereas here, the FEC is establishing a single tackle-to-tackle rate which will continue to be uniform in the conference loading range. According to the FEC, any additional charges are established by the various ports and the FEC will merely pass these charges on to the cargo.

A number of authorities[5] are cited by the FEC in support of its position that a conference "is entitled to divide its service and to charge one charge for the actual water transportation and to require the cargo interests to pay separately for the use of loading terminal facilities," and that a conference may pass along to the cargo interests charges for terminal facilities levied by terminal operators. *Terminal Rate Structure at Pacific Northwest Ports*, 5 F.M.B. 53, 56–57 (1956), decision on reargument in part 5 F.M.B. 326–327 (1957).

The FEC further argues that the:

"port interests which are opposing Rule 1 (a)(1) are, in effect, seeking Commission aid in eliminating port competition on the basis of efficiency and other advantages and disadvantages inherent in the geographical location of the ports and their facilities by forcing carriers to equalize the cost to the shipper regardless of the port used."

Finally, in responding to suggestions that FEC's proposed rule would result in double compensation, FEC states that Conference rates have not

[5] *Los Angeles By-Products Company v. Barber S.S. Lines, Inc.*, 2 U.S.M.C. 106 (1939); *J. G. Boswell Co. v. American Hawaiian S.S. Co.*, 2 U.S.M.C. 95, 102–105 (1939) and *Los Angeles Traffic Managers' Conference, Inc. v. Southern California Carloading Tariffs Bureau*, 3 F.M.B. 569, 578–80 (1951).

increased or remained unchanged since Rule 1(a)(1) was filed; rather, many of them have been "reduced drastically."

While FEC's argument regarding carrier tackle-to-tackle rates, terminal charges and their relationship to section 205 has some superficial appeal, it does not bear up under closer scrutiny. It is apparent that the overall assessment made by *the Conference* is not uniform, and because it is established through conference action falls squarely within the prohibitions of section 205. Historically, while the FEC has tackle-to-tackle tariff, it has absorbed any additional terminal charges assessed against the vessel. These additional charges, lawfully assessed against the vessel, are the responsibility of the carrier and presumably have been considered in establishing the level of tackle-to-tackle rates.[6] As a result, the shipper has been assessed a total rate which is uniform at all ports. The FEC's decision to discontinue absorbing these terminal charges and, instead, pass them on to the shipper, results in a new and additional charge *by the carrier* against the shipper. As long as the charges are, in the first instance, properly assessed against the carrier, any pass-through to the shipper results in a charge by the carrier and becomes a component part of the overall ocean freight paid for transportation by the shipper.

The FEC relies on *Terminal Rate Structure at Pacific Northwest Ports, supra,* for the proposition that carriers may assess cargo interests charges for terminal facilities. While the proposition is valid, the FEC misconstrues its application to the facts in this proceeding. A vessel may assess terminal charges against the cargo where the terminal operator has billed and collected such charges from the carrier, *provided the terminal charges are, in the first instance, incurred for the benefit of the cargo and are the responsibility of that party.* The difference here is that FEC's Rule 1(a)(1) would allow for the pass-through of terminal charges *lawfully assessed against the vessel.* When this pass-through is attempted within the framework of a conference agreement section 205 must be taken into consideration.

We do not argue with the right of a carrier to break out its tackle-to-tackle rates and accessorial charges. Indeed, section 18(b)(1) specifically provides for a separation of terminal or other charges under the control of the carrier or conference of carriers which is granted or allowed. Our concern is with the manner in which the FEC seeks to assess these terminal charges. Thus, a carrier could assess different accessorial charges at different ports, plus a uniform tackle-to-tackle rate provided it acts independently of other carriers. Similarly, the FEC could publish its Rule 1(a)(1) and avoid section 205 problems if each member line was given the

[6] Mr Gerald J. Flynn, Chairman of the FEC by affidavit states that Conference rates prior to the adoption of Rule 1(a)(1) were not intended to cover accessorial charges and that effectuation of Rule 1(a)(1) would not result in double compensation for accessorial charges. To what extent Rule 1(a)(1) would benefit the carrier beyond the level of benefits received we are unable to determine; however, it is difficult to believe that the FEC's existing rate structure does not incorporate some element of these accessorial charges.

right of independent action. In such situations the concerted action with which section 205 concerns itself would be lacking.

FEC's attempts to distinguish the facts presented by its tariff filing with those at issue in *Latin American Conferences* fall far short. The Associated Latin American Freight Conferences would have transferred carrier responsibility for terminal charges assessed against the vessel by establishing in the conference tariff specific wharfage and handling charges against the shipper or consignee. The only distinction in the FEC filing is that the FEC would not establish a specific charge at any port but merely pass through to the shipper the existing terminal charge at that port. While the form is different, the substance is not. The result is that the FEC's proposed rule would have the same effect as the tariff provisions found unlawful in *Latin American Conferences.*

Intervenors, North Atlantic Conferences (NAC), filing in support of the FEC, attack a number of prior Commission decisions addressing section 205. In addition, NAC contends that the Order to Show Cause does not frame any issues as to whether or not the FEC's relevant tariff rule is unlawful *per se.*

Specifically, with respect to section 15, NAC contends that the Order to Show Cause does not allege "that the tariff rule which is in issue is outside the scope of FEC's basic section 15 authority nor is there any allegation that FEC's approved section 15 agreement should be disapproved or modified." It is further contended that the Commission's past treatment of the "public interest" criteria and its application to section 205 are improper. NAC argues that the resolution of any section 15 issue necessarily involves matters of fact and cannot be determined as a matter of law because the initial determination of a section 205, Merchant Marine Act, 1936 violation is not a Shipping Act issue, but solely and exclusively a Merchant Marine Act issue. NAC contends that the Commission cannot base Shipping Act decisions solely upon its conclusion that other federal statutes have been violated by the conduct of persons subject to the Shipping Act. According to NAC, before there can be findings of unlawful conduct under section 205 there must be proof of required facts to support a violation.

NAC's challenge is directed at the Commission's decision in *Latin American Conferences* and prior cases which culminated in that decision. According to NAC, the Commission has strayed from the principles laid down in *Sun Maid Raisin Growers Association and SunLand Sales Cooperative Association v. Blue Star Line, Limited,* 2 U.S.M.C. 31 (1939) and *Encinal Terminals, et al. v. Pacific Westbound Conference,* 5 F.M.B. 316 (1957), both of which were decided by the "government agencies responsible for the administration of Section 205 of the Merchant Marine Act . . ."[7]

[7] The agencies involved were the United States Maritime Commission and the Federal Maritime Board, predecessors to the Federal Maritime Commission

The key to the *Sun Maid* and *Encinal* decisions, according to NAC, was the determination that there had to exist a "prevention" by the conferences involved which deprived individual members from serving particular federally improved ports regardless of the level of rates at these various ports. NAC argues that subsequent Commission decisions[8] have adopted a theory that:

> "substantial evidence of a prevention of service is not necessary to sustain a finding of a Section 205 violation. Such a finding may be sustained . . . by mere evidence of a difference in conference rates at applicable ports."

This allegedly erroneous rationale forms the basis of the *Latin American Conference* decision.

The arguments raised by NAC in connection with alleged procedural deficiencies in our Order to Show Cause are without merit. Tariff actions formulated by the FEC are taken pursuant to authority granted under the approved section 15 agreement. It follows therefore, that tariff matters found to be unlawful relate back to the issuing authority—the conference agreement—and failure to modify or delete an unlawful tariff provision can result in the disapproval of the underlying section 15 agreement. We see no procedural defect in not detailing the step-by-step procedure when the result should be obvious to all affected parties.

Similarly, NAC's challenge of the Commission's application of section 205 in connection with Shipping Act violations must be rejected. In *Pacific Coast European Conference—Rules 10 and 12,* 14 F.M.C. 266 (1971), the conference had maintained throughout the proceeding that the Commission had no authority to administer section 205 because administration of that section was not specifically delegated to the Commission under Reorganization Plan No. 7 in 1961. The Commission rejected that argument on the basis first enunciated in *Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12, 29 (1965), that "[T]he plan did not repeal section 205, and so long as it continues to be a part of the law of the land . . . [it] must be considered by the Commission in exercising its delegated functions.' " *Port of Stockton, supra,* p. 24.

The Federal District Court for the Northern District of California in *Sacramento-Yolo Port District v. Pacific Coast European Conference,* No. C–70–499 RFP (1970) took the same view of section 205 pointing out that:

> Even if the FMC does not have responsibility for section 205 it must take account of it in its deliberations . . . That which would contravene section 205 of the Merchant Marine Act would be grounds for disapproval under section 15 of the Shipping Act.[9]

On the basis of the foregoing, it is clear that where the facts indicate that a particular activity contravenes section 205 of the Merchant Marine

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[8] *Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12 (1965).*Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14,* 14 F.M.C. 266 (1971). *Sacramento-Yolo Port District v. Pacific Coast European Conference,* 15 F.M.C. 15 (1971)

[9] *See also Port of New York Authority v. Federal Maritime Commission,* 429 F.2d 663, 670 (6th Cir. 1970), *cert. den.* 401 U.S. 909 (1971) for a similar treatment of section 8 of the Merchant Marine Act of 1920, another provision of law not specifically administered by the Commission

Act of 1936, the Commission applying the "public interest" standard of section 15 of the Shipping Act, 1916 has no alternative but to disapprove such activity.

While contending on the one hand that the Commission has no authority to determine a section 205 violation, NAC also argues that the Commission has abandoned the "prevention" criteria established in earlier cases dealing with section 205. This argument ignores the fact that there is a "prevention" whenever a conference binds its members to a certain course of action. Here, the FEC members are bound by the provision in the FEC tariff. A Conference member cannot, absent the right of independent action, ignore Rule 1(a)(1) and continue to absorb terminal charges assessed against the vessel. This concerted action by the FEC prevents a member carrier from serving a particular port at the same rates which it charges at the nearest port already regularly served by it. As indicated previously, the FEC could have avoided any section 205 problems if the member lines had been given the option of absorbing the terminal charges.[10]

One final matter warrants discussion. NAC points out that while the FEC's disputed tariff rule is also directed to tolls, lighterage, cost of landing and "all other expenses beyond ship's tackle," the Commission's Order to Show Cause is directed only to the ". . . assessment of wharfage and other charges . . ." and does not discuss these other charges. NAC contends "that in view of this glaring ambiguity, the Commission should either confine its decision to the wharfage issue or publish a revised Order and afford further opportunity to be heard if it intends to determine the lawfulness of any other subject matter of FEC's relevant tariff . . ."

We see no reason to adopt either suggestion raised by NAC. Our Order put at issue Rule 1(a)(1) in its entirety and if the other charges encompassed within that rule are properly for the account of the vessel they are likewise included within the scope of our decision here.

Of the remaining intervenors, only the Board of Trustees of Galveston Wharves and the Board of Commissioners of the Port of New Orleans Traffic and Transportation Bureau, Inc., filed memoranda of law in support of the FEC's proposed tariff change. Their arguments generally follow those expressed by the FEC and accordingly, do not require further discussion. Similarly, the comments of Hearing Counsel and those ports opposed to implementation of Rule 1(a)(1) have been considered, and to the extent found meritorious, are reflected in our decision.

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

Accordingly, and for the reasons stated above, we find the proposed tariff rule relating to the assessment of wharfage and other charges against

[10] The FEC's apparent reluctance to allow such independent action indicates the possibility that certain member carriers might absorb This supports our view that the FEC's concerted action in adopting Rule 1(a)(1)is the "prevention" prohibited under section 205

the cargo at issue in this proceeding to be in contravention of section 205 of the Merchant Marine Act of 1936 and therefore contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916.

THEREFORE, IT IS ORDERED, That Rule 1(a)(1) relating to the assessment of wharfage and other accessorial charges filed by the Far East Conference be stricken from that Conference's tariff.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 481(I)

MITSUBISHI INTERNATIONAL CORP.

v.

U. S. LINES

NOTICE OF DETERMINATION NOT TO REVIEW

June 1, 1978

Notice is hereby given that the Commission on June 1, 1978, determined not to review the decision of the Settlement Officer in this proceeding served May 18, 1978.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 481(I)

MITSUBISHI INTERNATIONAL CORP.

v.

UNITED STATES LINES

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 refunds in the amount of $1,030.79 with respect to two shipments of fishing reels and parts, generically described and shipped as "fishing tackle," all of which were transported by United States Lines (U.S. Lines). According to the applicable tariffs[2], merchandise of this nature was to be assessed sums certain per kiloton or cubic meter, whichever yielded the transporting carrier the greater revenue, but at rates which were dependent upon the value of the particular items shipped. In all instances, fishing tackle valued at $1,000 per revenue ton or less was to be assessed a lower rate than that valued at more than $1,000 per revenue ton. Each Conference's tariff's Rule No. 8 requires shippers to submit commercial invoices to the carriers, and Rule No. 11 of each tariff explains how the FOB valuations are determined when necessary, as here,—either item by item or, in some instances by the total valuation declared in the invoice divided by the total revenue tonnage. Mitsubishi submitted item by item accountings in all instances, and in all instances U.S. Lines determined correctly that the appropriate basis of assessment was per cubic meter, but at the higher rates inasmuch as the fact that the value of some of the items shipped was less than $1,000 per revenue ton seems to have been overlooked.[3]

In its reply, U.S. Lines concedes that some adjustment is in order but disputes the amount. The Settlement Officer (S.O.) agrees with U.S.

[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] i e , those of the Trans-Pacific Freight Conference or Japan-Korea, Tariff No 35, FMC–6 and of the Japan-Korea/ Atlantic and Gulf Freight Conference, Tariff No 35, FMC–6.

[3] A violation by U.S. Lines of Section 18(b)(3) of the Shipping Act, 1916 is alleged by Mitsubishi

Lines but not to the extent that it would allow. In deciding as he has, the S.O. has, in all instances, verified the extensions of the measurements taken by the Japan Marine Surveyors & Sworn Measurers' Association[4] and has calculated the values per cubic meter of the various lots of cargoes itemized in the commercial invoices. Each claim will now be considered.

1. Claim MI-02:

This shipment went forward in the AMERICAN LEGION, Voy. 65E under U.S. Lines' Yokohama-San Francisco bill of lading (B/L) No. 631-3801 dated May 14, 1976. U.S. Lines determined that the shipment amounted to 52.295 cubic meters which, as overland common point cargo, it rated at $78 per measurement ton plus a 1½% currency adjustment charge (CAC). On this basis, total freight and charges amounted to $4,140.20.

The S.O. has determined that 12 of the 21 lots of cargo involved, totaling 41.080 cubic meters, were valued at less than $1,000 per measurement ton and should have been rated at $62 per ton plus 1½% CAC. Details are appended. The proper freight ($3,521.73) and charges ($51.33) amount to $3,472.06 or $668.14 less than that assessed Mitsubishi. Accordingly, a refund for this amount is in order. So ordered.

2. Claim M-03:

This shipment went forward in the AMERICAN ARCHER, Voy. 54E, under U.S. Lines' Yokohama-New York B/L No. 631-1 P/P dated April 15, 1976. U.S. Lines determined that the shipment amounted to 10.971 cubic meters which it rated at $93 per measurement ton plus a 1½% CAC. On this basis, total freight and charges amounted to $1,035.60.

The S.O. has determined that 5 of the 19 lots of cargo involved, totaling 7.063 cubic meters, were valued at less than $1,000 per measurement ton and should have been rated at $76 per ton plus 1½% CAC. The correct freight ($900.23) and charges ($13.50) amount to $913.73 or $121.87 less than that assessed Mitsubishi. Accordingly, a refund for this amount is in order.

So ordered.

(S) DONALD F. NORRIS,
Settlement Officer.

[4] According to the minutes of the Conferences meetings this organization is employed by the Conferences to perform such services.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 572

COLLIER CARBON & CHEMICAL CORP.

v.

SEA-LAND SERVICE, INC.

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

June 6, 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 June 6, 1978.

IT IS ORDERED, That applicant is authorized to waive collection of $653.50 of the charges previously assessed Collier Carbon & Chemical 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 572 that effective February 1, 1978, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 1, 1978 through February 26, 1978, the rate on 'Naphthalene' to Marseilles and Genoa, Minimum 39,000 lbs. per tank container is $134.25 W, 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. 572

COLLIER CARBON& CHEMICAL CORP.

v.

SEA-LANDSERVICE, INC.

Adopted June 6, 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 four tanks of napthalene, that moved from Elizabeth, New Jersey to Marseilles, France under Sea-Land bill of lading dated February 22, 1978. The application was filed April 24, 1978.

The subject moved under Sea-Land Tariff No. 232, FMC–104, 5th revised page 6, item 170, effective February 1, 1978, under the rate for "Napthalene: To Marseilles and Genoa, Minimum 39,000 lbs. per trailer." The aggregate weight of the shipment was 160,680 pounds. The rate applicable at time of shipment was $6.40 per hundred pounds. The rate sought to be applied is $6 per hundred pounds (W: $134.25 per ton of 2240 pounds) pursuant to Sea-Land Tariff No. 232, FMC–104, 6th revised page 6, item 155, effective February 27, 1978.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $10,283.52. Aggregate freight charges at the rate sought to be applied amount to $9,630.02. The difference sought to be waived is $653.50. The Applicant is not aware of any other shipment of 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:

[1] This decision became the decision of the Commission June 6, 1978.
[2] 46 U.S.C. 817 as amended

(4) On December 12, 1977 Mr. Williams of Collier Carbon wrote to Mr. Szewczyk requesting that the rate on napthalene in tanks ($6.00 per 100 lbs) item 155 Sea-Land Tariff 232 FMC—104 which was scheduled to be increased to $6.40 per 100 lbs. effective February 2, 1978 be extended through June 30, 1978.

On January 12, 1978 Mr. Szewczyk wrote to Mr. Williams of Collier Carbon and advised that the rate of $6.00 per 100 lbs. (W 134.25 per 2,240 lbs) converted to a per ton rate would be extended through June 30, 1978. A publication request was processed to update Sea-Land Tariff 232 FMC—104 but through an oversight the filing was not made effective until February 27, 1978.

A shipment moved forward on February 23, 1978 and was correctly rated at $6.40 per 100 lbs. Shipper is claiming that due to a Sea-Land administrative error the correct rate (W 134.35) was not filed on time and due to this error he was overcharged $653.50.

It should be noted that although the application refers alternately to both the Collier Carbon & Chemical Corporation and the Union Oil Company of California as if they were separate parties involved in the negotiation of the freight rate and the ultimate payment of the freight charges, supplemental correspondence with both Sea-Land and the shipper has established that the Collier Carbon & Chemical Corporation (Collier) was a wholly-owned subsidiary of the Union Oil Company of California and on February 1, 1978 Collier was merged into the Union Oil Company of California, and became the Union Chemicals Division of the Union Oil Company of California.

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.

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 intended earlier effective date on the special rate for napthalene, which would have continued the lower rate as had been promised the shipper.

[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).

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 Corp. to waive collection of a portion of the freight charges, specifically the amount of $653.50. An appropriate notice will be published in Sea-Land's tariff.

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

WASHINGTON, D.C.,
May 11, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–17

SEA-LAND SERVICE, INC. AND GULF PUERTO RICO LINES, INC.—
PROPOSED RULES ON CONTAINERS

DOCKET NO. 74–40

PUERTO RICO MARITIME SHIPPING AUTHORITY—PROPOSED ILA RULES
ON CONTAINERS

ORDER ON RECONSIDERATION

June 14, 1978

These proceedings were instituted to determine the legality of the so-called "50-mile container rules" proposed by Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Ltd., and subsequently, as successor to these two carriers, by Puerto Rico Maritime Shipping Authority (PRMSA). After extensive hearings and the filing of briefs, Administrative Law Judge Charles E. Morgan issued an Initial Decision finding the rules unlawful under the Shipping Act, 1916. Exceptions to the Initial Decision were filed, as were replies to such exceptions. Oral argument was heard and the matter came before the Commission for decision.[1]

By Order dated August 10, 1977, the Commission discontinued these consolidated proceedings as moot on the basis of a ruling by the Court of Appeals for the Second Circuit,[2] affirming the National Labor Relations Board decision finding the collective bargaining provisions underlying the 50-mile rules unlawful under the National Labor Relations Act, and on the basis of PRMSA's "effective withdrawal" of the allegedly unlawful rules on containers.

Following issuance of the Order of Discontinuance, petitions for reconsideration were filed. On the basis of those petitions, the Commission issued its Order Granting Reconsideration on November 22, 1977.

[1] For a more comprehensive discussion of the early proceedings in this case, see our Report and Order Adopting Initial Decision issued this date.

[2] *International Longshoremen's Association v. N L R B.*, 537 F.2d 706 (1976), *cert. den.* 429 U.S. 1040 (1977), *rehearing denied* 51 L. Ed. 2d 589.

Replies to the petitions have now been filed by Hearing Counsel and PRMSA.

PETITIONS

Petitions for reconsideration of the Commission's discontinuance of this proceeding were filed by National Customs Brokers & Forwarders Association of America, Inc., New York Foreign Freight Forwarders & Brokers Association, Inc., and Consolidated Forwarders Intermodal Corp. (filing a joint petition); International Association of NVOCC's; and Hearing Counsel.

The petition of National Customs Brokers & Forwarders Association of America, Inc. (National), *et al.*, alleged that the Commission erred in holding that the "Note" in the PRMSA tariff dated February 29, 1976 was an "effective withdrawal" of the proposed 50-mile rules which vitiated any need for a Commission determination of the rules' validity under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933.[3] In the 10-page argument in support of its petition, National raised numerous issues.

National first posited that, to have reached the conclusion that it did, this Commission must have taken "official notice" of certain extra-record facts—an action alleged to be error for numerous reasons. First, in order to be a fact susceptible to "official notice", it must, indeed, be fact under both our rules and those of the Federal Courts (see, 46 C.F.R. Section 502.226(a) and Federal Rules of Evidence, Rule 201(b), 28 U.S.C.A.). National pointed out that under the Federal Rules an adjudicative fact of which judicial notice may be taken:

> . . .must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. (Rule 201(b), *supra*.)

Citing the notes from the Advisory Committee on Proposed Rules, accompanying this rule, National claimed that the essence of this rule is the requirement that the fact be one of "a high degree of indisputability." National claimed that the tariff note on which the Commission based its decision to discontinue the proceeding is merely advice from the International Longshoremen's Association (ILA) to the New York Shipping Association which in turn was passed on the PRMSA and which ultimately was filed in the tariff. As such, that note was allegedly nothing more or less than ". . . a triple hearsay statement . . . (which) cannot rise to the dignity of a fact not subject to reasonable dispute. . . ."

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[3] The tariff note, in pertinent part provided

> . . the New York Shipping Association . . has informed PRMSA that the NYSA "have been advised by the International Longshoremen's Association, AFL–CIO that they will take no action against the NYSA or its members requiring them to enforce such rule "
>
> Therefore, the Rule set forth herein shall not be enforced until a determination of the validity of the Rule is made by the proper court of law or further advice is given from the parties of the Collective Bargaining Agreement.

National further argued that the tariff note deals only with the Port of New York while PRMSA serves other ports as well and that there is no basis upon which the Commission could conclude from the tariff note that the proposed rules will not be enforced at those other ports. As a result, National characterized the Commission's conclusion that the rules are not being enforced at those other ports. As a result, National characterized the Commission's conclusion that the rules are not being enforced at other ports as pure speculation.

National also challenged the Commission's determination that the rules at issue have been mooted. Citing case law, National took the position that even if PRMSA had actually withdrawn its rule, the Commission could not consider the issues raised by the rules to be moot, because to do so would mean that:

> An ocean carrier can adopt a practice by tariff rule, gain its benefits for several years, put injured parties to the trouble and great expense of a lengthy docket and then, as the proceeding is drawing to a close, deny the parties the opportunity for a decision by withdrawing the tariff rule.[4]

National concluded that if this Commission were to permit this course of action, we would be sanctioning an abuse of our processes and an abuse of the Shipping Act, 1916.

Finally, National submitted that all segments of the export-import commerce of the United States would benefit from a determination on the merits of the validity of the proposed rules under the Shipping Act, 1916. National explained:

> It is always possible that the ILA may in the future claim that the NLRB decision dealt only with that portion of the rules which denied containers to the NVOCC, and then only in the Puerto Rican trade and that the NLRB did not treat other aspects of the rules relating to exporters and importers. Also, it is always possible that another union, not party to the litigation before the NLRB, may adopt these rules in whole or in part.

As a result, National alleged that a determination of the lawfulness of the proposed rule under the Shipping Act is a necessary determination which would go beyond the limited issue posed before the NLRB—*i.e.*, whether the rules were or were not an unlawful secondary boycott prohibited by the National Labor Relations Act.

The International Association of NVOCC's (NVO's) alleged basic error by the Commission in our conclusion that the rules on containers are not being enforced because of the NLRB decision (upheld by the courts) finding them invalid under the National Labor Relations Act. The NVO's advised that the ILA and the ocean carriers including PRMSA have construed these rulings against the proposed rules to apply only to New York. The NVO's stated:

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[4] Cases cited by National include: *Southern Pacific Terminal Co v I.C.C. et al.*, 219 U.S 498; and *Walling v Haile Gold Lines*, 136 F2d 102 (and cases cited therein)

Indeed, as recently as August 16, 1977 six days *after* the Commission's order of discontinuance herein, an article appeared in the Journal of Commerce reporting that the NLRB found the same container rules involved herein unlawful under the National Labor Relations Act at the Ports of Baltimore and Hampton Roads. The rules had been in force up to March 17, 1977 at those ports until an injunction was obtained against those rules. . . .

The NVO's also averred that two of their number were informed "during the early months of 1976" that the NLRB and court decisions applied only to New York and that the rules on containers were in effect in Philadelphia. In fact, the NVO's claim, PRMSA itself refused to furnish containers in the Port of Philadelphia subsequent to the date of the tariff note on which the Commission relied.

The NVO's also urged that we reach a decision on the merits of the rules at issue. The NVO's submitted that the parties to these proceedings and the shipping public deserve a decision by the Commission on the merits of the legality of these rules. This would also allegedly eliminate the need to litigate and relitigate the issues involved each time a party proposes to implement such rules.

Hearing Counsel's Petition for Reconsideration argued that while it may be presumed that PRMSA's tariffs rules were not enforced subsequent to its tariff note, absent any record evidence, the events do not dispose of the need to address the issue of lawfulness of PRMSA's operations prior to the effective date of the note. Hearing Counsel, accordingly, requested Commission resolution on the merits if for no other reason than to determine whether or not PRMSA's enforcement of the tariff rules for some 16 months violated the Shipping Act. Finally, Hearing Counsel urged that this Commission:

. .weigh whether dismissal of this case is consistent with its policy of enforcing the shipping statutes and whether dismissal does not seriously damage the viability and credibility of its enforcement program in the eyes of the shipping industry and the shipping public.

REPLIES TO PETITIONS

Only PRMSA and Hearing Counsel filed Replies to the Petitions described above. PRMSA's Reply cited two grounds in opposition to reconsideration of this proceeding. First, PRMSA alleged that there is no unfinished business remaining in these dockets because, by notice of cancellation published in its tariff and effective November 6, 1977, PRMSA cancelled its proposed rules.[5] Additionally, PRMSA denied that there should be considered in this proceeding the issue of possible sanctions against it for enforcement of these rules at any time prior to the cancellation. PRMSA alleged that this issue had never been raised within the proceeding until the petition for reconsideration filed by Hearing Counsel, and urges the Commission to maintain this proceeding within its

[5] It is to be understood that this notice is not the same as the note at issue in the requests for reconsideration

original limitations. If the Commission does so, PRMSA claims, there remains nothing further to be determined in this docket.

Second, PRMSA alleges that no useful purpose would be served by the Commission deciding to proceed further in these dockets. PRMSA urges that the rules at issue in its tariff have been withdrawn; the courts have ruled on the underlying labor agreement provisions and found them unlawful; and PRMSA has acted promptly by appropriate court action to frustrate ILA attempts to enforce the rules. This being so, PRMSA claims that the Commission need not address the merits of the rules further.

PRMSA claims this is not a rulemaking proceeding of general applicability, but is, rather, an inquiry into the lawfulness of tariff rules which are no longer in the tariff. As a result, PRMSA urges that no further action by the Commission is required, and that any such action would simply be pointless.

Hearing Counsel's Reply urges that the Commission not embroil itself in post-record factual questions requiring a reopening of the proceeding. The Reply discusses certain of the procedural difficulties which Hearing Counsel see arising should the Commission determine to delve into post-record considerations. It is Hearing Counsel's position that consideration of such post-record information is unnecessary to deciding the case on the merits and should be avoided.

Hearing Counsel urge avoidance of post-record issues in light of its view of the original objective of the proceeding which they describe as simply a determination of a carrier's duties and obligations under the Shipping Act. Hearing Counsel state:

> If, as we are inclined to believe, . . . the post-trial matters are factual developments which are much more meaningful to understanding the post-record situation as a matter of labor law or policy, or the subject carrier's status as an employer of union labor, then further development of the post-record matters would appear to be unnecessary to a decision on the basis of the shipping statutes. Moreover, since a speedy resolution of the shipping statute questions would eliminate any uncertainty as to the carrier's obligations and duties under those statutes, it should lessen any conflicts that PRMSA or any carrier may have as a contractual matter under its labor contracts.

Thus, irrespective of the status of any post-record information, Hearing Counsel submit that those issues of carrier responsibility and obligation may be readily determined on the record already available to, and placed before, the Commission. It is Hearing Counsel's view that no consideration of post-record facts will sharpen any of those issues.

Discussion and Conclusions

We have reviewed each petition any reply submitted to us. On the basis of issues raised therein we have reconsidered our decision to discontinue these proceedings and have determined that we must vacate our previous order of discontinuance and enter a decision on the merits of the controversy at issue in this proceeding.

While numerous issues of varying merit were raised, we are of the

opinion that the reasoning urged upon us by National is sufficient in its own right to warrant the action taken here. We find persuasive the cases cited by National in support of its claim that the issues regarding the validity of the PRMSA rules are not moot. We find both the principle of law and the reasoning of National compelling. Further, no party opposing the position of National has pursuaded us to adopt a contrary view.

It is our determination, then, that the public and the parties deserve a ruling by this Commission on the merits of these cases and that law and policy require that we provide such a decision. This we are doing by separate Report and Order, served this date.

THEREFORE, IT IS ORDERED, That our Order of Discontinuance of August 10, 1977 is hereby vacated.

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 555

COMMERCIAL METALS COMPANY

v.

SEA-LAND SERVICE, INC.

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

June 14, 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 June 14, 1978.

It is Ordered, That applicant is authorized to waive collection of $5,820.00 of the charges previously assessed Commercial Metals Company.

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. 555 that effective August 8, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period August 8, 1977 through August 29, 1977, the rate on 'Scrap, viz. Stainless Steel', Minimum 20 WT for container, is $76 W, 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 thirty (30) days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the waiver and submit a copy of the published tariff notice.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 555

COMMERCIAL METALS COMPANY

v.

SEA-LAND SERVICE, INC.

Adopted June 14, 1978

Permission to waive collection of overcharges granted.

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

Sea-Land seeks permission to waive collection of a portion of the freight charges on a shipment of stainless steel scrap carried aboard the Consumer Voyage Jacksonville, Florida, to Rotterdam. The scrap moved under freight bill 971–752946.[2] It weighed 89,600 lbs. and measured 1500 cu. ft. At the time of shipment the applicable rate was $221.50 W/M 2240 lbs. or 40 cu. ft.[3] The rate sought to be applied is $76.00 W (2240 lbs.) minimum 44,800 lbs. per container.[4] The aggregate freight charges under the $221.50 rate would have been $8.993.60. The aggregate freight charges under the $76.00 rate would be $3,073.60—$3,040.00 ocean freight plus $33.60 charge at Tampa.[5] Sea-Land actually collected freight charges of $3.073.60 and seeks to waive collection of $5,820.00.

The circumstances set forth by Sea-Land as justifying the refund are:

ON MAY 27, 1977, SEA-LAND'S SALES PERSONNEL REQUESTED SEA-LAND PRICING PERSONNEL TO PROCEED WITH THE ESTABLISHING OF A NEW RATE FOR STAINLESS STEEL SCRAP FROM TAMPA TO CONTINENTAL EUROPE IN SEA-LAND TARIFF 259 FMC 133 ICC 104 WHICH WAS CONFIRMED

[1] This decision became the decision of the Commission June 14, 1978

[2] The shipment was "Sea-Land minibridge Tampa, Florida-Jacksonville, Fla. Thence water to Rotterdam."

[3] A short form ocean bill of lading was also issued by Sea-Land.

[4] Sea-Land Tariff No. 259 FMC No. 133, ICC No 104, Page 52, 7th Revised Item No. 90

[5] Sea-Land Tariff No. 259 FMC No. 133, ICC No. 104 Page 58, 10th Revised Item 545 as reinstated by Sea-Land proposal No GNF 2292 and Page 58, 9th Revised Item 545, erroneously showing expiration date of 8/7 77.

BACK TO SALES WITH A TELETYPE MESSAGE TO BE VALID THROUGH 8/17/77, COPY OF WHICH WAS GIVEN TO MR. WILLIAM BETCHER OF CLAIMANT ON 6/13/77—(SEE ATTACHMENT NO. 1). HOWEVER, ACTUAL PUBLISHING REQUEST SENT TO SEA-LAND'S TARIFF PUBLICATION DEPT. INADVERTENTLY SHOWED AN EXPIRATION DATE OF 8/17/77 (ATTACHMENT NO. 2). ACTUAL PRINTED PAGE, 6TH REVISED PAGE 58 SHOWED DATE OF 8/17/77 (ATTACHMENT NO. 3). CONSEQUENTLY, WHEN A SHIPMENT OF TWO CONTAINERS WAS OFFERED TO SEA-LAND LEAVING TAMPA'S RAIL TERMINAL ON 8/16/77 (ATTACHMENT NO. 4), SEA-LAND'S RATING PERSONNEL HAD NO APPLICABLE RATE OTHER THAN CARGO NOS PER 7TH REVISED PAGE 52 (ATTACHMENT NO. 5). CLAIMANT NOT BEING AWARE OF RATE EXPIRING ALREADY ON 8/7/77 INSTEAD OF 8/17/77 PAID FOR SHIPMENT ON BASIS OF RATE SEA-LAND COMMITTED TO THEM (ATTACHMENT NO. 6). RESPONDENT REQUEST PERMISSION TO WAIVE COLLECTION OF PART OF FREIGHT CHARGES ON BASIS OF CLERICAL ERROR IN PUBLISHING EXPIRATION DATE DIFFERENT THAN THAT ADVISED CLAIMANT.

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.[6]

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 an administrative nature, in publishing expiration date different than that advised claimant.
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 the freight charges, Sea-Land Service, Inc., 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.

[6] 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)

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $5,820.00. An appropriate notice will be published in Sea-Land's tariff.

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

WASHINGTON, D.C.,
May 22, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 567

KUEHNE & NAGEL INC.

v.

LYKES BROTHERS STEAMSHIP CO., INC.

NOTICE OF ADOPTION OF INITIAL DECISION

June 14, 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 June 14, 1978. Accordingly, Lykes Brothers Steamship Co., Inc. is authorized to modify charges assessed on the shipment in question and is ordered to publish, file and serve the tariff notice required and report to the Commission regarding compliance in the time and manner required by the Administrative Law Judge.

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 567

KUEHNE & NAGEL INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

Adopted June 14, 1978

Application granted.

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

By application, received for filing in the Office of the Secretary of the Commission on March 8, 1978, respondent, Lykes Bros. Steamship Co., Inc. (Lykes), seeks permission to waive a portion of the freight charges on a shipment of air conditioners from Green Bay, Wisconsin, to Oran, Algeria. The shipment moved under an "on board" bill of lading issued at New York, N.Y., on September 10, 1977. The complainant is Kuehne & Nagel Inc., as agent for Beton-Und Monierbow AG (Beton). Beton is shown as the shipper on the bill of lading. Kuehne & Nagel is a freight forwarder.[2] The complainant paid freight charges amounting to $2,793.23 on February 27, 1978. The amount sought to be waived is $1,111.69.

The application states that the rate applicable at the time of shipment was $125.00 W/M,[3] plus heavy lift charges and seaway tolls. The rate sought to be applied is $86.50 W/M plus the aforesaid heavy lift charges and seaway tolls.

The application goes on to say that respondent is not aware of any other shipments of the same or similar commodity which moved via respondent during approximately the same period of time at the rate applicable at the time of shipment. Respondent adds that it does not believe any discrimination among shippers will result from the waiver. It also agrees to publication of a notice or to take such action as the Commission may direct if permission to waive is granted.

[1] This decision became the decision of the Commission June 14, 1978

[2] License No. F.M.C. 1162

[3] W/M here means weight (2240 pounds) or measurement (40 cubic feet), whichever yields the greater revenue

The statement of facts made by the parties in support of the application, as pertinent, is as follows:

In August 1977, Lykes Bros. Steamship Co., Inc. negotiated with Kuehne & Nagel Inc. of New York, as agents for Beton—UND Monierbou AG, an ocean rate of $86.50 W/M plus heavy lifts and Seaway Tolls covering a shipment of 1155 cft. of Air Conditioners to move on the S. S. Marjorie Lykes Position 7018 Voyage 61 from Green Bay to Oran. . . .

Cargo was loaded on September 10, 1977, Bill of Lading (B/L) dated accordingly and cargo rated at $125.00 W/M, the applicable tariff rate at time of shipment. . . . however shipper paid ocean freight of *$2,793.33* basis the negotiated rate. . . .

Due to a clerical error, Lykes Bros. Steamship Co., Inc. inadvertently failed to file the agreed rate covering the above shipment and this rate was not filed in the American Great Lakes/Mediterranean Eastbound Freight Tariff No. 1 (FMC–88) until September 20, 1977 for a 30 day period. . . . Therefore at the time shipment was effected, the only tariff rate applicable was $125.00 W/M covering Machinery, N.O.S. . . .

The Machinery, N.O.S. rate of $125.00 W/M plus heavy lifts and Seaway Tolls would produce *$3,908.89* [should be $3,905.02] ocean freight representing an increase in costs of *$1,111.69* [should be $1,112.69] to the shipper greater than the negotiated rate of $86.50 W/M plus heavy lift and Seaway Tolls. Complainant has remitted *$2,793.33* as payment for the above referenced shipment which represents freight charges at the agreed upon $86.50 W/M plus heavy lifts and Seaway Tolls. This leaves the above mentioned *$1,111.69* as the amount uncollected for which respondent is requesting permission to waive collection. . . .

Respondent has filed the requested $86.50 W/M rate plus heavy lifts and Seaway Tolls . . . effective March 2, 1978. . . .

At my request, the parties submitted supplemental affidavits and documentation which establish the following:

(1) On an unspecified date in August 1977, when the cargo was booked, W. E. Wegmann, Manager-Great Lakes Traffic Eastbound, Lykes, and Wolfgang Emden of Kuehne & Nagel, negotiated the $86.50 W/M rate to cover the shipment of air conditioners from the consignor, Beton, originating at Green Bay, to the consignee at Oran. Mr. Wegmann inadvertently failed to file the agreed upon lower rate.

(2) Under the express terms of the tariff,[4] the cargo interest rather than the carrier paid stevedoring costs and other costs involved in the discharge of the cargo.

(3) The heavy lift charges and the seaway tolls remained constant irrespective of whether the shipment was rated at $86.50 or $125.00. Heavy lift charges inadvertently were incorrectly billed as $286.84. The proper charge is $295.97.[5] Seaway tolls were $8.80.[6]

(4) The shipment was delivered to Lykes at Green Bay at various times during the period from August 29, 1977 through September 9, 1977. The on board bill of lading, which also was the rated bill of lading, was the only bill of lading issued by Lykes for the shipment. The on board bill of

[4] See Rule 4(n) of Lykes' American Great Lakes/Mediterranean Freight Tariff No 1 (FMC–88), 1st Rev. Page 5D, effective April 21, 1977, providing that all rates to Algerian ports are on a Free Out (F O.) basis. See also, 29th Rev. Page 40–A1 and 32nd Rev. Page 40 showing that the applicable rate and the rate sought to be applied were on an F.O. basis

[5] See Rule 28, Heavy Lift Scale, at 1st Rev. Page 18.

[6] See Rule 31, St Lawrence Seaway Cargo Tolls, at original Page 27.

lading was issued at New York as a service to the cargo interest and accurately reflects the date the cargo was loaded aboard the vessel.

(5) When Lykes realized that it had failed to file the agreed air conditioner rate, it filed 32nd Rev. Page 40, effective September 20, 1977, showing an $86.50 rate through October 19, 1977 and showing a $120.25 rate effective October 20, 1977. In the erroneous belief that this was not the requisite filing of the conforming tariff under the second proviso of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3) (see text of statute, *infra*), Lykes filed another conforming tariff showing the $86.50 rate on March 2, 1978.[7]

(6) Kuehne & Nagel billed Beton at the rate of $86.50 plus heavy lift charges and seaway tolls for the shipment.

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).[8] 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.

An analysis of the application, the documents attached thereto and the supplemental affidavits and documents attached thereto shows that the application should be granted.

I find that it was an "error due to inadvertence in failing to file a new tariff," of the type which the Congress had in mind when it enacted

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[7] 41st Rev. Page 40

[8] 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)

section 18(b)(3),[9] which occurred when Lykes mistakenly did not file the $86.50 rate as it had agreed to do. Unquestionably, Lykes, per an executive officer authorized to cause negotiated rates to be published in the tariff, formed the intent prior to the shipment to publish and file the $86.50 rate for air conditioners, in lieu of the existing Machinery, N.O.S. rate of $125.00.

I find that the application was filed within one hundred and eighty days from the date of shipment[10] and that prior to filing the application Lykes

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[9] The following illustration of a remediable situation is provided in the legislative history ofthe above quoted four provisos of section 18(b)(3), House Report No. 920 (90th Cong., 1st Sess., November 14, 1967), pp. 3–4:

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 rate.

[10] A period of 179 days elapsed between the date the air conditioners were loaded aboard the vessel (the same day the on board bill of lading was issued) and the date the application was received for filing This satisfies the requirements of the fourth proviso of section 18(b)(3) under Commission precedents.

The fourth proviso has been construed to mean that the Commission lacks jurisdiction to entertain the application unless it is filed within 180 days from the "date of shipment." *U.S.D.A v Waterman Steamship Corporation*, Initial Decision (adopted May 5, 1978), at p. 5. In computing the time period, the count begins on the first day after the "date of shipment." *Id.*, at p. 6. The count ends on the date of filing the application. Filing takes place on the day the application is deposited in the mail or the day the application is received by the Commission, if filed by hand. *Ghisselli Bros. v. Micronesia Interocean Line, Inc.*, 13 F.M C. 179, 182 (1970); Notice of Proposed Rulemaking, Rules of Practice and Procedure, Simplification of the Rules Governing Special Docket Applications for Permission to Refund or Waive Portions of Freight Charges in the Foreign Commerce, 43 F.R. 18572. Thus, because it is tied to a discrete event, the date the count ends is certain and uniformly applies to all Special Docket proceedings This is not yet true of the date the count begins as the Commission has said in its Notice of Proposed Rulemaking, *supra*.

Because the count begins the day after "date of shipment," identifying the "date of shipment" is critical in determining approvability of Special Docket applications. The term is not defined in section 18(b)(3) or in the Shipping Act, 1916. The legislative history of the four provisos neither "contains a definition [n]or gives any explanation of what Congress meant by date of shipment." *Hermann Ludwig, Inc v. Waterman Steamship Corporation*, Report of the Commission, served May 8, 1978, at p. 4

The term "date of shipment" is not self-defining because the word "shipment" is ambiguous In various forums, "shipment" has been construed to mean such diametrically opposite things as delivery of the goods to the carrier and delivery of the goods by the carrier. There are still other interpretations which would define shipment in terms of events or actions occurring between the dates of delivery to or delivery by the carrier. See *Black's Law Dictionary*, 4th Ed., p. 1546, Words and Phrases (Permanent Edition, Volume 39), Shipment, p. 264. *et seq.*

After enactment of Public Law 90–298, containing the four provisos, the problem of establishing "date of shipment" first became crucial in *Ghiselli Bros., supra*. The rationale of the Initial Decision (adopted on this point by the Commission, but without comment) treated "date of shipment" as synonymous with "date the transportation begins," adding, "Transportation may be said to begin either when the merchandise is placed in the possession of a carrier or when the merchandise actually starts in the course of transportation," citing several cases, including *Coe v. Errol*, 116 U.S. 517, 525 (1886) and *Penna. R. Co. v. P. U. Comm'n*, 298 U.S. 170, 175 (1936) 13 F.M.C. 187. Assuming that the two terms (date of shipment and date the transportation begins) are synonymous (although there is nothing to support that theory in the Initial Decision), the Initial Decision misreads the rules of the two cited cases *Coe v. Errol* involved the validity of state taxation on merchandise in interstate commerce and for that purpose treated transportation as beginning either when the merchandise was placed with the carrier or when it actually started in the course of transportation. However, as Justice Cardozo reasoned in the second cited case, construing the applicability of the Interstate Commerce Act, 49 U.S C 1, *et seq*., dealing with common carriage and common carriers, just as the Shipping Act, 1916 does, there is a distinction between commerce and transportation by common carriers subject to regulation. He said, "Not all commerce is transportation, and not all transportation is by common carriers by rail. . For many purposes, as for example in testing the validity of state taxation, merchandise is deemed to be in interstate commerce when it has started on its journey, though still in the possession of consignor or seller. . . . Not so, however, in determining the application of this Act. *Transportation begins for that purpose, if not for others, when the merchandise has been placed in the possession of a carrier*" (*Emphasis supplied.*) *298 U.S. 174–175*.

In Ghiselli, the merchandise was delivered to the possession of the carrier on November 5, 1968, and the carrier issued an on board bill of lading on November 8, 1968. The application was given the benefit of the later date. As a result, *Ghiselli* has often been cited for the precedent and settled proposition that the date of issuance of the on board bill of lading is the "date of shipment" for the purpose of the fourth proviso See, e g , *Ludwig v Waterman, supra*, pp. 2–3, 3–4. In that case, the Commission explained that limiting "date of shipment" to mean the date of delivery of the cargo to the carrier would defeat the remedial legislative intent without serving any regulatory purpose. *Id*., pp 4–5. However, because the carrier could not locate the on board bills of lading, but maintained that they were issued the

filed a new tariff with the Commission setting forth a rate on which the waiver would be based.[11] I find, further, that Lykes has agreed to publish an appropriate notice in its tariff and is willing to take such other steps as the Commission may require to give notice of the rate on which waiver would be based.

Under the safeguards provided in the order, below, I find that the waiver will not result in discrimination among shippers and that additional refunds will be made with respect to other shipments of the same or similar commodities made during the same period of time, i.e., during the period from the approximate date in August 1977 when the negotiated rate was agreed upon to the date when the first conforming tariff was filed.

Accordingly the application to waive collection of a portion of freight charges is granted. It is ordered:

1. Lykes shall waive collection of freight charges in the amount of $1,112.69 due it from Benton in connection with a shipment of air conditioners under a bill of lading issued September 10, 1977. However, Lykes shall collect $9.13 (the amount of the inadvertent heavy lift undercharges) from Beton.

2. Lykes shall publish and file the following notice at the appropriate pages[12] in its tariff:

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same day the merchandise was stowed aboard the vessel, the Commission authorized relief upon proof that the goods were placed aboard ship on the date alleged

It would appear then, that under the teaching of *Ludwig v. Waterman*, the latest of two, or possibly three, dates may be viewed as the reference point for "date of shipment"—(a) the date of delivery to the carrier, (b) the date of the on board bill of lading, or (c) the date of loading. But that case is susceptible of being construed to mean that the Commission equated the date of loading to be synonymous with the date of issuance of the on board bill of lading. However it is not necessarily true in all instances that an on board bill of lading is issued on the same day as loading takes place. See, *U.S.D.A. v. Waterman*, *supra* (Initial Decision) p. 9, where an on board bill of lading was issued at least 9, and perhaps as many as 17, days after loading, also, see *Miles Metal Corporation v. M.S. Havjo*, 494 F.2d 563 (2 Cir. 1974), in which an on board bill of lading was issued without any evidence that the merchandise was even placed on board and in which the court held that an on board bill of lading (also known as a "shipped" bill of lading, see 46 U.S.C. 1303(7)) is not *prima facie* evidence of shipment. See, also, Gilmore and Black, *The Law of Admiralty* (Second Ed.) at 522–523 for a discussion indicating the general lack of conclusiveness and irrelevancy of an on board bill of lading as a shipping document. Manifestly, an on board bill of lading is not indicative of the discrete event of loading the merchandise aboard a vessel.

The Commission recognizes that "there is as yet no clear definition of the term 'date of shipment.'" Notice of Proposed Rulemaking, *supra*. The proposed rule seeks to fix the definition of that term to a discrete event so that fair and uniform treatment will be afforded to all Special Docket applications. Initially, the rule would define the term "to mean the date of issuance of the rated bill of lading, [another] point of reference which has often been employed in previous cases." *Id.*, 43 F.R. at 18573. But the Commission has invited comments regarding other standards deemed more appropriate and fair. *Id.*

Thus, the Commission has evidenced its concern about continuing to rely on ad hoc determinations of what "date of shipment" means. It has embarked on a procedure to rectify the problem because "the Commission believes that it is necessary to define [this] statutory [term] so that prospective applicants will not have to function in a state of uncertainty and to insure that applications which qualify in other respects are treated equally." *Id.*

[11] The filing of the first conforming tariff after transportation commenced satisfied the requirements of the second proviso. Any tariff filing setting forth a rate on which refund or waiver would be based, prior to filing the application suffices. See, *Henry J. Daly, Inc. v. Pacific Westbound Conference*, Initial Decision (adopted January 16, 1978), p. 6, n. 9.

[12] The notice shall appear at those tariff pages where the commodities "Air Conditioners" and "Machinery, N.O.S." are shown.

Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 567, that effective August 1, 1977, and continuing through September 19, 1977, inclusive, the rate on Air Conditioners (which during that period of time had been rated as Machinery, N.O.S.) from United States Great Lakes and St. Lawrence River Ports to Oran, Algeria, for purposes of refunds or waiver of freight charges is $86.50 W/M–FO, such rate subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

3. Lykes shall canvass its records for the period August 1, 1977 through September 19, 1977, to ascertain whether there were any other shipments of Air Conditioners from United States Great Lakes and St. Lawrence River Ports to Oran and shall mail copies of the tariff notices to any persons making such shipments during that period of time.

4. Waiver of the charges shall be effectuated within 30 days of service of notice by the Commission authorizing such waiver and Lykes shall within five days thereafter (a) notify the Commission of the date and manner of effectuation of the waiver, and (b) file with the Commission an affidavit of compliance with paragraphs 1, 2 and 3 of this order. In connection with paragraph 1, the affidavit shall state whether the additional heavy lift charges have been collected or shall describe the steps taken to effect collection.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
May 16, 1978.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 387(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

MOORE-MCCORMACK LINES, INC.

ORDER ON RECONSIDERATION

June 19, 1978

Complainant Pan American Health Organization has requested the Commission to reconsider its decision served March 30, 1978 denying reparation in the above docketed proceeding. No reply to the petition for reconsideration was filed.

Complainant contends that the Commission erred in finding the description "office stationery" more specific than "PAPER VIZ: Bond, Sulphite or Sulphite and rag mixed—see PRINTING PAPER" the description urged by Complainant. Complainant also maintains that even assuming that both descriptions equally applied to the shipment, the shipper is entitled to the lower of the two rates provided in the tariff.

Petitioner, however, states no new facts, provides no new information which would warrant a reconsideration of the Commission's decision.* Once the proper description for the product shipped has been established, the rate provided in the tariff for that description is the only applicable rate.

Complainant's other contentions are but a reiteration of the arguments made in the complaint which the Commission has rejected after careful consideration.

The relief requested must therefore be denied. The Commission decision served March 30, 1978 is hereby affirmed.

IT IS SO ORDERED.

By the Commission.*

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

*Rule 261 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.261)
*Commissioner Kanuk dissents

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–31

CHEVRON CHEMICAL INTERNATIONAL, INC.

v.

BARBER BLUE SEA LINE

ORDER ON RECONSIDERATION

June 19, 1978

By petition filed May 12, 1978, Complainant Chevron Chemical International, Inc. asks the Commission to reconsider its decision denying reparation upon a finding that Complainant had failed to state a claim upon which relief can be granted. No reply to the petition for reconsideration was filed.

The petition states no new facts, brings to our attention no new matter which would warrant a reconsideration of one decision* but reiterates the arguments made in the complaint and on exceptions, which the Commission rejected after careful consideration. Contrary to Complainant's contention, our finding that the complaint did not state a valid claim went to the merits of Complainant's case. Nothing in our decision implies that the dismissal rested on procedural grounds. The indisputable and controlling fact is that on the date of Complainant's shipment, there was no rate on "file" with this Commission applicable to such shipment.

The relief requested must therefore be denied. The Commission's decision served April 28, 1978, is affirmed.

IT IT ORDERED.

By the Commission.

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

*Rule 261 of the Commission's Rules of Practice and Procedure (46 C.F.R 502 261)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 565

MITSUI & CO.(USA), INC.

v.

PACIFIC WESTBOUND CONFERENCE

REPORT

June 23, 1978

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

The Commission determined to review the Initial Decision issued by Administrative Law Judge William Beasley Harris in the above-docketed proceeding.

By application filed under section 18(b)(3) of the Shipping Act, 1916, and section 92(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92(a)), the Pacific Westbound Conference, with the concurrence of the carrier, Sea-Land Service, Inc., asked permission to refund[1] a portion of the freight charges assessed on a shipment described in the bill of lading as "2 AMINO—2METHYL—1 PROPANO (AMP)."

The application alleges that when the Conference took over the tariffs published by its member lines, it republished many of the items in its own tariff[2] without changing the IBM item number identifying the commodity, to the Schedule B classification number as required by Rule 5 of the Conference's own tariff.[3] Because of this discrepancy the rate of $89.00 per 1000 kgs. provided in the Conference tariff for "Amino mixed with methyl propanol" could not be applied to the shipment which was therefore assessed an N.O.S. rate of $140.00 W/M.

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[1] The request was later changed to a request for a waiver.

[2] The reference apparently is to the intermodal tariffs filed independently by some lines which were withdrawn when the Conference filed its own intermodal tariff.

[3] Rule 5 of the Pacific Westbound Intermodal Tariff No. 8, which is no longer in effect, provided in part,

SCHEDULE B APPLICATION TO TARIFF

Commodities in this tariff are classified and organized in accordance with Schedule B Tariff (see Rule 10) and are identified by a 9-digit number shown as Item Numbers in the Commodity Rate Sections of this tariff.

In determining the applicable freight rate under this tariff determine the applicable 5-digit number in Schedule B Tariff and apply the most specific Commodity Item in this tariff the first 5 digits of which correspond to that Schedule B Tariff.

The Presiding Officer denied the application for the Conference's failure, prior to applying for a waiver, to file a new tariff upon which such waiver would be based even though the $89.00 W the Conference seeks permission to charge was already on file and in effect at the time the application was filed on January 9, 1977. Furthermore, in the Presiding Officer's opinion, the failure to change the item numbers could not be considered a clerical or administrative error of the type contemplated in section 18(b)(3), but reflected rather a change of policy on the part of the Conference "without its adequately checking as to the implementation of the policy and its effect."

We disagree with the denial of the application on the following grounds.

Section 18(b)(3) requires that prior to applying for a waiver the carrier or conference of carriers file a new tariff upon which such refund or waiver will be based. This presumes that the rate the carrier is asking permission to apply is not already on file with the Commission. However, where, as here, the rate upon which the waiver is to be based is already on file prior to the filing of the application, the filing of a new tariff reflecting an identical rate becomes superfluous and the failure to file such a tariff is not in our opinion a proper ground for denying the application.

We also disagree with the Presiding Officer's conclusion that the failure to change the commodity item number was not an error of a clerical or administrative nature. We presume, in the absence of proof to the contrary that in publishing its tariff the Conference intended to follow the rules contained in such tariff and that the failure to do so was caused by a clerical or administrative error of the type contemplated in section 18(b)(3).

On the basis of the foregoing we reverse the Presiding Officer's decision denying a waiver. The Pacific Westbound Conference is granted permission to waive $1,694.62 of the freight charges assessed on Mitsui's shipment, subject to the condition imposed below.

The Conference concedes that:

> When the Conference took over the tariffs published by its member lines, *many* items were published in the Conference Tariff carrying item numbers which bear no relationship to Schedule B numbers as does (sic) the rate items established by the Conference. Further, many of the previously independently published tariffs by member lines contained no rule similar to Rule 5. Thus the previous tariffs did not have to adhere to the application of a Schedule B number to its rates.
>
> On September 28, 1977, the independent member lines withdrew their filing and the Conference as a whole established the same rate without changing this IBM number to reflect the proper Schedule B number. (Emphasis added)

The question thus arises whether between September 28, 1977, when the Conference tariff became effective and December 31, 1977, when Rule 5 expired, other shippers in similar circumstances were charged the N.O.S. rate instead of the specific rate provided in the tariff for the commodity

shipped.[4] Granting the Conference an unconditional permission in this instance to waive collection of a portion of the freight charges assessed on Complainant's shipment might result in discrimination against such shippers if they were not given the opportunity to have their freight charges adjusted in the same manner.

Section 18(b)(3) embodies a provision intended to remedy just this type of situation. That provision states:

> 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 . . . .

Applying this procedure, and in order to prevent discrimination against shippers similarly situated, the Conference is directed to adjust the freight charges of any shipper who between September 28, 1977 and December 31, 1977, was assessed an N.O.S. rate instead of the specific commodity rate published in the Conference tariff without the proper Schedule B classification number. The Conference is further required to submit within sixty (60) days from the service of this order, a list of the shippers entitled to a refund, setting forth the manner in which freight charges are adjusted and the amount of each refund. Should the Conference fail to submit such a list within sixty days, permission to waive a portion of the freight charges shall be denied and the application dismissed.

It is so ordered.

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

[4] This also raises a question as to whether the failure to attach the proper item number to a specific commodity description created an ambiguity in the tariff so that the assessment of an N.O.S. rate rather than the specific commodity rate provided in the tariff for that description, might have violated section 18(b)(3) of the Shipping Act, *Continental Can Co. Inc. v. U.S.*, 272 F.2d 312 (2nd Cir. 1959), *United Nations Children's Fund v. Blue Sea Line*, 15 F.M.C. 206 (1972). In view of the nature of this proceeding and our recommended disposition of the special docket application, we need not, and indeed cannot address this issue here.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 445(I)

MINE SAFETY APPLIANCES CO.

v.

CHILEAN LINE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

June 21, 1978

Notice is hereby given that the Commission on June 21, 1978, determined not to review the decision of the Settlement Officer in this proceeding served June 7, 1978.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 445(I)

MINE SAFETY APPLIANCE COMPANY

v.

CHILEAN LINES, INC.

Reparation awarded in part.

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

Mine Safety Appliances Company, (complainant) which engages in the manufacture and distribution of safety gear used in mining enterprises, alleges that Chilean Lines, Inc. (respondent) transported a shipment of respiratory appliances from New York, New York to Arica, Chile, charging the Cargo, NOS class 1 rate of $153.75 per 40 cubic feet as contained in the Atlantic & Gulf/West Coast of South America Conference Freight Tariff F.M.C. No. 1, instead of the rate for Gas Masks, class 10 of $116.25 per 40 cubic feet contained in the same tariff. Respondent declined the Claim citing Item 7 of the conference tariff which provides:

" . . Adjustment of freight based 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 cargo leaves the carrier's possession . . ."[2]

While no violation of the Shipping Act is alleged, it is presumed to be a violation of Section 18(b)(3) thereof.

The test the Commission applies on claims of reparation involving alleged error of a commodity tariff classification is what the complainant can prove based on all the evidence as to how what was actually shipped differed from the bill of lading description.[3] However, the complainant

[1] Both parties having consented to the informal procedure of Rule 19(a) 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.

[2] With respect to such a rule the Commission in its report on remand served November 24, 1976, in *Kraft Foods v. Moore McCormack Lines, Inc.*, negated its application with respect to claims before the Commission stating in part "In effect the Rule sets up as a period of limitation, the time during which the shipment remains in the custody of the carrier, which limitation was reviewed by the Court as infringing on the rights granted by section 22 of the Shipping Act."

[3] *Western Publishing Company, Incorporated v. Hapag-Lloyd A.G.*, Docket No. 283(I), May 4, 1972.

has a heavy burden of proof once the shipment has left the custody of the carrier.[4]

In support of the Claim, complainant has submitted the bill of lading, freight bill, invoice, packing list and sales material concerning the goods shipped. Respondent's bill of lading No. 1 dated December 12, 1975 covered the movement of 37 cartons of respiratory appliances weighing 2,222 pounds, measuring 251 cubic feet moving on the COPIAPO from Port Newark, New Jersey to Arica, Chile.

The packing list indicates what actually moved in the subject shipment:

13 cartons of Respirators	@8.9 cu ft	115.7
24 cartons of Type S Filter Cartridges	17 @5.6 cu ft	95.2
	1 @5.1 cu ft	5.1
	5 @5.8 cu ft	29.0
	1 @5.8 cu ft	5.8
		250.8
	or	251 cu ft

Respondent was assessed:	
Cargo, N.O.S. 6.275 mt ($153.75)	$ 964.78
Bunker surcharge 6.275 mt ($8.25)	51.77
	$1,016.55
Respondent claims he should have been assessed:	
Gas Masks (class 10) 6.275 mt ($116.25)	$ 729.47
Bunker surcharge 6.275 mt ($8.25)	51.77
	$ 781.24
Alleged overcharge	$ 235.31

Two different commodities, separately packed, were moved, i.e. respirators and filter cartridges. With respect to the respirators, reference is made to *Webster's Third New International Dictionary*, G. & C. Merriam Company, 1964. Applicable definitions found therein are:

Respirator—A device (as a gas mask) for protecting the respiratory tract (as against irritating and poisonous gases, fumes, smoke, dusts) with or without equipment supplying oxygen or air (filters—provide protection against any particulate matter, either solid, mist or spray in an atmosphere containing a sufficient amount of oxygen).

Gas mask—A close fitting face piece connected to a canister through which all air breathed is drawn to protect the respiratory tract and face against irritating and poisonous gases: respirator.

Reference is made to *United States of America v. Hellenic Lines Limited,* 14 F.M.C. 255, (1971) at pages 256 and 257 wherein it is held:

[4] *Colgate Palmolive Co. v. United Fruit Co.*, Docket No. 115(I), September 30, 1970.

"The N.O.S. classification is a catchall which, by definition, is applicable if no other classification is or can be specified. While one should not unduly strain to find a classification for goods, nevertheless, an N.O.S. classification is a classification which should not be resorted to if a reasonable classification can otherwise be found in the tariff. . . ."

Title 30 of the Code of Federal Regulations in Chapter 1 entitled "Mining Enforcement and Safety Administration, Department of the Interior" under Section 11.3(ff) defines a respirator as any device designed to provide the wearer with respiratory protection against inhalation of a hazardous atmosphere. Section 11.90(a) thereof defines gas masks as including all completely assembled air purifying masks designed for use as respiratory protection during entry into atmospheres not immediately dangerous to life or health or escape only from hazardous atmospheres containing adequate oxygen to support life.

Based on the above, the lower class 10 Gas Mask rate (9th Revised Page 174 of the tariff) of $116.25 per measurement ton applies to the 13 cartons of respirators measuring 115.7 cubic feet. However, this rate would not apply on the filter cartridges.

With respect to the filter cartridges, which are used in the respirators shipped, here again respondent assessed the Cargo, NOS rate of $153.75. Reference is again made to Title 30 of the Code of Federal Regulations in Chapter 1 under Section 11.94 which covers:

"Filters used with canisters and cartridges; location; replacement.

"(a) Particulate matter filters used in conjunction with a canister or cartridge shall be located on the inlet side of the canister or cartridge.

"(b) Filters shall be incorporated in or firmly attached to the canister or cartridge and each filter assembly shall, where applicable, be designed to permit its easy removal from and replacement in the canister or cartridge."

The Cartridge and filter, as a single unit, is placed in the respirator. From the preceding coverage of respirators it is known that the cartridge and filter will be used to filter air. Such need may be required by (1) oxygen deficiency, (2) gases and vapors, (3) particles, including dusts, fumes and mists, and (4) pesticides. The Air Filter Class 9A rate (11th Revised Page 161 of the tariff) of $120.75 per measurement ton of 40 cubic feet applies to the 24 cartons of type S filter cartridges measuring 135.1 cubic feet.

Respondent has been assessed:	
Cargo, N.O.S. 6.275 mt ($153.75)	$ 964.78
Bunker surcharge 6.275 mt ($8.25)	51.77
	$1,016.55
Respondent should have been assessed	
Gas Masks 2.893 mt ($116.25)	$ 336.31
Air Filters 3.382 mt ($120.75)	408.38
Bunker surcharge 6.275 mt ($8.25)	51.77
	$ 796.46
Overcharge	$ 220.09

Respondent overcharged complainant $220.09.

Reparation for this amount is awarded.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 526(I)

MAN FUNG CHINA TRADING CO.

v.

K-LINES

NOTICE OF DETERMINATION NOT TO REVIEW

June 21, 1978

Notice is hereby given that the Commission on June 21, 1978, determined not to review the decision of the Settlement Officer in this proceeding served June 7, 1978.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 526(I)

MAN FUNG CHINA TRADING CO. INC.

v.

K-LINES

Reparation Awarded.

DECISION OF EDGAR T. COLE, SETTLEMENT OFFICER[1]

The Man Fung China Trading Co., Inc. claims $54.75 as reparation from "K" Line regarding one shipment of 29 cartons of Quilt Fibre Filling transported aboard "K" Line's vessel Queens Way Bridge, Voyage 41A from a supplier in Kobe, Japan[2] to The Man Fung China Trading Co., Inc., the bill of lading which indicates that San Francisco, California is the port of discharge. The cargo however was discharged at the port of Oakland and subsequently transported to San Francisco via Lucky Transfer on December 17, 1976. The claim was filed with the Commission on March 24, 1978, within two years from the date the cause of action occurred and must be considered on its merit as ruled by the Commission in *Colgate Palmolive Company v. United Fruit Company*, Informal Docket No. 115(I), served September 30, 1970.

The rate assessed on the commodity is not in dispute, it is the equalization amount claimed by complainant based on the excess of the trucking rates from Oakland to San Francisco which were paid by The Man Fung China Trading Co. Documentation furnished shows freight bills covering the truck movements of the 29 cartons of quilt fibre filing from Oakland to San Francisco.

Rule 46 of the Trans-Pacific Freight Conference of Japan/Korea FMC 6, of which "K" Line is a participating member, provides as follows:

"The ocean carrier may forward such cargo direct to a point designated by the consignee, provided the consignee pays the cost which he would normally have incurred

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

[2] The complainant's claim indicates that shipment originated in Hong Kong which is in error. The bill of lading clearly shows that Kobe, Japan is the port of origin.

either by rail, truck or water, to such point if the cargo had been discharged at the terminal port named in the ocean bill of lading."

The documents presented by the complainant show clearly that "K" Line discharged the cargo at a discharge port other than that specified on the bill of lading. "K" Line had two options available to them to accomplish delivery. They could have delivered the cargo at the designated port or moved the cargo from the port of diversion to the designated port at their own expense. They chose the latter course.

Based on the aforementioned rule, that since the carrier has elected to arrange ground transportation when it discharges cargo at a port other than that specified in the bill of lading, the consignee pays only the amount which it would have cost him to arrange transportation from the proper port to a point of destination.[3]

Listed below is the computation utilized by The Man Fung China Trading Co.'s claim for equalization reparation by "K" Lines:

11/26/76 Queensway Bridge Voyage 41 B/L K255–550218			
Lucky Transfer (19 cartons)	Charged		$64.43
S.F. to S.F. 1159 × 209		$24.22	
4.5% Inc.		1.09	
		$25.31	25.31
Freight Equalization			$39.12
11/26/76 Queensway Bridge Voyage 41 B/L K255–550218			
Lucky Transfer (10 cartons)	Charged		$34.12
S.F. to S.F. 610 × 209		$12.75	
4.5% Inc.		5.74	
		$18.49	18.49
Freight Equalization			$15.63
Total Freight Equalization			$54.75

Rates Oakland to San Francisco P.U.C. Tariff No. 2
San Francisco to San Francisco P.U.C. Tariff No. 19

"K" Line denied the claim solely on the basis of the rule published in their independent tariff which is incorrect.[4] However, it is our opinion that if they had used the correct tariff, Trans-Pacific Freight Conference of Japan/Korea, they would have denied the claim based on Rule 59, in the aforementioned tariff, which requires that claims be filed within six-months after date of shipment.[5]

The foregoing indicates that "K" Line is in violation of Section 18(b)(3) of the Shipping Act, 1916, for receiving a different compensation for the

[3] Konwall Co., Inc v Orient Overseas Container Line, Informal Docket No 326(I), 1975.

[4] "K" Line Freight Tariff No 218, FMC 60, Rule 177(a)(2). This rule states that claims for adjustment of freight charges must be presented to the carrier in writing within 6 months after date of shipment

[5] 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.

transportation of property or any service in connection therewith than the rates and charges specified in its tariff. Therefore, based on the facts at hand, The Man Fung China Trading Co., Inc. is awarded reparation in the amount of $54.75.

(S) EDGAR T. COLE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 525(I)

ARNELLE OF CALIFORNIA

v.

K-LINES

NOTICE OF DETERMINATION NOT TO REVIEW

June 26, 1978

Notice is hereby given that the Commission on June 26, 1978, determined not to review the decision of the Settlement Officer in this proceeding served June 15, 1978.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 525(I)

ARNELLE OF CALIFORNIA

v.

K-LINES

Reparation Awarded.

DECISION OF EDGAR T. COLE, SETTLEMENT OFFICER[1]

Arnelle of California claims $61.80 as reparation from "K" Line regarding one shipment consisting of 79 cartons of ladies cotton dresses transported aboard "K" Lines' vessel Queens Way Bridge, Voyage 35A from a supplier in Hong Kong to Arnelle of California located in San Francisco, California. The bill of lading indicates that port of discharge is San Francisco, California. However, according to the documents submitted the cargo was actually discharged at the Port of Oakland and subsequently transported to San Francisco via Bart Trucking Co. on May 27, 1976. The claim was filed with the Commission on March 24, 1978, within two years from the date the cause of action occurred and must be considered on its merit as ruled by the Commission in *Colgate Palmolive Company v. United Fruit Company*, Informal Docket No. 115(I), served September 30, 1970.

The rate assessed on the shipment in question is not in dispute, it is the equalization amount claimed by complainant based on the excess of the trucking rates from Oakland to San Francisco that were paid by Arnelle of California. The freight bill furnished indicating the movement from Oakland to San Francisco clearly shows that the 79 cartons of ladies dresses being picked up in Oakland by Bart Trucking Co. for delivery at San Francisco.

At the time of this shipment "K" Line published its own independent tariff i.e. "K" Line Freight Tariff No. 218, FMC 60 applying from Hong Kong and Taiwan to Hawaii, Alaska, Pacific, Atlantic and Gulf Ports of the U.S.A. Rule 177(a)(2) of the aforementioned tariff provides the

[1] Both parties having consented to the informal procedure of Rule 19(a) 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.

following in connection with cargo being discharged at other than bill of lading port:

"The ocean carrier may forward such cargo direct to a point designated by the consignee, provided the consignee pays the costs which he would normally have incurred either by rail, truck or water, to such point if the cargo has been discharged at the terminal port named in the ocean Bill of Lading."

The documents presented by the complainant show that "K" Line discharged the cargo at a discharge port other than that specified on the bill of lading. "K" Line had two options available to them to accomplish delivery. They could have delivered the cargo at the designated port or moved the cargo from the port of diversion to the designated port at their own expense. They choose the later course.

Based on the aforementioned rule, that since the carrier has elected to arrange ground transportation when it discharges cargo at a port other than that specified in the bill of lading, the consignee pays only the amount which it would have cost him to arrange transportation from the proper port to a point of destination[2].

In the computation to arrive at the amount due, complainant used the figure of $104.00, which represents the amount paid to Bart Trucking for the carriage of the cargo from Oakland to San Francisco. However, in reviewing the bill submitted by Bart an amount of $101.50 is shown. Contact made with the complainant indicated that in making a xerox copy of the bill the amount of $2.50 in the xeroxing process was inadvertently excluded. Complainant is unable to furnish the original bill showing the additional amount, therefore, the amount of $101.50 will be used in computing the reparation due. In line with the foregoing, listed below is the computation by Arnelle of California's claim for equalization reparation by "K" Lines:

5-27-76 Queensway Bridge Voyage 35A B/L K991–01300		
Bart Trucking Co.	$101.50	
San Fr. to San Fr. 3655 as 4000 × 100	$40.00	
5.5% Inc.	2.20	
		42.20
Freight Equalization		$59.30
Rates: Oakland to San Francisco P.U.C. Tariff No. 2		
San Francisco to San Francisco P.U.C. Tariff No. 19		

"K" Line denied the claim based on their Rule 280 published in their Freight Tariff FMC 60 which states that claims for adjustment of freight charges must be presented to the carrier in writing within six months after the date of shipment. In this connection, the Commission has held that the carrier's so called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such case. In the instant case the

[2] Konwall Co., Inc. v. Orient Overseas Container Line, Informal Docket No. 326(I), 1975.

complaint was filed with the Commission within the time limit specified by statute.

The foregoing indicates that "K" Line is in violation of Section 18(b)(3) of the Shipping Act, 1916, for receiving a different compensation for the transportation of property or any service in connection therewith than the rates and charges specified in its tariff. Therefore, based on the facts at hand, Arnelle of California is awarded reparation in the amount of $59.30.

(S) EDGAR T. COLE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NOS. 73–22, 73–22 (SUB. NO. 1) and 74–36 (SUB NO. 1)

IN RE: MATSON NAVIGATION COMPANY—CHANGES IN RATES IN THE U.S. PACIFIC COAST—HAWAII TRADE

Rates under investigation in Docket Nos. 73–22 and 73–22 (Sub. No. 1) found to be just and reasonable under section 18(a) of the Shipping Act, 1916 and sections 3 and 4 of the Intercoastal Shipping Act, 1933.

Rates under investigation in Docket No. 74–36 (Sub. No. 1) found not unreasonably high.

Respondent found not to he in violation of section 16, First by virtue of hold down on sugar and molasses rates.

Respondent found not to be in violation of section 16, First by virtue of increased rates on automobiles.

Respondent found not to be in violation of section 16, First with respect to the two-tier rate increase.

Respondent's rate base, for purposes of this proceeding, will be calculated as of the beginning of the year.

Rate base should be adjusted to reflect the existence of deferred income taxes in the carrier's capital structure.

Peter P. Wilson, David F. Anderson, David V. Ainsworth, and *George D. Rives* for respondent Matson Navigation Company.

Ronald Y. Amemiya, R. Dennis Chong, Richard S. Sasaki and *William W. Milks* for complainant-intervenor The State of Hawaii.

Charles Farrar, James J. Garrett, and *James P. Bennett* for complainant Pineapple Growers Association of Hawaii.

Jacob P. Billig and *Terrence D. Jones* for complainants Geo. A. Hormel & Company and Oscar Mayer and Company.

Alan F. Wohlstetter for complainant Household Goods Forwarders Association of America, Inc.

William W. Schwarzer for complainant Oroweat Baking Company.

John W. Gilius for complainant General Foods Corporation.

Myron Smith for complainant American Home Products Corp.

Dudley J. Clapp, Jr., Milton J. Stickles, Ronald L. Shingler, John L. Degurse, Jr., Harley E. Dilcher, and *Robert H. Swennes, II,* for complainants-intervenors Department of Defense, Military Sealift Command.

Stephen Chesnoff for complainant, J. C. Penney Company, Inc.,

Charles H. Lockwood II, and *Frank J. Mahoney* for complainant-

intervenor Motor Vehicle Manufacturers Association of the United States, Inc.

Philip E. Diamond, Howard D. Neal, and *Beryl G. Fritze* for complainant Hunt-Wesson Foods, Inc.

Ann M. Pougiales for intervenor The Wine Institute.

David Handel and *Calhoun E. Jacobson* for intervenor Traffic Managers Conference of California.

James F. Holden for intervenor AM General Corporation.

Michael E. Murphy for intervenor California and Hawaiian Sugar Company.

Keith J. Steiner for complainant-intervenor Hawaii Automobile Dealers Association.

J. Robert Ewers, Donald J. Brunner, Charles L. Haslup, III, David Fisher, C. Douglass Miller, and *C. Jonathan Benner,* for the Bureau of Hearing Counsel.

DECISION AND ORDER PARTIALLY ADOPTING INITIAL DECISION

June 30, 1978

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

These consolidated proceedings were individually instituted to test the justness and reasonableness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, of certain rate changes filed by Matson Navigation Company (Matson) during the years 1973, 1974 and 1975 in the U.S. Pacific Coast/Hawaii Trade. The proceedings were consolidated by order of the Chief Administrative Law Judge on July 25, 1975, and an Initial Decision was issued on February 22, 1977 in which, among other things, Presiding Administrative Law Judge Seymour Glanzer found that the issues of the justness and reasonableness of the rates had become moot.

Exceptions to the Initial Decision were filed by Matson, the Military Sealift Command (MSC) and Hearing Counsel. Oral argument was heard June 28, 1977.

Upon consideration of the entire record, and particularly the points raised in exceptions and oral argument, we have decided to adopt the Initial Decision, as modified and clarified below, with the exception of that portion declaring moot the issues of justness and reasonableness of rates. We find on consideration of the record that the rates in Docket No. 73–22 and 73–22 (Sub. No. 1) have been shown to be just and reasonable, and we so find. With respect to the rates under investigation

*Concurring in final result

in Docket No. 74–36 (Sub. No. 1), we find that Matson has carried its burden of demonstrating that the increase in question is not unreasonably high. Should the State of Hawaii wish to pursue its theory that Matson's rates on automobiles are unreasonably low, a complaint proceeding under section 22 would be the more appropriate forum.

DISCUSSION

A. Rate Base Adjustments

1. Average Depreciated Rate Base

We generally agree with the decision reached by the Presiding Officer on this issue. Matson has calculated its rate base taking into account accummulated depreciation as of the beginning of the year in accordance with the provisions of the Commission's General Order 11 (46 C.F.R. section 512). While Matson should be permitted to rely upon the Commission's regulations in presenting its case in this proceeding,[1] there are facts and arguments in the record in this case supporting the conclusion, that mid-year or average rate base may be a more appropriate basis for measuring rate of return. The use of a rate base stated at cost, less accumulated depreciation as of the beginning of the year, gives no effect to the fact that rate base is being reduced during the year by depreciation expense. For that reason, such a rate base may not be properly matched, for rate of return purposes, to the income which is being earned over the entire period. Therefore, we have commenced a rulemaking proceeding[2] to focus directly on this question so that the industry as a whole, as well as the shipping public may have the opportunity to comment on this matter and to assist the Commission in formulating a final rule on this issue.

2. Deferred Income Taxes

We agree with Matson that the language of the Initial Decision on the subject of deferred income taxes could lead to confusion as to which issues are being decided therein. It should be understood at the outset that we are deciding in this case whether an appropriate portion of accumulated deferred income taxes should be deducted from rate base and *not* whether it is more appropriate, to utilize "normalization" or "flow-through" of depreciation and tax expenses for purposes of the income side of the rate of return equation.

With respect to this latter issue, General Order 11 currently contains no specific guidance as to the method to be utilized by carriers in calculating

[1] In so ruling, we are mindful of the fact that Matson has deviated from the methodology prescribed by General Order 11 in other areas, particularly in the use of measurement tons for allocation purposes whereas General Order 11 prescribes revenue tons However, in that instance the Commission staff agreed to the filing and use of this alternate data taking the position that measurement tons are a more appropriate method of allocating costs in a container operation (see 46 C.F.R. 512.3(c)(2)).

[2] Docket No. 78–21, *Average Value of Rate Base*. Notice of Proposed Rulemaking served June 9, 1978.

depreciation, amortization and tax expense. Virtually all carriers in reporting these expenses under General Order 11, however, have chosen to use straight line or "normalized" depreciation and a hypothetical or "normalized" tax expense figure based upon the income resulting from the use of straight line depreciation, regardless of the related figures used for tax purposes.

While none of the parties raised the issue on brief to the Presiding Officer, both Matson and MSC now seek a decision on this issue of "normalization" vs. "flow-through"; Matson arguing for adoption of the former, and MSC taking a position in favor of flow-through. Because the matter was not decided in the Initial Decision, and because the issue has not been widely discussed or addressed by the parties to this proceeding, much less the industry as a whole, we deem it more appropriate to consider this issue in a rulemaking proceeding, rather than to remand this proceeding for further briefing of this question.

On the issue of deferred income taxes, we find general agreement among the parties[3] and the Presiding Officer that some portion of the deferred taxes found on the balance sheet of the carrier should be deducted from the rate base. Two refinements are necessary to this general proposition.

First, the Presiding Officer states, at pages 24 and 25 of the Initial Decision:

> "I find that for the future Matson shall be required to calculate its rate base without the inclusion of deferred income taxes This approach assures the protection of consumer interests and the financial health and integrity of Matson and is the method more likely to yield just and reasonable rates under the criterion of *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944). This finding shall not be construed as a determination concerning tax reserves accumulated in prior years".

We disagree with this conclusion. The item "Deferred Income Taxes" shown on the balance sheet of a corporation is, in fact, a reserve accumulated in prior years. The issue argued by the parties here concerns this accumulated reserve and not some figure to be accumulated in future years. To rule that Matson shall make an adjustment to rate base in the future with respect to deferred income taxes accumulated only in the future is akin to no decision on this issue in this case.

We are convinced that the record in the case supports an adjustment to Matson's rate base for the test years in question.[4] The record will likewise support the use of the accumulated deferred income tax reserve shown on Matson's balance sheet as the starting point for this adjustment. In other words, in determining whether the rates subject to this investigation are reasonable, we will reduce Matson's rate base by a *pro rata* share of the deferred tax reserves reflected on Matson's balance sheet.

[3] While Matson argued in opposition to this rate base adjustment throughout most of the proceeding, it conceded in writing and in its oral argument, that a *pro rata* share of deferred income taxes resulting from the use of accelerated depreciation should be deducted from rate base

[4] Calendar year 1975, and July 1, 1975—June 30, 1976.

The second refinement concerns the mechanics of the proper adjustment to rate base and the component parts of the deferred tax reserve reflected on the balance sheet. Matson and Hearing Counsel are now in agreement[5] that the adjustment to rate base should be made by multiplying the amount of deferred income taxes on the balance sheet by a ratio which has the rate base (prior to adjustment for deferred income taxes) as the numerator and the carrier's total capital as the denominator, as shown below.

$$\text{Adjustment for Deferred Income Taxes} = \text{Deferred Taxes} \times \frac{\text{Rate Base}}{\text{Total Capital}}$$

As a general rule, this formula accomplishes the purpose of equitably apportioning the carrier's deferred tax reserve between the rate base in question and other assets of the carrier and we adopt this formula as the appropriate method of arriving at the deferred income tax adjustment.[6]

The deferred tax reserve which is to be utilized in this formula is the reserve which has been accumulated only as a result of the use of accelerated depreciation for tax purposes. This decision is not meant to reduce rate base by any portion of deferred taxes resnlting from deposits in a Capital Construction Fund.[7] In the case of deferred taxes arising from deposits in a Capital Construction Fund, there is no record in this case on which to base a decision relating to a rate base adjustment. Therefore, the issue is not properly before us at this time.

B. Reasonableness of Rates

1. General

The issue of reasonableness of rates in these consolidated proceedings focuses on two test years—Constructive Calendar Year 1975 (relating to Docket No. 73–22) and Constructive Year July 1, 1975—June 30, 1976 (relating to Docket Nos. 73–22 (Sub. No. 1 and 74–36 (Sub. No. 1).

The test to be applied to determine whether the rates resulting from these general rate increases are reasonable is whether those rates produce revenues for the carrier which are sufficient to cover all legitimate expenses plus a fair return on the assets properly utilized in the trade.[8] In determining whether the return on assets is fair, the Commission must consider whether this return is sufficient to cover the cost of the debt

[5] See Oral Argument, Transcript at p 30

[6] In adopting this formula we realize that further definition of the term "total capital" may be necessary for the future For example, one of the issues in Docket No 76–43, *Matson Navigation Company—Proposed Rate Increase in the United States Pacific Coast/Hawaii Domestic Offshore Trade* whether deferred income taxes and other deferred credits should be included in total capital for purpose of determining the adjustment That question is not an issue in this case, however As determined herein, the rate of return is already within the zone of reasonableness with the deferred tax and credits removed from the denominator of the equation Mathematically, a larger denomination would result in a lower portion of deferred income taxes being removed from rate base, thus a larger rate base and a lower rate of return

[7] See Section 607 of the Merchant Marine Act, 1936, (46 U S.C. section 1177)

[8] See *Atlantic-Gulf/Puerto Rico General Increases in Rates and Charges*, 7 F.M C. 87 (1962).

capital properly allocated to those assets and to compensate the equity holder for its investment in those assets at a level which is comparable to the return achieved by equity holders in companies with similar risk characteristics.[9]

As with most general rate cases which have recently come before the Commission, there is a great deal of testimony and argument in this record which deals with this issue of a proper return on the equity portion of the pertinent rate base. Matson's position is that a fair return on its equity in the test years in question would be approximately 16 percent.[10] The State of Hawaii and Hearing Counsel, on the other hand, take the common position that a fair return on equity would be approximately 11.3 percent.[11]

Matson's return on equity for each of the test years in question is well below 10 percent. Without reaching a decision on the specific return which may have been appropriate for these test years, we find that any return on equity capital for a carrier similar to Matson which is below 10 percent cannot be found to be unreasonably high, either for the test years in question or for the foreseeable future.

2. Income—Rate Base—Rate of Return

Appendix A to this decision is a statement of rate base, income and rate of return for Matson for calendar year 1975. Appendix B is similarly, a statement of rate base, income and rate of return for constructive year July 1, 1975 to June 30, 1976. We have constructed these tables from the data in the record, with necessary adjustments, to implement our decision on the methodology questions prevsiously discussed herein.

On the basis of these figures, as shown in Appendix A, we find that, for constructive calendar year 1975, Matson's return on equity was 9.02 percent. Therefore, we find that the rate changes which are the subject of Docket No. 73–22 are just and reasonable.

Appendix B reflects a rate of return of equity of 7.75 percent for constructive year July 1, 1975—June 30, 1976. On the basis of these figures we find that the rate changes which are the subject of Docket No. 73–22 (Sub. No. 1) are likewise just and reasonable.

C. Discussion of Docket No. 74–36 (Sub. No. 1)

This part of the consolidated proceeding was instituted by the Commission on April 22, 1975 to determine whether increases in rates by Matson on automobiles and related commodities are just and reasonable under section 18(a) of the Shipping Act, 1916 and sections 3 and 4 of the Intercoastal Shipping Act, 1933. The Commission's Order of Investigation also required a determination whether Matson by these increases would subject any particular person, locality, or description of traffic to any

[9] See *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[10] Exhibit C–60, p. 41 and Reply Brief of Matson Navigation Company, p. 36–54.

[11] Opening Brief of Hearing Counsel, p. 68, and Response of the State of Hawaii to Supplemental Order of Administrative Law Judge p. 12.

undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Shipping Act, 1916. The increases were accomplished by first melding the then existing bunker surcharge of 9.3 percent into the rates and then increasing the resulting rates by 3 percent in the case of automobiles and by 8 percent on buses, fire trucks and trailers.

The Presiding Officer concluded that this record does not support a finding that there has been a violation of section 16 First as a result of these increases. We agree..

With respect to the reasonableness of the increases in rates on buses, fire trucks and trailers, Matson has presented evidence that the after tax earning per measurement ton on these vehicles will average $5.00 for the test year in question on a corresponding average revenue per measurement ton of $27.00. No evidence was presented in opposition to the reasonableness of rates on these vehicles.

We cannot find, on the basis of this record, that the increases in rates on these vehicles other than automobiles produce an unreasonable profit. Moreover, we find merit in Matson's argument that lack of shipper opposition to rate increases is one indication of reasonableness,[12] particularly where shippers of that commodity, as here, would normally be sophisticated industrial shippers. Therefore, we find the increases in rates on buses, fire trucks, and trailers to be just and reasonable pursuant to section 18(a) of the Shipping Act, 1916 and sections 3 and 4 of the Intercoastal Shipping Act.

In so concluding, we have specifically considered the evidence and arguments set forth by MSC in opposing the reasonableness of Matson's increases in question. The foundation of MSC's position is that westbound rates to Hawaii are subsidizing lower rates in the eastbound direction and that, if the eastbound rates were raised to an appropriate level, Matson would not need the increase sought in this proceeding.

This issue is substantially the same as that raised and disposed of in our earlier investigation into rate increases by Matson in the Hawaiian trade. In Docket No. 71–18—*Matson Navigation Company—General Increase in Rates in the U.S. Pacific/Hawaii Trade,* 16 F.M.C. 96 (1973), we concluded the following:

> We agree that to the extent Matson held down eastbound container cargo rates, they are justified as a matter of business judgment on the back-haul nature of the cargo. (16 F.M.C. 103)

There is likewise considerable evidence in this record on the need for lower eastbound rates on certain commodities, particularly canned pineapple moving in containers. None of the eastbound cargo has been shown to be less than profitable on an incremental basis. We will continue to adhere to the general principle enunciated in Docket No. 71–18, *supra* that the revenue from this cargo, some of which may not move except for the lower rates, contributes to the entire operation. Therefore, we will not

[12] See *e g . Alaskan Rate Investigation,* 1 U.S.S.B. 1 (1919).

adopt the adjustments suggested by MSC to the financial statements set forth as Appendices A and B.

With respect to the reasonableness of the rate increases on automobiles, only Hearing Counsel take a position that the resultant rates may be unreasonably high. Matson defends the rates as reasonable while the State of Hawaii takes the position that automobile rates are too low, even after the increases, a position that the State has traditionally voiced with respect to automobile rates.[13]

In supporting their position on the level of automobile rates, Hearing Counsel argue that the average pre-tax profit $34.32 per automobile. Matson contends that the comparable pre-tax profit figure is $31 per automobile ($14.00 after taxes). A major difference in the two pre-tax figures is found in the fact that Hearing Counsel allocate the total expenses attributable to automobiles evenly across all automobiles, both westbound and eastbound, while Matson allocates the majority of such expenses to westbound automobiles.

Because we find neither profit figure to be unreasonably high, we need not decide whether automobiles should be an exception to the general rule with respect to eastbound cargo discussed earlier in this decision. There is little in this record to support the position that eastbound automobiles would not move except for unusually low rates.

After concluding that the average profit per automobile is $34.32, Hearing Counsel state the following:

> "Although a $34.32 profit per automobile might not be unreasonable in the abstract, it is important to consider the economic impact that the 3 percent increase will have on the sale of U.S. automobiles in Hawaii." (Opening Brief of Hearing Counsel, p. 39)

As Matson points out, the record discloses a relatively minimal impact of the automobile increase on sales of U.S. automobiles in Hawaii. The fluctuations in sales during the period in question were far more dependent upon general economic conditions and the availability of gasoline (see Exhibits C–26, C–27 and C–28)than upon freight rates.

We conlude, therefore, that the increases in rates on automobiles which are the subject of Docket No. 74–36 (Sub. No. 1) have not been shown to be unreasonably high.

Whether the rates are unreasonably low, as argued by the State of Hawaii is a question that we will not decide in this case. We are not persuaded by the evidence and arguments presented by the State that the matter should be addressed in this proceeding. The State apparently miscalculated expenses attributable to automobiles resulting in an overstatement of such expenses. Furthermore, we are influenced in this action by the fact that the attorneys for the State of Hawaii are arguing a position that is founded primarily in policy when the State itself has not yet formulated a policy with respect to this issue.[14] Resolution of this

[13] See *e.g.* Docket No. 71–18 *supra*
[14] See *e.g.* 5 F.R. 1180

matter would be better left to a complaint proceeding under section 22 of the Act if the State wishes to pursue its position.

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding is adopted, as modified and clarified herein, and made a part hereof.

IT IS FURTHER ORDERED, That this proceeding be discontinued.

By the Commission.

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

APPENDIX A

MATSON NAVIGATION COMPANY
PACIFIC COAST-HAWAII SERVICE
ADJUSTED INCOME STATEMENT—RATE BASE—RATE OF RETURN
REVISED CONSTRUCTIVE CALENDAR YEAR 1975*
(Dollars in Thousands)

Line No.	Item	Matson Ex. C–12	Adjustment	Adjusted Amount
(1)	(2)	(3)	(4)	(5)
	Income Statement			
1	Operating Revenue	143,547	—	143,547
2	Vessel Operating Expense	94,142	—	94,142
3	Gross Profit	49,405	—	49,405
4	Administrative & General Expense	9,265	—	9,265
5	Other Shipping Operations Expense	21,116	—	21,116
6	Inactive Vessel Expense	342	—	342
7	Depreciation & Amortization Expense	7,677	—	7,677
8	Total—Other Expense	38,400	—	38,400
9	Net Income Before Provision for State and Federal Income Tax	11,005	—	11,005
10	State and Federal Income Tax	4,639	(60)	4,579
11	Net Income	6,366	60	6,426
	Rate Base			
12	Vessels	40,562	—	40,562
13	Other Owned Property and Equipment	17,580	—	17,580
14	Net Working Capital	5,303	—	5,303
15	Assets of Related Companies	14,238	—	14,238
16	Elimination of Deferred Income Taxes	—	(5,515)	(5,515)
17	Total Rate Base	77,683	(5,515)	72,168
18	Amount of Debt	18,636	1,369	20,005
19	Amount of Equity	59,047	(6,884)	52,163
	Rate of Return on Rate Base			
20	Return on Debt—Amount	1,603		1,720
21	Return on Equity—Amount	4,763		4,706
22	Return on Debt—Percent	8.60%		8.60%

* See notes for source of figures and explanation of adjustments

23	Return on Equity—Percent	8.06%	9.02%
24	Overall Rate of Return	8.19%	8.90%

NOTES

Line No.

1 Matson Schedule I. (Ex C–12).
2 Matson Schedule II. (Ex. C–12).
3 Line 1 minus Line 3.
4 Matson Schedule III. (Ex. C–12).
5 Matson Schedule IV. (Ex. C–12).
6 Matson Schedule V. (Ex. C–12).
7 Matson Schedule VI. (Ex. C–12).
8 Sum of Lines 4 through 8.
9 Line 3 minus Line 8.
10 Tax calculated at 41.61% per adjusted Matson Schedule VII.

ADJUSTED MATSON SCHEDULE VII AFTER REMOVAL* OF $15,000,000 LOAN TO ALEXANDER AND BALDWIN AND USING ADJUSTED RATE BASE CALCULATION

1. Net Income before Taxes (The Service)		(Schedule VII Ex. C–12)		11,005
$ Deduct Interest Expense:				
2. Total Interest Expense		(Schedule VII Ex. C–12)		2,359 (3)
Debt/Equity Ratio:		(Schedule VII Ex. C–12)		
3. Long-Term Debt @Jan. 1, 1975		26.728 (2)	27.72%	After the $15,000,000 loan to Alexander & Baldwin has been removed from equity.
4. Equity @Jan. 1, 1975		69,682	72.28%	
5. Total Capital Employed:		96,410	100.00%	
6. Debt (.2772 × 72,168)		20,005 (1)		
7. Equity (.7228 × 72,168)		52,163		
8. Total		72,168		
9. Interest Expense	20.005 (1) / 26,728 (2)	× 2,359 (3)	1,766	
10. Taxable Income for State Taxes (Item 1 minus Item 9)				9,239
11. State Tax Rate (Ex. C–12)				3%
12. State Tax Provision (Item 10 multiplied by Item 11)				277
13. Taxable Income for Federal Taxes (Item 10 minus Item 12)				8,962
14. Federal Tax Rate (Ex. C–12)				48%
15. Federal Tax Provision (Ex. C–12)				4,302
16. Combined State and Federal Tax Provision (Item 12 plus Item 15)				4,579
17. Effective Tax Rate (Item 16 divided by Item 1)				41.61%

*Matson agreed with Hearing Counsel and the State of Hawaii that the $15,000,000 loan to A & B should be excluded from Matson's capital structure. See Reply Brief of Respondent, p. 21.

Line No.

11 Line 9 minus Line 10.
12 Matson Schedule VIII (Ex. C–12).
13 Matson Schedule VIII (Ex. C–12).
14 Matson Schedule IX (Ex. C–12).
15 Matson Schedule X (Ex. C–12).
16 Deferred income taxes of $6.844 million are included in Matson's Balance Sheet for July 1, 1975 (Ex. C–23). The following methodology was employed to remove a portion of these deferred taxes from the rate base: Matson's rate base before elimination of deferred income taxes (the sum of Lines 12, 13, 14 and 15, page 1 of Appendix A) was divided by the total capital in Matson Navigation Company (Line 5, Page 3 of Appendix A). This quotient was then multiplied by the amount of deferred income taxes [$77.683 million divided by $96.410 million × $6.844 million = $5.515 million].
17 Sum of Lines 12 through 16.
18 Matson Schedule VII Ex. C–12 adjusted to the new debt equity ratio and rate base [.2772 (Line 3, Page 3 of Appendix A) multiplied by $72.168 million (Line 8, Page 3 of Appendix A) = $20.005 million].
19 Capital employed in the Service is .7228 (Line 4, Page 3 of Appendix A) multiplied by 72.168 million (Line 8, Page 3 of Appendix A) equals $52.163 million.
20 Line 22 multiplied by Line 18.
21 Line 11 minus Line 20.
22 Line 20 divided by line 18.
23 Line 21 divided by Line 19.
24 Line 11 divided by Line 17.

APPENDIX B

MATSON NAVIGATION COMPANY
PACIFIC COAST-HAWAII SERVICE
ADJUSTED INCOME STATEMENT—RATE BASE—RATE OF RETURN
CONSTRUCTIVE YEAR JULY 1, 1975—JUNE 30, 1976*

(Dollars in Thousands)

Line No.	Item	Matson Ex. C–16	Adjust-ment	Adjusted Amount
(1)	(2)	(3)	(4)	(5)
	Income Statement			
1	Operating Revenue	136,578	—	136,578
2	Vessel Operating Expense	87,810	—	87,810
3	Gross Profit	48,768	—	48,768
4	Administrative & General Expense	9,487	—	9,487
5	Other Shipping Operations Expense	22,793	—	22,793
6	Inactive Vessel Expense	374	—	374
7	Depreciation & Amortization Expense	6,581	—	6,581
8	Total—Other Expense	39,235	—	39,235
9	Net Income Before Provision for State and Federal Income Tax	9,533	—	9,533
10	State and Federal Income Tax	3,969	(56)	3,913

11	Net Income	5,564	56	5,620
	Rate Base			
12	Vessels	39,315	—	39,315
13	Other Owned Property and Equipment	16,865	—	16,865
14	Net Working Capital	5,039	—	5,039
15	Assets of Related Companies	15,373	—	15,373
16	Elimination of Deferred Income Taxes	—	(5,431)	(5,431)
17	Total Rate Base	76,592	(5,431)	71,161
18	Amount of Debt	17,877	1,315	19,192
19	Amount of Equity	58,715	(5,746)	51,969
	Rate of Return on Rate Base			
20	Return on Debt—Amount	1,486		1,595
21	Return on Equity—Amount	4,077		4,025
22	Return on Debt—Percent	8.31%		8.31%
23	Return on Equity—Percent	6.94%		7.75%
24	Overall Rate of Return	7.26%		7.90%

* See notes for source of figures and explanation of adjustments.

NOTES

Line No

1 Matson Schedule I (Ex. C–16).
2 Matson Schedule II (Ex. C–16).
3 Line 1 minus Line 3.
4 Matson Schedule III (Ex. C–16).
5 Matson Schedule IV (Ex. C–16).
6 Matson Schedule V (Ex. C–16).
7 Matson Schedule VI (Ex. C–16).
8 Sum of lines 4 through 7.
9 Line 3 minus line 8.
10 (A) Taxes have been recomputed at a 41.63 percent of effective rate for Matson's Schedule VII (Ex. C–16) because of the rate base revision on Page 1 of Ex. C–16.

Matson Schedule VII As Corrected In View Of
Revision No. 1 to Ex. C–16 (Line 10)

1. Net Income before Taxes (The Service)		(Schedule VII Ex. C–16)		9,533
Deduct Interest Expense:				
2. Total Interest Expense		(Schedule VII Ex. C–16)		2,220 (3)
Debt/Equity Ratio:				
3. Long-Term Debt		26,028 (2)		Schedule VII, Ex. C–16
@July 1, 1975		85,479	23.34%	
4. Equity @July 1, 1975			76.66%	
		111,507		
5. Total			100.00%	
Capital Employed:				
6. Debt (.2334 × 76,592)		17,877 (1)		
7. Equity (.7666 × 76,592)		58,715		
8. Total		76,592	as shown on Page 1 of Ex. C–16.	
9. Interest Expense	17,877 (1)			
	× 2.220 (3)			1,525
	26,028 (2)			

10. Taxable Income for State Taxes (Item 1 minus Item 9)	8,008
11. State Tax Rate (Ex. C–16)	3%
12. State Tax Provision (Item 10 multiplied by Item 11)	240
13. Taxable Income for Federal Taxes (Item 10 minus Item 12)	7,768
14. Federal Tax Rate (Ex. C–16)	48%
15. Federal Tax Provision (Item 13 multiplied by Item 14)	3,729
16. Combined State and Federal Tax Provision (Item 12 plus Item 15)	3,969
17. Effective Tax Rate (Item 16 divided by Item 1)	41.63%

10

(B) Taxes for adjusted rate base have been calculated at a 41.05 percent effective rate due to changes in net income before taxes and the capital structure.

Matson Schedule VII As Adjusted

1. Net Income before Taxes (The Service) as shown on Line 9, Page 1 of Appendix B			9,533	
Deduct Interest Expense:				
2. Total Interest Expense	(Schedule VII Ex. C–16)		2,220 (3)	
Debt/Equity Ratio:	(Schedule VII Ex. C–16)			
3. Long-Term Debt @ July 1, 1975	26,028 (2)	26.97%		After the $15,000,000 loan to Alexander & Baldwin has been removed from equity.
4. Equity @ July 1, 1975	70.479	73.03%		
5. Total	96.507	100.00%		
Capital Employed:				
6. Debt (.2697 × 71.161)	19.192 (1)			
7. Equity (.7303 × 71.161)	51.969			
8. Total	71.161	as shown on Line 17, Page 1 of Appendix B.		
9. Interest Expense $\frac{19.192\ (1)}{26.028\ (2)}$ × 2.220 (3)			1.637	
10. Taxable Income for State Taxes (Item 1 minus Item 9)			7.896	
11. State Tax Rate (Ex. C–16)			3%	
12. State Tax Provision (Item 10 multiplied by Item 11)			237	
13. Taxable Income for Federal Taxes (Item 10 minus Item 12)			7.659	
14. Federal Tax Rate (Ex. C–16)			48%	
15. Federal Tax Provision (Item 13 multiplied by Item 14)			3.676	
16. Combined State and Federal Tax Provision (Item 12 plus Item 15)			3.913	
17. Effective Tax Rate (Item 16 divided by Item 1)			41.05%	

11 Line 9 minus Line 10.
12 Matson Schedule VIII (Ex. C–16).
13 Matson Schedule VIII (Ex. C–16).
14 Matson Schedule IX (Ex. C–16).

15 Matson Schedule X (Ex. C–16).

16 Deferred income taxes of $6.844 million are included in Matson's Balance Sheet for July 1, 1975 (Ex. C–23). The following methodology was used to compute the amount of these taxes which should be removed from Matson's rate base:

First, Matson's rate base before elimination of deferred income taxes (the sum of Lines 12, 13, 14, and 15, Page 1 of Appendix B) was divided by the total capital in Matson Navigation Company (Line 5, Page 4 of Appendix B)—$\frac{76,592}{96,507} = 79.36\%$.

Second, this percentage was multiplied by the amount of deferred income taxes to arrive at the correct amount to be subtracted from the rate base. (TR. 2107) This methodology arrives at the following amount of deferred income taxes to be deducted from rate base: .7936 × $6.844 million = $5.431 million.

17 Sum of Lines 12 through 16.

18 Matson Schedule VII, corrected to conform to Matson's rate base in Revision No. 1, Ex. C–16, and recomputed capital structure and rate base. Debt employed in the Service is .2697 (Line 3, Page 4 of Appendix B) multiplied by $71.161 million (Line 8, Page 4 of Appendix B) equals $19.192 million.

19 Capital employed in the Service is .7303 (Line 4, Page 4 of Appendix B) multiplied by $71,161 million (Line 8, Page 4 of Appendix B) equals $51,969 million.

20 Line 22 multiplied by Line 18.

21 Line 11 minus Line 20.

22 Line 20 divided by Line 18.

23 Line 21 divided by Line 19.

24 Line 11 divided by Line 17.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 527

FORD FRANCE, S.A.

v.

SEA-LAND SERVICE, INC.

November 29, 1977

Application granted.

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

Sea-Land has requested permission to waive collection on a portion of the freight charges on four shipments of "Tractors, truck" from Elizabeth, New Jersey, to Antwerp, Belgium. The shipments weighing 157,543 lbs. and measuring 18,870 cu. ft. were shipped under bills of lading variously dated January 1, 1977, and February 4, 10 and 19, 1977. The rate applicable at the time of shipment was $100.25 WM or $74.75 WM depending upon the date of the particular shipment and the aggregate freight charges which would have been collected were $48,934.63.[2] The rate sought to be applied is $1,425.00 lump sum per tractor under which the aggregate freight charges would be $14,250.00. Permission is sought to waive the collection of $34,684.63.

As stated in the application the circumstances which warrant the waiver are:

> On January 14, 1977, the Ford Export Corp. requested Sea-Land to publish in the open rate section of the N A.C.F.C. Tariff No 29, FMC–4, a rate on Tractors, Truck (Model LTS 900 LWH $^{25}/_{6} \times {}^{7}/_{11} \times {}^{9}/_{0} - 102999$ lbs.). Lump sum $1,425.00 per tractor. This rate was filed by telex effective January 19, 1977, on 25th Revised page 188–D, N.A.C F C. Tariff No. 29, FMC–4 (Exhibit 2).
>
> Subsequent to this filing respondent was notified by Ford that Sea-Land filed the incorrect specifications in the rate item. In actuality, the model tractor was Model LTS 9000 (not LTS 900) LWH $^{25}/_{6} \times {}^{8}/_{0} \times {}^{9}/_{3} - 14065$ lbs. This amendment was filed on 27th revised page 288–D, N.A.C.F.C. Tariff No. 29, FMC–4. (Exhibit 3)

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502 227)

[2] Actually no freight was collected since consignee asserted that due to foreign exchange currency regulations they were unable to pay until an invoice on the agreed amount of freight charges was presented

Consignee has not paid any of the freight charges. They advise that due to foreign exchange control regulations, they are unable to pay until an invoice is issued in the amount of the agreed upon freight charges. If this waiver is granted, the corrected invoice can be prepared and collection obtained.

The clerical error in publishing the specifications for the model LTS–900 rather than the specifications for the model LTS–9000 was not discovered until the shipment had commenced. The mistake was corrected on February 23, 1977 and subsequent shipments moved at the lump sum rate.

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 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 should 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.

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

1. There was a clerical error which resulted in rejection of the rate sought.
2. The waiver requested will not result in discrimination among shippers.
3. Prior to applying for the waiver a new tariff was filed setting for the rate on which the waiver was based.
4. The application was filed within 180 days from the date of shipment.

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

WASHINGTON, D.C.,
November 29, 1977.

[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).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 527

FORD FRANCE S.A.

v.

SEA-LAND SERVICE, INC.

ORDER

July 3, 1978

In the Initial Decision served in this proceeding, Chief Administrative Law Judge John E. Cograve granted Sea-Land Service, Inc. permission to waive collection of $34,684.64 of the $48,924.63 assessed on four shipments of "tractors, truck" from Elizabeth, New Jersey to Antwerp Belgium. Before the time for filing exceptions had expired, Sea-Land petitioned for a reopening of the proceeding to permit the filing of a supplementary bill for heavy lift charges amounting to $967.32, erroneously omitted in the request for a waiver.

It appears that heavy lift charges were computed in the freight bills on three of the four shipments involved which were the subject of the application but were billed separately on the fourth shipment. Inasmuch as the request for a waiver extends to the freight charges assessed on that shipment and heavy lift is now included in the rate found to be applicable, the supplemental bill is accepted into the record, as requested by Sea-Land. The Initial Decision is hereby amended to increase the amount of the waiver from $34,684.63 to $35,661.15.

It is ordered.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 429(F)

NATIONAL STARCH & CHEMICAL CORP.

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF DETERMINATION NOT TO REVIEW

June 28, 1978

Notice is hereby given that the Commission on June 28, 1978, determined not to review the Supplemental Decision of the Presiding Judge in this proceeding.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 429 (F)

NATIONAL STARCH & CHEMICAL CORP.

v.

LYKES BROS. STEAMSHIP CO., INC.

Recovery for alleged overcharges denied.

Henry G. Kavanagh, Traffic Director, National Starch and Chemical Corporation, for Complainant.

Brian M. Dolan and *David W. Gunther,* Assistant to the Manager and Manager, respectively—Traffic Legislative and Regulatory Affairs, Lykes Bros. Stamship Co., Inc., for Respondent Carrier.

SUPPLEMENTAL[1] DECISION[2] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Background

The complaint in this proceeding sought to have the matter proceed under Subpart S—Informal Procedure for Adjudication of Small Claims, Rule 301 of the Commission's Rules of Practice and Procedure, 46 CFR 502.301. The complaint herein, received in the Commission on August 12, 1977, was filed timely. Pursuant to Rule 301 the case was assigned on August 17, 1977, to a Settlement Officer. The respondent, however, in a letter dated September 16, 1977, as well as in its answer to the complaint, elected not to consent to proceed under Rule 301, therefore this proceeding is pursuant to Subpart T—Formal Procedure for Adjudication of Small Claims, 46 CFR 502.311. The case was assigned on September 30, 1977, to the Presiding Administrative Law Judge, who on December 7, 1977, served his Initial Decision herein.

On December 27, 1977, the Commission served notice that on December 22, 1977, it determined to review the Initial Decision. On April 17, 1978, the Commission served its Order on Remand, in which it vacated the December 7, 1977, Initial Decision and directed the Presiding

[1] Supplemental Decision was directed to be issued by Commission's April 17, 1978, Order on Remand.

[2] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 318, Rules of Practice and Procedure, 46 CFR 502 318)

Administrative Law Judge to issue, within 45 days from April 17, 1978, a Supplemental Decision.

On April 18, 1978, the Presiding Administrative Law Judge served an Order for Procedural Schedule to Implement the Commission's Order on Remand, directing, *inter alia,* (1) Complainant to file on or before May 2, 1978, all facts supported by documents or affidavits and briefs it deems necessary to prove and corroborate the product shipped herein; (2) Carrier to file on or before May 15, 1978, any reply to Complainant's case with facts supported by documents or affidavits and briefs deemed necessary and (3) Complainant to file on or before May 22, 1978, a closing brief in response to Carrier's brief. The Complainant and Respondent complied with (1) and (2) respectively. No closing brief was received from the Complainant.

The Carrier's Bill of Lading No. 28 is dated September 26, 1975, at New Orleans, Louisiana, for the transportation on the Carrier's vessel *Thompson Lykes* from New Orleans to Guayaquil, Ecuador:

1000 bags Cornstarch =		
101,000 lbs. (2,125 cft) at $67.50/2000 lbs.	=	$3,408.75
Bunker Surcharge at $8.25/2000 lbs.	=	416.63
Congestion Surcharge at $6.00/2000 lbs.	=	303.00
		$4,128.38
Tolls		36.78
		$4,165.16

(There is no dispute as to this commodity and the freight charge for it.) 40 Drums: Liquid Synthetic Plastics N.0.1 (Catalyst B–29–9732) of a gross weight of 21,600 lbs. (467 cu. ft).

The applicable tariff herein is Atlantic and Gulf/West Coast of South America Conference (Agreement No. 2744), South Bound Freight Tariff No. 12, FMC No. 1. The Carrier applied Tariff Item 999, page 137, Class 1 at $135.75/40 cu. ft. (467 cu. ft. ÷ 40 = 11.675; $135.75 × 11.675 = $1,584.88; bunker surcharge at $8.25/40 cu. ft. = $96.32; congestion charge at $6.00/40 cu. ft. = $70.05 for a total charge of $1,751.25).

The Complainant contends the 40 drums should have been rated under Tariff Item 740, 36th Rev. Page 116, Resins, Synthetic; Non-hazardous, N.O.S. in other packing under Group 1 contract rate at $62.00/40cu. ft. and that the charge should have been $890.22 ($62.00 × 11.675 = $723.85; Bunker Surcharge $96.32; Congestion Surcharge $70.05—total $890.22). The $890.22 subtracted from the $1,751.25 leaves $861.03 which Complainant alleges is overpayment and for which recovery is sought.

In support of its claim, the Complainant alleged and attached to the complaint a copy of an overcharge claim made for it under date of August 2, 1976, No. 450221, by its consultant to the Respondent. Also attached was a letter from the complainant dated July 15, 1976, to its consultant stating, *inter alia,* "The complete description for Catalyst B (29–9732) is

Resin, Synthetic; Non-Hazardous, (Acetone Formaldehyde Condensation Polymer) in drums." The Commission in its April 17, 1978, Order on Remand indicated it was ". . . to provide Complainant further opportunity to introduce corroborating evidence in support of its claim. . . ." In a letter dated April 27, 1978, postmarked Somerville, N.J., April 28, 1978, Certified Mail No. 800943 (received May 2, 1978), the Complainant stated:

. . . As corroborating evidence in support of our position that material shipped were in fact a synthetic resin, we offer the following:

(a) U. S. Department of Labor, OSHA Material Safety Data Sheet submitted by my company for "Catalyst B" indicating that this is a ketone aldehyde "*thermosetting resin.*"

(b) A copy of a page from Van Norstrand Reinhold Company issue of The Condensed Chemical Dictionary covering "resins, synthetics."[3] Please note the "see also plastic" reference as well as specific reference to "resins are broadly classified as thermosetting."

(c) A notarized statement by our Mr. R. H. Williams, Product Development Manager for Industrial Chemicals certifying the product in question to be a "synthetic resin."

The Respondent by letter dated May 12, 1978 (received May 15, 1978), replied to the Complainant's corroborating evidence, attaching from the 8th revised Van Norstrand Reinhold Company (Hawley's) issue of the Condensed Chemical Dictionary a copy of the definition of "resin, synthetic."[4] Attached also was a copy of the "illegible Export Declaration" Complainant sent to respondent in response to request for production of documents. Respondent asserts the Schedule B number allegedly used by the Complainant did not exist at the time of shipment. Respondent asserts it has not received catalogs, brochures, specifications, plans, drawings, memoranda, correspondence or other documents it requested describing each component of the shipment. Further, the Respondent reiterates its position that the Complainant was correctly charged on the shipment in question.

Discussion

The Carrier admits it is a common carrier engaged in transportation by water from ports in the United States to Ports in Ecuador and as such subject to the provisions of the Shipping Act of 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended.

There is no dispute as to the charges totalling $4,164.16 for the transportation of the 1000 bags of cornstarch on the Carrier's Bill of

[3] 7th Edition edited by Arthur and Elizabeth Rose published 1966.

resins synthetic (See also plastic.) Amorphous, organic semisolid or solid materials produced by polymerization. The term synthetic resin is also sometimes applied to chemically modified natural resins. Resins are broadly classified as thermoplastic or thermosetting according as they soften or harden with application of heat

[4] 8th Edition, published 1971

resin, synthetic A man-made high polymer (q.v.) resulting from a chemical reaction between two (or more) substances, usually with heat or a catalyst. This definition includes synthetic rubbers, siloxanes, and silicones, but excludes modified, water-soluble polymers (often called resins). Distinction should be made between a synthetic resin and a plastic (q.v.): the former is the polymer itself, whereas the latter is the polymer plus such additives as fillers, colorants, plasticizers, etc

Lading No. 28. The dispute is as to the 40 drums described on Bill of Lading No. 28 as Liquid Synthetic Plastics N01 (Catalyst B–29–9782) and the $1,751.25 charge for its transportation from New Orleans, Louisiana, to Guayaquil, Ecuador. The total charge on B/L 28 is $5,916.41 from which is subtracted the undisputed charges of $4,165.16 leaving balance of $1,751.25. According to the complainant the 40 drums should have been rated under Tariff Item 740, Synthetic Resin, Non-Hazardous NOS at a rate of $62.00/40 cu. ft. thus:

467 cft at 62.00/40 cft	$723.85
Bunker sucharge (same as on B/L 28)	96.32
Congestion surcharge (same as on B/L 28)	70.05
	$890.22

The $890.22 subtracted from the $1,751.25 results in the $861.03 which the complainant alleges to have been overcharged.

Tariff Item 740, 36th Rev. page 116 of the applicable tariff herein, Atlantic and Gulf/West Coast of South America Conference (Agreement No. 2744), South Bound Freight Tariff No. 12, FMC No. 1, effective March 31, 1975, was in effect September 26, 1975, the date of shipment of freight in question. Tariff Item 740 reads, Resins, Synthetic; non-hazardous N.O.S. in other packing under Group 1 contract rate $61.00/40 cft. After NOS is (See Note 1). Note 1 reads, "For classification and rating under this item shipper must describe on the Bill of Lading the specific Resin(s) being shipped; failing such specific description Resin(s) by such Bill of Lading shall be rated as Cargo N.O.S. Class 1." The Carrier says that as to the drums Tariff Item 999, page 137, Class 1 is proper at $135.75/40 cu. ft. and that is what the Carrier applied.

As the Commission pointed out in its April 17, 1978, Order on Remand no evidence was introduced in support of the statement in the Complainant's letter of September 16, 1976, addressed to Complainant's consultant which described the Catalyst B shipped as a "Resin, Synthetic, non-hazardous, (Acetone Formaldehyde Condensation Polymer)." In response to the further opportunity given by the April 17, 1978, Order on Remand to introduce corroborating evidence in support of its claim, the Complainant introduced the definition of "resins, synthetic" from the 1966 Condensed Chemical Dictionary, to which the Respondent replied with introducing the 1971 edition of the said dictionary of "resins, synthetic" (both are footnoted above). The later edition points out the differences.

The Presiding Administrative Law Judge *finds and concludes* that the shipper has not provided the corroborating evidence demanded by the April 17, 1978, Order on Remand. He also finds and concludes that the Carrier properly rated the freight under the tariff and has not violated the Shipping Act

Upon consideration of the entire record in this proceeding, and in

appraisal thereof, the Presiding Administrative Law Judge *finds and concludes,* in addition to the findings and conclusions heretofore stated:

(1) The Carrier has not violated the Shipping Act.

(2) There has been no overcharge.

(3) Recovery for alleged overcharges should be denied.

(4) The claim should be dismissed and this proceeding discontinued.

Wherefore, it is ordered:

(A) The claim for recovery of alleged overcharges be and hereby is denied.

(B) The claim is dismissed and this proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
May 30, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69–57

AGREEMENT NO. T–2336—NEW YORK SHIPPING ASSOCIATION COOPERATIVE WORKING ARRANGEMENT

NOTICE CONCERNING SATISFACTION OF REMAINING VALID CLAIMS AND DISCONTINUANCE OF PROCEEDING

July 5, 1978

On April 3, 1978 we issued an order in this proceeding in which we determined the amount and directed satisfaction within 60 days of the remaining valid claims for assessment adjustments stemming from over-assessments made by the New York Shipping Association (NYSA) in funding benefits under a collective bargaining agreement between NYSA and the International Longshoremen's Association, AFL–CIO.

On June 2, 1978 NYSA notified the Commission of the manner in which it had satisfied the claims and requested that we find such satisfaction to be in compliance with our April 3rd order.[1]

NYSA has extended credits for the full amount of each claim on cargo loaded and/or discharged on or after June 2, 1978. Such credits are made subject to immediate refund with interest at the rate of 6 percent per annum computed from the date such credits or portions thereof were applied, in the event there is a final judicial determination reversing and setting aside our April 3rd order. We find that the granting of credits for the claims in question brings NYSA into substantial compliance with that order at the present time.

We have already approved credits as a proper means of satisfying the remaining claims (see April 3rd order, page 21), and we see nothing wrong with NYSA's making the credits effective as of June 2, 1977. It is clear that NYSA chose that date, as the 60th day after service of the April 3rd order, for the proper purpose of avoiding the payment of interest on the remaining claims. (See April 3rd order, pages 24–26.) NYSA adopted a similar course of making credits effective 60 days after service of our order directing satisfaction of the claims of the States Marine Group herein which we have already found to be in compliance

[1] In proceeding with satisfaction of the claims, NYSA has preserved its right to challenge our April 3rd order directing such satisfaction, review of which is now pending before the Court of Appeals for the District of Columbia Circuit

with that order. (See "Notice Concerning Satisfaction of States Marine Group's Claim," served November 18, 1977, pages 4–5.)

We have two reservations with respect to NYSA's satisfaction of the remaining claims, which are the same as those we had with respect to the satisfaction of some of the claims of the States Marine Group.

First of all, NYSA has sought to attach a condition to grant of the credits in question that interest shall be payable thereon in the event of judicial reversal of the Commission's April 3rd order. The question whether interest should be charged under these circumstances and, if so, as of what date, is a matter which should be judged in the light of facts and circumstances as they appear when final judicial resolution of the question of NYSA's liability for the assessment adjustments directed in our April 3rd order herein is made. Determinations with respect to liability, if any, for interest may vary depending upon the time when they are made.[2] Accordingly, we do not approve the provision with respect to interest payable by claimants to NYSA, but will await the termination of judicial review to examine the matter of interest which the remaining claimants could conceivably owe NYSA as a result of findings adverse to the Commission on such review as it appears after such review.

Secondly, we are unable to hold definitively at the present time that credits will continue to be a proper and sufficient means for satisfying the remaining claims since, if at some future time some of the claimants cease operations at the Port of New York, cash payments might be necessary to satisfy the remainder of their claims.

At the present time, however, we find NYSA to be in substantial compliance with our April 3, 1978 order herein directing satisfaction of the remaining valid claims.

Since all necessary adjustments have now been made with respect to the assessments which are the subject matter of this proceeding, no reason remains to continue it any longer. If the method of satisfaction of the claims here recognized as proper at the present time becomes improper, because a claimant ceases operations at the Port, or if it becomes necessary to consider the question of interest possibly due NYSA with respect to the claims, this proceeding can and will be reopened. For the present, however, our task here is completed. *Therefore, It is Ordered, That this proceeding be, and it hereby is, discontinued.*

By the Commission.

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

[2] See, e.g., our denials of pre-order interest herein but grant of post-order interest to run after 60 days of service of orders for unsatisfied claims.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 449(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

INFORMAL DOCKET NO. 450(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

INFORMAL DOCKET NO. 451(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

INFORMAL DOCKET NO. 452(I)

MECHANICAL PLASTICS CORP.

v.

DART CONTAINER LINE, INC.

INFORMAL DOCKET NO. 453(I)

MECHANICAL PLASTICS CORP.

v.

ATLANTIC CONTAINER LINE LTD.

INFORMAL DOCKET NO. 454(I)

MECHANICAL PLASTICS CORP.

v.

ATLANTIC CONTAINER LLINE LTD.

INFORMAL DOCKET NO. 455(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

INFORMAL DOCKET NO. 456(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

INFORMAL DOCKET NO. 457(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

INFORMAL DOCKET NO. 458(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

Notice is hereby given that the Commission, on July 5, 1978, determined not to review the decision of the Settlement Officer served June 23, 1978 subject to the corrections set forth below.

In Informal Docket No. 456(I) the rating factor should be 1.351 mt; the applicable freight charges should be $262.63; and the overcharge should be $126.73. The total overcharges set out on page 12 should be $2,537.08 and the amount of reparation due from American Export Lines, Inc. (page 13) should be $126.73 for 456(I) and the total reparation should be $1,808.99.

By the Commission.

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

Reparation awarded in part.

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

By 10 complaints filed on September 30, 1977, Mechanical Plastics Corp. (complainant)[2] alleges that for the period from September 26, 1975 to October 30, 1975, American Export Lines, Inc. (7 claims), Dart Containerline, Incorporated (1 claim), and Atlantic Container Line Ltd. (2 claims) handled 10 shipments of plastic fasteners from New York, New York to ports as covered herein on the Continent, Baltic and Mediterranean. It could be inferred that any claim filed covering shipments moving under bills of lading dated after September 30, 1975, was not filed within the two-year statutory limit set in Section 22 of the Shipping Act, 1916. However, reference is made to the Commission's Order on Remand in Docket No. 76–1, *CSC International, Inc.* v. *Orient Overseas Container Line, Inc.*, served July 12, 1976, wherein it held:

"The law is well settled that a cause of action based upon a claim for reparation accrues at the time of shipment or upon payment of freight charges, whichever is later. *Aleutian Homes, Inc.* v. *Coastwise Line, et al*, 5 F.M.B. 602, 611 (1959); *United States of America* v. *Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971); *U.S. ex rel Louisville Cement Company* v. *I.C.C.* 296 U.S. 638, 644 (1917). . . ."

Complainant's customer overseas, Hilti A.G. has submitted documentation indicating that the subject ocean freight bill payments were made to the respondents between October 14, 1975 and April 5, 1976. Therefore, the claims were filed within the two-year statutory limit of Section 22 of the Act.

On September 20, 1976, respondent American Export Lines, Inc., advised claimant's agent that the tariffs involved in the seven claims submitted to it all provided under their rules that any claims presented to the carrier alleging overcharges based on measurements, must be presented in time for the carrier to remeasure the cargo either at the port of loading or upon discharge from the vessel at destination.[3] As respondent was unable to measure the cargo it advised that it could not adjust the seven claims. On September 24, 1976, Atlantic Container Line gave the same response to complainant's agent. On August 24, 1977, (referring to an earlier letter of September 29, 1976) Dart Containerline gave the same

[1] All parties having consented to the informal procedure of Rule 19(a) 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: Determination not to review July 5, 1978)

[2] Mechanical Plastics Corp. *is the complainant herein even though the shipments moved freight collect.* The consignees were Hilti A.G. customers organizations located in Europe. Hilti A.G. paid the collect charges and assigned the overcharge claims to Mechanical Plastics. Hilti A.G. authorized Mechanical Plastics Corp. to file these claims *with the Commission.*

[3] With respect to such a rule the Commission in its report on remand served November 24, 1976, in *Kraft Foods* v. *Moore McCormack Lines, Inc.*, negated its application with respect to claims before the Commission stating in part: *In effect the Rule set up as a period of limitation*, the time during which the shipment remains in the custody of the carrier, which limitation was reviewed by the Court as infringing on the rights granted by section 22 of the Shipping Act. . . .

response to complainant's agent. Complainant has a heavy burden of proof once the shipment has left the custody of the carrier.[4]

While a violation of the Shipping Act, 1916, is not alleged, it is presumed to be Section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of shipment.

The claims are all the result of complainant's agent's excess volume declarations on the bills of lading. The computation of the correct cubic measurements are simplified due to the fact that complainant only ships three carton sizes in ocean foreign commerce. Below are my computations using the measurement rules of the governing tariffs:

Small 14#	$21\frac{3}{4} \times 12\frac{1}{2} \times 8$		
	$22 \times 13 \times 8 =$	2,228	= 1.324hcft ctn
		1,728	
Medium 20#	$27\frac{1}{2} \times 12\frac{1}{2} \times 10 =$	3,510	= 2.031 cft ctn
	$27 \times 13 \times 10$	1,728	
Large 24#	$30 \times 12\frac{1}{2} \times 11\frac{1}{2}$		
	$30 \times 12 \times 12 =$	4,320	= 2.5 cft ctn
		1,728	

As will be shown herein approximately double the above cubic foot measurements were used on the bills of lading and in computing the freight charges. Complainant has submitted a packing list on each shipment which indicates how many cartons of each of the above sizes were shipped to each consignee. Each list covers one shipment moved on the bill of lading which is the subject of each claim.

A second matter to be resolved is the conversion of currency. Complainant's (Hilti A.G.) customers marketing organizations were overcharged in the currency of the country of destination, e.g. Portugal (Escudo), Germany (Deutsche Mark), France (Frank), etc. In computing the balance due from complainant, Hilti A.G. converted the foreign currency to the Swiss franc on the date the freight charges were paid (between October 14, 1975 and April 5, 1976). However, in debiting complainant's account Hilti A.G. further converted the Swiss franc to the United States dollar on March 21, 1976 using an exchange rate of $0.4054 per Swiss franc. A total balance due of $3,742.70 was computed. However, this was an overstatement in that it covered two shipments on which claims were not filed. One involved a shipment to France involving an overcharge of 362.50 Swiss francs. The other involved a shipment to Finland involving an overcharge of 192.80 Swiss francs. These two shipments on which no claims were filed must be converted to U.S. dollars and subtracted from the above balance due. 362.50 plus 192.80 = 555.30 Swiss francs at the conversion rate of $0.4054 (as used by Hilti,

[4] *Colgate Palmolive Co. v. United Fruit Co.*, Docket No. 115(I), September 30, 1970.

A.G.) per Swiss franc totals $225.12. Subtracting this from the above balance due amends same to $3,517.58.

In my currency computations conversion of the foreign currency was made directly to the United States dollar at the exchange rate in effect, in the New York market, on the date of payment of the freight charges (between October 14, 1975 and April 5, 1976). My computations result in a balance due of $2,541.94. Complainant has agreed to the use of my currency exchange computations. My computations of $2,541.94 balance due covers the amount complainant was overcharged by respondents. The difference between Hilti A.G.'s total deduction from complainant's account of $3,742.70 and $2,541.94 reparation due from respondents is a matter between complainant and Hilti, A.G.

The product shipped is described on the bills of ladings as "Plastic Togglers." The product is completely made of plastic. Advertising material submitted by complainant gives insight into the uses for the product and what it is.

"THE NEW PLASTIC ANCHOR SHOWS WHAT IT CAN DO"

"Application

For light-duty fastening in non-loadbearing partition walls such as plasterboard, gypum board (Drywall), asbestos sheeting, woodwool panels or in hollow or cavity brick, concrete blocks, hollow filler tiles, acoustic ceilings and other lightweight materials.

"Trades

For all tradesmen, craftsmen and workmen, especially electricians, joiners, cabinet makers and internal decorators."

Upon reviewing the various tariffs involved, the only appropriate description therein was either General Cargo, Other Than Dangerous Cargo, N.E.S. or Articles of Artificial Plastic Materials, N.E.S., both of which take the same rate.[5] The only exceptions were American Export Lines Tariff No. 1, F.M.C. 141 (449–I), and the North Atlantic Baltic Freight Conference Freight Tariff No. 15, F.M.C.–3 (458–I), which have no rate on plastic articles, and therefore The General Cargo, N.O.S., Not Dangerous or Hazardous rate, was used.

[5] All of the conference tariffs but the North Atlantic Baltic Freight Conference have a lower valuation rate, i.e.:

Plastic Articles, N.E.S., Packed Up to incl. $500 per Freight ton

However, the valuation of a measurement ton of the subject shipments exceeds $500.00 for all three size cartons.

Small ctn—5,000 units ($17.20 per 1,000 units)—$86.00 valuation per ctn

$$\frac{40 \text{ cft mt}}{1.324 \text{ cft ctn}} = 30.2 \text{ ctns} = \text{mt } 30.2 \text{ ctns } ($86.00) = $2,597.20 \text{ value per mt}$$

Medium ctn—5,000 units ($13.90 per 1,000 units)—$69.50 valuation per ctn

$$\frac{40 \text{ cft mt}}{2.031 \text{ cft ctn}} = 19.6 \text{ ctns} = \text{mt } 19.6 \text{ ctns } ($69.50) = $1,362.20 \text{ value per mt}$$

Large ctn—5,000 units ($21.50 per 1,000 units)—$107.50 valuation per ctn

$$\frac{40 \text{ cft mt}}{2.5 \text{ cft ctn}} = 16 \text{ ctns} = \text{mt } 16 \text{ ctns } ($107.50) = $1,720.00 \text{ value per mt}$$

Following is a computation of each of the 10 subject small claim settlements:[6]

449(I) bill of lading 158119 of 9–29–75 to Lisbon, Portugal

18 ctns. Plastic Togglers 65 cu ft—Complainant debited[7] $233.92

American Export Lines, Inc. Freight Tariff No. 1–F.M.C. No. 141 General Cargo $115.75 W/M

6 small ctns. (1.324)	7.944 cu ft		
6 medium ctns. (2.031)	12.186 cu ft		
6 large ctns. (2.5)	15 cu ft	35.13	
		——— = .878 mt	
	35.130	40	
Applicable freight charges $115.75 (.878) =			$101.63
Overcharge			$132.29

450(I) bill of lading 158404 of 9–26–75 to Munich, West Germany

60 ctns. Plastic Togglers 232 cu ft—Complainant debited $1,109.37

North Atlantic Continental Freight Conference Tariff (29) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $180.75 W/M

20 small ctns. (1.324)	26.48 cu ft		
40 large ctns. (2.5)	100.0 cu ft	$\frac{126.48}{40}$ = 3.162 mt	
	126.48		
Applicable freight charges $180.75 (3.162) =			571.53
Overcharge			$537.84

451(I) bill of lading 158100 of 9–26–75 to Antwerp, Belgium

18 ctns. Plastic Togglers 65 cu ft—Complainant debited $316.59

North Atlantic Continental Freight Conference Tariff (29) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $180.75 W/M

5 small ctns. (1.324)	6.62 cu ft		
8 medium ctns. (2.031)	16.248 cu ft		
5 large ctns. (2.5)	12.5 cu ft	$\frac{35.368}{40}$ = .884 mt	
	35.368		
Applicable freight charges $180.75 (.884) =			159.78
Overcharge			$156.81

[6] Claims 452(I), 454(I) and 455(I) cover shipments rated in the North Atlantic French Atlantic Freight Conference, claim 458(I) in the North Atlantic Baltic Freight Freight Conference, and claim 456(I) in the North Atlantic Mediterranean Freight Conference. All of these conferences have dual rate contract systems but as neither the complainant or consignee is a contract signator, the higher non-contract rates apply. The other five claims are governed by tariffs which do not have dual rate contract systems.

[7] By Hilti, A.G.

452(I) bill of lading H0023 of 10–30–75 to LeHavre, France

176 ctns. Plastic Togglers 690 cu ft—Complainant debited $2,101.74

North Atlantic French Atlantic Freight Conference Tariff No. (3) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $212.50 W/M

16 small ctns. (1.324)	21.184 cu ft		
98 medium ctns. (2.031)	199.038 cu ft		
62 large ctns. (2.5)	155.0 cu ft	$\frac{375.222}{40}$ = 9.381 mt	
	375.222		
Applicable freight charges $212.50 (9.381) =			$1,993.46
Overcharge			$ 108.28

453(I) bill of lading A75019 of 10–23–75 to Antwerp, Belgium

15 ctns. Plastic Togglers 60 cu ft—Complainant debited $275.48

North Atlantic Continental Freight Conference Tariff (29) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $180.75 W/M

10 medium ctns. (2.031)	20.31		
5 large ctns. (2.5)	12.5	$\frac{32.81}{40}$ = .820 mt	
	32.81		
Applicable freight charges $180.75 (.820) =			148.22
Overcharge			$127.26

454(I) bill of lading A91032 of 10–26–75 to LeHavre, France

94 ctns Plastic Togglers 328 cu ft—Complainant debited $1,438.81

North Atlantic French Atlantic Freight Conference Tariff No. (3) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $212.50 W/M

34 small ctns. (1.324)	45.016		
36 medium ctns. (2.031)	73.116		
24 large ctns (2.5)	60.000	$\frac{178.132}{40}$ = 4.453 mt	
	178.132		
Applicable freight charges $212.50 (4.453)			946.26
Overcharge			$492.55

455(I) bill of lading 160699 of 10–15–75 to LeHavre, France

37 ctns. Plastic Togglers 132 cu ft—Complainant debited $572.46

North Atlantic French Atlantic Freight Conference Tariff No. (3) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $212.50 W/M

5 small ctns. (1.324)	6 62		
32 medium ctns. (2.031)	64 992		
	71 612		
		$\frac{71.612}{40}$ = 1 790 mt	
Applicable freight charges $212.50 (1.790)			380.38
Overcharge			$192.08

456(I) bill of lading 160123 of 10–8–75 to Genoa, Italy

28 ctns. Plastic Togglers 99 cu ft—Complainant debited $389.36

North Atlantic Mediterranean Freight Conference Freight Tariff No. 10–FMC–3 Articles of Artificial Plastic Materials, N.E.S. $194.40 W/M

8 small ctns. (1.324)	10.592	
14 medium ctns. (2.031)	28.434	
6 large ctns. (2.5)	15.0	$\frac{54.026}{40} = 1.326$ mt
	54.026	

Applicable freight charges $194.40 (1.326) 257.77

Overcharge $131.59

457(I) bill of lading 160557 of 10–17–75 to Hamburg, Germany

32 ctns. Plastic Togglers 133 cu ft—Complainant debited $770.51

North Atlantic Continental Freight Conference Tariff No. (29) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $180.75 W/M

16 medium ctns. (2.031)	32.496	
16 large ctns. (2.5)	40.0	$\frac{72.496}{40} = 1.812$ mt
	72.496	

Applicable freight charges $180.75 (1.812) 327.52

Overcharge $442.99

458(I) bill of lading 160572 of 10–17–75 to Copenhagen, Denmark

40 ctns. Plastic Togglers 154 cu ft—Complainant debited $590.00

North Atlantic Baltic Freight Conference Freight Tariff No. (15) F.M.C.–3 General Cargo, N.O.S. $177.00 W/M

10 small ctns. (1.324)	13.24	
10 medium ctns. (2.031)	20.31	
20 large ctns. (2.5)	50	$\frac{83.55}{40} = 2.089$ mt
	83.55	

Applicable freight charges $177.00 (2.089) $369.75

Overcharge $220.25

Total Overcharges $2,541.94

Complainant has borne the heavy burden of proof with respect to the subject shipments. Initially, with the claims, it filed the bills of lading showing the high cubic measurement indicated on each shipment. In addition, packing lists were submitted which contained the measurements of each of the three size cartons that complainant ships overseas. A compilation of the debiting of complainant's account by Hilti A.G. for overcharges paid by Hilti's marketing organizations was furnished. The dates of payment of transportation charges overseas on each shipment was provided—both to determine that the claims were not time-barred and to determine the date for currency exchange. Its status with respect to dual rate contracts in each of the trades was furnished. Abundant

literature was furnished showing just what a plastic toggler is to assist in determining its appropriate commodity tariff description.

There are three respondents herein and the reparation due complainant from each is summarized below:

American Export Lines, Inc.		
Docket No. 449(I)		$ 132.29
Docket No. 450(I)		537.84
Docket No. 451(I)		156.81
Docket No. 455(I)		192.08
Docket No. 456(I)		131.59
Docket No. 457(I)		442.99
Docket No. 458(I)		220.25
	Total	$1,813.85
Dart Containerline, Incorporated		
Docket No. 452(I)		$ 108.28
Atlantic Container Line Ltd.		
Docket No. 453(I)		$ 127.26
Docket No. 454(I)		492.55
	Total	$ 619.81

Reparation for the above amounts totalling $2,541.94, by the above respondents is awarded to complainant.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-35

CANCELLATION OF THE CONSOLIDATION ALLOWANCE RULE PUBLISHED IN THE FREIGHT TARIFFS OF CONFERENCES AND THE RATE AGREEMENT OPERATING FROM UNITED STATES ATLANTIC PORTS TO PORTS IN THE UNITED KINGDOM, IRELAND, THE SCANDINAVIAN PENINSULA AND CONTINENTAL EUROPE

Concerted establishment and maintenance of a system of payment of consolidation allowances found authorized by Respondents' approved agreements.

Maintenance of a system of consolidation allowances found to be in the public interest within the meaning of section 15 of the Shipping Act, 1916.

Concerted elimination of system of consolidation allowances found to be action requiring separate approval under section 15 of the Shipping Act, 1916.

Howard A. Levy, Jacob P. Billig and *John R. Attanasio* for Respondents.

F. Conger Fawcett for Intervenors Latin America/Pacific Coast Steamship Conference, North Europe—U.S. Pacific Freight Conference, Pacific Coast Australasian Tariff Bureau, Pacific Europe Conference, Pacific Coast River Plate Brazil Conference and Pacific—Straits Conference.

Gerald H. Ullman for Intervenors National Customs Brokers and Forwarders Association of America, Inc. and New York Foreign Freight Forwarders and Brokers Association, Inc.

Raymond P. deMember and *Abraham A. Diamond* for Intervenors J. E. Bernard & Co., Boston Consolidation Service, Inc., C.S. Greene and Company, Inc., and Yellow Forwarding Co. d/b/a/ Yellow Freight International.

Paul A. Mapes, et al., for United States Department of Justice.

John Robert Ewers, Martin F. McAlwee, Carlos Rodriguez for the Bureau of Hearing Counsel.

REPORT

July 12, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* James V. Day, *Commissioner;* Karl E. Bakke, *Commissioner* dissenting in part (separate opinion to be issued); Leslie Kanuk, *Commissioner,* not participating.)

In December, 1975 this Commission received tariff revisions from certain conferences, member carriers and a rate agreement indicating that, effective in January, 1976, those entities (Respondents hereafter) intended to suspend certain tariff rules which provided, generally, for payments to consolidators for consolidation into containers of a minimum of three different commodities from four separate shippers on outbound shipments.[1] The proposed suspension of those rules elicited expressions of great concern from non-vessel operating common carriers (NVO's), freight forwarders, and consolidators.[2]

In response, on June 22, 1976, the Commission issued an Order to Show Cause instituting this proceeding. Following issuance of that Order, Respondents produced a new proposed tariff amendment superceding the proposed cancellation of the tariff rules which would have resulted in loss of allowance payments by the majority of consolidators and greatly reduced allowances to the few which continued to qualify. On the basis of this filing, apparently, Respondents submitted a petition seeking discontinuance of the proceeding.

Replies to Respondents' Petition were filed and other procedural requests seeking "clarification of issues" were pursued. On September 24, 1976, the Commission issued an Order which denied the Petition to Discontinue, but restructured the proceeding. Issues pertaining to section 16 of the Act were made the subject of a separate proceeding while this docket was limited to two issues pertaining to section 15. As amended, the issues to be pursued in this proceeding were framed as:

> IT IS . . . ORDERED, That Respondents Show Cause why the Commission should not find that any concerted action of Respondents with regard to consolidation allowances are actions which implement unfiled, unapproved agreements in violation of section 15. . .
>
> IT IS FURTHER ORDERED, That since the joint fixing of consolidation allowances is a horizontal price fixing *per se* violation of the antitrust laws, Respondents Show Cause why, even if the concerted actions are pursuant to agreements approved by the Commission under section 15 of the Shipping Act, 1916, the Commission should not find such agreements contrary to the public interest which should be disapproved or modified.[3]

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[1] These parties the Respondents, are North Atlantic Baltic Freight Conference, North Atlantic Continental Freight Conference North Atlantic United Kingdom Freight Conference South Atlantic North Europe Rate Agreement Seatrain International, S A , American Export Lines Inc , Atlantic Container Line (G I I) Dart Container Co Ltd , Hapag-Lloyd Aktiengesellschaft, Norwegian American Line, Sea-Land Service, Inc United States Lines Inc, Transatlantic Container Management, N V , and Combi Line

[2] Hereinafter for convenience all of these persons will be referred to as Consolidators These and numerous other parties intervened The Intervenors are Department of Justice, J.E. Bernard & Co. Boston Consolidation Service, Inc C S Greene and Company, Inc. Yellow Forwarding Co , National Customs Brokers and Forwarders Association of America, Inc New York Foreign Freight Forwarders and Brokers Association, Inc Trans Freight Lines, Inc , Pacific Westbound Conference, Far East Conference, North Europe U S Pacific Freight Conference Pacific Straits Conference Latin America Pacific Coast Steamship Conference, Pacific Coast Australasia Tariff Bureau, Pacific Coast River Plate Brazil Conferences and Pacific Coast European Conference

[3] *Order Denying Petition to Discontinue and Amending Order to Show Cause*. Certain parties contend that the issues are so broad as to be improperly directed toward Respondents alone They urge that at issue are policy questions of industry-wide impact As a result it is submitted that the Commission has only two alternatives before it, it may either abandon this proceeding and reconstitute it as a rulemaking or it may decide these matters so as to restore the *status quo ante*—i.e. find this concerted activity to be within the scope of the agreements We disagree The same claim would be heard with respect to any proceeding before this Commission insofar as any forthcoming decision has precedent value Further it is clear that the choice between the use of rulemaking or an *ad hoc*

Additionally, the Order limited hearing to affidavits of fact and memoranda of law unless any party considered an evidentiary hearing to be required and requested one be held. That Order further provided, that such a request, would not be proper unless accompanied by:

> . . . a statement setting forth in detail the facts to be proven, their relevance to the issues . . . a description of the evidence which would be adduced to prove those facts and why such proof cannot be submitted through affidavit.

On October 15, 1976, Respondents filed a document entitled Request for Hearing and Associated Relief. This request was summarily denied by the Commission on the ground that:

> . . . Respondents have shown nothing . . . which indicates a need for evidentiary hearing. . . . On the contrary, Respondents have not addressed the issue at all.

Thus, this proceeding came before the Commission upon the affidavits and memoranda.[4]

DISCUSSION

The parties to this proceeding have divided themselves into three groups with respect to the issues involved. In one, are the Respondents and Intervenors on their behalf. Opposing them is the Commission's Bureau of Hearing Counsel. Finally, between these two, are the Intervenor Consolidators. The positions and arguments will be described separately as those of "Respondents," "Hearing Counsel", and "Consolidators", respectively.

Respondents' position is sweeping but precise. In their view any concerted action by the conference with respect to the practice of paying consolidation allowances is merely another form of rate setting which is within the general ratemaking authority granted them by Commission approval of their various agreements. As such, this action allegedly cannot be, and is not, the implementation of unfiled, unapproved section 15 agreements.

Respondents reached this conclusion by arguing that their approved authority to agree upon and establish rates and charges for the carriage of cargo extends to the consolidation of intermodal shipments. The specific language of the approved agreements, upon which Respondents' view is based, is as follows:

---

proceeding to determine policy is within the discretion of the administrative agency *Giles Lowery Stockyards, Inc. v. Dept. of Agriculture*, 565 F 2d 321.

[4] A motion filed by the Consolidators seeking Commission issuance of a cease and desist order to Respondents was rendered moot when the Consolidators sought and were awarded an Order of the Federal District Court of the Southern District of New York requiring restoration of the *status quo ante* (November 5, 1976, *C. S. Greene & Co., Inc v North Atlantic Baltic Freight Conference*).

This Agreement shall also extend to intermodal shipments . . . and shall cover . . . consolidation . . . and such other matters as may be ancillary to the transport of such intermodal shipments and the Conference may, reserving the right of independent action, consult, cooperate and agree with other Conferences having jurisdiction in the establishment, policing and enforcement of rules, practices and charges relating to the use, employment and transport of loaded and unloaded containers outside the gate of member lines' ocean terminals at European ports within the ranges covered by the Agreement.

Respondents concede that if the Commission is looking for express language in their agreements stating that:

. . . the member lines may take concerted action to establish, maintain, and modify allowances to be granted in respect of consolidated shipments of cargo it will not find it . . .

They are quick to point out, however, that this is equally true with respect to explicit language in any agreements authorizing the members to establish rates for house-to-house containerized cargo, for particular commodities, or special volume rates—all being activities in which the Commission has permitted conferences to engage. Respondents note that no such explicit wording is found in any general ratemaking agreement nor has it been required by the Commission. Hence, Respondents argue that under the general provisions of the agreements quoted above, ". . . all of the ratemaking authority otherwise provided in the agreements is thus clearly extended to the consolidation of intermodal shipments."

In order, of course, for this premise to be persuasive, Respondents must also prevail in their claim that the concerted action on the allowances is merely another form of ratemaking. This they seek to do by relying upon *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184 (1969) *aff'd. sub. nom., Port of New York Authority v. F.M.C.*, 429 F.2d 663 (5th Cir. 1970) cert. den. 401 U.S. 909 (1971).

In that case, the Commission and the Court of Appeals both found that overland and OCP rates and practices were interstitial to the conferences' approved agreements in that they were a particular type of ratemaking ". . . based upon normal economic factors such as cost and competition" and therefore within the scope of general ratemaking authority permitted by FMC approval of the agreements.[5] Respondents argue strenuously that their activity here is precisely that sort of interstitial rate setting described in the *Overland/OCP* case. They allege:

The concerted action at issue herein is clearly ratemaking. In form, the involved consolidation allowances are stated as a sum payable to the shipper (Consolidator/NVO) tendering cargo meeting certain conditions, but in fact (because it is payable only to shippers) these allowances merely represent a factor in the computation of the net rate applicable to such shipments.

Opposed to Respondents' view is the position of Hearing Counsel. Hearing Counsel is of the opinion that any concerted action taken regarding the allowances at issue is clearly something other than mere

[5] *Port of New York Authority v. F.M.C.*, *supra* at p. 668

joint ratemaking which might otherwise be found to be within the approved authority of Respondents' agreements. In support of this conclusion, Hearing Counsel relies entirely on the *Persian Gulf Outward—Freight Conference*, 10 F.M.C. 61 (1966), *aff'd sub. nom., Persian Gulf Outward Freight Conference v. F.M.C.*, 375 F.2d 335 (1967).

Persian Gulf catalogued circumstances in which, in prior decisions, the Commission or its predecessors had required that various arrangements be treated as separate agreements, subject to the filing and approval requirements of section 15 notwithstanding claims that the arrangements were interstitial or routine implementation of previously approval authority. Included in this compendium were arrangements:

> (1) introducing an entirely new scheme of rate combination and discrimination not embodied in the basic agreement . . .; (2) representing a new course of conduct; (3) providing new means of regulating and controlling competition; (4) not limited to the pure regulation of intraconference competition; or (5) instituting an activity the nature and manner of effectuation of which cannot be ascertained by a mere reading of the basic agreement. (10 F.M.C. 61 at p. 65).

Under these criteria, Hearing Counsel contends that concerted action suspending or cancelling consolidation allowances is clearly an action requiring separate section 15 scrutiny. Indeed, Hearing Counsel argues that the original institution of the system of consolidation allowance payment was, under the standards of *Persian Gulf*, an action requiring such separate approval. Therefore, any concerted activity regarding the allowances by the conferences was, and is, the effectuation of an activity subject to section 15 scrutiny which lacks FMC approval and is, therefore, unlawful *ab initio*. In sum, Hearing Counsel's position is that: (1) the joint setting of consolidation allowances is an activity subject to section 15; (2) the activity is neither routine nor interstitial activity encompassed within approved agreements; and (3) implementation of the allowances was, and remains, an act subject to section 15 which has not been approved by the Commission and which thus remains a violation of the Shipping Act, 1916.

Notwithstanding its view that the consolidation allowance activity has always been unlawful under section 15, however, Hearing Counsel argues that once in place, the allowances and their maintenance at current levels fulfill a serious transportation need which justifies approval of authority to set and maintain such allowances. In order to reach this conclusion, Hearing Counsel relies on testimony to the effect that consolidation allowances attract cargo and allow it to move when it might not otherwise have moved and fulfill a serious transportation need by providing a sound rate basis for containerized cargo and encouraging uniformity of allowances among carriers.[6] On the strength of these considerations, Hearing Counsel concludes that, although unlawful at their inception, the current

[6] See, *Affidavit* of Louis P. Kopley, Chairman, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference, and North Atlantic Baltic Freight Conference

consolidation allowances are justified and should be approved. Hearing Counsel urges, however, that future modifications be viewed under the standards of *Persian Gulf* and be required to be filed pursuant to section 15.

The positions of the various Intervenor Consolidator interests are expressed in two joint filings. The filing on behalf of National Customs Brokers and Forwarders Association of America, Inc. and the New York Freight Forwarders and Brokers Association, Inc. (National) takes a position closely akin to that of Hearing Counsel. The filing on behalf of J. E. Bernard & Co., Boston Consolidation Service, Inc., C. S. Greene and Company, Inc. and Yellow Forwarding Co., d/b/a Yellow Freight International (Bernard) takes a position somewhere between those of Hearing Counsel and Respondents. Each of these intervenor positions are discussed separately here for the sake of clarity.

National, like Hearing Counsel, takes issue with the Respondents' characterization of concerted action on the allowances as routine ratemaking. National charges:

> There can be no reasonable basis to equate the consolidation allowance with the usual activity of a conference in fixing a rate for a particular commodity.
>
> * * *
>
> The major policy determination [conference adoption of the system of payment of allowance] may not be glibly described as the fixing of a rate.

This activity, as described by National, allegedly fits squarely within the criteria of *Persian Gulf* and requires separate section 15 scrutiny and resolution. It is argued:

> When respondents decided to encourage the development of a consolidation industry, [by adopting the system of allowance payments] this was "a new course of conduct." When they decided to terminate the consolidation allowance . . ., this was "providing new means of regulating and controlling competition." And, when the conferences decided to restore an allowance in a restrictive form, this was "constituting an activity the nature and matter [sic] of effectuation of which cannot be ascertained by a mere reading of the basic agreement."

National next attempts to refute the reliance of Respondents on the rationale of the *Overland/OCP* case, *supra*. National claims that the Commission's reason for its determination that the setting of the OCP rates was a function included within the conferences' approved ratemaking authority was its finding that OCP rates ". . . are purely ocean rates in the trades served by respondents, and respondents' basic, approved agreements permit the setting of ocean rates. On this basis, they contend that the concerted institution or removal of the system of payment of consolidation allowances is clearly something other than routine rate setting. To hold otherwise, they submit, would be to permit the conferences "under the guise of 'routine rate-making' " to ". . . control the destinies of third parties, who, puppet-like, must dance on the conference string.

Bernard, as noted earlier, assumes a more moderate stance on the issues. Its position is that institution and maintenance of the allowance system are actions within the approved authority of Respondents which continue to be justified and in the public interest by fulfilling a serious transportation need.

Citing an affidavit attached to Respondents' filings, (see fn. [6] *supra*) Bernard alleges that it is uncontested that the consolidation allowance system supports a competitive industry which provides a valuable service to carriers and shippers alike. The system of allowance payments is universally seen as a means of attracting cargo which might not otherwise move, and as providing a sound rate basis for so doing.

Bernard argues that it must be borne in mind that the concerted action at issue here is the *cancellation* of the practice of paying allowances to consolidators. In this regard, it is noted that the system has been in place unchallenged for some seven years as an authority assumed to be within the scope of Respondents' agreements. Bernard submits, however, that the ability to cancel or to amend radically the system already in place is such a substantial restructuring of present container handling practices as to be beyond the scope of any existing agreement approved under Section 15.

Bernard then challenges Respondents' reliance on the *Overland/OCP* case as support for the proposition that the concerted action on the consolidation allowances is simply another form of ratemaking which does not require Commission approval. It is argued that:

> The cancellation, suspension or modification of the rules (where such modification severely impairs the ability of the consolidator/NVO from continuing in business) must necessarily require approval from this Commission. This follows from the fact that such drastic changes do not depend on "normal economic forces." The Commission has held.
>
> > ". . . that authority under general rate-setting agreements is limited to the adjustment of rates 'as the normal economic forces which govern the establishment of such rates may require.' " [citations omitted]

Further, Bernard claims that:

> Cancellation, suspension or modification of consolidation allowance rules are not "routine" rate changes no matter how often such language is repeated . . . . Severe economic loss results from such changes. They may make or break an industry. Such results cannot be "routine"; therefore, the causes cannot be "routine".

Finally, Bernard cites *Practices and Agreements of Common Carriers by Water in Connection with Payment of Brokerage or Other Fees to Ocean Freight Forwarders and Freight Brokers,* 7 F.M.C. 51 (1962) as "closely analogous" to the situation here. In that case we determined that agreement by carriers to prohibit the payment of brokerage to forwarders or a significant diminuation of such payments was an activity

[6] See, *Affidavit* of Louis P Kopley, Chairman, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference, and North Atlantic Baltic Freight Conference.

subject to section 15 and which also would be detrimental to the commerce of the United States in its deleterious effect upon the forwarder industry. Applying that ruling here, Bernard states that:

> Regardless of the substantive merits of the "agreements" to cancel, suspend or modify the consolidation allowance rules they must be held to be agreements subject to section 15. To do otherwise would be tantamount to permitting the respondent conferences to agree to eliminate the consolidator/NVO or the entire industry. This result cannot be a mere "normal" or "routine" rate adjustment. The Commission's responsibility is clear—preserve the NVOCC's competitive consolidation services which fulfill a serious transportation need and serve the public interest . . . .

Thus, Bernard concludes that, whatever else may be said about the implementation and maintenance of a system of payment of allowances to consolidators, the attempted cancellation or drastic modification of that system is a concerted conference action, subject to section 15 of the Shipping Act, 1916 which must be filed for approval and, in fact, approved by this Commission prior to its implementation.

CONCLUSIONS

The first issue set forth in our Show Cause Order of September 24, 1976, as discussed by the parties to this proceeding, requires resolution in three segments. As we used the term "concerted action" on consolidation allowances in that Order, it may be seen clearly to encompass the setting, maintenance (or reasonable modification), or the elimination or effective elimination of the allowances. Hence, we must determine as to each of these, whether or not it is an action implementing an unfiled, unapproved agreement subject to section 15, or is within an authority already convered by our approval of the Respondents' basic agreements. Consequently, of course, if we find any of these actions to be within Respondents' approved authority we are obligated to scrutinize the action or actions pursuant to the mandate of section 15 to determine whether or not it is one which serves the public interest so as to justify its continued maintenance.

As may be seen from the positions of the parties described above, the authority (or lack of it) at issue has been addressed in terms of whether or not a given action regarding consolidation allowances was or was not mere routine, interstitial ratemaking. It should therefore be made clear at the outset that we do not consider the consolidation allowance rules as ents' tariffs provide for payment to the consolidator of certain sums of ents' tariffs provide for payment to the consolidation of certain sums of money under particular circumstances. While Respondents' arguments to the contrary are creative, we are not persuaded that such a payment may be changed into a rate for the transportation of cargo by a carrier no matter how often that may be repeated. More accurately, these allowances represent a *fee* whose payment the carriers have jointly determined to be acceptable in return for a service performed by the consolidator. There is a critical difference between such a payment of compensation to

the consolidator for a service provided and a rate or charge assessed a shipper/consignee for the carriage of cargo. This difference underlies the basis upon which the situation here can be distinguished from that at issue in the *Overland/OCP* case.[7] However, whether or not the action under scrutiny is "ratemaking" is not necessarily controlling, or even relevant, here. What is relevant is whether or not, whatever one calls the authority, that authority is encompassed within the approved provisions of Respondents' agreements. The resolution, we conclude, is not to be based upon labels but upon proper documentary construction and interpretation. The pivotal issue is simply what is included within the scope of Respondents' agreements.

We have clearly stated that, while section 15 agreements have certain indicia of private contracts, their investment with the public interest and their regulations by the Commission makes them something more than a mere meeting of the minds of the parties signatory.[8] This distinction notwithstanding, one characteristic which section 15 agreements share with private contracts is the set of general principles of construction by which they are to be interpreted. A section 15 agreement, like any contract, is to be construed insofar as possible by interpretation of the language contained within the four corners of the document.

While the provisions which extend the conference agreements at issue to ". . . consolidation . . . and such other matters as may be ancillary to the transport of . . . intermodal shipments . . ." are broad enough on their face to encompass concerted action on consolidation allowances, they are not conclusive of the scope of the agreements. This must be done by a consideration of external circumstances which may be relevant to the scope of the phrase quoted above.

The most telling circumstance to be brought to our attention is that the system of payment of consolidation allowances has continued to appear without challenge in Respondents' tariffs for a number of years. In our opinion, the existence and maintenance of such a payment system show that we and all other interested parties have considered Respondents to have had the authority concertedly to institute and maintain this system. We find, therefore, that Respondents' agreements as approved by this Commission permit them the authority to initiate and maintain a system of payment of consolidation allowances with respect to intermodal shipments as currently found in the Respondents' applicable tariffs.

We must also determine whether or not the authority found to have been vested in the Respondents to initiate and maintain these allowances includes the right to cancel or effectively to eliminate this system. By our acquiescence in a particular course of conduct, *i.e.*, establishment and maintenance of a system of consolidation allowances, we have shown our

[7] That the compensation to the Consolidator is computed on the basis of an allowance to be deducted from the commodity rate does not alter this determination. As was succinctly pointed out by National: "Of importance is not the mechanism used, but the system adopted."

[8] See, *e.g.*, *In Re: Pacific Coast European Conference*, 7 F.M.C. 27 at p. 37 (1961).

approval of concerted action by Respondents only to the extent of that particular course of conduct. The initial attempt at a concerted cessation of a course of conduct cannot be shown to have had our approval. There has never been a history of concerted cancellation of this system which could be shown to be within our approval.

It is manifest that the proposed new concerted action is also conduct which affects competition outside the conferences. As such, there can be no question that section 15 applies to such concerted action and that its implementation requires prior Commission scrutiny and approval. In this respect, we find the *Overland/OCP* and *Persian Gulf* cases both to be apposite and both to support our findings.

Concerted action to withdraw or eliminate the consolidation allowances at issue here is an action which falls within at least three criteria of *Persian Gulf*, any one of which would require separate section 15 scrutiny. Specifically, we find that the proposed action: (1) represents a new course of conduct; (2) provides a new means of regulating and controlling competition; and (3) is not limited to the pure regulation of intraconference competition. Further, and as discussed above, it is clear that this proposed action cannot be called some sort of routine, interstitial ratemaking of the type involved in the *Overland/OCP* case.

Having determined what authority is and is not encompassed within Respondents' approved agreement with respect to the payment of consolidation allowances, we must now turn to the second issue. We must decide whether or not the authority jointly to implement and maintain these allowances as approved by the Commission is or is not in the public interest such that its perpetuation is warranted.

The record in this proceeding indicates that there exists a portion of the shipping commerce of the United States—the consolidators and NVO's—which in large measure owes its existence to the institution and continuation of a system of payments by the conference carriers for the services it renders. Not only does this segment of the industry exist and flourish, but it provides a service valuable to shippers and carriers alike.[9] We find that the consolidation industry which is supported by the system of allowances serves a useful transportation purpose and is accordingly in the public interest. That service fulfills a serious transportation need by allowing the carrier to attract cargo which otherwise might not move. Further, we find that the ability of Respondents to set and maintain these allowances in concert permits and requires the evenhanded tratment of recipients of the payments and of the underlying shippers.[10]

On the basis of the foregoing it is found that the approved agreements of Respondents authorize them to act concertedly to implement and maintain a system of payment of consolidation allowances. Further, it is

[9] See, in this regard, the affidavit of Louis P. Kopley, Chairman, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference and North Atlantic Baltic Freight Conference.

[10] *Id.*

found that the maintenance of this system is in the public interest and continues to be justified. Finally, we find that any concerted action by which this system is attempted to be eliminated or effectively eliminated through radical restructuring or diminution would be outside the scope of Respondents' approved authority; would be *prima facie* contrary to the public interest, and would require separate prior approval by this Commission.

THEREFORE, IT IS ORDERED, That Respondents cease and desist from concertedly eliminating the system of consolidation allowances presently maintained without prior approval pursuant to section 15 of the Shipping Act, 1916.

FURTHER, IT IS ORDERED, That this proceeding is discontinued.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 516(I)

ALLIED STORES INTERNATIONAL, INC.
SUBSIDIARY OF ALLIED STORES CORP.

v.

UNITED STATES LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

July 7, 1978

Notice is hereby given that the Commission on July 7, 1978, determined not to review the decision of the Settlement Officer in this proceeding served June 29, 1978.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 516(I)

ALLIED STORES INTERNATIONAL, INC.
SUBSIDIARY OF ALLIED STORES CORP.

v.

UNITED STATES LINES, INC.

Reparation awarded.

DECISION OF GEORGE D. UNGLESBEE, SETTLEMENT OFFICER[1]

Allied Stores International, Inc., Subsidiary of Allied Stores Corporation (complainant), alleges that United States Lines, Inc. (carrier) incorrectly rated six shipments consisting, inter alia, of electric crock pots and, in one instance ceramic covers therefor,[2] resulting in total overcharges of $2,405.12 (including a 1.5% Currency Surcharge) in violation of Section 18(b)(3) of the Shipping Act, 1916. Claims filed with the carrier were denied because they were not timely filed.

In responding to the served complaint, the carrier advised the claims were denied on the basis of the applicable conference tariff[3] provision pertaining to the filing of claims within six months for adjustment of ocean freight charges.

The six shipments, five from Yokohama, Japan to Kearny, New Jersey and one from Kobe, Japan to Kearny, moved under separate through bills of lading dated between March 12, 1976, and May 20, 1976,[4] on carrier's vessels AMERICAN AQUARIUS, AMERICAN LIBERTY and/or AMERICAN LYNX. The carrier assessed the rate named in Item

[1] Both parties having consented to the informal procedure of Rule 19(a) 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: Determination not to review July 7, 1978)

[2] Referred to in this manner for simplification purposes. These commodities were described on the respective bills of lading as "Electric Crockery Chef," "Electric Crockery Cooker," "Electric Crockery Pot," and/or "Crock Cover of Electric Cooker."

[3] Trans-Pacific Freight Conference of Japan/Korea Eastbound Intermodal Tariff No. 1, F.M.C. No. 4, I.C.C. No. 1.

[4] The complaint was filed with the Commission on March 9, 1978.

4160–00 of the governing conference tariff applicable, briefly and as far as pertinent herein, to:

"Electrical Goods, Supplies and Parts, not elsewhere covered includes:

Appliances for preparing Foods and Drinks, not elsewhere covered under this hearing."

on the electric crock pots; and, apparently, the rate named in Item 1260–05 of the governing tariff applicable to:

"Porcelainware, Earthenware, Chinaware and Manufactures thereof, Combined with Other Materials and/or Accessories and/or Attachments, including Electrical Heating Units,*shipped as a unit.*" *(emphasis added)*

on ceramic covers for electric crock pots. Total freight charges on the electric crock pots and the ceramic covers amounted to $19,526.46.

The complainant contends that the electric crock pots should have been assessed the rate contained in Item 1260–05,[5] and that the ceramic covers for electric crock pots should have been accorded the rate in Item 1320–05 of the governing conference tariff applicable to:

"Porcelainware, Earthenware, Chinaware and Manufactures made wholly thereof, N.O.S."

Based upon complainant's contention, the total freight charges on the electric crock pots and ceramic covers would have amounted to $17,121.34. Accordingly, complainant seeks reparation in the amount of $2,405.12 ($19,526.46 minus $17,121.34), plus interest. Of this amount, $2,402.38 is attributable to the electric crock pots and $2.74 to the ceramic covers for electric crock pots.

At the time the shipments in question moved, the governing tariff contained two commodity descriptions under which the electric crock pots could have moved.[6] The two descriptions were, in pertinent part, as follows:

1. Item 4160–00 (in Section 4 of the tariff)

ELECTRICAL EQUIPMENT
(EXCLUDING ELECTRICAL MACHINERY)

This heading
includes: 1) All apparatus that functions by the use of electrical energy.
. . .
excludes: 1) Articles made wholly of ceramic material or ceramic combined with other materials and/or accessories and/or attachments (See Section 3).
. . .
Electrical Goods, Supplies and Parts, not elsewhere covered includes:
Appliances for preparing Foods and Drinks, not elsewhere covered under this heading

[5] The carrier concurs with complainant that the electric crock pots should have been rated under Item 1260–05.

[6] This irregularity was subsequently corrected. Section 4 of the governing tariff was amended, effective May 1, 1977, to provide under the general heading of Electrical Equipment a new Item No. 3650–03 reading "Cooking Pots, Domestic." Effective October 1, 1977, Item 3650–03 was further amended to add "includes Procelainware, Earthenware and Chinaware Fitted with Electric Heating Units and "Rice Cookers, Domestic."

. . .

and

2. Item 1260–05 (in Section 3 of the tariff)

PORCELAINWARE, EARTHENWARE AND CHINAWARE

This heading covers all commodities wholly made of Chinaware, Earthenware, and Porcelainware Except as otherwise specified herein

Porcelainware, Earthenware, Chinaware and Manufactures thereof, Combined with Other Materials and/or Accessories and/or Attachments, including Electrical Heating Units, shipped as a unit

Absent a *specific* commodity description for electric crock pots, a determination must be made as to whether the commodity description in Item 4160–00 or the commodity description in Item 1260–05 more properly applies. If the evidence shows that a more specific tariff item fits the commodity shipped, claimant is entitled to be rated under that item. Docket No. 75–15, *The Carborundum Company v. Royal Netherlands Steamship Company (Antilles) N.V.*, Report served January 5, 1977. Rules of tariff construction also require that the more specific of two possible applicable tariff items must apply. *Corn Products Company v. Hamburg-Amerika Lines*, 10 FMC 388 (1967).

The general heading for "ELECTRICAL EQUIPMENT" in Section 4 of the governing tariff specifically provides for the exclusion of [all] "Articles made wholly of ceramic[7] material or ceramic combined with other materials and/or accessories and/or attachments" [even though the articles may include appliances for preparing foods and drinks]; and specifically directs the tariff user's attention to Section 3 of the tariff which contains Item 1260–05 quoted above. In turn, the commodity description in Item 1260–05 is explicit and restricted in its application in that it covers only the articles [including electrical heating units] which are specifically excluded from the application of Item 4160–00. The commodity description covered by Item 1260–05 is more specific and, therefore, more properly applies. With repect to ceramic covers for electric crock pots, in the absence of a *specific* commodity description therefor it is clear they should have been properly accorded the rate named in Item 1320–05, supra, which is not restricted to apply only when the specified articles are shipped as a unit, instead of the rate named in Item 1260–05 which is restricted to apply only when the specified articles are shipped as a unit.

The complaint was filed with the Commission within the time limit specified by statutes, 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)(3) 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. The involved commodities were improperly rated by the carrier and the complainant was overcharged in

[7] Webster's New World Dictionary, second college edition, defines ceramic as ". . .relating to pottery, earthenware, tile, porcelain, etc . . ."

the amount of $2,405.12. Accordingly, reparation for this amount is awarded to complainant.

(S) GEORGE D. UNGLESBEE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 568

WESTINGHOUSE TRADING CO. DIVISION OF WESTINGHOUSE ELECTRIC CORP.

v.

AMERICAN EXPORT LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

July 10, 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 July 10, 1978.

Applicant is ordered to effectuate the waiver, publish the prescribed tariff notice and notify the Commission of the date and manner of compliance as prescribed in the initial decision.

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 568

WESTINGHOUSE TRADING CO. DIVISION OF WESTINGHOUSE ELECTRIC CORP.

v.

AMERICAN EXPORT LINES, INC.

Adopted July 10, 1978

Carrier applicant found to have failed to file lower rate on a shipment of iron and steel rejects through inadvertence on the part of its rate clerk. Carrier also found to have filed its application for waiver under P.L. 90–298 within 180 days after date of shipment and its corrective tariff prior to the filing of the application. No discrimination among shippers will result if the application is granted. The application therefore meets all the requirements of P.L. 90–298 and is granted.

Although the carrier's original bill of lading was dated at a time beyond the 180-day period prior to date of shipment prescribed by law, the carrier has furnished evidence showing that the date of loading aboard vessel was within the 180-day period. Such a date has been accepted by the Commission in determining date of shipment.

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

This proceeding was commenced by an application filed by American Export Lines, Inc. (AEL) 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 pursuant to Rule 92(a) of the Commission's Rules of Practive and Procedure, 46 CFR 502.92(a). In its application filed March 10, 1978 (the date it was received by the Commission's Secretary), AEL stated that it wished to waive a collection of a portion of freight charges for the benefit of the shipper, Westinghouse Trading Co. (Westinghouse), the nominal complainant in this proceeding, on a shipment of iron and steel rejects. AEL stated that this shipment was transported under a bill of lading dated September 16, 1977, from Baltimore, Maryland, to Keelung, Taiwan and that it moved on AEL's *S/S Export Builder*. The application further states that AEL collected $3,849.66 in freight based upon a rate of $63 per weight ton which AEL had quoted to the shipper and that AEL wishes to

[1] This decision became the decision of the Commission July 10 1978.

waive $7,458.73 in freight charges because, through AEL's inadvertence, the $64 rate was not filed prior to the time of shipment. If the application is denied, then, AEL would be required to seek recovery of this amount of freight on the basis of the rate in effect at the time of shipment, i.e., cargo, not otherwise specified, $188 W/M. The shipment of iron and steel rejects, according to the bill of lading and corrected export declaration, weighed 132,610 lbs. (60.151 kilograms).

Although the application stated that AEL had quoted the $64 W rate to the shipper with the intention to request the Far East Conference (FEC), of which AEL was a member,[2] to file such rate on behalf of AEL in the FEC tariff's open rate section before the shipment and stated other facts tending to show that AEL had inadvertently failed to effectuate the tariff filing, the application, as originally filed, furnished virtually no supporting information or evidence, contrary to the Commission's Rule 92(a) and the standard form to which that rule refers.[3] Accordingly, I instructed AEL to furnish such information and evidence so that I would have a record on which to base a rational decision. See Order to Furnish Supporting Evidence, March 20, 1978. In response to my instructions, AEL furnished various materials consisting of an affidavit of Mr. T. Tjom, Pricing Manager of AEL, with copies of the rated bill of lading, AEL's freight bill, and a page from AEL's receipts journal. In addition, AEL furnished a letter from complainant-shipper's Senior Buyer, Mr. H. Philip Kennedy, to which was attached an invoice from the shipper's ocean freight forwarder confirming payment of freight charges in the amount stated in the application, and finally, a copy of the pertinent export declaration as corrected.

This additional information furnishes sufficient evidentiary support for the statements contained in the application with one exception relating to the date of AEL's bill of lading. This date is important because of the 180-day time limitation for the filing of special-docket applications contained in P.L. 90–298. As will be seen in my discussion below, this time factor is critical to a decision in this case. As shown by the affidavit and supporting evidence furnished by AEL, the factual situation is as follows.

In late August or early September of 1977, Mr. T. Tjom, Pricing Manager for AEL, authorized AEL's rate clerk in Baltimore to quote to the shipper Westinghouse a rate of $64 per weight ton for a shipment of steel seconds to be loaded at Baltimore, destined for Keelung, Taiwan. At that time, AEL was a member of FEC. That Conference, however, had "opened" the rate for this commodity item subject to a $64 per weight ton minimum. Under these circumstances each member carrier of the Conference was authorized to file its own rate for this commodity

[2] Since this proceeding was instituted, AEL has been acquired by Farrell Lines, Inc. See affidavit of Mr. T Tjom, Pricing Manager, AEL, April 11, 1978, p 1

[3] The only documents attached to the application, as originally filed, were copies of two tariff pages showing a higher, allegedly unintended rate and a lower, allegedly intended rate.

subject to the minimum. At the time of the quotation, AEL did not have an individual rate on this item. However, it did have its own cargo, not otherwise specified (NOS) rate applicable to commodities as to which the Conference had voted to "open" rates. See FEC Supplemental Freight Tariff No. 27–A, F.M.C. No. 11, 1st revised page 6. Therefore, since AEL had not filed a specific commodity rate in the "open" rate section of the Conference tariff for the item in question, the higher NOS rate of $188 W/M would have to apply. AEL, however, does not wish to apply the NOS rate because of its own admitted inadvertence in failing to file the intended $64 rate in timely fashion.

The explanation for the inadvertent failure to file the lower rate is further set forth in Mr. Tjom's affidavit. He explains that it was his intention, when quoting the $64 rate, to instruct FEC to file this rate for AEL upon advice that Westinghouse had agreed to ship at that rate. However, although Westinghouse agreed to the rate, AEL's rate clerk in Baltimore failed to inform Mr. Tjom and because of this failure AEL never caused the $64 to be filed before the shipment moved. To corroborate the fact that an agreement regarding the $64 rate had been reached between Westinghouse and AEL, AEL has furnished the bill of lading issued to Westinghouse's freight forwarder, H. W. St. John & Co., which was prepared and rated on the basis of $64. This bill of lading bears a date of August 25, 1977. On or before September 7, 1977, furthermore, the forwarder paid AEL on behalf of Westinghouse freight charges calculated on the basis of the $64 rate.

The Conference noticed that the shipment had been rated at the unfiled $64 rate through its Misrating Committee, which notified Mr. Tjom of that fact. However, upon explanation of the matter, the Misrating Committee decided not to proceed for collection of penalties against AEL and not to insist that AEL collect additional freight pending decision in this proceeding.[4] Moreover, Mr. Tjom gave instructions to the Conference to file the $64 rate on behalf of AEL. This rate was filed, effective January 1, 1978. See FEC Supplemental Freight Tariff No. 27–A, FMC No. 11, 9th revised page 17.

Mr. Tjom sums up the situation by stating that AEL's intention to make a timely filing of the quoted rate of $64 upon acceptance by the shipper was frustrated because of the inadvertence of AEL's clerical personnel and that failure to grant its application "would penalize the shipper in connection with an open and aboveboard transaction." Affidavit of T. Tjom, p. 3.

Discussion and Conclusions

The question to be decided in this case is simply whether the application for permission to waive a portion of freight charges and the supporting evidence establish that the type of error contemplated by P.L.

[4] The Conference has also concurred in the application itself.

90–298 occurred and that the application meets all other requirements in that law regarding the time of filing the application and corrective tariff and the assurance that no discrimination among shippers will result if the application is granted. All of these requirements appear to have been met. However, there is a problematic area relating to the question whether the application was filed within 180 days after "date of shipment," as required by law.

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 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 understood the rate to be. For example, a carrier after advising a shipper that he intends to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.[5]

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.[6]

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

[5] House Report No. 902, 90th Cong. 1st Sess., November 14, 1967 [to accompany H.R. 9473], pp 3, 4
[6] Senate Report No. 1078, 90th Cong. 2d Sess., April 5, 1968 [to accompnay H R. 9473], p 1.

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: *Provided further,* That the . . . carrier . . . has, prior to applying for authority, 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 application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

The statement in the application that AEL failed to file the specific commodity rate of $64 through inadvertence is fully explained in Mr. Tjom's affidavit. Had it not been for the failure of the Baltimore rate clerk to inform Mr. Tjom of Westinghouse's acceptance of the $64 rate, Mr. Tjom would have taken steps to have that rate filed for AEL in the open rate section of the FEC tariff. Furthermore, it is clear that it was AEL's intention to apply the $64 prior to shipment. Such intention is a necessary element to establish that there was an error in a tariff due to an inadvertence in failing to file a new tariff, as the legislative history to P.L. 90–298 demonstrates.[7] See also *Monoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1911, 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 there was an error in AEL's tariff due to an inadvertence in failing to file a new tariff.

With respect to the question of possible discrimination among shippers if the application is granted, I make the following findings. The application states that AEL is aware of no similar shipment other than that of Westinghouse which moved via AEL during the period of time involved herein. No evidence has been presented to indicate that other shippers of iron and steel seconds shipped via AEL during this time. Even if other shippers might have been involved, however, the possibility of discrimination will be eliminated by the publication of a notice in AEL's tariff, as ordered below, which will mean that any other shipments of the commodity in question will be entitled to the same rate. Therefore, permission to waive a portion of the freight charges in this case will not result in discrimination among shippers.

With respect to the requirement that the carrier file a new tariff prior to filing its application for permission to refund or waive, I find that this requirement has been met inasmuch as the new tariff was filed, effective January 1, 1978, whereas the application was filed (received by the Commission's Secretary) on March 10, 1978. There remains only the

[7] 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."

question whether the application was filed within 180 days from the "date of shipment," as required by law.

The "Date of Shipment" Problem

The problem which arose in this case concerning the requirement that the application be filed with the Commission within 180 days after "date of shipment" occurred because the relevant bill of lading under which the shipment moved bore a date of August 25, 1977, whereas the application was filed (received by the Commission's Secretary) on March 10, 1978. This would amount to 197 days between bill of lading date and filing date and the application would have to be denied if we were limited to these dates. However, the Commission has followed a policy of flexibility in connection with this particular statutory requirement and has specifically permitted the date of an "on board" bill of lading or the date of loading aboard vessel to start the time running. In other words, "date of shipment" has been determined by reference to an "on board" bill of lading date or date of loading, not merely by a bill of lading originally issued by the carrier. See *Ghiselli Bros. v. Micronesia Interocean Line, Inc.*, 13 F.M.C. 179, 182, 186 (1970); Special Docket No. 554, *Hermann Ludwig, Inc. v. Waterman Steamship Corporation*, May 8, 1978.[8] In both *Ghiselli* and Hermann Ludwig, the Commission remarked that P.L. 90–298 "is permissive and affords the Commission wide latitude of discretion" (13 F.M.C. at p. 182) and that it is a "remedial statute aimed at affording shippers relief from the consequences of certain errors inadvertently committed by carriers . . . ." *Hermann Ludwig*, cited above, pp. 4, 5. In the latter case the Commission confirmed the flexible policy enunciated in *Ghiselli* by stating that "a construction [of P.L. 90–298] which would unnecessarily limit the meaning of that term [i.e., date of shipment] to the date of delivery of the cargo to a carrier . . . would defeat the legislative intent without serving any regulatory purpose. (Citation omitted)." *Herman Ludwig*, cited above, p. 5.

There is therefore direct precedent to permit the carrier to submit evidence showing when the shipment was loaded aboard the vessel and to start the time running from "date of shipment" as meaning date of loading. Therefore, regardless of the present state of uncertainty occasioned by the lack of a fixed definition of the term "date of shipment" in the statute and Commission's regulations, there is no reason to deny the present application provided that satisfactory evidence has been furnished which meets the boundary marks of *Ghiselli* or *Hermann Ludwig*. Indeed, it would be inequitable for the Commission to deny the application when it has established certain guidelines by its won case law on which applicants may have relied, by *retroactively* changing such

[8] In *Ghiselli*, the Commission also held that a special-docket application could be considered to be "filed" not merely when it was actually received by the Commission but when the application was deposited in the mails, as evidenced by the postmark date. 13 F.M.C. at p. 182.

guidelines. See *Mediterranean Pools Investigation*, 9 F.M.C. 264, 304 (1966); *N.L.R.B. v. Guy F. Atkinson*, 195 F.2d 141, 149 (9 Cir. 1952); *Arizona Grocery v. Atchison Ry.*, 284 U.S. 370, 389 (1932); *Wainwright v. National Dairy Products Corp.*, 304 F. Supp. 567, 573 (N. D. Ga. 1969). Hopefully, as a result of the pending rulemaking proceeding seeking to amend Rule 92(a), 46 CFR 502.92(a), which, among other things, would fix a definite point of reference for "date of shipment," the difficulties of the type occurring in this case and in other cases will be avoided.[9]

In any event, AEL has furnished ample evidence explaining the critical facts. This evidence consists of an affidavit in letter form with attached dock and pier receipts and a Bureau of Customs Declaration showing date of departure of the *S/S Export Builder* from Baltimore. According to this evidence, the shipment in question was received at the terminal in Baltimore on August 25, 1977, but was not loaded aboard the *Export Builder* until September 22, 1977. The ship departed Baltimore on that date. If, as permitted by the *Hermann Ludwig* case, the date of shipment is considered to be September 22, 1977, and the date of filing is considered to be the date received by the Commission's Secretary (March 10, 1978), then the intervening time period is only 169 days, which is well within the 180-day period established by law.[10] Therefore all the requirements of P.L. 90–298 set forth above have been met.

Ultimate Conclusions and Orders

As discussed above, I have found that AEL failed to file a tariff conforming to its intentions to charge complainant a $64 rate through inadvertence, a type of error which is contemplated by P.L. 90–298. I have also found that AEL has met the other statutory requirements

[9] This rulemaking proceedings is Docket No 78–12 *Rules of Practice and Procedures, Simplification of the Rules Governing Special Docket Applications, etc.*, 43 Fed. Reg. 18572. In that proceeding the Commission is seeking comments from the public in an effort to establish a fixed definition of the term "date of shipment" as used in P.L. 90–298 The Commission acknowledges that the legislative history to that law is not illuminating and that the continued state of uncertainty regarding the proper definition has caused problems in disposing of special docket cases in the preamble to the proposed rule which suggests the date of rated bill of lading as the standard but invites comments on other standards such as date of payment, date of delivery, etc In Special Docket No 567, *Kuehne & Nagel Inc. v. Lykes Bros Steamship Co* Initial Decision, May 16, 1978, Judge Glanzer explains these problems at some length. See footnote 10 to the Initial Decision As he states, several standards have been used, such as date of delivery to the carrier, date of the on board" bill of lading and date of loading aboard vessel Although not advocating any particular standard he notes serious dangers in using "on board" bill of lading and cites some authorities for the use of delivery to or by the carrier.

According to *Words and Phrases* Shipment, p 264 *et seq* there is case law supporting both date of delivery to the carrier or date of loading aboard vessel. See, e.g. *Chicago R I & P Ry. Co. v. Petroleum Refining Co* 39 F.2d 629, 631 (E D Ky. 1930) (delivery to carrier) and *Lamborn & Co. v. Log Cabin Products Co* 291 Fed 435, 438–439(D. Minn. 1923) (loaded on board ship)

Counsel for AEL suggests date of sailing as well as date of loading on the grounds that these dates show the carrier's commitment to carry Another possibility is the use of carriers' own tariff rules regarding the time in which their rates are considered to be effective Every tariff must have such rules under the Commission's regulations. 46 CFR 536.5(d)(3) Such rules show the carriers' intention and intention is a critical factor in special-docket cases. Interestingly, AEL s own tariff (Far East Conference Tariff F.M.C. No. 10, 5th revised page 134, Rule 1(c)) uses the time of acceptance of the cargo at the carrier's terminal or date of sailing from port of loading in case of a rate reduction if such occurs prior to sailing

[10] Of course, if the date of filing is considered to be the date the application was placed in the mail, as mentioned in *Ghiselli*, which may have been as early as March 6, 1978, judging by the cover letter of AEL's counsel, the time period would be further reduced to 165 days

regarding the filing of its application within the 180-day period prescribed by law and the filing of its corrective tariff prior to the filing of its application. Furthermore, I have found that no discrimination among shippers will result if the application is granted since there do not appear to be any other shipments of the commodity in question which were similarly affected by AEL's inadvertence and the tariff notice to be published, as ordered below, will insure that even if such shipments did in fact occur, they will be treated similarly.

Therefore, the application for permission to waive a portion of the freight charges is granted. If this decision is adopted by the Commission and subject to whatever modifications the Commission may make, it is ordered that:

1. AEL is authorized to waive collection of freight in the amount of $7,458.73[11] in connection with a shipment of iron and steel rejects loaded on the *S/S Export Builder* on September 22, 1977, for the benefit of the shipper Westinghouse Trading Co., Division of Westinghouse Electric Corp.

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

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 568, that effective August 25, 1977, and continuing through December 31, 1977, inclusive, the rate on Plates or Sheets, Uncoated, Iron or Steel N.O.S., Rejects, Secondaries, Waste, as shown in Tariff Item 674.4000.28, is $64 per 2204.62 lbs., to Kaohsiung/Keelung, subject to all applicable rules, regulations, terms and conditions in this tariff, for purposes of refund or waiver of freight on any shipments which may have been shipped during this period of time.[12]

3. Waiver of the portion of freight charges shall be effectuated within 30 days of service of the Commission's notice of adoption of this decision (if adopted) and AEL shall within 5 days thereafter notify the Commission of the date and manner of compliance with this order.

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

WASHINGTON, D.C.,
June 12, 1978.

[11] AEL collected freight in the amount of $3,849.66 based upon a rate of $64 per weight ton of 1,000 kgs. applied against a weight of 132,610 lbs., which converts to 60,151 kgs. (The tariff states that 1,000 kgs. is the equivalent of 2204.62 lbs.) At the rate of $188 W/M previously in effect, the freight would have amounted to $11,308.39, on a shipment of 132,610 lbs. or its equivalent, 60,151 kgs. Thus, AEL wishes to waive $7,458.73, the difference between $11,308 39 and $3,849.66.

[12] The parties will notice that I have used the commodity description "Plates or Sheets, Uncoated, Iron or Steel N.O S. . . ." instead of the description "Secondary Tinplate, Terneplate & Tinfree Steel Plate (Chromium Coated) etc.," which appears in the corrective tariff effective January 1, 1978. That corrective tariff specifies that AEL intends the $64 rate to apply only to "Tariff Item 674.4000.28." According to the Tariff (FEC F.M.C. No. 10, 10th revised page 474) item 674.4000.28 is described as "Plates or Sheets, Uncoated, Iron or Steel N.O.S., etc." Therefore, I have employed the more specific description of the commodity shown for the item to provide more adequate notice to shippers.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 546

UNITED GROCERY EXPORT COMPANY

v.

PACIFIC WESTBOUND CONFERENCE

ORDER ON REVIEW OF INITIAL DECISION

July 14, 1978

Applicant in this proceeding seeks permission to refund a portion of freight charges applicable on a shipment of cream substitutes. Applicant alleged that the qualification "in bags" had inadvertently been added to the special rate which had been established for this commodity, thereby unintentionally depriving the shipper of such special rate.

Upon review of the initial decision, we determined that the application was not adequately supported since no evidence of inadvertent error had been submitted. The Secretary informed applicant that the application would be denied unless supporting evidence was supplied by a certain date. Applicant has now submitted an affidavit from its Executive Assistant who has the responsibility of implementing conference tariff actions. Applicant explains that the reinsertion of "in bags" was never intended and that the error occurred as a result of the heavy volume of tariff page turnover which is accomplished through the medium of magnetic card typing systems. Our independent search of conference minutes during this period also discloses no action by the Conference to reinsert the "in bags" qualification.

On the basis of the above we are satisfied that the reinsertion of the "in bags" qualification was not intended and that it happened as a result of inadvertent administrative or clerical error. The application complies with all of the other requirements of Section 18(b)(3) and, accordingly, applicant is authorized to refund $211.82 of the charges previously assessed.

It is 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. 546 that effective January 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period January 1, 1977 through June 8, 1977, the special rate on 'Cream and Milk Substitutes' applies without the qualification of "in bags," 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 thirty (30) days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the refund and submit a copy of the published tariff notice.

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 547

TOSHOKU AMERICA, INC.

v.

SEA-LAND SERVICE, INC.

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

July 14, 1978

We previously determined to review the initial decision in this proceeding. Upon completion of such review we have now determined to adopt the initial decision.

It is Ordered, That applicant is authorized to waive collection of $19,572.29 of the charges previously assessed Toshoku America, Inc.

It is further Ordered, That applicant shall publish promptly in its Tariff No. 183–A, FMC No. 134, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 547 that effective December 22, 1975, for purposes of refund or waiver of freight charges on any shipments of any commodities which may have been shipped during the period December 22, 1975 through May 14, 1977, the list of Ports served by Sea-Land includes Chignik, Alaska.

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 and submit a copy of the published tariff notice. Applicant shall also inform the Commission of any other shipments of any commodities during the period in question which are affected by this order and the rate adjustments made thereon.

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 547

TOSHOKU AMERICA, INC.

v.

SEA-LAND SERVICE, INC.

Adopted July 14, 1978

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

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

Sea-Land Service seeks permission to waive collection of $19,572.29 arising out of six shipments of refrigerated shell fish from Chignik, Alaska, to Tokyo, Japan, during the period April 29, 1977 - June 3, 1977.

The tariffs applicable at time of shipments were Sea-Land Service, Inc. Freight Tariff No. 197, ICC No. 71, Item 2220, 14 Revised Page 36 plus Supplement No. 12 (7%)–$7.80 per 100 lbs., minimum of 20,000 lbs.; $5.86 per 100 lbs., minimum of 30,000 lbs. Pacific Westbound Conference Local and Overland Freight Tariff No. 5., FMC–13, Item 031 3000 73, 1st Revised Page 263–$241.00 per ton of 1,000 kilos plus Terminal Receiving Charge, Rule 24.1, 1st Revised Page 67–$5.50 per metric ton as freighted, whereas the tariff sought to be applied is Sea-Land Service, Inc. Tariff No. 183–A, FMC No. 134, Item 200, Original Page 12.

The freight charges were assessed on the basis of an ocean rate of $200 per ton of 2,000 lbs., whereas the rate sought to be applied is an ocean through rate of $200 per ton 2,000 lbs., minimum of 15 tons per trailer.

The facts of record are as follows:

Sea-Land Service, Inc. (Sea-Land) has offered a domestic service from Chignik, Alaska, to the Continental United States. The service from Chignik, Alaska, to Far East ports is via a domestic vessel from Alaska to Seattle, Washington, then relayed to Pacific Division vessel in Seattle for transportaion to Far East. The Far East Service was regulated by Sea-Land Service, Inc. Tariff No. 183, FMC No. 57. This tariff was superseded by Tariff No. 183–A, FMC No. 134. The domestic service

[1] This decision became the decision of the Commission July 14, 1978

from Chignik, Alaska, is regulated by Sea-Land Service, Inc. Freight Tariff No. 197, ICC No. 71.

Sea-Land served Chignik, Alaska, by its own vessel and jointly with Salmon Carrier, Inc. under provisions of a connecting carrier agreement for service to Far East, see Tariff No. 183, 1st Revised Page 5–A, Effective July 11, 1973. This service was terminated by the connecting carrier in November 1973. The tariff page was revised to remove ports where service was no longer available. One of these ports was Chignik, Alaska. Tariff No. 183 was amended by 4th Revised Page 5–A when Sea-Land was able to jointly service Chignik with Puget Sound Tug and Barge Company. Chignik was again added to the ports serviced.

In December 1975, Puget Sound Tug and Barge Company ceased offering service and 6th Revised Page 5–A was issued canceling the joint service offered. Sea-Land's own vessels called Chignik during the above time frame and continued to call after cancellation by Puget Sound Tug and Barge Company. Freight Tariff No. 197, ICC 71 was used for shipment from Chignik, Alaska, to Seattle, Washington, on various commodities, including fish and related products. An administrative error was committed by removing Chignik from Tariff No. 183–A, FMC No. 134 when, in fact, Sea-Land did offer service via its own vessels under domestic Tariff No. 197, ICC No. 71 to Seattle. This service to and from Chignik, Alaska, never ceased; therefore, Chignik, Alaska, should not have been removed from Sea-Land Freight Tariff No. 183 or replacement Tariff 183–A.

This error, the removal of a port served by Sea-Land, was discovered when Sea-Land loaded nine trailers in Chignik, Alaska, for Tokyo, Japan, on March 31, 1977. A bill of lading was issued under Tariff 183–A, Bill of Lading No. 989–156742; but this bill of lading was canceled and replaced by Bill of Lading No. 992–298792 and 989–158660. The movement, due to the error in Sea-Land Tariff 183–A, FMC 134, was unable to be correctly billed. A combination of rates, Chignik, Alaska, to Seattle, Washington, Domestic Tariff 197, ICC No. 71, Item 2220 and Seattle to Japan, Pacific Westbound Conference Local and Overland Freight Tariff No. 5–FMC–13, Item 031–3000.73 was used to effect the shipments. This combination of rates was used in all six shipments in question.

No through rates were in effect from Chignik, Alaska, to ports in the Far East from December 1975 until Sea-Land corrected this error by publishing 2nd revised page 10 in Tariff No. 183–A–FMC No. 134, effective May 15, 1977. This was accomplished by a telegraphic filing.

The shipper, Toshoku America, Inc., paid all the Pacific Westbound Conference bills which covers the movement from Seattle to Japan. A partial payment has been made on Freight Bill 989–158660 of $8,045.69 of the total bill of $14,518.53. No other payments have been made.

In order to correct freight bills, Sea-Land needs authority to issue correct freight bills under Sea-Land Service Tariff 183–A, No. 134. This

would allow a waiving of collection of $19,572.29, which was caused by the administrative error since corrected.

Respondent does not believe that any discrimination among shippers will result from a waiver of collection of the amount involved. Respondent agrees to publication of a notice, or of such action that the Commission may direct, if permission to waive the collection of freight charges is granted.

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 92, *Special Docket Applications,* Rules of Practice and Procedure, 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.

The legislative 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 mistakes. 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.

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 inadvertent error of removing Chignik, Alaska, from Sea-Land Freight Tariff No. 183 or replacement Tariff 183–A as hereinabove set forth falls within the intended ground for waiving collection. Accordingly,

[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] Senate 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.*

Sea-Land is hereby granted permission to waive collection of $19,572.29 from Toshoku America, Inc.

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

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–15

THE CARBORUNDUM COMPANY

v.

ROYAL NETHERLANDS STEAMSHIP CO.
(ANTILLES) N.V.

ORDER ON RECONSIDERATION

July 17, 1978

This matter comes before the Commission on the Petition for Reconsideration (Petition) of the Carborundum Company (Complainant), requesting the Commission to amend its Report and Order in the above-captioned matter (Order). The original Order awarded Complainant reparation in the amount of $216.38. Complainant now requests that the total amount of reparation be increased to $402.04. Complainant bases this request upon item 10(o) on 14th Rev. page 8 of the United States Atlantic and Gulf-Jamaica Conference Freight Tariff F.M.C. No. 1. Royal Netherlands Steamship Co., the Respondent herein, has not responded to the Petition.

The Commission's prior award of $216.38 was based upon the "less volume" rate for the particular commodity which Complainant actually shipped. However, Item 10(o) of the above-referenced tariff operates to limit the freight and charges on this particular shipment to $980, the rate applicable to the next higher minimum of 14 weight tons.[1] Based upon this 14 ton minimum, the proper charge for the shipment including bunker surcharges and L and L charges totals $1,092.52. This represents a difference of $402.04 from the freight actually assessed by Respondent and $185.66 more than was awarded by the Commission's original Order.[2] Complainant is, accordingly, entitled to reparation in the total amount of $402.04.

THEREFORE, IT IS ORDERED, That the relief requested by the

[1] Item No 10(o) was in effect at the time of shipment and states as follows:

Whenever in this tariff a commodity is subject to two or more ratings based on quantity, the freight and charges on quantities less than a specified minimum shall not exceed the freight and charges applicable to the next higher minimum.

[2] It is assumed that Respondent has already paid Complainant the $216.38 specified in the original Order.

"Petition for Reconsideration" of the Carborundum Company is hereby granted; and

IT IS FURTHER ORDERED, That Royal Netherlands Steamship Co. pay to the Carborundum Company on or before 60 days from the date hereof, an additional $185.66, with interest at the rate of 6% per annum on any amount unpaid after 60 days.

By the Commission.

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

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[GENERAL ORDER 4; DOCKET NO. 77–53]

July 24, 1978

Part 510—Licensing of Independent Ocean Freight Forwarders

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: This rule increases the amount of the surety bond required for Commission licensed independent ocean freight forwarders engaged in the business of forwarding in the United States export trade from $10,000 to $30,000. The rule further provides for return of the application for failure to submit such required bond within a specified period. The rule also deletes certain provisions rendered obsolete or unnecessary by the passage of time.

EFFECTIVE DATE: To become effective September 1, 1978.

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney
Secretary
Federal Maritime Commission
Room 11101
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Washington, D.C. 20573
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SUPPLEMENTARY INFORMATION:

This proceeding was instituted by Notice of Proposed Rulemaking published in the *Federal Register* on October 21, 1977 (42 FR. 56139–56140) to: (1) amend section 510.5(g)(3) of the Commission's General Order 4 (46 CFR 510.5(g)(3)), by raising the amount of the surety bond required for Commission licensed independent ocean freight forwarders engaged in carrying on the business of forwarding in the export commerce of the United States from $10,000 to $50,000; (2) provide for the return of an application for a freight forwarders license to the applicant for failure

to submit surety bond in the required amount; and (3) make other modifications to section 510.5.

In its Notice the Commission explained that while the bonding requirement was intended to offer some degree of protection to the shipping public in the event a forwarder should cause financial loss to the shipper, experience has demonstrated that in many instances of forwarder default, the present amount of the bond does not reasonably afford the degree of protection originally intended. In this regard, it was noted that inflationary spiral since 1963, the date of the original $10,000 bond, requires that more financial protection be afforded shipper clients of freight forwarders. This, the Commission pointed out, is demonstrated by the fact that freight rates, the monies received by forwarders from shippers to be paid to carriers, have doubled and tripled since the original bond was established. The Commission also noted that to obtain such a bond would require the applicant forwarder to demonstrate a substantial degree of financial responsibility and that the surety companies would require a higher degree of financial responsibility from the forwarder.

In addition to increasing the amount of the required surety bond, the Commission also proposed to amend the existing provisions of section 510.5 by: (1) providing for the return of the application to the applicant for failure to submit required bond; (2) establishing a time period within which existing licensees would be required to file the increased bond; (3) eliminating those provisions pertaining to "grandfather" rights of forwarders and temporary bonding which have been rendered unnecessary by the passage of time; and (4) redesignating certain provisions and making other editorial revisions necessitated by the above changes.

The stated reason for additional amendment (1) above was to terminate the existing procedure of issuing a notice of intent to deny an application and affording the applicant an opportunity for hearing where such applicant has failed to file the required bond. The Commission reasoned that because the filing of a bond by an applicant prior to licensing is mandatory under General Order 4 and section 44 of the Shipping Act, 1916, to require a hearing under circumstances where no bond has been furnished is unnecessary and time consuming.

Comments to the proposed rule were received from 134 parties, 122 forwarders, four forwarder associations, two congressmen, two shippers, one insurance association, one government agency, one surety company, and one group of ocean freight agents. The Commission's Bureau of Hearing Counsel replied to the comments and answers to Hearing Counsel's replies were also submitted.

All of the comments address the proposal to raise the amount of the bond from $10,000 to $50,000. Most of these oppose the proposed increase in the amount of bond. Those opposed, including Hearing Counsel, agree, however, that some change in the present bonding requirement is necessary and a variety of alternatives is suggested.

Several reasons are advanced by those commentators supporting the

proposed increase; the increased bond would better protect the shipping public, help "professionalize" an industry in which, at present, an individual may enter with relatively little capital, reduce malpractices and deter undercapitalized individuals from entering the field.

Those opposing changes in the present bonding requirements take the position that the increase would impose a severe burden on small forwarders; that small forwarders would be forced from the business, leaving the field entirely in the hands of large forwarders. Several of these parties, including an insurance association and the Small Business Administration, submit that forwarders will be unable to: (1) afford the premium on such a bond; and/or (2) establish to the bonding companies that a small forwarder has sufficient financial strength to be eligible to receive a bond of the proposed size.[1] While most of those opposing the Commission proposal believe that the present bond is sufficient, some argue that no bond should be required.

A large number of comments was received favoring some change in the present bond, but opposing the proposed increase to $50,000. This group, which includes Hearing Counsel, states that small forwarders will be unable to secure a $50,000 bond due to the size of their forwarding operations and inability to pledge the required collateral, thus driving small forwarders from the trade, leaving ocean freight forwarding entirely in the hands of a limited number of large forwarders.

Many of these parties urge that the size of the bond be based upon the volume of the forwarder's business. Other comments suggest that recently licensed forwarders, or those licensed in the future, should be required to maintain a large bond while forwarders with several years of experience should be permitted to operate under the current bond requirements.

Certain of the commentators in favor of some change recommend that the amount of the bond be raised to $20,000; Hearing Counsel suggest $25,000. Some suggest that the public would be better served by rigorous Commission enforcement of existing regulations governing the conduct of forwarders in addition to imposing stricter requirements on forwarders seeking a Commission license. Several parties believe that the amount of credit extended by carriers to forwarders should be limited and that the bond requirement be replaced by a yearly license fee.

Hearing Counsel suggest the initiation of a further rulemaking proceeding to strengthen the Commission's regulation of the forwarding industry by establishing experience requirements for new forwarders and requiring financial data reporting by existing forwarders in order to identify those with potential problems.

Finally, one commentator suggests that the Commission give consideration to allowing the submission of security other than a bond. In this regard, it is noted that while section 44(c) of the Shipping Act, 1916,

[1] This is contravened in an answer submitted by another commentator engaged in the bonding of forwarders which submits that the $50,000 bond would not have an adverse impact on the forwarding company. This commentator claims that $50,000 is not beyond the ability of forwarders, even small forwarders, to secure

provides for a bond, "or other security", section 510.5(g)(3), of Commission General Order 4, allows only for the filing of a surety bond.

In this proceeding the Commission must weigh the consequences of the following alternatives. An increase in the amount of the forwarder bond to $50,000 could impose hardship on small forwarders and be detrimental to the interests of the shipping public and possibly reduce the number of forwarders with a corresponding lessening of competition. Conversely, requiring a $50,000 bond could enhance the level of protection to the shipping public by holding forwarders to a higher degree of financial responsibility.

After carefully considering and evaluating all arguments advanced in support of these conflicting propositions, we have decided to increase the amount of the forwarder bond to $30,000.[2] This not only should act to temper the fears of those who believe the existing $10,000 bond is inadequate to protect the shipping public, but also appears to be within the range which many of those opposing an increase to $50,000 would find reasonable.

No comments were made on the remaining proposed amendments to section 510.5 and subject to one minor change in redesignated paragraph (h)(2), will be adopted as proposed.[3]

Hearing Counsel have suggested various changes in the Commission's freight forwarder regulations which are outside the scope of this rulemaking and, accordingly, are not addressed here. However, these comments will be considered for possible inclusion in any future rulemaking.

Therefore, pursuant to sections 43 and 44 of the Shipping Act, 1916 (46 U.S.C. 841 a, 841 b); and section 4 of the Administrative Procedure Act (5 U.S.C. 553), section 510.5, Title 46 CFR, is hereby amended as follows:

1. Paragraphs (g)(1) and (g)(2) are deleted.

2. Paragraph (g)(3) is redesignated paragraph (g)(1) and revised as follows:

(1) No license shall be issued to a person to whom this paragraph is applicable unless such person has filed with the Commission a surety bond in the amount of $30,000 on Form FMC–59 as set forth below.

3. New paragraph (g)(2) is added as follows:

(2) Every licensee shall file with the Commission on or before December 1, 1978, a surety bond in the amount of $30,000 on Form FMC–59 as set forth below; otherwise such license issued to the licensee shall be revoked in accordance with section 510.9 of this Part.

4. Paragraph (h)(1) is deleted.

5. Paragraph (h)(2) is redesignated as paragraph (h)(1) and revised as follows:

Commissioner Karl E. Bakke dissents on this point. He does not find the proposed $50,000 figure to be unreasonable and would hold to that amount.

The phrase "for failure to prosecute its application in accordance with this section" has been deleted from final paragraph (h)(2) as unnecessary.

(1) The Commission shall notify applicants for license of their qualification for the issuance of a license. Within 30 days of such notice the applicant shall file with the Commission a surety bond in the form and amount prescribed in paragraph (g) of this section. The Commission may, upon a showing of good cause, extend the time within which to file said surety bond.

6. Paragraph (h)(3) is redesignated as paragraph (h)(2) and revised as follows:

(2) If the applicant shall not have submitted the surety bond required under paragraph (g)(1) of this section, within the period specified in paragraph (h)(1), or otherwise authorized, the Commission shall return the application to the applicant.

By Order of the Federal Maritime Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 554(I)

BEMIS MANUFACTURING CO.

v.

TRAILER MARINE TRANSPORT CORP.

NOTICE OF DETERMINATION NOT TO REVIEW

July 26, 1978

Notice is hereby given that the Commission on July 26, 1978, determined not to review the decision of the Settlement Officer in this proceeding served July 21, 1978.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 554(I)

BEMIS MANUFACTURING COMPANY

v.

TRAILER MARINE TRANSPORT CORPORATION

Reparation Awarded.

DECISION OF EDGAR T. COLE, SETTLEMENT OFFICER[1]

The Bemis Manufacturing Company claims $536.70 as reparation from Trailer Marine Transport Corporation (TMT) on a shipment of Bedpans and Urinals transported aboard their vessel TMT San Juan, bill of lading 8-1, from Jacksonville, Florida to San Juan, Puerto Rico, June 25, 1976. Complainant alleges a violation of Section 18(b)(3) of the Shipping Act, 1916.

The carrier in rating the subject shipment relied on its Freight Tariff No. 1, FMC-F No. 2, Item 3440, applying a rate of $.95 cft. applicable to Hospital, Medical, Surgical or Dental Material, viz.: Equipment. The complainant, on the other hand states that the correct rate should be $.58 cft., TL minimum 2000 cu. ft., based on the description Disposable Laboratory and Hospital Ware NOS. The foregoing description is also found in Item 3440.

The main issue in the instant case is whether the commodity shipped, bedpans and urinals, would qualify to be rated under the disposable rate of $.58 cft. No exceptions are taken to the accessorial charges that were assessed. Charges assessed by the carrier amounted to $1763.18 while the complainant alleges that the freight charges should be $1226.48, a difference of $536.70.

In considering claims involving disputes as to the nature of cargo, if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, the Commission has traditionally imposed a heavy burden of proof on complainant. See Informal Docket

[1] Both parties having consented to the informal procedure of Rule 19(a) 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 Determination not to review July 26, 1978.)

283(I), *Western Publishing Company, Inc. v. Hapag Lloyd A.G.* In support of its claim complainant has submitted a catalog page indicating that the shipment bedpans and urinals are for single patient use and therefore they qualify for the disposable rating. Webster's Dictionary defines disposable as subject to or available for disposal; a discarding or throwing away.

Although the documents originally submitted to the carrier do not indicate that the commodity shipped was disposable the catalog page furnished by Bemis does indicate that the plastic bedpans and urinals are for single use for the prevention of cross-infection.[2] In view of the new information it is believed that the claimant has furnished the necessary information and reasonable burden of proof in support of its claim and therefore has met the heavy burden of proof requirement.

In denying the claim the carrier relied solely on Rule 450 in its tariff which provides that overcharge claims for adjustment of freight charges to be presented in writing within six (6) months from date of the bill of lading. In this connection, it is noted that the claim was filed with the Commission within the two (2) year statutory time period 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.

Based on the information presented in connection with this claim, we believe that the complainant has supplied sufficient information that would warrant reparations in this case. Therefore, Bemis Manufacturing Company is awarded reparation in the amount of $536.70.

(Sh) EDGAR T. COLE,
Settlement Officer.

[2] Complainant acknowledges the fact that the bill of lading description was deficient and should have read bedpans and urinals, disposable hospital ware, rather than bedpans and urinals

TABLE OF COMMODITIES

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

AGREEMENTS UNDER SECTION 15: See also Terminal Leases

— In general

Following a determination that a stipulation and settlement agreement between complainant and respondent is not subject to section 15 of the Shipping Act, 1916, the Administrative Law Judge dismisses the proceeding without prejudice to its renewal on a showing of non-compliance with any of the terms and conditions of the stipulations and settlement agreement. Complainant's request to hold the proceeding in abeyance for 30 days for the complainant to decide it agrees with the order of dismissal or to file an amended complaint seems to seek an unwarranted advantage. To grant such request would sanction giving an unwarranted advantage, as well as tacitly approving the filing of an amended complaint. Capital City Stevedores, Inc, v. Greater Baton Rouge Port Commission, 9 (11–12).

A shipper's complaint failed to state a claim for relief under section 15 of the Shipping Act, 1916, where the complaint contained no allegations of fact which even mentioned a second carrier or an agreement between carriers. Carton-Print, Inc, v. The Austasia Container Express Steamship Co. 30 (31, 35–36).

Investigation into the approvability of agreements is discontinued upon withdrawal by the proponent of the agreements. Nothing in the order of investigation or in Commission precedent authorizes the Administrative Law Judge to disregard the voluntary withdrawal of the very agreements that are specified to be the precise subject of investigation and hearing and to unilaterally "shift the focus," i.e., change the subject, of the proceeding to another area that is of great interest to a designated protestant. That is not to say that the Commission lacks power to, *sua sponte*, initiate a new investigation into any area it believes may be violative of the 1916 Act. Also, the aggrieved party may file a complaint pursuant to the Act. Agreements Nos. 10072 and 10072–1, 127 (129–130).

Since the agreements which are the subject of the instant investigation are no longer in effect, and in the absence of any request to extend the life of the agreements, the issues in the proceeding are moot. No useful regulatory purpose would be served by continuing the proceeding and, accordingly, the proceeding is discontinued. Agreements Nos. 10040–2 and 10153—Agreements in the United States/Guatemala Trade, 162 (164).

Proceeding involving the approvability of an agreement to modify a basic agreement is dismissed upon withdrawal of the modification agreement by the proponents. Agreement No. 8600–4, 214 (215).

Whatever else might be intended by the requirement of section 15 that agency action occur "promptly" (consistent with due process), that statute does not authorize the approval of otherwise unapprovable agreements or implementation of unapproved

agreements whenever the proponents demonstrate that adjudication has not been "promptly" completed. Agreement No. T–2880, as Amended, et al., 753 (755).

The command of section 15 is absolute. Violations do not require a showing of bad faith or even of intent, and the Commission lacks general equity powers to assure that "fairness" is achieved in all matters over which it possesses regulatory jurisdiction. The Commission may not sanction past violations of the Shipping Act by retroactively approving an agreement under section 15. Agreement No. T–2880, as Amended, et al., 753 (755).

Where the facts indicate that a particular activity contravenes section 205 of the 1936 Merchant Marine Act, the Commission applying the "public interest" standard of section 15 of the 1916 Shipping Act has no alternative but to disapprove such activity. Far East Conference Amended Tariff Rule Regarding the Assessment of Wharfage and Other Accessorial Charges, 772 (778–779).

— Collective bargaining agreements

Proceeding relating to assessments made by the New York Shipping Association in funding benefits under a collective bargaining agreement between NYSA and ILO is discontinued. The Commission had directed satisfaction of remaining claims for assessment adjustments stemming from overassessments and the necessary adjustments had been made. Agreement No. T–2336—New York Shipping Association Cooperative Working Arrangement, 846 (847).

— Pooling agreements

Agreement calling for, *inter alia*, a pooling of net revenues by carriers belonging to the same rate fixing combination which would reduce the proponents' economic incentive to develop individual markets while simultaneously foreclosing competitors from a substantial share of the U.S. Pacific Coast/Argentina trade, must be considered a per se violation of section 1 of the Sherman Antitrust Act and is *prima facie* subject to disapproval under the public interest standard of Shipping Act section 15. Approval is only possible if its anticompetitive features are sufficiently justified. A sufficient justification is a showing that the arrangement is necessary to meet a serious transportation need, to secure important public benefits, or to further a valid regulatory purpose of the Shipping Act, or the agreement is otherwise found to be in the public interest. The burden of making the required showing falls on the parties to the agreement. Agreement No. 10056—Pooling, Sailing and Equal Access to Cargo in the Argentina/U.S. Pacific Coast Trade, 255 (257).

The Presiding Officer held that the proponents of an equal access to controlled cargo, coordination of sailings and net revenue pooling agreement between an Argentine and a U.S.-flag carrier met their burden of justifying the agreement because he found an important public benefit in the agreement's potential for creating "inter-governmental harmony." Once it was determined that the agreement was formulated in response to the Argentine cargo routing laws, the Presiding Officer assumed that the agreement represented an improvement over an unduly discriminatory and otherwise unalterable "reality." This approach was a natural result of the Commission's decision in the *Peru case*, 16 FMC 293. The Commission believes, however, that it is inadvisable to adhere to the expansive rationale presented in that case. Anticompetitive agreements must be justified on their individual merits and not merely because they have been customary responses to the problem of national flag discrimination. To do otherwise would tend to obviate Commission consideration of more direct corrective measures pursuant to section

19 of the 1920 Merchant Marine Act. Agreement No. 10056—Pooling, Sailing and Equal Access to Cargo in the Argentina/U.S. Pacific Coast Trade, 255 (258).

An equal access to government controlled cargo, coordination of sailings and net revenue pooling agreement between an Argentine and a U.S.-flag carrier already concertedly fixing rates, which agreement excludes competition from a significant share of a trade, is a *per se* violation of the Sherman Act. Since the agreement was not sufficiently justified, it is disapproved. Id. (257–258).

Any "remedial effects" of an agreement between an Argentine and a U.S.-flag carrier providing for equal access to controlled cargo, coordination of sailings and net revenue pooling were remote and speculative at best. The record did not reveal the existence of substantially probable unfavorable conditions requiring remedy. Despite the potentially all-encompassing scope of the Argentine cargo preference laws, as a practical matter they do not seem likely to harm shippers or prevent U.S. or third-flag carriers from retaining a viable portion of the traffic. Possible avoidance of intergovernmental conflict cannot alone provide a basis for compromising the United States' policy of free and open competition in its foreign trades. Proponents would have to establish a clear likelihood that a specific type of official confrontation would be avoided and particularize the negative effects this confrontation would have on ocean shipping in the U.S. trade route in question. Even if it were established that the Argentine carrier possessed or was certain to obtain an unreasonably large market share by reason of the preference laws, and that section 19 action was an undesirable means of dealing with the problem, a multilateral agreement among all carriers participating in the trade would increase competition equally well without giving the U.S.-flag carrier an unfair advantage over third-flag carriers. Id. (258–259).

— *Public interest*

Maintenance by conferences of a system of payment of consolidation allowance is in the public interest within the meaning of section 15 of the 1916 Act. The consolidation industry which is supported by the system of allowances serves a useful transportation service and is accordingly in the public interest. That service fulfills a serious transportation need by allowing the carrier to attract cargo which otherwise might not move. Cancellation of the Consolidation Allowance Rule Published in the Freight Tariffs of Conferences, 858 (867–868).

— *Rates*

The Commission does not consider consolidation allowance rules of conferences as constituting routine ratemaking. The allowances represent a fee in return for the services of consolidators. However, whether or not the action is "ratemaking" is not necessarily controlling. What is relevant is whether or not authority to adopt such rules is encompassed within the approved provisions of the conference agreements. Cancellation of the Consolidation Allowance Rule Published in the Freight Tariffs of Conferences, 858 (865–866).

Provisions which extend conference agreements to "consolidation . . . and such other matters as may be ancillary to the transport of . . . intermodal shipments" permit the conference to initiate and maintain a system of payment of consolidation allowances with respect to intermodal shipments as currently found in the conferences' applicable tariffs. The system of payment of consolidation allowances has continued to appear without challenge in the tariffs for a number of years. This shows that the Commission and all other parties have considered the conferences to have had the authority concertedly to institute and maintain the system. Id. (866).

Authority of conferences to intiate and maintain consolidation allowances does not include the authority to cancel the system without Commission approval. Concerted action to eliminate the allowance falls within at least three criteria which require separate section 15 scrutiny. Specifically, cancellation represents a new course of action; provides a new means of regulating and controlling competition; and is not limited to the pure regulation of intra-conference competition. Further, cancellation cannot be called some sore of routine, interstitial ratemaking. Id. (867).

— Self-policing

Self-policing rules are amended to require that self-policing of Commission approved carrier agreements be done by persons not otherwise employed by or having any financial interest in a party to such agreement, and that self-policing include self-initiated investigations. Reporting requirements are also amended. Self-Policing Systems, 609.

The duty to adequately self-police stems not from a finding by the Commission of a need for policing, but rather is an obligation imposed by law. The obligation cannot be fulfilled *pro forma* but is one which requires effective positive conduct on the part of the conferences in return for continued recognition of the conference system. Id. (610).

The Commission may make use of its rule making authority under section 43 of the Shipping Act, 1916, to define and articulate enforceable standards to be used to judge the adequacy or inadequacy of self-policing. A rule making proceeding appears to be superior and preferable to case by case adjudication. Id. (611).

Self-policing rules require that self-policing be carried out by neutral persons or bodies. An exemption is provided where it can be shown that the duties of the conference personnel entrusted with the self-policing functions are minimal, the agreement is limited, the parties to the agreement are small and the trade relatively free of malpractices. Id. (611–612).

Self-policing rules provide that no member or employee of the policing authority may be retained or employed by or financially interested in any party to the conference agreement. However, if the policing authority is an independent certified public accountant with no connection with a member line other than as an independent contractor, there is little likelihood of compromise of confidential business records or chance that any bias will enter into the implementation of the policing authority. However, even independent certified public accountants would be put into an untenable conflict of interest situation in cases where a firm would be called on to investigate a client. In such situations the public accountant should not make the investigation and another independent certified public accountant without such connections with the investigated party should take its place. Id. (612).

Self-policing rules are amended to more clearly state the requirements that a policing authority must be established, that the functions and authority of the policing authority must be stated, and that the method or systems used to police the obligations under the agreement must be described. Id. (613).

With regard to self-policing procedures, investigations of malpractices or other violations of the agreement which come to the attention of the policing authority must be undertaken. Id. (613).

In order for a self-policing system to be effective, the policing authority must make investigations *sua sponte*. Each conference must establish a program of self-initiated investigations such as surprise audits of books, and examination of records, billings, classifications, bills of lading and other documents. Agreements must provide for such authorizations. Id. (613).

Since there is no search or seizure by the government and no criminal action is

contemplated, there is no constitutional impediment to requiring members of a conference to submit to surprise audits and other investigations in connection with the self-policing of conference agreements. Id. (614).

"Misratings" are subject to self-policing sanctions. Misratings can be an effective and disguised method of rebating and should therefore be one of the prime concerns of a self-policing program. Id. (614).

While the Commission recognizes that it is important to use its enforcement powers in such a manner as to promote and not to discourage self-policing, it also has a duty to enforce the provisions of the Shipping Act, 1916. The requirement to self-police contained in section 15 of the Act was not intended to limit the Commission in carrying out its enforcement function. The Commission will make every effort to encourage and cooperate with self-policing authorities, and at the same time will remain committed to the use of enforcement powers to whatever degree necessary to free U.S. waterborne commerce of Shipping Act violations. Id. (615).

Periodic self-policing reports must state how many violators are caught. The report must state the number and general description of other violations by the carrier involved in the five years preceding the date of the finding of the violation. This information, along with the specific and detailed description of the offense and the exact amount of the penalty (liquidated damages), will enable the Commission's staff to ascertain how effectively self-policing obligations are being carried out. Id. (615–616).

COMMON CARRIERS: See also Tariffs

A terminal operator is not an "other person" subject to the 1916 Shipping Act if the only vessels calling at its piers are not common carriers. The Shipping Act applies to common carriers at common law. At common law, a carrier is a common carrier if it holds itself out to carry goods for anyone. Here, vessels calling at the operator's coal piers do not hold themselves out as common carriers. Rather, the vessels carry coal under contract or charter only for either the purchaser or the seller of the coal. The vessels do not advertise a sailing schedule, they have not published a tariff for the carriage of coal, nor have they filed a tariff for such carriage at the Commission. Accordingly, vessels calling at the coal piers are not common carriers, and thus the operator does not provide terminal services in connection with a common carrier by water. The operator is not an "other person" with respect to its operations at the coal piers and, consequently, the Commission does not have jurisdiction over the operations of the coal piers. McAllester Brothers, Inc. v. Norfolk & Western Ry. Co., 62 (65–66).

The definition of a nonvessel operating common carrier does not include liability for the inland movement goods and liability for such movement is immaterial to the Commission's exercise of jurisdiction over the water portion of the movement. Thus a company which met the criteria for being classified as a common carrier by water and which disclaimed liability for the inland portion of the movement of goods was, in this case, a nonvessel operating common carrier. Pacific Coast European Conference v. Southern Pacific Marine Transport, Inc., 166 (167–168).

The Commission has determined that a person or business association may be classified as a common carrier by water who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce, as defined in the 1916 Shipping Act; assumes responsibility or has liability imposed by law for the safe transportation of the shipments; and arranges in his own name with underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as

defined in the Act. Liability for the inland movement was not included within the definition and is immaterial to the Commission's exercise of jurisdiction over the water portion of the movement. Id. (168).

Failure of an entity purporting to operate as a nonvessel operating common carrier to assume liability for the inland movement of goods does not of itself preclude it being found to be an NVOCC within the meaning of the Shipping Act, provided it meets all the other criteria. Id. (168, 183).

The imposition of liability on a nonvessel operating common carrier is a rule of general applicability and does not necessarily turn on the particular facts of each case. Thus, distinctions drawn on the basis of the trade or type of proceedings involved or the position taken by the parties as to their status are all irrelevant. Liability will be imposed by law regardless of these considerations if a person in fact performs as an NVOCC. Id. (169).

The Commission does not decide whether the provisions of the Carriage of Goods by Sea Act are applicable to NVOCCs. That is for the courts to decide. If it is determined that an NVOCC is not a "carrier" under COGSA, liability for the loss of or injury to goods received by it for transportation would probably be imposed by law on the NVOCC as an insurer. The important consideration is that liability, in some form, will be imposed on an NVOCC as a "common carrier." Id. (171–172).

While an entity purporting to operate as a nonvessel operating common carrier failed, in fact, to assume liability for the water portion of the movement of goods, if a person in fact performs as an NVOCC any assumption of liability on the part of that person is unnecessary because liability will be imposed on him by law. Equally, any disclaimer of liability whether inadvertent or intentional is without meaning and standing alone has no legal consequence in determining carrier status. As to the port-to-port movements involved in the present case, the entity is an NVOCC. Id. (183).

The fact that the president of a nonvessel operating common carrier referred to shipments as "tendered to the ocean carrier" did not make the NVOCC a freight forwarder. The entity was in fact an NVOCC. The statement should have been: "tendered to the underlying ocean carrier." Rather than dispatching shipments for others, the entity was tendering shipments to the underlying ocean carrier in its capacity as an NVOCC. Id. (184).

CONDITIONS UNFAVORABLE TO SHIPPING IN U.S. FOREIGN COMMERCE

The Commission enacts rules pursuant to section 19 of the 1920 Merchant Marine Act to adjust or meet conditions unfavorable to shipping in the foreign trade of the United States which result from discriminatory laws of Guatemala. Guatemalan-flag carriers and their associates are required to pay an equalization fee on all cargo, and make a specific request for a refund of the fee for any shipment which does not enjoy a duty free status under the industrial incentive laws of Guatemala. The fee is expected to be passed through the carrier to the shipper. A "favored carrier" must file an equalization fee payment guarantee with the Commission. Actions to Adjust or Meet Conditions Unfavorable to Shipping in the Foreign Commerce of the United States, 330 (334–337).

DISCRIMINATION

A violation of section 17 of the 1916 Shipping Act does not necessarily require a finding that a shipper has been commercially injured and, to the extent a prior decision implies such a finding, it is retracted. Household Goods Forwarders Association of America, Inc. v. American Export Lines, 496.

Complainant, which had the burden of proof, failed to establish that the practice of carriers of charging different rates for household goods shipped by the Military Sealift Command than for household goods shipped by nonvessel operating common carriers and by civilian shippers constitutes unjust discrimination. The existence of unjust discrimination is a factual question which depends upon more than a bare difference in rates on similar commodities. A variety of rate discriminations is permissible in the presence of justifying transportation conditions. The record in the present case did not show the exact carrier costs and other transportation conditions prevailing for any of the carriers' three types of household goods shipments. Id. (497–498).

FREE TIME AND DEMURRAGE

Proceeding to determine whether the rules and regulations governing free time and demurrage on break bulk cargo at the Port of New York should be extended to containerized cargoes is discontinued in view of the absence of present practices which require remedial action or a showing that there exists a potential for future violation of the Shipping Act sufficient to warrant corrective action at this time. Free Time on Import Containerized Cargo at the Port of New York, 679 (681).

The Commission's power to adopt free time and demurrage rules does not depend upon a prior finding of a violation of section 17 of the 1916 Shipping Act. The Commission's section 43 rule making authority permits the adoption of substantive rules in furtherance of general Shipping Act objectives without a prior finding that a specific Shipping Act violation has occurred. While section 17 allows the Commission to prescribe a just and reasonable regulation to correct one found unlawful, that section may also form the substantive basis for establishing a rule of general applicability under section 43; thus, section 17 can serve to redress "demonstrative" ills and, when used with section 43, "potential" ones as well. Id. (681–682).

The provision of the rules dealing with truck detention at the Port of New York (GO 35), which states that "steamship companies responsible for house-to-house movements of containers . . . are responsible under this part for delay occasioned by a lack of sufficient chassis," applies only to penalties assessed under the detention rule and the consignee's obligation to pay demurrage to an independent terminal operator is not relieved where the carrier has failed to provide chassis necessary for the movement of a house-to-house container and, as a result, free time is exceeded. In such a situation, the consignee or his agent could file a penalty claim against the water carrier responsible for the house-to-house movement. Id. (682).

FREIGHT FORWARDING

The Commission will not add to its freight forwarders compensation rule (Rule 510.25 (B)) language "that with respect to shipments handled for a government agency the forwarding fee shall not be less than the average freight forwarding fee recovered by the licensee on commercial accounts in the preceding fiscal year. The Commission prefers to handle the problem of preferential forwarding fees on government shipments by an *ad hoc* process of investigation and adjudication. Freight Forwarder Bids on Government Shipments at United States Ports, 16 (17).

Commission report on the matter of freight forwarder bids on government shipments does not generally condone variation between commercial and government forwarding fees. Only variations grounded on demonstrable economies of scale in providing the forwarding services in question are permitted. Id. (17).

The Presiding Officer properly found that nonvessel operating common carrier by

water was not carrying on the business of forwarding without a license. There was no evidence in the record that freight forwarding services were performed on shipments not handled by the carrier in its capacity as an NVOCC. It is not a question of determining whether the NVOCC performs "forwarding services as a matter of fact" as contended, but whether the services are rendered on shipments not carried under the NVOCC's own bill of lading. Provided the carrier only performs freight forwarding services in connection with its own shipments it need not be licensed by the Commission. Pacific Coast European Conference v. Southern Pacific Marine Transport, Inc., 166 (169).

Proceeding instituted to determine whether a shipper directly or indirectly controlled the forwarding activities of a licensed freight forwarder was discontinued in view of the fact that the licensee had changed the circumstances of his operation so as to avoid any appearance or possibility of shipper control. Orlando A. Puig, dba Houston Export International, 226 (227, 229).

Proceeding instituted to determine whether respondent's freight forwarder license should be suspended or revoked is discontinued. Because the premise for the Order To Show Cause was respondent's apparent failure to answer the Commission's inquiries and because respondent showed that it was not responsible for the delay and had fully complied with the Commission's request, the basis for questioning respondent's fitness to hold its license no longer existed. Lativan, Inc., Freight Forwarder License No. 1660, 313.

Proceeding instituted to require freight forwarder to show why its license should not be revoked because of the existence of a shipper relationship was discontinued on severance of the relationship by transfer of the license. The transfer was approved under delegated authority. J. T. Steeb & Co., Inc. 429.

Petition for declaratory order that the rates accepted by the General Services Administration for freight forwarding services in 11 ports for its fiscal year commencing July 1, 1977, are lawful under the freight forwarder rules of the Commission, is denied. An appropriate investigation into the probable violations revealed by the petition will be instituted. Freight Forwarder Bids on Government Shipments at United States Ports—Possible Violations of the Shipping Act, 1916, and General Order 4 488 (489).

Rules with respect to the licensing of independent ocean freight forwarders are amended to increase the amount of the surety bond required for licensed forwarders engaged in the business of forwarding in U.S. export trade from $10,000 to $30,000; to provide for the return of an application for a license to the applicant for failure to submit a bond in the required amount; to establish a time period within which existing licensees will be required to file the increased bond; and to eliminate those provisions pertaining to "grandfather" rights of forwarders and temporary bonding. Licensing of Independent Ocean Freight Forwarders, 892 (893, 895–896).

OIL POLLUTION, ALASKA PIPELINE

The purpose of the Commission regulation with respect to financial responsibility for oil pollution (Alaska pipeline) is to assure that adequate funds will be available within reach of the courts of the United States, to pay all persons suffering injury as a result of oil pollution occasioned by the transportation of North Slope oil to other ports of the United States. The term "persons" is intended to refer to any individual or entity permitted to make a claim under the provisions of the Trans-Alaska Pipeline Authorization Act. Financial Responsibility for Oil Pollution, Alaska Pipeline, 80 (83).

When the broad purposes of the Trans-Alaska Pipeline Authorization Act are considered, to wit, to push ahead with the construction and operation of the pipeline without permitting further environmental challenge, and to provide compensation for

injuries sustained as a result of the production and transportation of Alaskan oil; and in view of the position taken by the Department of the Interior in its final rules regarding this subject, the Commission concludes that the sounder interpretation of the Act is that its financial responsibility provisions apply to all vessels engaged in any segment of the transportation of the pipeline oil between the terminal facilities of the pipeline and the port under the jurisdiction of the United States where that oil is first brought ashore. Accordingly, the Commission intends its financial responsibility regulations to apply to any vessel which has on board oil which has been transported through the pipeline at any time between the time the oil is originally loaded at the terminal facilities of the pipeline and the time it is first brought ashore at a port under the jurisdiction of the United States. Id. (85–86).

With respect to financial responsibility for oil pollution, Alaska pipeline, so long as the person operates the vessel carrying Alaska pipeline oil or is responsible for its operation, the person is an operator within the definition of the term, whether or not the person is the titled owner of the vessel, a demise charterer of the vessel, any other owner *pro hac vice* of the vessel, or any other class of person. Id. (86).

By its regulations on financial responsibility for oil pollution, Alaska pipeline, the Commission intends to prohibit any vessel to receive oil that has been transported through the pipeline, prior to the time oil is first brought ashore at a U.S. port, unless the vessel has on board the original copy of the certificate required by the rules, and can produce that certificate to enforcement officials on demand. This rule applies to the original loading of the oil in Alaska, the subsequent loading of that oil at any other place, the transportation of that oil, the transfer of that oil from one vessel to another, and merely having the oil on board a vessel whether or not the vessel is transporting the oil, or merely storing it. Id. (86–87)

Applications for certificates of financial responsibility for oil pollution, Alaska pipeline, must be filed at least 45 days prior to the date on which the vessel to be certificated will need the certificate. Fees may be paid at any time, but certificates will not be issued until the fees have been paid. If anyone other than an individual, a partner in a partnership, and an officer of a corporation signs the application, the application must be accompanied by documentation of the authority of the signer to sign the application, which documentation must itself be signed by a person authorized to confer the authority. Only persons who actually conduct or are responsible for the operation of a vessel may apply for a certificate. Owners may apply, but only if the owner operates the vessel. Id. (87)

Requests for renewal certificates of financial responsibility for oil pollution, Alaska pipeline, must be filed no later than 45 days before the expiration of the existing certificate, but not before 60 days prior to the expiration date. A request shall not be considered to have been filed unless it is complete. Id. (87–88).

All applicants for certificates of financial responsibility for oil pollution, Alaska pipeline, must keep the Commission informed of any changes in facts having a bearing on their financial responsibility. An applicant should not wait the five days technically permitted by rule, hoping that a certificate will be issued in the interim, for if such a certificate is issued, it might well be revoked immediately thereafter. Id. (88).

The Commission's rules on financial responsibility for oil pollution, Alaska pipeline, provide that financial responsibility established under the rules shall be separate from, and in addition to, the financial responsibility, if any, required of a vessel operator by the Federal Water Pollution Control Act and the Commission's rules implementing that Act. Since reasonable arguments can be made that liability would attach to a vessel operator under both the FWPCA and the Trans-Alaska Pipeline Authorization Act for damages arising out of the same incident, the Commission must require that financial

responsibility for both potential liabilities be evidenced before certificates of financial responsibility are issued. The Commission does not express any view as to whether the liability of an operator in any one incident shall be greater than $14,000,000. Id. (88–92).

With respect to an applicant for a certificate of financial responsibility for oil pollution, Alaska pipeline, who wishes to self-insure, the Commission adopts a modified working capital test. The applicant/certificant must show that it has working capital and net worth in the amount of $19,000,000 in order to obtain a certificate for only one vessel. The self-insured operator of more than one vessel is requried to have only $5,000,000 in additional assets for the second vessel, $4,000,000 for the third, $3,000,000 for the fourth, $2,000,000 for the fifth, and $1,000,000 for the sixth. No additional assets will be required for the seventh and subsequent vessels. Id. (92–94).

The assets of an applicant for a certificate of financial responsibility for oil pollution (Alaska pipeline), who wishes to be a self-insurer, which may be included in computing the required working capital and net worth, must be located in the United States. Thus, working capital is calculated by determining the amount of current assets of the applicant which are located in the United States, and deducting from those current assets all of the current liabilities of the applicant, wherever they are owed. Net worth is calculated in a similar manner. The amount required of a self-insurer under the Alaska oil pollution rules is in addition to the amount required of the applicant under the rules relating to water pollution, if the applicant holds a certificate under the latter rules as a self-insurer. Id. (94–95).

Holders of certificates of financial responsibility for oil pollution, Alaska pipeline, who are self-insured, must notify the Commission within five days of the date they knew, or had reason to believe, that the amounts of working capital or net worth had fallen below the required amounts. Similarly, the annual financial reports, the six-month financial reports, and the quarterly affidavits must be filed at the stated times. Certificates of a self-insurer who fails to timely file reports will be revoked, on short notice, merely because the reports were not timely filed, whether or not the reports are actually filed later and evidence a satisfactory financial condition. Id. (95–96).

Because there may exist methods of establishing a vessel operator's financial responsibility for oil pollution, Alaska pipeline, other than those specifically set forth in the oil pollution rules, a catch-all method is added to the rules. This method is intended to apply to a new method, e.g., a letter of credit, or a rider or endorsement to an insurance policy, or some other form of financial responsibility. Under the catch-all method, an applicant must show that the new method is in the public interest by reference to identifiable and provable factors. Id. (96).

If a guaranty is filed as evidence of financial responsibility for oil pollution, Alaska pipeline, the guarantor must establish that it has the resources to make good on its guaranty. The guarantor must meet the same requirements as to working capital and net worth and the same reporting requirements as a self-insurer. A guarantor may also be a self-insurer in its own right and, if so, the guarantor must demonstrate and maintain working capital and net worth equal to the total of its obligations as a guarantor and as a self-insurer. Id. (97).

The oil pollution, Alaska pipeline, rules provide that any insurance form, guaranty, or bond provided as evidence of financial responsibility under the rules, shall expressly permit direct action by the claimant against the underwriter and that in any such action the underwriter will be entitled to invoke only those rights and defenses permitted by the Trans-Alaska Pipeline Authorization Act. The Act does not expressly grant a right or direct action against the underwriter by any claimant. As to defenses to direct action, the underwriter may assert the defenses it would have under the Federal Water Pollution Control Act, but only to the extent that those defenses are consistent with the purposes

of the TAPAA. Clearly, the defenses of Act of God, and causation in a third party *without regard to the negligence* of that third party, and any causation in any third party other than the United States or other governmental entity, are not consistent with the *purposes* of the TAPAA. Id. (97–101).

The oil pollution, Alaska pipeline, rules require that the original copy of the certificate of financial responsibility be carried on board the vessel, that the certificate will expire at a date certain, and that the certificate will be void if there are any erasures on or alterations of the certificate, or if the certificant is not the operator of the vessel named on the certificate. Id. (102).

The oil pollution, Alaska pipeline, rules set forth five reasons for denying an application for a certificate of financial responsibility, or *revoking* a certificate. Certificates may be denied or revoked for willful false statements to the Commission, for failure to comply with Commission *inquiries, regulations*, or orders, for failure to timely file financial reports (self-insurers), for cancellation of any undertaking, e.g., a surety bond, and for *failure to maintain financial* responsibility. Id. (103–104).

Before denying an application for a certificate of financial responsibility, Alaska *pipeline*, or *revoking* a certificate, the applicant or certificant will be afforded an opportunity to show that the basis for the intended denial or revocation is not true. The period of time will vary according to the urgency of the action. Id. (105).

OVERCHARGES: See Reparation
PRACTICE AND PROCEDURE

—Administrative Procedure Act

Under the Administrative Procedure Act, an agency which issues opinions in narrative and expository form may do so without making separate findings of fact and conclusions of law, *provided that the agency's* findings and conclusions on material issues of fact, law, or discretion, are indicated with such specificity as to advise the parties and any reviewing court of their record and legal basis. Further, an agency need treat only material questions of fact, law, or discretion, and is not required to make findings and conclusions, and give reasons therefor, on collateral issues or issues not relevant to its decision. Department of Defense and Military Sealift Command v. Matson Navigation Co., 24 (25–26).

Commission order upholding an order of the Presiding Officer dismissing a complaint by the Military Sealift Command, relating to Matson's failure and refusal to file military class rates, met the requirements of the Administrative Procedure Act and the Commission's Rules of Practice and Procedure. The Presiding Officer concluded that MSC had failed to meet its burden of proving that Matson's *failure* and refusal is an unjust and unreasonable practice within the meaning of section 18(a) of the 1916 Act and section 4 of the 1933 Act. The *Commission* agreed *and*, in addition, considered the Presiding Officer's specific endorsement and adoption of the reasoning of Matson, Hearing Counsel, *et al.*, as well as a statement of his own reasoning and conclusions, as sufficient to comply with the APA and the FMC Rules. The Presiding Officer's order *adequately and sufficiently* apprised the parties, and any potential reviewing court, of the basis for the determinations reached therein. However, whatever the merits of the Presiding Officer's order, the FMC's order in effect addresses and disposes of the relevant issues raised *de novo* and, to that extent, cures any procedural or substantive failings argued to exist in the Presiding Officer's order. Id. (26).

— Complaints; dismissal

Joint motion to dismiss proceeding is granted in view of the fact that the practices of the carrier complained of have ceased. Any further consideration of the record with the view toward further proceedings on alleged past violations of law is singularly within the province of the Commission and no recommendation from the Administrative Law Judge seems either desirable or appropriate. International Paper Co. v. Lykes Bros. Steamship Co., Inc., 117 (119).

Complaint is dismissed upon a clear indication that complainant does not intend to pursue its complaint. Interconex, Inc. v. Sea-Land Service, Inc., 770.

— Declaratory orders

Petition for declaratory order to determine the applicability of a conference tariff to the movement of shipment from Ensenada, Mexico, to Wilmington, Calif., is denied and the proceeding is discontinued. The fact is that the shipment actually moved from Puntarenas, Costa Rica to Wilmington. As a result, and inasmuch as all parties have suggested in their pleadings that the conference tariff might well be applicable to the entire carriage, the Commission declines to issue a declaratory order within the framework of the instant proceeding. Thomas P. Gonzales Corp. v. Westfal-Larsen & Co., A.S., 131 (132).

— Designation of parties

Rules of Practice and Procedure are amended to terminate the practice of naming persons protesting individual changes in tariffs "complainants" and to cease making them automatic parties to formal proceedings to investigate rate changes in general revenue cases. Designation of Parties, 202.

Practice of naming persons protesting individual changes in tariffs "complainants" and making them automatic parties to formal general revenue proceedings frequently causes such proceedings to suffer undue delay because such protesting parties are usually interested in issues pertaining to the reasonableness of an individual rate or rates rather than the central issue whether the gross revenue which the carrier is seeking to derive from its proposed rate changes is just and reasonable. Under present practice, protestants are, in effect, granted intervention without having to make a showing of substantial interest in the issues or representing that they will not unduly broaden the issues. With elimination of the practice, protestants may still be permitted to intervene under the standards prescribed by Rule 72. Id. (203).

The decision to investigate rate changes in general revenue cases is made by the Commission on the basis of information submitted by the carriers, protesting persons, and other information available to the Commission, and not because protesting persons may or may not intend to take an active role in the proceeding. If protesting persons decide not to participate actively, this does not mean that the carrier suffers some kind of prejudice. By law a carrier has the burden of proving the justness and reasonableness of its proposed rate changes. Should the carrier need to examine the position of an absent protestant, the carrier can use the Commission's deposition and subpena processes. Id. (204).

Contention that elimination of the practice of naming persons protesting individual changes in tariffs "complainants," and making them automatic parties to formal, general revenue proceedings, would eliminate consideration of evidence pertaining to individual commodity rates and movements is unfounded. In any general revenue case, the carrier attempts to predict volume of movement and the revenue to be expected following rate

changes. Any such prediction or evaluation may obviously be affected by changes in volume of movement of particular commodities and if the commodities are major-moving items which are affected by elastic demand factors, the carrier's predictions may be subject to significant revisions. The rule changes do not preclude consideration of these factors. However, the question of the reasonableness of a particular rate is still an essentially different issue which should be litigated in consideration of transportation factors such as cost of service and value of service. Id. (206).

— Discovery

Section 27 of the 1916 Act provides that in all proceedings under section 22 of the Act, discovery proceedings shall be available under rules and regulations of the Commission. The Senate Report accompanying the Act, whereby section 27 was amended to permit discovery, stated that discovery procedures would be applicable only in adjudicatory proceedings arising under section 22. Agreement No. 9973–3 and Agreement No. 9863, 133 (135).

The Administrative Procedure Act defines "adjudication" as the "agency process for the formulation of an order." "Order" is defined as "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." Section 15 of the Shipping Act, 1916, provides that the Commission shall approve, modify, or disapprove agreement by order. Hence, the instant proceeding involving the lawfulness of agreements is an adjudicatory proceeding. Under the actual wording of section 27 and its legislative history, discovery is available under Commission rules and regulations, in adjudicatory proceedings conducted, as here, pursuant to section 22 of the Act. Id. (135–136).

Section 22 of the 1916 Act authorizes the Commission to conduct investigations into "any violation of" the Act. The phrase "any violation of" includes inquiries concerning the approval or disapproval of agreements pursuant to section 15, as well as "violations" of the proscriptive provisions of the Act. Thus, it follows that discovery is available in proceedings instituted to determine the approvability, pursuant to section 15, of Agreements. Id. (136).

The Commission did not waive the applicability of its discovery rules because the order of investigation and hearing provided that the proceeding shall be limited to the submission of affidavits of fact and memoranda of law, replies thereto, and oral argument, if requested and/or deemed necessary by the Commission. The limitation was on the method whereby evidence and argument will be presented, but not on the method whereby that evidence will be acquired by the parties to the proceeding. Use of discovery is not inconsistent with the expeditious resolution of the proceeding because the discovery rules provide that the parties may be ordered to commence the "hearing" prior to the completion of discovery. Id. (136–137).

Where a proceeding was limited to the submission of affidavits and memoranda, and it was determined that discovery was available in the proceeding, the order of investigation was modified to provide for referral of the proceeding to an Administrative Law Judge to oversee the discovery phase of the proceeding. The Commission is not constituted to handle, with the degree of expedition desired, the interlocutory matters relating to discovery. On a date when the protestants to the agreements involved are required to file their affidavits, the jurisdiction of the judge shall terminate, and all subsequent documents shall be filed with the Commission. Id. (138–139).

Rule permitting automatic appeals or review by the Commission in the case of subpenas and discovery directed against Commission staff personnel does not depart from the principle of equality embodied in section 27 of the Shipping Act, 1916. Unless

the Commission itself has some control over the matter of prehearing discovery and disclosure directed against its own staff and documents in its possession, the Commission cannot adequately protect functions which may involve delicate and sensitive considerations of policy as to which presiding officers may be unaware. The Commission does not intend to deprive parties of vital information necessary for proper cross-examination nor conduct its investigations and present evidence in reliance on secret, privileged information. Rules of Practice and Procedure, 604 (606–607).

— *Ex parte communications*

Complainant, who was not represented by counsel, violated the Commission's rules against ex parte communications where in response to a motion to dismiss it sent a letter from its president to the ALJ without sending a copy to the carrier. Although authorized to dismiss a complaint for breach of the rule against ex parte communications, the ALJ did not dismiss this complaint in consideration of the fact that the complainant was without counsel. The complainant's letter and attached documents were made part of the record and a copy was furnished to the carrier. Carton-Print, Inc. v. The Austasia Container Express Steamship Co., 30 (32–33).

— *Informal docket procedure*

Claims against a common carrier for loss or damages in transit are specifically excluded from adjustment under the informal docket procedure of Rule 19 of the Commission's Rules of Practice and Procedure. Freeport Kaolin Company v. Combi Line, 249 (250).

— *Initial decisions, adoption of*

The fact that an initial decision is adopted upon "the Commission's having determined not to review the same" does not deprive the decision of precedential value. Upon adoption, the initial decision becomes the decision of the Commission regardless of the procedure used to effect that adoption. Pacific Coast European Conference v. Southern Pacific Marine Transport, Inc., 166 (169).

— *Record, adequacy of*

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, on remand, to make necessary directed findings, it remains his responsibility to take whatever action is necessary (including reopening of the record) to assure development of a record sufficient to resolve the issues remanded. Accordingly, where the presiding officer in a remanded proceeding issued a "supplemental decision" stating that the record developed before him was inadequate to resolve the issues raised by the Commission's order of remand and suggesting that the proceeding be reopened, the supplemental decision would be vacated and the cause again remanded with instructions to reopen for such further hearings as would be necessary to permit resolution of the stated issues. The presiding officer should have reopened the proceeding *sua sponte*. Baton Rouge Marine Contractors, Inc. v. Cargill, Inc., 570 (571).

— Rule making proceedings

Rules are amended to provide for a single round of comments in rule making proceedings unless particular circumstances warrant the filing of replies to comments and to provide for the participation of the Bureau of Hearing Counsel. The one-round procedure would not be followed in proceedings involving factual disputes or complex issues. Moreover, the determinations as to what type of proceeding will be employed will not necessarily be made in the initial proposal. Further submissions may be called for after seeing the initial comments. The Commission will not make substantive changes to a proposal and finalize without further opportunity for comment. Rules of Practice and Procedure, 626 (627–628).

— Subpenas

Rule 135 dealing with subpenas of Commission staff personnel and subpenas for production of documents in the possession of the Commission is amended to provide for service of subpenas on the Commission's Secretary; to conform the procedural schedule regarding prehearing depositions with that which applies to motions to quash subpenas served in connection with depositions; to authorize the General Counsel to designate an attorney to represent staff personnel under subpena; to permit rulings of the presiding officer to be appealed or, absent appeal, to be reviewed by the Commission; and to provide for replies to appeals. The filing of such appeals will automatically stay the presiding officer's rulings until the Commission acts on the matter. Rules of Practice and Procedure, 604 (605).

Rule requiring that subpenas of Commission staff personnel be served on the Commission's Secretary will not deprive the staff member of his own view on the propriety of complying with a subpena or discovery order. Likewise, the delegation by the General Counsel of an attorney to represent the staff member is not intended to have this effect. Id. (606).

An attorney designated by the General Counsel to represent a staff member under subpena will be free to represent him before the presiding officer and the Commission without supervision by the General Counsel or by anyone else whose interests may conflict with that of the staff member. The General Counsel would become involved only in the matter of advising the Commission when appeals are filed or the Commission decides to review on its own motion. The Commission expects the General Counsel, whenever possible, to select an attorney from without his office. Id. (606).

Rule permitting automatic appeals or review by the Commission in the case of subpenas and discovery directed against Commission staff personnel does not depart from the principle of equality embodied in section 27 of the Shipping Act, 1916. Unless the Commission itself has some control over the matter of prehearing discovery and disclosure directed against its own staff and documents in its possession, the Commission cannot adequately protect functions which may involve delicate and sensitive considerations of policy as to which presiding officers may be unaware. The Commission does not intend to deprive parties of vital information necessary for proper cross-examination nor conduct its investigations and present evidence in reliance on secret, privileged information. Id. (606–607).

PRACTICES OF CARRIERS

Proceeding to determine whether nonvessel operating common carriers in the Port of Miami area were engaging in practices violative of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, is discontinued in view of settlement agreements. As an

express condition of settlement the respondent consented to the entry of an order directing them to cease and desist from certain practices and to the entry of an order requiring the submission of compliance reports. The orders related, inter alia, to: accepting shippers' measurements for cargo without having ascertained that they are in fact correct; the practice of rounding fractional cubic measurements prior to computation of cubic measurements of cargoes tendered for shipment; assessment of collection of pickup and delivery charges, or any other rates or charges required to be filed with the Commission, prior to the effective dates of such rates and charges; and applying rates and charges which have been superseded by subsequent filings and rates and charges. U.S. Miami—Caribbean Puerto Rico Trades, 188 (189).

PREFERENCE OR PREJUDICE

Carrier's rate increases on automobiles and related commodities did not subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or advantage in violation of section 16 First of the 1916 Shipping Act. Matson Navigation Co.—Changes in Rates in the U.S. Pacific Coast-Hawaii Trade, 822 (827–828).

RATES

— In general

Proposed rule requiring common carriers by water, conferences of such carriers and member carriers of such conferences operating in U.S. foreign commerce to submit revenue and cost data to the Commission in connection with general rate increases and certain surcharges filed with the Commission by such carriers or conferences, is withdrawn. Submission of Revenue and Cost Data Concerning General Rate Increases and Certain Surcharges Filed by Common Carriers, Conferences, and Member Carriers of Rate Agreements, 1.

Initial tariff of Arctic Lighterage Company in the Western Alaska Trade is not unreasonable under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933. The tariff withstands the test of operating ratio which is 122.26%. Artic sustained a loss for the 1976 operating season, so that there can be no rate of return on equity or rate of return on rate base. Arctic Lighterage Co.—Proposed Initial Tariff in the Western Alaska Trade, 112 (116).

Proceeding to determine the lawfulness of a rate increase by a carrier in a domestic offshore trade is discontinued since the carrier had terminated its all water service in the trade and cancelled its tariff. Sea-Land Service, Inc.—General Increase in Rates in the U.S. West Coast/Puerto Rico Trade, 504.

While a carrier will be permitted to calculate its rate base taking into account accumulated depreciation as of the beginning of the year in accordance with General Order 11, there are facts and arguments in the record supporting the conclusion that mid-year or average rate base may be a more appropriate basis for measuring rate of return. The use of a rate base stated at cost, less accumulated depreciation as of the beginning of the year, gives no effect to the fact that the rate base is being reduced during the year by depreciation expense. Thus, such a rate base may not be properly matched, for rate of return purposes, to the income which is being earned over the entire period. A rule making proceeding has been instituted to focus on this question. Matson Navigation Co.—Changes in Rates in the U.S. Pacific Coast-Hawaii Trade, 822 (824).

The Commission is deciding in the instant case whether an appropriate portion of accumulated deferred income tases should be deducted from rate base, and not whether it is more appropriate to use "normalization" or "flow-through" of depreciation and tax expenses for purposes of the income side of the rate of return equation. The issue of "normalization" vs. "flow-through" will be considered in a rule making proceeding. Id. (825).

Some portion of deferred taxes found on a carrier's balance sheet should be deducted from the rate base. In this case, in determining whether the rates subject to investigation are reasonable, the carrier's rate base will be reduced by a pro rata share of the deferred tax reserves reflected on its balance sheet. The adjustment to rate base should be made by multiplying the amount of deferred income taxes on the balance sheet by a ratio which has the rate base (prior to adjustment for deferred income taxes) as the numerator and the carrier's total capital as the denominator. The deferred tax reserve to be used in this formula is the reserve which has been accumulated only as the result of the use of accelerated depreciation for tax purposes. Id. (825–826).

The test to be applied to determine whether rates resulting from general rate increases are reasonable is whether the rates produce revenues for the carrier which are sufficient to cover all legitimate expenses plus a fair return on the assets properly used in the trade. In determining whether the return on assets is fair, the Commission must consider whether it is sufficient to cover the cost of the debt capital properly allocated to those assets and to compensate the equity holder for its investment in these assets at a level which is comparable to the return achieved by equity holders in companies with similar risk characteristics. Id. (826–827).

Carrier's increases in rates of buses, fire trucks and trailers cannot be found to produce an unreasonable profit. Lack of shipper opposition to rate increases is one indication of reasonableness, particularly where shippers of that commodity, as here, would normally be sophisticated industrial shippers. Therefore, the increases are found to be just and reasonable pursuant to section 18(a) of the 1916 Act and sections 3 and 4 of the Intercoastal Shipping Act. Id. (828).

— Intermodal transportation

A carrier's intermodal joint through rail/water transportation service between mainland states and Puerto Rico is not within the exclusive jurisdiction of the ICC. The rate "divisions" received by the participating rail carriers are subject to rate regulation by the ICC and the water carrier's rate divisions are subject to full FMC regulation. Trailer Marine Transport Corp.—Joint Single Factor Rates, Puerto Rican Trade, 524 (530).

Under section 302 of the Interstate Commerce Act, adopted in 1940, when rail/water transportation moves between states, it is exclusively an ICC matter. When it moves from the mainland United States and a place other than a state as defined by section 302 ("State" means a State of the United States or the District of Columbia), the ICC has "exclusive" jurisdiction only before the cargo is transshipped to the ocean vessel. Today's intermodal transportation requires some secondary inquiry by both the ICC and FMC into the effects of a through rate. For instance, the ICC has "exclusive jurisdiction" over the rail division of a joint service (to Puerto Rico), 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. Id. (531).

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 adopted by the ICC 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. Id. (535).

— Military rates

Certain provisions of Rule 549.5(b) pertaining to the use of a Uniform Capacity Utilization Factor in determining cargo unit costs in connection with carrier bids for the carriage of military cargo, are revoked. UCUF has rarely affected bidding and the burden of UCUF reporting is extreme in comparison to its utility. Military Rates, 3 (4).

The burden of proof in a proceeding commenced by the filing of a formal complaint is on the complainants as proponents of the order requested of the Commission. Here, the Military Sealift Command challenged Matson's decision not to reestablish special class rates for government cargoes subsequent to the repeal of section 6 of the 1933 Act, contending that Matson's failure to continue a long standing practice of a separate, simplified rate system for MSC cargo is a violation of section 18(a) of the 1916 Act. MSC's only justification for finding Matson's current practices unlawful was the problems encountered by MSC in complying with MILSTAMP in rating military cargoes under the commercial rate structure, which allegedly results in MSC paying a higher rate than is appropriate because it cannot furnish an adequate description of the cargo to permit selection at the lowest proper commodity rate in Matson's tariff. This justification was found to be insufficient to support a determination that Matson was in violation of section 18(a). Arguments by MSC that the record contains evidence of cost savings are without merit. Department of Defense and Military Sealift Command v. Matson Navigation Co., 24 (28).

Unless and until it is clearly established that the ocean rates available to the Military Sealift Command do not reflect *bona fide* differences in carrier costs, value of service, competition or other recognized transportation factors, the most appropriate course is to permit MSC's competitive procurement methods to continue. Whatever adjustment may eventually be required in these methods, by reason of repeal of section 6 of the Intercoastal Shipment Act, can probably be best accomplished by amending the Commission's regulations governing the level of military rates. Household Goods Forwarders Association of America, Inc. v. American Export Lines, Inc., 496 (499).

REFUND AND WAIVER APPLICATIONS: See Reparation

REPARATION

— In general

The complainant shipper did not have standing to recover reparation of alleged overcharges where the consignee, not the shipper, paid the freight and the shipper had never received a valid assignment of the claim from the consignee. Carton-Print, Inc. v. Austasia Container Express Steamship Co., 30 (31, 34–35, 42).

Even if the shipper's poorly drafted complaint could be interpreted as alleging that the carrier assessed "unjust and unreasonable" rates and thus as invoking section 18(b)(5) of the Shipping Act, 1916, no award of reparation would be granted under section 18(b)(5), since that law does not apply retroactively and cannot properly be applied where, as was the case herein, there is no rate on file with the Commission. Id. (36).

A shipper's complaint did not state a claim for relief under section 18(b)(1) of the Shipping Act, 1916, notwithstanding that the Commission had previously determined in another matter that the carrier had not filed a tariff with the Commission, since the

carrier's failure to file a tariff could not be shown to have been the proximate cause of any injury to the shipper. The supporting information furnished by the shipper gave absolutely no indication that the consignee's injury (it was the consignee, not the shipper, which paid the freight charges), which allegedly resulted from the overcharges, was caused even remotely by the carrier's failure to file a tariff. Id. (31, 36–38, 42).

Where a carrier's tariff rules provided that the carrier may load other freight in the free space available in a container, and that rates would be assessed based on 100 percent of the cubic capacity of the container if the shipper failed to furnish the cubic measurements of cargo rated on a cubic foot basis; complainant delivered containers sealed, thereby effectively preventing the carrier from using whatever space might otherwise have been available; and complainant failed to apprise the carrier of the actual measurements of the cargo as required by the tariff, complainant was not entitled to reparation on the basis that it had been overcharged because of the application of the carrier's tariff rules. Recovery will be allowed under proper circumstances where due to inaccuracies in the shipping documents the carrier is led into assessing higher charges than provided in its tariff for what actually moved. In this case, what actually moved, and what complainant was properly assessed for, were entire containers. Cone Mills Corp. v. Trailer Marine Transport Corp., 141 (142, 144); 146 (147, 150).

There is no basis for complainant's assumption that the reparation issues in the proceeding would be considered in a separate proceeding. Commission Rule 251 contemplates a two-tier procedure within the same proceeding, with the reparation phase following a determination that a right to reparation exists, i.e., upon a showing that a violation of the Shipping Act, 1916, has occurred. In the present case, complainant alleged violations by respondent but failed to introduce evidence in support of the alleged violations. In the light of their failure, due process does not require that the proceeding be remanded for further hearing without some additional assurance by complainant that it is interested in actively litigating the alleged violations. Pacific Coast European Conference v Southern Pacific Marine Transport, Inc., 166 (170–171).

A shipper was entitled to reparation for overcharges resulting from misdescription of chemicals carried by respondent and assessed at the highest rate potentially applicable according to the description provided on the bill of lading. A shipper's misdescription of cargo can still afford a basis for later reparation relief; the controlling test is what the complainant shipper actually shipped, and is not limited to how the cargo was described on the bill of lading. Bristol-Myers Co. v. Prudential Lines, Inc., 191 (193).

The degree of transportation experience or knowledge of a shipper organization, based upon its size and frequency of booking cargo, does not appear to constitute a valid mitigating factor sufficient to justify denial of the shipper's claim of reparation for overcharges resulting from misdescription of cargo on the bill of lading. Id. (193).

Since a shipper is charged with knowledge of a tariff, it should submit cargo specifications in a manner which insures the most favorable rate application statutorily permissible. Failure to do so, however, cannot insulate the carrier against claims for a subsequent rate adjustment if the carrier chooses to accept a questionable cargo description at face value or arbitrarily freight a mixed shipment at the highest rate for any item included in the shipment for lack of a breakdown of the contents. A more appropriate course of action for the carrier to follow would be to resolve questionable or insufficient cargo descriptions at the time of billing by reviewing other available supporting documentation or by contacting the shipper. Id. (194).

Where a carrier filed a temporary tariff rate covering carpet yarn in December, 1974, which rate consisted of a price/metric ton component and a bunker surcharge; the carrier's conference issued a permanent tariff filing in February, 1975, bearing an effective date of October 1974, in which it was intended that the price/ton component

and the bunker surcharge be incorporated into a single rate, but in which the last two digits of the intended combined rate were accidentally transposed, resulting in the issuance of a rate nine dollars lower than that actually intended; and where the inadvertent error was not discovered immediately upon receipt of the tariff, resulting in publication of the erroneous rate in February, 1975, two shipments of carpet yarn which moved in January, 1975, were properly freighted at the dual component temporary rate effective in December, and were not subject to the erroneously stated permanent rate, despite its earlier purported effective date. Where a permanent tariff filing differs from the temporary filing which it replaces due to error in the permanent filing, the erroneously printed rate does not become the lawful rate which must be applied until the date of receipt of the permanent tariff page. Mere failure to detect and reject an erroneous tariff filing cannot negate the statutory requirement that those rates specified in the carrier's tariff on file with the Commission and duly published and in effect at the time of shipment be applied; any other course would permit retroactive rate application, which is expressly prohibited by section 18(b) of the Shipping Act, 1916. Allied Chemicals, S.A. v. Farrell Lines, Inc., 208 (212–213).

Where a permanent tariff filing differs from the temporary filing that it replaces due to error in the permanent filing, the erroneously printed rate, whether higher or lower than the intended rate, becomes the lawful rate which must be applied on and after the date of receipt of the permanent tariff page. The rate may not be the legal rate, however, and if the quotation violates any part of the statute, relief may be sought by the shipper. Id. (213).

The Commission's dismissal of a complaint did not affect the award of reparation by the Presiding Officer. The Order of Adoption of the initial decision clearly stated that it was adopted in its entirety. That, of necessity, included the award of reparation which rested on a finding that freight charges on one of the shipments reflected a rate increase not in effect at the time of shipment, a ground for relief not stated in the complaint. To the extent the complaint claimed reparation on the ground of misdescription and misclassification of the cargo, the holding called for its dismissal. Chevron Chemical Co. v. Mitsui O.S.K. Lines, Ltd., 216 (218).

A carrier was correct in denying a shipper's overcharge claims based on misidentification of goods and consequent misapplication of rates where the shipper's claims were not filed within the time limits specified in the applicable tariff and where the misapplications, if any, were the result of the use by the shipper of a generic commodity description not conforming with the tariff description of the commodities allegedly shipped. Pan American Health Organization v. Atlantic Lines, Inc., 220 (222).

Reparation was denied and additional transportation charges were due to respondent where the evidences adduced clearly showed that the only applicable rate produced charges in excess of those paid by the shipper. Freeport Kaolin Co. v. Combi Line, 249 (251).

Reparation may be awarded only to a "complainant" who has shown that it was injured by a violation of the Shipping Act, 1916. Accordingly, the Commission did not approve an initial decision which awarded reparation "to the party which paid the freight charges" and left unclear who was to be the actual recipient. The application for reparation stated that the "complainant," an independent ocean freight forwarder, not the shipper, had paid the charges, but it did not state in what capacity. Since the freight forwarder was not a party to the contract of affreightment, it would not have standing to seek reparation under that contract in the absence of an assignment of the claim from the shipper. In the event the forwarder had advanced freight monies as agent of the shipper and was not fully reimbursed for the freight paid, such an assignment might be implied. However, the record was void of the information needed to reach such a

conclusion. The proceedings were therefore remanded so that the presiding officer might make additional findings of fact. Williams, Clarke Co., Inc. v. Sea-Land Service, Inc., 300 (301).

A shipper of red label adhesives was entitled to reparation in the amount of the difference between the freight charges assessed by the carrier and the contract rate for red lable adhesives. However, where a claimant is seeking the benefit of a contract rate, evidence should be adduced showing that the shipper was indeed eligible for the lower rate; the shipper had submitted no such evidence in the instant proceeding. Accordingly, the award of reparation was made conditional upon submission by the claimant of a copy of the contract evidencing its dual rate shipper status. National Starch & Chemical Corp. v. Hapag-Lloyd & United States Navigation, Inc., Agent, 321 (322).

The legality of the actions of a common carrier by water can only be judged against the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time. A shipper and a carrier are free to negotiate whatever terms they may, but until the understandings so negotiated are fixed in the manner specified in the Shipping Act, the Commission cannot become involved. Accordingly, a shipper's contention that a carrier charged it freight rates higher than it had been led to expect during negotiations with the carrier (during which the shipper drew the incorrect conclusion that the carrier was not a member of the Trans-Pacific Freight Conference, and would charge rates lower than those charged by Conference members) did not state a cause of action within the Commission's jurisdiction, where the freight rate charged by the carrier was not higher than that allowed by its applicable tariff and where no clerical, administrative or inadvertent error of the type contemplated by section 18(b)(3) of the Shipping Act, 1916, was involved. The shipper's claim appeared to be one sounding more properly in contract and resolvable by an appropriate *nisi prius* court. Sidney-Williams Co. v. Maersk Line Agency, 323 (325–326).

Reparation was awarded where the appropriate rate for the shipment was $89.00 per ton 2,000 pounds rather than $133.50 per ton of 2,000 pounds as assessed by the carrier, and where the proper basis for the receiving, storage and delivery charge and the port rationalization charge was 40.4 weight tons rather than 47 measurement tons as assessed by the carrier. Reparation was awarded with respect to the receiving, storage and delivery overcharge and the port rationalization overcharge, notwithstanding that the complainant had overlooked this discrepancy in its complaint. CPC International Trading Corp. v. Sea-Land Service, Inc., 358 (359–361).

Reparation was awarded on a shipper's claim that the carrier had erred in measuring the shipment where the claim was substantiated by supporting documentation (the packing list covering the shipment) and where the carrier did not dispute the facts outlined in the complaint but defended the claim solely on the basis of a tariff rule which prohibited a carrier from considering claims based on error in measurment after the shipment has left the custody of the carrier. Such a tariff provision cannot serve to void the requirements of sections 18(b)(3) and 22 of the Shipping Act, 1916, as they relate to assessing the properly applicable tariff rates and providing a two-year time period for filing a complaint. Tokheim Corp. v. Hapag-Lloyd A.G., United States Navigation, Inc., Agents, 362 (363–364).

A carrier conference's application for permission to refund a portion of the freight charges assessed on certain shipments of raw cotton was denied. The application was supported by a letter from the cotton's carrier to the conference, confirming the carrier's intention that the conference file on the carrier's behalf the "lowest independent rate" in the conference's new intermodal tariff covering raw cotton; however, a teletype message dated about one week later rescinded the carrier's grant of blanket authority to file the lowest rates, and instructed the conference to file such rates for it only with

respect to certain enumerated items, of which raw cotton was not one. Since the latter communication replaced and withdrew the intention set forth in the former, the carrier conference could not have had blanket authority to file the lowest rate, and its failure to do so with respect to the cotton shipment could not have constituted a ground for refund under section 18(b)(3) of the Shipping Act, 1916. Nan Fung Textiles, Ltd. v. Pacific Westbound Conference, 403 (404–405).

The legislative history of the amendment to section 18 of the Shipping Act, 1916 (Public Law 90–298) specifies that carriers are authorized to make voluntary refunds and to waive collection of a portion of their freight charges for good cause such as bona fide mistake. Although the statute is forgiving, it is to be strictly construed, so as to prevent its use as a vehicle for improper rebating. Id. (406).

A shipper's claim for reparation for an alleged overcharge on a shipment of refrigerated cargo was denied. The shipper's contention that the cargo, which moved at a rate assessed per weight ton, should have moved at a rate assessed per measurement ton, which would have produced a saving to the shipper, was without merit; the applicable tariff provision stated that the cargo would move at whichever of the two rates would produce the higher revenue. Moreover, as to part of the shipment, the carrier had applied the lower of the two rates; thus, the shipper had in fact been undercharged on the shipment, and the parties would be required to adjust the undercharge promptly to complete the record. Kraft Foods v. Sea-Land Service, Inc., 407 (409–410).

Applications for waiver or refund of freight charges pursuant to P.L. 90–298, involving a joint intermodal landbridge tariff, must show that the refund or waiver will apply only to the water portion of the through water. Farr Co. v. Seatrain Lines, 412 (417–418).

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 Shipping Act the controlling test is what the complainant shipper actually shipped, and is not limited to how cargo was described in the bill of lading. Lord Export Co., A Division of Lord Corp. v. United States Navigation, Inc., 419 (421).

A carrier's application for permission to waive collection of a portion of freight charges assessed upon a shipment of labeling machines was considered to have been withdrawn when, in response to the administrative law judge's request that the carrier contact the shipper in order to obtain certain necessary documentation, the carrier stated that it would not make such a request in view of the small amount of money in issue. Salentine & Co., Inc. v. Europe Canada Lakes Line, 424 (426–426).

A tariff has the force and effect of law. Accordingly, where a carrier's application for permission to waive collection of freight charges is withdrawn, the carrier is required to comply with the law by collecting the portion of the freight charge as to which the application was originally filed, and will be required to file within 30 days an affidavit of compliance with the order dismissing the waiver application and requiring such collection. Id. (427).

Where a carrier which intended to request a "refund" of a portion of freight charges mistakenly requested a "waiver" and the hearing officer was advised orally and by letter of this typographical error, the application would be considered as one for refund rather than waiver. A clarification of a pleading which commences a proceeding relates back to the time of the original filing of the pleading especially where the pleading errs only in the type of relief requested. A.W. Fenton Co. v. Europe Canada Lakes Line, 453 (455).

A close examination of section 18(b)(3) of the Shipping Act, 1916, shows that Rule

92(b) of the Commission's Rule of Practice and Procedure goes beyond the law in requiring the concurrence of the complainant on an application for permission to refund a portion of freight charges. There is no requirement in the law that complainant concur in the application. Accordingly, the fact that the signature of the complainant in this case was obtained much later than 180 days following the date of shipment was immaterial for purposes of determining whether the application was timely filed. The application was properly filed within the 180 days from the date of shipment, regardless of the date of the complainant's signature. JTH Teng Printing Ink Factory v. Sea-Land Service, Inc. 466 (486).

A close examination of section 18(b)(3) of the Shipping Act, 1916, shows that Rule 92(b) of the Commission's Rules of Practice and Procedure goes beyond the law in requiring the concurrence of the complainant on an application for permission to refund a portion of freight charges. There is no requirement in the law that complainant concur in the application. Accordingly, the fact that the signature of the complainant in this case was obtained much later than 180 days following the date of shipment was immaterial for purposes of determining whether the application was timely filed. The application was properly filed within the 180 days from the date of shipment as required by section 18(b)(3), regardless of the date of the complainant's signature. Yah Sheng Chong Yung Kee Co. Ltd. v. Sea-Land Service, Inc., 472 (474).

A close examination of section 18(b)(3) of the Shipping Act, 1916, shows that Rule 92(b) of the Commission's Rules of Practice and Procedure goes beyond the law in requiring the concurrence of the complainant on an application for permission to refund a portion of freight charges. There is no requirement in the law that complainant concur in the application. Accordingly, the fact that the signature of the complainant in this case was obtained much later than 180 days following the date of shipment was immaterial for purposes of determining whether the application was timely filed. The application was properly filed within 180 days from the date of shipment as required by section 18(b)(3), regardless of the date of the complainant's signature. Pai Tai Industrial Co., Inc. v. Sea-Land Service, Inc., 478 (480).

Where the carrier's tariff had a specific item for the commodity shipped and that rate was not charged, the carrier violated the express provisions of section 18(b)(3) of the Shipping Act, 1916, by not applying the proper rate to the shipment. The complainant was awarded reparation in the form of a portion of the freight charges where the documentation it had submitted in support of its claim was sufficient to enable the hearing officer to determine the proper freight charges. Allied Chemical International Corp. v. Atlantic Lines, 520 (521–523).

Commission Rule 92(a) which requires that someone (normally the shipper or consignee or other person who actually paid the freight) appear on a carrier's application for permission to refund freight charges as the "complainant," and concur in the application, seems to impose a technicality which is not required by the underlying statute but which can nonetheless cause delay in deciding the application. Salentine & Co., Inc. v. Europe Canada Lakes Line, 542 (546–547).

A carrier's application for permission to refund a portion of certain freight charges could not be considered until the carrier had submitted the names of "complainants" who concurred in the application. A carrier complied with this requirement where it submitted affidavits of freight forwarders stating the forwarders' concurrence and stating that the forwarders would transmit any refunds which might be permitted to the shippers who had actually paid the freight charges involved. Id. (547).

A shipper of chemical products which were described as "chemical, n.o.s." was entitled to reparation in the amount of the difference between the general rate and the rate applicable to "emulsifiers" upon a showing that the chemicals involved were

generally used as emulsifiers for plastics and waxes. CSC International, Inc. v. Lykes Bros. Steamship Co., Inc., 551 (560–561).

A shipper of "aluminum can stock (in coils)" was entitled to reparation in the amount of the difference between the rate charged by the carrier, which applied to "aluminum cans k.d. packed (body blanks and ends)" and the rate which should have been applied, which covered "aluminum sheets, flat or in coils." Kaiser Aluminum & Chemical Corp. v. Atlantic Container Line, 564 (565).

A shipper's claim for reparation for overcharges assessed on a shipment of fishing tackle was granted in part where the claim, while otherwise accurate and sufficient to warrant an award, understated slightly the actual volume of misrated cargo which had moved in the shipment. Mitsubishi International Corp. v. Y.S. Line, Inc., 575 (577).

Where the complainant was not a merchant's agreement signatory with the conference and thus was not entitled to a lower contract rate, reparation of alleged freight overcharges was denied since the sole basis for the claim was the complainant had been quoted the contract rate and had in fact been charged that rate on its first shipment. The respondent was correct in its contention that an undercharge had been assessed with respect to the first shipment and an adjustment of the undercharge between the parties was ordered. A. Rami Greenberg v. Venezuelan Line, 619 (620–621).

The complainant was entitled to reparation of a portion of freight charges on certain shipments which moved after the date on which the complainant had signed the merchant's rate agreement and thereby made itself eligible for the lower contract rate. The shipments which moved had been incorrectly rated at the higher rate applicable to shippers not included on the conference's list of contract signatories. General Time Corp. v. Sea-Land Service, Inc., 632 (634–635).

While a violation of the Shipping Act, 1916, had occurred, the settlement officer erred in awarding reparation where the claimant failed to demonstrate that it actually paid or reimbursed the forwarder for payment of the charges found to be unlawful. Mitsubishi International Corp. v. N.Y.K. Line, 636 (637).

Where a special project rate sought to be applied was published under special permission pursuant to Commission rules governing the filing of rates and tariffs in the domestic offshore trade; the rules require carriers in such cases to include in their applications a statement that the bill of lading will be clause "All materials included in this bill of lading are of a wholly proprietary nature"; the carrier provided the necessary statement in its project rate application but did not properly clause the bill of lading; and the proprietary nature of the cargo was clear and undisputed, the shipper was entitled to reparation inasmuch as the carrier failed to apply the project rate and instead applied a higher N.O.S. rate. The clausing requirement is directed only to the carrier and does not impose any obligation on the shipper. The proper rate is determined by what is actually shipped. Durite Corp., Ltd. v. Sea-Land Service, Inc., 674 (675–676).

Where, in its application for permission to refund a portion of freight charges, the carrier identified 55 other affected "shippers" of military household goods, who were in reality forwarders acting for the U.S. Government, the underlying shipper, a procedure was established whereby the carrier could make refunds (or waiver portions of freight charges as applicable) to the actual shippers who bore the cost. The carrier was required to notify each forwarder and company appearing on its records as "shippers" that it should submit to the carrier an affidavit as to who bore the cost of the shipment. On receipt of the affidavit, the carrier can make payments and report its action to the Commission, furnishing the affidavit in support. To insure that each forwarder and company is aware of its rights to file claims, the carrier is to mail copies of its tariff notice regarding such rights to each such person. To insure further that the Government contracting office understands the situation, if it bore the cost, each such office should

receive copies of the tariff notice together with payment of refunds by the carrier with appropriate explanations. Time limitations are also imposed. Aero Mayflower Transit Co. v. Sea-Land Service, Inc., 719 (724–729).

A tariff rule which provided that when containers are packed and sealed by the shipper, the carrier will accept them as shipper's load and count and the carrier will not be responsible for any discrepancy in count or concealed damage did not bar recovery of reparation where the shipper was able to prove what actually moved. The rule was not directed to the question of freight charges, but was rather a disclaimer of any liability for shortages in or damage to cargo received in shipper packed and sealed containers. Paramount Export Co. v. Sea-Land Service, Inc., 747 (748–749).

A carrier must assess and collect freight charges only for what it actually carries and at the rate in effect at the time of shipment. This requirement places on the carrier the obligation of collecting only such charges as are provided in its tariff for what actually moved. Where, in the case of containers packed and sealed by the shipper, the carrier assessed various commodity rates and charged freight according to the quantity of each commodity shipped (and not a rate per container), the carrier could not collect freight on 400 crates of plums if, in fact, only 310 were shipped. Reparation was awarded where the shipper proved that only 310 were shipped (the bill of lading showed 400). Id. (749).

Reparation was awarded where a carrier determined correctly that the appropriate basis for assessment of shipments of fishing tackle was per cubic meter, but overlooked the fact that the value of some of the items shipped was less than $1,000 per revenue ton and should have been assessed at a lower rate than other items which were valued at more than $1,000 per revenue ton. Mitsubishi International Corp. v. U.S. Lines, 781 (782–783).

Prior decision denying reparation is affirmed. Once the proper description for the product shipped has been established, the rate provided in the tariff for that description is the only applicable rate. Pan American Health Organization v. Moore-McCormack Lines, Inc., 805.

Prior decision denying reparation is affirmed. Contrary to complainant's claim, the Commission finding that the complaint did not state a valid claim went to the merits of the case. The controlling fact is that on the date of the shipment involved there was no rate on "file" with the Commission applicable to the shipment. Chevron Chemical International, Inc. v Barber Blue Sea Line, 806.

Where the documents presented by the consignee showed clearly that the carrier had discharged the cargo at a discharge port other than that specified on the bill of lading, the consignee was entitled to reparation of that part of the overland trucking charges it had paid, which charges were in excess of what it would have cost the consignee to arrange transportation from the proper port of discharge to the point of destination. Nan Fung China Trading Co., Inc. v. K-Lines, 814 (815–817).

Where the carrier had elected to arrange ground transportation after it discharged cargo at a port other than that specified in the bill of lading, the consignee would be required to pay only the amount of ground transportation charges which it would have incurred to arrange transportation from the proper port of discharge to the point of destination. Reparation of ground transportation charges paid by the consignee in excess of that amount was awarded. Arnelle of California v. K-Lines, 818 (819–821).

A shipper of electric crock pots and ceramic crock pot lids was entitled to an award of reparation in the amount of the difference between the freight charges assessed by the carrier and the charges payable under a more specific tariff item, which should have been applied to the cargo by the carrier. Allied Stores International, Inc v. United States Lines, Inc., 869 (872).

P.L. 90–298, which amended section 18(b)(3) of the Shipping Act, 1916, 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), the carrier was bound, prior to the enactment of P.L. 90–298, 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. Moreover, if the carrier, through inadvertence, republished a tariff and caused the tariff to reflect an unintended, higher rate, prior to the enactment of the remedial statute the carrier was compelled to charge the higher rate, 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 the equities. Westinghouse Trading Co. v. American Export Lines, Inc., 874 (878).

A shipper was entitled to reparation in the amount of the difference between the freight charges actually paid, which were based on application of a "less volume rate" covering shipments of less than 14 tons, and the charges which should have been assessed, which involved application of a tariff provision limiting the total amount of charges which could be assessed on two shipments of less than 14 tons to the rate applicable to the next higher minimum weight. Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V., 890.

— *Administrative or clerical errors* **(see also negotiated rates)**

Where the carrier's sales personnel made a verbal commitment with the shipper to reduce a certain rate but, through clerical error compounded by misunderstanding between the carrier's sales and pricing personnel, the promised reduction was not published until after the goods were shipped, the carrier would be permitted to waive collection of that portion of the freight charges due to the inadvertent filing error. The waiver would not result in discrimination among shippers; prior to requesting permission to waive collection of the freight charges the carrier had filed a new tariff setting forth the rate upon which the waiver was assessed; and the waiver application was filed within 180 days of the date of shipment. U.S. Despatch Agency v. Sea-Land Service, Inc., 46 (47–49).

Permission to refund a portion of freight charges paid by a shipper of beer kegs was granted where, due to a clerical error not discovered until after the date of shipment, the carrier's tariff publishing department failed to pick up the revised page of the carrier's tariff reflecting a reduction in the applicable rate and instead copied the higher rate formerly applicable which rate was billed to and paid by the shipper. The carrier's error was an "error due to inadvertence in failing to file a new tariff" within the meaning of section 18(b)(3) of the Shipping Act, 1916. Van Munching & Co., Inc. v. Sea-Land Service, Inc., 158 (160–161).

The failure of a carrier to notify a shipper of onions that the shipper would be required to sign a dual rate contract before a reduced contract rate quoted to the shipper could be put into effect did not constitute a "clerical or administrative error in a tariff" or an "inadvertent error in failing to file a new tariff" within the meaning of section 18(b)(3) of the Shipping Act, 1916. The carrier's application for permission to waive collection of the difference between the quoted contract rate and the higher regular tariff rate was accordingly denied. Capital Trading Co., Inc. v. Sea-Land Service, Inc., 315 (317).

A carrier was permitted to waive collection of freight charges in the amount of the difference between the agreed rate covering empty wooden barrels and the higher applicable rate in effect at the time of shipment where the carrier's conference had

agreed to extend the lower rate beyond its scheduled expiration date in order to accommodate the shipment of barrels but the agreed extension had been omitted from the new tariff page due to inadvertence, causing the overcharge. The omission of the extension was a clerical or administrative error of the type contemplated by section 18(b)(3) of the Shipping Act, 1916. Porcella, Vicini & Co., Inc. v. U.S. Atlantic & Gulf-Santo Domingo Conference, 318 (319–320).

A carrier's application to refund freight charges paid in connection with a shipment of wastepaper for recycling was granted where the carrier, which had intended to extend the reduced contract rate covering wastepaper through the month in which the shipment moved, mistakenly entered the extension in the wrong section of its tariff, and did not discover and correct its error until after the shipments had moved. The carrier's error was a clerical error resulting in the payment of an overcharge of a type within the contemplation of section 18(b)(3) of the Shipping Act, 1916. Gaynar Shipping Corp. v. Sea-Land Service, Inc., 327 (329).

A carrier conference was permitted to refund freight overcharges paid in connection with a shipment of ethyl cellulose which should have been freighted under a tariff provision provding for rating on the basis of price per kiloton, but which was instead rated under a provision permitting rating on the basis of price per kiloton per cubic meter, whichever produced the greater revenue. The latter provision had been operative due to the omission of the former, proper rate by the tariff agent, which was not discovered and corrected until the shipment was already en route; the agent's mistake was a clerical or administrative error of a type within the contemplation of section 18(b)(3) of the Shipping Act, 1916. Hercules International Trade Corp., Ltd. v. Pacific Westbound Conference, 340 (341–342).

A carrier was permitted to refund a portion of freight charges assessed on a shipment of green coffee sweepings where the carrier's freight association had agreed to file a reduced rate in time for application to the shipment in question, but the freight conference office which filed all the association's tariffs failed, due to inadvertence, to file the agreed rate until after the shipment had moved. The conference's error was a clerical error of a type within the contemplation of section 18(b)(3) of the Shipping Act, 1916. Buckley & Forstall, Inc. v. Gulf European Freight Association for the Combi Line, 343 (346–347).

A freight conference was permitted to refund a portion of freight charges where, due to an administrative error, (cancellation of a rate that was thought to be a "paper rate" to effect an increase in rates on cargo that proved to be moving), the conference had failed to extend the coverage of the proper rate. The refund would not result in discrimination among shippers; prior to applying for authority to refund a portion of the freight charges, the conference had filed a new tariff which set forth the rate on which the refund was based; and the refund application was filed within 180 days from the date of shipment. Imperial Oil & Grease Co. v. Latin America/Pacific Coast Steamship Conference, 373 (374–375).

Liability for demurrage was that of the consignee despite the shipper's assumption of part of that liability for demurrage occasioned by its error in improperly designating the consignee. There was no basis for waiver of demurrage charges otherwise properly accrued and owing pursuant to the tariff on file. Even if the provisions of the Special Docket rules applicable to foreign commerce were to be utilized as a basis for waiver, no waiver could be granted inasmuch as there was no error of a clerical or administrative nature between the parties or an error due to inadvertence in failing to file a new tariff. General Motors Overseas Distribution Corp. v. Puerto Rico Maritime Shipping Authority, 376 (377–378).

A carrier was permitted to waive collection of a portion of freight charges where, due

to a clerical error, the carrier had failed to extend a certain "special rate" applicable to the shipment. The error had been corrected before the waiver application was filed; the waiver would not result in discrimination among shippers; and the waiver application was timely filed. Europam Paper & Fibre Corp. v. Sea-Land Service, Inc., 379 (380–381).

A carrier was permitted to waive collection of a portion of freight charges where, due to an administrative error, a reduced agreed to freight rate was not issued and made effective in the carrier's tariff until after the date of shipment. The error had been corrected before the waiver application was filed; the waiver would not result in discrimination among shippers; and the waiver application was timely filed. U.S. Information Agency v. Sea-Land Service, Inc., 382 (383–384).

A carrier was permitted to waive collection of a portion of freight charges assessed upon shipments of U.S. mail where, as a result of inadvertent administrative error, the applicable tariff was not amended to conform to a Commission General Order amendment exempting mail rates from the tariff filing provisions of the Shipping Act for almost two months, during which time the shipments of mail moved at the higher rate applicable prior to the amendment. The failure to conform the tariff to the regulations promptly was an appropriate basis for waiving the tariff rate and permitting the lower rate to prevail pursuant to section 18(b)(3) of the Act. U.S. Post Office v. Sea-Land Service, Inc., 400 (401–402).

Tariffs have the force and effect of law and carriers must adhere to them strictly unless, pursuant to P.L. 90–298, 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. Farr Co. v. Seatrain Lines, 412 (414).

Carrier's application to waive collection of a portion of the freight charges assessed on a relief or charity shipment of pharmaceutical products was granted where the shipper had tendered the shipment to the carrier under the belief that there would be no drastic increase in rates covering the goods when the carrier's conference filed its amended intermodal tariff, but the new tariff did not provide for the previously-applicable reduced rate on relief shipments, an oversight which was not discovered or corrected by the carrier until after the shipment had moved. The oversight and the resultant failure to effectuate the carrier's intention to carry forward the special rate for charity or relief shipments constituted an error justifying relief under section 18(b)(3) of the Shipping Act. Catholic Relief Service v. Pacific Westbound Conference, 442 (444–445).

Where due to a clerical error the truckload rate on pneumatic tires was omitted from the carrier's tariff, the carrier was granted permission to refund a portion of the freight charges representing the difference between the truckload rate and the less-than-truckload rate at which the freight charges had been assessed on a truckload size shipment of pneumatic tires. The charging of the less-than-truckload size shipment measuring a minimum of 1600 cubic feet was unjust, unreasonable and unlawful, in violation of section 18(a) of the Shipping Act, 1916. Williams, Clarke Co., Inc. v. Sea-Land Service, Inc., 460 (463–464).

A carrier's application for permission to refund a portion of freight charges was granted where the application was based on an error in the published rate at which freight charges on the subject shipment were assessed which error was of a clerical nature. JTH Teng Printing Ink Factory v. Sea-Land Service, Inc., 466 (467–471).

A carrier's application for permission to refund a portion of freight charges was granted where the application was based on error in the published rate at which freight charges on the subject shipment were assessed, which error was of a clerical nature. Yah Sheng Chong Yung Kee Co. Ltd. v. Sea-Land Service, Inc., 472 (473–477).

A carrier's application for permission to refund a portion of freight charges was

granted where the application was based on an error in the published rate at which freight charges on the subject shipment were assessed, which error was of a clerical nature. Pai Tai Industrial Co., Inc. v. Sea-Land Service, Inc., 478 (479–483).

A petition for permission to refund a portion of freight charges was granted where the evidence submitted supported the conclusion that there had been an error of a clerical nature in the conversion of the tariff item upon which the charges had been assessed from the imperial to the metric system. Mitsui and Co. U.S.A., Inc. v. Pacific Westbound Conference, 501 (502–503).

A carrier was permitted to refund a portion of the freight charges assessed on a shipment of nuclear fuel elements, unirradiated, where, in the course of converting the applicable conference tariff to the metric system, an error was made in the pertinent tariff item which had caused an overcharge to the shipper. The administrative error involved was of a type warranting a refund pursuant to section 18(b)(3) of the Shipping Act, 1916. Mitsubishi International Corp. v. Far East Conference and American President Lines, Ltd., 566 (567).

Carrier is permitted to waive collection of a war risk surcharge where the carrier's tariff publishing agent made a bona fide mistake in making a project rate subject to a war risk surcharge tariff rule. The mistake was bona fide because the agent acted beyond the scope of his instructions from the carrier and, more significantly, it was not the intent of the carrier to subject the shipments in question to the surcharge. The shipper had entered into the booking contract with the carrier based on that understanding. There is settled precedent for allowing carriers to include surcharges of general applicability in flat rates for government shippers in foreign commerce, as here, under a contractual arrangement upon proof that when the contract was made it was reasonably foreseeable that the event which might trigger the surcharge was likely to arise during the contract period. U.S. Department of Agriculture v. Waterman Steamship Corp., 644 (659–661).

Application for permission to refund a portion of freight charges was granted where, through clerical oversight, a minimum weight requirement was stipulated in filing the rate, no discrimination would result as between shippers, and the application was timely filed. Firestone International v. United States Lines, Inc., 666 (668–669).

Carrier is permitted to waive collection of a portion of freight charges, where the carrier's tariff filer was instructed to file a particular rate effective by a certain date, but failed to do. The error was clerical in nature, no discrimination as between shippers will result, and the application was timely filed. Sunpak Movers, Inc. v. Sea-Land Service, Inc., 714 (717).

Where the carrier, in republishing a tariff item, inadvertently omitted a notation which had appeared in the previous tariff that no separate bunker surcharge would apply, the carrier was permitted to refund a portion of freight charges collected on the shipments in question. It was clear that it was the carrier's intention prior to the shipments not to assess an additional bunker surcharge. The element of the carrier's pre-shipment intention is essential. Aero Mayflower Transit Co. v. Sea-Land Service, Inc., 719 (721–723).

Application for permission to waive collection of a portion of freight charges is granted where the carrier inadvertently filed the agreed rate, but to a port other than intended. Deutsche Schaghtbau-und Tiefbohrgesellschaft MBH v. Lykes Bros. Steamship Co., Inc., 730 (731–732).

Application for permission to waive collection of a portion of freight charges is granted upon submission of additional documentation to show that the carrier filed an agreed rate but inadvertently excluded a particular port from the tariff. Cutler-Hammer Denver v. Lykes Bros. Steamship Co., Inc., 733 (734–735).

Application for permission to refund a portion of freight charges was granted where the carrier inadvertently failed to file an agreed rate based on a long ton instead of on a metric ton. The error was occasioned, at least in part, by confusion during the conversion to the metric system. Georgia-Pacific Corp. v. Gulf United Kingdom Conference, 737 (739–740).

Carrier was granted permission to waive collection of a portion of freight charges where, through oversight, the carrier failed to timely file an agreed extension of a rate which expired prior to the time of shipment. Collier Carbon & Chemical Corp. v. Sea-Land Service, Inc., 784 (786–787).

Carrier was permitted to waive collection of a portion of freight charges where, in filing a rate, it inadvertently showed an expiration date other than was intended, resulting in a higher rate becoming applicable to the shipment involved. Commercial Metals Co. v. Sea-Land Service, Inc., 794 (795–796).

Where, when the conference took over the tariffs published by its member lines, it republished many of the items in its own tariff without changing the IBM item number identifying the commodity to the Schedule B classification number as required by its own tariff rule, the Commission presumed, in the absence of proof to the contrary, that the conference intended to follow its tariff rule and that the failure to do so was caused by a clerical or administrative error of the type contemplated in section 18(b)(3) of the 1916 Act. To prevent discrimination against shippers similarly situated, the conference was directed to adjust the freight charges of any shipper who between September 28, 1977 (when the conference took over its members' tariffs) and December 31, 1977 (when the conference rule expired) was assessed an N.O.S. rate instead of the specific rate published in the conference tariff without the proper Schedule B classification number. Carrier was permitted to waive a portion of freight charges where it inadvertently failed to file a negotiated rate prior to the time of shipment. The carrier had formed an intent prior to shipment to publish and file the agreed rate. Kuehne & Nagel, Inc. v. Lykes Bros. Steamship Co., Inc., 798 (799–802).

A carrier was permitted to waive collection of a portion of the freight charges assessed on a shipment of frozen shellfish where, due to inadvertence, the port of origin of the shellfish had been removed from the applicable tariff, which forced the application of a series of connected rates in place of the formerly applicable ocean through rate, causing an overcharge. The administrative error fell within the intended grounds for permitting waiver pursuant to section 18(b)(3) of the Shipping Act, 1916. Toshoku America, Inc. v. Sea-Land Service, Inc., 885 (887–888).

— Burden of proof

Reparation was awarded on a claim that the carrier applied an incorrect measurement to a shipment of auto parts where the complainant met its heavy burden of proof as to the true weight and measurement of each piece of the shipment that was actually transported. It was immaterial that the error in measurement was not brought to the carrier's attention in sufficient time for it to verify the shipper's figures. Guiterman Co., Inc. v. Prudential Lines, Inc., 5 (6–8).

What actually moves as shown by all the evidence determines the applicable tariff rate. Accordingly, reparation was awarded on a claim that a commodity was misclassified and incorrectly measured where the claim was adequately substantiated by supporting documentation as to what was actually transported. It was immaterial that the documentation had not been provided the carrier at the time of shipment; nor would any weight be given to a tariff rule which provided that wherever the tariff provides different rates on a commodity and an adequate description of that commodity is not

stated in the bill of lading, the highest of the rates will be assessed. Pan American Health Organization v. Prudential-Grace Line, Inc., 18 (21–23).

In determining whether reparation should be awarded in a cargo misdescription case, the controlling test is what the complainant shipper can prove was actually shipped. Thus, reparation was awarded where the shipper met its heavy burden of proof that it had been overcharged for a shipment of oil well drilling supplies through a combination of commodity misdescriptions and improper billing under a standard contract rate rather than an industrial contract rate. Sun Company, Inc. v. Lykes Bros. Steamship Company, Inc. 67 (68–74).

In cargo misdescription cases, where the shipment has left the custody of the carrier and the carrier is thus prevented from personally verifying the complainant shipper's amended cargo description, the complainant has a heavy burden of proof and must establish, with reasonable certainty and definiteness, the validity of its claim. However, even where the requirements of the "six-month rule" are not adhered to, and the carrier is therefore denied an opportunity to inspect the cargo prior to its clearing the carrier's custody, the carrier is not relieved from making an appropriate rate adjustment where that burden is met by the shipper. Bristol Myers Co. v. Prudential Lines, Inc., 191 (194).

A shipper seeking reparation for overcharges resulting from misdescription of cargo satisfied its heavy burden of proving the validity of its claim where respondent carrier did not dispute that the cargo was misrated and where the shipper submitted unchallenged documentation adequately supporting the stipulated amount of overcharge. Id. (193–194).

In deciding claims for reparation alleging error in cargo descriptions, the determining factor is what the complainant can prove, based upon all the evidence, as to what was actually shipped. Pan American Health Organization v. Atlantic Lines, Inc., 220 (222).

Where a shipment, as to which reparation based on error in cargo description is sought, has already left the custody of the carrier, and the carrier is thereby prevented from personally verifying the complainant's contentions, the complainant has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of its claim. Id. (223).

A shipper of Malathion was entitled to reparation in the amount of the difference between the tariff rate for "insecticides, n.o.s.," and the lower rate for "agricultural insecticides" where the documentation presented by the shipper (including a chemical dictionary and an ordinary English dictionary) established that Malathion was an insecticide primarily employed in agriculture, and thus an "agricultural" insecticide within the meaning of the tariff. Id. (223).

Complainant was entitled to reparation for freight overcharges which had been assessed on the basis of a freight forwarder's misdescription of a commodity, where the complainant met its heavy burden of proof with respect to what was actually shipped. It was immaterial that the carrier's tariff provided that adjustment of freight charges based on alleged misdescriptions would be declined unless an application for adjustment were submitted to the carrier sufficiently in advance to permit verification of the description before the cargo left the carrier's possession. Acme Cotton Products Co., Inc. v. Royal Netherlands Steamship Co., 230 (231–233).

Reparation was awarded where complainant was able to prove that the actual value per ton of the commodity transported was less than that at which it was assessed by the carrier and the carrier in a letter to the Settlement Officer agreed that the complainant was correct R.T. French Co. v. Prudential Lines, Inc., 296 (298–299).

Where the evidence showed that a more specific tariff item than that used by the carrier fit the commodity shipped, the complainant was entitled to be rated under that item, and, accordingly, was entitled to reparation of the freight overcharges that had

been assessed because of the improper classification. Continental Shelmar, Inc. v. Sea-Land Service, Inc., 305 (306–307).

A shipper of empty tin cans and parts was entitled to reparation in the amount of the difference between the rate assessed by the carrier, the source of which was undetermined, and the lower rate applicable to empty tin cans according to the carrier's tariff. The shipper carried its burden of proving the nature of the goods actually shipped, and the carrier advised that the shipper was correct and did not dispute the claim. Continental Shellmar, Inc. v. Sea-Land Service, Inc., 309 (311).

A shipper of adhesives satisfied its burden of proving the description and weight of the commodity shipped in a reparation proceeding alleging overcharge based on misapplication of rate on a shipment of "red label" adhesive. The bills of lading and carrier due bills both showed the shipments to have contained red label adhesives and showed the weights thereof to be as claimed by the shipper; moreover, the carrier did not dispute the shipper's claim. National Starch & Chemical Corp. v. Hapag-Lloyd & United States Navigation, Inc., Agent, 321.

In a reparation proceeding alleging misapplication of rates, the bill of lading is the prima facie evidence of what was actually shipped in the purportedly misrated shipment. Where no party disputes the accuracy of the bill of lading, there is no need to question it, particularly where the information contained therein is substantiated by other documents. Id. 321.

Reparation was awarded to a shipper where goods described in the bill of lading as "oil well drilling equipment" were shown by the export declaration actually to have been "parts, accessories and attachments for well-drilling machines," which were subject to a lower tariff rate. The shipper's documentary evidence, which was unchallenged by the carrier, was sufficient to establish the alleged overcharge. Ocean Drilling & Exploration Co. v. Kawasaki Kisen Kaisha, Ltd., 349 (353).

Where reparation is sought by a shipper on the ground of misdescription of cargo in the bill of lading, and the shipment involved has left the custody of the carrier (thus preventing the carrier from personally verifying the shipper's new description), the shipper has a heavy burden of proof and must establish, with reasonable certainty and definiteness, the validity of its claim. Lord Export Co., A Division of Lord Corp. v. United States Navigation, Inc., 419 (421).

In cargo misdescription cases, it is usually the case that the carrier, in classifying and rating a shipment, must look to the information supplied it by the shipper or freight forwarder. Accordingly, where goods are incorrectly described in the bill of lading, one cannot "fault" the carrier for relying on the incorrect descriptions set forth. However, in determining whether reparation should be awarded in a given case, a "tariff is a tariff," and the controlling test is what the shipper can prove was actually shipped. Id. (421–422).

Shipper was entitled to reparation for an overcharge assessed on a shipment of cargo described in the bill of lading as "shock absorbers" but shown by the original motor carrier bill of lading, the dock receipt, the export declaration, an invoice and an advertisingbrochure, singularly and collectively, to have consisted of rubber fenders or bumpers, as to which a lower freight rate was applicable under the carrier's tariff. Id. (422).

Complainant was awarded reparation in the form of a portion of freight charges in a rate misapplication case where the documentation submitted in support of its claim, consisting of price lists, invoices, customs entries and bills of lading for the shipments in question, amply demonstrated that the carrier had misclassified the goods that were transported. American Import Co. v. Japan Line (U.S.A.) Ltd., 517 (518–519).

Complainant shipper of chemical products did not carry its burden of proving

entitlement to reparation in the amount of a surcharge allegedly improperly assessed by respondent carrier where complainant did not raise the surcharge issue in its complaint and presented neither exposition nor argument on the issue at the hearing. CSC International, Inc. v. Lykes Bros. Steamship Co., Inc., 551 (562).

A shipper seeking reparation based on respondent's alleged misrating of the cargo shipped could not carry its heavy burden of proving the alleged misclassification of the cargo where its contentions as to the actual description of the cargo was inconsistent (the cargo was described differently in the shipper's complaint, its exhibits, its opening brief and its exceptions). Moreover, the record evidence appeared to support the respondent's classification of the cargo. Madeplac S.A. Industria De Madeiras v. L. Figueriedo Navegacao S.A., 578 (581).

Even if a shipper had carried its burden of proving that respondent carrier had incorrectly described cargo carried for the shipper, the evidence presented by the shipper with respect to the weight and amount of the cargo was inconsistent, which clouded the shipper's demand for reparations. Id. (581–582).

Even assuming that a shipper of a prefabricated building could establish that respondent carrier had misclassified the cargo according to its tariff, the shipper failed to meet its burden of establishing that an overcharge had resulted. The shipper's expert witness testified that, based on the testimony and evidence presented by the shipper, he could not determine if there had been an overcharge; moreover, the witness testified that if he had rated the cargo based on that evidence, he would have assigned an n.o.s. classification to most of it, which would have resulted in the assessment of additional freight charges. Id. (582).

Because of the complainant's failure to supply literature on the product shipped and in light of a chemical dictionary definition which excluded plastics from the class of synthetic resins, the complainant failed to sustain its burden of showing with reasonable certainty that the product shipped, which was described on the bill of lading as "Liquid Synthetic Plastics (Catalyst B-. . .)," was a liquid synthetic resin which should have been classified and rated under the tariff item for resins. Accordingly, the initial decision in which reparation was awarded was vacated and the case remanded to provide the complainant further opportunity to introduce corroborating evidence. National Starch & Chemical Corp. v. Lykes Bros. Steamship Co., Inc., 601 (602).

Reparation of a portion of freight charges was awarded where supporting documentation consisting of a Department of Defense specification pamphlet and the shipper's export declaration correction form substantiated the complainant's claim that a commodity described by its trade name on the bill of lading was entitled to be rated under a more specific tariff item than "Cargo N.O.S." Sun Oil International, Inc. on behalf of Venezuelan Sun Oil v. Venezuelan Line & TTT Ship Agencies, Inc., 622 (624–625).

Reparation of a portion of freight charges was awarded where supporting documentation consisting of the carrier's freight bill and the export declaration, which documents described the commodity shipped as "Synthetic Resin," substantiated the complainant's claim that the cargo should have been classified and rated under the carrier's specific tariff item for "Synthetic Resin." Union Carbide Corp. v. Hapag-Lloyd A.G., 629 (630–631).

Reparation of a portion of freight charges was awarded where supporting documentation consisting of the bill of lading, freight bill, invoice, packing list and sales material concerning the goods shipped, substantiated the complainant's claim that the goods shipped should have been classified and rated under a more specific tariff item than the N.O.S. classification. Mine Safety Appliances Co. v. Chilean Line, Inc., 810 (811–813).

In an action for recovery of alleged overcharges which had been remanded by the Commission for purposes of allowing the complainant further opportunity to introduce

evidence in support of its claim that the commodity shipped was a "Synthetic Resin," the complainant failed to provide such corroborating evidence demanded by the order on remand and thus was denied reparation of the alleged overcharges. National Starch & Chemical Corp. v. Lykes Bros. Steamship Co., Inc., 840 (843–845).

Reparation of a portion of freight charges was awarded where supporting documentation, consisting of a packing list on each shipment which indicated how many cartons of each size were shipped, substantiated the complainant's claim that its agent had made excess volume declarations on the bills of lading. Mechanical Plastics Corp. v. American Export Lines, Inc., 848 (852, 857).

— Carrier's six-month tariff rule

Complainant was entitled to reparation where the carrier did not dispute complainant's contention that it had not applied the correct rate on a cargo of "Artificial Christmas Trees," and offered nothing other than the so-called "six-month" tariff rule in its defense. It has been well established that a carrier's "six-month" rule may not act to bar recovery of an otherwise legitimate claim. Stop & Shop Companies, Inc., Bradlees Division v. Barber Blue Sea Lines and Barber Steamship Lines, Inc., 252 (253–254).

Reparation was awarded in a rate application case where the carrier had denied complainant's claims solely on the basis of the provisions of its tariff restricting payment of overcharge claims submitted to it within six months after the date of shipment, and complainant substantiated its claim. National Starch & Chemical Corp. v. Atlantic Container Line, Ltd., 282 (284–285).

A carrier conference's "six-month rule" governing claims for refund of overcharges did not act to bar an award of reparation on a complaint filed within the two-year statutory period of limitation. No mere conference rule can work to defeat the Commission's statutory jurisdiction. Ocean Drilling & Exploration Co. v. Kawasaki Kisen Kaisha, Ltd., 349 (352–353).

Commission holding that OLOA 229 was properly classified as a "lubricating oil additive" rather than as a "detergent" was based not on the concept of what "the man in the street, the housewife, the grocery clerk" may have of a detergent, but rather on the bases of the manufacturer's own literature and description of the product and the testimony of an expert witness. Complainant failed to refute this testimony by an expert witness of its own, or indeed to offer any expert evidence whatsoever. Chevron Chemical Co. v. Mitsui O.S.K. Lines, Ltd., 216 (217).

A shipper of frozen beef tongues was entitled to reparation where the carrier had admittedly applied a higher rate to the shipment than was permitted under the applicable tariff. The carrier had denied the shipper's claim under the "six-month rule" set forth in the tariff; however, such a rule is not a bar to recovery of reparation for overcharge in a subsequent Commission proceeding. Swift & Co. v. Sea-Land Service, Inc., 572 (573–574).

A carrier's "six-month rule" pertaining to overcharge claims by shippers cannot serve to subvert the Commission's jurisdiction where an otherwise proper claim is presented by a shipper. Mitsubishi International Corp. v. Y.S. Line, 575 (577).

— Classifications

Prior decisions of the Commission do not require that a chemical compound be reduced to its components for classification purposes. The proper description and classification of a product may depend on various factors which must be determined in each particular case. Chevron Chemical Co. v. Mitsui O.S.K. Lines, Ltd., 216.

The Settlement Officer erred in concluding that a shipment of office stationery of paper and paper board was improperly classified by the carrier as "stationery" and in awarding reparation to the shipper on the basis of a rate covering "paper, viz.: bond, sulphite or sulphite and rag mixed—see Printing Paper." Although the shipper showed that the paper involved was sulphite bond, it never denied that it was office stationery, nor did it assert that it was printing paper; moreover, the description urged by the shipper was not an n.o.s. tariff description, but listed the precise types of paper covered, thereby excluding all other types not specifically mentioned. While various types of paper may be made of sulphite bond, the term "stationery" is more specific than the term "paper, viz.: etc." used in the tariff; thus, the carrier properly classified and rated the shipment. Pan American Health Organization v. Moore-McCormack Lines, Inc., 568 (569).

A shipper of hospital bedpans and urinals was entitled to reparation in the amount of the difference between the charges paid, which were based on application of the rate for "hospital equipment," and the charges that would have been assessed had the proper rate, covering "disposable laboratory and hospital ware," been applied. A catalog page submitted by the shipper, which showed that the bedpans and urinals were for single patient use, was sufficient to establish that they qualified for the "disposable" rating. Bemis Manufacturing Co. v. Trailer Marine Transport Corp., 897 (898–899).

— Discrimination

Where a shipper sought reparation for freight overcharges resulting from misdescription of the cargo on the bill of lading, respondent carrier's contention that it was obliged to freight the shipment on the basis of the highest rate potentially applicable in order to avoid discrimination was without merit, in view of the multitude of prior Commission decisions holding that the rate applicable to the cargo actually shipped is the only rate that may be applied to any given shipment. Bristol Myers Co. v. Prudential Lines, Inc., 191 (194).

Since P.L. 90–298 permits a waiver or refund of freight charges to be granted "where it appears that such refund or waiver will not result in discrimination among shippers," an application for waiver or refund should contain a statement as to whether any other shippers of the same or similar commodity were involved around the time of shipment. Farr Co. v Seatrain Lines, 412 (418).

Granting carrier's application for permission to waive collection of a portion of freight charges assessed upon a shipment of garden supplies due to clerical error would not result in discrimination among shippers, despite the fact that one other shipment of such goods had moved during the period involved, where the second shipment was itself the subject of a special docket proceeding filed simultaneously with the instant application. EME Norlett AB v. Sea-Land Service, Inc., 438 (440).

Permitting carrier to waive collection of a portion of freight charges assessed upon a shipment of garden supplies due to clerical error would not result in discrimination among shippers, despite the fact that one other shipment of such goods was known to have moved during the period involved, where the latter shipment was itself the subject of a concurrently filed special docket proceeding. S.C. Sorensen v. Sea-Land Service, Inc., 446 (448).

The payment of a requested refund of freight charges would not result in discrimination among shipper where there was no evidence that any other shipment of the same or similar commodity moved during the time within which a desired lower rate was to have been effective, and where, even if there were such shipments, the carrier's publication of a tariff notice would mean that any other shipper would be entitled to the same rate

during the same period of time. A.W. Fenton Co. v. Europe Canada Lakes Line, 453 (458).

Denial of a carrier's applications to refund portions of freight charges assessed on certain shipments of bottle labeling machines and parts was not required merely because the shipper had failed in each of the five applications filed to mention the other four shipments which moved during the relevant time period. The carrier's omissions appeared to be the result of carelessness or confusion due to its inexperience in filing special docket applications, and not the result of a deliberate attempt to conceal the existence of the other shipments, and would not result in discrimination among shippers. Salentine & Co., Inc. v. Europe Canada Lakes Lines, 542 (548).

Denial of a carrier's application for permission to refund portions of freight charges assessed on five shipments of bottle labeling machines and parts was not required merely because the carrier had withdrawn one of its five special docket applications due to the small amount involved therein. Discrimination among shippers could be avoided by requiring the carrier to publish an appropriate tariff notice and to notify the shipper involved in the withdrawn application of the availability of a refund of charges. Id. (548–549).

Even if other shipments of iron and steel seconds might have moved during the period of complainant's shipment (as to which waiver of collection due to inadvertent error was requested by respondent), which appeared not to be the case, the possibility of discrimination could be eliminated by the publication of a notice in respondent's tariff which would indicate that such other shipments as might have moved would be entitled to the rate applied to complainant's shipment. Westinghouse Trading Co. v. American Export Lines, Inc., 874 (879).

— Filing of new tariff

A carrier's application for permission to waive collection of a portion of freight charges was denied where, after an agreed reduced rate was not timely filed due to administrative error by the carrier, and after the shipment was delivered to the carrier, the carrier filed a corrected tariff which, due to another clerical error, reflected a rate lower than that previously agreed upon by the parties. Section 18(b) of the Shipping Act, 1916, requires that the carrier file a new tariff upon which a waiver will be based prior to applying for permission to waive collection of charges; such a "new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment. The Commission's authority 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 does not extend to approving a rate upon which agreement was never reached and which was never filed. Munoz y Cabrero v. Sea-Land Service, Inc., 152 (153).

Permission to waive collection of a portion of freight charges assessed on a shipment of "Tumeric" was denied where the tariff rate for which retroactive application was sought was not filed by the carrier prior to filing the application for permission to waive collection. Section 18(b)(3) of the Shipping Act, 1916, provides in part that waiver of collection cannot be granted unless the carrier has filed a new tariff setting forth the rate on which the waiver would be based prior to applying for authority to waive collection; this provision of the Act is jurisdictional, and cannot be waived. Louis Furth, Inc. v. Sea-Land Service, Inc., 186 (187).

Carrier was permitted to waive collection of a portion of freight charges where, due to a typographical error as to the effective date of an initial rate, the rate was rejected by the Commission's Bureau of Compliance. The waiver would not result in discrimination among shippers; prior to applying for the waiver a new tariff had been filed setting forth

the rate on which the waiver was based; and the waiver application had been filed within 180 days from the date of shipment. Milchem, Inc. v. Flota Mercante Gran Centroamericana, S.A., 302 (303–304).

A carrier was not permitted to waive collection of a portion of freight charges because of a clerical error in its failing to file a rate promised the shipper where an examination of the tariffs on file with the Commission failed to turn up the tariff amendments which the carrier alleged it had filed to reflect the appropriate rate and the carrier could not furnish proof in the form of a stamped receipt from the Commission that it had filed the amendments. A.E. Staley Mfg. Co., Decatur, Illinois v. Mamenic Line, 385 (388).

An application to refund a portion of freight charges was denied where the jurisdictional requirement for Special Docket relief under section 18(b)(3) had not been satisfied in that neither the conference nor the carrier had filed a new tariff setting forth a rate which would permit the requested refund to be made prior to filing the refund application. Henry I. Daty, Inc. v. Pacific Westbound Conference, 390 (394).

Carrier's application to refund a portion of certain freight charges on the ground of administrative error was denied. While the error involved was of the type within the contemplation of section 18(b)(3) of the Shipping Act, 1916, the carrier had failed to file a new tariff setting forth the rate on which its application was based prior to filing the application, as required by the Act. The requirement that the rate upon which the refund is to be based be filed prior to making application is statutory, and there is no discretion to waive it. Texaco Export, Inc. v. American West African Freight Conference, 430 (432).

Unless the carrier prior to filing its application to waive collection of a portion of freight charges publishes a new tariff which sets forth the rate it seeks to apply, the Commission is without authority under section 18(b)(3) of the Shipping Act, 1916, to consider the merits of the application. This requirement cannot be waived; and as much as the Commission might wish to grant relief in situations where the hardship resulting from the carrier's error in failing to file a rate promised the shipper falls upon the shipper, the Commission, whose jurisdiction is strictly limited by statute, has no power to grant such relief. A.E. Staley Mfg. Co., Decatur, Illinois v. Mamenic Line, 642 (643).

Section 18(b)(3) of the 1916 Act requires that prior to applying for a waiver the carrier or conference of carriers file a new tariff upon which a refund or waiver will be based. This presumes that the rate the carrier is asking permission to apply is not already on file with the Commission. However, where the rate is already on file prior to the filing of the application, the filing of a new tariff reflecting an identical rate becomes superfluous and failure to file such a tariff is not a proper ground for denying an application. Mitsui & Co. (U.S.A.), Inc. v. Pacific Westbound Conference, 807 (808).

— Intended use of cargo

The use for which a product is manufactured and sold can be a most important factor in deciding the proper tariff classification for the product. CSC International, Inc. v. Lykes Bros. Steamship Co., Inc., 551 (560).

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; the fact that an article may have subordinate and secondary uses does not alter the nature of the product. Id

— Interest

While the complainant in a cargo misdescription case was able to prove that it was entitled to reparation, no interest was awarded on the reparation because of the

confusion caused by the complainant's improper description in the bill of lading of the commodities by their trade names and because of the complainant's own failure to submit the required proprietary clause at the time of loading which clause entitled the complainant to an industrial contract rate rather than the standard contract rate applied by the carrier. Sun Company, Inc. v. Lykes Bros. Steamship Co., Inc., 67 (73).

— Misinterpretation of tariff

Application to waive collection of a portion of freight charges cannot be granted under the special docket procedure established by P.L. 90–298 and Rule 92(a), where the mistake involved in the case—a misreading by the carrier's rating person of the tariff in effect at the time of shipment—was not an error in the tariff or an error on the part of the carrier in inadvertently failing to file a new tariff. Farr Co. v. Seatrain Lines, 412 (413–414).

To be subject to the remedial provisions of P.L. 90–298, more is required than merely a mutual misunderstanding of the carrier and shipper as to the rate applicable to a particular shipment. A misquotation of a rate by a carrier's clerk is not an error in a tariff of a clerical or administrative nature, nor is it an error due to an inadvertence in failing to file a new tariff. Id. (415–416).

A misreading of a tariff is not the type of mistake contemplated in section 18(b)(3) of the Shipping Act, 1916, and cannot, therefore, be a basis for granting a waiver of collection of a portion of freight charges. Accordingly, where the carrier's rate clerk informed the shipper that an agreed upon rate would become effective on March 28 (which it did for all carriers belonging to the rate agreement as of that date) but, because she apparently did not read the small print at the bottom of the tariff, failed to inform the shipper that the lower rate would not be effective for the carrier herein until three days later (the date that this carrier joined the rate agreement), permission to waive collection of a portion of freight charges was properly denied. There was no allegation that the March 28th filing was filed in error, or that the carrier intended, but failed, to file the agreed rate in its own tariff. Farr Co. v. Seatrain Lines, 663 (664–665).

— Negotiated rates

The carrier was permitted to waive collection of a portion of certain freight charges where the rate promised by the carrier on the basis of "2,240 pounds, minimum 44,480 pounds per container" was inadvertently filed on the basis of "40 cubic feet or 2,240 pounds, whichever resulted in the greater freight charge." The waiver of collection of a portion of the freight charges would not result in discrimination among shippers; prior to applying for authority to waive collection of a portion of the freight charges, the carrier had filed a new tariff which set forth the rate on which the waiver would be based; and the waiver application had been filed within 180 days from the date of shipment. Sadagen Trading, Inc. v. Sea-Land Service, Inc., 50 (51–53).

Where, due to a tariff clerk's inadvertence, a lump sum rate negotiated by the carrier and the consignee was not filed until after the shipment was loaded, the carrier was granted permission to waive collection of a portion of the freight charges on the shipment. The waiver would not result in discrimination among shippers; prior to applying for authority to waive collection of a portion of the freight charges, the carrier had filed a new tariff which set forth the rate on which the waiver would be based; and the waiver application had been filed within 180 days from the date of shipment. Ideco Rigs and Equipment Operations v. Lykes Bros. Steamship Co., Inc., 54 (55–57).

The carrier was permitted to waive collection of a portion of the freight charges on a

shipment of rice where due to clerical error the carrier had failed to timely file the rate on the shipment it had promised the shipper. The waiver would not result in discrimination among shippers; prior to applying for authority to waive collection of a portion of the freight charges, the carrier had filed a new tariff which set forth the rate on which the waiver was based; and the application was filed within 180 days from the date of the subject shipment. Riviana Int'l., Inc. v. Lykes Bros. Steamship Co., Inc., 58 (59–61).

Where a clerical and administrative error by the freight conference resulted in its inadvertent failure to timely file a new minimum rate for shipments of the subject commodity which had been promised the shipper, the conference was permitted to refund that portion of the freight charges collected on the shipment which resulted from the error. The refund would not result in discrimination among shippers; prior to applying for authority to refund a portion of the freight charges, the conference had filed a new tariff which set forth the rate on which the refund would be based; and the refund application was filed within 180 days from the date of the subject shipment. Corning Glass Works v. North Atlantic Continental Freight Conference, 75 (76–78).

The carrier would be permitted to waive collection of a portion of freight charges where there was an error in the tariff rate assessed by the carrier of a clerical and administrative nature which resulted from the inadvertent failure of the carrier to file the rate it had promised the shipper. The waiver would not result in discrimination among shippers; prior to applying for authority to waive collection of a portion of the freight charges, the carrier had filed a new tariff which set forth the rate on which the waiver was based, and the waiver application was filed within 180 days from the date of the subject shipment. Footner and Co., Inc. v. Sea-Land Service, Inc., 123 (124–126).

Permission to refund a portion of freight charges paid by a shipper of herbicides was granted where, through clerical error compounded by a misunderstanding between the carrier's sales and pricing personnel, an agreed reduced rate was not telegraphically filed until the day after the date of the shipment. The shipment involved was the only shipment of similar commodities made by the carrier during the relevant time period, and the carrier's error was of a 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. Velsicol Chemical Corp. v. Sea-Land Service, Inc., 154 (156–157).

Permission to refund a portion of freight charges paid by a shipper of paper was granted where, through clerical error, the carrier's pricing personnel instructed the tariff publishing officer to publish an agreed reduced rate in an incorrect item of respondent's tariff, which he did, and where the error was discovered and the agreed rate (albeit without the agreed minimum quantity term) was published after the movement of the shipments involved but prior to the filing of the petition for refund with the Commission. The clerical and administrative error involved, which resulted in the publication of the originally agreed rate and minimum, but in the wrong tariff item, was of the kind contemplated by section 18(b)(3) of the Shipping Act, 1916, and the other requirements of that section were met by the carrier. Union Camp International Sales Corp. v. Sea-Land Service, Inc., 195 (197).

A carrier was permitted to waive collection of a portion of freight charges where, due to a clerical error by the carrier's freight association, a higher rate than that promised the shipper was published in the association's tariff. The waiver would not result in discrimination among shippers; prior to filing the waiver application the association filed a new tariff with the Commission setting forth the rate on which the waiver was based; the association had agreed to publish an appropriate notice in its tariff with respect to the correct rate; and the waiver application had been filed within 180 days from the date

of shipment. Alcoa International, Inc. v. Gulf European Freight Association, 366 (367–370).

An application to waive a portion of freight charges was granted where, due to clerical error, a promised extension of a special rate was not timely filed with the Commission. The error had been corrected by an effective tariff before the waiver application was filed; permission to refund would not result in discrimination as between shippers; and the application for a waiver was timely filed. Abikath Export Corp. C/O Franlig Forwarding Co., Inc. v. Sea-Land Service, Inc., 396 (397–399).

Where a carrier agreed with a shipper to a 15% reduction in the tariff rate applicable to a shipment of lubricating oil and grease, but due to administrative error the carrier's tariff amendment referred only to lubricating oil, the carrier's error appeared to be of a kind that would support an application for permission to refund resultant overcharges pursuant to section 18(b)(3) of the Shipping Act, 1916. Texaco Export, Inc. v American West African Freight Conference, 430 (432).

A carrier was permitted to waive collection of a portion of the freight charges assessed upon a shipment of garden equipment where, after the carrier had agreed with the shipper upon a rate for the shipment, and had further agreed that the rate would not be subject to the carrier's upcoming general rate increase, the carrier's tariff office failed, due to clerical error, to exempt the agreed rate from the general increase, which error was not discovered and corrected until after the shipment had moved. The clerical error involved was of the kind within the contemplation of section 18(b)(3) of the Shipping Act, 1916. EME Norlett AB v. Sea-Land Service, Inc., 438 (440).

A carrier was permitted to waive collection of a portion of the freight charges assessed upon a shipment of garden equipment where, after the carrier had agreed with the shipper upon a rate for shipment, and had further agreed that the rate would not be subject to the carrier's upcoming general rate increase, the carrier's tariff office failed due to clerical error to exempt the agreed rate from the general increase, which error was not discovered and corrected until after the shipment had moved. The clerical error involved was of the type within the contemplation of section 18(b)(3) of the Shipping Act, 1916. S.C. Sorensen v. Sea-Land Service, Inc., 446 (448).

Carrier was permitted to waive collection of a portion of the freight charges assessed on a shipment of liquor where the carrier and the shipper had agreed upon a reduced rate to cover the shipment and the carrier's agent had written a "rough draft" of the revised applicable tariff page, but the rough draft had specified that the rate would apply "house to pier" instead of stating the agreed "house to house" basis. The mistaken transcription was a clerical or administrative error in a tariff of the type within the contemplation of section 18(b)(3) of the Shipping Act, 1916. Juillard Alpha Liquor Co. v. Sea-Land Service, Inc., 450 (451).

A carrier who through inadvertence failed to file a new tariff in time to assess a lower rate on a movement of fork lift trucks, which rate had been promised the shipper, was granted permission to refund a portion of the freight charges on that shipment. The documentation submitted by the carrier supported its 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 to that effect had been misplaced. Payment of the requested refund would not result in discrimination among shippers; a new, correct tariff had been filed prior to the filing of the refund application; and the refund application was filed within 180 days from the date of shipment. A.W. Fenton Co. v. European Canada Lakes Line, 453 (457–458).

The carrier was permitted to waive collection of a portion of freight charges where its clerical personnel inadvertently failed to notify the conference to process and file a special rate promised to the shipper for a certain shipment of rice before the bill of

lading was issued on that shipment. The documents submitted by the carrier, the Department of Agriculture "Cargo Booking Forms" for the shipment, which were signed by representatives of both the carrier and the shipper, established that there was a prior agreement between the carrier and the shipper to move the rice at the special rate. The clerical error recited in the waiver application was of the type within the intended scope of section 18(b)(3) of the Shipping Act, 1916. Commodity Credit Corp. v. Delta Steamship Lines, Inc., 484 (486–487).

A petition for permission to waive collection of a portion of freight charges and to refund freight charges already collected was granted where the documents submitted in support of the petition clearly established that it was the intention of the parties that a tariff be filed 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. David Ullman v. Sea-Land Service, Inc., 490 (491–493).

Initial decision granting waiver of collection of freight charges is remanded to the ALJ for further proceedings. No evidence had been furnished which would substantiate that a prior agreement was reached to establish a rate to include a particular port as a loading port or that the exclusion of the port from the tariff was inadvertent. More is required than the mere allegation of the carrier concerning the nature of the agreed rate. If written evidence of the verbal agreement does not exist, affidavits of those involved in the rate negotiations and agreement could serve as a substitute. Cutler-Hammer Denver v. Lykes Bros. Steamship Co., Inc., 494 (495).

A carrier was permitted to refund a portion of the freight charges assessed on certain shipments of bottle labeling machines and parts where the carrier had transmitted to its tariff agent a request that special rates be filed on such commodities prior to the shipments, but the agent had misplaced the telex request an had failed to comply with the request until after the shipments had moved. The misplacing of the telex constituted an error due to inadvertence in failing to file a new tariff within the meaning of section 18(b)(3) of the Shipping Act, 1916. Salentine & Co., Inc. v. Europe Canada Lakes Line, 542 (547)

A shipper's reparation claim was dismissed for failure to state a claim upon which relief could be granted. The shipper had shipped bulk lubricating oil at a rate agreed upon between the shipper and respondent carrier, but not filed by respondent: the shipper's claim was based on the difference between the agreed rate and the minimum rate specified in the carrier's open conference tariff provision covering lubricating oil, which the shipper alleged to be the applicable rate in view of respondent's failure to file the higher agreed rate. However, the setting of a minimum rate in an open rate provision of a conference tariff could not constitute the "filing" of that rate by the conference; and the shipper's contention that, since respondent was a party to the conference minimum, that minimum was the only rate lawfully applicable, was wholly without merit: reparation cannot be granted on the basis of a nonexistent rate. Chevron Chemical International, Inc. v. Barber Blue Sea Line, 594 (595)

The carrier's application for permission to waive collection of a portion of freight charges was granted where, due to vacations and travel by the carrier's pricing personnel, there had been an inadvertent failure to revise the tariff in accordance with the carrier's agreement with the shipper and the cargo had moved without the tariff being amended. American Home Foods v. Sea-Land Service, Inc., 638 (640-641).

Carrier is permitted to waive collection of freight charges at the rate provided for General Cargo N.O.S. in its tariff, where the carrier, through a bona fide mistake, failed

to file a rate which had been negotiated with the shipper. U.S. Department of Agriculture v. Waterman Steamship Corp., 644 (649, 651–652).

Where the conference at a conference meeting had agreed to the filing of special project rates requested by the shipper, the failure of carrier's representative at the meeting to request a telegraphic filing of the rates to make them applicable to the shipments resulted in the conference's inadvertent failure to file a rate it had approved and intended to file, an error clearly within the ambit of section 18(b)(3) of the 1916 Act. Thus, the carrier will be permitted to waive collection of a portion of freight charges, provided that the carrier file within 30 days either copies of the on board bills of lading or an affidavit attesting to the date the shipments were placed aboard ship. Hermann Ludwig, Inc. v. Waterman Steamship Corp., 670 (672–673).

Permission to waive collection of a portion of freight charges was granted where due to clerical error the carrier had filed the incorrect specifications for the goods shipped in the rate item amendment it had promised the shipper. The waiver request would not result in discrimination among shippers; prior to filing for the waiver a new tariff was filed setting forth the rate on which the waiver was based; and the waiver application was timely filed. Ford France, S.A. v. Sea-Land Service, Inc., 837 (838–839).

The failure of respondent's local rate clerk to inform respondent's pricing manager of complainant's acceptance of a proposed tariff rate constituted an error due to inadvertence in failing to file a new tariff within the meaning of section 18(b)(3) of the Shipping Act, 1916. It was clear that, but for the error, steps would have been taken by the pricing manager to file the necessary tariff. Further, it was clear that it was respondent's intention to file the agreed rate prior to the date of the shipment; such intention is a necessary element in establishing that an error is of a type within the contemplation of the statute. Westinghouse Trading Co. v. American Export Lines, Inc., 874 (879).

An affidavit from respondent's Executive Assistant, stating that the insertion of a qualifying term in a tariff provision (which had the effect of depriving complainant of the benefit of an agreed special rate) was never intended and occurred as a result of the heavy volume of tariff page turnover which is accomplished through the medium of magnetic card typing systems, and the Commission's independent search of conference minutes, which disclosed no action by the conference to insert the term, were sufficient to establish the existence of an inadvertent clerical or administrative error justifying refund of freight overcharges paid by complainant as a result of the error. United Grocery Export Co. v. Pacific Westbound Conference, 883.

— Port equalization

Where a tariff rule gave the carrier the option of discharging cargo at ports designated on the bills of lading or moving the cargo from the port of actual discharge to the port of designation at carrier's expense, the shipper was entitled to equalization reparation. The carrier had discharged the cargo at a port other than that designated and had charged the shipper for the cost of transportation to the port of destination. Fritzi of Calif. v. K-Lines, 710 (711–713).

— Settlements

Complaint alleging that complainant's vessel was improperly evicted from a terminal in order that a vessel of respondent could be berthed, and that the berthed vessel caused a break in the bus bar conductor system which had the effect of precluding the movement of container cranes at another terminal so that complainant's vessels could

not use dockside space at the latter terminal, is dismissed with prejudice in view of a settlement between the parties whereby respondent would pay complainant $10,000. The parties also agreed that the settlement would not prevent either party from contending in any court that any conduct or acts alleged in any complaint or action before the FMC constituted, or were part of, or were evidence of violation of any federal or state laws. Sea-Land Service, Inc. v. City of Anchorage, Alaska and Totem Ocean Trailer Express, Inc., 13 (14–15).

Complaint is dismissed and the proceeding terminated on the basis of a settlement agreement between complainant and respondents. Both the law and Commission policy favor settlements. State of Alaska v. Pelican Cold Storage, Inc., 109 (111).

The informal docket proceeding with respect to complainant's request for reparation for freight overcharges was dismissed where a settlement of the claim with the carrier had been achieved. A. Bohrer, Inc. v. Hapag-Lloyd Lines (U.S. Navigation, Inc.), 234 (237).

Shipper's claim for reparation was dismissed upon a showing that respondent carrier had paid the shipper's claim in full and that the shipper had acknowledged receipt of such payment. Royal Cathay Trading Co. v. Seaway Express Lines, 354 (357).

With respect to a statement by the ALJ, in dismissing a complaint proceeding upon the basis of a settlement between the parties, that the Commission is without power to force a complainant to litigate his claim, Rule 93 of the Commission's Rules of Practice and Procedure states that satisfied complaints will be dismissed in the discretion of the Commission. Considering the fact that the parties here feel that settlement is more prudent than bearing the expense of litigation and the fact that it is not clear that respondent is subject to the Commission's jurisdiction, the order of dismissal is upheld. Since the terms of settlement were not furnished to the Commission, dismissal should not be regarded as a determination of the propriety of the terms. Parties who settle section 18(b)(3) rate disputes are charged with knowledge that the section requires strict adherence to published tariff rates of common carriers and the penalties for violation of the section. Supreme Ocean Freight Corp. v. All Caribbean, Inc., 428.

— Statute of limitations

A claim for alleged freight overcharges on a shipment which occurred in October, 1974, was timely filed with the Commission in July, 1976, well within the two years after the cause of action accrued. Pan American Health Organization v. Prudential-Grace Lines, Inc., 18 (19).

Where it was determined that the complainant shipper did not have standing to assert a claim for reparation of alleged overcharges which had been paid by the consignee, not the shipper, and that no valid assignment of the consignee's claim had been made to the complainant within the two-year period of limitations prescribed by section 22 of the Shipping Act, 1916, the complainant would not be permitted to file an amended complaint based on an assignment of the consignee's claim subsequent to the running of the limitations period. Delay in filing a sustainable complaint beyond a permissible period of time established by law is not excusable on the ground that the person did not know the law or understand its procedures. Carton-Print, Inc. v. Austasia Container Express Steamship Co., 30 (39–42).

The two-year limitations period set forth in section 22 of the Shipping Act, 1916, starts either upon delivery of the cargo to the carrier or upon payment of the freight charges, whichever is later. Accordingly, a complaint filed on February 17, 1977, was timely filed notwithstanding that the bill of lading was dated February 12, 1975, where

payment of the freight charges was actually made on or about March 10, 1975. Sun Company, Inc. v. Lykes Bros. Steamship Co., Inc., 67 (68–69).

Carrier was required to pay a freight overcharge claim made almost two years after shipment and based on value per the shipper's invoice, where the claim was filed within two years of accrual, the invoice supported the claim, and the carrier had admitted that the claim was correct and had offered nothing other than the so-called "six-month" tariff rule in its defense. CSC International, Inc. v. Venezuelan Lines, 293 (294–295).

A cause of action based upon a claim for reparation accrues at the time of shipment or upon payment of freight charges, whichever is later. Accordingly, shipper's claim for refund of an overcharge, which was received by the Commission two years and four days after the date of shipment, was nonetheless filed within the two-year statute of limitations since the freight charges on the shipment were not paid until three months after the date of shipment. Royal Cathay Trading Co. v. Seaway Express Lines, 354 (356).

Section 18(b)(3) of the Shipping Act, 1916, specifies that an application for permission to refund portions of freight charges must be filed with the Commission within 180 days from the date of shipment. An application which was not received in the Office of the Secretary of the Commission until 181 days after the date of shipment, but which bore a stamp showing that it had been received at the Commission on the 180th day, was timely filed within the meaning of the statute. Mitsubishi International Corp. v. Far East Conference and American President Lines, Ltd , 566 (567).

The settlement officer incorrectly interpreted the Commission's rule which states that a cause of action is deemed to accrue "upon delivery of the property or payment of the charges, which ever is later," to mean delivery to the consignee. The correct interpretation of the rule is delivery to the carrier rather than the consignee. In this case one of the complainant's claims was time-barred under either interpretation. Mitsubishi International Corp. v. N.Y.K. Line, 636.

Provision of law that an application for refund or waiver of freight charges must be filed with the Commission within 180 days from the date of shipment means that the count begins on the first day after the date of shipment. The date when the cargo is delivered to the carrier's dock or the date when the bill of lading is issued may be considered as the date of shipment. There is reason to believe that the term "from the date of shipment" was intended to be synonymous with the term "after the cause of action accrued" in section 22 of the Shipping Act, 1916. If this is so, then the 180 day count under section 18(b)(3) would begin at the time of shipment or upon payment of the freight charges, whichever is later. U.S. Department of Agriculture v. Waterman Steamship Conference, 644 (648)

On the basis of established precedent either the date of delivery of the cargo to the carrier or the date of the on board bill of lading may properly serve as the start-up date for computing the 180-days statutory period of limitation for filing refund or waiver applications. Hermann Ludwig, Inc. v. Waterman Steamship Corp., 670 (671–672).

Where a period of 179 days elapsed between the date the cargo was loaded aboard the vessel and the date an application to waive a portion of freight charges was received for filing, the 180-day requirement of section 18(b)(3) of the 1916 Act was satisfied. Kuehne & Nagel, Inc. v Lykes Bros. Steamship Co , Inc., 798 (802).

In computing the 180-day time period for filing waiver or refund applications pursuant to section 18(b)(3) of the 1916 Act, the count begins on the first day after the "date of shipment" and ends on the date of filing the application. Filing takes place on the day the application is deposited in the mail or the day the application is received by the Commission, if filed by hand. Id. (802).

With regard to the statutory requirement that an application for permission to waive

collection of a portion of freight charges be filed with the Commission within 180 days of the date of shipment, the Commission has followed a policy of flexibility and has specifically permitted the date of an "on board" bill of lading or the date of loading aboard vessel to start the time running; that is, the "date of shipment" has been determined by reference to an "on board" bill of lading date or date of loading, not merely by the bill of lading originally issued by the carrier. Westinghouse Trading Co. v. American Export Lines, Inc., 874 (880).

Regardless of the present state of uncertainty occasioned by the lack of a fixed definition of the term "date of shipment" as used in section 18(b)(3) of the Shipping Act and the Commission's regulations thereunder, there was no reason to deny a carrier's application for permission to waive collection of certain freight charges provided that the carrier provided sufficient evidence to place its application within the boundaries of timeliness established by the Commission's prior decisions. Indeed, since the Commission had established by its prior case law certain guidelines for computing the 180 day period within which the application was required to be filed, it would have been inequitable to deny the application due to a retroactive change in those guidelines. Id. (880).

A carrier which sought permission to waive collection of a portion of the freight charges sufficiently established that it had filed its application within 180 days after the date of shipment (despite the fact that the application was filed 197 days after the date of shipment shown on the carrier's original bill of lading) where it presented an affidavit with attached dock and pier receipts and a Bureau of Customs Declaration showing date of departure of the carrying vessel which proved that the shipment in question had not been loaded on the ship until 169 days prior to the filing of the carrier's application. Id. (881).

— Tariff designations; ambiguity

Where two tariff descriptions apply to shipped goods, the more specific of the possible applications must prevail. Pan American Health Organization v. Atlantic Lines, Inc., 220 (223).

The Commission's domestic offshore commerce tariff rules with respect to forbidding options as to applicable rates merely forbids the filing of rates which are clearly duplicative, conflicting or ambiguous. The possibility that a tariff allows a given commodity to quality (on meeting expressly stated conditions for carriage) for more than one rate when the different rates in question reflect *bona fide* differences in transportation conditions is not grounds for rejection or cancellation. Publishing, Filing and Posting of Tariffs in Domestic Offshore Commerce, 238 (246).

A fair and reasonable construction must be given to the terms of a tariff, and the terms must be construed in a 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. CSC International, Inc. v. Lykes Bros. Steamship Co., Inc., 551 (555).

A tariff, when in dispute, is to be construed "as any other document." This rule means that a tariff, having been written by the carrier, is vulnerable against the carrier if the tariff's meaning is ambiguous. It does not mean, however, that other rules of documentary construction necessarily apply to the construction of tariffs. Thus, for example, when construing a contract or statute, a proper inquiry is the intent of the parties or the legislature, however, when construing a tariff, the "express language" of the tariff governs, not the "unexpressed intention" of the author of the tariff. Id. (555).

In construing tariff provisions, resort to extrinsic evidence or matters outside the

express language of the tariff may be had in only three instances; where the language of the tariff is itself vague; where the tariff contains technical words which require interpretation because their meaning is not generally known; or where there exists a custom or usage of a trade or a course of dealing of the parties which, although not specified in the tariff, is such that it must be applied. Id. (555–556).

The rule of tariff construction which permits resort to extrinsic evidence where the language of the tariff is "vague" appears to permit the introduction of extrinsic evidence in virtually every case in which a tariff provision is subject to dispute. The very existence of a dispute between a skipper or his professional freight auditor and a carrier would seem to present an arguable case of vague tariff language. Id. (556).

Extrinsic evidence, in the form of consultation of the dictionary, is considered in virtually all cases involving tariff construction. Resort to extrinsic evidence, however, obviously encompasses a good deal more than mere reference to dictionaries; resort to the dictionary may give rise to the problem of alternative meanings, which only poses the further problem of which alternative to choose. Where this problem arises, the proper choice is that meaning of a tariff word or phrase which is generally understood and commercially accepted. Id. (556).

A shipper's contention that the term "petroleum solvents" appearing in a carrier's tariff item, interpreted in accordance with chemical industry understanding, reasonably described a shipped substance which was a "petrochemical," was without merit. To accept the shipper's conclusion would require the inclusion under the generic head "petroleum solvents" of petrochemical solvents that were neither based on nor derived from petroleum, which would constitute a "strained and unnatural" construction. Id. (558).

The manipulation of dictionary definitions can never establish that a particular meaning of a "technical term" or a particular description of a product is the meaning or description generally attributed to it by those in a particular industry or commercial endeavor. Id. (558–559).

The fact that a shipper of chemical products, which presumably had access to the applicable tariff, described chemical products delivered to respondent carrier as "chemical, n.o.s.," and not as "petroleum solvents," cast considerable doubt on the shipper's subsequent contention that the chemicals shipped were understood by the chemical industry to be petroleum solvents within the meaning of the tariff Provision. Id. (559).

Reparation of a portion of freight charges was awarded where the carried improperly classified a shipment of "Plastic Insulated Mugs" under the tariff item designated "Plastic Goods, N.O.S." rather than under the more specific tariff item designated "Plastic or Paper Products." The Commission has held that the more specific of two possible tariff applications must prevail, and since "Plastic Insulated Mugs" were "Plastic Products" within the meaning of this generic tariff item, the N.O.S. rate had no application. KFC International Sales v. Atlantic Lines, 597 (598–600).

Where the carrier had a rate for alcohol, including methanol, and a rate for dangerous or hazardous cargo, N.O.S., the shipper of methanol, described on the bill of lading as flammable liquids, was entitled to the lower rate for methanol. Tariff terms must be interpreted in the sense they are generally understood and accepted commercially. Methanol is described as methyl alcohol or wood alcohol. Reparation is awarded. J. T. Baker Chemical Co. v. Barber Blue Sea Line, 684 (686–687).

Shipper was not entitled to reparation because it was allegedly overcharged as a result of the carrier failing to apply a palletization allowance on a shipment of rubber cement. The cargo was hazardous and the tariff rule on palletized cargo listed dangerous and

hazardous cargo as cargo upon which the allowance was not to apply. National Starch & Chemical Corp. v. Hansa Line, 741 (742–743).

Rules of tariff construction require that the more specific of two possibly applicable tariff items must apply. If evidence presented by a shipper shows cargo shipped and rated by the carrier to be covered by a more specific item of the carrier's tariff, the shipper is entitled to rating of the cargo under that item. Allied Stores International, Inc. v. United States Lines, Inc., 869 (872).

— Trade name rules

The trade name rule, whereby bills of lading reflecting only trade names are automatically subject to application of the rate specified for Cargo, N.O.S., governs only the rating of cargo by the carrier at the time of shipment and cannot be invoked as a bar to a later showing in a proper proceeding before the Commission as to the exact nature of the commodity shipped. If the evidence shows that a more specific tariff item fits the commodity shipped, the complainant is entitled to be rated under that item. Sun Oil International, Inc. on behalf of Venezuelan Sun Oil v. Venezuelan Line & TTT Ship Agencies, Inc., 622 (623–624).

TARIFFS

Investigation into the lawfulness of proposed ILA tariff rules on containers is discontinued in the light of the effective withdrawal of the rules through a decision of the court upholding a decision of the National Labor Relations Board that ILA had violated the National Labor Relations Act with respect to the collective bargaining provisions which underlie the tariff rules, and by a tariff rule providing for non-enforcement of the container rules. The determination of the Commission to take no action should not be construed as a conclusion by the Commission with respect to its authority over the container rules where they attempted to be enforced at any time. Sea-Land Service, Inc and Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers, 120 (121–122).

Nonvessel operating common carrier is required to amend the bill of lading to clarify the contractual relationship between the actual shipper and the NVOCC as "carrier." The title page in its tariff must be amended to delete the statement that the tariff is applicable to cargo moving on "through Bill of Lading issued by the Carrier." The NVOCC admitted that it does not issue a through bill of lading and reference to such on the title page is misleading. Pacific Coast European Conference v. Southern Pacific Marine Transport, Inc., 166 (171).

Investigation into Sea-Land tariff changes on the commodity "Freight, All Kinds" for shipments from U.S. Atlantic coast ports to Puerto Rico is discontinued. The carrier had received permission to withdraw and cancel the subject tariff pages. Thus, the matters under investigation were moot and the relief originally sought by petitioning intervenors had, in effect, been granted in full. Sea-Land Service, Inc.—Amendment to Freight, All Kinds in the U S. Atlantic/Puerto Rico Trade, 199 (200).

Regulations governing the publishing, filing and posting of tariffs in domestic offshore commerce are revised to require the filing of through intermodal tariffs. The Commission has authority to "accept intermodal joint rates" between FMC regulated domestic offshore carriers and carriers regulated by other agencies. The acceptance of such tariffs and the regulation of practices clearly ancillary to the all water transportation of such carriers does not represent an attempt to assert substantive authority over inland activities within the exclusive jurisdiction of the ICC or the CAB Publishing, Filing and Posting of Tariffs in Domestic Offshore Commerce, 238 (240).

The Commission's responsibilities to prevent unfair and unreasonable rates and

practices pursuant to Shipping Act sections 16 First and 18(a) and Intercoastal Shipping Act sections 2, 3 and 4, is sufficient to support a requirement that domestic offshore carriers file their entire through rate with the FMC as well as their port-to-port rates when they provide through transportation to the public. Shipping Act section 33 does not prohibit the Commission from obtaining tariff information which is also submitted to the ICC. Id. (240).

Rules governing the publishing, filing, and posting of tariffs in domestic offshore commerce are amended to permit the filing (without special permission) of project rates which meet certain specifications. Major, one time only, governmental and charitable construction or relief projects otherwise eligible are included in the definition of project rates. Each such rate must be accompanied by a showing that the rate covers all of the carrier's variable costs and makes more than a *de minimis* contribution to fixed expenses. Id. (241).

Definition of "substituted service" in the revised rules governing the filing of tariffs in domestic offshore commerce limits the use of such service to the occasional use of other carriers or other modes of transportation necessitated by unexpected operating exigencies. Regular arrangements for servicing a locality indirectly on a single bill of lading by substituting the facilities of another carrier must be treated as joint through transportation (whether intermodal or not), and not as the through service of a single carrier. Id. (241).

Requirement that a through route be offered under a single bill of lading is deleted from the final rules on publishing and filing tariffs in domestic offshore commerce. Whether a through rate is formed by combining local or proportional rates is, by itself, irrelevant for tariff purposes, and requirements relating to such combinations are deleted from the definition of through rate. Id. (241–242).

"Transshipment" in the revised rules governing the filing of tariffs in domestic offshore commerce is defined as the physical transfer of cargo from a vessel operating domestic offshore carrier to any other carrier, and the definition of "carrier" is modified to indicate that commonly owned or controlled carriers operating in different transportation modes shall be considered separate carriers for tariff filing purposes. ICC regulated Part III carriage shall be considered a different "mode" of transportation than domestic offshore water carriage for tariff filing purposes. Id (242).

Definition of cargo "interchange" is omitted from the revised rules on filing of tariffs in domestic offshore commerce. The term is not used in the rules and part of the original definition is incorporated into the final definition of "transshipment." It is assumed that "interchange" will be used in tariffs to describe cargo transfers between vessels of the same carrier or transfers between non-FMC regulated carriers Id. (242).

Repeal of former section 6 of the Intercoastal Shipping Act does not prohibit the publication of tariffs exclusively for government cargo in domestic offshore commerce. Section 6 dealt only with the level of government rates. Carriers may, but are not required to, continue offering rates for government cargoes provided that any discounts or other privileges provided are reasonable and cost justified under Shipping Act standards. Id. (243).

Rules governing the filing of tariffs in domestic offshore commerce provide a minimum 30-days notice. Carriers may file tariffs which furnish a greater period of notice, but the procedures employed to protest tariffs remain the same in each instance. Uniform procedures for protesting tariffs allow for greater efficiency in the administration of the Intercoastal Act section 3 and should eliminate a present source of confusion to shippers and carriers alike. Id. (243).

Contention of PRMSA that it is unreasonable that PRMSA be required to mail domestic commerce tariff matter to its large number of tariff subscribers on or before

the time it submits its filing with the Commission is rejected. Although some carriers may find it necessary to begin planning their tariff filings somewhat earlier than they do now, there is no reason to believe such advance planning will cause inefficiencies or hardships as a general rule. The special permission process is available in hardship cases. Id. (243–244).

Revised rules on the posting of tariffs in domestic offshore commerce require posting 30 days prior to their effective date. Intercoastal Shipping Act section 2 requires 30 days advance posting. Posting is the only practical method for non-tariff subscribers to obtain advance notice of tariff changes. "Posting" refers to the maintenance of complete and up-to-date tariffs for public inspection during ordinary business hours, and tariff material which is filed, but not yet effective, must be maintained in a manner which indicates its prospective nature. Carriers are also required to provide the public with sufficient access to informed carrier personnel to permit interested persons to accurately ascertain the carrier's present and proposed rates as expressly set forth in the applicable tariff or tariffs. Id. (244).

Rule with respect to the effective date of rate changes for through intermodal transportation in domestic offshore commerce is revised so that it applies to all joint through routes (but not single carrier transportation featuring pickup and delivery service), while retaining the essential requirement that shippers be charged the rate in effect on the day the first (or initiating) carrier takes possession of the cargo. Id. (245).

The Commission's domestic offshore commerce tariff rules require a full description of all terminal services provided as part of a tariffed transportation service, whether charged for separately or included in the line haul rate. Dollar amounts must be stated only when the carrier collects a separate charge for services it performs itself (or through agents) or offers shippers a terminal allowance in lieu of performing specified services—i.e., when the carrier can control the dollar amounts involved. When a third party performs terminal services which are charged against the cargo, the tariff must advise the shipper of this fact, but may refer to a terminal tariff or other governing publication for an exact statement of the charges in question. Id. (246–247).

Rules governing the publishing of tariffs in domestic offshore commerce require public disclosure of through intermodal transportation rate divisions Id. (247).

Foreign commerce tariff filing regulations are amended to, *inter alia*, temporarily withdraw certain definitions to avoid possible conflict with recent court cases concerning intermodal transportation and the Commission's General Order 38; to expressly include nonvessel operating carriers in the definition of "carrier;" to remove temporarily the requirement that tariffs contain a precise breakout of the port-to-port rates for each commodity carried; to permit carriers to offer individual subscriptions to bill of lading tariffs, rules tariffs, or other major components of their total tariff filing; to permit contract rates to be increased after 90 days' notice without regard to the length of time the rate has been in effect; and to delete a provision which flatly proscribed the filing of requests for special permission to increase Merchant's Contract rates on short notice. The action taken by the Commission does not represent its final position—especially insofar as intermodal tariff filings are concerned. Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States, 286 (289–290).

Section 18(b) of the Shipping Act requires precision in tariff Preparation, content and filing to the greatest extent practical. The Commission must interpret what is "practical" in the light of current shipping conditions. In today's containerized, highly competitive shipping environment, the agency's staff, port interests, competing carriers and shippers can all better conduct their business when tariffs list only the individual ports or points which actually receive regular service from the publishing carrier. Carriers can amend

their tariffs on the requisite statutory notice when they wish to call at additional ports. Id. (290).

Foreign commerce tariff filing regulations require carriers to accurately disclose what they pay to ocean freight forwarders. It is beyond the scope of the instant proceeding to determine whether modifications should be made in the nature and extent of forwarder brokerage compensation that carriers are presently paying. Contention that the rule is vague and ineffective should be presented in the form of a petition or complaint directed at specific aspects of General Order 4, the freight forwarder rules. Id. (291).

Certain tariffs of four nonvessel operating common carriers are cancelled in view of the carriers' failure to respond to a show cause order, failure to amend the tariffs since at least July 1, 1974, and failure to submit annual financial reports commencing with their respective 1975 fiscal years. Publication of Inactive Tariffs by Nonvessel Operating Carriers in Domestic Offshore Commerce, 371.

Carriers 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) of the Commission's tariff filing regulations, and their tariffs are subject to cancellation. Publication of Inactive Tariffs by Carriers in Foreign Commerce, 433 (434).

The presumption that active common carrier service has ceased which is created by carriers' failure to amend their tariffs for at least two to eight years is not overcome by statements that the tariffs were active, but with no showing of actual cargo carryings, regularly scheduled voyages, ongoing cargo solicitation, recent bills of lading or other evidence. The tariffs are cancelled. Id. (434).

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 day notice or 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 shippers, but do allow the carrier to quickly reduce rates whenever a large enough shipment is tendered to make a vessel call profitable. Filing of such tariffs is not permitted because they are essentially misleading to shippers, potentially unfail to small shippers and carriers attempting to maintain regular schedules in the trade, encourage misunderstanding and sharp practices, and impose an unnecessary administrative burden on the Commission staff. Such a tariff is cancelled in the instant proceeding. Id. (435).

Proposition 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, is untenable. Section 18(b) applies only to common carriers by water and carriers who serve a trade "by inducement only" are not common carriers by water for the purpose of publishing a tariff covering that trade. Common carriage for tariff filing purposes is defined as commercial activity which shows a clear intention to move cargo under the proffered tariff within a commercially reasonable period of time subsequent to filing. It is not necessary to find that a carrier has actually refused cargoes tendered for carriage at its published tariff rates. It is enough that there has been an extended period within which no common carrier service has been provided to the subject trade. Id. (436).

Tariff actions formulated by a conference are taken pursuant to authority granted under the approved section 15 agreement. It follows that tariff matters found to be unlawful relate back to the issuing authority—the conference agreement—and failure to modify or delete an unlawful tariff provision can result in the disapproval of the underlying section 15 agreement. A show cause order was not procedurally defective in not detailing this step-by-step procedure when the result should be obvious to all

affected parties. Far East Conference Amended Tariff Rule Regarding the Assessment of Wharfage and Other Accessorial Charges, 772 (778).

On reconsideration of decision to discontinue proceedings instituted to determine the legality of so-called "50-mile container rules," the Commission determines that the order of discontinuance must be vacated and a decision issued on the merits. Cases cited by a party opposing discontinuance are persuasive of the claim that the issues regarding the validity of the rules are not moot. The proceeding had been discontinued as moot on the basis of a court ruling affirming an NLRB decision finding the collective bargaining provisions underlying the rules unlawful under the NLRA, and on the basis of an "effective withdrawal" of the rules. Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers, 788 (792–793).

TERMINAL LEASES: *See also* Terminal Operators

Considering the time lapse since the institution of the proceeding and the technological changes which have occurred in the operation of terminals, the Commission withdraws its proposed rules governing the filing of terminal lease agreements between common carriers by water and/or "other persons" subject to the 1916 Shipping Act. Filing of Agreements Between Common Carriers by Water and/or "Other Persons" Subject to the Shipping Act, 1916, 44 (45).

The Commission reaffirms its finding that respondents implemented a cooperative working arrangement without Commission approval since signing mini-max terminal lease agreements. Eight mini-maxi piers were designated as "public piers" with the understanding that the provisions of a public tariff would not actually be applied to them pending resolution of the instant proceeding. These agreements were not filed for approval and were continually implemented in violation of section 15 from the date the piers were declared "public" until occupancy either ceased or became based upon an approved agreement. Agreement No. T–2880, As Amended, et al., 753 (754).

Mini-max terminal lease agreements cannot be approved retroactively. Id. (754).

Whatever else might be intended by the requirement of section 15 that agency action occur "promptly" (consistent with due process), that statute does not authorize the approval of otherwise unapprovable agreements or implementation of unapproved agreements whenever the proponents demonstrate that adjudication has not been "promptly" completed. Id. (755).

The command of section 15 is absolute. Violations do not require a showing of bad faith or even of intent: and the Commission lacks general equity powers to assure that "fairness" is achieved in all matters over which it possesses regulatory jurisdiction. The Commission may not sanction past violations of the Shipping Act by retroactively approving an agreement under section 15 Id. (755).

Terminal lease agreements which reserve to the lessor an absolute veto as to which vessels may use the leased facilities or limiting vessel use of the facilities bring the agreements within the regulations of the Commission which define the agreements subject to the Commission's jurisdiction under section 15. One provision of the regulations requires the filing of an agreement by any person who owns or leases property used as a terminal in connection with a common carrier by water when the landlord maintains some control over the lessee's rates or competitive practices either by unilateral action or by mutual agreement. Another provision requires filing of agreements covering the lease of terminal facilities, when they control, regulate, prevent or destroy competition by obligating the lessee to discriminate against one carrier or shipper in favor of another. The agreements here provide for some control by the lessor port over its tenant's competitive practices. In addition, the leases provide that the

lessee shall not maintain or permit on the premises any refrigerating or cold storage facilities. Thus, the agreements further control how the facilities shall be used by limiting the kind of cargo that can be handled. Id. (762–763).

The incorporation by reference into terminal lease agreements of the lessor's rules and regulations, which substantially affect the operations and competitive practices of the terminal facilities by the lessees, bring the agreements within the purview of a Commission interpretive regulation which requires the filing of agreements covering the lease of terminal facilities when they fix or regulate the rates, rules, regulations or charges by requiring the lessee to conform to rates, rules or regulations established by the lessor. Id. (764).

Where the lessee of terminal facilities under a mini-max lease also operated public terminals, with the charges made pursuant to a tariff, the deviation as to rentals charged under the lease agreements as compared to those persons using the public piers, results in the lease agreements falling within the purview of the Commission's interpretive regulation which requires filing of agreements covering the lease of terminal facilities when they give or receive special rates, accommodations or privileges by deviating from established tariff charges through a fixed rental in lieu of tariff rates, or rental payment based on tariff charges with a maximum payment established. Id. (764).

Commission regulation which requires filing of agreements covering the lease of terminal facilities when they give or receive special rates, accommodations or privileges by deviating from established tariff charges through a fixed rental in lieu of tariff rates, or rental payment based on tariff charges with a minimum payment established, is applicable to the Port Authority's leases of its Brooklyn terminal since not all of the tenants are afforded the benefit of a reduced rental as is provided in the leases. Id. (764–765).

TERMINAL OPERATORS: See also Terminal Leases; Wharfage

A terminal operator is not an "other person" subject to the 1916 Shipping Act if the only vessels calling at its piers are not common carriers. The Shipping Act applies to common carriers at common law. At common law, a carrier is a common carrier if it holds itself out to carry goods for anyone. Here, vessels calling at the operator's coal piers do not hold themselves out as common carriers. Rather, the vessels carry coal under contract or charter only for either the purchaser or the seller of the coal. The vessels do not advertise a sailing schedule, they have not published a tariff for the carriage of coal, nor have they filed a tariff for such carriage at the Commission. Accordingly, vessels calling at the coal piers are not common carriers, and thus the operator does not provide terminal services in connection with a common carrier by water. The operator is not an "other person" with respect to its operations at the coal piers and, consequently, the Commission does not have jurisdiction over the operations of the coal piers. McAllester Brothers, Inc. v. Norfolk & Western Ry. Co., 62 (65–66).

A port authority violated section 17 of the 1916 Shipping Act by establishing, assessing, attempting, and actually collecting a charge for electric power furnished to containers plugged into reefer slots which was not authorized and provided for in its tariff. Prior to May 5, 1976, the port furnished electric power to refrigerated containers when they were plugged into the reefer slots, but no charge over and above the charges stated in the port's tariff for wharfage, demurrage or storage was assessed for electric power furnished these containers. The port then claimed that a tariff provision authorized a charge. However, that provision was contained in a section of the tariff relating to stevedoring services and dealt with electric power supplied to the vessel. The organization of the tariff was such that to interpret the provision as authorizing a charge

for electric power furnished to containers would be to create an ambiguity where none existed. Matson Navigation Co. v. Port Authority of Guam, 505 (508, 510–513).

Provision of a terminal tariff which provides for an electric power charge at a cost to be determined by another person requires the user to look beyond the tariff to ascertain what the cost to him will be. This places on the user an onerous burden not imposed by law and such practice cannot be too strongly condemned. Id. (514).

WHARFAGE

Proposed tariff rule of the Far East Conference which would assess wharfage and other accesorial charges against the cargo contravenes section 205 of the 1936 Merchant Marine Act and, therefore, is contrary to the public interest within the meaning of section 15 of the 1916 Shipping Act. Since terminal charges generally vary from port to port, the effect of the rule would be that shippers would pay a total ocean carrier freight charge which varies at different ports. Far East Conference Amended Tariff Rule Regarding the Assessment of Wharfage and Other Accessorial Charges, 772 (774–775).

Conference argument that section 205 of the 1936 Merchant Marine Act does not apply to the conference's filing of a tariff assessing wharfage and other charges against the cargo because that section speaks about prevention, by agreement, of a carrier from serving an improved port at the same rates which it charges at the nearest port already served by it, and the rates quoted by the conference in its tariff are the same regardless of port of loading and only the charges assessed by the terminal operator are to be passed on to the cargo interests, is rejected. It is clear that the overall assessment made by the conference is not uniform (terminal charges vary), and because it is established through conference action falls squarely within the prohibition of section 205. The conference decision to discontinue absorbing these terminal charges and, instead, pass them on to the shipper, results in a new and additional charge by the carrier against the shipper. As long as the charges are, in the first instance, properly assessed against the carrier, any pass-through to the shipper results in a charge by the carrier and becomes a component part of the overall ocean freight paid for transportation by the shipper. Id. (775–776).

A vessel may assess terminal charges against the cargo where the terminal operator has billed and collected such charges from the carrier, provided the terminal charges are in the first instance, incurred for the benefit of the cargo and are the responsibility of that party. Far East Conference tariff rule would allow for the pass-through of terminal charges lawfully assessed against the vessel. Where this pass-through is attempted within the framework of a conference agreement section 205 of the 1936 Merchant Marine Act must be taken into consideration. Id. (776).

A carrier has the right to break out its tackle-to-tackle rates and accessorial charges. A carrier could assess different accessorial charges at different ports, plus a uniform tackle-to-tackle rate provided it acts independently of other carriers. Similarly, a conference could publish a tariff rule assessing wharfage and other charges against the cargo and avoid problems with section 205 of the 1936 Merchant Marine Act if each member line was given the right of independent action. In such situations the concerted action with which section 205 concerns itself would be lacking. Id. (776–777).

U.S. GOVERNMENT PRINTING OFFICE 1979 O—274-273