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FEDERAL MARITIME COMMISSION

Washington, D.C.

June 30, 1979

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REPORT AND ORDER ADOPTING INITIAL DECISION

June 14, 1978

Docket No. 73-17 was instituted on April 13, 1973 to determine whether the so-called "50-mile container rules" proposed by Sea-Land Service, Inc. (Sea-Land) and Gulf Puerto Rico Lines, Inc. (GPRL) in the U.S. East and Gulf Coast/Puerto Rico trade were violative of sections 14 Fourth, 16 First, and 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act of 1933.

Thereafter, Respondent Sea-Land proposed revisions to its tariff rules which it claimed would cure the infirmities which led to the investigation and suspension. However, by Commission Order of August 10, 1973, these revisions were likewise placed under investigation. This investigation proceeded under the August 10 Order until September, 1974.

During the period between April, 1973, and September, 1974, Sea-Land and GPRL withdrew from the Puerto Rican trade and the Puerto Rico Maritime Shipping Authority (PRMSA) succeeded them as an ocean common carrier in that trade. On August 2, 1974, PRMSA filed its tariff which was to become effective on September 16, 1974, at or about which date PRMSA was to enter the U.S. East and Gulf Coast/Puerto Rico trade as an ocean common carrier. Certain portions of that tariff set forth identical provisions to those already under investigation. Therefore, by Order of September 13, 1974, the Commission placed PRMSA's proposed tariff rules under investigation; consolidated the new investigation (Docket No. 74-40) with the existent Docket No. 73-17; and ordered that the record already adduced in Docket No. 73-17 be used to the fullest extent possible to develop the issues in Docket No. 74-40.

Thereafter, on February 14, 1975, PRMSA filed amendments to its proposed tariff. By Order of March 14, 1975, the Commission ordered that these amendments be made a part of the ongoing investigation and that any future change, amendment, or reissuance be so incorporated. This Order puts in issue the rules of PRMSA as they stood at the time of hearing.

During the course of these proceedings, various participants either were named as parties or intervened. As the case came before us, the parties to the proceeding, in addition to PRMSA, were: Commonwealth of Puerto Rico (Commonwealth), Council of North Atlantic Shipping Associations (CONASA), International Association of NVOCC's (NVOCC's) National Customs Bureau and Forwarders Association of America, Inc. (National), New York Foreign Freight Forwarders & Brokers Association (NYFF), Consolidated Forwarders Intermodal Corp. (CONFICO), Puerto Rico Manufacturers Association, Truck Drivers Local Union Number 807 of the International Brotherhood of Teamsters, *et al.* (Teamsters Local 807), American Importers Association (AIA), Household Goods Freight Forwarders Association of America, Inc., and Commission Hearing Counsel.

After many months of hearings and the amassing of a voluminous record, Administrative Law Judge Charles E. Morgan issued his Initial Decision in which he found that the Commission had jurisdiction over the rules in issue and that such rules violated the sections of the Shipping Act as alleged.

Exceptions to the Initial Decision were filed by PRMSA and CONASA. Replies thereto were submitted by Hearing Counsel, by the NVOCC's, and by National, NYFF, and CONFICO.

Oral argument was heard and these proceedings came before us for decision. While our decision in these proceedings was pending, the validity of the collective bargaining rules which underlie the tariff rules was challenged before the NLRB. The collective bargaining provisions called Rules on Containers were found to be in violation of the National Labor Relations Act by the NLRB and the ILA and NYSA were ordered to cease their implementation and enforcement. That finding was upheld and the NLRB's order directed to be enforced by the Court of Appeals. The Supreme Court denied *certiorari.*[1]

As a result of the NLRB's decision, PRMSA filed a tariff note providing that its tariff rules on containers would not be enforced pending a determination of the validity of the underlying collective bargaining rules by the proper court of law.[2] In light of this tariff note provision and the holdings of the various courts, by Order issued August 10, 1977, we discontinued these cases on the ground that the allegedly unlawful rules on containers published by PRMSA had been "effectively withdrawn" by it.[3] Following issuance of our Order of Discontinuance, petitions for reconsideration were filed.[4] On the basis of these petitions, we granted reconsideration of the proceedings. Replies to the Petition for Reconsiderations were filed by Hearing Counsel and PRMSA.[5]

By Order on Reconsideration issued simultaneously with this Report and Order, we vacated our previous Order of Discontinuance and determined to issue

[1] The NLRB decision was served December 9, 1975. It was upheld by the Court of Appeals at 537 F.2d 706 (1976) and denial of *certiorari* was ordered by the Supreme Court at 429 U.S. 1040 (1977). The Supreme Court also denied rehearing by Order of February 28, 1977 (51 L.Ed.2d 589).

[2] For a more thorough discussion of this tariff note, see our Order on Reconsideration issued this date.

[3] These rules were, in fact, specifically cancelled by notice in PRMSA's tariff effective November 6, 1977.

[4] Petitioners were: 1. National Customs Brokers & Forwarders Association of America, Inc., New York Foreign Freight Forwarders & Brokers Association, Inc., and Consolidated Freight Forwarders Intermodal Corp. (filing a joint petition); 2. International Association of NVOCC's; and 3. Hearing Counsel.

[5] Pursuant to rules applicable to proceedings of this vintage, no replies to the petitions were permitted until the request for reconsideration was granted. See 46 C.F.R. Sections 502.261 and 502.262 as provided prior to May 19, 1976.

a decision on the merits of the proceeding. As a result, we have, once more, reviewed the record of these cases and herewith serve our Report.

DISCUSSION

Many of the exceptions are merely reargument of positions taken before the Presiding Officer. Therefore some will not be discussed here. However, we have devoted a great deal of time and care to a thorough analysis and review of each exception in light of the record. If certain exceptions are not specifically discussed it is because, in each instance, we are of the opinion that the argument advanced was adequately analyzed and properly disposed of by the Presiding Officer.

In its exceptions, PRMSA merely adopted much of the argument propounded in brief by CONASA. In large part, these issues were adequately and properly treated by the Presiding Officer. However, we are of the opinion that one issue so raised deserves further discussion here.

In support of its position that its tariff rules should not have been found to be unlawful as alleged, PRMSA cites the holding of the Commission in the *South Atlantic and Caribbean Line* (SACL) case (12 F.M.C. 237 (1969)). We wish, once and for all, to put to rest any attempt to apply the holding of that case to the rules at issue here. That case presented only two issues. The first was one of fact: did the refusal to handle certain cargo constitute a true embargo in the sense that the carrier was "physically incapable of handling the traffic"? The second issue was one of law: did the SACL "Embargo Notice" comply with the filing and notice requirement of section 2 of the Intercoastal Shipping Act? There was no allegation of any violation of sections 14, 16 or 18 of the Shipping Act or of section 4 of the Intercoastal Act in that case.

In the present case, PRMSA claims that pursuant to the holding in the SACL case, since the tariff rules at issue here were properly filed under section 2 of the Intercoastal Act, they cannot be found to be unlawful as alleged. This is a clear non sequitur. We may readily agree that PRMSA filed its tariff rules properly in accord with section 2 of the Intercoastal Act and in consonance with the SACL case. However, the provisions of those rules, notwithstanding proper filing, can obviously, simultaneously, be unjust, unreasonable, and unduly and unreasonably prejudicial and disadvantageous.

The exceptions of CONASA constitute, almost entirely, a reargument of its position before the Presiding Officer. We are of the opinion that the Presiding Officer also properly disposed of those issues again with qualifications.

CONASA has raised as an issue on exception, the alleged error of the Presiding Officer with respect to his findings of violations of sections 14 Fourth and 16 First. CONASA objects to what it characterizes as a "per se violation" concept. CONASA's allegation is two-pronged.

First, CONASA claims that the Presiding Officer erred in concluding that the ocean transportation service rendered by PRMSA is the same whether a given container is loaded or unloaded at the pier or at an offpier facility. CONASA maintains that such a view ignores essential terminal services performed by ILA longshore labor as part and parcel of the total transportation service rendered by PRMSA.

Second, CONASA challenges the conclusion of the Presiding Officer that the dissimilarity of treatment of shippers under the rules as shown in the record constituted a violation of sections 14 and 16 of the Act. It argues that to constitute a violation of the Act, such dissimilar treatment must be undue or unjust—*i.e.* unjustified by transportation factors. CONASA's position is, in essence, that the longshore services and the underlying collective bargaining agreement which regulates them are transportation factors which must be considered with regard to alleged violations of sections 14 and 16. Those services and the underlying agreement which created the disparate treatment of shippers, upon implementation by the tariff rules, constitute, in CONASA's view, a transportation factor which justifies the inequality which it creates. This is a novel, and, in our view, a circular proposition. CONASA would have us accept the proposition that the factors which created the uneven treatment also sufficiently justify such treatment. We find this argument ingenious but unconvincing.

We are of the opinion that the rules published in PRMSA's tariff were properly found by the Presiding Officer to create an anomalous condition where shippers who are similarly situated in all other transportation respects, are treated decidedly differently. Further, we agree with the Presiding Officer that the existence or not of a collective bargaining agreement which *affects* but is not *a part of* the transportation aspects of a shipper's relationship with his carrier, need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment. We may agree that such an agreement is a factor to be considered. However, there are other factors. The mere existence of the collective bargaining agreement does not pre-empt those other factors or foreclose our consideration of them. For us to adopt the contentions of respondents would be tantamount to an acknowledgement by us that a common carrier by water or other person subject to our jurisdiction could escape our jurisdiction by the simple device of voluntarily (albeit with pressure from a union) entering into an agreement which obligates the common carrier to take actions which may be or are in clear violation of the Shipping Act. We do not view the impact of the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations when conducting and resolving labor/management negotiations.[6] We find that upon consideration of the transportation factors in the situation created by these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rules is not adequately justified.

This is not an adoption of a "per se violation" concept. It is, rather, a simple acknowledgement by us that the record in this proceeding shows adoption and implementation of tariff rules which are unjust and unreasonable, and which are unduly and unreasonably prejudicial and disadvantageous because their effects are unjustified by transportation factors.

Additionally, on the theory that the rules at issue are lawful collective bargaining rules which are exempt from the strictures of the antitrust laws, and by extension, the requirements of the Shipping Act, Respondents have throughout this proceeding argued the Commission's lack of jurisdiction over such rules.

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[6] *Local 1976, United Brotherhood of Carpenters v. Labor Board*, 357 U.S. 93 (1958); *Galveston Truck Lines v. Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957).

In advancing this argument, Respondents rely heavily on the Supreme Court's decision in *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261, 19 L.Ed. 2d 1090, 88 S.Ct. 929 (1968) (Volkswagen). We find that case unpersuasive with respect to the question of this Commission's jurisdiction over the rules here at issue.[7]

In Volkswagen, the Court was confronted with a problem similar to that at issue here. In that case, the Pacific Maritime Association (PMA), an employer organization not unlike CONASA, had reached a "milestone agreement" with the International Longshoremen's and Warehousemen's Union (ILWU). By that agreement the ILWU agreed to the introduction of labor-saving devices and the elimination of restrictive work practices on the West Coast waterfront in return for PMA agreement to create a fund to mitigate the impact upon ILWU employees of the labor-saving technological innovations. The fund created—the so-called "Mech" fund—was to be raised and the method of its raising determined by the PMA alone.

The method used to raise this fund allegedly resulted in inequities borne by Volkswagenwerk Aktiengesellschaft, one shipper who supported the fund. It, therefore, refused to pay the assessments levied upon it with predictable loss of revenue to the fund.

Volkswagen obtained a stay of the court proceedings which followed in order to permit this Commission to exercise its jurisdiction and to determine certain issues. Those issues were:

1. whether the assessments against Volkswagen were claimed pursuant to an agreement required to be filed with the Commission pursuant to section 15 of the Shipping Act, which agreement had not been filed with or approved by the Commission;
2. whether the assessment subjected Volkswagen to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act; and
3. whether the assessment method constituted an unjust and unreasonable practice in violation of section 17 of the Shipping Act as to Volkswagen.

The Commission found against Volkswagen and dismissed the complaint. The Court of Appeals affirmed the Commission. However, thereafter the Supreme Court reversed the Court of Appeals.

A majority of the Court found that the assessment formula (as distinct from the agreement to set up the fund) was subject to the filing and approval requirements of section 15 of the Shipping Act. As such, the assessment agreement was to be filed with the Commission under that section. In the Commission's deliberations of this agreement, the Court concluded, the Commission would also have to take into consideration the alleged violations of sections 16 and 17. Therefore, the Court did not reach the merits of the sections 16 and 17 claims, and remanded the case to the Commission for further proceedings.

In a dissent, Mr. Justice Douglas urged that "to require the funding part of maritime collective bargaining agreements to receive prior approval from the

[7] We note in this regard the recent decision of the Supreme Court in *Federal Maritime Commission, v. Pacific Maritime Association*, 435 U.S. 40 (1978), with respect to requisite filing with and pre-implementation approval by the FMC of certain collective bargaining agreements which impose terms controlling or affecting competition upon employers who are not members of the multi-employer bargaining unit.

Maritime Commission . . . " was an unwise decision. He feared that such advance approval by the Commission would "partially paralyze" collective bargaining. Additionally, Douglas stated:

> I believe the Court has misconstrued section 15 of the Shipping Act, 1916; and I fear that its erroneous construction will cause serious disruption in the process of collective bargaining in the maritime industry. If the tariff extracted from [Volkswagen] is discriminatory or unreasonable, sections 16 and 17 of the Shipping Act provide a remedy.

Mr. Justice Harlan, in his separate concurring opinion, took issue with Douglas. Harlan stated:

> . . . he [Douglas] suggests that a proper accommodation between "labor" and "competition" interests can be reached by exempting both labor agreements and labor-related agreements from the filing requirements of section 15 but leaving them subject to the specific prohibitions of the antitrust laws and sections 16 and 17 of the Shipping Act.
>
> This suggested accommodation appears to me demonstrably wrong. In the first place, as the Court notes, the filing requirement of section 15 was drafted broadly, and the filing-and-approval process includes review of questions arising under sections 16 and 17, and specifically creates an exemption from antitrust attack.

As may be seen, the Harlan position, which is used repeatedly before us in an attempt to support the antitrust exemption and the exemption from the Shipping Act of the rules involved here simply does not support that contention. Harlan's position is addressed to agreements which should receive advance approval under section 15, and concurrent sections 16 and 17 scrutiny. We have no such agreement at issue here. What we have here is merely the unilateral implementation of a rule founded in a collective bargaining agreement.

One collateral matter addressed by the Presiding Officer needs to be disposed of although it may have been rendered moot by the passage of time. In his Initial Decision, the Presiding Officer found that, while the rules at issue violate the Shipping Act and the Intercoastal Shipping Act, any hastily effected order in the nature of a cease and desist order might precipitate interference with the ocean commerce involved which may be to the detriment of the public interest. As a result, the Presiding Officer determined that in the absence of review by us or exceptions, the effective date of any order requiring cancellation of PRMSA's offending tariff rules should be deferred for three months.

While we are amenable to deferring the effective date of the cease and desist order entered herein, we believe that the three months recommended by the Presiding Officer is unjustifiably long. We believe 30 days is sufficient time to allow Respondent to order its affairs and conform its tariffs, if necessary.

THEREFORE, IT IS ORDERED, That, except to the extent noted above, the Initial Decision issued in this proceeding is hereby adopted as our own and made a part hereof; and

FURTHER, IT IS ORDERED, That, within 30 days from the date of service of this Report and Order, Puerto Rico Maritime Shipping Authority shall cancel the tariffs found unlawful herein; and

FINALLY, IT IS ORDERED, That this proceeding be discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

No. 73–17

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

No. 74–40

PUERTO RICO MARITIME SHIPPING AUTHORITY—PROPOSED ILA RULES ON CONTAINERS

Adopted on June 14, 1978

Found (1) that the Federal Maritime Commission has jurisdiction over the tariff rules on containers of the Puerto Rico Maritime Shpping Authority (PRMSA), an ocean common carrier in the trade between ports on the East and Gulf Coasts of the United States, and ports in Puerto Rico; (2) that the present tariff rules on containers of PRMSA are unlawful under the Shipping Acts; and (3) that the pubic interest in its overall aspects necessitates that the effective date of an order requiring the cancellation of PRMSA's tariff rules on containers be deferred for three months, so that PRMSA in the meantime may determine and publish new tariff rules on containers, which are lawful under the Shipping Acts, and which are consistent with overall aspects of the public interest, including the preservation of a steady flow of ocean-borne commerce of the United States between the East and Gulf Coasts and Puerto Rico.

Mario F. Escudero and *Edward J. Sheppard* for respondent the Puerto Rico Maritime Shipping Authority and for intervener the Commonwealth of Puerto Rico.

Gerald A. Malia, Brian P. Murphy, and *Thomas D. Shea* for respondents Sea-Land Service, Inc., and Gulf Puerto Rico Lines, Inc.

C. P. Lambos, Francis A. Scanlan, Donato Caruso, and *Jacob Silverman* for intervener Council of North Atlantic Shipping Associations.

Raymond P. deMember and *H. Neil Garson* for intervener International Association of NVOCCs.

Gerald H. Ullman for intervenors and complainants National Custom Brokers and Forwarders Association of America, Inc., New York Foreign Freight Forwarders and Brokers Association, Inc., and Consolidated Forwarders Intermodal Corp.

Rafael Cebollero for intervener Puerto Rico Manufacturers Association.

J. Warren Mangan for intervener Truck Drivers Local Union Number 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Samuel Frankel for intervener and complainant American Importers Association.

Alan F. Wohlstetter and *Ernest H. Land* for intervener Household Goods Forwarders Association of America, Inc.

Donald J. Brunner, Charles L. Haslup, III, Marilynn J. Goldsmith, and *Martin F. McAlwee* as Hearing Counsel.

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

THE ISSUES AND THEIR SIGNIFICANCE

These *two consolidated proceedings are investigations* of the lawfulness *of certain tariff rules*[2] on containers in the Puerto Rican trade between ports on the East and Gulf Coasts of the Continental United States (mainland), on the one hand, and, on the other, ports in Puerto Rico. The present tariff rules are applicable at North Atlantic ports, Maine to Hampton Roads, inclusive, South Atlantic ports, Charleston, S.C., and Jacksonville, Fla., and at a Gulf port, New Orleans, La.

In the first of the two investigations herein, the tariff rules were those of the original two respondents, two ocean common carriers, Sea-Land Service, Inc. (Sea-Land), and Gulf-Puerto Rico Lines, Inc. (GPRL). As *now in issue, the tariff rules are those of* the present respondent, an ocean common carrier, *the Puerto Rico Maritime Shipping Authority* (PRMSA), which is an instrument of the government of the Commonwealth of Puerto Rico.

The second or present investigation began on September 13, 1974, although PRMSA did not begin operating as an ocean common carrier until October, 1974, when it took the place of the main former operators in the Puerto Rican trade, Sea-Land, GPRL, Seatrain Lines, Inc. (Seatrain), and Transamerican Trailer Transport, Inc. (TTT). PRMSA then adopted the tariff rules on containers formerly in the tariff of Sea-Land. PRMSA's present tariff rules on containers substantially are unchanged. PRMSA feels that much of the history of, and justification for, these tariff rules on containers preceded PRMSA's entry into the Puerto Rican trade (the trade).

Hearing in the second investigation was delayed for a time in order for PRMSA, and its new management, to get oriented to the many problems facing a new operator in the trade, and to permit PRMSA to examine its tariff rules on containers and possibly to revise them. No substantial revision resulted. Hearing was held in Washington, D.C., and was concluded on May 7, 1975. The final briefs of the parties were served on August 12, 1975.

The tariff rules in issue place certain restrictions on the movement of cargo in containers over mainland waterfront facilities, generally when such containerloads come to or from points within 50 miles of mainland ports. *In particular instances these tariff rules require some container cargoes to be "stripped,"* or unloaded, *from one container, and "stuffed" or "restuffed,"* or loaded or reloaded, *into another container* at the waterfront facilities (the piers). At the same time under the tariff rules certain *other containerloads may be handled* across the same mainland waterfront facilities *without the stripping and restuffing*. Yet, as to the ocean transportation service provided there is no difference between the containers which move freely and those which do not move freely.

[1] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission. Rule 13(g), Rules of Practice and Procedure, 46 CFR 502.227.

[2] On brief one party insists that the issue herein involves "work preservation rules," rather than tariff rules. If these tariff rules were merely work preservation rules, affecting only employers of longshoremen and the longshoremen, but not affecting shippers, there would have been no need to place these rules in a tariff of an ocean common carrier subject to regulation under the Shipping Acts.

In other words, while PRMSA's ocean carrier service is the same, one containerload moves without restriction and another containerload is restricted.

This stripping and restuffing of some containerloads at the mainland waterfront facility, before ocean carriage to Puerto Rico, ostensibly *is required by so-called "work preservation rules," but not by any recognized or legitimate transportation need.* The work preservation rules, which apply in this Puerto Rican trade and which also apply in many wor' ' rades, subject the ocean carriers to a penalty of $1,000 per container with regard to those containerloads of cargo which have not been stripped and restuffed in contravention of the work preservation rules.

The work preservation rules (see Exhibit 95 for example) and PRMSA's tariff rules on containers (see Exhibit 51) are alike in many respects. The work preservation rules and tariff rules differ in at least one important respect, in that only the tariff rules require the shipper or consignee to be liable to the ocean carrier for the penalty of $1,000 per container.

PRMSA, as was also the case with Sea-Land, feels that it cannot afford the work preservation rules' $1,000 penalty per container, and accordingly has chosen to pass the penalty (called "liquidated damages" in both the work preservation rules and in the tariff rules) on to its shippers in the form of its (PRMSA's) tariff rules on containers. The PRMSA tariff rules' $1,000 penalty applies to a shipper in instances where it is determined that the shipper "evaded" the stripping and stuffing requirement. A shipper, consignee, consolidator, forwarder, or deconsolidator may not evade the requirements of these tariff rules on containers by subterfuge, improper documentation, etc., but said shipper is not subject to the $1,000 penalty if he chooses to have the ocean carrier strip the container and restuff the cargo at the ocean carrier's waterfront facilities, where deep-sea longshore labor is used for this purpose.

The above stripping and restuffing constitute a substantial cost to the ocean carrier, and PRMSA considers that this cost compels it, in turn, to place charges therefor in its tariff. PRMSA's "transfer charge" for the stripping and restuffing is $150 for a 35-foot container and $175 for a 40-foot container, in connection with its freight-all-kinds (FAK) rate on containers. Needless to say, a shipper, who already has gone to the expense of stuffing a container at a point away from the waterfront facilities, is not happy to be faced with the additional PRMSA transfer charge for the stripping of that container and the restuffing of the contents by the ILA at the waterfront facilities, before the cargo is ocean-borne to Puerto Rico.

If the shipper, forwarder, or consolidator chooses not to be subjected to the $1,000 penalty by incurring the extra expense (transfer charge) for the second handling of the contents of his container before it is ocean-borne, said shipper also would be concerned with possible delays, losses, or damages related to the second handling. Of course, under ideal circumstances the shipper wants his cargo stuffed only once and he does not want to be subjected to any penalties for "evading" a second handling of his cargo.

The discussion above of the rules on containers in PRMSA's tariff largely relates to problems associated with container cargoes going from the mainland, or southbound, to Puerto Rico. Commerce to and from Puerto Rico mainly is southbound, but there is a substantial northbound movement to the mainland from Puerto Rico. On the northbound movement of containers there are similar restrictive requirements in the tariff rules on containers, including certain warehousing requirements which permit deconsolidation away from the piers without stripping and restuffing at the piers only if certain northbound cargoes are warehoused a minimum of 30 days. Many consignees and deconsolidators do not want their northbound cargoes stripped and restuffed at the piers, nor alternatively do they want to be subjected to the 30-day warehousing expense.

The tariff rules permit some container cargoes, such as "manufacturer's label" stuffed by the manufacturer, and in most instances[3] cargoes coming from or going to points more than 50 miles from a port, to cross mainland waterfront facilities without further stripping or stuffing.

The alleged unlawfulness comes about because the same tariff rules concurrently require the second stuffing or stripping of other container cargoes, such as cargoes coming from consolidators or going to deconsolidators located within 50 miles of a port. The second stuffing or stripping and other requirements of the container rules are alleged to be unjustly discriminatory and otherwise unlawful, among other reasons, because the tariff rules treat similar (from-a-transportation-viewpoint) shippers differently and because the tariff rules themselves allegedly are vague, uncertain, and unreasonable.

Besides the lawfulness of these tariff rules, another principal issue is the jurisdiction of the Federal Maritime Commission. Intervener, the Council of North Atlantic Shipping Associations (CONASA), contends that the attack by shippers on the tariff rules is in reality an attack on traditional work preservation rules or agreements known as the "Rules on Containers." These work preservation agreements are made between the International Longshoremen's Association AFL-CIO (ILA), on the one hand, and, on the other, certain shipping associations, such as for example, the agreement between the Atlantic Coast District of the ILA and CONASA.

In brief, three matters must be decided herein. (1) whether the Federal Maritime Commission (FMC or Commission) *has jurisdiction; (2)* if the FMC has jurisdiction, *whether the tariff rules on containers are* unjustly discriminatory, unduly prejudicial or otherwise *unlawful;* and *(3)* if the FMC has jurisdiction and if the tariff rules on containers are unlawful, *what kind of order should be issued,* including the timing of such order.

The significance of any order of the FMC herein cannot be minimized. It is alleged by CONASA that any order, prohibiting a single ocean carrier from including in its tariff the "Rules on Containers" in the Puerto Rican trade, would invite all ocean carriers in many world-wide trades to breach their contractual obligations to abide by these so-called work preservation agreements, and thereby upset practices and labor agreements of long duration. PRMSA fears an ILA shutdown if PRMSA is required not to follow the ILA's Rules on Containers. The various complainants and shipper interests herein fear dire consequences to United States trade and to themselves unless the Commission finds

[3] The "work preservation rules" have been interpreted, and in turn the tariff rules on containers have been interpreted, to require cargoes outside of a 50 mile radius to be stripped and restuffed if a consolidator, etc., were to move his consolidation point from within 50 miles to another point outside of a 50 mile radius of a port so as to "evade" the rules on containers.

the tariff rules on containers to be unlawful and promptly orders their cancellation. Hearing Counsel state that the issues are of monumental importance, and that unlike any other case now before the Commission, the issues involve a direct challenge to the viability of the Commission, and the regulatory mandates which it has insisted upon and enforced for many years.

It would seem that we must not only do justice to the various parties, particularly the shippers and consignees, but also we must consider the general public interest in fostering and maintaining a merchant marine consistent with maintaining the national defense and developing the foreign and domestic commerce of the United States through ocean shipping services which will provide steady flows of ocean commerce. In particular, we must assure a steady flow of ocean commerce to and from Puerto Rico.

THE ORDERS OF INVESTIGATION AND OTHER ORDERS

The *first proceeding, No. 73-17,* arose from the Commission's *order of investigation and suspension served April 13, 1973.* Therein Sea-Land and GPRL were named respondents, these respondents' proposed tariff rules on containers were suspended to and including August 13, 1973, and placed under investigation pursuant to section 22 of the Shipping Act, 1916 (1916 Act), and sections 3 and 4 of the Intercoastal Shipping Act, 1933 (1933 Act). It was ordered that determinations be made pursuant to sections 14 Fourth, 16 First, and 18(a) of the 1916 Act, and section 4 of the 1933 Act, as to whether there would be unfair or unjust discrimination against any shipper in the matter of cargo space accommodations, as to whether any particular person, locality, or description of traffic would be subjected to any undue or unreasonable prejudice or disadvantage, and as to whether the proposed tariff rules are just and reasonable.

By *first supplemental order* in No. 73-17 *served August 10, 1973,* the Commission placed under investigation certain revisions of Sea-Land's tariff rules on containers, and noted in this order that the proposed changes were protested by the Commonwealth of Puerto Rico (Commonwealth)[4] and by the International Association of NVOCCs (the NVOCCs).

On *August 28, 1973,* the Commission served its *order* in No. 73-17, *denying the motion to dismiss* filed June 11, 1973, by intervener CONASA. CONASA had urged that the FMC lacked jurisdiction over the subject matter of the proposed Rules on Containers and over the administration and interpretation of these rules, since CONASA claims that these are work preservation rules and part of the collective bargaining process, that these are matters covered by the National Labor Relations Act under the jurisdiction of the National Labor Relations Board (NLRB) and the courts, and that FMC jurisdiction would have a devastating effect on labor relations in the maritime industry, and impinge on labor peace, etc.

The Commission concluded that it was not persuaded to overrule the ruling issued on June 27, 1973, of the Administrative Law Judge, wherein he had denied the motion to dismiss, on the grounds generally that the proposed Rules

[4] The Commonwealth, as a protestant, was represented in the first investigation by the same counsel, who also represented PRMSA, as the respondent in the second investigation. Since PRMSA is an instrument of the Commonwealth, the Commonwealth has been in both investigations, but has changed from opposition to support of the tariff rules.

on Containers imposed terms which affected persons other than the collective bargaining parties and that the proposed rules apparently will have a substantial effect on the obligations of ocean common carriers to the shipping public. On brief, CONASA continues to assert that the FMC lacks jurisdiction.

By *order served September 26, 1973*, the Commission *denied the petition* of the NVOCCs filed on July 12, 1973, *for enforcement of the Commission's order of April 13, 1973*. Sea-Land had taken the position that no finding then could be made that Sea-Land was in violation of the Shipping Acts until after a full hearing. The Commission stated that no action to enforce suspension in connection with the first investigation herein could be maintained at the time (September 26, 1973) since such enforcement could only take the form of an extension of the suspension period, a form of relief which the courts and the Commission cannot grant.

The second proceeding, No. 74–40, arose from the Commission's *order of investigation and suspension served September 13, 1974*. Therein PRMSA was named respondent, the American Importers' Association, Dolphin Forwarding, Inc., the National Customs Brokers and Forwarding Association of America, Inc., the New York Foreign Freight Forwarders and Brokers Association, Inc., and Consolidated Forwarders Intermodal Corporation, Inc., were named complainants. (Some of these complainants had previously intervened in the first investigation herein.) The order of September 13, 1974, also provided that PRMSA's tariff rules on containers be suspended to and including January 15, 1975.

But, by a further *order issued September 23, 1974*, in Nos. 73–17 and 74–40, the Commission stated upon further consideration it became convinced that *suspension of these tariff rules on containers would not be in the public interest*, and it decided to allow the subject tariff matter of PRMSA to become effective while this investigation was conducted, and accordingly *the Commission vacated the said suspension.*[5] While the order of September 23, 1974, did not elucidate what specific matters of public interest were the basis of the order, presumably there was concern about the continuance of a steady flow of ocean commerce to and from Puerto Rico, a matter which apparently was one of the concerns of PRMSA when it adopted its tariff rules on containers. The investigation, but not the suspension, provided for in the order of September 13, 1974, remains in effect.

The Commission stated in its order of September 13, 1974, that generally PRMSA's tariff rules on containers provide that, at Atlantic Coast ports, consolidators including NVOCCs who operate facilities within 50 miles of a port will be furnished no containers where that would be contrary to these tariff rules, and that any containers which may come from them shall be stripped at the pier and the cargo placed (stuffed) into another container; also that at New Orleans, there is no prohibition against the furnishing of containers by the ocean carrier to

[5] The order of the Commission served September 13, 1974, provided that there be a hearing before an Administrative Law Judge at a date and place determined by him, and that he submit an Initial Decision no later than November 15, 1974; but the Commission's further order served September 23, 1974, deleted the requirement that an Initial Decision be rendered no later than November 15, 1974, and the presiding Administrative Law Judge was "urged to expedite these proceedings within the limits of his discretion and due process." These proceedings have been handled with expedition within the limits of due process in accordance with the general policy for all proceedings of similar magnitude and import.

consolidators, but that the stripping and restuffing provisions apply, and also that at all ports, these tariff rules would permit the carrier to pass along to the shipper fines or liquidated damages assessed against the carrier for violations of these tariff rules on containers, if the violation were caused by evasion, subterfuge, oversight, or other action by the shipper.

The Commission also stated in this order that certain notes to items 15940 and 18880 of PRMSA's tariff made PRMSA's Freight-All-Kinds (FAK) rates subject to its tariff rules on containers, and that Note 7 to item 15940 and note 6 to item 18880 provide that where the carrier is required by a collective bargaining agreement to strip and stuff, a shipper may bring his FAK cargo to the pier in his own trailer (container), where it will be placed into the carrier's container, or vice versa, for a fee, depending upon the size of the container, and that the shipper will then obtain the FAK rate. The Commission ordered an investigation of notes 6 and 7 of item 15940 and of notes 5 and 6 of item 18880.

The Commission ordered in No. 74–40 that determinations be made pursuant to sections 14 Fourth, 16 First and 18(a) of the 1916 Act, and section 4 of the 1933 Act as to whether there would be unfair or unjust discrimination against any class of shippers in the matter of space accommodations or other facilities, as to whether certain consolidators or certain consolidated cargo would be subjected to undue or unreasonable prejudice or disadvantage, and as to whether the subject tariff rules are unjust and unreasonable. The Commission's order consolidated No. 74–40 with No 73–17 and provided that the record already compiled in No. 73–17 be utilized to the maximum extent possible to develop the issues in No. 74–40.

By First Supplemental Order served March 14, 1975, in Nos. 73–17 and 74–40, the Commission stated that on February 14, 1975, PRMSA filed amendments to become effective March 16, 1975 (issue date of tariff February 11, 1975), setting forth new tariff rules on containers, which appeared to be based upon the collective bargaining agreements with the ILA for the period October 1, 1974, to September 30, 1977. The Commission noted that while the form of the rules is considerably different the substance of these tariff provisions appeared to be generally unchanged. The Commission ordered these PRMSA amendments to be made part of the investigation herein, as well as any other future change, amendment, or reissue of PRMSA's tariff rules on containers. This order brought into issue specifically certain tariff pages listed in its appendix, including tariff rule 440 covering CONASA ports, rule 442.5 covering the South Atlantic ports of Charleston and Jacksonville, and rule 445, covering the Gulf port of New Orleans.

THE PARTIES AND THEIR GENERAL POSITIONS ON THE ISSUES

The *Household Goods Forwarders Association of America, Inc.*, an intervener, expressed its concern as to whether non-military or commercial shipments of household goods would be exempt from the stripping and stuffing requirements of the tariff rules on containers. By order served January 16, 1974, the Commission rules that non-military, as well as military, shipments of household goods are not subject to the stripping and stuffing requirements, as stated on page 2 of the order served April 13, 1973. Accordingly, this intervener withdrew from active participation in the proceeding.

Sea-Land and GPRL. At the first prehearing conference, reference was made to the presumed fact that all ocean carriers serving the Port of New York in almost all cases abided by their collective bargaining agreements with the ILA. This reference was made in particular with regard to the so-called ILA "Rules on Containers," but it also was stated that so far as was known only Sea-Land and GPRL placed what these two ocean carriers deemed to be corresponding and appropriate rules on containers in their tariffs. Apparently, the ocean carriers in other trades in many or mostly all instances complied with their agreements with the ILA as to the ILA's "Rules on Containers," but did not elect to publish in their tariffs corresponding rules on containers. In time, Sea-Land and GPRL were succeeded in the trade herein to and from Puerto Rico by PRMSA, with the result that *Sea-Land* and *GPRL* cancelled their tariffs in this trade and *were dismissed as respondents* at the hearing on April 29, 1975.

Some of the principal features of the Puerto Rican trade herein were that, one, it was the first trade to use the container method of ocean transportation extensively, and, two, the consolidation of less-than-container loads into container loads was prominent in this trade. Because of these two features of this Puerto Rican trade apparently the ILA tended to focus a great deal of its attention regarding the enforcement of its "Rules on Containers" on this trade, rather than on other trades.

PRMSA, the remaining respondent, states that it is caught in a dilemma, that it is aware of the injustices which the strict application of the container rules has brought upon segments of the shipping industry, but that PRMSA must abide by the ILA container rules if it is to serve Puerto Rico from the East and Gulf Coast mainland ports, that PRMSA cannot absorb the $1,000 per violation penalties, much less expose iself to a possible ILA shut-down, and that under the circumstances it must be found that the tariff rules on containers of PRMSA are not unlawful under the Shipping Acts.

PRMSA's plaint reflects a prior comment made when PRMSA was not a party. At the first prehearing conference, counsel for CONASA had commented that Sea-Land was caught between Scylla and Charybdis. At that time Sea-Land's and GPRL's tariff rules on containers were under suspension, and counsel for CONASA asked whether these ocean carriers should obey the FMC[6] and fall into violations perhaps of their collective bargaining agreement, or should these ocean carriers obey their collective bargaining agreement and not pay attention to requirements of the FMC.

CONASA is the principal party supporting the tariff rules, and in fact CONASA, not PRMSA, assumed the main defense of these rules. But actually CONASA supports these rules not so much as tariff rules, but primarily as legitimate work preservation rules of ILA, or as agreements between the ILA and the various shipping associations, and subject not to the jurisdiction of the FMC, but to the jurisdiction of the National Labor Relations Board.

[6] That is, permit the relatively free movement of container cargoes across the mainland waterfront facilities without stripping and stuffing at the piers, because the restrictive tariff rules on containers then were under suspension by the FMC.

The ILA did not become a party.[7] Nevertheless, considerable evidence was offered and received as to the developments of the ILA's Rules on Containers, and the reasons for such rules, as background necessary to the development and interpretations of the tariff rules of Sea-Land and GPRL, and of PRMSA in issue herein. Under the circumstances, and in view of the substantial record made,[8] it is concluded that the existing record is ample to reach the conclusions and findings required by these investigations.

The *National Custom Brokers & Forwarders Association of America, Inc.* (National Association), the *New York Foreign Freight Forwarders & Brokers Association, Inc.* (New York Association), and *Consolidated Forwarders Intermodal Corp.* (Confico), all of whom have their principal offices in the City of New York, oppose the tariff rules on containers. These parties contend that PRMSA's rules operate to the detriment of United States exporters, are harmful to United States importers, are unduly restrictive to NVOCCs, consolidators, and ocean freight forwarders, and are harmful to ports, warehousemen, terminal operators and to United States flag carriers.

The non-vessel operating common carriers *(NVOCCs)* contend that previously, under rules and practices applicable to all shippers the NOVCCs were able to obtain containers (to be taken away from the piers) pursuant to the FAK tariff provisions of the ocean carriers in the Puerto Rican trade, that NVOCCs were able to load (stuff) containers at their own facilities, and deliver these containers to the ocean carriers at the port where these containers were loaded aboard vessels without stripping and restuffing. The NVOCCs also contend that they were able to receive loaded containers on return shipments without stripping and storage at the piers, which containers were unloaded (stripped) and distributed at the NVOCCs' own facilities. But, now the NVOCCs, under present PRMSA tariff rules on containers, allegedly economically in effect are embargoed from obtaining and using PRMSA's FAK tariff provision, with the result that several NVOCCs have been forced out of business. The NVOCCs contend that the ILA is using featherbedding practices to prevent the ocean carriers such as PRMSA from providing services to those persons, such as the consolidators and NVOCCs, which the ILA does not want the ocean carriers to serve.

The *American Importers Association* opposes the tariff rules on containers. The continued existence and operation of deconsolidators of container loads is of great importance to importers and especially to small firms. Distinctions in the tariff rules on containers as to whether or not an importer operates within 50 miles

[7] *In the first proceeding*, No. 73–17, Hearing Counsel procured numerous subpoenas, including a subpoena issued on June 4, 1973, directing the deposition of the president of the ILA. Said subpoena was served on the office manager of the ILA's office at 17 Battery Place, New York, N.Y. An attorney for the ILA indicated to Hearing Counsel that he had received personally the subpoena directed to the ILA's president, and was contemplating the filing of a motion to quash, but had not had an opportunity to discuss it with the ILA's president. The matter was dropped and no further action was taken by any party to secure the oral testimony of the President of the ILA, *but two affidavits*, dated April 19, 1974, and May 6, 1974, submitted by him in an NLRB proceeding, were received into the record of No. 73–17 as CONASA rebuttal exhibits, and in accordance with the agreement of all parties, there was no oral examination or cross-examination of the ILA's president on his affidavits. Nor was there oral examination or cross-examination in the present proceedings before the Administrative Law Judge of numerous other person who made statements on both sides of the issues herein. These statements also became exhibits in the present record. The agreement of all parties to waive cross-examination of numerous witnesses and to accept their written testimony as exhibits greatly shortened the time and expense of the hearing.

[8] The large record consists of 1311 pages of transcript, and 95 exhibits. Many exhibits are depositions, some consisting of hundreds of pages. Some exhibits are parts of the record in the proceeding, *Balicer v. International Longshoremen's Association and New York Shipping Association*, 364 F. Supp. 205 (D.N.J. 1973) (73 Civ. 1155) affirmed without opinion, 491 Fed. 2d 748 (3d Cir., 1974).

of a port, or imports goods in containers consolidated with cargo for other importers, or transfers title to merchandise within a 30-day warehousing period, etc., are unlawful in the view of these importers.

Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 807, IBT) also opposes the tariff rules on containers in order to preserve teamster jobs. This teamster union contends that there are import-export warehouses which have been customarily manned by Teamsters, and that these warehouses regularly received containers from CONASA ports without restrictions prior to the so-called ILA-CONASA Dublin conference in February, 1973. The Teamsters contend that if the tariff rules on containers are permitted to exist the import-export warehouses in the geographic area of CONASA ports will have to go out of business and thereby deprive Teamsters of jobs.

Hearing Counsel insist that PRMSA's tariff rules on containers are unlawful and should be ordered stricken from the tariff, and furthermore that PRMSA should be prohibited from engaging in the unlawful practices ostensibly permitted by the provisions of these tariff rules on containers. Hearing Counsel state that the Shipping Act was not drafted by Congress in 1916 to possess the qualities of a chameleon and to change colors to suit the contractual or economic needs of private parties. Hearing Counsel state that the issues focus on the question of whether persons subject to the FMC's jurisdiction will pattern their business practices on the regulatory mandates of the Shipping Acts, or whether such practices will be forged solely in the collective bargaining arena.

THE WORK PRESERVATION RULES

CONASA is an unincorporated association. Since 1971, it has negotiated collective bargaining agreements with the ILA on a master contract basis concerning the North Atlantic or CONASA ports of Boston, Providence, New York, Baltimore and Hampton Roads. CONASA has acted on behalf of its six member associations, the Boston, the Rhode Island, the New York and the Hampton Roads Shipping Associations, the Philadelphia Marine Trade Association, and the Steamship Trade Association of Baltimore. The six shipping associations individually negotiate labor agreements with the ILA covering local conditions excepted from the master contract. The members of these six associations include ocean common carriers, stevedores, terminal operators and others functioning in waterfront related activities. Besides CONASA, there are multi-employer bargaining associations for the South Atlantic and Gulf Coasts. For the ports of Charleston, S.C., and Jacksonville, Fla., the South Atlantic Employers Negotiating Committee negotiates with the ILA. For the Port of New Orleans, La., the New Orleans Steamship Association negotiates with the ILA.

Of the three multi-employer bargaining associations, only CONASA intervened, and as a result the evidence largely relates to the situation at CONASA ports, and in particular to the situation at the Port of New York.[9]

[9] Problems concerning the ILA's work preservation rules are not confined to the Port of New York. Notice is taken that as recently as September 19, 1975, U.S. District Judge Robert R. Merhige, Jr., denied a temporary injunction against the ILA and the Hampton Roads Shipping Association (HRSA) sought by the NLRB to bar fines imposed by the ILA and HRSA Joint Grievance Committee on Containers on steamship lines whose containers were stripped in the port area by truckers. Fines totalling $10,000 were imposed in

The Rules on Containers are a compromise between the shipping industry (ocean common carriers, stevedores, terminal operators, et al.) and the ILA. The compromise enables the shipping industry to enjoy the benefits of innovation, particularly the handling of cargoes in containerloads over the piers, by the relatively free movement of an estimated 80 percent of the containers across the piers, while preserving to the longshoremen of the ILA some part of their traditional work jurisdiction.

As recently as the first three weeks of March 1975, out of the total average PRMSA weekly movement of 1,373 containers southbound in this trade, 1,140 containers, about 83 percent, crossed the piers without ILA rehandling of their contents.

Out of the other 233 containerloads per week, PRMSA consolidated 136 containers with LTL or LCL components at the piers; 26 containers of NVOCC cargoes were stripped and restuffed by PRMSA; and 71 containers of NVOCC cargoes were not subjected to this further stripping and stuffing by PRMSA because of court injunctions obtained by two NVOCCs. Of course, this figure of 1,373 total weekly containerloads, does not take into account some containerloads shifted from away from the Port of New York to a South Atlantic port and shipped on an ocean common carrier which did not use ILA labor at the piers.

In the Port of New York, for example, in the contract year ending September 30, 1959, before containerization became of any substantial significance, there were over 30,000 longshoremen who worked 44.7 million man hours per year. For the contract year ending September 30, 1973, there were only about 13,000 longshoremen who worked only 22.6 million man hours per year.

In the view of CONASA if the work preservation rules now were to be nullified, there would be an estimated further loss of 3,000 longshore positions in the Port of New York, which CONASA believes would threaten the present uneasy longshore labor peace. The 1974–1977 ILA-shipping industry labor contracts were reached without resort to strikes or work stoppages, an unusual event in the history of ILA labor contracts for the past 30 years. Both the longshoremen and the shipping industry are to be commended for reaching agreement without interruption to the steady flows of ocean commerce to and from the United States.

For many years before containerization, the longshoremen moved cargo over the piers piece by piece, and containerization posed a serious threat to ILA work opportunities. From time to time, as ILA labor contracts came up for renewal various compromises were reached between the ILA and the shipping industry. Generally in the bargaining sessions, before the agreements were reached, the ILA would insist on stuffing and stripping all containerloads at the piers, while the shipping industry would insist that no containerloads be stuffed and stripped at the piers. During the negotiations leading to the 1974–1977 labor agreement, these same goals of the ILA (stripping all) and of the shipping industry (stripping

1974 on United States Lines when certain truckers had stripped ten containers. When United States Lines was unable to recoup the fines from the truckers, it canceled its agreements with the trucking firms, and one result was that the Tidewater Motor Truck Association filed an unfair labor charge against the ILA and the HRSA. Judge Merhige cited the ILA's work preservation rule 1(a)(3) which *provides that ILA deepsea labor shall strip cargo from containers designated for a single consignee from which the cargo is discharged* (deconsolidated) by other than its own employees within the geographic area.

no containers) were again put forward, before the 1974–1977 "compromise" labor agreement was reached.

In the past the ILA and the shipping industry came to agreement on the ILA's Rules on Containers, which permitted many containers to move freely across the docks, and which restricted the free movement of other containers. There are certain containers which apparently always have moved freely across the docks without rehandling by the ILA, including household goods, mail, military effects, and coastwise and intercoastal containers (the latter two being considered marginal from a competitive standpoint with all-rail land movement).

The ILA apparently recognized that the container revolution was here to stay, by ceding that containers originating more than 50 miles from a port generally could move across the piers without rehandling by the ILA. In return for this and other concessions, the ILA obtained various benefits from the shipping industry such as better wages, vacation, health and retirement benefits, guaranteed annual income (GAI) and container royalties. These royalties were intended as partial compensation to the ILA for containers stuffed away from the piers by non ILA labor. Nevertheless, even with GAI and container royalties, the ILA wanted to hold on to as many jobs as reasonably possible for its members, and the ILA did not want only make-work jobs, such as sweeping piers.

Although the ILA insisted on holding on to the right to stuff and strip local containers coming from or going to points within its local area, or within 50 miles of the ports, even in this so-called "geographic area" the ILA gave up further cargoes. It excepted from its handling requirements containers loaded with cargo at a qualified shipper's facility with its own employees and so-called manufacturer's label containers loaded by a single manufacturer at its facilities with its own employees. However, where the shipper did not use its own employees to load the container, the ILA under its Rules on Containers insisted on its right to strip and stuff the containers at the piers.

From time to time officials and members of the ILA checked certain stuffing and stripping operations of consolidators and deconsolidators located within 50 miles of the Port of New York. ILA officials were very irate when they found in 1962, for example, that certain consolidation work was being performed away from the piers by non-union labor at 90 cents per hour, which was less than the minimum wage.

The main remaining containerloads which the ILA now insists on stuffing and stripping at the piers are containers coming to and from NVOCCs, consolidators, forwarders, deconsolidators, and other shippers and consignees who do not use their own employees to load and unload their containers, where the containers come to or go from points within 50 miles of a port. The ILA considers that these containerloads in reality consist of less-than-truckload (LTL) and less-than-containerload (LCL) cargoes, which the ILA insists must be consolidated and deconsolidated at the piers by longshoremen, thereby in the view of the ILA continuing the work jurisdiction of the ILA over these LTL and LCL cargoes.

The NVOCCs, consolidators and deconsolidators in response, contend that the ILA should not restrict their containers, and let other containerloads pass relatively freely over the docks.

The teamsters are in disagreement with the ILA as to the work jurisdictions of the members of the two unions. There is a disclaimer in the ILA's Rules on Containers, which states, "That these rules do not have any effect on work which historically was not performed at a waterfront facility by deepsea ILA labor." This disclaimer does not satisfy intervener, truck drivers' Local 807 IBT. This truck drivers' union fears that it will lose more jobs of its members, besides the estimated 2,500 jobs already lost in its view because of containerization.

Apparently, the ILA theoretically does not object to the stuffing and stripping by the Teamsters union of containers at locations within the 50-mile areas of port, such as at public warehouses or other points away from the piers. But, the practical problem between the ILA and the Teamsters arises because the ILA concomitantly insists on stuffing and stripping the same containers at the piers even when these containers also have been stuffed and stripped by the Teamsters away from the piers. Presumably, with regard to containers coming to and from areas outside of the 50-mile areas there is no problem, and the Teamsters or other non ILA labor could stuff and strip these containers outside of the 50-mile areas without any corresponding insistence by the ILA that it should also stuff the same containers at the piers.

Perhaps, this is the reason that Local 807 IBT intervened rather than the general IBT union. In one of his affidavits the president of the ILA, chides the president of Local 807 IBT, because the latter failed to supply any affidavit of the former or present general presidents of the Teamsters. The president of the ILA insists that there was an inter-union agreement or understanding that all work performed within the "compound" or waterfront ocean terminal, which covered the loading and stripping of containers on the piers and in the ocean terminals, and any and all work connected with the movement of cargo within such piers and terminals, was exclusively within the jurisdiction of the ILA.

The ILA's understanding of the inter-union agreement was that the jurisdiction of the Teamsters was to move the cargo to and from the compound. The ILA's view is that the Teamsters had no jurisdiction at the compound to consolidate or to deconsolidate containers. The president of the ILA states that his view was reaffirmed from time to time by the former and by the present general presidents of the Teamsters.

The president of Teamsters Local 807 insists that there was and is an inter-union agreement between the ILA and IBT that the unloading from trucks of all cargo for export is under the work jurisdiction of the Teamsters, and that the loading of import cargo on the trucks is divided betwen members of the IBT and of the ILA.

Some undisputed facts apparently are that the truck driver is the boss of, and is responsible for, any movement or placement of cargo within his truck. The truck driver and his helper are responsible for unloading the cargo from the truck to a point adjacent to the truck tailgate. If and when at times, the truck driver further moved export cargo and placed pieces of cargo in specific bins or cribs or places of rest for export, such placement was made under the work jurisdiction of the longshoremen, even though to save the time of, and for the convenience of, the truckman, he did some of the placement work on the pier. The placement on the docks had to be under the supervision of an ILA checker or clerk.

While the Teamsters in the past have handled certain boxes and cartons of small proportions on the piers, the ILA always has taken the view that boxes eight feet or larger containing consolidated loads are subject to rehandling by the ILA at the waterfront. The ILA apparently, because of the nature of the cargoes or for general convenience in clearing the piers, has loaded most of the import cargoes into trucks, but the actual loading into the trucks and placement of pieces inside the truck is the responsibility and is under the supervision of the truckman.

In summation of the inter-union contentions insofar as they relate to the stuffing and stripping of consolidated containers, the ILA generally insists on work jurisdiction at the piers, and the IBT generally insists on work jurisdiction away from the piers. If the result were that both the ILA and the IBT were to stuff and strip the same container there would be no inter-union problem. But, the problems arise because it is too expensive for the shippers and consignees to have their shipments consolidated or deconsolidated twice. Some of the above statements and findings of fact as to the work jurisdiction of the ILA and IBT may be both partially inaccurate and incomplete, but this matters not to the ultimate conclusions and findings herein.

Regardless of what is the complete and true situation and history as between the ILA and the IBT concerning labor jurisdiction to stuff and strip consolidated containers coming from or going to points within 50 miles of the ports, what we are faced with in these proceedings is that the ILA's Rules on Containers, in effect, have been adopted largely by PRMSA in its tariff rules on containers. And only PRMSA's tariff rules on containers are in issue herein.

The ILA's Rules on Containers were codified and placed into the October 1, 1968–September 30, 1971, collective bargaining agreement between the ILA and the New York Shipping Association (NYSA). But, it is the position of the ILA that these rules originated in the collective bargaining agreement effective October 1, 1959. Paragraph 8(c) of that agreement provided in connection with containers—Dravo[10] size or larger:

> Any work performed in connection with the loading and discharging of containers for employer members of the NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

The ILA always intended that its work preservation rules be strictly enforced, and from time to time the ILA was assured by the ocean carriers and stevedores that these rules were being enforced. However, enforcement of these work preservation rules was relatively lax in earlier years. As time went on enforcement increased in intensity. NYSA on February 28, 1962, issued the following statement to the ILA:

> Where an employer member of NYSA supplies a container which is the property of such member, to a consolidator for loading or discharging of cargo in the port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates.

From time to time the ILA complained to NYSA that certain ocean common carriers were not honoring the labor agreement as to the loading of containers by the ILA. In 1969, after a 57-day strike on this issue, the ILA obtained the rule in the collective bargaining agreement which imposed liquidated damages (then

[10] Dravo is 8 feet by 8 feet by 8 feet.

$250, now the $1,000 penalty) on ocean common carriers violating the Rules on Containers, as shown on page 69 of attachment 9 of Exhibit 5.

In 1973, the ILA demanded and obtained the so-called "Dublin Rules," which were designed to make violations of the Rules on Containers more difficult. In the 1974 CONASA-ILA negotiations, the Rules on Containers were revised and the Dublin Rules were incorporated therein. Nevertheless, even after the 1974–1977 Rules on Containers went into effect, the investigators for the ILA found that hundreds of containers were moving in violation of the Rules on Containers, and the ILA protested that the ocean common carriers and stevedores were not living up to their bargain.

The present Rules on Containers in Rule 1(a)(1) provides that any container, whether owned, leased or used, by an ocean common carrier which contains a consolidated containerload, which comes from or goes to any point within the 50 mile radius of a port shall be stuffed or stripped by ILA deepsea labor, subject to exceptions provided in the Rules. One key word in Rule 1(a)(1) is "used," which means that this rule covers not only ocean-carrier owned or leased containers, but also any container used or transported by the ocean carrier. This is a tightening of certain earlier Rules on Containers, such as the October 1, 1968, Rules, which listed only owned or leased containers.

On April 28, 1975, the ILA unilaterally (as permitted in the labor agreement) revoked the present Rules on Containers and implemented even more restrictive provisions. Later, the ILA agreed to reinstate the Rules on Containers effective May 30, 1975, provided that a Council of Container Carriers actively participated in the implementation and administration of these Rules. Such a Council was formed.

The NYSA-ILA Contract Board is charged with the implementation and administration in the Port of New York of the CONASA-ILA collective bargaining agreement and of the local collective bargaining agreement between NYSA and ILA. This same Contract Board also acts as the NYSA-ILA Container Committee to enforce and administer the ILA's Rules on Containers. This committee has employed Mr. Michael Nicholas as its contract administration officer to interpret, administer, and police the enforcement of the Rules on Containers. His decisions are subject to hearing and review by the Contract Board, and when and if there is a deadlock on the Contract Board, the dispute goes to final and binding arbitration under the labor agreement's grievance and arbitration provisions.

Mr. Nicholas has rendered certain decisions interpreting the ILA's Rules on Containers. His decisions are communicated to the ocean carriers. Up to the time Mr. Nicholas testified, May 1, 1975, all ocean carriers had accepted his decisions without any dispute. No party had insisted upon any review of Mr. Nicholas' decisions by the NYSA-ILA Container Committee.

Inasmuch as various persons from time to time have disagreed as to their interpretation of the ILA's Rules on Containers and the ocean carriers have found it necessary to go to Mr. Nicholas for his interpretation, it follows that the ILA's Rules on Containers have not been entirely clear, and that to some extent they contain conflicting or ambiguous provisions. Since the ILA's Rules on Containers have been substantially copied in PRMSA's tariff rules on containers, it follows that the latter also are ambiguous and not clear on their face. Ambiguous tariffs are contrary to the requirements of the Shipping Acts, because tariffs must be definite and certain. There is a general principal of tariff construction or interpretation, that where a tariff is ambiguous it must be construed against the maker (the ocean common carrier in this instance) and in favor of the shipper.

When its tariff container rules are questioned an ocean carrier, such as PRMSA, would in certain instances feel bound to obtain the ILA-NYSA construction by Mr. Nicholas of the ILA's Rules on Containers. Of course, Mr. Nicholas properly avows that he is not a tariff (or traffic) man, and that his only duties relate to the ILA's labor Rules on Containers. However, the practical effect of his rulings relating to containers transported by PRMSA would be to guide PRMSA in its interpretation of its tariff rules on containers. The ultimate result could be the passing on by PRMSA of a $1,000 penalty suffered by this ocean carrier to a shipper, NVOCC, consolidator, forwarder, or deconsolidator. In practical effect, we would have Mr. Nicholas indirectly interpreting an ocean carrier's tariff, even though he is not a party to the transportation contract. Stated another way, we would have the ILA in part, through the contract administration officer of the NYSA-ILA Container Committee, influencing the interpretation of a tariff of an ocean common carrier.

CONASA turns this viewpoint around, and contends that the FMC under the guise of tariff regulation is urged by certain parties other than CONASA to improperly venture outside the sphere of its statutory jurisdiction into the area of labor relations and collective bargaining to outlaw the only conceivable work preservation clause in the shipping industry, and that just as the antitrust laws of the United States may not be utilized to outlaw valid union activity, so, too, must not the Shipping Acts which are economic regulatory statutes complementary to the antitrust laws.

CONASA further contends that the ILA's Rules on Containers must be reappraised continually to keep pace with rapidly changing work conditions, cargo movements and handling techniques. CONASA states that these Rules on Containers, like all other labor contract provisions are not rigid and static mechanisms and thus are not amenable to protracted administrative review.

The short answer of the NVOCC's, the consolidators, forwarders, importers and Hearing Counsel to the contentions of CONASA is that much of the evidence relied upon by CONASA, particularly the evidence as to labor problems and work preservation rules, is irrelevant to the issue of the tariff rules on containers of PRMSA, and that the work preservation rules of the ILA are not in issue. However, it would appear that the FMC must not only consider PRMSA's tariff rules in their effect on the consolidators, forwarders and importers, but also in their broader effect on the public interest of maintaining steady flows of ocean commerce to and from Puerto Rico. In that broader sense CONASA's evidence as to labor problems and the work preservation rules is relevant to the issues.

The work preservation rules of the ILA were part of a labor agreement between the ILA and the shipping industry including the ocean common carriers, stevedores and terminal operators. The consolidators, forwarders, importers and NVOCCs were not parties to the labor agreement.

Nevertheless, many of these non-parties were aware of the labor agreement *and its restrictive rules on containers. But these non-parties including* NVOCCs endeavored to continue operating by continuing to deal with the ocean carriers under the tariffs of these carriers. For a number of years, the NVOCCs managed to have their containers loaded away from the piers and then moved over the piers without further stripping or stuffing.

Consolidated Express, Inc. (CEI), an NVOCC, made illegal payments through its general manager from about 1961 or 1962 to about November 1972, to the pier superintendent and to the assistant pier superintendent, members of the ILA, employed by Sea-Land at the waterfront facilities of Sea-Land at Elizabethport, N.J., totalling $200 per month on a regular monthly basis. The payments were listed in CEI's books as travel and entertainment expenses.

A vice-president and part owner of CEI, took the view that these payments were not made to avoid the stuffing and stripping of CEI's containers by the ILA at Elizabethport, but that the payments were made to expedite both the paperwork at the piers and the placement of the containers aboard ship when, for example, the containers reached the waterfront close to 4:30 p.m. when the pier was about to close down, and the containership was near sailing time. This witness also pointed out that it would be an advantage to CEI to have CEI's containers stacked among the three layers of containers on top of the deck, rather than below deck, so that upon reaching Puerto Rico, CEI's containers would be among the first to be taken off the ship, and would reach the ultimate consignee earlier than the other containers stacked four deep below deck.

CONASA disputes the above views, and contends that these illegal payments were made to persons having no authority with respect to stowage aboard ship, and that the payments were made to avoid the stuffing and stripping requirement of the ILA's Rules. The true purpose of the payments does not matter to the ultimate conclusions herein, but the circumstances show the intent of the ILA to hold on to the consolidation work, and the intent of at least one NVOCC to do this consolidation itself and to have its containers move relatively freely across the piers, as were many other containers which moved without restriction.

An NVOCC may perform various special services for an exporter or importer, such as accepting prepaid, collect or C.O.D. shipments, and offering storage in transit and warehousing facilities. The NVOCC may route its containers to match sailings of ocean carriers so as to avoid delays waiting for a ship. The NVOCC assumes certain liabilities for losses of the cargo of the exporter or importer and in this respect, at least, acts as a common carrier, even though the NVOCC has no ocean-going ships.

While an NVOCC is a common carrier in the view of the small exporter or small importer, whose packages the NVOCC consolidates with other exporters' or importers' packages to make a containerload, on the other hand, in relation to the ocean common carrier, such as PRMSA, the NVOCC is a shipper or consignee. In the utilization of PRMSA's tariff, the NVOCC is a shipper or consignee and should be treated as other shippers and consignees are treated.

The NVOCC makes a profit by paying the containerload rate for freight-all-kinds of the ocean carrier, while the NVOCC charges his individual package rates to the exporters or importers who do not individually have the volume of packages sufficient to make a containerload. In the view of ILA officials, the estimated profit of an NVOCC is unduly high in relation to its relatively small capital investment in facilities and equipment. Apparently this NVOCC profit was, in the ILA's mind, another reason justifying the restrictive treatment of the NVOCCs and consolidators, in the ILA's Rules on Containers.

Some NVOCCs have experienced hard times, which they attribute at least in part to the ILA's work preservation rules and to Sea-Land's and PRMSA's tariff rules on containers.

Drake Marine, a division of Drake Motor Lines, Inc., commenced NVOCC operations on May 15, 1970, in the Puerto Rican trade, and provided service between the ports of New York, Charleston, Jacksonville and Miami on the one hand, and on the other San Juan, Puerto Rico. Drake Marine discontinued operations between New York and San Juan, and between Charleston and San Juan in March 1975.

Drake Marine was advised by PRMSA in January 1975, that all trailers (containers) tendered by it as a consolidator to PRMSA would be considered LTL or LCL shipments in accordance with the ILA's Rules on Containers, and accordingly Drake's trailers (containers) would have to be stripped at the piers. Drake was also advised that PRMSA would not furnish its containers to Drake. What this meant apparently was that PRMSA would not allow Drake or any other NVOCC to take a PRMSA container away from the piers. Nevertheless, Drake might bring a consolidated load in a non-PRMSA container to the piers, where under the tariff rules this containerload could be stripped and restuffed into a PRMSA container by ILA deepsea labor. In February 1975, Drake tendered eight trailers to PRMSA for delivery to Puerto Rico, and these containers were stripped and restuffed into thirteen PRMSA containers. Drake was assessed the transfer charge of $172 per 40-foot container.

Because of the above circumstances related to the Rules on Containers, and also because two other NVOCCs (Consolidated Express, Inc., and Twin Express, Inc.) were able to have their containers moved across the piers without stripping and restuffing, Drake discontinued its New York and Charleston/Puerto Rico operations. Consolidated Express and Twin Express continued to receive containers from PRMSA, and these two NVOCC's continued to have their containers moved across the piers without restriction because of a Court injunction obtained by them. The injunction did not apply to Drake and other NVOCCs, which had not joined in the Court proceeding with Consolidated Express and Twin Express.

Dolphin Forwarding, Inc., an NVOCC, has operated in the Puerto Rican trade since September 1964, mainly between New York and San Juan. It was advised by PRMSA in December 1974 that PRMSA could not provide[11] Dolphin with containers because of the ILA's contract restrictions and because of the PRMSA tariff rules on containers which were patterned on the ILA's restrictions. Dolphin

[11] Presumably PRMSA meant that it could not provide containers to Dolphin where that would be contrary to PRMSA's tariff rules on containers, and it was assumed by PRMSA that its tariff rules would be violated by furnishing containers to Dolphin. CONASA points out that the ILA's Rules on Containers do not deny containers to shippers, but "merely" require that ILA labor be used to stuff and strip local cargo into and out of the containers, and that the containers are available at the pier facility where the local cargo is to be loaded or discharged by ILA labor. CONASA seems to ignore the ILA's Rule 1(e) as well as PRMSA's tariff rule 1(e), both of which provide that no carrier shall supply its containers to any consolidator or de-consolidator. Apparently CONASA interprets this to mean only a requirement not to supply containers unless the ILA strips and stuffs the containers. But, there is no ambiguity if you read rule 1(e) as it stands clearly by itself.

in its judgment became obliged to divert all of its container cargoes from the Port of New York to the Port of Jacksonville.

Dolphin in February 1970, purchased Acme Fast Freight International, Inc. (AFFI), which began operations in the Puerto Rican trade in March 1960, under the name Acme Fast Freight of Puerto Rico. AFFI experienced a period in the spring of 1968 when its containerloads were stripped by the ILA. Dolphin was never exposed to the ILA's "Rule 1" until its publication in PRMSA's initial tariff, and being unable to qualify under "Rule 1," it protested the PRMSA tariff rules. Dolphin by diverting its containers to Jacksonville, has lost some customers, and its service is slower than before. Dolphin fears that its survival is in jeopardy.

San Juan Freight Forwarders, Inc. (SJF), an NVOCC, has been operating in the Puerto Rican trade since July 1972, during which year none of its trailers were stripped and restuffed at the piers. In late October 1973, TTT began to strip every container of SJF. After PRMSA took over TTT's operations in October 1974, SJF began to have problems getting containers from PRMSA.

PRMSA has two subsidiary groups, one group managing and operating the roll-on-roll-off ships formerly operated by TTT (the TTT group) and the other group, the conventional containerships of Sea-Land and Seatrain (the Sea-Land group). The two groups do not use the same waterfront facilities. The two managing and operating groups apparently at least for a time had different attitudes and reactions to the ILA's Rules on Containers. SJF continued after October 29, 1974, to receive containers from the TTT group, but could get no containers from the Sea-Land group. The containers furnished to SJF by the TTT group continued to be stripped at the piers.

By affidavit dated July 29, 1975, attached to Hearing Counsel's reply brief, the President of San Juan Freight Forwarders states that SJF has been forced to stop using the Port of New York temporarily because of PRMSA's tariff rules on containers. This affidavit hereby is accepted as an addendum to Exhibit 73 of record.

The record contains considerably more evidence as to the problems faced by the NVOCCs above and by other NVOCCs and by other shippers and consignees, but the general picture above is sufficient to show that not all NVOCCs and shippers were treated alike. Enforcement of the ILA's rules varied from time to time, it varied as between Staten Island piers (TTT group) and New Jersey piers (Sea-Land group), and PRMSA's tariff rules were interpreted differently as to the furnishing of containers as between the TTT group and Sea-Land group. And most importantly, the NVOCCs were treated differently from other shippers who owned and loaded their containers with their own labor at their own facilities.

THE TARIFF RULES ON CONTAINERS OF PRMSA

Under PRMSA's tariff rules on containers, one exporter may have 20 packages of a particular commodity, these packages amount to a containerload, the container is loaded by employees of the exporter at the exporter's own facility located within 50 miles of a port, and the exporter delivers this container to the pier, and this container will not be stripped and restuffed at the pier by ILA deepsea labor, because the tariff provides, rule 440, or 442.5, or 445, Rules on Containers, Rule 2A.(2), that "Containers loaded with cargo at a qualified shipper's facility with its own employees" are excluded from the requirement of loading by ILA deepsea labor.

However, a second exporter with 20 packages of the same commodity who is not large enough, or for some reason does not have his own warehouse facility, and does not have his own employees to load the container, but instead delivers his 20 packages to a public warehouse within 50 miles of a port and has the 20 packages loaded by employees of the warehouse into the container, must have his container stripped and restuffed at the pier by ILA deepsea labor under PRMSA's tariff rule 440, or 442.5, or 445, Rules on Containers, Rule 1(a)(2).

Since it makes no sense for the second exporter above to incur the double handling of his goods and a stripping and stuffing charge at the pier as well, he must arrange for the trucking of his 20 individual packages to the pier where they will be loaded into a container by ILA deepsea labor.

Many exporters believe that when the packages are handled at the pier, they will be subject to pilferage, delay, and damage. These exporters believe that when cargo crosses a pier in a sealed container it is a lot less subject to pilferage and damage than when moved loose to be stuffed into a container at the pier. There is some dispute by CONASA that the danger of pilferage and damage at the pier is any different or any greater than the danger when the loose pieces are handled and stuffed into containers away from the piers.

Regardless of any conclusion as to the relative danger of pilferage and damage when the ocean transportation service of PRMSA is the same for two exporters who each ship 20 identical packages of the same commodity, to permit the first of these two exporters to have his container moved promptly and freely across the pier, and at the same time to require the second exporter to have his container delayed, stripped and restuffed or to require him to deliver his 20 packages loose to the pier, obviously restricts the freedom of choice of the second exporter and results in unfair and unjust discrimination against the second exporter.

A similar situation of undue preference and unjust discrimination may arise, where the first exporter's 20 packages are loaded at his own facility by his own employees and his container moves freely across the piers; whereas a second and a third exporter each has 10 packages, and in combination they amount to a similar 20-package containerload, but these 20 packages are consolidated by an NVOCC into one container, with the result that the second and third exporters may not have their consolidated container moved freely across the piers, again though PRMSA's ocean transportation service is the same for the container of the first exporter as it is for the container of the second and third exporters.

The impact of the 50-mile rule as it has been interpreted actually extends beyond 50 miles of a port, for example, in the case of a consolidated container shipped via the Port of New York originating within 50 miles north of the Port of Boston, but more than 50 miles from the Port of New York. On the other hand, an exporter consolidating at a public warehouse 150 miles due west of the Port of New York would not have his container stripped at the Port of New York because this warehouse is not within 50 miles of any CONASA port.

Under PRMSA's tariff rules on containers an import containerload discharged at a qualified consignee's facilities by its own employees is not required to be stripped and stuffed at the piers by ILA deepsea labor, Rule 2B(2). The qualified consignee is defined as the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being delivered and who is named in the delivery order. But if such consignee does not own or operate his own warehouse facility and instead uses a public warehouse the consignee, Rule 2B(4)2., must pay the normal warehouse storage fees for a minimum of thirty days, and meet other requirements in order to be excluded from the requirement that his import containerload be stripped and stuffed at the piers by deepsea ILA labor.

As seen above, one importer of a containerload of shoes who unloads his container at his own facilities with his own employees may immediately distribute these shoes to retail outlets. However, another importer of a containerload of shoes who does not have his own warehouse facilities and employees, and who uses a public warehouse to unload the container must pay a warehouse storage fee for a minimum of 30 days, and furthermore, as the tariff rules provide, this second importer may not transfer title to the shoes within the 30 days of warehousing, Rule 2B(4)3. As seen, the tariff rules on containers of PRMSA restrict the freedom of some importers in moving merchandise and add substantially to their costs, while other importers are not so treated.

In PRMSA's tariff rules on containers there are provisions in Rule No. 440 (applicable at CONASA ports) and in Rule No. 422.5 (applicable at the South Atlantic Ports of Charleston and Jacksonville) which provide in rule 1(e) that no carrier or direct employer[12] shall supply its containers to any consolidator or deconsolidator, and further that all rule 1 containers be stuffed or stripped at a waterfront facility. Rule 445 (applicable at the Port of New Orleans) contains a different rule 1(e), which does not mention carriers, but does refer to "employer" and is otherwise the same as the rule 1(e) in Rules 440 and 442.5 above. Obviously, when an ocean carrier supplies equipment (containers) to one shipper but not to a second similar shipper, this action and the tariff rule providing for such action are unjustly discriminatory and unlawful.

Under the tariff rules of Sea-Land and GPRL in effect in prior years before these two carriers placed into their tariffs the rules now substantially adopted by PRMSA as its tariff rules on containers, and when Sea-Land and GPRL in their operations in the Puerto Rican trade had no restrictive rules on containers, at those times the shippers, including the NVOCCs, consolidators and forwarders, were free, at least insofar as these ocean carriers' tariffs provided, to obtain containers from these ocean carriers, the shippers were free and able to load containers at any facilities away from the piers, the shippers could deliver containers to the ocean carriers at their waterfront facilities, and these containers could be placed aboard the containerships without any stripping and restuffing, at the piers. At present as seen, the shipping acts are being violated by the unequal treatment of shippers. Regardless of whether the treatment of shippers is unequal, the tariff rules may also be unjust and unreasonable insofar as they may require the uneconomic second handling (stripping and restuffing) of containers at the piers when there is no ocean transportation need for such second handling.

[12] The tariff says "employee," probably a typographical error. The *ILA's Rules on Containers (Exhibit No. 95)* also contain in their Rule 1(e) the words, direct employee, so it appears that PRMSA copied the ILA's Rules and typographical error. Direct employer in the usual sense of the collective bargaining agreement, means employer of ILA longshoremen.

Certainly the rehandling or stripping and restuffing of a container does not add anything of value to the ocean service provided to the shipper.

DISCUSSION AND CONCLUSIONS

Section 14 Fourth of the 1916 Act provides in part that no common carrier by water in the Puerto Rican trade shall make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of cargo space accommodations or other facilities.

PRMSA will not supply PRMSA containers to certain consolidators and deconsolidators, whereas PRMSA will supply its containers to other shippers and consignees in the same geographic area. PRMSA's rules on containers unfairly treat and unjustly discriminate against certain consolidators and deconsolidators inasmuch as PRMSA does not provide them the same facilities (containers) as PRMSA provides other shippers and consignees, in violation of section 14 Fourth.

PRMSA's rules on containers are in violation of section 14 Fourth insofar as these rules permit certain containerloads to move freely over facilities of PRMSA, that is, over the piers, while PRMSA's rules also require other similar containerloads to be stripped and restuffed at the piers by ILA deepsea labor. The unlawful discrimination results from the unequal availability of the piers for movement of containerloads to and from ships.

Clearly, PRMSA's tariff rules on containers unfairly treat and unjustly discriminate against certain shippers and consignees in the matter of cargo space accommodations and other facilities, including the use of the piers and the use of containers for consolidated shipments.

Section 16 First of the 1916 Act provides in part that it is unlawful for any common carrier by water to make or give any undue or unreasonable preference or advantage to any person, or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect.

PRMSA's rules on containers are in violation of section 16, First, in that they unduly prefer certain shippers and consignees, such as for example, those who have certain facilities and whose employees stuff and strip containers, while these rules subject other shippers and consignees to undue and unreasonable prejudice and disadvantage, such as for example, those shippers and consignees who do not have their own facilities or do not have their own employees to stuff and strip containers. PRMSA's rules require certain shippers to suffer transfer or rehandling charges at the piers for their containers to their undue prejudice, while other shippers escape such transfer charges to their undue preference, in violation of section 16, First.

Section 18(a) of the 1916 Act and section 4 of the 1933 Act, in part, together provide that the common carriers by water in the Puerto Rican trade must provide just and reasonable rates, regulations and practices relating to various matters, including the receiving, handling, transporting, storing or delivering of property; and that if the FMC finds these rates, regulations and practices to be unreasonable, it may prescribe just and reasonable rates, regulations and practices.

PRMSA's rules permit shippers to be held liable for fines or penalties of \$1,000 per container, which penalties have no relationship to the cost of transportation or of handling of the container from an ocean transportation viewpoint. These PRMSA tariff rules in part are ambiguous and uncertain in that they are not clear on their face, and are subject to various interpretations. PRMSA's rules are unreasonable insofar as certain shippers must undergo the added transfer charges, for example, of \$172 per 40-foot container, in order to avail themselves of PRMSA's FAK rate on containerloads, when there is no transportation necessity to transfer the contents of a container from one container to another container. PRMSA's rules are unreasonable in a number of other ways, including that they deny containers to some shippers while providing containers to other shippers, and that the rules require certain consignees to warehouse their imports under certain restrictions while not so requiring other consignees to so warehouse their imports. For the reasons stated in this paragraph PRMSA's tariff rules on containers are unjust and unreasonable in violation of section 18(a) of the 1916 Act and of section 4 of the 1933 Act.

There are certain fundamental truths pertinent to these proceedings. One is that all shippers should be treated substantially equally, provided of course that they seek and receive the same ocean transportation service from the same ocean common carrier. If we were considering only the tariff rules on containers of an ocean carrier, without knowing what caused these rules to be put in the tariff, clearly we would find that tariff rules, such as PRMSA's rules on containers, are unlawful. In an ordinary proceeding there would be no need to go any further, that is, there would be no need to go beyond an examination of the tariff rules on containers. But the present proceedings have potential ramifications which go beyond the ordinary problems of the legality of a tariff rate or rule, and we must consider these ramifications in issuing our order herein.

Another fundamental truth is that the FMC has jurisdiction over tariffs (rules, rates, etc.) of ocean common carriers in the United States mainland/Puerto Rico trade. Keeping the above two fundamentals in mind, the FMC clearly has jurisdiction over the lawfulness of PRMSA's tariff rules in the Puerto Rican trade. Secondly, if the tariff rules provide for grossly unequal treatment of similarly situated shippers the rules are clearly unlawful under the Shipping Acts. Furthermore, if one shipper receives preferred treatment, and another shipper is subjected to unfair, unjust and grossly discriminatory treatment, such treatment is clearly unlawful when for the same ocean transportation service, despite any reason leading to the discriminatory treatment.

In other plainer words, unlawful tariff rule discrimination is unlawful tariff rule discrimination, regardless of the fact that it may have been caused by a work preservation rule, and it matters not at all whether the work preservation rule is lawful in and of itself. It is elemental and basic to United States transportation law, that shippers all be treated equally, whether large or small, or whether they differ in their plants, warehouse facilities or in other respects, provided only that they are buying identical transportation services.

One other fact should be remembered. We are not here dealing with section-15 agreements between two or more persons subject to the Shipping Acts. We are dealing merely with tariff rules on containers of an ocean common carrier. A tariff provision is not an agreement; rather it is a unilateral statement of the author of the tariff. Basically a tariff sets the price and terms at which a common carrier offers its services. Therefore any citations of cases dealing directly or peripherally with section-15 agreements are really not directly in point, although they may be of some background interest.

The Commission previously has ruled on a matter which had substantially similar, if not the same, legal implications as the matter now at issue. The factual background in the previous case was that on February 19, 1969, the ILA and the employers of longshoremen at the Port of Miami entered into a deepsea longshore agreement, which contained a Clause 19, in which clause there was a series of rules designed to protect and preserve the work jurisdiction of longshoremen of the ILA at deepsea piers and terminals.

Clause 19 in part required that certain containers containing consolidated loads, destined to or coming from any person including a consolidator or deconsolidator who is not the beneficial owner of the cargo, which containers come from or are destined to any point within a 50-mile radius from the center of the port, shall be stuffed and stripped by ILA labor at longshore rates at a waterfront facility. Also, Clause 19 provided where such a container had not been stuffed and stripped by the ILA that the ocean carrier should pay liquidated damages of $250 per container to the ILA if for any reason the container was no longer at the waterfront facility where it should have been stuffed or stripped.

Based upon the above labor agreement, South Atlantic and Caribbean Line, Inc. (SACL), an ocean common carrier then operating in and out of Miami in the Puerto Rican trade, published an embargo notice which stated that it would not book or accept certain consolidated containerloads at Miami unless certain conditions were met. One proviso was that the shipper agree to indemnify SACL in the amount of $250 per container in the event that the ILA invoked the liquidated damages provision of Clause 19. While this $250 penalty proviso later was deleted by SACL, its embargo notice stood in effect as an absolute refusal to carry "clause 19 cargo." The legal question then became whether the embargo notice imposed a true embargo, because financial loss on the carriage does not normally constitute sufficient justification for the institution of an embargo. The usual justification for an embargo is congestion or physical disability, and there was no physical disability of SACL to carry the consolidated containerloads.

SACL did not want to perform the additional terminal or transfer service of stripping and restuffing the consolidated containerloads, inasmuch as that was not something offered by SACL to the shipping public as an aid to the efficient transportation of goods. If anything, from SACL's point of view the stripping and restuffing was a penalty for handling NVOCCs' or consolidators' trailers. In this situation at Miami, SACL itself did not employ the ILA labor and was not a party to the labor agreement, but SACL's stevedore at Miami presumably was a party to the labor agreement.

Under the above circumstances, in *South Atlantic and Caribbean Line, Inc.*, 12 F.M.C. 237, at page 241 (1969), the Commission stated:

We are not here concerned with the ultimate validity of clause 19. Such a determination is beyond our jurisdiction and is within the province of the National Labor Relations Board. But whatever its validity, we cannot permit the mere execution of a collective bargaining agreement to override the clear requirements of a statute we are charged to administer. Statutes controlling the activities of common carriers and the obligations of those carriers are not subordinate to the requirements of labor contracts. *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C. 617, at page 627 (1957).

The Commission further went on to say at pages 241 and 242:

> We are not without sympathy for the position in which SACL finds itself, but it is of course not an excuse for the imposition of an unlawful embargo.
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> * * *
>
> Our decision here does not reach either the validity of the collective bargaining agreement and clause 19 or the questions of what actions by SACL would be proper should the ILA insist on invoking clause 19.
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> * * *
>
> Although the Commission cannot deal with the new labor contract which is the immediate source of this condition, we can deal with those persons affected by it and within our jurisdiction. In that posture we do not intend to permit disruptions of our waterborne foreign or domestic offshore commerce.
>
> * * *
>
> Now we would accept any appropriate tariff filing on short notice, the result of which would be to make the carrier whole in the event clause 19 is invoked and which would enable the cargo to move.

The above words of the Commission in 1969, with very slight adjustments, might well be restated and be appropriate for the present investigations. What the Commission apparently hoped for in the 1969 SACL matter, was a mutually beneficial result, which not only would not interfere with the collective bargaining labor agreement, but which also would enable the consolidated containerloads of the NVOCCs to move freely in compliance with the Shipping Acts, and which would not place any undue burden on the ocean carrier. Of course, there were some differences between the SACL matter and the present investigations. In 1969 in the SACL matter, there was a carrier's embargo of certain NVOCC or consolidated containerloads. Notice is taken that SACL canceled its tariff in 1970, and presumably went out of business in that year. At present we now are concerned with, among other matters, what amounts to an embargo of the furnishing by PRMSA of PRMSA's containers to the NVOCCs and to the consolidators.

In 1969, the Commission stated that statutes controlling the activities of ocean common carriers and the obligations of these carriers are not subordinate to the requirements of labor contracts. The same is true in 1975. In 1969, the Commission said that an ocean common carrier has a duty and obligation to accept and carry all cargo tendered to it in accordance with the terms and conditions of its published and filed tariffs, *South Atlantic and Caribbean Line, supra,* at page 239. The same is true in 1975, and that duty includes the furnishing of the ocean carrier's containers and facilities equally to similarly situated shippers. In 1969, the Commission said that although it could not deal with the new labor contract, it could deal with those persons affected by it and within the Commission's jurisdiction. The same is true in 1975. In 1969, the Commission said that it did not intend to permit disruptions of our waterborne foreign or domestic offshore commerce. Obviously, this is true in 1975.

In *Volkswagenwerk v. F.M.C.*, 390 U.S. 261 (1968), the Supreme Court found that a certain agreement among members of the Pacific Maritime Association to impose certain assessments upon member ocean common carriers, stevedores, and terminal operators and their customers was subject to the jurisdiction of the FMC under section 15 of the 1916 Act. Therein it was stated, at page 278, that we are not concerned here with the agreement creating the

Association or with the collective bargaining agreement between the Association and the ILWU (International Longshoremen's and Warehousemen's Union). CONASA in its opening brief states that in this *Volkswagenwerk* case the Supreme Court reaffirmed that there is a labor exemption from antitrust statutes for labor agreements which would otherwise be subject to such antitrust regulation. What the Supreme Court actually said was that those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, but the Supreme Court went on to say that the assessment arrangement or agreement in issue affected only relationships among Association members and their customers. Thus, there was no labor agreement in issue in the *Volkswagenwerk* case.

More importantly, nowhere in *Volkswagenwerk v. F.M.C., supra,* is there any issue of the lawfulness of a tariff rule. Whatever significance that case has to the present investigation possibly may be found in the concurring statement of Justice Harlan. He was concerned about the exact extent of the labor exemption from statutes regulating competition. He pointed out that no collective bargaining agreement was before the Court and that it would be inappropriate to suggest the affirmative extent of the labor exemption or immunity. He went on to say, at page 287, that:

the assessment agreement before us is not immune or exempt, for it raises 'shipping' problems logically distinct from the industry's labor problems; at the same time Commission review itself must be circumscribed by the existence of labor problems that it is not equipped to resolve.

In the present proceeding, PRMSA's tariff rules on containers raise shipping problems logically distinct from the labor problems which may be raised by the ILA's Rules on Containers. Anytime two shippers seeking the same ocean transportation service are treated differently by an ocean carrier, to the extent that one shipper is unduly and unreasonably preferred and the other shipper is unduly and unreasonably prejudiced, there is a shipping problem. The FMC must exercise its jurisdiction over shipping problems.

There is no evidence in this record that any ocean carriers other than Sea-Land, GPRL, and PRMSA placed in their tariffs, rules on containers patterned after the ILA's Rules on Containers. To the extent that these carriers did so, it appears that they did as a matter of individual choice. The vice-president, traffic, of a management subsidiary of PRMSA recommended that PRMSA file its tariff rules on containers, among other reasons, so that PRMSA could recover the $1,000 penalty (liquidated damages) per container from the shipper and to provide that PRMSA could not supply trailers (containers) to NVOCCs. As noted heretofore, the ILA's rules do not require that the ocean carrier pass on the $1,000 penalty to the shipper. Before PRMSA took over the operations of Sea-Land, Seatrain and TTT, these three ocean carriers had pursued different courses with respect to tariff rules on containers. Sea-Land filed such rules, Seatrain did not file, and TTT filed rules but its filing was rejected by the FMC. From these facts it is concluded that there was no concerted agreement between the carriers in the Puerto Rican trade, or between the many ocean carriers operating in both the foreign and domestic trades out of New York, to publish similar tariff rules on containers. The ILA and the shipping associations insofar as their collective *bargaining agreement contained* the ILA's Rules on Containers apparently considered these to be strictly a labor matter and not a shipping matter or problem subject to the filing of a section-15 agreement.

Notwithstanding that the present case involves tariff rules and shipping problems and does not involve any section-15 agreement between two or more persons subject to the 1916 Act, some consideration may be appropriate concerning the so-called "labor exemption" from antitrust laws. *In United Stevedoring Corp. v. Boston Shipping Association,* 16 F.M.C. 7, the Commission found that a certain agreement among and between members of the Boston Shipping Association as to the allocation of labor gangs among stevedores was entitled to the labor exemption and therefore not required to be filed and approved under section 15 of the Shipping Act, 1916.

The Commission stated in *United Stevedoring Corp., supra,* at pages 11, 12, 13, 14, and 15:

> The 'labor exemption' originated in the area of accommodation of the labor laws and the antitrust laws. * * * Thus, the analogy to a 'labor exemption' from the shipping laws is obvious. We are in agreement with the view that such a labor exemption should exist. However, the problem is one of line drawing, i.e., just how far should the labor exemption extend and at what point should the shipping laws be activated.
>
> * * *
>
> The Supreme Court attempted to balance the interests of both policies so that only 'legitimate' collective bargaining objectives would be without the scope of the antitrust laws.
>
> * * *
>
> Hence, from these cases have evolved the various criteria for determining the labor exemption from the antitrust laws and which we herewith adopt for purposes of assisting us in determining the labor exemption from the shipping laws with this caveat. These criteria are by no means meant to be exclusive nor are they determinative in each and every case. Just as in the accommodation of the labor laws and the antitrust laws the courts have resolved each case on an ad hoc basis, so too will we.
>
> * * *
>
> Upon thorough review of the views presented on this issue, we conclude that no valid regulatory purpose would be served in requiring organic agreements of pure collective bargaining units to be filed and approved pursuant to section 15. However, to the extent that any organic agreements provide for purposes other than collective bargaining, no labor exemption from section 15 would apply to those portions of the organic agreements, and filing and approval of those provisions would be required.
>
> Thus the line is drawn at the point where purely labor matters cease and shipping matters begin.
>
> * * *
>
> The mere fact, therefore, that a certain agreement is part of a collective bargaining agreement does not *automatically immunize* that agreement from the antitrust laws.
>
> * * *
>
> In the same manner in which offensive collective bargaining agreements in general are challenged under the antitrust laws, collective bargaining agreements in the shipping industry can be challenged under the shipping laws, with due regard for the labor policy considerations discussed above.

In the present investigations, it is herein found that the tariff rules on containers of PRMSA are a shipping matter subject to shipping laws, and separate from any labor matter and the labor laws. However, if one were to conclude that PRMSA's rules on containers are partly a shipping matter and partly a labor matter, one still must conclude that the shipping part is of such importance that it is not immunized from the shipping laws.

The United States Court of Appeals for the Second Circuit, in *New York Shipping Association, Inc. v. Federal Maritime Commission,* 495 F. 2d, 1215 (2d Cir. 1974), denied the petitions to review filed by NYSA and the ILA, and found that a certain assessment agreement was subject to the filing and approval requirements of section 15 of the 1916 Act. The Court of Appeals made references to *Volkswagenwerk v. FMC, supra,* among others, and referred to Justice Harlan's concurrence wherein he warned against assuming that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain. The Court of Appeals stated that like the *Volkswagenwerk* case, its case also raised shipping problems logically distinct from the industry's labor problems. The Court of Appeals went on to say that in determining whether the agreement should be approved, disapproved or modified, the Commission must thus continue to weigh the Shipping Act and labor interests raised by different portions of the agreement and should move with caution in areas of greater collective bargaining concern.

In none of the cases referred to by the parties in their briefs do I find any holding that where there is a shipping problem the Federal Maritime Commission should ignore that problem. I must conclude that the FMC has jurisdiction over the shipping problem here in issue, and it must take steps to remedy that problem. Of course, the FMC should proceed cautiously in issuing its findings and order herein.

Attention is invited to Exhibit No. 88, the supplemental testimony of the President of CONASA, and to his oral testimony on May 7, 1975. His testimony should be given the most careful consideration. The recent CONASA-ILA negotiations, leading to the current 1974–1977 labor contract, commenced again with the demand of the ILA that all containers be stuffed and stripped on the piers by the ILA. CONASA's counter position at the outset of these negotiations was that all containers should be permitted to move without any restriction by the ILA. The ILA immediately rejected CONASA's proposal stating in that event a strike by the ILA would be assured. CONASA represented that the desire of the shipping industry was to permit shippers as much flexibility as possible without causing an assured strike.

Many median or compromise proposals were discussed and analyzed. For example, the New York Foreign Freight Forwarders and Brokers Association suggested that consolidators be permitted to operate, utilizing ILA deepsea labor within the waterfront terminal areas, but away from the actual pier operations of ship loading and unloading. The ILA rejected this proposal upon receiving legal advice that this proposed approach would constitute an affirmative extension of the ILA's work jurisdiction subject to attack before the NLRB. Many other proposals were discussed at great length and rejected. Finally the ILA and the shipping industry settled on the ILA's Rules on Containers which had been in effect for some time.

The wages issues and the fringe benefit issues consumed only a few hours during the continuous negotiations from June 11 to June 21, 1974. The issue which required the continuous time and efforts of the negotiators on almost a 100 percent basis was the containerization issue. In the view of CONASA's president any disturbance of the ILA's Rules on Containers would result in a resurgence of labor unrest on the entire Atlantic and Gulf Coasts to the detriment of the longshoremen, ocean carriers, stevedores and the general public as well. There is no reason to doubt the testimony of CONASA's president.

PRMSA, as seen, fears an ILA shutdown if it is required not to follow the ILA's Rules on Containers. Nevertheless, the Commission must act in the overall public interest.

The Commission must make findings with respect to the 1916 and 1933 Acts. Also, it should recognize that any order it may issue should be carefully drawn so as not to precipitate any actions which may interfere with the steady flow of ocean commerce in the Puerto Rican trade. PRMSA should be given a reasonable period of time to adjust its tariff rules on containers so that they do not violate the Shipping Acts, and also so that PRMSA may continue to operate. Undeniably such an adjustment of PRMSA's tariff rules will be most difficult, but PRMSA is closest to the problem and should not be fettered by any rigid preconceived notions as to the best solution. Within the PRMSA management are persons with many years experience in the shipping business, and of course, PRMSA should be free to consult with other experienced tariff and traffic experts. The overall aspects of the public interest necessitate that the effective date of an order requiring the cancellation of PRMSA's tariff rules on containers be deferred for three months, or such other reasonable period as may be appropriate as the circumstances may develop.

ULTIMATE FINDINGS

It is found that the Federal Maritime Commission has jurisdiction over the tariff rules on containers of PRMSA in the Puerto Rican trade, and that these tariff rules are unlawful in violation of sections 14 Fourth, 16 First and 18(a) of the 1916 Act, and of section 4 of the 1933 Act.

It is ordered, subject to review by the Commission on appeal or upon its own motion, that the tariff rules on containers of PRMSA be canceled, and that PRMSA publish and file revised tariff rules on containers and other tariff provisions as may be necessary which will treat all similarly situated shippers and consignees, including consolidators and deconsolidators, fairly and equally. It is further ordered that the effective date of this order, requiring PRMSA to cancel its tariff rules on containers and to publish and file new tariff rules on containers and other tariff provisions, be deferred for a period of three months from the date of this initial decision if no exceptions are filed thereto and there is no Commission review thereof. In the event that there is review by the Commission of this decision, it is suggested that the Commission, if it adopts the findings herein, give PRMSA a reasonable time to cancel its tariff rules on containers and to publish and file new tariff rules on containers and other tariff provisions which will be lawful under the 1916 and 1933 Acts and which at the same time will enable a steady flow of ocean commerce in the Puerto Rican trade and which will be consistent with the overall aspects of the public interest.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D.C.
October 9, 1975

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-48

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

NOTICE OF DETERMINATION NOT TO REVIEW

June 22, 1978

Notice is hereby given that the Commission on June 20, 1978 determined not to review the Administrative Law Judge's order of discontinuance in this proceeding served May 26, 1978.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–48

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTION 15, 16 AND 17, SHIPPING ACT, 1916

ORDER DISMISSING APPLICATION AND DISCONTINUING PROCEEDING

Finalized on June 22, 1978

On March 23, 1978, one of the respondents, Pacific Maritime Association (PMA), served a document, entitled Notice of Cancellation and Withdrawal of Agreement, on its own behalf and on behalf of the other respondent, International Longshoremen's and Warehousemen's Union (ILWU). In that document, which was filed with the Commission on March 27, 1978, PMA advised "that the Nonmember Participation Agreement . . . has been cancelled and withdrawn." Concomitantly, PMA expressed the belief that "We assume an appropriate Order will enter terminating the proceeding.

I ordered that the document be treated as a motion to dismiss the application and to discontinue the proceeding and fixed the time for filing replies to the motion. In addition, I ordered that any reply address the question whether the replicant intends to prove that the Nonmember Participation Agreement was implemented without Commission approval.

Only Hearing Counsel, of all the other parties in the proceeding, replied. Among other things, Hearing Counsel stated that it had consulted with some of the parties opposing approval of the Nonmember Participation Agreement and that neither Hearing Counsel nor anyone Hearing Counsel consulted with,[1] "have any information tending to indicate that the Nonmember Participation Agreement . . . was implemented without approval by the Commission under Section 15 of the Shipping Act." Hearing Counsel did not oppose discontinuance of the proceeding.

Hearing Counsel's statement confirms representations iterated throughout the proceeding by PMA to the effect that the Nonmember Participation Agreement had not been and would not be implemented until either (a) it was determined that

[1] Hearing Counsel spoke to counsel for the Port of Seattle, the Petitioner Ports (Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, Portland and Tacoma), CONASA (North Atlantic Shipping Association) and the New York Shipping Association, which was, but no longer is, a member of CONASA. An intervenor, Wolfsburger Transport-Gesellschaft m.b.H. (Wobtrans), received an extension of time to reply to the motion, but filed no reply. However, Wobtrans' counsel advised me, by telephone, that the motion would not be opposed.

the Commission did not have jurisdiction over the Agreement, or (b) the Commission approved the Agreement.

It is now beyond cavil that the Commission has jurisdiction over the Nonmember Participation Agreement. The Commission reached that conclusion in its decision on severed jurisdictional issues, holding that the Nonmember Participation Agreement was subject to its jurisdiction under section 15 of the Shipping Act, 1916, 46 U.S.C. 814, and holding, also, that the Agreement was not "labor exempt." *Pacific Maritime Association–Cooperative Working Arrangement; Possible Violations of Sections 15, 16 and 17, Shipping Act, 1916,* 18 F.M.C. 196 (1975).[2] Judicial review of that decision has now been completed. In *Federal Maritime Commission v. Pacific Maritime Association,* 435 U.S. 40 (March 1, 1978), the Supreme Court upheld the Commission's jurisdiction over collective bargaining agreements of the type here involved.[3]

One of the issues specified to be determined in this proceeding, see n. 2, *supra,* was whether the Nonmember Participation Agreement should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916. Other issues in connection with the Nonmember Participation Agreement were whether its implementation would result in violation of other sections of the Shipping Act, 1916. However, in the light of the cancellation of the Nonmember Participation Agreement and the fact that it was never implemented, it would appear that no useful regulatory purpose would be served by continuing the investigation.

In reaching the conclusion that the investigation should be discontinued, I am not unmindful of the fact that the several Orders instituting and defining the scope of the investigation also placed the 1972 amendments to the Master Collective Bargaining Agreement under investigation.[4] Hearing Counsel has noted this additional aspect of the investigation in its reply to the motion, indicating that discontinuance should not be construed as approval of the Master Collective Bargaining Agreement.

However, in a supplemental, joint filing with PMA, Hearing Counsel modified the position it had taken earlier. Hearing Counsel now believes that, under the express language of the Commission's decision on jurisdictional issues in this proceeding, the underlying Master Collective Bargaining Agreement, absent the Nonmember Participation Agreement, was not intended to come under section 15 investigation for purposes of approval, disapproval or modification. Hearing

[2] The Commission's Order implementing its decision directed that the investigation proceed to determine specified remaining issues. 18 F.M.C. at 212–213. By order of March 4, 1975, I stayed the proceeding pending judicial review.

[3] In affirming the Commission, the Supreme Court reversed an earlier reversal of the Commission by the Court of Appeals. See *Pacific Maritime Association v. Federal Maritime Commission*, 542 F. 2d 395 (D.C. Cir. 1976). By Order of April 5, 1978, the Court of Appeals recalled its judgment and opinion from the Commission.

[4] (1) Order of Investigation, served September 6, 1972; (2) First Supplemental Order Severing Jurisdictional Issues, served October 19, 1972; (3) Order of January 27, 1975, *supra,* 18 F.M.C. at 212–213. The third, and last, Order, of course, superseded the previous orders. Insofar as the Master Collective Bargaining Agreement was concerned, the Third Order sought a determination whether its implementation, in conjunction with the Nonmember Participation Agreement, would result in any practices which would subject any person, locality or description of traffic to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act, 1916, 46 U.S.C. 815, or would result in any practice which would be unjust or unreasonable in violation of section 17 of the Shipping Act, 1916, 46 U.S.C. 816. In addition, it was to be determined whether any labor policy considerations would operate to exempt the Agreements or practices resulting therefrom from any provision of sections 16 or 17.

Counsel and PMA find support for this proposition in the following discussion by the Commission, 18 F.M.C. at 209:

> Further, we disagree with Respondents that our jurisdiction over the Revised Agreement will preclude the remaining sections of the master collective bargaining agreement from being implemented. *At issue here is only the Revised Agreement which we consider severable from other provisions of the master collective bargaining agreement, i.e.,* the amount of fringe benefits to be paid the union. The obligation of PMA to pay those benefits remains unimpaired. *Consequently, the Commission's assertion of jurisdiction will have no effect upon PMA's obligations under the labor contracts.* (Emphasis added.) (18 F.M.C. at 209.)

I agree with PMA and Hearing Counsel that the Master Collective Bargaining Agreement was intended to be a subject of the instant investigation only because of the presence of the Nonmember Participation Agreement, entered into by the same parties, and the interrelationship of the two agreements. Now that the Nonmember Participation Agreement has been withdrawn, there appears to be no need for concern that the Master Collective Bargaining Agreement might be violative of sections 16 or 17. With regard to the "labor exempt" issue specified in the Third Order, it appears that the Commission has now indicated a preference to treat this matter by way of rulemaking rather than as an adjudicatory matter in this proceeding. See *Advance Notice of Proposed Rulemaking, Exemption of Certain Collective Bargaining Agreements.* 43 F.R. 17845.

Accordingly, it is ordered that the application for approval of the Nonmember Participation Agreement be dismissed and the investigation be discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

May 26, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–41

HOUSTON GULF CRANE, INC., ET AL.

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

NOTICE OF DETERMINATION NOT TO REVIEW

July 12, 1978

Notice is hereby given that the Commission on July 10, 1978 determined not to review the Administrative Law Judge's order of dismissal in this proceeding served June 15, 1978.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

40 21 F.M.C.

FEDERAL MARITIME COMMISSION

June 15, 1978

No. 77–41

HOUSTON GULF CRANE, INC., ET AL.

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

COMPLAINT DISMISSED

Finalized on July 12, 1978

This proceeding commenced with the filing of a complaint on August 9, 1977, by a corporation and individual owners of the corporation owning and renting cranes operating at the Port of Houston. Complainants alleged that respondent Port of Houston Authority of Harris County, Texas, had violated sections 16, 17, and 18 of the Shipping Act, 1916 (the Act), by engaging in practices by which respondent's cranes were given preference in the hiring of cranes by stevedores at the Port. Complainants also alleged that they had suffered financial injury as a result of these practices and asked for "monetary reparations, damages, penalties, costs, interest and reasonable attorney's fees," totalling one million dollars. Respondent filed general denials of the material allegations and more specifically denied that complainants were entitled to any monetary damages.

By letter dated June 9, 1978, Mr. Joe E. Turner, attorney at law, who had been conferring with complainants, advised that they had decided to withdraw from the case because "they do not feel that the potential recovery is great enough to justify the expense and inconvenience of litigation . . . " For the reasons explained below, this letter is being treated as a motion to withdraw or dismiss the complaint and is granted.

As indicated, complainants have decided that the cost of pursuing this litigation would not be justified by any potential recovery. In addition to the fact that certain elements of damages which complainants in this case were seeking, e.g., "penalties," "costs," "reasonable attorney's fees," do not appear to be compensable items of reparation under section 22 of the Act,[1] the two-year

[1] The entire matter of reparation awards is discretionary with the Commission and the mere showing of a violation may not be enough to justify an award of reparation under section 22 of the Act. See, e.g., *Federal Maritime Commission v. Consolo*, 383 U.S. 607, 621 (1966), and cases cited in my Initial Decision, pp. 47–49. Items of reparation should be shown to be compensable under applicable law. Such things as punitive damages, attorney's fees, and costs are not considered compensable absent statutory authority. See, e.g., *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717–720 (1967) (attorney's fees); *Fitzgerald v. Civil Service Commission*, 407 F. Supp. 380 (D.D.C. 1975) (attorney's fees); *Ace Machinery Company v. Hapag-Lloyd*, 16 Shipping Regulation Reports (Pike & Fischer) 1258, 1261; *Id.*, 16 SRR 1531, 1534 (1976) (attorney's fees, punitive damages, lost management time).

period of limitation prescribed in section 22 of the Act would appear to have a substantial effect in reducing any potential monetary recovery in view of the fact that the complaint was filed on August 9, 1977, and complainants discontinued business at Houston on November 1, 1975.[2]

The decision of complainants that further prosecution of their complaint would be uneconomical and inconvenient should be respected. No doctrine of law of which I am aware requires a complainant to litigate against his will and economic interests. Furthermore, in view of the Commission's decision in the *Perry* case, cited below, should the complainants ever wish to resume business at the Port of Houston, they will not suffer any disadvantage because of the previous practices which the Commission found lawful and ordered terminated and which the Port has discontinued. Accordingly, the complaint is dismissed.[3]

(S) NORMAN D. KLINE
Administrative Law Judge

June 15, 1978

[2] Reparation would be awardable, if at all, only during the period August 9, 1975, through August 9, 1977, 46 U.S.C. 821. Since complainants terminated their business at Houston on November 1, 1975, there would be less than three months' time in which damages could be computed (August 9, 1975 through November 1, 1975).

[3] The present complaint is one of four similar complaints filed by crane operators at the Port of Houston, all alleging that they suffered financial injury because of alleged violations of the Shipping Act on the pert of the respondent Port. The first of these complaints was that in Docket No. 75-51, *Perry's Crane Service, Inc. v. Port of Houston Authority*, on September 28, 1976, I issued an Initial Decision finding violations of sections 16 First and 17 of the Act and ordered respondent to terminate certain preferential practices in hiring of cranes. I found insufficient proof of monetary damages and recommended that the case be remanded on the issue of reparation (damages) to give complainant a second chance to establish his measure of damages and further encouraged settlement under Commission rule 252, 46 CFR 502.252. On February 25, 1977, the Commission affirmed my findings and recommendations with certain modifications. See Partial Adoption of Initial Decision. Three similar complaints were filed subsequent to my Initial Decision seeking reparation, namely, Docket No. 76-57, *H & H Cranes, Inc. v. Port of Houston Authority*, No. 77-41 (the present case), and No. 77-42, *P & M Cranes, Inc. v. Port of Houston Authority*. Virtually no progress toward settlement or trial was made in any of these cases following the Commission decision in February, 1977, despite my rulings and instructions, apparently because of the inability of complainants' original counsel to proceed expeditiously. New counsel has, however, replaced counsel for complainants in Nos. 75-51, 76-57, and 77-42, and hopefully these cases can now move along to conclusion with minimal delay.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-45

HAWAII MEAT COMPANY, LIMITED

v.

MATSON NAVIGATION COMPANY

ORDER OF ADOPTION OF INITIAL DECISION

July 25, 1978

This proceeding comes before the Commission on exception to the Initial Decision of Administrative Law Judge Stanley M. Levy in which he determined that Matson Navigation Company's (Matson) increase in rates for the carriage of cattle feed did not subject Hawaii Meat Company, Limited (Hawaii), to any undue or unreasonable prejudice or disadvantage; that the increases were just and reasonable; and that Matson did not intend to drive out or injure a competitive carrier by decreasing and subsequently increasing its rates.

Hawaii now contends that the Initial Decision fails to indicate that Matson had the burden of proving that the changes from its prior rates were just and reasonable. The instant dispute is a complaint proceeding brought under section 22 of the Shipping Act, 1916, and not a Commission instituted investigation. Although the rate under investigation is a new rate, section 502.155 of the Commission's Rules places the burden of proof upon a section 22 Complainant. *Department of Defense v. Matson Navigation Company,* 17 S.R.R. 671, 675 (1977). Moreover, upon a careful consideration of the record, we find that the evidence fully supports the findings and conclusions as set forth in the Initial Decision without regard to which party had the burden of proof. In view of such evidence the issue of which party has the burden of proof becomes irrelevant. *Rates of Pacific Northwest Elevators Association,* 11 F.M.C. 369, 378 (1968).

Other exceptions raised by Hawaii have been carefully reviewed and found to constitute contentions already argued before the Presiding Officer and properly disposed of by him.

Accordingly, the Initial Decision issued in this proceeding is hereby adopted and made a part hereof.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77–45

HAWAII MEAT COMPANY, LIMITED

v.

MATSON NAVIGATION COMPANY

Adopted July 25, 1978

Complaint seeking reparation for alleged violations of sections 16, 18 and 19 of the Shipping Act, 1916, dismissed.

Increases in rates for carriage of animal feed did not subject shipper to any undue or unreasonable prejudice or disadvantage.

The increase in rates for animal feed were just and reasonable.

The increase in rates for animal feed were not intended to drive out or injure a competitive carrier.

Arthur B. Reinwald for complainant, Hawaii Meat Company, Limited.
David F. Anderson and *Peter B. Wilson* for respondent, Matson Navigation Company.

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

On August 8, 1978, Hawaii Meat Company, Limited (Hawaii Meat), filed the complaint in this proceeding seeking reparations in the amount of $54,500 for 1976 and an undetermined amount for 1977. The action for reparation based upon rate increases effective April 7, 1976, is Matson tariff no. 14–D. Hawaii Meat alleges that the increase in rates for carriage for animal feed by 15% is unlawful, unjust and unreasonable, in light of the fact that the overall rate increase was 5.4% and the rates for carriage of a competing product, chilled meat, were not increased at all.

Matson filed two subsequent rate increases by supplements to tariff no. 14–E, being 3.5% effective August 2, 1976, and 2% effective July 31, 1977. To the extent these increases were based upon the 15% increase in tariff no. 14–D, Hawaii Meat seeks reparation.

The complaint was served on Matson on August 22, 1977, and on August 28, 1977, it was noticed in the *Federal Register*. On September 6, 1977, Matson served its Answer to Complaint denying all liability. Pursuant to notice of the Presiding Administrative Law Judge, served November 4, 1977, oral hearing was held January 16, 1978, in Honolulu, Hawaii. Twenty-one exhibits were admitted in evidence as well as certain portions of the record in Docket No. 75–57 incorporated by reference.

[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).

FINDINGS OF FACT

(1) In 1965, switching from grass feeding, Hawaii Meat opened its feed lot. Basically the new operation withdrew from marketing fully grown grass-fed beef; and it introduced the delivery of small yearling calves to the feed lot, to be fattened on imported grains, thus producing beef to grade U.S. Choice, in competition with what was being imported from the mainland U.S. (Ex. 1)

(2) The wholesale price for Hawaiian produced meat has been and continues to be that prevailing in the West Coast market plus the cost of transportation to Hawaii. (Ex. 1, p. 2)

(3) Most of the meat produced in Hawaii is pen fed. Approximately two tons of imported animal feed are required to raise a beef calf to butcher block weight and maturity. (Ex. 1)

(4) In 1965, when feed lot operations started, Matson delivered feed at $136 less than fully allocated cost per container. (Ex. 11)

(5) Approximately 75 percent of the animal feed consumed in Hawaii is imported; some carried by Matson, some by barge-operators. (Ex. 2; Ex. 5, p. 12)

(6) In 1976, Matson carried 22,957 tons of feed; barges 14,297 tons. (Ex. 2, p. 1)

(7) In the first ten months of 1977, Matson carried 11,915 tons; barges 16,212 tons. (Ex. 2, p. 1)

(8) In 1976, Matson carried 46 percent of Hawaii Meat's feed requirements; in the first ten months of 1977, 29.6 percent. (Ex. 2, p. 1)

(9) Some of Hawaii's ranchers operated at losses 1975-1977. The higher animal feed shipping rates since 1976 contribute to such losses. (Ex. 1, pp. 35)

(10) In October 1975, Matson filed with the Commission revisions of several of its tariffs, embodied in tariff no. 14–D, resulting in rate increases on 356 commodity items for which Matson published rates in the U. S. Pacific Coast/Hawaii trade. The increases vary from commodity to commodity, with an overall increase of Matson's gross revenues by approximately 5.4%. Some items were increased by up to 15% and some items were not increased at all. (See, Order of Suspension and Investigation, December 3, 1975, Docket No. 75–57; Ex. 1, pp. 3, 5, 7; Ex. 5, p. 12; Ex. 7, p. 6)

(11) Most of the revisions were to become effective December 8, 1975, and the remainder on January 2, 1976. By the Order of Investigation and Suspension, filed in Docket No. 75–57 on December 3, 1975, the effective dates were suspended until April 8 and May 2, 1976. (See, Order of Suspension, etc., *Ibid.*)

(12) Matson's new tariff no. 14–D increased the rates for carrying animal feed (item 1030) by 15%. Although many reefer cargo rates were increased, tariff no. 14–D did not increase chilled meat reefer cargo (items 2015, 2075, 2077 and 2080). (Docket No. 75–57; Ex. 1, pp. 3, 5, 7; Ex. 5, p. 12)

(13) Animal feed produces the lowest minimum containerload revenue in Matson's tariff no. 14–D, even after the increase by 15 percent. (Docket No. 75–57; Ex. 1, p. 2)

(14) Matson filed a supplement to tariff no. 14–G, increasing all rates by 3.5 percent, effective August 2, 1976. Those rates became effective without suspension.

Matson filed another supplement to tariff no. 14-E, increasing all rates 2 percent, effective July 31, 1977. Those rates became effective without suspension. (Ex. 7, p. 6)

(15) As a consequence of the subsequent increases in 1976 and 1977 revenue per container from the carriage of refrigerated cargoes increased from $1,039 during the first 7 months of 1977, to $1,210 for the three-month period ending November 30, 1977. For refrigerated meat items, comparable figures were $1,078 and $1,217. (Ex. 7, p. 7)

(16) Matson reduced the rates for shipping animal feed from $516 per 20 ton container ($25.80 per ton) in March 1964, to $398 per container ($19.90 per ton). Those rates remained unaltered until March 1971. It increased the rates to $500 per container in April 1972, but again reduced the rates to $400 per container in August 1972, because of what its competitors, United States Lines and Seatrain, were charging. Its rates did not rise to above $500 per container until 1975, after its major competitor Seatrain ceased operations in the trade. (Exs. 9, 11, 19 (Req. 8), 20 (Int. 8, 9); Tr. 33, 34, 42, 43)

(17) When Matson filed the tariff changes in 1975 it was aware that the airline industry had emerged as a real competitor to Matson in the carriage of among other commodities, meat items. Matson had been unable to determine the volume of fresh meat products that were being carried by the airlines because it had no definitive source for the data but found some evidence of air carriage from shipper interviews. Because of the inherent susceptibility of meat products to the air transportation mode which combined with Matson's tonnage decline during the middle months of 1975 and the narrowing margin between ocean and air rates for meat products led Matson to conclude that increasing amounts of meat products were moving by air.

(18) In 1975, Matson's carriage under meat items was down approximately 30 percent versus similar periods in 1974. Matson's meat product rates had increased since 1967 while air rates had been reduced by approximately 60 percent during the same eight year period. A number of meat shippers indicated to Matson's Sales Department that they were shipping by air to some extent, particularly those shippers whose meat shipments originated inland. (Ex. 20, pp. 2-3 (Interrog. 3))

(19) Airline competition on reefers westbound in 1975 amounted to the equivalent of approximately 550 containers a year as against approximately 13,845 reefer containers carried by Matson. (Docket No. 75-57, Tr. 426-427)

(20) With one exception, early in 1964, animal feed has never been carried at fully allocated cost. (Tr. 45; Ex. 11)

(21) For the period 1964 through April 1976, the approximate ratio of Matson's revenues for animal feed to fully allocated costs averaged approximately 80 percent. (Tr. 43-45; Ex. 11)

(22) In April 1976, the ratio of revenues to fully allocated cost increased to approximately 87 percent. (Tr. 43-45; Ex. 11)

(23) If instead of the 15 percent increase, a 5.4 percent increase had been imposed, the ratio of revenue to fully allocated cost would have been about 80 percent—the ratio for the 1964-1976 period. (Tr. 44)

(24) The rate increases since April 1976, have increased the ratio of revenues to cost to 86 percent. (Tr. 60–61; Exs. 11, 17)

(25) From 1969 to 1976, the price of feed per 100 pounds increased in Hawaii from $4.43 to $8.95 and the ocean freight rate as a percentage of price decreased from 22.5 percent to 17.1 percent. (Ex. 7, p. 4)

(26) With one exception, early in 1964, Matson's animal feed rates have been less than fully allocated costs of shipping containers. From 1965–1975, the charges for feed containers averaged about 77.7% of fully allocated costs. (Ex. 11, Tr. 44–45)

(27) Matson calculates that for 1976, the fully allocated cost of a container of animal feed was $752 (Exs. 16, 17; Tr. 60–62). It also calculated that revenues for that period were an average of $654 per container. (Exs. 16, 17; Tr. 61) It thus claims a negative difference of about $98 per container (Ex. 16). After the 15 percent rate increase the revenue per container was about 87% of fully allocated cost.

(28) In 1972, Matson reduced its rates from $25 to $20 per ton to meet competition. (Exs. 9, 11; Tr. 30–34) Its rates in early 1973 were 62% of the $32.24 being charged in 1977. Its fully allocated cost of $516 in 1973 was 69% of the $752 in 1977. If the $20 per ton had been increased the same percentages that the costs had increased, then the rates at the beginning of 1977 would have been $28.99 per ton. (Ex. 12; Tr. 20–23) A 5.4% rate increase in April 1975 and a 3.5% increase in August 1976 from the $26.56 rate in effect at the beginning of 1975 would have produced virtually the same figure ($28.98). (Ex. 11 and calculate)

(29) Even if the rates for animal feed are 80% or less of fully allocated cost, Matson's revenue will exceed direct incremental cost by several hundred dollars. The direct costs for each container of animal feed are $150. Indirect costs are $466. Overhead and return are $137. (Tr. 60–62) Revenues of $650 per container were approximately $102 less than fully allocated costs in 1976. (Ex. 21).

(30) Matson's cost of carrying a container of feed to Hawaii in 1976 was $752.18 and its revenues were $653.55. (Ex. 16)

(31) The fully allocated costs for refrigerated containers are calculated at $964 per container plus $68 for allocation from unrecovered cost pool. (Ex. 18) Direct costs of carrying a container of chilled meat are $212 compared to $150 for animal feed. Overhead and indirect costs total $752. (Ex. 21)

(32) Matson's cost of carrying a container of chilled meat to Hawaii in 1976 was $968.21 excluding the allocation from the unrecovered cost pool and its revenues were $1,033.04. (Ex. 16)

(33) A container of feed has a value of about $3,580, a container of chilled meat about $25,000. (Tr. 4)

(34) While costs of carriage for feed is less, Matson under its tariff loses money on each container whereas chilled meat costing more to carry nevertheless generates a profit per container under Matson's tariff. (Ex. 16)

(35) For the five year period 1972–1976, Matson carried the following tons of chilled meat:

1972	23,152	
1973	33,756	
1974	44,665	
1975	43,801	
1976	46,134	(Exhibit 14)

(36) During the same period, the number of tons of animal feed carried by Matson were:

1972	40,719	
1973	56,888	
1974	90,051	
1975	107,256	
1976	107,800	
1977	95,792	(Ex. 7, p. 5; Ex. 19 (Req. 1); Ex. 20 (Int. 5))

Following the 1976 rate increases, the tonnage of feed dropped over 11%. (Ex. 7, p. 5)

(37) If Matson had merely raised the animal feed rates by 5.4%, Hawaii Meat would have paid $71,238 less for the animal feed than it did under the 15% increase, for the period April 2, 1976, through October 31, 1977.

RATE MAKING FACTORS

What constitutes a just and reasonable rate is determined by a number of interdependent factors, among which are value of service, necessity, cost of service, capacity, volume and competition.[2] In this case complainant stresses the value of the commodity as controlling. Its witnesses set forth that Hawaii meat competes with chilled beef imported from the West Coast. The wholesale price of Hawaii meat is based upon the West Coast price plus the cost of transportation. They claim that during the years 1975 through 1977 most Hawaii ranchers received less for their beef than the cost of raising and feeding. The 15% rate increase for animal feed was especially hard. Since the price for importing chilled meat was not increased, Hawaii's ranchers were not able to increase prices on account of higher transportation costs for animal feed. These costs merely added to the losses.

Respondent stresses the cost of service in contending that the increase in the rate of animal feed is not unreasonable since it still remains the lowest rated item in the tariff and even with the increase it fails to produce revenue equal to fully allocated costs.[3]

For the period 1964 through April 1976, the approximate ratio of Matson's revenues for animal feed to fully allocated costs averaged approximately 80 percent. In April 1976, the ratio of revenues to fully allocated cost increased to approximately 87 percent.[4] If instead of the 15 percent increase, a 5.4 percent increase had been imposed the ratio of revenue to fully allocated cost would have been about 80 percent—the ratio for the 1964–1976 period.[5]

[2] *Chicago Board of Trade v. United States*, 223 F. 2d 348, 351 (D.C. Cir. 1955).

[3] Docket No. 75–57, Exhibit 1, p 2.

[4] Tr. 43–45; Exhibit 11.

[5] Tr. 44.

The rate increases since April 1976 have increased the ratio of revenues to cost to 86 percent.[6]

With one exception, early in 1964, animal feed has never been carried at fully allocated cost.[7]

In 1965 the meat industry in Hawaii made the capital investment in converting primarily from range feeding to pen feeding. Matson's rate for feed in effect from May 1962 through March 1965 was $25.80 per ton.[8]

Hawaii Meat contends that in 1965 when it started feed lot operations Matson delivered feed at a loss of $136 less than fully allocated cost per container. Since it could take more than $1.63 today to equal the value of a dollar in 1965 to maintain the same economic dollar relationship today Matson receipts per container would have to be $222 less than fully allocated costs. Since Matson established a loss of only $98.63 in 1976 Hawaii Meat says it is obviously overcharging for delivery of animal feed.[9]

Whatever the accuracy of Hawaii Meat's analysis of the decline in value of the dollar there is no validity to the proposition that having taken a loss that such loss is the bench mark which thereafter controls; that failure of the carrier to maintain such loss is prejudicial to the shipper equal to the degree that the loss to the carrier is diminished, either in actual or devalued dollars.

From August 1972 until May 1973 the rate on animal feed was $20.00 per ton. In May 1973, it was increased to $22.50 per ton and the current rate is $32.24 per 2,000 pounds.

The rate prior to May 1973 thus was 62 percent of the current rate. Fully allocated costs prior to May 1973 were $516.57, 69 percent of current cost of $752.18[12] If rates had increased proportionate to the slower rate of increase in costs the current rate would be only $28.986 instead of $32.24.[13] In other words rates have gone up disproportionately higher than costs have gone up.[14]

For a period of almost ten years during the 1960's Matson took no general rate increase.[15] The relationship that existed then between different commodity rates is at the heart of the dispute here. As Matson in the early 1970's began increasing rates based on a percentage of the previous rate the dollar differential between the higher and lower rated items began to widen.[16] Matson then determined to narrow the gap to a point closer to the early dollar differentials by raising rates for lower rated items a greater percentage than for higher rated items.[17]

Hawaii Meat believes the historic percentage differential between higher and

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[6] Revenue $653; fully allocated cost $752. See Tr. 60–61. Exhibits 11, 17.

[7] Tr. 45; Exhibit 11.

[8] Exhibit 9. The $25.80 rate per ton was not exceeded until April 1975, approximately 13 years after its publication.

[9] Hawaii Meat opening brief, pp. 26–27; reply brief, p. 3.

[10] Tr. 20–21; Exhibit 9.

[11] Tr. 23, Exhibit 12.

[12] *Ibid.*

[13] *Ibid.*

[14] Tr. 24.

[15] Docket No. 75–57, Tr. 83–84.

[16] *Ibid.*, Tr. 91.

[17] Fifteen percent versus an average increase of 5.4 percent. See Docket No. 75–57, Exhibit 1, p. 2.

lower rated items ought to be retained rather than the dollar differential. Out of these opposing rate making concepts this proceeding has been born.

It is generally true that Matson's cost of carrying containers is approximately the same, regardless of the commodity carried. If increases are assessed on a percentage basis the higher rated items assume a greater burden. Since 1970 this has generally happened.[18] Lower rated items may be carried below fully allocated costs. By raising such rates at a higher percentage it is an attempt to reach fully allocated costs for such items.[19]

Hawaii Meat contends that in raising the animal feed rate in 1976 in an effort to maintain and restore the dollar difference between animal feed container rates and the rates for higher priced containers Matson did not consider the decreasing value of the dollar difference and therefore Matson did not maintain comparable economic relationships.

Hawaii Meat says that in the inflationary 1970's, maintenance of a previous nominal dollar relationship is an insufficient basis upon which a disproportionate rate increase can be found to be just and reasonable.

In 1971, with a rate of $398 per 20 ton container, Matson's fully allocated cost was $500. The difference was $102. Prior to the 1975 rate increase the difference between feed rate of $531 in revenues to an allocated cost of $697 was $166. In 1976, after tariff no. 14-D became effective, the rate per 20 ton container was $610, which was $87 less than the fully allocated cost of $697.[20]

The cost of living in 1971 is taken to be 118.9; in 1976—162.8 [based on 100 in 1969].[21] On such basis the ratio of cost of living 1971-1976 is 1.369. The difference between revenue and cost in 1975 was $166. The ratio of such difference to the difference in 1971 of $102 is 1.627; the ratio of the difference between revenues and cost in 1976 of $87 after the increase compared to the $102 difference in 1971 was .853; the difference between revenue and cost if the rate had been increased only the average 5.4 percent would have been $137; as compared to the 1971 loss of $102 this ratio is 1.343.[22]

Thus, Hawaii Meat argues that tracking the cost of living rate of 1.369 an increase in rates of 5.4 percent would have most closely kept revenues at approximately the same disparate ratio below cost as existed in 1971. To narrow the spread in 1976 by increasing the rate on animal feed by 15 percent it claims narrowed the difference to a disproportionately greater amount than the cost of living index warranted.

The weakness in Hawaii Meat's analysis is that by the same rationale it is apparent that rates in 1971 were too low compared to the cost of living index—that is, the negative spread of 1.627 between revenues and costs was greater than the cost of living index then warranted.

[18] Docket No. 75-57, Tr. 238; Exhibit 1, p. 2. For example: if one started out with an original proposition of commodity "A" at $100; and commodity "B" at $200; and then were to double the rates for all the commodities, you would have $200 and $400; whereas before there was a gap of $100; between "A" and "B," there is now a gap of $200 between "A" and "B," and that Matson decided that if such were to occur a gap of $100 was more appropriate than the $200 gap, so they would raise the one commodity more to maintain a gap, not of $200, but of $100.

[19] Docket No. 75-57, Tr. 239.

[20] Exhibit 13.

[21] Exhibit 13.

[22] *Ibid.*

A further weakness is that there is no basis for assuming that cost of living ratios are the bench mark for determining whether rates—in 1971, 1975 or now—are just and reasonable. To do so would be to perpetuate possible error—too high or too low.

Although Hawaii Meat's economic analysis focuses on holding the rate increase to a comparable increase in the cost of living yet the increase of the feed rate has not increased as much as the price of feed and the rate of carriage for feed as a percentage of the price of feed has in fact decreased over the years.[23] During the period 1969 through 1976, there was an approximate doubling of the price of feed per 100 pounds[24] in Hawaii, and during that time Matson's rate as a percentage of price decreased from 22.5 percent to 17.1 percent.[25] Thus the shipping burden as a percentage of value of the commodity declined approximately 24 percent. Even with the imposition of the 15 percent increase, Matson's rate as a percentage of price is below that which existed in 1973. The tragic economic plight of Hawaii's ranchers is attributable not to the increase in the cost of feed transportation but primarily to the increase in the cost of the feed itself.

Hawaii Meat contends that the increase in animal feed rates without a corresponding increase in chilled meat rates performs a disservice to Hawaii agriculture; it jeopardizes the highly capitalized pen feeding operations.

Hawaii Meat's witness Mr. Bennett testified that "We firmly believe that there is a service responsibility [by Matson] to bring in basic products at rates which allow [H]awaiian agriculture to compete with mainland counterparts."[26]

Assuming there is such a "responsibility" on the part of Matson, to the extent that Matson carries feed at a loss[27] it subsidizes and meets its responsibility to Hawaiian agriculture. To the extent that the Hawaii meat industry had the benefit of the low rate for those years prior to the increase, so Matson and other shippers had the detriment.

In 1972 approximately 30,000 tons of locally produced meat was marketed in Hawaii. In that year Matson carried approximately 23,000 tons of meat and 41,000 tons of feed. By 1975 Matson carried approximately 44,000 tons of meat and had increased its feed carriage to approximately 107,000 tons. Despite this increase in feed carriage locally produced meat had declined to approximately 25,000 tons.[28] The increased carriage of feed had apparently not stemmed the decline by 1975 of the Hawaiian meat industry *vis-a-vis* mainland meat. In 1976 Matson carried approximately 46,000 tons of meat which competed with approximately 30,000 tons of Hawaiian meat. The local industry was doing a bit better, approximating its 1972 production. In that year, after the increase in the rate for feed, Matson's carriage of feed declined about 11 percent.[29]

Mr. Bennett testified that "We [i.e., Hawaii Meat] are just beginning to develop barge shipments for our feed requirements. We expect that in the future

[23] Exhibit 7, pp. 3–4.

[24] 1969—$4.43; 1976—$8.95.

[25] Exhibit 7, p. 4.

[26] Exhibit 1, p. 6.

[27] $495,023.97 in 1976. Exhibit 16.

[28] Exhibit 14. In these years feed lot beef has accounted for between approximately 60 and 66 percent of local production.

[29] Tr. 37; Exhibit 14.

Matson will lose a substantial part of its feed carriage to barge operations."[30]

Mr. Nishiyama, testifying on behalf of Hawaii Meat, stated [31] that in 1976 Hawaii Meat received 22,957 tons of feed shipped by Matson, 14,297 tons hauled by barge and 12,402 tons produced in Hawaii. Thus approximately 46 percent of Hawaii Meat's feed requirements were carried by Matson in 1976.[32] In the first ten months of 1977, Matson carried 11,915 tons, 16,212 tons imported by barge and 12,036 tons purchased locally. Thus, approximately 29.6 percent of Hawaii Meat's requirements were carried by Matson in that period.[33]

Mr. Nishiyama, in corroboration of Mr. Bennett's testimony regarding the future of feed carriage by barge operations further stated that "we expect that it [i.e., the barge carrier] will be importing for our account a greater portion of our total commodities purchased."[34]

The Commission in *Reduced Rates–Atlantic Coast Ports to Puerto Rico*, 9 F.M.C. 147 (1965), recognized that some commodities must, because of the public interest, bear more than their full share of allocated costs in order that other commodities might bear less. That some high-valued commodities should share some of the costs of the movement of basic commodities and that such rate practices are necessary for the overall growth and health of certain economies is good policy. [In that case, Puerto Rico]. Thus the necessity of raising some rate to facilitate the carriage of commodities essential to the welfare of the community is unquestionably in the public interest. In this proceeding, however, there is no present danger of loss of the carriage of any basic commodity since the movement of the item involved is being facilitated by barge movements. Whatever the impact Matson may have on Hawaii Meat's cost of production it can be seen that Hawaii Meat is not primarily dependent on Matson. To equate the rate increase with economic survival is not established by dependency on Matson—or lack thereof—of the magnitude reflected by Mr. Nishiyama's testimony. The evidence is to the effect that barges are moving on ever increasing volume and percentage of the commodity. Barge movements combined with locally available feed reduce any necessity of requiring other commodities or respondent to subsidize to a greater degree the carriage for them of animal feed than is presently being provided.

If Hawaiian raised beef must meet the price competition posed by chilled beef shipped from the mainland it may not survive as an industry. The cost of animal feed shipped from the mainland may be an insurmountable barrier. But transportation charges are only a fraction of the cost of feed[35] and to the extent that transportation charges are deemed by Hawaii Meat to be an insufficient subsidy that is more than can be said of the cost of feed itself.[36] Matson should not be required single handedly to sustain the industry. If public policy requires

[30] Exhibit 1, pp. 6–7.

[31] Exhibit 2, p. 1.

[32] *Ibid.*

[33] *Ibid.*

[34] Exhibit 2, p. 1.

[35] Exhibit 7, p. 4.

[36] There is no evidence and no reason to believe that the animal feed producers have ever sold feed at less than the cost of production.

survival of Hawaiian produced beef, then public means should be explored as a possibility thereof.

Profitability of a shipper's business is not the determinent of the justness and reasonableness of a rate.

This Commission has consistently refused to permit the "profitability" of a shipper's business to determine the reasonableness of a carrier's rates. The reason given for this rule is that ocean rates are but a single factor affecting "profitability" which is also affected by a narrowing market, increased cost of production, over production, and many other considerations. *Reduced Rates on Flour from Pacific Coast Ports to Hawaii,* 10 F.M.C. 145, 152.[37]

The simple irreducible fact in this proceeding is that despite the rate increases for animal feed Matson still carries animal feed at a loss. There is no basis, therefore, for finding that a rate increase which is insufficient to recover fully allocated costs is unlawful, unjust and unreasonable as alleged. Hawaii Meat as a shipper has been subsidized by other shippers. It now contends that it has a right to be subsidized and that it is unlawful, unjust and unreasonable to reduce that subsidy. I cannot find that by any interpretation of the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, that other shippers are required to subsidize Hawaii Meat or that Matson is required to carry for Hawaii Meat at a loss.

Profits or rates of return may be found to be excessive and therefore unlawful, unjust or unreasonable. However, this concept of public utility regulation does not extend so far as to find an action by a carrier to reduce loss results in an unlawful, unjust or unreasonable act as to be in violation of sections 16, 18, and 19 of the Shipping Act, 1916.

The complainant seeks a ruling that if the value of the service is so low that at compensatory rates the industry cannot compete with mainland beef it must be allowed a lower rate. The argument would have greater validity if the survival and competition would redound to the benefit of the Hawaiian consumer. The marketing history of Hawaii Meat, as established by the testimony of Mr. Bennett, that the "wholesale price of such meat [i.e., feed lot produced in Hawaii] has been and continues to be that prevailing in the west coast market [for "block-ready beef] plus the cost of transportation to Hawaii"[38] indicates that the Hawaiian consumer will not necessarily be benefitted by any reduction in the rate for animal feed. The Hawaiian consumer pays the price prevailing on the west coast for "block-ready" beef plus cost of transportation. If rates for feed are reduced the Hawaiian consumer will still pay the same since Hawaii Meat's contention is that reduced feed rates will enable it to remain in business and thus be able to continue to market its product.

The shipper is seeking, as a matter of law, to have the Shipping Act, 1916, require that a carrier must subsidize the competitive position of the shipper. I can find no basis for finding that the Shipping Act is to be so construed.[39] If public policy is to establish tariff import protection to Hawaiian producers against United States mainland producers, and if constitutional, it must be done by

[37] *See also Eastbound Intercoastal Lumber,* 1 U.S.S.M.C. 608, 620 (1936); *Increased Rates Alaska Steamship Company,* 3 F.M.B. 632 638 (1951); *Interstate Commerce Commission v. Diffenbaugh,* 222 U.S. 42, 46 (1911).

[38] Exhibit 1, p. 2; also p. 4, "since the Hawaii wholesale price is tied to the Los Angeles price plus transportation, the ranchers are not able to increase the wholesale price to compensate for increased shipping costs; they have to swallow them."

[39] "Ocean rates are but a single factor affecting "profitability" which is also affected by . . . increased cost of production, and many other considerations." *Reduced Rates on Flour-Pacific Coast Perts to Hawaii,* 10 F.M.C. 145, 152 (1966).

legislation clearly establishing such public policy. It is not yet embodied in the Shipping Act, 1916.

The concept of just and reasonable rates does not permit on this record a finding that, in order to preclude losses to a shipper, a rate which is at a level below fully distributed costs of the carrier is prejudicial and discriminatory and unlawful.

In any event, the lowest rated commodity in a tariff, carried at a loss, cannot be and is not found to be so unjust and unreasonable a rate as to be unlawful and support a claim for reparation.

Complainant has alleged violations of sections 16, 18 and 19 of the Shipping Act, 1916.

Section 16 provides in pertinent part:

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly: First. To make or give any undue or unreasonable preference or advantage or any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 18 provides in pertinent part:

That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charters, classifications, and tariffs.

Section 19 provides:

That whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the board finds that such increase rests upon changed conditions other than the elimination of said competition.

SECTION 19

Section 19 makes it unlawful to reduce rates below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water.

The evidence in this case establishes that in 1972, Matson reduced the filed rate for animal feed from $25.00 to $20.00 per weight ton.[40] The evidence is that in 1972, Matson and its two competitors in the trade at that time, United States Lines, Inc., and Seatrain Lines, California ("Seatrain"), had rate levels for different size containers proportionate to the cubic capacity of those containers.[41] Effective August 18, 1972, Seatrain reduced its rates. Effective September 9, 1972, Matson reduced its rates to the same rate that Seatrain had chosen.

Matson's witness, Mr. Kane, testified that the decrease was necessary in order to meet a competitor's rates. Matson did not wish to go below the Seatrain rate, but rather, Matson wanted to be on an equal competitive basis with Seatrain.[42] Mr. Kane testified that he was not aware that Matson's volume of feed carried increased substantially after the rate reduction.

Hawaii Meat presented no evidence to support its allegation of section 19 violation that the August 1972 rate reduction was intended to drive a competitor

[40] Exhibit 9.

[41] Tr. 31–33; Docket No. 75–57, Tr. 121.

[42] Tr. 32–34.

out of business. The only evidence in this proceeding relating to that reduction shows that Matson did no more than meet a competitor's rate.

The Commission in the case of *Matson Navigation Company-Van Measurements/Heavy Cargo Rules*, 7 F.M.C. 239 (1962), held that an allegation of a section 19 violation failed where the record established only that one competitor met another's rate.

In that case Matson changed its tariff rule to conform to a change previously made by its competitor. Even if this charge caused rates to be reduced below a fair and remunerative basis the Commission held that section 19 was not violated where the purpose of the reduction is to meet competition. Subsequently, the competitor ceased operation and Matson thereafter restored its original tariff rule. This is no violation of section 19.

The facts in this proceeding, insofar as they relate to alleged violations of section 19, conform to those in the *Van Measurements/Heavy Cargo Rules* case. In conformity with the Commission's ruling therein, it is found and concluded that Matson in the instant case has not violated section 19 of the Shipping Act, 1916.

SECTION 16

In this case Hawaii Meat contends Matson violated section 16 in that Matson increased the animal feed rate by 15 percent in April 1976, and did not increase the chilled meat rate.

Section 16[43] proclaims, in essence, that it shall be unlawful to give any undue preference to any traffic or to subject any traffic to undue or unreasonable prejudice or disadvantage.

To warrant the finding of undue preference and prejudice, the evidence should disclose (1) that a difference in the level of the rates exists in favor of the preferred rate, (2) that the difference in rates is not justified by transportation conditions, (3) that there is a carrier which is the common source of the rate prejudice and which participates in the prejudiced and preferred traffic, and (4) that the prejudiced parties suffer actual or potential injury.[44]

The first element in a prejudice or preference case is showing that the preferred shipper has a lower rate on a competitive commodity. In this case the complaint must fail because there is not a rate differential existing in favor of the commodity alleged to be preferred, i.e., chilled beef. Rather, the rate differential exists in favor of the commodity alleged to be prejudiced, i.e., animal feed which has the lowest minimum container load charge in respondent's tariff.

Another element to be considered is whether the difference in rates is justified by transportation conditions.

Presumptively, it can be argued that any time a tariff item is changed it gives a

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[43] Section 16 provides in pertinent part:

> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly; First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[44] *Fresh Meats from Illinois, Indiana, Kentucky, Ohio and Missouri to Points in Florida*, 318 I.C.C. 5 (1962), and in *Classification of Corrugated Boxes*, 1970 Fed. Carr. Cases 36389 (1970).

preference or advantage to or prejudices or disadvantages every other item in the tariff not similarly changed. But any presumption that such act is unlawful remains valid only if no reasonable basis exists for the tariff change. In this proceeding the evidence establishes valid reasons for imposing different percentage increases on commodities. There is at the very least a rebuttable presumption that a rate which even after an increase continues to recover less than the carrier's cost and which produces the lowest minimum containerload revenue in the carrier's tariff does not unduly or unreasonably prejudice or disadvantage such commodity as against other commodities which produce revenues in excess of cost, subsidize less than cost carriage, and contribute to fair return.

In 1976, Matson carried 5019 containers of feed at a loss of $98.63 per container,[45] or a total loss of $495,023.97. If the feed rate had not been increased by 15 percent in April 1976, losses presumably would have been much greater. Even after the 15 percent increase, the minimum containerload charge for the carriage of feed was $85.00 below Matson's cost.

Hawaii Meat has complained of undue prejudice because Matson held down the rate on chilled beef at the same time that it increased the rate on animal feed 15 percent.

Matson contends that when it filed the tariff changes it was convinced that the airline industry had emerged as a real competitor to Matson in the carriage of among other commodities, meat items. Matson had been unable to determine the volume of fresh meat products that were being carried by the airlines because it had no reliable source for the data. Matson was aware that its meat product rates had increased since 1967 while air rates had been reduced by approximately 60 percent during the same eight year period. A number of meat shippers indicated to Matson's Sales Department that they were shipping by air to some extent, particularly those shippers whose meat shipments originated inland.[46] While Matson admits it carries substantially more westbound reefer cargo than is carried by air, approximately 13,845 containers annually versus an estimated approximately 550 equivalent containers, nevertheless, it believed it could not ignore the competition posed by air carriers for reefer cargo.[47] Supporting this view was the fact that in 1975, Matson's carriage of chilled beef declined slightly from the previous year, after having nearly doubled in three years.[48]

Subsequent to the October 1975 filing, as the air freight situation stabilized, Matson filed across-the-board increases which became effective in August 1976 and July 1977. Additionally on July 31, 1977, changes in the chilled meat items were made which require the shipper to achieve a weight of 30,000 pounds in each container to obtain the lowest possible per pound rate. For the three-month period ending November 30, 1977, Matson's revenue from the carriage of chilled meats increased from $1,078 to $1,217 per container, or 12.9 percent, while feed rates were increased by 2 percent.[49]

Costs of carrying feed are approximately $200 less than costs for carriage of

[45] Exhibit 16.

[46] Exhibit 20, pp. 2–3.

[47] Docket No. 75-57, Tr. 426–427.

[48] Exhibit 19, p. 3.

[49] Exhibit 7, pp. 6–7.

chilled meats. The issue is whether Matson is unduly prejudicing feed cargoes by raising rates 15 percent while holding down the rate for chilled meat cargoes, the alleged competitive cargo.

While costs of carriage for feed is less, Matson under its tariff loses money on each container[50] whereas chilled meat costing more to carry nevertheless generates a profit per container[51] under Matson's tariff. In essence, complainant would have Matson make up its losses by increasing rates on chilled beef to the benefit of Hawaiian ranchers and to the detriment of Hawaiian consumers. In the alternative, complainant would have Matson maintain the historical rate spread by holding down on feed; this to the detriment of Matson and to the benefit of Hawaiian ranchers. Under either approach other parties would suffer economic detriment in order that Hawaiian ranchers could benefit.

The final element in consideration of undue preference or prejudice is injury. There must be a showing of the character of the competition, i.e., of the preferred commodity, and of the effect of the rate relation of such competiton.[52] In this case the problem is magnified since the rate on the competitive product is not only higher but also it is not subsidized by other shippers. In other words, shippers of chilled beef are subsidizing the complaining competitive product.[53] This is an anomaly in considering who is being prejudiced or disadvantaged by the rate offered the competitive product. In any event, while there is testimony that some Hawaiian ranchers have suffered operating losses this is not necessarily conclusive that the injury has been created by the increase in the cost of transportation. During the period 1969 through 1976, there was an approximate doubling in the price of feed per 100 pounds in Hawaii, and during that time while Matson's rate on feed increased[54] yet its rate as a percentage of price decreased approximately 24 percent.[55] The economic problem besetting importers of feed is primarily that of the basic cost of the commodity rather than the transportation element.

In 1965, switching from grass feeding, Hawaii Meat opened its feed lot. Mr. Bennett, president of Hawaii Meat, testified[56] that basically the new operation withdrew from marketing fully grown grass-fed beef, in competition with lower priced imports; and it introduced the delivery of small yearling calves to the feed lot, to be fattened on imported grains, thus producing beef to grade U.S. Choice, in competition with what was being imported from the mainland U.S. Approximately two tons of imported animal feed are required to raise a beef calf to butcher block weight and maturity. The wholesale price for such meat has been and continues to be that prevailing in the West Coast market plus the cost of transportation to Hawaii. However, since the Hawaii wholesale price is tied to the Los Angeles price plus transportation, the ranchers are not able to increase

[50] In 1976, $98.63 per container: revenue $653.55; cost $752.18. Exhibit 16.

[51] In 1976, $68.83 per container before allocation of unrecovered costs: revenue $1.033.04; cost $968.21. Exhibit 16.

[52] *Johnson Picket Co. v. Dollar Steamship Lines, Inc.*, 1 U.S.S.B.B. 585, 587 (1936).

[53] Tr. 59–60.

[54] Exhibit 9.

[55] In 1969, the average price of feed per 100 pounds was $4.43; in 1976, $8.95 per 100 pounds. In 1969, the freight rate was $.995 per hundred pounds; 22.5% of price; in 1976, the freight rate was $1.527 per hundred pounds; 17.1% of price. Exhibit 7, pp. 3–4.

[56] Exhibit 1.

the wholesale price to compensate for increased shipping costs; they have to swallow them. Mr. Bennett also testified that because of the high cost of importing grain feed grains to Hawaii, the "freight rate differential" was necessary for survival of Hawaii's beef; other meat and egg producers. "Economic justification of the livestock industry in this State becomes very questionable with costs of importing foodstuffs rising faster than the costs of importing competitive meat products."[57]

Most important, and critical to this proceeding, he testified that "the costs of feed have been increasing to the point where in 1975 through 1977, most Hawaii ranchers received less for their beef than the cost of raising and feeding them."[58]

The importance of this economic fact is that transportation costs in 1976, even after the 15 percent rate increase, accounted for only approximately 14.6 percent of the landed cost of the feed.[59] The substantial increases in the base cost of feed plus other costs involved in raising and feeding cattle are overwhelmingly the reason that "in 1975 through 1977, most Hawaii ranchers received less for their beef than the cost of raising and feeding them" rather than the increase in transportation costs. Inflation is that insidious villain which lays us all low.

It is uncontroverted that Hawaiian agriculture faces many problems[60] and since "local production costs run appreciably higher than out of State (most often the case), freight costs offer only limited benefit for the local producer in offsetting higher production costs."[61] "Commodities in diversified agriculture have had a marked loss of market share in recent years due to adverse cost disadvantages which outweigh corresponding advantages of freshness, quality and location [i.e., shipping costs of mainland food products]."[62]

The magnitude of these problems far exceeds any which may be caused by Matson's rate increase on animal feed for Mr. Bennett testified that "Assuming that barging costs rose to the level sought by Matson, *and this appears to be the case considering the increases in the delivered costs of feed . . .*"[63] (Emphasis added.)

The economic evidence of cost of production in Hawaii as against cost of production on the mainland is sadly deficient in this proceeding. Presumably mainland producers have feed costs and, in addition, shipping costs to Hawaii. One may wonder, then, why the wholesale price in Hawaii is predicated on the mainland wholesale price plus costs of shipping rather than on the cost of Hawaiian produced beef. If Hawaiian produced beef is less expensive than mainland produced beef plus transportation costs the price should redound to the benefit of Hawaiian consumers rather than have the price pegged to the higher mainland beef costs, including transportation. If mainland beef, including feed costs, plus transportation costs can be sold at a price less than Hawaiian produced beef, including transportation feed costs, but absent other transportation cost,

[57] Exhibit 1, p. 5.

[58] *Ibid.*, p. 3.

[59] Feed per 100 pounds—$8.95; transportation per 100 pounds—$1.527; total cost—$10.48 per 100 pounds. Exhibit 7, p. 4.

[60] Exhibits 4 and 5.

[61] Exhibit 4, p. 4.

[62] *Ibid.*, p. 5.

[63] Exhibit 1, p. 4.

then the Hawaiian consumer benefits from the availability of mainland beef. If prices of both are kept artificially high by both local and mainland producers, because of the islands isolation, then the Hawaiian consumer is the innocent victim.

There has been no contention in this proceeding that there is a shortage of beef in the markets in Hawaii. The consumers' need for subsistence items is being met by mainland beef at a cost which the Hawaiian producers say is less than the cost of locally produced beef. In the absence of a showing that island food requirements are not being met or absent a showing that a rate reduction in feed would result in lower cost to the consumer it cannot be established on this record that a carrier should subsidize the island industry and be required to carry at a rate lower than a rate which despite the increase complained of is still the lowest rated item in respondent's tariff and is still less than respondent's fully allocated cost.

Based on the record herein and for all of the foregoing reasons it is found and concluded that the increase in the rate of animal feed at a time when the rate on chilled beef was not increased did not give any unlawful or undue preference to any traffic nor subject any traffic to undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Shipping Act, 1916.

SECTION 18

Section 18 provides in pertinent part:

> That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs.

In order to find a violation of section 18(a) by Matson, it must be established that the rate charged is not just and reasonable. Before Hawaii Meat may recover reparations there must be a demonstration that the feed is unjustly or unreasonably high as to be unlawful.

A lawful rate in the domestic off-shore commerce generally falls within a maximum and a minimum range of rates. The minimum may reflect bare out-of-pocket costs, whereas the maximum may reflect administrative costs, overhead and other costs, as well as a reasonable profit.

The standard for unreasonableness is set forth by the Commission in *Matson Navigation Company Pallets and Containers Pacific Coast/Hawaii Trade*, 7 F.M.C. 771, 772 (1964), in which the Commission said that it can only disapprove a rate if it finds that the rate exceeds a just and reasonable figure. In *Thatcher Glass Manufacturing Co. v. Sea-Land Service, Inc.*, 8 F.M.C. 645, 647 (1965), the Commission held that when the rate is insufficient to cover the cost of transportation it cannot be demonstrated that the rate is unjustly or unreasonably too high.

The movement through Matson's system of a container of feed does not differ from the movement of another commodity moving in the same service in another dry container.[64] Feed produces the lowest minimum containerload charge in Matson's tariff and did not at the pre-increase level even come close to recovering Matson's fully allocated costs. Even after the 15 percent increase,

[64] Exhibit 6, p. 2.

feed is still the lowest minimum containerload charge in Matson's tariff.[65]

Margaret S. Fletcher, a Matson Financial Analyst, testified that in 1976, it cost Matson $752.18 to move a container of feed for which it earned revenues of $653.55.[66] Although the data was not available for a comparable study for 1977, Mrs. Fletcher said that there would be no major difference in the cost of moving containers between 1976 and 1977.[67] She also testified that in 1976 Matson's per container revenues were $1,033.04 from the carriage of chilled meats as opposed to $653.55 from the carriage of feed.[68]

Hawaii Meat suggests that when in 1972 Matson reduced its rate on animal feed from $25 to $20 its revenue was $400 per container and 72 percent of allocated cost; that not even Matson has argued that such 72 percent of allocated cost was not a just and reasonable rate. Therefore Hawaii Meat argues that "If that was a just and reasonable rate, the question remains whether the dramatic, disproportionate increase in 1976 to 88% of fully allocated cost was just and reasonable."[69]

The evidence in this case is that the rate reduction was made to meet a competitor rate.[70] The reduced rate exceeded incremental costs—the irreducible minimum. As such it was not an illegal rate. *Reduced Rates on Flour-Pacific Coast Ports to Hawaii,* 10 F.M.C. 145, 149 (1966).

Even with the 15 percent increase of animal feed Matson suffered a loss of $98.63 per container in 1976 for every container of animal feed carried. Such loss is incompatible with a finding that the rate is unreasonably high.

Hawaii Meat argues that despite the loss of $98.63 per container in 1976, the rate increases in August 1976 and July 1977 should provide "virtually equal revenues with fully allocated costs."[71]

The record does not contain any evidence of 1977 revenues, costs or tons per container which Hawaii Meat extrapolates for 1977. The assumptions of tonnage per container at 20 tons per container[72] in 1976 and 23 tons in 1977[73] are inapposite. If 23 tons in 1977 would reduce loss so as to result in "virtually equal revenues" then in 1976 23 tons would be carried and 23 tons resulted in $98.63 loss. Twenty-three tons in 1977 even at the higher rates would not make up $98.63 difference. In any event, even accepting Hawaii's assumption that losses are now negligible, it is an ancient saying that loss per item is not made up by volume. Raising to near cost cannot be equated to an unjust and unreasonable rate which is prejudicial and discriminatory as against a higher rate for a competitive product, particularly when the higher rate on the competitive product returns a profit above fully allocated rates.

[65] Docket No. 75-57, Exhibit 1, p. 2.

[66] Exhibit 16.

[67] Exhibit 15, p. 4.

[68] Exhibit 16.

[69] Hawaii Meat reply brief, p. 10.

[70] Docket No. 75-57, Tr. 121-122.

[71] Hawaii Meat reply brief, p. 6; see also opening brief, pp. 20-21.

[72] Hawaii Meat opening brief, p. 20.

[73] Hawaii Meat opening brief, pp. 20-21.

Inasmuch as the feed rate paid is the lowest in Matson's tariff no. 14–E and revenues earned by Matson from the carriage of feed are less than costs of that carriage it cannot be found on this record that the feed rate is unlawful as being unjustly or unreasonably high in violation of section 18 of the Shipping Act, 1916.

CONCLUSIONS

On the basis of all of the aforementioned findings of fact and for all of the reasons hereinbefore set forth it is determined and concluded that the increases in rates for the carriage of animal feed did not subject complainant to any undue or unreasonable prejudice or disadvantage; the increase in rates for animal feed were just and reasonable; and the increase in rates for animal feed were not intended to drive out or injure a competitive carrier.

Ordered:

Complaint seeking reparation for alleged violations of sections 16, 18 and 19 of the Shipping Act, 1916, dismissed.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
May 10, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–83

COM-CO PAPER STOCK CORPORATION

v.

PACIFIC COAST-AUSTRALASIAN TARIFF BUREAU, ET AL.

NOTICE OF DETERMINATION NOT TO REVIEW

July 27, 1978

Notice is hereby given that the Commission on July 27, 1978, determined not to review the order of dismissal of the Administrative Law Judge in this proceeding served June 29, 1978.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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FEDERAL MARITIME COMMISSION

June 29, 1978

No. 71–83

COM-CO PAPER STOCK CORPORATION

v.

PACIFIC COAST-AUSTRALASIAN TARIFF BUREAU, ET AL.

APPROVAL OF SETTLEMENT: JOINT MOTION FOR DISMISSAL WITH PREJUDICE GRANTED

Finalized July 27, 1978

By joint motion, the complainant, Consolidated Fibres, Inc.,[1] and the respondents, Pacific Coast-Australasian Tariff Bureau and its member lines,[2] seek dismissal of the complaint, with prejudice, upon approval of a negotiated compromise settlement. The terms of settlement appear in the Compromise Settlement and Mutual Release, annexed hereto. Hearing Counsel, an intervenor, supports the joint motion.

In my judgment, the settlement agreement, with one modification, should be approved and motion should be granted.

BACKGROUND

Prior to instituting this proceeding in October 1971, the complainant, herein, had initiated a similar complaint proceeding against the respondent, herein, in May, 1967. The first proceeding was assigned Docket No. 67–31. Essentially, the complaint in No. 67–31 alleged that the complainant, a wastepaper exporter, was injured because the conference's rate structure unjustly and unlawfully discriminated against wastepaper by virtue of more favorable rates on woodpulp, a commodity with which wastepaper competes in the marketplace. When the respondents agreed to amend their 1967 tariff in a manner deemed satisfactory to complainant, the complainant moved to dismiss the proceeding. Acting on that motion, the Commission discontinued No. 67–31 in September, 1967.

Although the basic tariff rates for wastepaper and woodpulp remained in parity from 1967 to 1971, presumably in accordance with the 1967 settlement agreement, another tariff provision, called a "penalty provision," was added to

[1] After the complaint was filed, Com-Co Paper Stock Corporation changed its corporate name to Consolidated Fibres, Inc.

[2] Pacific Coast-Australasian Tariff Bureau is a conference of common carriers by water with authority to establish ocean freight rates pursuant to approved Agreement No. 50, as amended.

the tariff. In the instant proceeding it is alleged that the penalty provision applied solely against wastepaper, thereby bringing about the same type of discrimination in favor of woodpulp vis-a-vis wastepaper which existed before the 1967 settlement. As amended and supplemented, the complaint alleges injury, by way of loss of sales, in a sum substantially in excess of $150,000, because respondents' rates and charges on wastepaper are unlawful and in violation of sections 14, 15, 16 First, 17 and 18(b)(5) of the Shipping Act, 1916, 46 U.S.C. 812, 814, 815, 816 and 817(b)(5).

From the time that issue was joined this proceeding was vigorously contested by the parties. Among other things, both parties engaged in profuse prehearing discovery and inspection activity, and lengthy, complex motions for summary judgment and for consolidation[3] with Docket No. 72-35, *Pacific Westbound Conference–Wastepaper and Woodpulp from United States West Coast to Far East*, were filed. No. 72-35 is a related matter, and, as its title indicates, involves a similar wastepaper-woodpulp rate controversy in a different trade.

The Commission investigation in No. 72-35 concerned hundreds of thousands more tons of wastepaper movements, annually, than the movements in this proceeding and it went to evidentiary hearing before this proceeding was ripe for oral hearing. Consolidated Fibres, Inc., was an intervenor in No. 72-35, as was the trade association to which it belonged.[4] Because of the more advanced status of No. 72-35, the complainant moved to hold these proceedings in abeyance pending the initial decision in No. 72-35. The motion was granted on July 9, 1974. After service of the initial decision in No. 72-35 on August 15, 1977, this proceeding was reactivated and was set for oral hearing on April 18, 1978. The scheduled oral hearing was canceled when the parties advised that they had reached a settlement and would file an appropriate motion for approval of the terms of their agreement.

Discussion

The key features of the bargain struck are: (1) respondents promise to take and maintain certain tariff actions, whereby, at least through December 31, 1979, parity of wastepaper and woodpulp will be guaranteed; (2) in return, complainant commits to refrain from initiating any new proceeding for alleged discrimination through 1979, and thereafter as well, if the conference's promise is kept by maintaining in the tariff the parity principles enunciated in the agreement; (3) in addition, without admitting any violation of the Shipping Act, 1916, the respondents agree to pay Consolidated Fibres, Inc., the sum of $20,000 as a compromise settlement of the alleged damage.

The substantive difference between the instant settlement agreement and the one which resulted in the discontinuance of No. 67-31 is the $20,000 compromise of damage provision. It is an important difference because the agreement expressly negates any admission of violation of law and, if the compromise

[3] The motion for summary judgment was denied by Judge Charles E. Morgan who then presided over this proceeding. Former Chief Judge Clarence W. Robinson denied the motion for consolidation.

[4] National Association of Recycling Industries, Inc., and its member, Consolidated Fibres, Inc., were among the chief litigants in Docket No. 72-35. See, *Pacific Westbound Conference–Wastepaper and Woodpulp from United States West Coast to Far East*. Initial Decision, served August 15, 1977 (pending on exceptions), at pp. 3, 5.

provision is approved, there will be no finding of violation of law by the Commission. The issue thus raised is whether the Commission may authorize settlement of a proceeding on the basis of a compromised reparation payment, absent an admission or finding of violation of law. The parties to the proceeding, complainant, respondents and Hearing Counsel, submit that in the circumstances of this proceeding these factors present no obstacle to approval of the terms of settlement. I agree.

There are two aspects to the stated issue. First, it must be determined whether the Commission considers itself empowered to approve the kind of settlement proposed. Second, if the power exists, it must be ascertained whether the terms of settlement are meritorious.

In regard to the first part of the issue, it is recognized that the Commission has adopted the principle that before it will approve settlement agreements in reparation cases in which the payment of money is one of the terms or conditions, there must be a showing of a violation of law. However, this principle has been limited to cases arising under section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3), which "directs common carriers to collect the rates and charges specified in their tariffs and forbids rebates, remissions or refunds of lawful charges." *Consolidated International Corp. v. Concordia Line,* 18 F.M.C. 180, 183 (1975). In that case the statement of limitation was made in the following way, 18 F.M.C. at 183:

> It follows that an agreement to settle a proceeding, brought under Section 22 of the Shipping Act, alleging a violation of Section 18(b)(3), can be approved only upon an affirmative finding that such violation occurred.

On the other hand, in proceedings seeking reparation for alleged unjust discrimination in violation of section 17 of the Shipping Act, the Commission has excercised its power to authorize money settlements without admission or finding of violation. See *All Chilean Fruit Corp. v. Grace Line, Inc.*, Docket No. 66–64, and *Arthur Schwartz v. Grace Line, Inc.*, Docket No. 66–69 (the *All Chilean* cases). The order approving the settlement in the *All Chilean* cases was issued by an Examiner and did not require subsequent Commission action.[5] The Commission has since ratified the settlement in that case. See *Levatino & Sons v. Prudential-Grace Lines, Inc.*, 18 F.M.C. 82, 85, 100–103, 112–114 (1974).[6] In the light of this precedent establishing that the Commission is empowered to authorize money settlements in reparation proceedings alleging discrimination absent a determination of violation, it is now appropriate to inquire whether the settlement is meritorious.

The movants assert that the amount agreed to is based upon a reasonable

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[5] Rule 227(c) of the Commission's Rules of Practice, 46 CFR 502.227(c) was not in effect at the time of the issuance of the order in the *All Chilean* cases. Rule 227 (c) provides the procedure for review of orders of dismissal issued by an Administrative Law Judge.

[6] It does not seem necessary in this order to write an exhaustive treatise explaining why the Commission views its authority to approve settlements differently in section 18(b)(3) cases than in section 17 cases. It is sufficient to recognize that the dominant issues in section 18(b)(3) cases are different from those in section 17 cases. In the former the lawfulness of the tariff rate is conceded and the question is whether, under the rule of rigid observance of the tariff, the proper tariff rate has been applied. In the latter, the question is whether the tariff rate that has been applied is lawful. Moreover, in section 18(b)(3) cases, determination of a violation fixes the reparation for the injury and permits no room for compromise of the amount of damage. In section 17 cases the measure of damages where a violation has been found is governed by "remoter considerations." See, generally, *Southern Pacific Company v. Darnell-Taenzer Lumber Company*, 245 U.S. 531 (1918); *Pennsylvania Railroad Company v. International Coal Mining Company*, 230 U.S. 184 (1913); *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924).

estimate of the cost of litigating the proceeding and an evaluation of the potential reparation. Insofar as the cost of litigation is concerned, it is reasonable to speculate that it would take about the same length of time to litigate this case as it took for Docket No. 72–35. Given the 18 days of trial, nearly 3,000 transcript pages, 110 exhibits, the lengthy briefs and exceptions in No. 72–35, the parties' estimate of expense seems to be on the conservative side. With regard to liability and reparation, respondents state that they continue to believe they would prevail on the merits but they must be cognizant of the possibility of an adverse determination against the conference similar to a recent determination made "against another conference, in a somewhat parallel case."[7] The movants also submit that no undue prejudice or preference or unjust discrimination can arise by payment of the $20,000 inasmuch as there is no other wastepaper shipper operating in the trade served by the respondents.

I am satisfied that the terms and conditions of the settlement agreement are the result of arms length negotiations between the complainant and respondents; that the agreement to maintain parity between wastepaper and woodpulp rates will not result in violation of the Shipping Act; that the agreement of the complainant to take and the respondents to give $20,000 by way of compromise is based upon realistic estimates of expense of litigation and likelihood of success; that the amount of compromise is subordinate to the complainant's real objective of obtaining present and future rate parity between wastepaper and woodpulp; that the determination to settle reflects sound managerial judgments on both sides; that the compromise amount will not result in rebates or other violations of the Shipping Act; and that the settlement agreement as a whole warrants approval as an appropriate compromise of differences in the special circumstances of this case. "The law, of course, encourages settlement and every presumption is indulged in which favors their fairness, correctness and validity generally." *Merck Sharp & Dohme v. Atlantic Lines,* 17 F.M.C. 244, 247 (1973).

In only one respect will I require modification of the settlement terms. Paragraph No. 9 of the Compromise Settlement and Mutual Release should be changed to read "To the extent not governed by the Shipping Act, 1916, this Mutual Release shall be governed by the law of the State of California."[8]

Therefore, it is ordered that the terms and conditions of the attached Compromise Settlement and Mutual Release, as modified, are approved.

It is further ordered that the complaint be dismissed, with prejudice, and the proceeding be discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

June 29, 1978

[7] Respondents refer to the initial decision in Docket No. 72–35.

[8] By telephone, I was informed by counsel for the respondents that this modification is acceptable.

APPENDIX

COMPROMISE SETTLEMENT AND MUTUAL RELEASE

IT IS HEREBY AGREED, by and between the undersigned, CONSOLIDATED FIBRES, INC. (hereinafter "Consolidated"), complainant in F.M.C. Docket No. 71-83, and the PACIFIC COAST AUSTRALASIAN TARIFF BUREAU and its member lines (hereinafter "the Conference"), respondents in the same Docket, that the said Docket shall be terminated by mutual agreement, on the following terms, conditions and commitments:

1. Rates on wastepaper in minimum quantities of 150 long tons from one shipper and one port of loading to any one or all of the ports of Sydney, Melbourne, Adelaide and/or Brisbane, Australia, on one vessel, shall be "open" at least through September 30, 1978.

2. Rates after "closing" of open-rate status, pursuant to paragraph 1, and/or before that for quantities less than the minimum tonnage specifications contained in paragraph 1:

(a) To be tariff rates (i.e., "off-contract").

(b) Wastepaper and virgin wood pulp to be in parity as to both base rates and incremental "step" increases for increased cubic measure; minimum quantity discounts and reductions applicable to such rate structure also to be parity, to be guaranteed through December 31, 1979.

(c) In the case of rates for 40-foot containers, wastepaper will be maintained (at the least) in parity with wood pulp consistent with maximum load limits permitted by highway or other regulations, also guaranteed through December 31, 1979.

3. The foregoing terms and conditions apply on rates to Australia only.

4. The respondents, in the aggregate, shall pay a total sum in compromise settlement of Consolidated's allegations of damage (but expressly without admission of liability therefor) of $20,000.

5. Consolidated and/or any successor in interest shall be barred from initiating any new claim against the Conference, for alleged discrimination against wastepaper vis-a-vis virgin wood pulp, at any time prior to January 1, 1980, or thereafter, so long as the parity principles outlined in paragraphs 1 through 3, above, are maintained.

6. Both parties hereto expressly waive the benefit of §1542 of the Civil Code of the State of California, which provides:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor, at the time of executing the release, which, if known by him, must have materially affected his settlement with the debtor;"

and agree as a further consideration and inducement for this Mutual Release that it shall apply to all unknown and unanticipated losses or damages, and all losses or damages which may arise in the future, arising out of actions or inactions up until the date of this Mutual Release, which may hereafter be claimed by either party, as well as to those presently known by either party.

7. It is understood and agreed that this Mutual Release is in full accord and

satisfaction of doubtful and disputed claims, and that the execution of this release is not an admission of liability by any party hereto.

8. It is further understood and agreed that Consolidated's release of the Conference and its member lines hereunder extends not only to present member lines but also to former member lines within the scope and time-frame of the Complaint in Docket No. 71-83.

9. This Mutual Release shall be governed by the law of the State of California.

10. This Mutual Release constitutes the entire agreement between the parties and is executed by the parties with and upon the advice of independent counsel.

IN WITNESS WHEREOF, the undersigned have executed these presents this 17th day of April, 1978.

CONSOLIDATED FIBRES INC.

By

PACIFIC COAST AUSTRALASIAN TARIFF BUREAU

By

A.H. Eber, Secretary

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND REGULATED ACTIVITIES

DOCKET NO. 78-9; GENERAL ORDER NO. 40

Part 542—Financial Responsibility for Water Pollution

August 4, 1978

ACTION: Adoption of Final Rules

SUMMARY: Part 542 of the Commission's Rules has been revised to conform to the requirements of the 1977 Clean Water Act amendments to the Federal Water Pollution Control Act (33 U.S.C. 1321). Part 542 establishes procedures whereby vessel operators may demonstrate the financial ability to meet their liability to the United States for the costs of removing oil and other polluting substances discharged into any waters over which the United States has jurisdiction.

Financial responsibility requirements are now $125 per gross ton or $125,000 (whichever is greater) for "inland oil barges;" $150 per gross ton for "vessels not carrying oil or hazardous substances as cargo;" and $150 per gross ton or $250,000 (whichever is greater) for "vessels which do carry oil or hazardous substances as cargo."

Applications for Certificates of Financial Responsibility (Water Pollution) must be made to the Commission on Form FMC-321 and accompanied by application and certification fees, as applicable. Certificates are issued for a term of three years. Unless a current Certificate is carried aboard a vessel, the vessel may be denied use of the navigable waters of the United States or of any port or place located thereon.

EFFECTIVE DATE: August 11, 1978

SUPPLEMENTARY INFORMATION:

On April 20, 1978, (43 *Fed. Reg.* 16772), the Commission proposed the issuance of regulations to implement the Clean Water Act of 1977.[1] The proposal would replace both the Commission's current provisions for oil pollution responsibility (General Order 27, 46 C.F.R. Part 542) and the adopted, but not implemented, provisions for oil *and* hazardous substance pollution responsibility (General Order 31, 46 C.F.R. Part 542)[2] with an updated and revised Part

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[1] P.L. 95-217, 91 Stat. 1566. The Clean Water Act (CWA) amends the Federal Water Pollution Control Act (FWPCA), 33 U.S.C 1321. The latter statute, as amended through 1977, is hereinafter referred to as the "Act".

542. Relatively brief comments were received from 23 persons, who took issue with some 25 aspects of the proposed regulations.[3]

The majority of the objections related to procedural or administrative matters such as the length of the certification period or the requirement of keeping original documents on board unmanned vessels.[4] Need for greater coordination between FMC and Coast Guard certification programs was the most frequently expressed comment. Time restraints preclude the consideration of any specific "joint certification" program in this instance, but it also appears that basic differences in the two agencies' regulatory functions make such joint certification impractical, if not actually impossible.

The various objections raised and the revisions made in the proposed regulations are discussed below. In some instances, related matters are combined as a single discussion item.

(1) The proposed regulations require persons engaged in "building, repairing, scrapping or selling vessels" to obtain Certificates on the basis that they are vessel "operators" during the time they control a vessel's activities in their yards. Several shipbuilding concerns oppose this requirement as duplicative, unduly expensive and beyond the purpose of the Act without recognizing that the requirement has been in effect for shipyards since 1971.[5] Only the addition of the clarifying word "repairers" is new, yet Todd Shipyards complains of the potentially high insurance expense for repairers which might temporarily be handling a large number of very large vessels.

The proposed regulations pertaining to the certification of "builders, repairers, scrappers, or sellers" will be adopted. Shipyards which are in fact responsible for the operation of vessels under their control are liable for pollution damage under the Act, and each of the shipyards complaining of an "unwarranted extension" of the Commission's requirements hold existing FMC Certificates. Moreover, the proposed regulations would not require duplicate certification of a given vessel or place an unreasonable financial burden on repairers. First of all, shipyards are permitted to obtain a Master Certificate based upon the largest vessel the yard will handle. Secondly, the shipyard and the "nonshipyard"

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[2] General Order 31 was adopted in October, 1973 in anticipation of the Environmental Protection Agency's promulgation of regulations identifying the "hazardous substances" encompassed by the Act. General Order 31 was not to take effect until the EPA regulations were effective. The EPA published its rules on March 13, 1978 (43 *Fed. Reg.* 10474) to take effect with respect to vessels on September 11, 1978. On June 8, 1978, however, the United States District Court for the Western District of Louisiana, issued a preliminary injunction against certain of the EPA regulations. *Manufacturing Chemists Association v. Douglas M. Costle*, Civil Action No. 78-0578. Hearings on a permanent injunction were conducted on July 24, 1978. The Commission will issue such further Order concerning the hazardous substances provisions of Part 542 as may be appropriate following release of the Court's decision.

[3] Those submitting comments were: American Commercial Barge Line Company; Union Carbide Corporation; Chevron Shipping Company; Norfolk Shipbuilding & Drydock Corp; American Waterways Operators, Inc.; Exxon Company, U.S.A.; Todd Shipyards Corporation; Dow Chemical U.S.A.; International Committee of Passenger Lines (ICPL); Water Quality Insurance Syndicate (WQIS); International Group of Shipowners' Protection and Indemnity Association (International Group); Jacksonville Shipyards, Inc.; Stauffer Chemical Company; Council of American-Flag Ship Operators (CASO); Zapata Corporation; Bethlehem Steel Corporation; Ingram Materials, Inc.; Chotin Transportation, Inc.; Old Man River Towing, Incorporated; Mr. Donald McGulgan of Omaha, Nebraska, and Bath Iron Works Corporation. Mr. McGulgan limited his remarks to endorsing the general purpose of the Clean Water Act and the proposed regulations. Bath Iron Works stated only that the existing regulations are adequate and the proposed rules unnecessary. The late filed comments of Ingram Corporation and the United States Coast Guard (Coast Guard) were also considered by the Commission.

[4] The International Group also voiced a preference for the uniformity which could be obtained if the United States were to abandon its separate oil spill program and adhere to the International Convention on Civil Liability for Oil Pollution Damage—a matter entirely beyond the scope of the instant proceeding.

[5] See existing section 542.6(d), 36 *Fed. Reg.* 5704 which refers to "builders, scrappers, and sellers."

vessel operator are free to contract for the responsibility of maintaining a Certificate while the vessel is in the yard. The proposed regulations are not intended to require a nonshipyard operator to return its Certificate to the Commission when a vessel is temporarily turned over to a shipyard.[6] To clarify this intention, section 542.9 will be modified by adding a new paragraph (f) referring to temporary custodial arrangements.

(2) Proposed Forms FMC-322 through 326 state that the liability coverage provided by the underwriter:

shall not be reduced or modified by any agreements or warranties made between an [operator] and the [underwriter] that any such vessel is or is not an "inland oil barge", will or will not carry oil or certain hazardous substances, or will or will not operate in certain waters.

WQIS argues that this language improperly attempts to eliminate defenses available to the insurer under section 311(p)(3) of the Act. The International Group states only that this provision should not be construed to prejudice any other "defenses to which the association or member concerned, or either or them, might have under the Act or the certificate of insurance."

The CWA establishes different levels of liability for vessel owners and operators based upon whether the vessel in question is an "inland oil barge," a "vessel carrying oil or hazardous substances as cargo," or, a "vessel not carrying oil or hazardous substances as cargo." However, the liability category applicable to a given vessel can only be determined *at the time pollutants are discharged.*[7] For this reason, the financial responsibility coverage required by Forms FMC-322 through 326 is based on *vessel status at the time of the incident.* The language disputed by WQIS was added to the various FMC Forms to assure that the vessel's *actual status* would govern the underwriter's payment by preventing the underwriter from contractually conditioning coverage upon prior representations by the vessel operator as to a vessel's status. This was necessary to close the potential loophole created by section 311(p) of the Act which allows an underwriter to raise "defenses which would have been available to it if an action had been brought against it by the vessel operator."

By inserting the "actual status" clause in the FMC Forms, the Commission is acting within its statutory authority to prescribe the "evidence of financial responsibility" which meets the standards of the Act. The "actual status" clause does not preclude the underwriter from raising defenses traditionally reserved to it by law. It merely precludes vessel certification in situations where financial responsibility coverage may be denied in whole or in part because of changes in the vessel's liability status. Because the proposed language was perceived by WQIS as an attempt to prohibit insurance companies from exercising "warranty" defenses of a type not contractually created by the Insurer and not plainly inconsistent with the purpose of the CWA amendments, modifications have been made in the final version of the Forms to more plainly reflect the limited purpose of the "actual status" clause.

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[6] The proposed rules were silent on this point, but *existing* section 542.6(c) expressly dealt with such situations.

[7] Before liability limits can be established, one must know whether a vessel is actually carrying oil or hazardous substances as cargo, or whether an oil tank barge, certificated by the Coast Guard to operate only in "the inland waters of the United States," is actually operating in such waters.

(3) Section 542.2(k). Only four parties mentioned the problem presented by the CWA's new definition of "inland oil barge" despite the Commission's express request for comments on this subject. The Act requires that such barges be "certificated to operate only in the inland waters of the United States." No such route certification program is presently in effect, but the Coast Guard stated that it will "in the future," issue inland waters inspection certificates to persons specially requesting them. The only suggestion concerning the proper response of the Commission during the interim period was Chotin Transportation's unclear request that "the regulation" not become effective until Coast Guard certification is available.

The "inland oil barge" definition creates an exception from the Act's $150 per gross ton liability ceiling. If the definition were omitted, operators of such barges would have to demonstrate the higher level of financial responsibility required of other vessels. The Commission has determined to construe the "inland oil barge" exception narrowly in the interest of providing maximum protection by requiring Coast Guard certification in all instances where the lower "inland oil barge" liability is claimed.

Modifications have been made in the final rule to reflect this strict construction, and also to reflect the conclusion expressed in the April 20th Notice of Proposed Rulemaking that barges otherwise qualifying as "inland oil barges" should be deemed as such regardless of whether they are actually carrying oil as cargo at the time they cause a spill. Congress does not appear to have intended that empty oil barges be subject to greater liability limits than are loaded oil barges.

Finally, WQIS observed that the use of the words "which is" in the proposed definition of "inland oil barge" tended to defeat the intended meaning that empty inland barges be assessed no greater liability than loaded inland barges. These words have been deleted from the final rule.

(4) WQIS objects to the definition of "cargo" in proposed section 542.2(d) as overly broad and desires that it be limited in one or both of the following respects: 1) that oil be transported under a bill of lading, charter party, or other freight agreement; and 2) that some minimum quantity of oil be prescribed before "cargo" status is reached. The International Group believes that the Act was intended to refer only to cargo carried in bulk. Neither commentator cites authority for its limited interpretation of the Act, an interpretation particularly inappropriate in the case of hazardous substances which may vary widely in toxicity and transportation characteristics. The policy most consistent with the general purpose of the Act is to define cargo broadly. It is not anomalous within the purpose of the Act that a vessel carrying a single drum of oil or hazardous substance *as cargo* be subject to greater liability than a vessel carrying no oil or hazardous substance as cargo. Editorial changes have been made in the final rule for the sake of clarity, but the basic scope of section 542.2(d) has not been altered. "Cargo" is not dependent upon the nature of the shipping documents. In fact, shipping documents may be absent altogether in some circumstances.[8] Oil

[8] The reference to such documents in the final rule is not meant to exclude materials carried pursuant to oral understandings or other less formal arrangements.

carried only as *operating fuel* for an equipment carrying barge *(e.g.*, a crane barge) would not fall within the definition finally adopted herein when carried on board the equipment barge in question in quantities ordinarily required to power onboard equipment.

(5) Objections were raised to the various provisions which preclude vessel owners (who are not also vessel operators) from applying for Certificates. Dow Chemical claimed this restriction unnecessarily impinges upon the freedom of vessel owners and operators to contract for the responsibility of obtaining FMC certification and was inconsistent with proposed sections 542.9(a) and 542.13(e) which require that both owners and operators be identified on FMC certificates. Ingram Materials, Inc., states that the common business practice of "spot" or "trip" chartering inland barges on short notice would be unduly hampered if owners could not apply for certificates because a new operator would be unable to complete a new FMC application as quickly as an owner could amend an existing application.

Once again, the proposed regulation reflects existing Commission policy and practice and does not impose new requirements or limitations. Present Part 542 does not permit applications by owners which are not responsible for vessel operations. *See*, 35 *Fed. Reg.* 5216 (1970). The name of a registered owner has been and continues to be required on application forms (Forms FMC-224 and 321) only as a further means of vessel identification useful in enforcement situations.

There is no indication that the practice of limiting applications to "operators" has significantly impeded the business of spot chartering and Ingram Materials does not allege that it has—only that it somehow will. Dow Chemical's concern that the proposed regulations will limit its freedom to contract also appears unwarranted. Existing section 542.6(c) contemplates just such contractual shiftings of pollution responsibilities, and permits a previously certificated owner/operator to maintain its FMC Certificate so long as it continues to be responsible for the vessel's potential liabilities under the Act. In Item 1, *supra*, the Commission provided for the addition of a provision closely modeled after existing section 542.6(c) to the final rules as a new section 542.9(f). Those portions of proposed sections 542.9(a) and 542.13(e) which require vessel owners to be listed on FMC Certificates in addition to vessel operators have been deleted for the time being, however, because the Commission's data processing system is not yet fully capable of printing certificates containing ownership data.

(6), (7) and (8). On Board Documentation. One of the more frequently objected to proposals was section 542.10 ("Operator's Responsibility for Identification") which requires vessels operated by persons other than their owners to carry copies of a demise charter-party or other contract which demonstrates that the person named on the FMC Certificate is the current and actual vessel operator. The proposed regulations also delete former section 542.6(a) which allowed vessels to mark an FMC Certificate number on the bow in lieu of carrying an on board copy of the Certificate whenever it would be "physically impossible" to do so. Proposed section 542.9(b) requires vessels to carry their *original* FMC Certificates, except that unmanned barges and vessels covered by Master Certificates need only carry a copy of the Certificate. Keeping Certificates on board is allegedly an administrative burden for vessel operating personnel, and American Waterway Operators state that many barges would require the construction of a weatherproof document container if the Commission did not allow some alternative to onboard documentation.[9] The extent or cost of these administrative burdens and vessel alterations was not discussed, however, and they are presumed to be minimal, especially in light of the Coast Guard's statement that unmanned barges with Coast Guard Certificates of Inspection are outfitted with a "tube" or "mailbox" for carrying such documents. Few vessels appear to have made use of the bow marking option in the past. Accordingly, no change has been made in the final regulations insofar as the on board carriage of FMC Certificates is concerned.

The "charter-party" requirement was opposed by barge operators because such documents are often bulky, contain confidential information which could be viewed by competitiors, are often oral, are difficult to maintain intact on working vessels (especially unmanned barges) and because the Commission has established no clear need for the requirement.

The purpose of maintaining charter-party documents on board vessels is to assist the U.S. Customs Service and the Coast Guard in their enforcement efforts and to minimize occasions for detaining vessels pending proper identification of their operators. It is doubtful, however, that the availability of charter party agreements for cross-reference purposes will appreciably increase the ability of the Coast Guard and Customs Service agents to critically examine the FMC Certificates of unmanned barges which operate primarily on inland waters. The final regulations contain several other measures directed towards improved enforcement efforts: providing Certificate expiration dates; requiring Certificates on board all vessels; and increasing the carriage of original Certificates, all of which should reduce the opportunity for the circulation of revoked or altered Certificates. Acordingly, final section 542.10 has been modified to exempt unmanned barges from its provisions, and to require the carriage of *any document*—including a letter—which identifies the operator rather than the more formal "demise charter-party or other contract" now specified.

(9) and (10) Certificate Term and Certificate Fee. Several parties objected to the two year expiration date on FMC Certificates proposed by section 542.9(a) and to the flat $20.00 certificate fee provided by proposed section 542.13(e). Existing section 542.9(e) already imposes certification fees on a sliding scale of between $2 and $25, but there is no expiration date on existing Certificates so that the fees need only be paid once in most instances. The proposed requirements were complained of as make work and unduly expensive ($10 per vessel per year). It was contended that the better allocation of resources would be for the Commission to enforce penalties directly against operators which refuse to surrender cancelled certificates, rather than require the entire industry to be recertified. If a fixed expiration date were nonetheless needed for enforcement purposes, it was urged that the Commission lengthen the term to a less costly five or ten years.

[9] Some barge operators actually opposed the placement of numbers on the outside of dry cargo barge hulls because they are easily obliterated by wear and tear. A system wherein the operator would have the option of placing the numbers on the hull or within the rake compartment near the Coast Guard's net tonnage numbers was preferred.

There is a sound enforcement basis for issuing Certificates for a fixed term. Periodic termination of all Certificates will reduce opportunities for the misuse of revoked or altered Certificates to a much greater extent than the initiation of criminal sanctions against those operators which refuse to surrender cancelled Certificates. Levying fines under section 311(p)(4) requires coordination with other agencies, is time consuming, relatively expensive, and effective only against known violators present in the United States. The Commission's objective is to assure the highest practical correlation between operators holding FMC Certificates and operators liable under section 311 of the Act. See proposed section 542.9(e). However, the Commission has determined to ameliorate the cost of recertification by lengthening the certification period from two to three years.[10]

(11) Date When Insurance Coverage Terminates. Only WQIS objects to the proviso clause in proposed Insurance Form FMC-322 which establishes a flexible insurance termination date for vessels carrying oil or hazardous substances in bulk loaded prior to the ordinary termination date (the 30th day after notice to the Commission).[11] WQIS states that these provisions unduly complicate its underwriting decisions and request that a definite termination date be devised.

There are two elements of uncertainty in the proposed clause. The first is whether a vessel actually has on board bulk cargo which was loaded prior to the ordinary termination date (the 30th day after notice) and the second is the unloading date. The former "uncertainty" is necessitated by the purposes of the Act—to indemnify the public against the cost of removing spilled pollutants. This protection would be considerably weakened if the coverage ended before existing cargos were reasonably likely to be discharged. The second "uncertainty" should not cause any significant underwriting difficulties. Insurers will presumably charge premiums based upon the maximum 60 day period and then allow refunds when furnished with evidence of the actual discharge date by the Insured.

Accordingly, no modification has been made in the proposed termination of liability clause.

(12) Notice Provided in Certain Instances of Certificate Revocation or Denial. CASO suggested that the Commission clarify section 542.12(b) to indicate that those types of Certificate denial or revocation mentioned in the last sentences of that section are subject to the appropriate notice provisions of subsections 542.12(c) and (d). The availability of such notice is already discernible from a fair reading of the proposed regulation and section 542.12(b) has been adopted with only one clarifying modification not directly related to CASO's comment.

(13) Removal of Certificates from Vessel. CASO also suggested that proposed section 542.9(b) be amended to expressly state that governmental officials may not remove FMC Certificates from vessels. No information was provided to

[10] In any event, the present Act is likely to be superceded by "Super Fund" legislation before CWA certificates expire. Four bills have been introduced in the 95th Congress proposing to consolidate existing federal water pollution legislation into a comprehensive system of pollution liability and compensation. H.R. 6803, S.1187, S.2083 and S.2900.

[11] Forms FMC-322 through 326 provide for the continuation of coverage for a fixed period of 30 days, and then, after the 30th day, continuation in the cases of previously loaded vessels only until the cargo is unloaded or until the 60th day after notice.

indicate that this practice constitutes a particular problem and no change has been made in section 542.9(b) in this regard. *Although no one other than the vessel operator is authorized to remove currently valid FMC Certificates from vessels,* it should be noted that this fact does not preclude U.S. Customs officials from requiring vessel operators to present their Certificates at on shore U.S. Customs facilities.

(14) Certificate Renewal Exemption for Passenger Vessels. ICPL requests that the 75 or so passenger vessels subject to the Act be granted a waiver of proposed section 542.9(a)'s requirement that vessel operators file a Certificate renewal request every two years. ICPL claims the Certificate renewal process is an unfair burden upon passenger vessels because they already submit semiannual change in ownership or operation statements to the Commission under its Safety of Life at Sea Act regulations (46 C.F.R. Part 540). No such exemption has been created. ICPL's complaint centers upon the shortness of the proposed renewal period and the $20.00 certification fee, and should be partially satisfied by the modification of section 542.9(a) extending the certification period to three years. (Item 9–10, *supra*). Moreover, the Certificate renewal procedure (section 542.7) is quite simple and does not involve filing a new Form FMC-321. The materials ICPL members now submit to the Commission's Passenger Vessel Certification Office pertain to another regulatory program with different definitions of "vessel operator" and different financial responsibility requirements. Except in the case of self-insurers, there is very little common information on a vessel's Part 540 and Part 542 reports.

(15) Create a Master Certificate for Fleet Operators. Two barge fleet operators stated that the Commission should permit them to obtain a Master FMC Certificate covering all the vessels of a single operator, thereby eliminating the need for them to obtain Certificates for individual barges. The financial security for such a Master Certificate would be based upon the largest vessel in the fleet.

The Commission presently recognizes that financial responsibility may be based upon the largest vessel under the control of a single operator and that "cumulative" or per vessel coverage is not required.[12] A vessel operator presently files only a single application form (FMC-224) which lists all its vessels, and only one application fee must be paid. The only advantage to a Master Certificate approach would be a saving in certificate fees and perhaps simpler procedures for handling original Certificates. Copies of the Master Certificate would still be required on each vessel. From the Commission's viewpoint, the suggested procedure would expedite the issuance of Certificates, but would also make enforcement of the Act and overall program administration more difficult. Accordingly, no revisions were made in the proposed rules in this regard.

(16) and (17). Requests for Further Explanation. WQIS requested that the Commission expand upon the language of proposed section 542.8(d) pertaining to "direct action" against insurers. WQIS wants the Commission to specify who might be considered a "claimant" for purposes of a direct suit against an insurer. Section 311(p)(3) of the Act provides for the filing of claims directly against the

[12] Although some insurance companies insist upon separate premiums for each vessel insured, vessel operators need not obtain insurance. They may also establish financial responsibility through surety, self insurance and guaranty arrangements.

insurer and does not appear to limit the class of potential claimants. The purpose of the proposed regulations is to require insurers to submit to *all* direct claims to which they may be subject under the Act and not to define the nature and extent of such claims. Accordingly, no change has been made in proposed section 542.8(d).

Exxon requested that the Commission provide more information in proposed section 542.8(b)(5) concerning "other methods" of insurance which might be acceptable to the Commission. The purpose of subparagraph (b)(5) is merely to indicate that the Commission is willing to consider requests from vessel operators for approval of methods of demonstrating financial responsibility which significantly differ from the four previously described methods. No specific alternate procedures are presently contemplated, and no change has been made in proposed section 542.8(b)(5).

(18–20) Self-Insurance and Guaranty Standards. Three modifications to section 542.8(b) were made in response to the comments of the Zapata Corporation and Exxon. The original proposal has been modified to provide that: requests for waiver of working capital requirements will be considered in limited circumstances where the applicant's financial stability is otherwise firmly established; an appropriate officer of an applicant (as well as a Certified Public Accountant) may certify the amount of assets located in the United States when nonconsolidated financial statements are submitted; and guaranty arrangements involving joint guarantors will be permitted.

(21–23) Miscellaneous Provisions Adopted for Purposes of Clarification or Program Efficiency.

(21) Proposed section 542.12(a)(3) was modified to expressly provide for the revocation or denial of Certificates for violations of Part 542 regulations and not for the violation of *any* Commission Rule.

(22) The new CWA Certificates will contain language similar to that found in proposed section 542.9(c) to the effect that any erasures or alterations will automatically void the Certificate.

(23) Proposed section 542.7 was modified to permit applicants to request the issuance of a renewal Certificate up to 90 days prior to the expiration date of the existing Certificate, rather than the 60 days originally specified.

(24) Use of Existing Certificates on an Interim Basis. If a vessel operator does not comply with revised Part 542 by October 1, 1978, Certificates issued to that operator under prior Part 542 regulations will be automatically invalidated on that date (without prior notice). In response to a suggestion of the International Group, however, the Commission shall permit a valid existing Certificate to be used as evidence of compliance with the new CWA regulations until such time as a new Certificate is issued. This procedure will be permitted only in cases where vessel operators have made *timely and complete application (including evidence of financial responsibility and fees) for CWA Certification*. It is anticipated that some 26,000 vessels will require new CWA Certificates, and the suggested procedure should facilitate the Commission's task of preparing and mailing these documents. It should be noted, however, that no Interim Certificate will remain valid if the underlying evidence of financial responsibility is terminated.

(25) Amendment of Existing Forms FMC-225. The International Group also

suggested that burdensome paperwork could be eliminated if insurers were allowed to convert their present insurance Form FMC-225 to the new CWA Form FMC-322 by means of a simple endorsement or rider, rather than preparing new forms. This approach was successfully employed in implementing the Commission's Trans-Alaska Pipeline Authorization Act regulations (46 C.F.R. Part 543) and should also be of assistance to both insurers and the Commission in the instant circumstances. Accordingly, insurers may convert existing insurance Form FMC-225 to insurance Form FMC-322 merely by issuing a uniform endorsement; provided, however, that such endorsement is first found acceptable in all respects by the Commission's Bureau of Certification and Licensing.

Finally, the Commission has made editorial changes throughout the regulations intended solely to improve their readability.

Because of the large number of applications which must be processed by the Commission prior to October 1, 1978, the date the CWA requires vessels to be certified, the Commission finds that good cause exists for making the revised Part 542 regulations effective upon less than the 30 day notice ordinarily applicable under 5 U.S.C. 553(d).

THEREFORE, IT IS ORDERED, That, effective upon publication in the *Federal Register*, Subchapter B of Chapter IV of Title 46 of the Code of Federal Regulations is amended by the deletion of existing Part 542 in its entirety (both General Order 27 and General Order 31) and the addition of a revised Part 542, as set forth below; and

IT IS FURTHER ORDERED, That existing General Order 27 Certificates shall be sufficient evidence of compliance with revised Part 542 in cases where vessel operators have complied with the revised regulations by submitting a complete application Form FMC-321, appropriate fees, *and* demonstrating acceptable financial responsibility prior to October 1, 1978. Such grandfathered or Interim Certificates shall remain valid until a new Certificate is issued pursuant to revised Part 542, unless earlier invalidated; and

IT IS FURTHER ORDERED, That in lieu of submitting a new Form FMC-322, Insurers may submit an endorsement to existing insurance Form FMC-225 stating that the vessel operator(s) in question has insurance coverage meeting the standards of the Clean Water Act of 1977 and revised Part 542; Provided, however, that any such endorsement be specifically approved by the Commission's Bureau of Certification and Licensing prior to submission.

By Order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

PART 542—FINANCIAL RESPONSIBLITY FOR WATER POLLUTION

AUTHORITY: This revised Part 542 is issued under section 311(p) of the Federal Water Pollution Control Act (33 U.S.C. 1321(p), 86 Stat. 862), as amended by the Clean Water Act of 1977 (P.L. 95–217, 91 Stat. 1566), and section 3 of Executive Order 11735 (38 Fed. Reg. 21243, 1973).

§542.1 Scope

(a) These regulations implement paragraph (1) of subsection 311(p) of the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977 (Public Law 95–217), and apply to all vessels using any port or place in the United States or the navigable waters of the United States except (1) vessels which are 300 gross tons or less, (2) non-self-propelled barges which do not carry oil or hazardous substances as cargo or fuel, and (3) public vessels.

(b) The regulations in this Part set forth the procedures whereby vessel operators can demonstrate that they are financially able to meet their liability to the United States resulting from the discharge of oil or hazardous substances (1) into or upon the navigable waters of the United States, adjoining shorelines or waters of the contiguous zone, or (2) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).

(c) Upon the satisfactory demonstration of financial responsibility, the Commission shall issue Certificates of Financial Responsibility (Water Pollution) which are to be carried aboard the vessels covered by such Certificates. The carriage of a valid Certificate indicates compliance with these regulations.

§542.2 DEFINITIONS

For purposes of this Part, the following terms shall have the indicated meanings:

(a) "Act" means the Federal Water Pollution Control Act, as amended.

(b) "Applicant" means any vessel "operator," as defined in paragraph (q) of this section, who has applied for a Certificate or for the renewal of a Certificate.

(c) "Application" means Application for Certificate of Financial Responsibility (Water Pollution), Form FMC-321.

(d) "Cargo" means goods or materials on board a vessel for purposes of transportation, in any quantity, whether in bulk or by lot, and regardless of whether transported under proprietary or nonproprietary shipping documents. Oil carried solely as operating fuel for equipment carrying barges, while on board such barges, is not within this definition.

(e) "Certificant" means any operator, as defined in paragraph (q) of this section, who has been issued a Certificate.

(f) "Certificate" means a Certificate of Financial Responsibility (Water Pollution) issued by the Federal Maritime Commission pursuant to these regulations.

(g) "Commission" means the Federal Maritime Commission.

(h) "Financial responsibility" means proof of financial ability to reimburse the United States under the requirements of section 311(p)(1) of the Act.

(i) "Fuel" means any oil or hazardous substance used or capable of being used to produce heat or power by burning.

(j) "Hazardous substances" means any substance or substances designated as such by the Administrator of the Environmental Protection Agency pursuant to section 311(b) of the Federal Water Pollution Control Act. Generally, hazardous substances are those elements and compounds, other than oil, which, when discharged, may present an imminent and substantial danger to the public health or welfare including, but not limited to, fish, shellfish, wildlife, shorelines and beaches.

(k) "Inland oil barge" means a non-self-propelled vessel over 300 gross tons capable of carrying oil in bulk as cargo and which is certificated by the U.S. Coast Guard to operate only in the inland waters of the United States, while operating in such waters. Regardless of the actual routes traveled by a barge, it shall not be deemed an "inland oil barge" until and unless it possesses Coast Guard certificaton to that effect.

(l) "Inland waters of the United States" means those waters of the United States lying inside the baseline from which the territorial sea is measured and those waters outside such baseline which are a part of the Gulf Intracoastal Waterway.

(m) "Insurer" means one or more acceptable insurance companies, corporations or associations of underwriters, shipowners' protection and indemnity associations, or other persons acceptable to the Commission.

(n) "Master Certificate" means a Certificate issued to builders, repairers, scrappers and sellers of vessels pursuant to section 542.11 of these regulations.

(o) *"Navigable waters of the United States" means the waters of the United* States, including the territorial sea.

(p) "Oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes other than dredged spoil.

(q) "Operator" or "Vessel operator" means any person, including, but not limited to, an owner, a demise charterer or other contractor who conducts or who is responsible for the operation of a vessel. Persons who are responsible for vessels in the capacity of a builder, repairer, scrapper, or seller are included in this definition of operator.

(r) "Owner" or "Vessel owner" means any person holding legal or equitable title to a vessel. In a case where a Certificate of Registry or equivalent document has been issued, the owner shall be deemed to be the person or persons whose name or names appear thereon as owner; *provided, however,* that where a Certificate of Registry has been issued in the name of the President or Secretary of an incorporated company pursuant to 46 U.S.C. 15, such incorporated company will be deemed to be the owner.

(s) "Person" includes, but is not limited to, an individual, a government, a firm, a corporation, an association, a partnership, a joint-stock company, a business trust, or an unincorporated organization.

(t) "Public vessel" means a vessel, not engaged in commerce, the operator of which is the Government of the United States or a State or political subdivision thereof, or the government of a foreign nation.

(u) "Remove," "removing,"or "removal" means (1) the removal of oil or hazardous substances from the water and shorelines; (2) the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare (including, but not limited to, fish, shellfish, wildlife and public or private property, shorelines and beaches), resulting from a discharge or substantial threat of a discharge of oil or a hazardous substance; and (3) the restoration or replacement of natural resources damaged or destroyed as the result of a discharge of oil or a hazardous substance in violation of subsection 311(b) of the Act.

(v) "Underwriter" means an insurer, a surety company, a guarantor, or any other person, other than the operator, which undertakes to pay the liability of the operator.

(w) "United States" means any place under the jurisdiction of the United States, including, but not limited to, the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the United States Virgin Islands and the Trust Territory of the Pacific Islands.

(x) "Vessel" means every description of watercraft or other artificial contrivance which is used, or capable of being used, as a means of transportation on water, and which is over 300 gross tons. Drilling rigs are included within this definition, except when at a drilling site *and* in a drilling mode. Public vessels are not included in this definition.

§542.3 General

(a) Paragraph (1) of subsection 311(p) of the Act requires vessel operators whose vessels are subject to that paragraph (i.e., vessels subject to these regulations) to establish evidence of financial responsibility to meet removal cost liability to which such operators could be subjected under section 311 of the Act. Upon satisfactorily establishing such evidence, Certificates are issued to the vessel operator in accordance with these regulations.

(b) After September 30, 1978, no vessel subject to these regulations shall use any port or place in, or the navigable waters of, the United States, unless that vessel has a Certificate covering that vessel and its operator.

(c) The gross tons of a vessel subject to these regulations shall be presumed to be the tonnage indicated in the vessel's Certificate of Registry or, in the absence thereof, other marine documents acceptable to the Commission. If a vessel has more than one gross tonnage, the higher tonnage shall apply unless the vessel's operator states in writing that the vessel never operates in any United States waters under such higher tonnage.

§542.4 Where to Apply and Obtain Forms

(a) Any operator who wishes to be issued a Certificate (including a Master Certificate) shall file or cause to be filed with the Commission an application Form FMC-321, fees and evidence of financial responsibility at the following address:

Office of Water Pollution Responsibility
Federal Maritime Commission
Washington, D.C. 20573

(b) Regulations concerning application Forms FMC-321 are set forth in the remaining paragraphs of this section 542.4 and in sections 542.5 and 542.6. Regulations concerning fees are set forth in section 542.13, and regulations concerning evidence of financial responsibility are set forth in section 542.8. Regulations concerning Master Certificates (i.e., special Certificates applicable only in connection with vessels held solely for building, repair, scrapping, or sale) are set forth in section 542.11.

(c) Application Forms FMC-321 may be obtained from the Commission's Washington, D.C. address set forth in paragraph (a) of this section and from the Commission offices at New York, New York; New Orleans, Louisiana; San Francisco, California; Chicago, Illinois; Savannah, Georgia; San Pedro, California and Hato Rey, Puerto Rico. All requests for assistance, including telephone inquiries, in completing applications should be directed to the Commission's Office of Water Pollution Responsibility in Washington, D.C.

§542.5 Time to Apply

A completed application, fees and evidence of financial responsibility shall be filed before September 30, 1978. After that date, filings shall be made at least 21 days prior to the date the Certificate is required. Applications will be processed in the order in which they are filed.

§542.6 Applications, General Instructions

(a) All applications and supporting documents shall be in English. All monetary terms shall be in United States currency.

(b) *Only vessel operators*, as defined in paragraph (q) of section 542.2, may apply for a Certificate.

(c) The spaces on the application Form FMC-321 shall be filled in only with the information requested or the phrase "Not applicable." Applicants for a Master Certificate should refer to Section 542.11.

(d) The application shall be signed by an authorized official of the applicant, whose title shall be shown in the space provided on the application. A written statement proving authority to sign shall also be required where the signer is not disclosed as an individual (sole proprietor) applicant, a partner in a partnership applicant, or a director or other officer of a corporate applicant.

(e) If, prior to the issuance of a Certificate, the applicant becomes aware of a change in any of the facts contained in the application or supporting documentation, the applicant shall, in writing, within five (5) days of becoming aware of the change, notify the Commission of the change.

§542.7 Renewal of Certificates

After Certificates are issued, certificants shall apply to the Commission for the issuance of renewal Certificates. Such applications shall be made in writing at least 21 days, but not earlier than 90 days, prior to the expiration dates of the existing Certificates. Each application shall be accompanied by appropriate recertification fees, shall identify any item of information on the original application Form FMC-321 which has changed since the original application was filed, and shall set forth the correct information in full.

§542.8 Financial Responsibility, How Established

(a) *General*—In addition to filing an application Form FMC-321, each applicant shall demonstrate that it is able to pay the amount necessary to meet its removal cost liability under section 311 of the Act by establishing evidence of financial responsibility in accordance with these regulations. The amount of evidence of financial responsibility required by the regulations in this Part 542 is separate from and in addition to the amount, if any, required of the applicant pursuant to Part 543 (Oil Pollution Cleanup—Alaska Pipeline) of this Title.

(b) *Methods*—An applicant shall establish evidence of financial responsibility by any one of, or by an acceptable combination of, the following methods:

- Insurance;
- Surety Bond;
- Qualification as a Self-Insurer;
- Guaranty;
- Other Methods.

(1) *Insurance*—Insurance may be established by filing with the Commission an Insurance Form FMC-322 (Master Insurance Form FMC-323 when applying for a Master Certificate) executed by an insurer which is acceptable to the Commission for purposes of these regulations;

(2) *Surety Bond*—An applicant may file with the Commission a Surety Bond Form FMC-324, executed by the applicant and by a surety company which is acceptable to the Commission for purposes of these regulations. To be

acceptable, surety companies must, at a minimum, be certified by the United States Department of the Treasury with respect to the issuance of Federal bonds in the penal sum of the bonds to be issued under these regulations;

(3) *Self-Insurance*—A person may qualify as a self-insurer by maintaining, in the United States, working capital and net worth, each in the amount of $150 per gross ton of the largest vessel to be self-insured or $250,000, whichever is greater. For the purposes of this subparagraph, "working capital" is defined as the amount of current assets located in the United States, less *all* current liabilities; and "net worth" is defined as the amount of all assets located in the United States, less *all* liabilities. The amounts required by this subparagraph are in addition to the amounts of working capital and net worth, if any, required by Part 543 of this Title (Oil Pollution Cleanup—Alaska Pipeline). Maintenance of the required working capital and net worth shall be demonstrated by submitting with the initial application the items specified in subdivision (i) of this subparagraph for the applicant's last fiscal year preceding the date of application. Thereafter, for each of the applicant's fiscal years in which the certificant is holding a Certificate, the applicant/certificant shall submit the items specified in subdivision (i) and (ii) of this subparagraph and shall be subject to the provisions of subdivisions (iii), (iv), (v) and (vi) of this subparagraph:

(i) *Initial and Annual Submissions*—An applicant/certificant shall submit an annual, current nonconsolidated statement of income and surplus, certified by an independent Certified Public Accountant. Those financial statements shall be accompanied by an additional statement from the applicant/certificant's Treasurer (or equivalent official), certifying to both the amount of current assets and the amount of total assets included in the accompanying balance sheet, which are located in the United States and acceptable for purposes of this Part, *e.g.*, not pledged for purposes of Part 543. If the balance sheet and statement of income and surplus cannot be submitted in nonconsolidated form, consolidated statements may be submitted if accompanied by an additional statement prepared by the involved Certified Public Accountant, certifying to the amount by which (A) the applicant's/certificant's total assets, located in the United States and acceptable for purposes of this Part, exceed its total liabilities, and (B) the applicant's/certificant's current assets, located in the United States and acceptable for purposes of this Part, exceed its current liabilities. Such additional statement by the Certified Public Accountant must specifically name the applicant/certificant, must indicate that the amounts so certified relate only to the applicant/certificant, apart from any other entity, and must identify the consolidated financial statement to which it applies;

(ii) *Semi-Annual Submissions*—When the applicant's/certificant's self-insurance covers a vessel which carries oil or hazardous substances in bulk as cargo and its demonstrated net worth is not at least ten times the required amount, an affidavit shall be filed by the applicant's/certificant's corporate Treasurer (or the equivalent official in cases where the applicant/certificant is not a corporation) covering the first six months of the applicant's/certificant's fiscal year. Such affidavits shall state that neither the working capital nor the net worth have, during the first six months, fallen below the required amounts;

(iii) *Additional Submissions*—Additional financial information shall be submitted upon request of the Commission. All applicants/certificants who choose self-insurance shall notify the Commission within five days of the date such persons know, or have reason to believe, that the amounts of working capital or net worth have fallen below the amounts required by this subparagraph;

(iv) *Time for Submissions*—All required annual financial statements shall be received by the Commission within three calendar months after the close of the applicant's/certificant's fiscal year, and all six-month affidavits within one calendar month after close of the applicable six-month period. Upon written request, the Commission may grant a reasonable extension of the time limits for filing financial statements/affidavits, provided that the request sets forth good and sufficient reason to justify the requested extension and is received 15 days before the statements/affidavits are due. The Commission will not consider a request for an extension of more than 45 days;

(v) *Failure to Submit*—Failure to timely file any statement, data, or affidavit required by this subparagraph (3) shall cause the revocation of the Certificate;

(vi) *Waivers of Submissions*—For good cause shown in writing by the applicant/certificant, the Commission may waive the working capital requirement in cases where the applicant/certificant is an economically regulated public utility, a municipal or higher-level governmental entity, or an entity which operates solely as a charitable, non-profitmaking organization. The Commission will consider good cause to have been shown when the applicant/certificant demonstrates in writing that the grant of such waiver would benefit at least a local public interest without resulting in undue risk to the environment *and* without resulting in undue risk that the applicant's/certificant's removal cost liability could not be met. In addition, for good cause shown in writing by the applicant/certificant, the Commission may waive the working capital requirement in any case where it can be demonstrated that working capital is not a significant factor in the applicant's/certificant's financial condition. An applicant's/certificant's net worth in relation to the amount of its exposure under the Act, as well as a history of stable operations will be major elements in such demonstration;

(4) *Guaranty*—An applicant/certificant may file with the Commission a Guaranty Form FMC-325 (Master Guaranty Form FMC-326 when applying for a Master Certificate) executed by a guarantor acceptable to the Commission for purposes of these regulations. A guarantor shall be subject to and must fully comply with all of the self-insurance provisions of subparagraph (3) of this paragraph (b). In addition, the amounts of working capital and net worth required to be demonstrated by an acceptable guarantor shall be no less than the aggregate amounts underwritten as a guarantor and self-insurer pursuant to these regulations and the regulations of Part 543 of this Title;

(5) *Other Methods*—An applicant may choose any other method specially justified and acceptable to the Commission, provided that such other method is not a mere modification of any of the foregoing methods;

(c) *Forms—General*—The Commission's Application Form FMC-321, Insurance Form FMC-322, Master Insurance Form FMC-323, Surety Bond Form FMC-324, Guaranty Form FMC-325, and Master Guaranty Form

FMC-326, as appended to this Part, are hereby incorporated into this Part. If more than one insurer, guarantor, or surety joins in executing an insurance, guaranty, or surety bond form, such action shall constitute joint and several liability on the part of such joint underwriters. Each form submitted to the Commission pursuant to these regulations shall set forth in full the correct name of the applicant or certificant on whose behalf such form is submitted.

(d) *Direct Action*—Forms FMC-322 through FMC-326 and any other undertaking accepted pursuant to the provisions of these regulations, shall permit the commencement of an action in court for removal cost claims arising under the provisions of section 311 of the Act by the claimant (including a claimant by right of subrogation) directly against the underwriter. Such forms and other undertakings shall also provide that in the event such action is brought directly against the underwriter, such underwriter shall be entitled to invoke only those rights and defenses permitted by paragraph (3) of subsection 311(p) of the Act, as specified by the Commission.

(e) *Public Access to Data*—Financial data filed by applicants, certificants, and underwriters shall be public information to the extent required by the Freedom of Information Act and permitted by the Privacy Act.

§542.9 Individual Certificates

(a) An individual Certificate for each vessel listed on completed applications shall be issued by the Commission when acceptable evidence of financial responsibility has been provided and appropriate fees have been paid, except where Master Certificates are issued pursuant to section 542.11 of these regulations. Such Certificates will be issued only to vessel operators, as defined in paragraph (q) of section 542.2. Each Certificate shall be effective for not more than three years from the date of issue.

(b) The original Certificate shall be carried on the vessel named on the Certificate. However, a legible copy (certified as accurate by a notary public or other person authorized to take oaths) may be carried in lieu of the original Certificate if the vessel is an unmanned barge and does not have a facility which the vessel operator believes would offer suitable protection for the original Certificate. If a copy is carried aboard such barge, the original shall be retained at a location in the United States and shall be kept readily accessible for inspection by U.S. Government officials.

(c) Erasures or other alterations on a Certificate or copy is prohibited (even if made by government authorities) and automatically voids such Certificate or copy.

(d) If at any time after a Certificate has been issued a certificant becomes aware of a change in any of the facts contained in the application or supporting documentation, the vessel operator shall notify the Commission in writing within five (5) days of becoming aware of the change.

(e) If for any reason, including a vessel's demise or transfer to a new operator, a certificant ceases to be the vessel's operator, as defined in paragraph (q) of section 542.2, the certificant shall, within ten (10) days, complete the reverse side of that vessel's original Certificate and return it to the Commission. Such Certificate and any copy thereof is automatically void (whether or not *returned to the Commission), and its use is prohibited.* Where such voided Certificate cannot be returned because it has been lost or destroyed, the certificant shall, as soon as possible, submit the following written information to the Commission:

(1) The number of the Certificate and the name of vessel;

(2) The date and reason why the certificant ceased to be the operator of the vessel;

(3) The location of the vessel on the date the certificant ceased to be the operator, and

(4) The name and mailing address of the person to whom the vessel was sold or transferred.

(f) In the event of the temporary transfer of a vessel certificated pursuant to this Part, where the certificant transferring such vessel continues to be responsible for liabilities to which such vessel could be subjected under section 311 of the Act, and continues to maintain on file adequate evidence of financial responsibility with respect to such vessel, the existing Certificate will remain in effect and the new operator shall not be required to obtain an additional Certificate.

§542.10 Operator's Responsibility for Identification

Except in the case of unmanned barges, operators who are not also the owners of certificated vessels shall carry on board such vessels the original or legible copy of the demise charter-party or any other written document which demonstrates that such operators are, in fact, the operators designated on the Certificates. Such documents shall be presented for examination to U.S. Government officials upon request.

§542.11 Master Certificates

(a) A contractor or other person who is responsible for vessels in the capacity of a builder, repairer, scrapper, or seller may choose to apply for a Master Certificate in lieu of applying for an individual Certificate for each vessel. A Master Certificate is designed to cover all of such applicant's vessels, provided each of such vessels is held by the applicant *solely* for purposes of construction, repair, scrapping, or sale. A vessel which is being operated commercially in any business venture, including the business of building, repairing, scrapping, or selling other vessels (e.g., a slop barge used by a shipyard), is not eligible to be covered by a Master Certificate. Any vessel which requires a Certificate but which is not eligible for coverage by a Master Certificate shall be covered by a separate Certificate applied for in accordance with the provisions of section 542.9.

(b) Application for a Master Certificate shall be made by filing Form FMC-321, appropriate fees, and evidence of financial responsibility. Acceptable evidence of financial responsibility may be established by any of the methods set forth in paragraph (b) of section 542.8, except Insurance Form FMC-322 and Guaranty Form FMC-325. Application Form FMC-321 shall be completed in full, except for Item 5. In lieu of completing that item, the applicant shall make the following statement in Item 5, and shall indicate the gross tonnage of the largest vessel to be covered by the Master Certificate: "This is an application for a Master Certificate. The largest vessel to be covered by this application is __________ gross tons." The gross tonnage indicated by the applicant in such statement may not exceed the applicant's dollar amount of financial responsibility divided by $150.

(c) Each Master Certificate shall indicate thereon (1) the name of the operator (the applicant builder, repairer, scrapper, or seller), (2) the dates of issuance and termination, encompassing a period of not more than three years, and (3) the gross tonnage of the largest vessel eligible for coverage by that Master Certificate. The gross tonnage indicated on a particular Master Certificate shall be determined by the amount of financial responsibility established by the applicant pursuant to the optional methods set forth in paragraph (b) of section 542.8 (a master insurance form, a surety bond, self-insurance, or a master guaranty form). Master Certificates will not name the vessels covered by such Certificates.

(d) Once a Master Certificate is issued, new vessels (none of which exceed the tonnage indicated on the Master Certificate, all of which are eligible for coverage by a Master Certificate, and all of which are held solely for the purpose of construction, repair, scrapping or sale) shall be automatically covered by that Master Certificate. However, before acquiring a vessel (by any means, including conversion of an existing vessel) of a larger gross tonnage than the tonnage indicated on the existing Master Certificate, the certificant shall submit (1) evidence of increased financial responsibility to cover the larger vessel, (2) a new certification fee, and (3) either a new application form or a letter amending the existing application form to reflect the new gross tonnage which is to be indicated on a new Master Certificate.

e) A person to whom a Master Certificate has been issued shall submit to the Commission, every six months beginning with the month in which the Master Certificate is issued, a report indicating the name, previous name, or other identifying information and gross tonnage of each vessel covered by the Master Certificate during the six-month reporting period.

f) A copy of the Master Certificate shall be carried aboard each vessel covered by the Master Certificate. The original Certificate shall be retained at a United States location and be kept readily accessible for inspection by U.S. Government officials.

g) Upon revocation or other invalidation of the Master Certificate, the original Certificate shall be returned within ten (10) days to the Commission and all copies shall be destroyed by the person in whose name the Certificate was issued. The use of an invalid Master Certificate or any copy thereof is prohibited.

§542.12 Certificates, Denial or Revocation

(a) A Certificate shall be denied or revoked for any of the following reasons:

(1) Making any willfully false statement to the Commission in connection with an application for an initial Certificate or a request for a renewal Certificate;

(2) Failure of an applicant or certificant to establish or maintain acceptable evidence of financial responsibility as required by these regulations;

(3) Failure to comply with or respond to lawful inquiries, regulations, or orders of the Commission pertaining to activities subject to this Part;

(4) Failure to timely file the statements or affidavits required by subdivisions (i), ii), or (iii) of subparagraph (3) of paragraph (b) of section 542.8 of these regulations; or

(5) Cancellation or termination of any insurance form, surety bond, guaranty or other undertaking issued pursuant to these regulations, unless acceptable substitute evidence of financial responsibility has been submitted.

(b) Denial or revocation of a Certificate shall be immediate and without prior notice where the applicant or certificant (1) is no longer the responsible operator of the vessel in question, (2) fails to furnish acceptable evidence of financial responsibility in support of an application, or (3) permits the cancellation or termination of the insurance form, surety bond, guaranty or other undertaking upon which the continued validity of the Certificate was based. In any other case, prior to the denial or revocation of a Certificate, the Commission shall advise the applicant or certificant, in writing, of its intention to deny or revoke the Certificate, and shall state the reason therefor.

(c) If the reason for an intended revocation is failure to file the required financial statements or affidavits, the revocation shall be effective ten (10) days after the date of the notice of intention to revoke, unless the certificant shall, prior to revocation, demonstrate that the required statements were timely filed.

(d) If the intended denial or revocation is based upon one of the reasons in subparagraphs 542.12(a)(1) or (3), the applicant or certificant may request, in writing, a hearing to show that the applicant or certificant is in compliance with the provisions of these regulations, and, if such request is received within 30 days after the date of the notification of intention to deny or revoke, such hearings shall be granted by the Commission. Hearings pursuant to these regulations shall be conducted in accordance with the Commission's Rules of Practice and Procedure (46 CFR Part 502).

§542.13 Fees

(a) This section establishes the application fee which shall be imposed by the Commission for processing Application Form FMC-321 and also establishes the certification fee which shall be imposed for the issuance of Certificates.

(b) No Certificate shall be issued unless the application and/or certification fees set forth in paragraphs (d) and (e) of this section have been paid.

(c) Fees shall be paid by check, draft or postal money order in United States currency and be made payable to the Federal Maritime Commission.

(d) Each applicant who submits Application Form FMC-321 for the first time and who does not hold a *valid* Certificate of Financial Responsibility (Oil Pollution) pursuant to previous Part 542 of this Title (i.e., General Order 27), shall pay an initial, nonrefundable application fee of $100. Only one application fee shall be necessary where an applicant submits both an application for individual Certificates and an application for a Master Certificate. Applications for additional Certificates, or to amend or renew existing Certificates, shall not require new application fees. However, once an Application Form FMC-321 is withdrawn or denied for any reason, and the same applicant, holding no valid

Certificates, wishes to reapply for a Certificate (covering the same or new vessel), a new application form and application fee of $100 shall be required.

(e) In addition to a $100 application fee, applicants shall pay a $20 fee for each Certificate issued, whether an individual Certificate or Master Certificate. Applicants shall submit such certification fee for each vessel listed in, or later added to, an application for individual Certificates. The $20 certification fee is required to renew or to reissue a Certificate for any reason, including, but not limited to, a name change or a lost Certificate.

(f) Certification fees shall be refunded, upon receipt of a written request, if the application is withdrawn or denied prior to issuance of the Certificates. Overpayments in the application fees and/or the certification fees will be refunded on request only if the refund is $10 or more. However, any overpayments not refunded will be credited, for a period of two years from the date of receipt of the monies by the Commission, for the applicant's possible future use in connection with these regulations.

§542.14 Enforcement

(a) Any operator of a vessel subject to subsection 311(p) of the Act who fails to comply with the provisions of subsection 311(p) of these regulations shall be subject to a fine of not more than $10,000 for each such failure to comply.

(b) The Secretary of the Treasury may refuse to grant the clearance required by section 4197 of the Revised Statutes of the United States, as amended (46 U.S.C. 91), to any vessel subject to subsection 311(p) of the Act which does not have a Certificate issued pursuant to these regulations.

(c) The Secretary of the Department in which the Coast Guard is operating many deny entry to any port or place in the United States or the navigable waters of the United States and detain at the port or place in the United States from which it is about to depart for any other port or place in the United States any vessel subject to subsection 311(p) of the Act, which, upon request, does not produce a Certificate issued pursuant to these regulations.

§542.15 Service of Process

(a) When executing the forms required by these regulations, each applicant and underwriter shall designate thereon a person in the United States as its agent for service of process for the purposes of section 311 of the Act and of these regulations. Each designation shall be acknowledged in writing by the designee unless that party has already furnished the Commission with a "master" concurrence showing that it has agreed in advance to act as the United States agent for service of process for the applicant or underwriter in question.

(b) When the designated agent cannot be served because of death, disability, or unavailability, the Secretary of the Federal Maritime Commission will be deemed to be the agent for service of process. When serving the Secretary of the Federal Maritime Commission, the server shall also send to the applicant, certificant, or underwriter, a copy of each document served upon the Secretary, and shall attest to that mailing at the time service is made. Copies will be sent by registered mail, postage prepaid.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–38

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, ET AL.

v.

AMERICAN MAIL LINES, LTD., ET AL.

REPORT AND ORDER ADOPTING INITIAL DECISION

August 8, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice-Chairman;* Karl E. Bakke,[1] James V. Day, and Leslie Kanuk, *Commissioners*)

This proceeding was initiated by the filing of a complaint on July 9, 1973, in which the Council of North Atlantic Shipping Associations (CONASA), the International Longshoremen's Association, AFL/CIO (ILA), the Delaware River Port Authority (DRPA) and the Massachusetts Port Authority (Massport), charged fifteen common carriers by water (Respondents)[2] with violations of sections 15,[3] 16 First, 17 and 18(b)(5) of the Shipping Act, 1916. Complainants challenged the legality of the transportation system known as Far East minilandbridge or minibridge. Numerous parties intervened on behalf of both Complainants and Respondents.[3]

The Far East minibridge system is representative of most minibridge services. Rail and water carriers jointly undertake to provide through transportation under a tariff filed with both the Federal Maritime Commission and the Interstate Commerce Commission (ICC). The shipper pays a single rate and the goods move under a single bill of lading. The water and rail carriers divide the "joint rate" pursuant to a previously agreed upon formula.[4]

[1] Concurring in final result.

[2] Respondents are: American Mail Line, Ltd.; American President Lines, Ltd. (APL); Japan Line, Ltd. (Japan Line); Kawasaki Kisen Kaisha Line, Ltd. (K Line); Mitsui-O.S.K. Lines, Ltd.; Nippon Yusen Kaisha Line, Ltd.; Orient-Overseas Line, Inc.; Pacific Far East Line; Phoenix Container Liners, Ltd. (Phoenix Line); Sea-Land Service, Inc. (Sea-Land); Seatrain Line, Inc. (Seatrain); Showa Shipping Co., Ltd. (Showa); United States Lines, Inc. (USL); Yamashita-Shinnihon Line; and Zim Israel Navigation Co., Ltd.

[3] The section 15 allegation was dismissed by an order served April 8, 1975.

[3] Appendix A to the Initial Decision lists all intervenors.

[4] The Presiding Officer provides an example of a minibridge movement from Kobe, Japan, to New York: . . . [T]he agreed to division takes the form of a water rate and a flat rail rate per container, the rail carriage being from rail ramp at the West Coast port to rail ramp at New York. The Kobe shipper takes delivery of the water carrier's container, packs it, and delivers it to the water carrier's container yard. The water carrier collects the total freight from the shipper, moves the cargo to the West Coast port (*e.g.*, Long Beach), pays the Long Beach terminal and wharfage charges, transfers the cargo from the ship to the rail ramp, and pays the railroad the agreed rate for transcontinental transport. The consignee receives the container at the New York railhead. Outbound the operation is reversed. The shipper, of course, has the free choice between an all-water service or a minibridge service. (I.D., at 5).

Chief Administrative Law Judge John E. Cograve (Presiding Officer) issued an Initial Decision on July 1, 1977, holding that Respondent's Far East minibridge service was not violative of Shipping Act sections 16 First, 17 or 18(b)(5). Complainants and Intervenors filed Exceptions to the Initial Decision.[5] Oral argument was conducted before the Commission on June 13, 1978.

POSITION OF THE PARTIES

The Exceptions raise numerous allegations of error which can be categorized as follows:

1. Minibridge violates sections 16 First and 17 of the Act and section 8 of the Merchant Marine Act of 1920, in that:
   a. minibridge carriers absorb shippers' costs;
   b. minibridge diverts substantial amounts of naturally tributary cargo from Atlantic and Gulf ports.
   c. minibridge inflicts serious harm on Complainants;
   d. minibridge causes undue prejudice and unjust discrimination against shippers and against ports;
2. Minibridge rates are so unreasonably low they violate section 18(b)(5) of the Act;
3. Respondents must justify the use of minibridge;
4. Minibridge traffic should move at premium rates or a floor should be imposed on minibridge rates;
5. The Commission lacks jurisdiction to accept minibridge tariffs;
6. The Presiding Officer failed to establish guidelines for future cargo diversion cases;
7. The Initial Decision inadequately describes Far East minibridge service;
8. The Presiding Officer improperly characterized the testimony of certain witnesses;
9. Complainants were denied full discovery.

DISCUSSION

Upon review of the entire record in this proceeding, it has been concluded that the findings and conclusions set forth in the Initial Decision are correct in all substantial respects. Exceptions (1) through (4) consist entirely of matters argued in briefs before the Presiding Officer. All have been adequately treated in the Initial Decision and require no further response by the Commission. Accordingly, the Initial Decision shall be adopted as our own except as it may be modified or clarified by the following discussion of matters raised by Complainants' remaining exceptions.

CONASA asserts that the Commission lacks statutory authority to accept

[5] Separate Exceptions were filed by: (a) CONASA, ILA, and DRPA; (b) Port of Seattle; (c) Massport; (d) State of Texas, Board of Trustees of Galveston Wharves; Galveston Cotton Exchange and Board of Trade, Port of Beaumont Navigation District of Jefferson County, Port of Houston Authority of Harris County, Texas Ports Association, and Houston Port Bureau, Inc. (Texas); (e) Board of Commissioners of the Port of New Orleans and New Orleans Traffic and Transportation Bureau (New Orleans); and (f) the Commonwealth of Pennsylvania (Pennsylvania).

Replies to Exceptions were filed by: (a) Japan Line; (b) APL; (c) Sea-Land; (d) the intervening railroads; (e) K Line; (f) Bureau of Hearing Counsel (Hearing Counsel); (g) United States Department of Transportation (DOT); and (h) USL; Phoenix; Seatrain; and Showa (jointly).

minibridge tariffs for filing. CONASA claims that prior to 1970, the Commission maintained that it lacked authority to accept joint rates for filing and sought intermodal legislation from Congress. It further states that the Commission's adoption of regulatons in 1970 governing the filing of joint through intermodal rates,[6] cannot compensate for the absence of statutory authority to accept minibridge tariffs.

The Commission's authority to accept rail/water tariffs for filing and regulatory jurisdiction over the water portion of such joint through rates pursuant to section 18(b) of the Shipping Act, 1916, 48 U.S.C. 817(b)(1), has been confirmed by recent judicial decisions. In *Commonwealth of Pennsylvania v. I.C.C.*, 561 F.2d 278 (D.C.C. 1977) the court held that the ICC was authorized to accept joint intermodal tariffs—which are filed at both the ICC and this Commission and which specify the land/water rate divisions—and to confine its jurisdiction to the land portion of the through transportation.[7] This result was plainly premised upon the FMC exercising jurisdiction over the water portion of the joint rate just as the ICC regulates the land portion.[8]

Early in the instant proceeding, APL petitioned the Commission to institute rulemaking on the subject of minibridge as a substitute for adjudication of Complainants' claims. In denying this petition, the Commission designated this proceeding as a lead case for the establishment of "general principles" concerning minibridge.[9] Three parties now allege that the Presiding Officer failed to establish the guidelines contemplated by our December, 1973 Order.[10] When examined in context, however, the Initial Decision, contains a statement of the principles governing the diversion of containerized cargo and port equalization sufficient to delineate the general limits within which minibridge carriers will be allowed to compete for intermodal cargoes.

The record in this proceeding and the varied allegations of the complaint necessarily limit the context within which specific guidelines can be established. The Presiding Officer soundly determined that it was "not practical or feasible to draw future guidelines for measuring the lawfulness of diversion, if by guidelines is meant the drafting of precise rules of conduct under which a particular practice could be judged valid or invalid by the simple process of matching a particular practice against the language of a rule." (I.D., at 69). The Commission, however, views the Initial Decision as establishing the following general principles:

1. Certain cargo may be naturally tributary to a port, but any "naturally

[6] "Filing of Through Rates and Through Routes," Amendment 4 to General Order 13, 46 C.F.R. 536.16, 35 Fed. Reg. 6394 (1970).

[7] The ICC had previously maintained that it lacked authority to accept joint through tariffs in foreign commerce and had also sought intermodal legislation.

[8] Other recent decisions have assumed the existence of FMC jurisdiction to accept joint tariffs for filing. *State of Texas v. Seatrain International, S.A.*, 518 F.2d 175 (5th Cir. 1975) and *Commonwealth of Pennsylvania v. Federal Maritime Commission*, 392 F.Supp. 795 (D.D.C. 1975).

[9] Order served December 5, 1973, 14 S.R.R. 236. However, in its "Clarification of Denial of Petition for Rule Making" served April 5, 1974, 14 S.R.R. 630, 633, the Commission further stated that "[i]t was not our intention to conduct a rule making proceeding sub nomine adjudication, or to resolve *all* of the manifold absorption and minibridge questions in one proceeding."

[10] Seattle's contention that the Initial Decision "fails to enunciate general principles under which minibridge is to be conducted" merely voices dissatisfaction with the Initial Decision's failure to adopt the particular principles espoused by Seattle. We find no support in the record for Seattle's request that minibridge rates be set in relation to Overland Common Point (OCP) rates.

tributary zone'' surrounding a port is constantly changing.[11] In a particular case, this zone is determined by consideration of: (a) the flow of traffic through the port prior to the conduct in question, including points of cargo origin or destination; (b) relevant inland transportation rates; (c) natural or geographical transportation patterns and efficiencies, and (d) shipper needs and cargo characteristics.

2. A carrier or port may not *unreasonably* divert cargo which is naturally tributary to another port. When diversion of naturally tributary cargo occurs, the reasonableness of the practice must be determined. The reasonableness of the particular practice is determined by consideration of: (a) the quantity and quality of cargo being diverted (is there substantial injury?), (b) the cost to the carrier of providing direct service to the port; (c) any operational difficulties or other transportation factors that bear upon the carrier's ability to provide direct service *(e.g.*, lack of cargo volume, inadequate facilities); (d) the competitive conditions existing in the trade; and (e) the fairness of the diversionary method or methods employed *(e.g.*, absorption, solicitation).

These guidelines shall be considered in all future proceedings wherein violations of section 16 First and 17 of the Act are alleged based upon the diversion of cargo from a port.

Seattle and Pennsylvania except to the Presiding Officer's description of minibridge. Pennsylvania asserts that certain details about minibridge were omitted. Whereas, Seattle contends that the description is misleading because many import containers are actually ''dropped off'' at interior points rather than delivered to the destination ''port'' specified in Respondent's tariffs. The record simply does not support any finding of a ''drop off'' of containers.[12] Moreover, we find that the Presiding Officer's description of minibridge does accurately describe all elements of the service relevant to Shipping Act regulation.

Texas and Pennsylvania except to statements of the Presiding Officer characterizing the testimony of their respective governors as being primarily for ''psychological effect.'' (I.D., at 33). When it is considered that the broad assertions made by the governors were unsupported by facts it would appear that the Presiding Officer correctly described the nature of the testimony. Even if these observations were without a reasonable foundation, however, they were plainly harmless in that they had no perceptible effect upon the Presiding Officer's handling or disposition of the case.

Complainants assert that a ruling on discovery denied them access to carrier cost data concerning minibridge.[13] Complainants submitted an extensive discovery request on October 5, 1973. At a second prehearing conference on October 24, 1973 a group representing Complainants, Respondents, and Intervenors was designated to draft a standard discovery form relating to Complainants' original discovery requests. A procedural schedule was agreed to by all parties at a third prehearing conference on February 7, 1974. Further discovery was at that time

[11] A port's locally tributary zone will not only vary over time, but with the nature of the commodity shipped. The tributary zone for cotton may differ from that for apples or for computer parts.

[12] If carriers are indeed ''dropping off'' containers at points not specified in their tariffs such action would violate both the Interstate Commerce Act and the Shipping Act and subject them to possible civil penalties.

[13] The ''Ruling on Additional Interrogatories'' denying further discovery was issued on September 12, 1974.

clearly limited to: (1) matters which could not have been reasonably foreseen; and (2) "follow-up" on responses to the original discovery requests. On the date designated for follow-up discovery, June 10, 1974, Complainants served numerous additional interrogatories. The Presiding Officer concluded that this new request sought information which could have been foreseen at the time of the original request and did not constitute follow up discovery. We perceive no error in this ruling and recognize that our adjudicatory proceedings must be characterized by such firm but fair actions by administrative law judges, if a timely and useful record is to be produced.[14]

The Commission's Office of Environmental Analysis has identified the energy and environmental consequences of a final resolution of this proceeding in a Final Environmental Impact Statement (FEIS) served June 26, 1978.[15] We have thoroughly reviewed the FEIS and have fully considered it in our determination of this matter.

The FEIS discusses the environmental effects of the three possible alternative resolutions of this proceeding—(1) declaring the minibridge service lawful; (2) declaring it unlawful; or (3) declaring it lawful with certain provisions. It concludes that the environmentally preferable alternative is to declare minibridge lawful. Such a decision will promote energy efficiency, conserve fossil fuels and benefit the shipping public. We note that in declaring minibridge lawful, certain adverse environmental impacts are unavoidable. For instance, air pollution may increase in certain United States land areas. These adverse impacts are minimal, however, and do not warrant deviation from the regulatory action otherwise mandated by Shipping Act sections 16, 17 and 18(b).

THEREFORE, IT IS ORDERED, That the Exceptions of CONASA, ILA, and DRPA; Port of Seattle; Massport; State of Texas, Board of Trustees of Galveston Wharves; Galveston Cotton Exchange and Board of Trade, Port of Beaumont Navigation District of Jefferson County, Port of Houston Authority of Harris County, Texas Ports Association, and Houston Port Bureau, Inc. (Texas); Board of Commissioners of the Port of New Orleans and New Orleans Traffic and Transportation Bureau (New Orleans); and the Commonwealth of Pennsylvania (Pennsylvania) are denied and the Initial Decision issued in this proceeding is adopted; and

IT IS FURTHER ORDERED, That the Final Environmental Impact Statement served June 26, 1978, is adopted, and;

IT IS FURTHER ORDERED, That the complaint of the Council of North Atlantic Shipping Associations, the International Longshoremen's Association AFL-CIO, the Delaware River Port Authority, and the Massachusetts Port Authority is denied and this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[14] Complainants could have attempted to obtain carrier cost data at the hearing by employing the subpoena power available under section 502.131 of the Commission's Rules. 46 C.F.R. 502.131. They chose not to do so.

[15] The energy assessment is required by section 382(b) of the Energy Policy and Conservation Act of 1975, 42 U.S.C. 6362; the environmental assessment by the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

FEDERAL MARITIME COMMISSION

No. 73–38

COUNCIL OF NORTH ATLANTIC
SHIPPING ASSOCIATIONS, ET AL.

v.

AMERICAN MAIL LINES, LTD., ET AL.

Adopted August 8, 1978

Respondents' Far East minibridge service found not to violate sections 16 First, 17 or 18(b)(5) of the Shipping Act, 1916.

Analysis of precedent shown to require reevaluation of past criteria for intermodal or minibridge service in the light of present advances in transportation, particularly containerization and the developments fostered by it.

Francis A. Scanlan, Sean O'Callaghan, and *C. Peter Lambos* for complainant Council of North Atlantic Shipping Associations.

Thomas W. Gleason, Jr., for complainant the International Longshoremen's Association.

Francis A. Scanlan, George F. Mohr, and *Victor Wright* for complainant Delaware River Port Authority.

Joseph F. Kelly, Jr., for complainant Massachusetts Port Authority.

Warner W. Gardner, R. James Woolsey, and *Robert T. Basseches* for respondents American Mail Line, Ltd., and American President Lines, Ltd.

George F. Galland, Robert L. McGeorge, John C. O'Shea, and *Amy Klein* for respondent Japan Lines, Ltd.

John P. Meade, David C. Nolan, Forrest Booth, and *Frank A. Devine* for respondent Kawasaki Kisen Kaisha, Ltd.

Edward J. Sheppard, IV, and *Edward Schmeltzer* for respondents Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha Line, Ltd., and Yamashita-Shinnihon Line.

Seymour H. Kligler for respondent Orient Overseas Line, Inc.

Lee A. Monroe and *Roy G. Bowman* for respondent Pacific Far East Line.

Neal M. Mayer and *Paul D. Coleman* for respondents Phoenix Container Liners, Ltd., Seatrain Lines, Inc., and Showa Line, Ltd.

Edward M. Shea, John A. Douglas and *Peter Hearn* for respondent SeaLand Service, Inc.

Russell T. Weil, James B. Moore, and *Mary Lou Montgomery* for respondent United States Lines, Inc.

Edwin Longcope for respondent Zim Israel Navigation Co., Ltd.

Dudley J. Clapp, Jr., Milton J. Stickles, Jr., E. Duncan Hamner, Jr., and *John DeGurse* for intervenor Military Sealift Command on behalf of the Department of Defense.

G. B. Perry and *C. C. Guidry* for intervenor Board of Commissioners of the Port of New Orleans.

Louis A. Schwartz, Laurence F. Daspit, and *G. B. Perry* for intervenor New Orleans Traffic and Transportation Bureau.

John P. Meade and *Carl Parker, Jr.,* for intervenor the Board of Trustees of the Galveston Wharves.

G. B. Perry for intervenor Gulf Ports Association, Inc.

Samuel Frankel for intervenor American Importers Association, Inc.

David C. Redford, F. William Colburn and *G. E. Strange* for intervenors Port of Houston Authority, Houston Port Bureau, Inc., and Texas Ports Association.
G. K. Winn for intervenor Board of Commissioners of the Port of Lake Charles.
T. M. Hogg for intervenor Greater Baton Rouge Port Commission.
Gerald B. Grinstein, Michael B. Crutcher, Emanuel Rouvelas, James D. Dwyer, and *Jonathan Blank* for intervenor Port of Seattle.
Eldered N. Bell, Jr., and *Gary Koecheler* for intervenor Maryland Port Administration.
Peter R. Schaff for intervenor Brazos River Harbor Navigation District of Brazoria County, Texas (Port of Freeport).
Wayne C. Page for intervenor Nueces County Navigation District No. 1, Port of Corpus Christi.
John P. Meade for intervenor the Galveston Cotton Exchange and Board of Trade.
Doyle G. Owens for intervenor Port of Beaumont Navigation District of Jefferson County, Texas.
J. Kerwin Rooney and *Robert Crandall* for intervenor City of Oakland.
Marion S. Moore, Jr., for intervenor South Carolina State Ports Authority.
Charles W. Burkett and *William P. Higgins* for intervenors Southern Pacific Transportation Company and Union Pacific Railroad.
Leonard Putnam and *Leslie E. Still, Jr.,* for intervenor City of Long Beach.
Frederick G. Pfrommer and *Leland E. Butler* for intervenor The Atchison, Topeka and Santa Fe Railway Co.
Israel Packel and *Gordon P. MacDougall* for intervenor Commonwealth of Pennsylvania.
Robert Szwajkos, John J. Paylor, Jervis Langdon, Jr., and *George P. Baker* for intervenor Trustees of the Property of Penn Central Transportation Company.
Richard Lalanne for intervenor Trustees of the Property of Lehigh Valley Railroad Company.
J. P. Clark, Thomas F. Patton, and *Ralph S. Taylor, Jr.,* for intervenor Trustees of the Property of Erie Lackawanna Railway Co.
John J. Paylor for intervenors the Baltimore and Ohio Railroad Company, the Chesapeake & Ohio Railway Company, and Western Maryland Railway Company.
Richard W. Kienle for intervenor Norfolk and Western Railway Company.
Robert S. Davis for intervenors the Missouri Pacific Railroad Company and the Texas and Pacific Railway Company.
J. Thomas Tidd, James C. Schultz, Stuart G. Meister, John Hart Ely, and *Barry Chasnoff* for intervenor Department of Transportation.
Charles M. Butler, III, for intervenors John Tower, Member from Texas, United States Senate, and Bill Archer, Member from the Seventh District of Texas, United States House of Representatives.
C. D. Haig, Jr. and *Charles H. Lombard* for intervenor Alabama State Docks Department.
Thomas J. White, Norman E. Sutherland, Lloyd Robinson, and *Milton A. Mowat* for intervenor the Port of Portland, Oregon.
John L. Hill, Larry F. York, Rex H. White, Jr., and *David Hughes* for intervenors State of Texas and the Port of Beaumont Navigation District of Jefferson County, Texas.
Jack L. Well, Burt Pines, and *Frank Wagner* for intervenor City of Los Angeles.
Robert K. Jorgensen for intervenor the International Association of Great Lakes Ports.
Arthur W. Jacocks for intervenor Virginia Port Authority.
S. H. Moerman, Douglas W. Binns, and *P. M. Donovan* for intervenor the Port Authority of New York and New Jersey.
Donald J. Brunner, John Robert Ewers, and *C. Douglass Miller* as Hearing Counsel, intervenors.

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

A maritime association, a labor union, and two port authorities have challenged the legality of a transportation system which has come to be known as Far East mini-landbridge or just minibridge. The Council of North Atlantic Shipping

[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).

Associations (CONASA), the International Longshoremen's Association, AFL-CIO (ILA), the Delaware River Port Authority (DRPA), and the Massachusetts Port Authority (Massport), charge fifteen common carriers by water[2] with violations of "the following sections of the Shipping Act, 1916 (46 U.S.C. 815-817) for the reasons expressed:

(1) Section 16—by subjecting localities and descriptions of traffic to undue or unreasonable prejudice or disadvantage, and granting other localities undue preference or advantage.

(2) Section 17—by demanding, charging or collecting rates or charges which are unjustly discriminatory between shippers or ports, through absorption, port equalization or other unlawful devices.

(3) Section 18(b)(5)—by charging rates so unreasonably low as to be detrimental to the commerce of the United States."[3]

This case has assumed a significance which goes beyond the interests of the complainants. The Commission while denying a petition for the institution of a "rulemaking" proceeding to dispose of all the so-called "cargo diversion issues," designated this proceeding as the lead case for the establishment of general "minibridge" principles. (See Order of the Commission dated December 5, 1973.) For obvious reasons a number of petitions to intervene were filed and granted.[4]

The Minibridge System

The first minibridge tariff filed with the Commission was that of Seatrain, from the United Kingdom and Europe to the West Coast, effective January 14, 1972.[5] This was soon followed by Seatrain's Far East minibridge tariff which became effective on January 24, 1972.[6]

All the Far East minibridge services are conducted under joint through service tariffs filed with both this Commission, which has jurisdiction over the water transportation, and the Interstate Commerce Commission, which has jurisdiction over the rail transportation.

The physical characteristics of the Far East to U.S. Atlantic minibridge service are typical of most if not all minibridge services. The minibridge tariff calls for a single bill of lading and a single rate. Under the tariff the steamship line and the rail carrier have agreed upon the division of the "joint rate." Using as an example a movement from Kobe, Japan, to New York, the agreed to

[2] The named respondents are American Mail Lines (AML), American President Lines, Ltd. (APL), Japan Lines, Ltd., Kawasaki Kisen Kaisha Line, LTd. (K Line), Mitsui-O.S.K. Lines Ltd., Nippon Yusen Kaisha Line, Ltd. (NYK), Orient-Overseas Line, Inc. (OOL), Pacific Far East Line (PFEL), Phoenix Container Liners, Ltd., Sea-Land Service, Inc., Seatrain Line Inc., Showa Shipping Co., Ltd., United States Lines., Inc., Yamashita-Shinnihon Line, and Zim Israel Navigation Co., Ltd.

[3] Originally, complainants alleged that the respondents were operating the Far East minibridge system pursuant to unfiled and unapproved agreements in violation of section 15 of the Shipping Act, 1916. The section 15 allegation was dismissed by an order served April 8, 1975.

[4] For a listing of the intervenors see Appendix A.

[5] There is in addition to the so-called mini-landbridge or minibridge service a "landbridge" service between Europe and the Far East. As distinguished from minibridge, landbridge cargo originates say in Europe, moves by water to a U.S. Atlantic Coast port, across the U.S. by rail to a West Coast port and then by water to a Far East port.

[6] The Commission has by now approved under section 15 of the Shipping Act some 27 agreements or amendments to agreements granting "intermodal" authority for joint rail/water through service. For convenience, and to save space the names of the conferences have been omitted and only the FMC agreement numbers given: No. 9982-3, No. 2846-24, No. 5850-25, No. 8210-24, No. 93-9, No. 7100-16, No. 50-27, No. 14-33, No. 150, No. 3103-8, No. 2744, No. 5660, Nos. 6190 and 6780, No. 6400, No. 7590, No. 7670, No. 7770, No. 7890, No. 8090, No. 8660, No. 8770, No. 9214, No. 9360 A and B, No. 9548, No. 9615, and No. 9988.

*division takes the form of water rate and a flat rail rate per container, the rail car-*riage being from rail ramp at the West Coast port to rail ramp at New York.[7] The Kobe shipper takes delivery of the water carrier's container, packs it, and delivers it to the water carrier's container yard. The water carrier collects the total freight from the shipper, moves the cargo to the West Coast port (e.g. Long Beach), pays the Long Beach terminal and wharfage charges, transfers the cargo from the ship to the rail ramp, and pays the railroad the agreed rate for transcontinental transport. The consignee receives the container at the New York railhead. Outbound the operation is reversed. The shipper, of course, has the free choice between an all-water service or a minibridge service. Often, as in the case of APL and the Japanese line, both services are offered by the same line.[8]

DISCUSSION OF THE "EVIDENCE"

The record in this proceeding consists of 2,651 pages of transcript and 100 exhibits.

The complainants[9] have quite naturally attempted to carry the main burden of demonstrating the impact of the Far East minibridge. Intervenors in support of complainants by and large adopt all findings of fact proposed by CONASA insofar as they are relevant to their respective positions.

For reasons which should soon become apparent, I consider it necessary to discuss the "evidence" presented at the hearing before making specific findings of fact.

One example of complainants' approach to the evidence is the following *finding of fact* proposed on brief: "The Governor of Pennsylvania testified that he found the minibridge to be unjustly discriminatory and unduly prejudicial against the Port of Philadelphia." Now, strictly speaking, that proposed finding could be adopted. The Governor did indeed testify and in his testimony he "concluded (found) that minibridge was unjustly discriminatory and unduly prejudicial against Philadelphia." But to adopt such a finding would not advance complainants' case. It would merely show that there was testimony by the Governor. The Governor's "finding" was not supported by hard evidence and no matter how eloquently expressed, remains nothing more than his considered opinion or assertion. Unfortunately a dismayingly large portion of complainants' proposed findings fall into one or the other of these categories—Opinion or assertion. *See e.g.* the testimony of the Governor of Texas. (Ex. 39).

A. General Impact of Far East Minibridge

CONASA offers the testimony of Mr. Richard J. Barber[10] an economist and lawyer who undertook to conduct a study of the impact of the Far East minibridge

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[7] The flat rail rate decreases as more than 20, 40 or 60 containers are offered.

[8] Rather hyperbolically, one of the complainants states as a proposed finding of fact that "The only justification urged for such flagrant violation of the law (minibridge operations) is a desire to provide shippers a choice." This statement is then footnoted: "It is absurd for carriers such as Seatrain, Showa, Phoenix, PFEL and OOL which do not provide all-water service to any CONASA port to masquerade as providing a 'choice'." The "choice" of course is between all-water and minibridge regardless of whether both services happen to be offered by the same carrier.

[9] CONASA, the ILA and DRPA filed a joint brief. Massport filed a separate brief. For convenience and unless specified, or the context requires otherwise, "CONASA" when used applies to all complainants including Massport, and any reference to complainants or respondents includes those intervenors taking positions in support of them.

[10] Mr. Barber's testimony was also adopted by the Port of Beaumont, the Port of Houston Authority, the Houston Port Bureau, Inc., and the Texas Port Association.

service on ten selected North Atlantic and Gulf ports.[11] Additional witnesses appeared on behalf of the ports of Philadelphia, New York/New Jersey, Boston, New Orleans, Beaumont, Houston, Galveston, Lake Charles and Baltimore. But before using the specific conclusions of Mr. Barber, CONASA urges as a general proposition that the nation's ports, in order to meet the "widely anticipated continued growth in world trade," will have to develop new container and other cargo handling facilities.[12] These new facilities will have three characterisitics: (1) They are very long-lived and fixed in place, and their costs cannot be modified to reflect diminution or changes in container traffic volume; (2) they are very expensive and paying for them entails large scale, long-term borrowings, often through revenue or general obligation bonds; and (3) they must be intensively used if the fixed investments are to be amortized. CONASA follows this proposition with the prediction that it will be difficult to obtain the "tremendous additional investment" to construct these new facilities. This difficulty it seems stems from the uncertainty of a port's prospects when minibridge threatens to "drain" cargo and revenue from the port. CONASA then moves to what this cargo drain means to a port.

The value of a ton of containerized cargo "drained" from a port is "conservatively" estimated by the American Association of Port Authorities as \$25.00. This assertedly represents the income that arises directly from loading and unloading the cargo and other port charges.[13] To this CONASA would apply the so-called multiplier effect.[14] This effect attempts to measure "the additional revenue generated by the flow of direct revenue payments through the local economy" when a ton of containerized cargo moves through the port. It is measured "cautiously" at 2.5 or approximately \$60 a short ton or "not at all unreasonably" at a multiplier of "three"—which comes to \$75.00 a ton. "Thus," to CONASA, "the value of a ton of cargo, including both direct and indirect income to a port is approximately \$75.00 (\$25.00 × 3)," which when applied to the "estimated 708,825 tons of container cargo *diverted* by minibridge from the ten ports studied," comes to a revenue loss for the 18-month period mid-1972 through 1973 of some \$53 million.[15] CONASA would then apply these "figures" to individual ports. Using numbers of containers supplied by the respondents themselves CONASA says that respondents *diverted* containers over the 18-month period July 1972—December 1973 on the following scale:

Boston	6,392	
New York	21,454	
Philadelphia	3,291	
Baltimore	3,236	
Hampton Roads	2,180	
	36,553	Estimated Loss

[11] The ports studied were Boston, New York/New Jersey, Philadelphia, Baltimore, Hampton Roads, New Orleans, Lake Charles, Beaumont, Galveston and Houston.

[12] This prediction of growth in exports and imports is based on a table which does not deal with particular ports or even geographical areas in the U.S.

[13] The \$25.00 a ton figure takes in account "inflation" and is less than the figure (not in the record) for handling a ton of breakbulk cargo.

[14] By the multiplier effect is meant "the cumulative revenue generated as the first wave of direct port related revenue flows, in ripple like fashion, through the local economy in which the port is participant."

[15] If the 2.5 multiplier effect had been used, the "loss" would have been \$43 million.

However there is a fatal flaw in the figures upon which complainants' "estimated loss" is based. This flaw is pointed out by DOT which states on brief, "The testimony[16] does not show, however, how much Far East cargo was *diverted* by Minibridge." (Emphasis mine.) What the record does show is the *level* of minibridge operations. The assumption inherent in complainants' assertions of diversion is that *all* traffic consolidated and shipped from the railhead at each of the ten ports is traffic which would have moved through that port were it not for the minibridge system or at the very least originated in territory which is naturally tributary to that port. Of course it does not show the inland point of origin of the particular container loaded at the port city railhead. That this assumption is incorrect is clear from the record.

Complainants' main witness, Barber, admitted that he did not know the exact origin or destination of the cargo moving by minibridge; rather he counted as "diverted" all minibridge cargo which was handled at a rail terminal at or near one of the ten ports. By the witness's own admission the cargo he counted as "diverted" could have come from more than 200 miles away from any of the ten ports. An example of the fallacy in this approach is demonstrated by the fact that some 26 percent of Phoenix Lines' minibridge containers originated in or were bound for states different from the one in which the railhead was located. Thus, even if such cargo had moved all-water to the Far East, it would not necessarily have moved through one of the ten ports. It might just as well have passed through one of the many other ports on the East and Gulf coasts with container facilities. Indeed, Baltimore, one of the ten ports who testified, offered testimony that the port was already so congested that no more Far East traffic could be handled if it became available.

In addition there is testimony by shippers that some or all of their cargo would not have moved at all and therefore would not have moved through the ten ports. For example, W. J. Jackson of E.I. Dupont DeNemours and Company and Frederick Drager of Gould, Inc., testified that their overseas sales would decrease were it not for minibridge. Some shippers indicated that if minibridge were not available, they would not be able to do any business in the Far East.[17]

Of course, this method used by complainants to measure minibridge cargo "diversion" has a direct bearing on the reliability of the computations of losses to the ports in both containers and revenues. The unwarranted assumption that all minibridge containers would have moved all-water through one of the ten ports causes the asserted number of containers, and therefore cargo tons, allegedly lost to minibridge to be imprecise, unreliable and at the very best overstated by a degree impossible to measure on this record.

Respondents on the other hand urge that it is misleading to measure the impact of minibridge on the ten ports only in terms of Far East containers which tends to distort and exaggerate that impact. For example, if minibridge is viewed in the light of the ports total operations, it accounted for only 4.6 percent of the ten ports' total container movements and 1.5 percent of the total cargo movements. A comparison of total minibridge traffic to the overall increase in Far East

[16] As used by DOT "testimony" includes exhibits.

[17] *See e.g.* statements of M. Lowenstein and Sons and North American Hide Exporters Inc., reflected in Table III of Exhibit 95.

container traffic at the ten ports for the relevant time period reveals that minibridge traffic was equal to only 35 percent of the total growth in Far East container traffic during this period. Thus, minibridge has not had the overwhelming impact on the method of shipment to the Far East that complainants assert and such impact as minibridge has had is more than offset by the growth in Far East shipments generally, including those not moving via minibridge.

Complainants' assertions of losses from Far East minibridge do not take into account any gains from other minibridge operations. For example, Seatrain moved more than 27,000 containers between July 1973 and December 1976 through one or more of the ten ports under a minibridge system linking the West Coast of the U.S. with Europe (the so-called Euro-Cal minibridge).[18] Baltimore also states that it handles a substantial number of Euro-Cal minibridge containers and is working on plans to encourage an increase in this traffic. Finally, there is evidence that losses suffered by port cities because of minibridge may be recouped in other ways. There is the already mentioned Euro-Cal minibridge;[19] and, additionally, losses incurred when a container is not loaded on a ship are to some extent made up since the container must be loaded aboard the train at the port cities railhead. This benefits other labor and presumably carries with it its own ripple effect, but a positive rather than a negative one.

The "evidence" alleged to suport the impact of the Far East Minibridge on the individual ports studied will be taken up next.

1. New York

CONASA launches a two-pronged attack on the mainibridge operations as they affect New York: (1) Its impact on labor at the Port, and (2) its impact on Port revenues. To take labor first.

CONASA asserts, "It is undisputed that, at least partly due to Far East minibridge, the ILA has only half the members in the port of New York that it had only a few years ago." Thus, in 1966, the ILA active membership eligible for Guaranteed Annual Income (GAI) was 21,471 but in 1974 had fallen to 11,746. The total manhours in New York in 1966 approximated 43 million while in 1974 manhours were down to about 24 million.[20] These are the only figures offered by CONASA to demonstrate the "decimation" of labor at New York. The remaining proposed findings deal with the "good-faith" bargaining by the ILA, the cost of the GAI program and other fringe benefits for ILA members and general argument that minibridge erodes work opportunities and is an "outright

[18] A situation which directly reverses the impact of the Far East minibridge service.

[19] Complainants point to a decline in Euro-Cal minibridge traffic (1973—2943 containers, 1974—2281 containers). This is for Seatrain only however. CONASA also contrasts the Euro-Cal and Far East minibridges. A Euro-Cal container merely involves loading or unloading the container on the ship while Far East deprives CONASA ports of other work opportunities such as stuffing and stripping, terminal operations, etc. Here we have not only the basic assumption that the minibridge cargo would move all-water through a CONASA port, but also that outbound cargo would require consolidation and stuffing into the container and that inbound cargo would require stripping from the containers at the port city terminal area. Since by their own admission, complainants do not know the ultimate origin or destination of the cargo, there is no way on the basis of this record to measure in any way the losses allegedly incurred.

[20] CONASA also asserts that Boston estimated the total loss in wages, pension and coastwise assessment benefits in 1973 was $315,230 and $605,777 in 1974. This is best dealt with when the Port of Boston is discussed. No other figures are offered by CONASA for other ports.

evasion of the container royalty fund in all CONASA-ILA ports."[21]

The first thing to be noted is the period chosen by CONASA to illustrate the dire straits of ILA labor at New York. Of the eight years covered, five were prior to the advent of minibridge, but included the period of the so-called container revolution, and only three were after the beginning of the minibridge system. Breaking down the figures by periods, from 1966 to 1971 the last year prior to minibridge, the membership went from 21,471 to 14,942, a drop of 6,529. For the same period manhours went from 43,695,544 to 30,849,623, a reduction of 12,845,921. For the period covered by minibridge 1972–74, membership in 1972 was 12,984 while in 1974 it was 11,746, a drop of 1,238. Manhours for 1972 wee 22,627,084 while in 1974 manhours were 24,771,211. Thus, when the general conclusion drawn by CONASA that the ILA had only "half" the members in 1974 that it had in 1966 at the Port of New York and that manhours "plummeted" from "approximately 43 million" to "about 24 million" only "eight short years later," may be arithmetically within the bounds of accuracy, it completely distorts the impact of minibridge operations on the labor situation at New York. By far the greatest drop in ILA membership took place prior to the advent of minibridge, and during the minibridge period the manhours actually increased from the low point reached in the first year of minibridge operations. Finally, the assertion that minibridge "decimates port labor and affects labor stability at all Atlantic and Gulf ports" borders on the absurd when you consider the fact that under even the most liberal estimates the "loss" of cargo to minibridge operations at all ten ports amounts to only 1.5 percent of the total cargo moved through those ports.

As already noted CONASA asserts that 21,454 containers have been "diverted" from the Port of New York by the Far East minibridge system. The testimony of Mr. James J. Dickman is offered by CONASA in an effort to show the precise impact of the Far East minibridge.[22] According to Dickman Far East minibridge "diverted" an "approximate average of 500 containers a week in 1974." Also " . . . according to reports received from industry sources" Dickman concluded that "most of this cargo is cargo that would have moved through the Port of New York." In 1974, therefore, it was estimated that "as a result of the staggering diversion" of 570 containers a week the economic loss to New York "was on the order of $20 million." Dickman breaks the loss down as follows:

$ 4,600,000 -	direct payroll loss
4,000,000 -	loss of fringe benefits
2,200,000 -	loss of overhead and supervision revenue
3,000,000 -	loss of dockage and wharfage charges
2,000,000 -	loss of insurance, taxes, waterfront commission
3,000,000 -	loss of miscellaneous items such as cargo watching fees, maintenance, truckloading equipment
1,100,000	loss of potential profit
$20,000,000 -	Estimated Direct Loss in 1974 to Port of New York

[21] The container royalty fund is the result of a contractual program designed to "compensate" the ILA where its members do not stuff or strip certain containers at the pier. As already noted this of course assumes that minibridge containers would not only move all-water through New York but that they would require stuffing or stripping. Again the record provides no basis for measuring how many, if any, containers would have met this condition.

[22] Mr. Dickman is President of both CONASA and the New York Shipping Association. The figures offered by Dickman were his own and not those of the Port of New York Authority which did not appear in the case.

Dickman next applies the "multiplier effect" figures that the total loss to the economy of New York for 1974 was $60 million. A great deal of difficulty is immediately encountered in accepting Dickman's estimates of the injury to the Port of New York caused by minibridge operations.

In the first place Dickman presented no documentary evidence in support of his assertions of losses to the Port of New York.[23] On cross-examination Dickman was unable to call upon any specific documentary evidence to support the figures used by him to estimate the losses in revenue to the Port of New York. Rather he pointed only to "people" he represented in the minibridge trade, "industry sources," unproduced records of "meetings," and his general "experience"—hardly a proper foundation upon which to base a finding of a $60 million loss.

2. PHILADELPHIA

Philadelphia "as a conservative estimate" figures it lost "31,000 tons of cargo" in 1973 and as a result the port and the "local economy" lost "in the neighborhood" of 1.5 million dollars in combined direct and indirect income. The total investment in general cargo facilities at the port is "upwards of $165 million." Some $47 million was invested in container facilities in 1973. The port urges that the new investment is based upon anticipated continued growth and that the anticipated growth "is made uncertain by the continuing drain of cargo caused by minibridge, with the result that future investments are cut back or abandoned altogether." Thus a planned third container terminal "may not become a reality because of minibridge."

In contrast to the gloomy picture painted above the record shows: Philadelphia containership services are concentrated in trades other than the Far East, and Philadelphia has no specific figures to back its assertion of increased cargo diversion from minibridge. Philadelphia's own estimates show that from the fourth quarter of 1972 to the fourth quarter of 1973 there was an increase of only one minibridge container. The basis for Philadelphia's belief that cargo drain by minibridge is on the rise came from the port's staff which made no attempt to quantify with any degree of accuracy the number of containers allegedly diverted or to be diverted.

In 1973 Philadelphia reached a record total of more than 79,000,000 tons of bulk and general cargo. General cargo to the Far East in 1973 increased 20.8 percent over 1972. Container cargo went from 546,760 tons in 1972 to 1,050,000 tons in 1973. Using the Port's own estimate of an average of 13 minibridge containers a week, minibridge cargo represents .039 percent of bulk and general cargo, .048 percent of general cargo, and 2.9 percent of container cargo. Finally, in a statement before the Pennsylvania Senate's Special Sub-Committee on Port Development on April 25, 1974 (which was after the complaint in this case), the Delaware River Port Authority said that the Packer Avenue and Tioga container terminals were nearing their capacity and that container cargo had increased to 1,050,000 tons in 1973, almost double the volume of 1972. The statement was directed to the funding required for planned expansion. No mention was made of minibridge and its alleged adverse effects.

[23] The only exhibit cited to support Dickman's testimony was Exhibit 7.

3. *MASSPORT (BOSTON)*

The Massachusetts Port Authority is charged with the responsibility of promoting and protecting the maritime commerce at the Port of Boston. As of June 30, 1974, the value of Massport's capital investment in maritime facilities was approximately $38,600,000. In addition, Massport owes the Commonwealth of Massachusetts an additional $17,650,000 for the port properties which it acquired from the Commonwealth in 1959. Total Massport investment in its maritime facilities as of June 30, 1974, was therefore $56,250,000.

The Far East general cargo tonnage figures compiled by the Bureau of Census for Boston for the years 1968 through 1973 and Massport's own estimate of 1974 tonnage show the historic steady level of Far East traffic until 1972 (the decreased tonnage in 1969 is largely attributable to a prolonged ILA strike in that year).

Far East tonnage at Boston was increasing prior to the full-fledged introduction of minibridge in 1973.

Commencing in 1973, the Far East tonnage moving through the Port of Boston decreased.

During the last two quarters of 1972 and in 1973, ''substantial numbers'' of containers carrying Far East cargo were moved into and out of Boston by minibridge. The increase in minibridge movements by respondents at the Port of Boston is ''illustrated'' by the following figures extracted from respondents' answer to complainants' interrogatories as set forth in exhibit 7, table C:

	Total TEUs[24] Both Directions
3rd Q 1972	830
4th Q 1972	1,906
1st Q 1973	2,014
2nd Q 1973	2,311
3rd Q 1973	2,327
4th Q 1973	2,218
Total	11,606

Massport asserts that the growth of minibridge at the Port of Boston increased dramatically between 1973 and 1974, and projecting the continuing erosion of Far East waterborne cargo in 1974, Massport contends that approximately 8,000 additional TEUs were lost to minibridge in 1974.

To Massport the decrease in Far East tonnage at the Port of Boston in 1973 was principally attributable to the introduction of minibridge movements between the Far East and New England. Moreover Massport asserts that New England shippers located near Boston who formerly shipped to the Far East by water through the Port of Boston simply switched their method of shipping to minibridge.

And finally Massport contends that there is no evidence to support a claim that the Port of Boston is getting any significant reverse minibridge cargo bound for Europe.

[24] TEUs refers to twenty-foot equivalent units or containers.

The foregoing represents Massport's view of the record in this case of the impact of Far East minibridge on the Port of Boston. There are however a number of qualifying factors in the record which Massport has not taken into account.

In trying to show the decline in Far East cargo for 1974, Massport used the total Asia figures with no breakout to show how much "Far East" cargo was lost.[25]

Massport experienced 140 percent growth from 1972 to 1973 in container cargo volume. The amount of containerized tonnage went up 135,450 tons between 1972 and 1973. Any drop in 1974 volume is explained by Massport's internal memo which stated that Massport "simply does not have the space to sustain this growth through 1974." Other reports indicated:

> We [Massport] are very definitely outrunning our available space and growth may force Massport into more and more costly operations, rather than achieving expected economy scales.

Total Far East tonnage at Boston increased from 8,666 tons for the last half of 1972 to 26,667 tons for the last half of 1973 or an increase of approximately 20 percent.

Sea-Land's minibridge containers at Boston were 8,870 for 1973, which at an average 8.5 tons (as used by Massport's witness, Mr. Soules) represent .27 percent of total cargo moving through Boston in 1973 and 12.7 percent of containerized cargo. Additionally, Massport's general cargo tonnage decreased from 1972 to 1973 and is estimated to have decreased from 1973 to 1974 while total container cargo has increased. Massport, without any quantification, assumed that every ton of general cargo lost was diverted to minibridge in 1974. The statistician who prepared Massport's evidence admitted on cross-examination that the lower tonnages were not necessarily container cargo and consequently probably were not caused by minibridge. Additionally the witness admitted that the estimated 1974 total container cargo was understated.

Finally, Massport's own study (the Maguire study) shows that additional container handling facilities within the port will be required to handle the increased growth projected to 1990. The study concluded this even though minibridge had been in operation for over two years. One of the things considered by Massport in addition to its study was the Maritime Administration study which predicted surplus port facilities on both the Atlantic and West Coasts. Aware of these factors, Massport intends to expand its container facilities.

4 New Orleans

The Port of New Orleans is located on the Mississippi River and two man-made channels—the Industrial Canal and Mississippi River Gulf Outlet.

Navigation from the Gulf to New Orleans involves a distance of 124 miles on the River, with steaming time of 7–8 hours conditioned to water levels; the Outlet distance is 66 miles requiring 5 hours.

As presented in the 78th Annual Report of the Board of Commissioners of the Port of New Orleans, investment in fixed assets (land, wharves, sheds, etc.) had reached the amount of $163,639,077 in fiscal year 1974.

[25] Additionally the figures used to support Boston's loss were based on total figures for all general cargo and they indicate clearly that the greater part of the loss was other than container cargo

General cargo berths total 97 in number, and represent a total frontage of approximately 60,000 lineal feet and 14½ million square feet of covered and open area. These facilities are the primary source of Port income. In 1974 the upsurge in international commerce developed exceptional earnings of $13,070,646, exceeding the prior fiscal year by approximately $3 million.

General cargo berths also handle container traffic.

At present two full container berths are in operation. Their construction costs were in excess of $12 milllion. One of the berths is leased to Sea-Land on an annual rental basis. In the aggregate, the Board has expended over $15 million for the development of container facilities. Constructions in progress and future planning indicate an additional expenditure of approximately $45 million on container facilities will be required to meet the needs of the Port of New Orleans by the year 2000.

In terms of 20′ equivalents, the Port of New Orleans handled 76,638 containers in the fiscal year 1972–1973 (ending June 30), while for the fiscal year 1973–1974, comparable volume was 104,000 containers. (Both loaded and empty containers appear in these totals.) Basing upon an estimation of 11 net tons per inbound container and 13 tons outbound, containerized cargo tons in 1972–1973 aggregated 490,356; tons in 1973–1974 were 793,717.

In relation to total general cargo handled through the Port in 1973 and 1974, 10 percent was containerized.

During the last two quarters of 1972, and the full year 1973, New Orleans asserts that 5,790 container units moved in minibridge service between New Orleans and the Far East. Here again the figures merely show the number of containers loaded or unloaded at the railhead.

The volume of general cargo moving through Port of New Orleans breaks down into three major areas of trade—Europe, Latin America and Asia. General cargo movements with Asia, and more particularly Japan, represents 20 percent of the total. This makes Japan the largest single customer of the Port.

This fact was given strong consideration in planning of capital facility—programs designed to the accommodation of containerized cargoes.

In the years 1972–1974, in units and cargo volumes, increases were experienced, including the Far East. The really substantial increase in containerized cargo, however, was in the European trade.

Containers in the Continent-United Kingdom trade were 31 percent of the total in 1972, 41 percent in 1973, and 50 percent in 1974 (seven months). In comparison, the Far East ratio was 22–23 percent in the years 1972–1973, and 15 percent in 1974.

Studies and projections indicate that the Port's container capability at present can accommodate an additional 25,000 containers per year through existing facilities. Development of additional acreage as programmed for one of the container facilities would increase capacity by 24,000 TEUs at that facility alone. But the assurance of further investment would depend on obtaining additional cargo. All of the containers now moving between the Port and Far East are transported via conventional vessels berthed at river facilities, and there is no full container vessel service from or to the Far East which would utilize facilities constructed to that purpose.

As a sure average, using New Orleans as the last port of call and Japan the first port of call, voyage time to the Far East is 20–22 days, via the Panama Canal.[26] Even so steamship services from New Orleans to the Far East reduced in the 1973–1974 period; Japanese carriers for example went from 13 to 9 lines. There was, however, a sufficiency in sailings to accommodate all cargo offerings, in fact, volumes of cargo offered in the last half of 1973 and first half of 1974 resulted in an increase in frequency of sailings.

As a consequence, progression of Berth 4 has been put on a delayed basis. If the need is not there with under-utilization of Berth 5, alternate uses may be developed. About $150 thousand has been spent on design.

The Port's agent in Japan advised the Director for Trade Development that the new facility should not go forward because of diversions of Japanese cargoes to minibridge.

As before there are flaws which seriously distort the picture painted by New Orleans of the impact of the Far East minibridge.

The record shows: Total cargo increased 49.8 percent from 5,056,000 short tons in 1972 to 7,576,000 short tons in 1973. General cargo increased from 1,499,000 short tons in 1972 to 1,649,000 short tons in 1973. Total containerized tonnage increased 43.7 percent from 516,000 tons in 1972 to 742,000 tons in 1973. The number of container units increased from 30,394 in 1971 to 64,020 in 1973. Far East container tonnage increased from 179,000 tons in 1972 (approximately 3 percent of total tonnage) to 256,000 tons in 1973 (again approximately 3 percent of total general cargo tonnage). The number of Far East containers increased from approximately 10,000 in 1972 to 15,000 in 1973. For the fiscal year ended June 30, 1974, New Orleans had revenue of $2,476,300 as opposed to $1,403,194 for fiscal 1973.

Converting forty-foot units and the "other" units (on the same basis) to TEUs, and multiplying by the average of 11 tons per container claimed by New Orleans, minibridge container cargo in 1973 was approximately 1.2 percent of total general cargo, and 5 percent of total Far East general cargo. Far East containerized cargo represents 3.4 percent of the Port's total general cargo.

The Port of New Orleans has a total investment of $163,639,077 of which approximately $15,000,000 is for container facilities and less than $500,000 is attributable to the Far East trade. This represents approximately .3 percent of the total investment and 3 percent of container facilities' investment.

Port of New Orleans does not know the origin or destination of minibridge cargo. It does know, in the absence of minibridge, whether cargo in containers would go overland to other ports rather than through New Orleans. In fact, not all minibridge cargo went previously all-water from the Port of New Orleans.

The Port of New Orleans maintains offices in New York, Chicago and St. Louis to serve the area surrounding these cities and solicit business therefrom. Fifty-two percent of New Orleans cargo is believed by the Port to be "up for grabs" among Atlantic and Gulf Coast ports.

The principal item of import from Japan through the Port of New Orleans is steel. Steel is not a containerized commodity.

[26] Obviously, this is not always the case.

5. GALVESTON AND BEAUMONT[27]

A rather glaring example of the rather generalized approach taken by the opponents of the Far East minibridge system appears in a section of the joint brief headed "Combined Evidentiary Summary and Argument."[28] A perhaps overlong quote from this section will demonstrate what is meant:

> The interest of Texas in this proceeding is best illustrated by Witness Carl Parker, Jr. of Galveston's Exhibit No. 37 which is a synopsis of information derived from Respondent Carriers concerning the volume of containers moving by mini-bridge service between the Gulf and Atlantic ports. This Exhibit demonstrates that during the year 1973, of all westbound export mini-bridge traffic handled, 59.51% originated at the Gulf ports. The Port of Houston alone originated 41.5%, and Texas ports accounted for over 46% of the admitted total. There is ample reason to believe, in view of other admitted evidence, that the total amount of cargo moving in this service is even higher. To document the diversion of cotton, the principal commodity indigenous to the Port of Galveston, attention is called to witness Louis C. Oliver and Exhibit 36. Mr. Oliver is the General Manager and Secretary of the Galveston Cotton Exchange and Board of Trade, and is responsible for the keeping of all statistical and financial records of the Exchange. He furnished a 26 year history of cotton receipts and exports to and from the City of Galveston. His testimony revealed the loss of 728,619 bales of cotton from the Cotton Exchange records during the 1973/1974 cotton season which could only have been moved from Galveston in containers. His testimony emphasized the yearly increase in this mysterious disappearance which began in 1971, a year which coincides with the advent of the mini-bridge service. This evidence is further verified by a reconciliation Mr. Oliver made of his statistical records (Page 3, Exhibit 36) which excluded 20,000 bales lost to a fire, and 75,000 moving in trucks to various Southeastern points. With the obvious loss of cotton inferentially going to mini-bridge, thereby bringing about a corresponding change in the pattern of shipping practices, cotton will no longer come to the City of Galveston. As Oliver points out on page 3 of his written statement: "This will reduce the need for our services and impair our revenues which are based on 1/8th of a cent per bale placed in the warehouse, and 9 cents for cotton available for certification. This will adversely affect all other maritime related industries that have depended upon our services for over one hundred years."[29]

Galveston goes on to propose as findings of fact:[30]

Galveston is the Nation's "number one cotton facility." The Port has surpassed all of the United States ports in cotton export tonnage for over fifty years.

If cotton should be lost to Galveston, the City would experience closing of the cotton warehouses employing 1,769 individuals, adverse impact on 1,860 longshoremen, stevedores and freight handlers and 450 Port employees.

Twenty-five percent of the ship calls at the Galveston Wharves are cotton ships.

During the year 1973, 1,096 ocean vessels called at the Port of Galveston. In 1974, the total was 905 vessel sailings.

The Port of Galveston's Far East sailings averged 25 calls per month during

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[27] The State of Texas, the Board of Trustees of the Galveston Wharves, the Galveston Cotton Exchange and Board of Trade and the Port of Beaumont Navigation District of Jefferson County filed a joint brief.

[28] Which section strangely enough precedes the section titled "Proposed Findings of Fact." Even stranger is the fact that in the Galveston's proposed findings these figures are not alluded to or proposed as facts to be found.

[29] The first thing to be noted is Texas' interest is best illustrated by an exhibit which synopsises information from respondent carriers on the volume moving by minibridge between the Atlantic and Gulf ports. From this information it is asserted that "59.51 percent originated at the Gulf ports." In reality it means only that the cargo was loaded or delivered at Gulf port railheads. It does not show that the cargo would have moved *through* a Gulf port. Moreover the "mysterious disappearance" of some quarter of a million bales of cotton is only "inferentially going to minibridge." If the disappearance is "mysterious" how then attribute it to the overt minibridge operations?

[30] Quotation marks have been omitted and some small paraphrasing and reorganization has been indulged in.

the first half of 1973 which dropped to an average of 6 calls a month during the last quarter of 1974.

Beaumont simply states that, "The all-water sailings from the Port of Beaumont to the Far East in 1973 have decreased by more than 75 percent from the prior year."

Thus it would appear from the above that minibridge is rather a drastic effect upon Galveston and Beaumont. However, the record also clearly shows that despite the mysterious disappearance of the 1/4 million bales, cotton exports increased from 1969 through 1973.

The record further demonstrates that total tonnage at Galveston increased from 719,667 tons in 1972 to 1,054,313 tons in 1973. Outbound total Far East general cargo for 1972 was 277,694 tons, which increased to 525,033 tons for 1973. Total containers handled during 1972 were 9,204 TEUs of which 30 were to the Far East. Cotton exports increased to all Far East destinations from 1,413,539 bales in 1972/73 to 1,499,264 bales in 1973/74. Exports to the Far East increased 61 percent from 932,649 bales in 1969 to 1,499,264 bales in 1974. Total exports to China, Japan and Korea increased from 849,254 bales during the 1971/72 season to 1,720,148 for the 1973/74 season.

Utilizing 80 bales per forty-foot container at an average of 530 pounds per bale, minibridge tonnage in 1973 was 13,175.8 tons or 1.2 percent of total tonnage at Galveston for 1973, and only 2.5 percent of *outbound* Far East general cargo for 1973. Assuming there was some inbound Far East general cargo, the 2.5 percent would decrease.

Galveston, like the other ports in this proceeding, improved its container facilities after the advent of minibridge tariffs. The Galveston container facilities first became operational in 1972 while the minibridge tariffs had been filed a year earlier.

Congestion on the wharves in 1973 and 1974 may have forced some shippers to use minibridge rather than all-water service from Galveston. Indeed, port officials warned that there could be chaos on the wharves in the spring of 1974.

As for the Port of Beaumont, it admits that the respondents have not taken away any container business which the port enjoyed. In fact, Beaumont has no facility dedicated exclusively to container operation. Approximately 200 short tons of container cargo, either import or export Far East cargo, moved through Beaumont during 1971, 1972, and 1973 which is only an infinitesimal percentage of its 1974 general cargo of 628,134 tons.

6. Houston

The book value of facilities of the Port of Houston Authority, excluding its investments at its Bayport Divison, as of November 30, 1974, is $75,131,798.00, which includes fixed assets such as land, buildings, railroads, and machinery and equipment. The total investment in all facilities, including $22,693,926.00 at Bayport, is $125,967,610.00.

The Port of Houston Authority has invested substantially in container facilities since Sea-Land's first container voyage to Houston in 1956. Prior to April 1973, expenditures for container facilities of the Port of Houston amounted to approximately $12,000,000.00. In 1967, General Obligation Bonds were issued in the *amount of $16,000,000.00 and it was thought that this issue would provide* ample funds for facilities to handle container traffic for the following twenty (20) years. However, in approximately 1969, an unexpected surge of container activity in Houston began and the Port Authority felt that further expansion of Port facilities to handle containers was called for. In April 1973, a $40,000,000.00 General Obligation Bond Issue was submitted to and accepted by the voters of Harris County. The bulk of the $40,000,000 will be used for new container facilities. The Port of Houston Authority is also developing a division at Bayport of which approximately two hundred fifty (250) acres out of a total of seven hundred (700) acres owned by the Port Authority are designated for container facilities. There are also extensive investments at the Port of Houston in container facilities by steamship lines.

It is urged that the result of the minibridge activities have been decreased sailings between Japan and the Port of Houston and decreased container cargo tonnage at the Port of Houston.

Containers transported via minibridge between the Port City of Houston, Texas, and the Far East during the third quarter, 1972, to the fourth quarter, 1973, totalled 11,341.[31] The "loss" of those containers adversely affected the Port of Houston Authority and the economy of Houston and Harris County. To Houston the result of this "diversion" was decreased sailings between Houston and the Far East; and some instances of warehouses being moved from Houston to interior points, and the loss of cargo which could reasonably have been expected to move through the Port of Houston if not for the Far East minibridge.

However, as respondents point out, the record also reveals that total cargo at Houston increased from 10,228,592 tons in 1971 to 12,860,897 tons in 1973 or an increase of 25.7 percent. Container cargo increased from 565,666 tons in 1971 to 1,399,824 tons in 1973 or an increase of 147.5 percent. Foreign trade container general cargo increased from 316,040 tons in 1972 to 802,592 in 1973. Foreign trade general cargo increased from 4,921,387 in 1972 to 5,770,050 in 1973.

Using Houston's calculations of 13 tons average weight per container for 16,289 TEUs carried in minibridge service during 1973, it is seen that minibridge cargo represented approximately 1.6 percent of total cargo at Houston for 1973 and 3.6 percent of foreign trade general cargo.

Respondents somewhat gleefully point out that Houston advertises that "a Minibridge between Houston and California can save time and money for shipments going to Europe." The prospective customer is then urged to let C. A. Rousser, Western Sales Manager for the Port of Houston, "tell you the facts about MiniBridge."

Additionally shippers have complained as to the shortage of containers for Far East movement and congestion in the Port of Houston. Delays in shipments through the Port have run as much as five weeks longer than when the cargo was expected to be moved. Shippers have further complained of the prohibitive pier handling charges on their commodities at the Port of Houston.

[31] Once more there were containers loaded or unloaded at the railhead in and near Houston; and once more the specific origins or destinations of particular containers is unknown.

Finally, the assertion that most if not all the minibridge cargo would have moved through the Port of Houston is supported only by an assumption that shippers with facilities in and around Houston would have sent their cargo through the Port but for the Far East minibridge.

7. Lake Charles

From the third quarter of 1972 to the fourth quarter of 1973 eight containers were "transported via minibridge at the Port City of Lake Charles." The record further shows that Lake Charles increased its total tonnage in 1972, 1973 and 1974. Lake Charles has no container experience as it moved no containers in either import or export trades with the Far East in 1972, 1973, and 1974, and in fact, the port does not even have container cranes.

8. Baltimore

From third quarter 1972 to fourth quarter 1974, 3,238 containers moved by minibridge, both eastbound and westbound, at the Port City of Baltimore.[32]

The direct testimony of Mr. Eldered Bell, Director of Transportation for the Maryland Port Authority, reveals that even if the carrier's figures are used the "diverted" cargo is less than 1 percent of Baltimore's total container cargo. Thus Baltimore "cannot rightfully claim substantial harm by the practice of minibridge. . . ." Baltimore does not support the complainants' position in this case.

9. Hampton Roads

Hampton Roads "lost" 2,180 boxes eastbound and westbound to minibridge. Again the period used is third quarter 1972 to fourth quarter 1973. These figures are of course subject to the same caveat as the others used in Exhibit 1. While the Virginia Port Authority was granted leave to intervene, it did not intervene in support of complainants and filed no brief in the case.

"Absorptions" by Minibridge Carriers

Complainants assert that since in minibridge the railroads perform only railramp to railramp service, the ocean carriers must necessarily "absorb" the costs between railramp and ocean terminal on the West Coast. Complainants would contrast this with the all-water shipper from the Atlantic or Gulf and the "local" West Coast shipper to the Far East.[33]

They further note that minibridge carriers also "absorb" the costs of "loading and unloading of containers to or from inland railcar or truck, gate charges, wharfage charges and other cargo handling." Then complainants state "Except as noted these charges in either all water service or in the local West Coast service are for the account of the shipper." No explanation is given for the phrase "Except as noted" and no figures are offered as to what charges may be included within the meaning of that phrase.

[32] Baltimore's figures are for the year 1973 1,007 boxes westbound and 1,192 boxes eastbound—a total of 2,199 Again it must be remembered that the figures in Exhibit 1 show only those containers *moving* via minibridge and do not necessarily show that the cargo would have moved through the particular port.

[33] Respondents concede that they pay drayage charges between the terminal and dockside.

Additionally, complainants allege that "other charges absorbed by minibridge carriers include the cost of repositioning of containers as a result of the imbalance between inbound and outbound minibridge movements."

Finally complainants assert that because minibridge rates had to be priced at "parity" with the all-water rates, minibridge carriers had to settle for a division of revenue less than they would receive in their all-water service.[34] From this it follows, in the eyes of complainants, that the minibridge operator "receives significantly less revenue" than he would for the all-water service and he even gets less than he would from carrying OCP cargo.[35]

From the foregoing complainants offer the following proposed "finding":

> Unlike the rates in parallel services, either all-water or local West Coast, the joint rates in minibridge are not, even partially based on carrier costs. The minibridge rates merely track all-water rates . . . Since minibridge generates less revenue to the carrier than the parallel services, the result must be a partial absorption of costs by the ocean carrier, especially where, as in minibridge, there are additional costs not present in the parallel services—wharfage, terminal costs, cargo handling costs, drayage and repositioning costs. Where minibridge costs are set *below* all-water ocean rates the absorption of costs is even greater.

Complainants' assertions concerning "absorptions" among other things attempt to show that minibridge operations as conducted by respondents are not economically viable.

Much of the respondents' answer to the charges of absorption deals not with the idea that they pay some of the costs involved in inland operations but rather argument over the legal meaning of the word "absorption"; or they offer proposed findings that result in much the same thing. Thus Sea-Land offers as a finding of fact:

> . . . None of the railroad's costs or charges are borne by the water carrier from the time the [minibridge] container enters the . . . system at the rail terminal and there is no evidence of *absorption* of any inland costs that *must* be borne by the shipper/consignee in getting the container to or from the rail terminal and its origin or destination. (Emphasis mine.)[36]

Seatrain, on the other hand, chooses to avoid the "problem" of absorptions by offering as proposed findings the following sequence of events:

> . . . A shipper having chosen to utilize the service, contacts Seatrain, obtains a booking permit and arranges for the pickup of an empty container. After the container is . . . stuffed by the shipper, a drayman delivers the container, at the shipper's expense, to the rail terminal for movement in the joint rail/water service. . . . *The container is then transported on regularly scheduled trains and vessels.* (Emphasis mine.)

However, Seatrain offers an alternative proposition for measuring economic viability of minibridge operations.[37] Seatrain would compare "revenues per nautical mile from the East Coast to the Far East via direct or indirect water carriage, from the West Coast to the Far East via direct water carriage, and carriage by minibridge from East Coast rail terminals to the Far East. . . ."

[34] The term "division of revenue" arises from the fact minibridge shippers pay the ocean carrier a "joint through rate" out of which the ocean carrier pays a "division" to the railroad.

[35] Complainants offer two examples both of which deal only in the disparity of rates between (1) minibridge, (2) Local West Coast, (3) OCP, and (4) all-water from Atlantic and Gulf ports to the Far East.

[36] Of course the question of what charges *must* be borne by the shipper is one of law.

[37] At the heart of complainants' charges of the lack of revenue received by minibridge operators is that they are taking losses merely to divert cargo from Gulf and Atlantic ports and then eliminate calls at those ports.

Using this theory Seatrain demonstrates that minibridge yields greater revenues per nautical mile than the Atlantic Coast all-water service and that the yield is not far below the yield of the West Coast local service.[38]

Another respondent K Line asserts that the averge revenue of a minibridge container is higher than the revenue from an all-water container moving from Atlantic or Gulf ports.

Other "evidence" purportedly dealing with noncompensatory rates, naturally tributary territory and rate discrimination between shippers is best dealt with in the context of the specific violations of law to which such evidence is assertedly relevant.

Before concluding this discussion of the record, a few observations seem in order.

I have already made theat the record in this proceeding consists of 2,651 pages of transcript and 100 exhibits. It is dismaying to discover that so much of the material was introduced for its psychological effect.[39] It is equally discouraging to find that in the name of advocacy parties resort to hyperbole and evasion. Hyperbole in casting the other parties' actions in a distorted light and evasion in ignoring the most salient points of the opposition. Such an approach gains nothing for either side.

FINDINGS OF FACT[40]

Complainants anticipate a continued growth in world trade which should necessitate the development of new container and other cargo handling facilities. Any new facilities actually developed will have three characteristics: (1) they are long-lived and fixed in place and the costs cannot be modified to offset reduction in container traffic; (2) they are expensive and the financing entails long-term borrowing, often through revenue or general obligation bonds; and (3) they must be intensively used if fixed investments are to be amortized.

To the extent that minibridge can be expected to drain substantial amounts of cargo from a port, difficulty could arise in the financing of container facilities at the port. However, the difficulty is at this time only speculative.

Complainants employed the firm of Richard J. Barber Associates, Inc., to conduct a study of ten selected ports on the Atlantic and Gulf coasts. The study was to show the "impact" of the Far East minibridge systems on the ports of Boston, New York/New Jersey, Philadelphia, Baltimore, Hampton Roads, New Orleans, Lake Charles, Beaumont, Galveston, and Houston.

The American Association of Port Authorities concludes that the average value to a port of containerized cargo is conservatively estimated at $25.00. This figure supposedly takes into account "inflation" and is said to represent the income that arises directly from loading and unloading the cargo and other port charges. The $25.00 a ton in direct revenue is less than the direct revenue

[38] Complainants attack this position because "expenses of all-water carriers are not apportioned on a per mile basis."

[39] For instance the testimonies of the Governors of Texas and Pennsylvania—the testimony becomes psychological when not followed up by facts and figures which support the broad assertions made by them—in this case no reliable facts and figures were forthcoming. Had they really been in the possession of complainants, quite obviously they would have been produced.

[40] No one disputes the physical operation of the Far East minibridge. For a description (and a reminder) of the way it operates see pages 4 and 5.

received from a ton of breakbulk cargo—the figure for breakbulk is not in the record. However, a figure of $35.00 is given for "general cargo."

In determining additional revenue to a port from a ton of containerized cargo complainants would employ a "multiplier" effect of 3 times the value of a ton of cargo, i.e. $25 × 3 = $75.00 a ton of containerized cargo.[41] The "multiplier" is used to calculate revenue lost because of the "ripple" effect produced by the loss of a ton of cargo. It is explained as follows:

> . . . Cargo means revenue to a port and the loss of cargo through diversion sets in motion a chain of reverberations just as a stone tossed into a pond sets off a pattern of rippling effects. Some of these are readily apparent (in wage earnings to port facility operators, income to public authorities, benefits to firms and workers serving a port, etc.); others less apparent though nonetheless real (those who benefit through secondary waves of expenditures, as when employees spend their earnings).

Obviously these are highly theoretical averages, do not provide actual figures for one specific ton of cargo, and will vary at each port.[42]

Using figures supplied by respondents, complainants show that 54,525 containers "were moved via minibridge" from the ten "port cities." Since the data supplied by respondents did not show the weight of each container, complainants used figures from the Maritime Administration's "Preliminary Containerized Cargo Statistics on Selected Trade Routes" and came up with an average of 13 short tons per container which results in some 708,825 tons of cargo which were moved from port cities via minibridge. At $75 a ton this would have resulted in losses in the region of $53 million dollars,[43] if all the cargo was actually "diverted" from the studied ports.

However, these figures do not show losses from cargo *diverted* from the ten ports by the Far East minibridge operators. They do show the number of containers which were handled at a railhead in or near one of the ten port cities studied. The record does not establish that any or all of the cargo moved via minibridge would have gone through a complainant port. For example, some shippers testified that were minibridge not available they would not be able to do business in the Far East. Congestion at some ports would have rendered it extremely difficult to use the all-water service and some of the cargo could have just as readily moved through two or more ports.

Taking the ten ports as a whole minibridge accounted for 4.6 percent of all container movements and only 1.6 of the total cargo moved through those ports. Using the relevant time period minibridge traffic was equal to only 35 percent of the total *growth* in Far East container traffic. Thus, the real impact of minibridge which is impossible to quantify accurately on this record is more than offset by the total growth in Far East movements. Additionally, using complainants' ten port example, the asserted losses from minibridge are offset (again to extent impossible to quantify) by the Euro-Cal minibridge operations.[44] As for losses

[41] Both the $25.00 figure and the multiplier of 3 come from a mixed bag of secondary sources which include a number of studies by personnel at various universities, a letter from the Director of the American Association of Port Authorities, an annual report from one port, and a "Grant Economy model" from yet another port.

[42] Indeed the multiplier effect ranges from a low 2.5 at Baltimore to a high of 3.05 at Corpus Christi. The inclusion of Corpus Christi is somewhat puzzling. It was not one of the ten ports selected for the basic study and there appears to be no other data for Corpus Christi.

[43] See page 8 for individual losses asserted for CONASA ports.

[44] For example Seatrain moved more than 27,000 containers between July 1973 and December 1976 through one or more of the ten ports studied. Baltimore is working on plans to increase its Euro-Cal tonnage.

due to the "ripple effect" they are to some extent made up for by other revenues generated in the port city by minibridge, i.e. the containers must be handled and loaded or unloaded at the railhead.

The record purporting to show the impact of minibridge at the individual ports suffers from the same deficiencies mentioned above.

NEW YORK

In 1966 the ILA had an active membership at the Port of New York of 21,471—by active members, complainants mean those eligible for Guaranteed Annual Income. The total manhours approximated 43 million in 1966. In 1974 total membership was down to 11,746 and manhours were about 24 million. This decline in membership and manhours was overwhelmingly the result of the introduction of containerization and not due to the advent of minibridge. By far the greatest drop in membership took place prior to the advent of minibridge and during the minibridge period the manhours actually increased from the low point reached in the first year of minibridge operations.

Some 21,454 containers were loaded or unloaded for minibridge at the railhead at the Port of New York for the period from July 1972 through December 1973. From this and other sources complainants projected a loss of 570 containers a week for the year 1974. It is asserted that 570 "diverted" containers cost the port $20 million. This assertion is unsupported by any documentary evidence and is based upon unsupported and unreliable sources.

The Port of New York has lost some containers to minibridge operators which containers would have moved through the Port of New York but for those operators. There is, however, no way on the basis of this record to tell how many containers were lost or even to make a reasonably accurate estimate.

PHILADELPHIA

The record shows that 3,291 containers were moved from or to the railhead at Philadelphia via minibridge. Using complainants' conversion methodology some 31,000 tons of cargo moved by minibridge. The record does not show the origin or final destination of this cargo; nor does it show that but for the minibridge system the cargo would have moved through the Port of Philadelphia.

The record does not establish that the construction of a third container facility "may not become a reality because of minibridge." From the fourth quarter of 1972 to the fourth quarter of 1973 there was an increase of only one minibridge container.

Minibridge cargo represents only .039 percent of bulk and general cargo, .048 percent of general cargo, and 2.9 percent of container cargo. Philadelphia at the close of this record was proceeding with plans for expansion of container facilities without regard or reference to the allegedly adverse impact of minibridge operations.

BOSTON

Using TEUs[45] and their own conception of the trade involved, Boston shows that 11,606 containers moved via minibridge from the railhead at Boston. Citing the increase in minibridge from 1972 to 1973, Boston projected an additional 8,000 TEUs "lost" for 1974. However, Boston did not have the facilities to handle the total growth in containerized cargo for 1974.

Total Far East tonnage for Boston increased from 8,666 tons for the last half of 1972 to 26,667 tons for the last half of 1973—an increase of some 200 percent. Taking Sea-Land as an example minibridge represented .27 percent of total cargo moving through Boston in 1973 and 12.7 percent of containerized cargo.

Boston has lost some cargo to minibridge. The record does not establish how much nor does it afford a basis for any reasonably accurate estimate.

NEW ORLEANS

In the fiscal year 1972-1973 New Orleans handled 76,638 containers (TEUs) while in fiscal 1973-1974 the port handled 104,000 (the figures include empties). Using an average of 13 tons outbound and 11 tons inbound the tonnage amounted to 490,356 in 1972-73 and 793,717 in 1973-74. Of the total general cargo handled, containerized cargo represented 10 percent.

For the period in question 5,790 "container units" moved via minibridge between New Orleans and the Far East. However, total cargo at New Orleans increased 49.8 percent from 5,056,000 short tons in 1972 to 7,576,000 in 1973. General cargo increased from 1,499,000 short tons in 1972 to 1,649,000 in 1973. Total containerized tonnage increased 43.7 percent from 516,000 tons in 1973. Far East container tonnage increased from 179,000 tons in 1972 (about .03 percent of total tonnage) to 256,000 tons in 1973 (again about .03 percent of total). For the fiscal year ending June 30, 1974, New Orleans had revenue of $2,476,300 opposed to $1,403,194 for the previous fiscal year.

Minibridge cargo for 1973 was about 1.2 percent of total general cargo and about 5 percent of total Far East cargo. Far East containerized cargo represents about 3.4 percent of the ports total general cargo. The principal import from Japan is steel which is not a containerized cargo.

New Orleans has lost some cargo to minibridge; however, since New Orleans itself admits that the origin and destination of the "5,790 containers" is not known, it has no way of knowing whether any container would have moved through the port had it not been for minibridge; and this record provides no basis for making such a determination.

GALVESTON AND BEAUMONT

Galveston, using a synopsis of information provided by respondents, demonstrates that 51 percent of all Far East minibridge movements originated at Gulf ports, that Texas ports accounted for 46 percent of the total movement, and that Houston alone accounted for 41.5 percent.

During the 1973/74 cotton season 728,619 bales of cotton "mysteriously"

[45] See footnote 24.

disappeared from the records of the Galveston Cotton Exchange. It is asserted but not established that the missing bales could only have moved by container and the inference is drawn that they moved by *minibridge* container to the Far East.

Historically 50 percent of all cotton exports from Galveston have been destined to Japan. In the last quarter of 1974 the percentage was 24.4. However, total cotton exports to all Far East destinations went from 1,413,539 bales in 1972/73 to 1,499,264 bales in 1973/74.

Utilizing 80 bales per forty-foot container at an average of 530 pounds per bale, minibridge in 1973 was 13,175.8 tons or 1.2 percent of total tonnage at Galveston and only 2.5 percent of total outbound Far East general cargo for 1973.

That Galveston has lost some cotton to minibridge is highly probable. Just how much is impossible to determine from this record. Other factors such as congestion undoubtedly played a part in some of the individual decisions to use minibridge.

Beaumont admits that minibridge has not taken away any container business which the port would otherwise have enjoyed. Beaumont has no facility exclusively dedicated to the handling of container operations. Some 200 short tons of Far East container cargo moved through Beaumont during 1971–1973 which is only an infinitesimal percentage of its 1974 general cargo of 628,134 tons.

HOUSTON

During the period from the third quarter 1972 through the fourth quarter 1973 11,341 minibridge containers moved between the port city of Houston and the Far East. There is no hard evidence to show that but for minibridge those containers would have moved through the Port of Houston.

Total cargo at Houston increased from 10,228,592 tons in 1971 to 12,860,897 in 1973—an increased of 25.7 percent. Container cargo increased from 565,666 tons in 1971 to 1,399,824 tons in 1973. Foreign trade container cargo increased from 316,040 tons in 1972 to 802,592 tons in 1973. Foreign trade general cargo increased from 4,921,387 in 1972 to 5,770,050 in 1973.

Using Houston's calculations of 13 tons average weight per container for 16,289 TEUs carried in minibridge service in 1973, minibridge cargo represented some 1.6 percent of total cargo at Houston for 1973 and 3.6 percent of foreign trade of general cargo.

Houston actively solicits Euro-Cal minibridge cargo.

Other factors such as shortage of containers and congestion may have contributed to some degree to the individual decision to ship minibridge.

It appears that Houston has lost some cargo to minibridge but once again it is impossible from this record to quantify that loss.

LAKE CHARLES

From the third quarter 1972 through the fourth quarter 1973, eight containers moved by minibridge at the Port City of Lake Charles. The port has had no container experience and has moved no containers in either the export or import trades. Lake Charles does not have a container crane.

BALTIMORE

The Port of Baltimore does not support complainants' position. The 3,238 containers[46] moved by minibridge to or from the railhead at Baltimore represent less than one percent of Baltimore's total container cargo; thus Baltimore "cannot rightfully claim substantial harm by the practice of minibridge. . . ."

HAMPTON ROADS

From the third quarter 1972 through the fourth quarter 1973 2,180 containers moved to or from the railhead at Hampton Roads. Although offered the opportunity, Hampton Roads did not intervene in support of complainants and filed no brief in the case. The record affords no basis for determining the actual impact of minibridge on the port.

Generally, it can be seen from the foregoing that while some cargo has been lost by the various ports, the record does not allow any quantification of the actual losses and thus renders virtually impossible any reasonable estimation of the harm if any inflicted on the ports by minibridge.

Overall, the ports studied have realized increases in the total cargo handled in foreign trade and most ports are going ahead with plans for the expansion of container facilities despite the dire predictions and gloomy pictures painted about the expected depredations of minibridge.

Findings as to facts relevant to noncompensatory rates, naturally tributary territory and rate discrimination between shippers will be made when those allegations of violations are discussed below.

DISCUSSION AND CONCLUSIONS

As already noted, by an order dated December 5, 1973, the Commission assigned this case an importance which went beyond the simple resolution of a purely private dispute between complainants and respondents. That order denied a petition of American Mail Line which sought the institution of a general rulemaking proceeding to solve the problems said to inhere in intermodalism. In denying the petition, the Commission clearly recognized that developments in transportation had sharpened the historical conflict between ports, which desire the maximum amount of carrier calls obtainable, and the carriers, which continually sought to reduce the number of port calls. As the Commission recognized, the rapid growth of containerization:

> . . . increased the inland mobility of export and import cargo; cargo can and does move from or to any part of the continental United States through ports on any coast. At the same time, a rigorous restriction of port calls with supplemental road or rail distribution from or to the terminal ports has become an economic necessity for the containership operator. Additional port calls both magnify voyage expense and require increased terminal investment or expense. (Order of December 5, 1973.)

Thus, containerization, intermodalism generally, and, in this case, minibridge in particular have pitted the economic interests of the complaining ports against the economic interests of the respondent containership lines.

With denial of the petition for rulemaking, primarily on the ground that each intermodal situation would present different factual circumstances, the Commis-

[46] These are complainants' figures.

sion designated two cases then pending—this case and Docket 73–35, *Intermodal Service of Containers & Barges at Philadelphia,* as vehicles for the establishment of "general principles." Thus it would seem that something more than a simple resolution of the controversy here, say on the basis of burden of proof, is called for in this decision. However, the "general principles" can only be considered on the basis of the record here and in the context of the specific allegations of the complaint.

The complaint in this case charges respondents with violations of sections 16 First, 17 and 18(b)(5).[47] The minibridge service is said to violate sections 16 and 17 because it (1)". . . unlawfully diverts locally tributary cargo from [complainant] ports"; and (2) this " . . . diversion is accomplished by unlawful absorption of shipper and inland costs, and creates discrimination."

Complainants also urge that minibridge is contrary to the policies of section 8 of the Merchant Marine Act 1920 (46 U.S.C. 867), which they allege "embodies the policy and intent of Congress to protect and promote ports." Because of its pivotal importance here, section 8 is set forth below in its entirety:

> It shall be the duty of the Secretary of Commerce, in cooperation with the Secretary of the Army, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view of devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carrier by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: *Provided,* That if after such investigation the Secretary of Commerce shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the board may submit its findings to the Interstate Commerce Commission for such action as such commission may consider proper under existing law.

The section, of course, addresses itself to the Secretaries of Commerce and the Army, and even then only imposes the duty to investigate and to report any recommendations to the Interstate Commerce Commission. Section 8 does not proscribe any particular activity by carriers, be they water or rail, and it represents only a statement of Congressional policy to be given weight by the Commission when adminstering the statutes entrusted to it by Congress. *Intermodal Service to Portland,* 17 F.M.C. 106 (1973); *Port of New York Authority v. F.M.C.,* 429 F.2d 663 (5th Cir., 1970). Section 8 has indeed been given such

[47] Section 16 First makes it "unlawful for any common carrier by water . . . either alone or in conjunction with any other person, directly or indirectly: . . . to make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . (46 U.S.C. § 815)

Section 17 provides: That no common carrier by water in foreign commerce shall demand, charge or collect any rate, fare or charge which is unjustly prejudicial to exporters of the United States as compared with their foreign competitors. (46 U.S.C. § 816)

Section 18(b)(5) will be dealt with later in this report.

"weight" in the past when the Commission dealt with discrimination or prejudice toward a port; (*Associated Latin American Freight Conferences,* 15 F.M.C. 151 (1972) at 155–156). However complainants may not be too far from the mark when they argue that:

> . . . the cases cited make clear that a violation of Section 8 will sustain a finding that a rate or practice is unduly prejudicial under section 16 or unjustly discriminatory under section 17 of the Shipping Act. *City of Portland v. PWC,* 4 F.M.B. 665 (1955), at 674.

Complainants go on to say:

> As the Commission has repeatedly held, these laws [§§16 & 17] are violated whenever an ocean carrier, by some unlawful technique, whether it be absorption of inland transportation costs, or port equalization, or by any discriminatory device, diverts traffic from a port to which the area of origin or destination of the cargo is naturally tributary. The only circumstance under which such diversion may be justified is where there is a lack of adequate service to the shipper at the port or ports from which traffic is diverted. *Intermodal Service to Portland, Oregon, supra; Sea-Land Service, Inc. v. S. Atlantic and Caribbean Line* 9 F.M.C. 338, 344 (1966); *see also City of Mobile v. Baltimore Insular Line,* 2 U.S.M.C. 474 (1941); *Beaumont Port Commission v. Seatrain Lines, Inc.,* 2 U.S.M.C. 500 (1941), and 2 U.S.M.C. 699 (1943); *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 665 (1955), and 5 F.M.B. 118 (1956); *Proportional Commodity Rates on Cigarettes and Tobacco,* 6 F.M.B. 48 (1960); *Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12 (1965).[48]

As readily seen complainants (1) identify minibridge as but another form of "port equalization"; (2) equate port equalization with other "unlawful" means of diverting cargo; and (3) argue that the only justification against "diversion" is an inadequacy of service at the port from which the cargo is diverted. There would appear to be some confusion here on the part of complainants.

Port equalization is not of itself an unlawful device; it is not unlawful in principle. *Beaumont Port Commission v. Seatrain Lines Inc.,* 2 U.S.M.C. 500, 504 (1941). It has been defined as:

> . . . The allowance or absorption by the ocean carrier of such amount as will make the shipper's cost of overland transportation identical or substantially so, from his inland point of origin to two or more ports. Its purpose is to enable the ocean carrier to compete for cargo without calling at the port closest to or enjoying the lowest inland transportation costs from, the point where cargo originates. *Sea-Land Services, Inc. v. S. Atlantic & Caribbean Line Inc.,* 9 F.M.C. 338 at 344 (1966).)[49]

Port equalization, although most often described as a practice, is in one way as much a result reached through the use of other practices as it is a practice itself. Port equalization can be accomplished by the use of allowances, absorptions, differentials, proportional rates or "transshipment."[50] (*SACL* case, *supra,* at 345.) All of the cases cited by complainant above are cases which deal with one or another of the forms of port equalization.

Once equalization is practiced and cargo is diverted from territory naturally tributary to a port, it is said that the only defense against a charge of unlawfulness

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[48] It is at times quite difficult to disentangle the legal reasoning from the hyperbole and emotional polemics of at least one complainant's "argument" on the issues. As an example, in one brief we find that "Seatrain and its imitators" have "mounted a single-minded assault on the cargo markets of CONASA port areas." But what appears to make this single-minded assault, reprehensible is that it was "Impelled by the search for profits . . . "; moreover the actions of Seatrain have apparently imperiled the "livelihood" of "hundreds of thousands of people." To complainants the respondents make "arrogant claims" and generally disport themselves in a manner that is at least unbecoming and at worst malevolent. Such emotional appeals do not in any way advance decision on the merits and only redound to the detriment of those practicing them.

[49] This will be referred to as the *SACL* case hereinafter.

[50] "Transshipment" as used in connection with port equalization means "the movement of cargo, usually by land carrier, in the water carrier's name and at its expense, from a dock or terminal at the port where it is originally delivered by the shipper to the water carrier, to the dock or terminal at another port where it is loaded aboard the vessel" (*SACL* at 345).

is inadequacy of service at that port. Adequacy of service is a "general" rather than a "particularized" concept and has been recognized as a "troublesome one" because:

> In a very real sense, it is the ocean carriers themselves who, because of a desire to serve a port indirectly, can theoretically make service "inadequate" merely by refusing to serve that port directly, and then unlawfully divert cargo from that port by an indirect service. *Intermodal Service to Portland, Oregon,* 17 F.M.C. 106 at 131 (1973).

In the *Portland* case the troublesome aspect of the adequacy test was remedied through section 15 (not at issue here) under which the Commission directed that only members of the Conference serving Portland direct by alternate sailings could equalize against Portland. (17 F.M.C. at 131.)

Thus if the law is as complainants see it, and leaving aside any attempt to capture the elusive concept of "naturally tributary" the entire verbiage of section 8 has been reduced to the twofold proposition of (1) "diversion" of cargo from a port by a practice such as allowance or absorption and (2) "inadequacy of service" as the only defense to such diversion.[51] Before attempting to state the current law on equalization and to apply it here,[52] some review of the development of that law is necessary. To be kept in mind throughout this review is the fact that the sections of the Shipping Act alleged to have been violated are sections 16 First and 17 and that it is undue preference or prejudice to ports and unjust discrimination against ports, not diversion of cargo, which those sections proscribe.

The first case in which the question of "discrimination" against a port was considered was *Alaska Rate Investigation,* 1 U.S.S.B. 1 (1919). There it was asserted that the rates on farm products and coal which were higher from Anchorage to Juneau than from Puget Sound ports to Juneau subjected Anchorage to "undue discriminations." In reaching its determination, the Board concluded that (1) as to some of the commodities at least, Juneau was the logical market for the products and that shippers at Anchorage competed there with shippers from Puget Sound ports; (2) that but for the rate differential much larger quantities would move through Anchorage; and (3) the carriers could show no circumstances which would warrant the differentials. The Board then concluded, among other things that "The maintenance of rates on farm products from Puget Sound ports to Juneau, Alaska, lower than rates contemporaneously maintained on like traffic from Anchorage to Juneau [was] unduly preferential to Puget Sound ports and unduly prejudicial to Anchorage; and the resulting *undue discrimination* must be removed."[53] (Emphasis added.)

In *Port Differential Investigation,* 1 U.S.S.B. 61 (1925), a tripartite conference agreement divided ports on the North Atlantic, South Atlantic and Gulf

[51] When section 8 directs the Secretaries of Commerce and the Army with the object of promoting, encouraging and developing ports to investigate "territorial regions and zones tributary to such ports," the investigation is to take into consideration "the economies of transportation by rail, water and highway and the natural direction of the flow of commerce"—"adequacy" of service is of course not mentioned.

[52] Some respondents argue that minibridge operations do not result in port equalization. This will be dealt with later.

[53] This report, written in apparently less demanding times, failed to cite a single statutory provision which had been violated. However, it is obvious that at least three were involved i.e., sections 18(a), 16 First and 17. It will of course be observed that the precise discrimination asserted is between shippers, but the Port of Anchorage could just as readily make the charge. It will remain to be seen whether there is any sound basis for a different law for discrimination or prejudice against shippers as distinguished from ports. Finally, the use of the term "undue discrimination" is an early indication of the confusion which arose in the application of sections 16 and 17.

coasts into three groups and rates were fixed on a principle of differentials which favored ports in the North Atlantic. Ports in the South Atlantic and Gulf alleged that the differentials were unduly prejudicial and unjustly discriminatory in violation of sections 16 and 17.

The Board noted that the port groupings and differentials had been in effect for some time and that the circumstances surrounding the adoption of the differentials did not reveal any clearly defined rule or reason for their amount or measure. The carriers' principal defense for the differentials was that their purpose was to "offset the addditional cost of operation from the South Atlantic and Gulf ports over the North Atlantic ports on the basis of the then existing level of rates." The Board said:

> If that were the desideratum it is difficult to understand why these differentials have not varied with the exceedingly large variation in rates. In making this observation the Board does not concur in the theory that a carrier is justified in burdening a port with a differential for the sole and only reason that the cost of operation from that port is greater than from some other port. It is obvious to the Board that many elements such as volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service and others are properly to be considered in arriving at adjustment of rates between ports. . . .

The Board concluded that the differentials did not violate sections 16 and 17. Of interest is that while the case was decided in 1925 no mention was made of section 8 which was enacted in 1920. Additionally, a differential could be justified by a *number of transportation factors* and not just inadequate service at the ports burdened by the differential. Similarly in *Everett Chamber of Commerce v. Luckenbach S.S. Co.*, 1 U.S.S.B. 149 (1929), arbitraries[54] were imposed on certain West Coast ports which those ports alleged violated section 16 of the Shipping Act. The Board found no violation and in doing so the Board concluded that volume of cargo and *competition between carriers* were factors to be considered when determining a violation of section 16 involving ports.[55] In the same year, 1929, the Board decided *Board of Commissioners Lake Charles H & T.D. v. N.Y. & P.R.S.S. Co.*, 1 U.S.M.C. 154 (1929). In that case Lake Charles complained that respondent New York & Porto Rico Steamship Company was "equalizing" at the Port of New Orleans against Lake Charles in violation of section 16.[56] The Board found no violation. The Board found that before the port at Lake Charles opened almost all rice moved through New Orleans, that respondent had never served Lake Charles, and that respondent's rates were set in an effort to retain the rice traffic at New Orleans. The Board said:

> This situation is manifestly beneficial to the shippers concerned for the reason that they are afforded two routes for the movement of their product; and particularly so in that the route via New Orleans is shorter in total distance by from 94 to 213 miles depending upon point of origin.[57] (page 156).

The Board then took occasion to discuss the "naturally tributary" concept, although it did not use that term. The Board said:

[54] The arbitraries resulted in higher rates on cargo destined to the ports of Everett and Bellingham than for cargo destined for Seattle and Tacoma.

[55] It is 1929 and there is still no reference to section 8.

[56] The complaint was based on the fact that respondent's rate on rice when added to the rail rate from point of origin to New Orleans was the same as or lower than the through rate via Lake Charles to Puerto Rico.

[57] Thus at this time at least total distance, land and water, was a factor to be considered, and benefit to shippers would appear a consideration.

> Regarding the contention of the Port of Lake Charles that because of its geographical location it is the normal outlet for shipments of clean rice to Puerto Rico and extending to that contention every consideration to which it may be entitled, yet there is manifestly no provision of the Shipping Act which can be construed to forbid a carrier to meet competition or to enlarge the scope of its patronage and its volume of business if it can do so without unfairness to those whom it serves. The respondent does not now and never did serve the Port of Lake Charles and the complainant presents nothing to show that the rates are unremunerative or that they in any manner burden other traffic in the carriage of which the respondent is engaged.[58]

Some years later in 1936, the Port of Philadelphia complained that a number of lines were charging higher rates from Italian ports to Philadelphia than they were from those same ports to New York.[59] While here complainant was trying to *achieve* "equalization" the basic principle remains the same; and again the Board pointed out that, "The uniformity of treatment contemplated by the Shipping Act is a relative equality based on transportation conditions only."[60]

From the foregoing it can be seen that in the early cases a goodly number of transportation factors must be considered in arriving at a determination as to the validity of rate differentials, arbitraries, absorptions and equalizations both as between shippers and as between ports.[61] Up to this point section 8 of the Merchant Marine Act 1920 had not been considered, weighed, or for that matter, even mentioned, although the geographic advantages or disadvantages of localities or ports had been discussed and considered in deciding cases under sections 16 and 17 of the Shipping Act. It was not until 1941, some twenty years after its enactment that section 8 achieved specific mention in a decision.

In *City of Mobile v. Baltimore Insular Line,* 2 U.S.M.C. 474 (1941), a number of carriers set their rates on shipments to Puerto Rico so that "the combination of the inland rates from point of origin and ocean rates beyond are adjusted so that the lowest combination via any United States port served by a defendant will apply via any other from which any defendant maintains service. . . ." This practice was said to violate sections 16 and 18 of the Shipping Act and section 3 of the Intercoastal Shipping Act. Because this is the first case in which section 8 plays a role it might seem that something in the way of general principles governing the application of the section would have been developed. However, no amount of careful reading and analysis can extract anything remotely resembling a consistent or even coherent theory of the case.

The respondent carriers all operated pursuant to a joint tariff filed by an agent, one G. A. Meyer. They maintained sailing from various ports on the Atlantic and Gulf coasts ranging from New York to Port Arthur, Texas. However, there was no competition between the carriers at any port of origin except New York.

Item 26 of the joint tariff was entitled "Port Equalization." The item among other things authorized a deduction of 3 cents per hundred pounds on carload and less-than-carload traffic to Puerto Rico from New York. The cargo originated at

[58] *See also, Atl. Refining Co. v. Ellerman & Bucknall S.S. Co.,* 1 U.S.S.B. 242 (1932), which involved alleged rate discrimination between shippers at New York and Philadelphia in violation of sections 16 and 17. Quoting Justice Brandeis, the Board said: "To bring the difference in rates within the prohibition of these sections it must be shown that such a difference is not justified by the respective services, by their value, or by other transportation conditions."

[59] *Phila. Ocean Traffic Bureau v. Export S.S. Corp.,* 1 U.S.S.B. 538 (1936).

[60] *See also Commonwealth of Mass. v. Colombian S.S. Co., Inc.,* 1 U.S.M.C. (711) (1938).

[61] For other examples, see *Harbor Comm. of San Diego v. American Mail Line Ltd.,* 1 U.S.M.C. 661 (1937); rehearing 2 U.S.M.C. 23 (1939); *Sun Maid Raisin Growers Assn. v. Blue Star Line, Ltd.,* 2 U.S.M.C. 31 (1939); *Intercoastal Rate Structure,* 2 U.S.M.C. 285 (1940).

rail points named in the item, and there were a great number of specific exceptions to the item exceptions published elsewhere in the tariff. Under the exceptions equalization was practiced on traffic originating in Georgia, Tennessee, the Carolinas and other states in the Southern Territory and from as far West as Denver, Colorado. These and certain other absorptions were disposed of because they failed to meet the tariff filing requirements of section 2 of the Intercoastal Act.

Pointing to a number of instances under Item 26 where favorable inland rates were offset by equalization complainants had argued;

> . . . that the development and maintenance of a port depends upon traffic from inland areas naturally tributary thereto, as well as that which originates at Seaboard; that the equalization practice nullifies inland rate structures through the diversion of traffic to ports to which higher rates ordinarily would apply; and that established, prescribed or approved inland rates should be left undisturbed.

The Commission without reference to this general proposition took up and dealt with several specific instances of equalization. For example, on steel, iron, pipe etc. manufactured in the Birmingham district of Alabama complainants claimed the natural route was through Mobile because of the distance factor and more frequent sailings there. Bull Insular and Baltimore Insular in an effort to compete with Waterman at Mobile and New Orleans reduced their rates from Charleston, South Carolina, by the difference between that port and Mobile. From some origins inland rates were the same to New Orleans as to Mobile yet Waterman reduced only the rate from New Orleans to equalize the rates via the northern ports. Of this practice the Commission said:

> . . . Shippers are thereby deprived of their choice of routes via New Orleans or Mobile, and Mobile is deprived of an opportunity to compete. Such action is unduly prejudicial to Mobile and unduly preferential to New Orleans in violation of section 16 of the Shipping Act, 1916.[62]

Waterman's practice of equalizing rates via New Orleans against those via Galveston was found to be "an unreasonable practice." Apparently it was not equalization as such but Waterman's method of achieving equalization that was disfavored, for the Commission said:

> If any deduction in the local [rail?] rate on traffic moving via New Orleans is warranted such deduction must be made between applicable export [rail] rates over established routes from a common origin to both Texas and New Orleans. The use of a difference between an export [rail] rate to one port and a domestic [rail] rate to another port, or between other unlike rates to different ports, as a basis for reductions in port-to-port rates is in the circumstances an unreasonable practice (p. 481).

Carriers operating out of New York and Baltimore equalized inland rates to those ports on a number of commodities originating at some 800 points in Iowa and points in Minnesota and South Dakota, and on other commodities originating at points in Indiana and Illinois. The variety and disparity of the deductions led the Commission to say:

> . . . Such varying deductions result in innumerable port-to-port rates for substantially similar transportation. The diversion through New York by means of "equalization" of traffic which by reason of a substantially more favorable geographic position is naturally tributary to South Atlantic ports—or to Gulf ports—is uneconomic and unnecessarily wasteful of carrier revenue.[63]

[62] Minibridge rather than depriving shippers of routes offers them additional ones and additional ports are afforded an opportunity to compete for Far East traffic.

[63] It should be remembered that section 18(a) of the Shipping Act and the Intercoastal Shipping Act were at issue in *City of Mobile*, *supra*.

Other deductions for the purpose of equalization were found unlawful because they rendered the tariff ambiguous, and still others were found to be beyond the scope of the conference agreement. With this the Commission went on to say that there were many other instances which could be cited but it thought what had been said was "sufficiently illustrative." The Commission then took up arguments for and against equalization generally under Item 26. The supporters urged that it should not be condemned because of the length of time it had been observed, and the fact that shippers and consignees had become accustomed to it and that ports and businesses had been built upon it. The Commission, however, noted, "They offered little evidence."[64] The argument was made that since Item 26 resulted "in shippers paying the same amount via any port and affords carriers and ports an equal opportunity to attract traffic no unlawfulness exist[ed]." The Commission noted that as authority for this proposition *Port Differential Investigation*, 1 U.S.S.B. 61 (1925), was cited and "that at page 71 of that decision the contention of New York and other port interests that rail-water should be equalized via Atlantic and Gulf ports was considered and dismissed on jurisdictional grounds." The Commission merely noted this argument and had nothing to say on its merits at this point; it simply went on to the next point which was made by the "[I]sland interests" that "continuation of equalization was not only desirable, but necessary, in order that the delivered cost of merchandise might be the same to all, thus permitting a consignee to compete with others in the same business." The Commission dismissed this with "Even with equalization the suggested result could not be achieved. All purchasers do not patronize the same manufacturer and the combination of inland-ocean rates is different for each origin."[65]

Urged not to declare equalization unlawful in principle, the Commission merely said that equalization as practiced under Item 26 was "unreasonable."

The argument was then made that the rates fixed under Item 26 were "proportional rates on through traffic" and as such lawful under prior decisions.[66] The Commission agreed proportional rates in water transportation may be proper in some instances, but only when delivery costs at ports are relied upon to fix the differentials between ports. Such was not the case under Item 26. The Commission concluded its discussion with:

> The contention that inland rates to seaboard, whether voluntarily established or prescribed or approved, should not be nullified cannot be entirely ignored. We could not prescribe a rule or regulation designed solely to equalize inland rate differentials. Carriers may do many things which we could not compel, but that privilege is not unlimited. To permit continuation of unrestricted solicitation by carriers for business through condonation of a practice whereby unfavorable inland rates are overcome would wholly ignore the right of a port to traffic to which it may be entitled by

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[64] The problem of "little evidence" would seem perennial.

[65] This seems to represent a somewhat confused notion of "equalization."

[66] Cited was *Intercoastal Rate Structure*, 2 U.S.M.C. 285 (1940), where the Commission concluded that certain equalization practices and the rate thereunder were unlawful. After noting that the practices were "primarily designed to entice a larger share of the business away from . . . competitors," the Commission went on to say: "The record in this proceeding shows that the present rates are ambiguous in their application and may be unjustly discriminatory as between commodities and localities. To this extent, they further confuse an already complicated competitive struggle and should be declared unreasonable." The Commission found the rules unreasonable, but stated that, "This finding is without prejudice to the establishment of reasonable rules *designed only to equalize rates where necessary in view of the applicable rail rates to the ports*." (Emphasis added.) Of further interest is that the Commission found that there was no question of the lawfulness of carriers making absorptions of the cost of on carriage to ports seldom or never served for legitimate competitive reasons.

reason of its geographical location. Such right appears fundamental under statutes designed to establish and maintain ports. Under section 8 of the Merchant Marine Act, 1929, we are required to recognize territorial regions and zones tributary to ports and should there exist rates to seaboard which, among other things, do not recognize the natural direction of the flow of traffic, recommendations may be made to the Interstate Commerce Commission for such action as it deems necessary. The contention has been made that section 8 has no relation to rate regulatory provisions of the Shipping Act, 1916. But to wholly ignore basic policies of Congress would be unwarranted.

The Commission at this point would seem almost to restrict its *duties* under section 8 to reporting unfavorable inland rates to the ICC.

The Commission specifically found that Item 26 and the practices under it resulted in an unjust and unreasonable tariff in violation of section 18 of the Shipping Act, and that equalization as practiced resulted in undue and unreasonable preference and prejudice under section 16 of the Shipping Act. It was further found that Item 26 did not comply with section 2 of the Intercoastal Shipping Act of 1933.

What can be said of the decision in *City of Mobile?* About the only certainty to be found is the uncertainty of the law to be applied to equalization. Some of the practices resulted in an ambiguous tariff in violation of the 1933 Act; some were found to be "unreasonable practices" without mention of any statutory provision; some were found to be "uneconomical and unnecessarily wasteful of carrier revenue," again without statutory reference; some were found unlawful because improper pairs of rail rates were used to fix the differentials; and some because they deprived shippers of a choice of routing. The *City of Mobile* case quite simply provided no guidance in ascertaining the general principles of law which were to be applied in future cases of equalization.

The next case dealing with equalization was *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500 (1941), decided the same month as the *City of Mobile* case. In *Beaumont,* Seatrain, on traffic originating at Houston, Galveston, and Beaumont, equalized, through absorption, the cost of making delivery to its vessels at Texas City as against ship's side at Houston, Galveston, and Beaumont. It was alleged that this practice violated sections 16 and 17.[67] For the little over two-month period in question Seatrain had diverted some 2,673 tons of cargo to the three ports. It was the "considered opinion" of complainant's witnesses that the "breakbulk" lines[68] could not long compete with Seatrain at equal rates.

Quoting from its discussion of section 8 in the *City of Mobile* case, (see page 57 of this decision), the Commission said, "This statement is even more applicable in the present situation where the absorption practice permits a carrier to reach into the port itself and draw therefrom the traffic which is local and therefore naturally tributary to that port." The Commission went on to say:

The practice of equalization is not condemned by us as a general principle. But here it creates an undue advantage which cannot be overcome by the break-bulk lines individually, except by resigning from the conference and precipitating a rate war which is a condition contrary to the best interests of the American merchant marine. An absorption practice which would bring about such a result should be condemned.

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[67] A violation of section 15 was also alleged, but the Commission merely found the tariff ambiguous and ordered it amended.

[68] Seatrain's service differed "materially" from the breakbulk carriers, and was conceded by all parties to be of a superior nature.

Three years later, the Commission accepted Seatrain's third petition for reconsideration and held a further hearing.[69] On rehearing the Commission summarized its earlier report:

> The previous report recognized Seatrain's superior service; pointed to the diversion of traffic from Galveston, Houston and Beaumont as a result of the absorption and the consequent crippling of essential carrier services performed by the breakbulk lines serving those ports; stated that the breakbulk lines could not overcome their resulting disadvantage without possibly precipitating a rate war, and found that the practice was unduly prejudicial and discriminatory in violation of sections 16 and 17, respectively, of the Shipping Act, 1916.

On the basis of the facts established at the second hearing, the Commission reached a number of conclusions. Seatrain could not attract traffic at rates higher than the breakbulk lines and thus could not reenter the trade upon a competitive basis without absorption or rate reductions.[70] The fear that Seatrain would monopolize had not been realized; in fact Seatrain's operations had not seriously disrupted or affected the operations of the breakbulk lines, and that the further testimony and argument emphasized the question which the Commission thought decisive to the case—whether the traffic involved was naturally "tributary to Seatrain as well as the breakbulk lines?" The Commission concluded "that the ports of Galveston and Houston and the surrounding territory are centrally, economically and naturally served by Seatrain's facilities at Texas City." Beaumont, it was found, was not within the "Galveston Bay group and traffic through Beaumont was not naturally tributary to Texas City." Finally there was no evidence of discrimination between shippers since a shipper paid the same through transportation costs whether he shipped via Galveston, Beaumont or Texas City. The Commission concluded that Seatrain's equalization against Galveston and Houston did not violate sections 16 and 17. Nothing in this decision would lead one to the conclusion that "adequacy of service" at the port equalized against was the sole defense available to the carriers practicing equalization.

The next case to deal specifically with section 8 was *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955), in which the Conference's tariff Rule 2 was challenged under sections 15, 16, and 17 of the Shipping Act, and was alleged to violate "the principles and policies of the Merchant Marine Act, 1920." Under Rule 2 a member line could meet competiton of the other member lines through equalizing the cost of a shipper of shipping through any Pacific Coast port. The difference between the shipper's cost of delivery to ship's tackle at the nearest port and his cost of delivery to ship's tackle at another port served by the equalizing line was absorbed by that line.

The Board finding that the Conference's equalization practices drew certain cargoes from territory which was naturally tributary to the complaining ports then for the first time cast inadequacy of service as the sole justification for "diverting" cargo from a port through equalization.

Thus, in allowing the practice of equalization on apples to continue, the Board said:

[69] *Beaumont Port Commission v. Seatrain Line, Inc.*, 2 U.S.M.C. 699 (1943).

[70] The conference had filed a modification which would have removed the Texas ports from its jurisdiction and Seatrain announced that it would "shrink" its rates at Texas City so as to equalize the rates via Galveston, Houston and Beaumont.

We will require, however, that equalization on shipments of apples and other deciduous fruits be subject to continuing review. *When reasonably adequate service is provided from the Northwest, the reason for this equalization rule will no longer exist.* (Emphasis added.)

On dairy products the Board permitted equalization "only when service is unavailable in those ports through which such products would normally move but for the conference's equalization practice. . . ." Finally the Board had the following to say:

In view of our findings of unjust discrimination[71] arising out of specific equalization practices, it necessarily follows that those practices are detrimental to the commerce of the United States and violate the principles and policies of section 8 of the 1920 Act. That section requires, all other factors being substantially equal, that a given geographical area and its ports should receive the benefits of or be subject to the burdens incident to its proximity or lack of proximity to another geographical area. To the extent therefore that the ports of a given geographical area *give or can give adequate transportation services, we look with disfavor on equalization rules or practices which divert traffic away from the natural flow of that traffic* (Emphasis added.) (4 F.M.C. 679)[72]

So it was that by 1955, and without anything in the way of explanation, inadequacy of service had become the sole defense to discrimination against a port through *absorption* of inland charges. In 1960 in *Proportional Rates on Cigarettes and Tobacco,* 6 F.M.B. 48 (1960), the adequacy of service doctrine was reaffirmed. However, in 1962, the Commission decided the case of *Surcharge on Shipments from Buffalo, New York,* 7 F.M.C. 458 (1962). In that case the Mediterranean Eastbound Conference established a 10 percent surcharge on all shipments originating at Buffalo. The Governor of New York filed a petition under section 16 First alleging that the surcharge created an undue and unreasonable prejudice against Buffalo and a preference to other Great Lakes ports. No mention was made of section 8. The conference defended on the ground that the surcharge was due to extraordinarily high terminal costs and excessive delays at Buffalo. The Commission concluded that the record would not support the conference and in finding that the surcharge violated section 16 noted that:

There are also other elements which should be considered in determining whether a *rate differential* at a particular port may be upheld, such as volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service and others. (Emphasis added.) (7 F.M.C. 462).

That the surcharge had or would have the effect of diverting traffic from Buffalo is obvious. Thus there would appear only two reasons for the difference in criteria between the *City of Portland* case and the *Buffalo* case: i.e., (1) Unless section 8 is specifically injected into the case there are factors other than adequacy of service to be considered; or (2) It is the manner, method or practice actually used (absorption, surcharge, etc.) to "divert" cargo which determines the defenses available to the carrier. The former would allow the agency to ignore a "basic policy" of Congress and the latter will not bear rational inquiry.

Notwithstanding the *Buffalo* case, the remaining decisions on "port equalization" in which section 8 is at issue, are more or less consistent in their adherence to inadequacy of service as the only defense to a charge of diversion "contrary to

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[71] The finding was made under section 15 alone. The section 16 and 17 allegations were not considered on the ground that the action taken under section 15 disposed of the issues. But the principle was to remain the same when sections 16 and 17 were at issue.

[72] On rehearing the Board allowed equalization on explosives because of inadequacy of service (5 F.M.B. 118 (1956)).

the policies of section 8." *See e.g., Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12 (1965);[73] *Sea-Land Service Inc. v. S. Atlantic and Caribbean Line, Inc.,* 9 F.M.C. 338 (1966); *Intermodal Service to Portland, Oregon,* 17 F.M.C. 106 (1973).

From the foregoing we can see that in the early development of the law governing sections 16 and 17 as they applied to ports, many transportation factors were deemed applicable to establishing or defending against a violation of those sections, e.g., volume of traffic, competition between carriers, character of traffic and the ubiquitous legalism "other." *See e.g., Alaska Rate Investigation, supra; Port Differential Investigation, supra; Everett Chamber of Commerce v. Luckenbach S.S. Co., supra.*

Although section 8 made its debut in reported decisions in 1941, inadequacy of service as the sole defense against diversion did not appear until 1955 in *City of Portland* case, *supra.* What may seem surprising is that the report contains no discussion of precedent which would have led one to understand why the "traditional" defenses against charges of discrimination or prejudice were no longer valid.[74] Whatever the reasons, "inadequacy of service" has remained the sole defense against diversion contrary to the policies of section 8. The principle was reaffirmed in the latest Commission decision on equalization, *Intermodal Service to Portland, supra.* But what of the other cases involving section 16 and 17? As already noted the *Buffalo* case reinjects the traditional transportation factors into deliberations on sections 16 and 17 when the question of *arbitraries* is at issue. Moreover in *Discounting Contract/Noncontract Rates,* 12 F.M.C. 20 (1968), (supplemental report on remand) the traditional transportation factors such as volume of traffic, competition, etc., must be considered when "determining the propriety of *rate differentials*" under sections 16 and 17. Here as in the *Buffalo* case there was no mention of section 8. What has emerged would appear to be a double standard. If the alleged preference or prejudice involves *shippers* at competing ports all the traditional defenses are available to the carrier. *West Indies Fruit Co. v. Flota Mercante,* 7 F.M.C. 66 (1962). However, if the alleged preference or prejudice is against a port, as distinguisted from a shipper, and if section 8 is argued, inadequacy of service is the sole defense available to a respondent. Moreover, even if, as in the *Buffalo* and *Contract Rate* cases, *supra,* the alleged harm is to a port, but section 8 is not at issue, or at least not pleaded, the traditional defenses again become available. There is in short no consistent body of precedent dealing with sections 16 and 17; and the decisions contain no explanation or discussion of the seemingly inconsistent treatment meted out under those sections.

[73] In *Stockton* the following rather interesting statement appears: "In seeking to bring itself within the protection of section 8 . . . Stockton relies on its physical separation from San Francisco Bay proper. But other factors must be considered in making determinations under section 8. Thus the '*economies of transportation*' and the 'natural flow of commerce' are relevant. . . ." (Emphasis added.) (9 F.M.C. at 21) Aff'd *sub nom Stockton Port District v. F.M.C.,* 369 F.2d 380 (9th Cir. 1966), cert. den. 386 U.S. 1031.

[74] In one respect the failure to explain departures from or to distinguish past precedent is not surprising. Until 1966 research into the law of the Shipping Act and the other statutes the administration of which was charged to the various predecessors of the Commission was indeed a sometime thing. One is tempted here to indulge in personal reminiscences, but it is enough to point out that with the publication and binding of Volume 2 of the reports of the United States Shipping Board and the United States Maritime Commission all such activity ceased. The first two volumes contained excellent indices and provided a wealth of legal "precedent." However, after 1951 the decisions were in no way bound, indexed or otherwise arranged to facilitate recourse to the wisdom of the past. Research depended largely on the "remembrance" of colleagues. Sometimes around 1961 or 1962 the Commission undertook to bind and index all past decisions. Volume 3 appeared in 1963 and by 1966 publication was pretty much on an annual basis.

What seems to have been overlooked in the development of the theory of section 8 is that it announces but *one* Congressional policy which is to be considered by the Commission in discharging its duties and responsibilities. There are of course other Congressional policies which bear upon or affect the Commission's responsibilities under the statutes it administers directly which are entitled to equal consideration. But before turning to that problem a closer look at the way past precedent has dealt with the specific language of section 8 is in order.

As has been seen the cases on section 8 have laid down three criteria for the establishment of a violation of sections 16 and 17 when ports are the complainants: (1) there must be a practice by a carrier such as absorptions, differentials, arbitraries, etc. (which practices are generally lumped under the heading of "port equalization"); and the practice must (2) divert cargo which has its origin within territory which is "naturally tributary" to the complaining port; and (3) there must be adequate service at the port from which the cargo is diverted. The latter of course is the reverse of the only defense available to the carrier.

Under section 8 and with the object of "promoting, encouraging, and developing ports and transportation facilities in connection with water commerce," Congress has ordered investigations into "territorial regions and zones tributary to such ports. . . ." In conducting an investigation into these tributary zones and regions consideration is to be given not only to the "natural direction of the flow of commerce" but also to the *economies of transportation by rail, water, and highway.* It is clear from the language of section 8 itself that even if the natural flow of commerce indicates that cargo originating from a zone or region naturally tributary to a port should move through that port, before a carrier can be found guilty of an unlawful diversion of that cargo the *economies of transportation by rail, water and highway* must be considered and weighed in the balance. However, since the *City of Portland* case in 1955 the economies of transportation have received what would appear to be merely lip service.

Thus, in *Stockton Port District v. Pacific Westbound Conf.*, 9 F.M.C. 12 (1965), after specifically stating that the economies of transportation were relevant in cases of diversion and after concluding that the respondent carriers had "ample economic and cost justification for the discrimination" the Commission went on to say at page 23, "But even this would not save respondents' equalization under the *applicable precedents* were it established that the practice drew cargo away from territory which was exclusively and naturally tributary to Seattle."[75] The *Stockton* decision turned on the question of what was Seattle's naturally tributary territory.[76]

It seems to me that it is in this investigation of zones or regions which are naturally tributary and their delineation that the economies of transportation by rail, water, and highway are to be considered. This is what the clear language of section 8 requires; yet this doesn't seem to have been the case in the past. Some example of past definitions should serve to illustrate:

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[75] The report fails to cite or discuss the applicable precedents.

[76] An interesting question comes to mind at this point. If inadequacy of service is the only defense against port equalization, why are the reports of the cases replete with so much economic data such as cost of vessels calling at the port, investments in facilities at the port, etc. *See Stockton* case, *supra*, and *Intermodal Service to Portland*, *supra*. Under the "applicable precedent" it would seem that the only relevant data that need be produced is that dealing with adequacy of service.

. . . section [8] requires that, all other factors being substantially equal, that a given geographical area and its ports should receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area. (*City of Portland,* 4 FMC at 679.)

Citing the above quote from *City of Portland,* the Commission in the *Stockton* case said:

The delineation of a "given geographical area" will almost always of necessity involve the inclusion of ports whose location from specified inland points will vary in distance or mileage. Thus, mileage alone is not the determinative factor. (*Stockton Port District,* 9 F.M.C. at 21, 22.)

In *Pacific Coast European Conference–Rules 10 and 12,* 14 F.M.C. 266 (1971), the Commission said, ". . . areas are naturally tributary to ports if they are 'centrally, economically and naturally' served by such ports." Finally in *Intermodal Service to Portland* an area can be said to be naturally tributary if it is "historically, geographically, economically and commercially" served by that port. The really troublesome feature of the various definitions of naturally tributary is that they are all one-sided. The various elements comprising the definitions are considered only as they apply to or affect the port not the carrier, a situation which of course ignores the economies of transportation as they apply to the carrier.

This one-sided approach to the establishment of naturally tributary areas would not present a problem if in finding undue prejudice or unjust discrimination against a port under sections 16 and 17 two distinct steps were taken, i.e., first a determination that a given area was naturally tributary to that port; and, secondly that the "economies of transportation by . . . water" afforded no justification for the particular practice which resulted in the unlawful diversion which prejudiced or discriminated against the port. Thus, as was almost the case in *Stockton, supra,* the ultimate conclusion that there had been "diversion" contrary to the policies of section 8 and in violation of sections 16 and 17 would be the result of a balancing of interests as between the port and the carriers. Or to put it another way, the impact of the diversion on the port would be weighed against the burden upon or the economic feasibility of the carriers providing direct service to the port. This would be consistent with not only the policy expressed in section 8 but perhaps more importantly the overall policies expressed in the Merchant Marine Act of 1920 and the Shipping Act, 1916,[77] and it would avoid the frozen-in-time aspect of the past approach to port equalization.

This past approach to section 8 has produced yet another curious result. Since 1950 it has been the Secretaries of Commerce and the Army who have been charged with conducting the investigations called for by section 8. Thus, it would seem that if pursuant to section 8 particular zones or regions are to be declared naturally tributary, it should be done by the Secretary of Commerce and the Secretary of the Army. However, with one exception, Commission cases do not seem to contain any reference to investigations conducted by the Secretaries

[77] The preamble to the Merchant Marine Act, 1920, proclaims that the purpose of the Act is, among other things, not relevant here, "To provide for the promotion and maintenance of the American merchant marine. . . ." Certainly this is an expression of Congressional policy which should be given equal weight with the policy stated in but a single section [section 8] of that Act. Additionally one of the purposes of the Shipping Act, 1916, is the "encouraging, developing and creating [of] . . . a merchant marine."

or their designees.[78] Thus, the agencies charged with the administration of section 8 could define one region, zone or area as tributary to a port, while the Commission when considering the *policy* of section 8 could quite conceivably draw quite different boundaries. In short the Commission, an agency not charged with the administration of section 8, more often than not ends up carrying out the investigation which by the literal language of the section is the responsibility of other agencies. Thus, not only has the *policy* of section 8 been applied in a manner which overrides and, indeed, excludes other announced policies of Congress, the *policy* attributed to section 8 does not even square with the literal language of that section.

If the foregoing demonstrates nothing else it shows that the time has come for a reexamination and recasting of the role of section 8 in cases involving diversion of cargo. Accepting this premise, what guidelines can be set for the future?[79] At the outset it should be apparent that there are no easy solutions. As already noted intermodalism generally and minibridge in particular pits the interests of the ports against the interests of the carriers. Given the present statutory scheme, it is in my opinion not practical or feasible to draw future guidelines for measuring the lawfulness of diversion, if by guidelines is meant the drafting of precise rules of conduct under which a particular practice could be judged valid or invalid by the simple process of matching a particular practice against the language of a rule[80]. An example, take the criteria "historically" which has been used as a factor in determining whether an area is naturally tributary to a given port. If an area has been "historically" served by a port does this mean that the past must dictate to the future? To draw the absurd analogy, should the age of sail dictate to the age of steam. Or more realistically should the traffic patterns developed from, and the operations of, an era in which the relatively small breakbulk carriers were predominant be immutable and thereby lay down the operational limitations of today's large and extremely expensive containerships, Lash or RoRo vessels? What benefits do shippers, the ultimate consumers of all the services we are considering, derive from a regulatory philosophy that does not recognize technological and commercial advancements in the state of art? Thus, historicity seems at best a criteria to be applied lightly if at all. All of this is to say nothing of the innovations and changing modes in inland transportation—the most significant of which is, of course, the concept of the container which can be moved either by truck or rail without destroying the integrity of the "pack-

[78] That such investigations do exist is shown by the one mentioned exception. In the *Stockton* case, *supra*, reference is made to "The Ports of San Francisco and Redwood City, Calif., Port Series, No. 30, Rev. 1951," a joint publication of "the Maritime Administration, Department of Commerce and the Corps of Engineers, Department of the Army, which are of course the governmental agencies charged with the administration of section 8. . . ." The joint publication cited contained a section headed "tributary territory." (9 F.M.C. at 24.)

[79] With the benefit of hindsight, one can see that this case may not have been a particularly happy choice as the vehicle for the establishment of guidelines. Counsel for complainants restricted themselves to a presentation of their particularized case while other counsel equally restricted themselves either to supporting complainants or to defending against complainants' charges. No one offered any discussion, argument or theorization on general principles or future guidelines. All this despite the Commission's designation of the case, and the multiplicity of intervenors.

[80] Using the Commission's present techniques of rulemaking, any rules promulgated would not be based upon the kind of record needed to produce guidelines which encompass the entire spectrum of cargo diversion. Perhaps were the Commission to conduct "legislative" type open hearings designed for the gathering of the vast amounts of information necessary, it would be possible to draft a reasonable set of rules. To date, however, such hearings have not been the usual vehicle for rulemaking.

age."[81] In short and with the later discussion of naturally tributary areas in mind, the historical criteria would seem only to show what past practice had been—not what future developments should be. But it is useful to show what territory *had* been naturally tributary in the past and that can be used to determine the impact of the present or future diversion. Given the limitations of this case any guidelines drawn from the record here must of necessity take the form of general propositions which are of necessity culled from past decisions and the language of the statutes themselves; but more importantly these propositions need to be reevaluated in the light of current conditions in our waterborne commerce.

First, the concept of naturally tributary territory has never been positively defined in any meaningful way. More often than not, the decisions are specific only when they speak to elements which are not sole criteria for defining naturally tributary areas. Thus mileage and the inland rate from a point of origin to a port are not by themselves determinative of the question of whether that point of origin is within territory naturally tributary to that port. *Stockton Port District v. Pacific Westbound Conference,* F.M.C. 12 (1965). Even if the most recent "definition" of naturally tributary territory is considered little is gained that is helpful in fixing the boundaries of such areas in future cases. Having stated that zones or regions are naturally tributary to a port if they have been "centrally, economically and naturally" served by that port, or that an area is tributary if it has been "historically, geographically, economically and commercially" served by a port, just what has been said?

The real problem is that terms like "centrally,"[82] "geographically" or "historically" are not constants; and also that terms like "economically" have real meaning only if they are applied in an evenhanded way, i.e., a port can economically serve a given area if its charges are no higher than its nearest competitor ports, but the port cannot serve an area economically if the carrier lifting the cargo cannot serve the port equally "economically." As for "geographically" tributary, if the term becomes anything more than a means of physically delineating territory which is economically naturally tributary, then it too becomes meaningless. The final descriptive criteria "commercially" is but another way of resorting to economics—not just port economics but carrier economics. Commercial feasibility is nothing but economic feasibility.

The concept of naturally tributary zones, regions, areas or territories is and should be a constantly changing one. It is a concept which includes inland rates, distances, traffic patterns (not only as they were but as they are) and, it seems to me, most importantly shipper preferences or considerations. A suggested approach to the concept of naturally tributary territory would involve: (1) Evidence of the past flow of traffic through the port, (2) the points of origin of all cargoes, (3) the relevant inland rates, and (4) the natural or historical transportation patterns, and of course the amounts of cargo diverted.

Having established that cargo which was naturally tributary to the port had

[81] If this case does nothing else, it points up the inefficiency if not absurdity of departmentalizing the regulation of transportation. The problem of cargo diversion is not one that involves water carriers only. Minibridge would not be a factor at all if the rail rates were prohibitive. The basic premises underlying the Shipping Act and the Interstate Commerce Act have never, to my knowledge, been examined one in the light of the other, yet that they do interrelate and at times work at cross purposes has, with cases like this become increasingly obvious.

[82] "Centrally" seems to present a special problem since it does not seem to be related to anything that "normally" goes into definitions of naturally tributary territory.

been diverted the second consideration should be the reasonableness of the particular practice of the carrier which has caused the diversion. Any judgment on the question of reasonableness should take into consideration the cost to the carrier of providing direct service to the port, the competitive conditions existing in the trade, any operational difficulties involved in providing direct service, and any other transportation factors that bear upon the carrier's ability to provide direct service. As already noted the economies of carrier operation do not and have not, at least since 1955, figured in determinations of prejudice and discrimination against ports. Adequacy of service as the sole defense against diversion is as has been said a troublesome concept indeed and one which in my opinion is contrary to the specific language of section 8 of the Merchant Marine Act 1920, sacrifices the overall policy of the 1920 act to the limited and misconstrued policy of section 8, and results in creating dual and inconsistent standards for judging carriers' practices under sections 16 and 17 of the Shipping Act. For the reasons already set out above, it is my opinion that if a port has shown that cargo which had been naturally tributary to that port was being diverted by the practice of a carrier then the carrier has the right to resort to what for a lack of a better name are called the traditional defenses available against charges of undue prejudice or unjust discrimination in violation of sections 16 and 17. Having once determined that cargo which had been naturally tributary to a port was being diverted by absorption, rate differentials, arbitraries, or some other practice the carrier should be allowed to show that the practice was the result of competition from other carriers, lack of volume of cargo offered at the port, the port's charges as compared with other ports' charges, adequacy of facilities at the port, and of course whatever else is relevant to the carrier's decision not to call directly at the port. Finally, before the carrier can be said to have violated sections 16 and 17, the harm suffered by the port must be "substantial."[83]

What seems to have been overlooked in "weighing" the Congressional policies expressed in section 8 is that the "encouragement" and "development" of ports was not to be at the expense of or to the detriment of the carriers serving those ports. Yet it seems that this must be the ultimate result if the present course is rigidly adhered to. Now more than ever before would seem the time to apply again the philosophy expressed in *Disposition of Container Marine Lines,* 11 F.M.C. 476 (1968):

> . . . the Commission does not intend to create or permit impediments to the improvement of shipping services. Enlightened regulation is the key to effective regulation; no regulatory agency can permit regulation to be outstripped by new techniques in the industry. Progressive regulation is required in the interest of encouraging the modernization of shipping services. Outmoded principles and rules will surely stifle advancements in all fields, and especially transportation where developments have followed so quickly upon each other.[84]

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[83] In *Associated Jobbers & Mfrs. Co. v. Am.-Hawaii S.S. Co.,* 1 U.S.S.B. 161 at 167–168 (1929), the Board said: The standard by which to determine when an advantage to one or a prejudice to some other is undue or unreasonable is not difficult to determine. Whenever it is sufficient in amount to be substantial and of importance to either the one receiving the advantage or to the one suffering the prejudice it must be held to be undue or unreasonable.

[84] The Commission then quoted from the Supreme Court's opinion in *American Trucking v. A.T. & S.F.R. Co.,* 387 U.S. 397, 416 (1967), where the Court in dealing with the rise of rail piggyback by truckers dealt even more forcibly with the need to encourage and not throttle that innovation in service: . . . This kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulating agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adopt their rules and practices to the nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Minibridge greatly expands the alternative forms of transportation open to the shipper's choice. To unwarrantedly inhibit this freedom of choice would be detrimental to commerce as the Board found in *Swift & Co. v. Gulf & South Atlantic Havana Conf.*, 6 F.M.B. 215, 226 (1961). The Board's words are wholly applicable here:

> The interests and needs of shippers in foreign commerce should dominate where competing methods and new techniques of water transportation are involved. An arrangement would seem to operate to the detriment of the commerce of the United States or to be unfair as between shippers and exporters of the United States and their foreign competitors which prevents the former from having a free choice among competing methods of transportation for cost advantages. Anything which impedes free choice among constantly changing alternatives provided by technical changes in traffic and transportation methods is detrimental to commerce in the long run.

The transportation truisms would of course yield to a plain requirement of the Shipping Act; but that requirement should be a very plain one indeed, and it should be adopted only after a complete reexamination and reevaluation of the limits of yesterday in the light of today's practices.

If the suggestions set out above lead to the "big" case, that of itself is not necessarily a novelty in cases of port equalization. The record in this case stands as an example of the "big" case gone astray under the old limits. It might not have done so if clear principles governing port equalization were to be found in the precedents. Future case records need not necessarily be bigger; they need only be *relevant* to the overall issue presented by carrier practices which allegedly divert cargo from ports.

The foregoing is all that I have been able to furnish by way of suggested guidelines for future cases and it is time now to turn to the resolution on this record of the specific issues raised by complainant. Leaving aside for the moment complainants' assertions of ownership of naturally tributary cargo, they contend that the respondents have violated indifferently sections 16 and 17 by the unlawfulness of shippers' costs and by discrimination against shippers and ports. Without the asserted payment of a shipper's cost there is no absorption and therefore no undue preference, advantage, disadvantage under section 16 and no unjust discrimination under section 17. *Sea-Land Service Inc. v. S. Atlantic & Caribbean Line, Inc.*, 9 F.M.C. 388, 344, 347 (1966).

Complainants claim that minibridge shippers do not pay the West Coast drayage and terminal charges involved in the rail-water transfer. This is true, but for more than a hundred years this has not been a shipper cost for any movement, whether by joint rate or OCP/overland tariff when the shipper or consignee is East of the Rocky Mountains. *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, 189–190, 197, 202 (1969), aff'd *Port of New York Auth. v. Federal Maritime Comm'n.*, 429 F.2d 663 (CA 5, 1970). There is no difference between a minibridge shipment and a shipment under OCP/overland rates at least in the matter of absorptions by the carrier. If the drayage and terminal charges for the rail-water transfer at West Coast ports have for some 100 years been considered for the carrier in OCP shipment, there is absolutely no reason to now distinguish minibridge and make those costs for the shipper—to do so would be to create a distinction without a difference.

Secondly, complainants claim that respondents must be absorbing shipper costs because their net revenue after rail division and transfer costs is less than the net revenue realized in all-water, OCP or local service. At least two things are wrong with this general proposition. First on this record it has not been shown, and indeed it is highly doubtful that the overall net revenue is in fact less than that realized from the other forms of service. Secondly, an unlawful absorption is simply not established by the mere showing of a difference in rate structure or return. Finally, in an argument that borders on the frivolous, complainants assert that absorptions can be found in the east-west imbalance of container movements. Complainants state: "These costs [inland transportation costs] are exacerbated by the fact minibridge westbound movements outnumber minibridge eastbound movements by a ratio of about 4–1so that minibridge ocean carriers also have to beat the cost of repositioning empty containers."

Here as in so many other instances complainants leap from the valid general to the unlawful specific without providing the nexus which the law renders essential. Complainants provide no specific cost figures, do not consider the carrier's total operations (which may be global) and completely ignore such things as container interchange agreements[85] or the lease to rail or truck carriers of empty containers for movements East. The finding of an unlawful absorption cannot rest upon infirmities. Moreover, a carrier's expense is going to vary, from commodity to commodity, from port to port, and from service to service. It has never before been suggested that this variance somehow amounted to absorption of shipper costs. Moreover, if we consider the precise area of container imbalance it would be more costly to remedy the same directional imbalance between the Pacific Coast to Far East which would lead to the finding—if complainants' argument were accepted—that there would be an unlawful absorption every time a trans-Pacific carrier loaded a container.

Thus, on the record before me, I conclude that complainants have failed to establish that respondents have made any absorptions which are unlawful under sections 16 and 17 of the Shipping Act, 1916.

The keystone to complainants' contention that minibridge is unlawful is the assertion that the service diverts local cargo which is naturally tributary to complainant ports. While it is clear that without absorption or other repayment of costs which should be borne by the shipper no "naturally tributary" issue can arise *(Intermodal Service to Portland, supra)* it is nevertheless appropriate to probe the bases of complainants' contentions on this issue.[86]

Complainants simply ignore the "absorption" limitation on the naturally tributary doctrine, and assume that the port has a vested interest, which the Commission is obliged to protect, in handling all cargo local to the port.[87]

Setting aside for the moment the question of whether container cargo is indeed

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[85] This is not to suggest that respondents are parties to such agreements, it is merely mentioned to demonstrate a valid operational factor which complainants did not consider but which has direct relevance to the unlawful practice asserted by them.

[86] On brief, counsel for one respondent attributes such probing to "the redundant habits of our [the legal] profession." While I would be the last to exonerate the profession of redundancy (witness this opinion) I am more of the mind that any "redundancy" results more from the structure of the system than from any desire to display a *talent for saying the same thing in a variety* of ways. Each of us who write, be it argument on brief or exposition in decision, run the risk that the reader will not be persuaded by a single argument or conclusion. So if there are several reasons or conclusions dictating the same result, each must be presented in the hope or conviction that at least one of them will be persuasive.

[87] This seems to have been the basic theory of the 1973 complaint. Indeed some of the complainants took the theory so to heart that they filed a complaint against a line which simply solicited cargo—without any absorption or inducement—in Philadelphia for loading or discharging in Baltimore or New York. This claim was decisively rejected in Docket No. 73–78, *Delaware River Port Authority v. TTT, Inc.*, mimeo, decision served February 4, 1975. *See also Delaware River Port Auth. v. TTT, Inc.*, 501 F.2d 917 (CA 3, 1974).

tributary to but a single port, and using the latest Commission pronouncement on the issue, local cargo is tributary to a port but inland cargo is not. Intermodal Service to Portland, *supra*. Thus, it is necessary (1) to define the territory local to the port, and (2) to determine what part of the minibridge shipments originated in that area. Complainants have failed on both counts.

First, the only effort on the part of CONASA to define "local" territory is confined to an equivocal footnote which says:

The "port area" is *normally* considered to be the area within a 50-mile radius of the port . . . of course, the naturally tributary area of a port . . . is far broader, being a territory that has particular historic, geographic, commercial and economic ties, with one of the major considerations being the existence of favorable inland rates.

For the "port area," a 50-mile radius, however valid, is precise enough, but for the purpose of delineating the naturally tributary area the definition becomes vague and resorts to the descriptive adjectives which sprinkle past decisions. There is no satisfactory way to demarcate local from inland cargo except to show port by port, the territory from which substantially all containers would in the absence of the minibridge has moved through the port.[88] CONASA has not shown that the cargo would have moved through the complaining ports and while this might not prove fatal CONASA has failed even to show that the cargo in question originated in locally tributary areas. CONASA places its full reliance on the fact that the container was loaded at the railhead at a port city. This is simply not enough. For instance Seatrain had containers originating in or destined to Arkansas, Illinois, Indiana, Kentucky, Michigan, Missouri, Ohio, West Virginia and Wisconsin. In February and March 1975, 26 percent of the identifiable Phoenix containers had origin or destination in a different state than the bill of lading port. Among the shippers whose testimony is part of this record are included a dozen located in Nashville, Cleveland, Minnesota, Florida, Cincinnati, North Carolina, Scranton, Illinois, and Southeast United States.[89] The reasonable assumption is that most but not all of this outlying minibridge cargo would move via the West Coast at overland OCP rates and that most but not all local cargo would move by all-water service. Thus, the record here demonstrates nothing more than that minibridge diverts *some* cargo but there is no way of knowing how much. Thus there is no way of determining or measuring the harm to complainants caused by minibridge operations. The record does show, however, that minibridge does not threaten the viability of complainant ports.

The 1973 minibridge traffic represented only some 4.6 percent of the total container traffic handled by the 10 ports studied—and there is again no way of knowing how much of that 4.6 percent was "naturally tributary" to those ports

[88] I realize that in the *SACL* case *supra*, a similar test was rejected. In that case Hearing Counsel argued that complainant had failed to show that *but for* respondent's indirect service from Miami the "diverted" cargo would have moved through Jacksonville thus there had been no violation of section 16. The Commission said:

We reject the "but for" test of Hearing Counsel. In *Phila. Ocean Traffic Bureau*, our predecessor formulated an extreme requirement for a finding of violation of section 16 First. To the extent that this language relates to port equalization or qualifies our expression of the applicable standards for port equalization cases *Phila. Ocean Traffic* is overruled.

No explanation is given as to why the "but for" test is extreme. The rejection of this test immediately raises the question, If the allegedly diverted cargo would not have moved through the port in any event, how has that port been harmed by the practices of the "equalizing" carrier? No answer has been given, and one does not come readily to mind. The "but for" test should be reinstated.

[89] The district court proceedings produced a convenient listing of 74 minibridge shippers and a deposition program could have produced information on cargo origins, shipping practices and intentions in the absence of minibridge. If this was thought to be ambitious CONASA could have at least interrogated the score or so of shippers who appeared for cross-examination in this proceeding.

or how much was actually *diverted* from those ports by minibridge. If the total general cargo handled by the 10 ports is considered the minibridge movements amounted to only about 1.5 percent of the total.

In *Associated Jobbers & MFRs v. Am. Hawaii S.S. Co.*, 1 U.S.S.B. 161 (1929), a predecessor first noted that the preference or prejudice prohibited by section 16 is that which is undue or unreasonable and went on to say:

> In the language of a well considered Federal Court decision construing an identically phrased provision of another regulatory statute it is said:
>
>> The standard by which to determine when an advantage to one or a prejudice to some other is undue or unreasonable is not hard to determine. Whenever it is sufficient in amount to be substantial and of importance to either the one receiving the advantage or to the one suffering the disadvantage, it must be held to be undue or unreasonable.

In the same case it was held that the effect of the allegedly prejudicial practice on all interests—including shippers—must be taken into account when measuring the substantiality of the prejudice or preference.

Here the record permits no measure of any meaning or relevance to the charges made. But even if we accept complainants' assumptions 4.6 percent of container traffic and 1.5 percent of general cargo—the latter being the better gauge, the "harm" to complainants is not substantial within the meaning of an undue or unreasonable prejudice in violation of section 16 First. To find such a violation on this record, which is replete with speculation and unwarranted assumptions, would be tantamount to sacrificing the transportation mode of the future to inflexible criteria designed for an era already a part of transportation history. Respondent minibridge operators have not subjected complainants to any undue prejudice within the meaning of section 16 of the Shipping Act.

Complainants also assert that respondents have violated section 17 by discriminating against ports and shippers. The discrimination which is alleged against shippers is that the respondents:

> By means of the large scale and pervasive absorption of shippers' and inland transportation costs, the minibridge carriers have created systematic discrimination against certain shippers in favor of others. Thus local West Coast shippers effectively pay more than do minibridge shippers. Such a system of which charges varying amounts for identical services is discriminatory and in violation of section 16 First. *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48, 55 (1960).[90]

In the first place that the "services" are not identical has long been recognized. *Overland/OCP* case, *supra*. Secondly, "Discrimination against a shipper is necessarily measured by what the shipper pays not what the carrier collects." *Stockton Port District v. Pacific Westbound Conf.*, 9 F.M.C. 12, 27 (1965). Moreover, where no shipper has complained of discrimination the Commission will not hear others complain for them. *Beaumont Port Commission v. Seatrain Lines*, 2 U.S.M.C. 699, 703 (1943). Still alleging "discrimination," CONASA argues that minibridge tariffs force shippers of low-rated cargo to subsidize shippers of higher-rated cargo to subsidize minibridge because the low-rated shipper pays higher rates than would be the case if the minibridge service were "compensatory." CONASA cites *Nonassessment of Fuel Surcharges on MSC*

[90] Complainants continually lump together both sections 16 and 17 and shippers and ports without regard to the differing criteria or circumstances applicable to each.

Rates, 15 F.M.C. 92 (1972). As will be shown later CONASA has failed to show that the minibridge service is not "compensatory" and the reliance on the *Fuel Surcharge* decision is misplaced. In that case the Commission was dealing with an extraordinary event, one which bore no relationship to the transportation factors normally applicable to the fixing of rates on particular commodities. The surcharge was applied across the board on "commercial" shipments regardless of commodity, rate or other transportation factors. It was not applied to Defense Department shipments. The Commission merely held that in view of this, commercial shipments were subsidizing military shipments. We are not dealing here with any such extraordinary assessment and the Fuel Surcharge case is inapposite.

For the foregoing reasons, I conclude that respondents have not unjustly discriminated between shippers within the meaning of section 17 of the Shipping Act, 1916. There remains, however, the allegation that minibridge discriminates as between ports. As CONASA puts it:

> Minibridge, more importantly, is unjustly discriminatory against CONASA ports in violation of section 17 and subjects them to undue disadvantage in violation of section 16 First [because] Minibridge diverts locally tributary cargo by means of absorption of costs without any justification. (Citations omitted.)

From the above it can be seen that CONASA[91] relies upon the same propositions to establish a violation of section 17 as those already rejected under section 16 First. It would be sufficient to simply refer to the conclusions already set forth were it not for the decision in *North Atlantic Mediterranean Freight Conf.–Rates on Household Goods*, 11 F.M.C. 202 (1967).

In the *Household Goods* case, the Commission attempted to formulate the criteria which apply to undue or unreasonable prejudice against a shipper under section 16 First, on the one hand, and the criteria which would apply to unjust discrimination as between shippers under section 17 on the other. In doing so, the Commission adopted the definition of discrimination formulated by the Supreme Court when it considered section 2 of the Interstate Commerce Act in the case of *Wight v. United States*, 167 U.S. 512 (1897). The Commission said:

> Thus . . . discrimination arises when two shippers of like traffic, shipping over the same [line] between the same points under substantially similar circumstances and conditions are charged different rates. (11 F.M.C. at 212).

However, the Commission was fully aware that in defining discrimination against shippers, it might have created problems in other areas:

> We are of course aware that section 17 also prohibits fares or charges which are unjustly discriminatory between ports; and that in such a case it is difficult to envision a situation where the transportation involved would be "between the same points." But whatever the criteria for measuring or judging unjust discrimination between ports may be, we find no differences in transportation conditions between land carriage under the Commerce Act and water carriage under the Shipping Act which would warrant the continuation of an unfortunate departure from the long established principles governing unjust discrimination between shippers. (11 F.M.C. at 216).

In view of the above and in the light of the Commission's view of this case some analysis of the *Household Goods* decision appears warranted.

Undue or unreasonable preference or prejudices arises when shippers at A and

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[91] The arguments of the other ports to the extent they address themselves to the issue are the same in all essentials.

B are competitive in a common market at C, the line hauls from A and B to C are the same and the same competitive influences apply to both. Section 16 First is thus designed to prohibit carrier *favoritism* which enables, say, the shipper from A to deliver his goods to C cheaper than can the shipper from B, thereby giving the shipper from A an advantage in the common marketplace which advantage is based solely on transportation rates. Thus shippers, just as ports, are:

> . . . entitled to all the benefits to be derived from their natural or acquired advantages of geographical location and carriers may not by a difference in rates destroy those advantages unless the difference is justified by the cost of the respective services, by their values or by other transportation conditions. . . . Since the section [16 First] is intended to prevent unlawful favoritism among competitors in the same market place, the allegedly preferred shipper must ordinarily be in competition with the allegedly prejudicial shipper. . . . (11 F.M.C. at 210).

Thus, under section 16 First the shippers must "ordinarily" compete with each other; and before a violation can be found there can be no justification for the difference in rates. The justifications, or defenses available to the carrier are such as: competition from another carrier, convenience to the public, the relative cost of the service and profit to the carrier and the situation and circumstances of the respective customers competitive or otherwise. (See 11 F.M.C. at 210.)

On the other hand discrimination between shippers under section 17 entails different considerations. Again adverting to the Supreme Court's analysis of section 2 of the Interstate Commerce Act, the Commission quoted with approval from *Wight v. U.S.:*

> The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than the other. (167 U.S. at 157.)

To establish a violation of section 2 and thus one under section 17, it is not necessary to show that the two shippers involved compete with each other. Moreover where section 17 is involved a carrier may not make a difference in rates because of shippers' circumstances, identity of shippers, or whether a shipper is hurt or not. (11 F.M.C. 212.) But the shipments in question must move on the same carrier from the same point of origin to the same point of destination.

The importance of the *Household Goods* decision is not so much for this case as it is, perhaps, for future cases.

In the very near future however it is likely that the criteria for establishing discrimination between ports will be necessary. When Congress and the Supreme Court defined discrimination between shippers they were dealing with a situation which must have appeared to them as having no justification other than blatant favortism. After all how does a carrier "justify" charging one shipper of barrels of beer more than another shipper of barrels of beer when both are shipping from the same point in origin to the same point of destination on the same railroad, or for that matter water carrier? *Wight v. United States, supra.*[92]

When dealing with "discrimination between ports" a quite different situation arises. Discrimination between ports is the same as *undue preference or prejudice* between shippers—it cannot be equated with *discrimination* between shippers. Discrimination between ports will necessarily involve two separate points of origin. The circumstances requisite for the latter simply do not exist.

[92] *See e.g., Lake, Discrimination by Railroads and other Public Utilities,* (1947).

Thus, the same defenses available to a carrier against a section 16 First allegation must be available to a carrier when the alleged offense is unjust discrimination under section 17. This is because the very operation which gives rise to the allegation involves transportation factors which cannot arise under the *Household Goods* case definition of discrimination. There must of necessity be two ports involved; thus there must be at least two points of destination or two points of origin. That differing transportation factors will affect the rates, practices, charges or whatever is called into issue about the carrier's service or lack thereof at one of the two ports is so obvious as to not need elaboration. Thus, the transportation factors which led to the practice should, under any reasonable statutory interpretation and all practical, logical and common sense guides be taken into account. In short discrimination under section 17 should be treated the same as undue or unreasonable preference or prejudice under section 16 First.[93] Perhaps legislative clarification should be sought.

Thus applying the same criteria to the alleged violation by respondents of section 17, I conclude that there has been no unjust discrimination between ports within the meaning of section 17.

The final allegation to be dealt with is that "Minibridge Rates are Unreasonably Low and Detrimental in U.S. Commerce in Violation of Section 18(b)(5)."

The argument consists (1) of an assertion that "minibridge" rate levels are significantly below the rate levels in any "comparable" services, i.e., local West Coast or OCP; (2) that the purpose of the low rates is diverting cargo from "CONASA and Gulf ports"; and (3) "Such purposeful and systematic diversion has necessitated rate levels which flatly violate the prohibition contained in Section 18(b)(5)."

The first thing to be noted in discussing this allegation is that only Sea-Land disclosed its costs attributable to minibridge carriage.[94] In discussing Sea-Land's submission CONASA first describes it as discredited, then cites it as showing that Sea-Land "is not meeting fully distributed or variable costs," and then dismisses the whole thing as "unresponsive" and "vapid."

Meeting "fully distributed costs" is not a test that the Commission has thus far adopted as a means of determining whether a rate violates section 18(b)(5). Rather, the criteria is whether a particular rate meets "out-of-pocket costs." *Investigation of Rates in the Hong Kong United States Atlantic and Gulf Trade*, 11 F.M.C. 168 (1967). Aside from the particular assertion that the rates do not

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[93] I realize that in treating the discrimination the same as preference or prejudice I am doing to some extent what the Commission condemned counsel in the *Household Goods* case for when it said: "The difficulties experienced by the parties in this case are due to the fact that they have treated sections 16 and 17 as if one or the other was the product of a meaningless redundancy on the part of Congress. . . ." (11 F.M.C. 208.) However, the confusion between discrimination and preference and prejudice existed for at least a decade before the passage of the Shipping Act, 1916, (see e.g., 11 F.M.C. 209, footnote 14.) and the problem alluded to in *Household Goods* seems to me to admit of only the suggested solution.

[94] CONASA asserts that the ruling by Judge Marshall on September 12, 1974, constitutes reversible error. I have examined the ruling and subsequent denial of appeal and am convinced that Judge Marshall's disposition was correct. Judge Marshall clearly limited the second round of interrogatories to matters clearly relevant to the first round of interrogatories. His rulings make clear that this was not the case. CONASA, however, cites the Commission designation of this proceeding as a "leading case" as a reason for the allowance of thair departure from the clear instructions of Judge Marshall. I cannot accept this belated recognition of the asserted importance of this case as grounds for challenging tha rulings. Counsel for CONASA have throughout the entire proceeding treated the case as a restricted complaint case and have not, attempted to break the boundaries of their particular interests, to consider the overall implications of minibridge for all ports, for all carriers or for all shippers—to say nothing of the ultimate consumers of the goods which are carried, handled, stored, charged or otherwise burdened by transportation costs.

exceed "fully distributed costs" CONASA only cites, for whatever reason, the following:

> . . . a rate which prevents cargo from moving certainly is detrimental to commerce. But what of a more intangible economic impact, the watering down of profits or the inability of a merchant to enter in a market at all? An unreasonable rate which causes either of these results is detrimental to U.S. commerce. Many situations may arise in which some economic harm other than "lost sales" is worked by a rate upon some aspect of our commerce. Thus, we will not restrict the definition of detriment to commerce to those rates which prevent a commodity from moving. Rather, we will define detriment as something harmful, not limit it to "lost sales" or other rigid formulas. . . .

Presumably CONASA is attempting to show that "merchants" have failed to enter some market or that "intangibles" should be taken into account. No merchants have appeared to support the first proposition and CONASA has failed to point out any intangibles which should be taken into consideration.

Finally the claim that Sea-Land's minibridge service did not return its fully distributed or variable costs is not supported by any discussion which is relevant to the charge that Sea-Land did not meet such costs.

It is difficult to imagine a plausible claim of a section 18(b)(5) violation when the average minibridge TEU in 1973 brought a carrier revenue of $1,058 and the average all-water TEU a revenue $1,111, or when for the five reporting respondents the 1974 per container revenue from minibridge was $1,994 and the all-water and OCP service averaged $2,111.[95]

Complainants have simply (1) failed to show that minibridge rates are so high or so low as to be detrimental to the commerce of the United States; and (2) not established that the criteria they would apply are applicable to a determination that minibridge rates violated section 18(b)(5).[96]

Respondents have not set rates so high or so low as to be detrimental to the commerce of the United States within the meaning of section 18(b)(5).

Finally, it has been suggested that should minibridge be found lawful or rendered so by legislation, the "premium pricing" might be appropriate. By premium pricing is meant the setting of minibridge rates at some fixed percentage above the all-water rates from the East Coast. Whatever validity there may ultimately be in such a proposition the record here neither demonstrates the need nor establishes a basis for such a system of rates.

As an alternative it is suggested that Commission approval of minibridge should be conditioned upon the setting of minimum rate levels—i.e., the minibridge rate should be at least equal to the lowest all-water rate. The proponent of this suggestion "considers that there is developing a trend toward minibridge rate cutting" which if unchecked would result in "massive instability in the East Coast/Far East rate structure. . . ." As in premium pricing the record here simply does not afford any basis for such restrictions on minibridge.

There remains only to deal with a Motion to Strike Portions of Reply Brief of CONASA-ILA filed by Sea-Land. The motion is to "all references, discussion and argument concerning the issue of whether the Federal Maritime Commission possesses the statutory authority to accept joint rail-water tariffs." Sea-Land

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[95] The above figures are taken from exhibit 95.

[96] Without delving into the decidedly complex area of when a minibridge rate becomes so low or so high as to be detrimental to commerce, one of the questions to be resolved is whether the minibridge service is to be isolated and considered alone or is to be taken as but a part of a carrier's entire operation.

argues that, "It is significant, however, that it [the jurisdictional issue] was first mentioned in Complainants' Opening Brief (p. 2), and the theory was first developed as a proposition to be considered as material to the disposition of the proceeding in the Complainants' Reply Brief (pp. 1–3)." According to Sea-Land:

> . . . this untimely effort to raise a new issue deprives the FMC itself and the Respondents of adequate notice and places them in the untenable position of not being able to respond to the allegations including the opportunity for cross-examination and presentation of evidence on this issue, to say nothing of now being foreclosed from arguing the matter on brief after an adequate record has been made.

CONASA's reply urges denial of the motion because Sea-Land did have adequate notice and the question of lack of jurisdiction can be raised at any time during the proceeding.

As noted by Sea-Land itself, the "jurisdictional" issue was first raised in CONASA's opening brief thus Sea-Land had it chosen to do so should have addressed the issue on brief as indeed did other counsel. Moreover, since CONASA viewed the issue as one of law and presented no witnesses or "evidence" it is difficult to understand how Sea-Land gives no indication of just what evidence it would present. Accordingly, the motion is denied.

CONASA's position is that the Commission has exceeded its statutory authority by accepting the filing of minibridge tariffs. It would appear that CONASA's argument is based upon the admitted lack of authority in the Commission to "approve" agreements between land and water carriers. Thus CONASA says in a classic non sequitur:

> Although the FMC has acknowledged that it lacks any statutory basis for assuming jurisdiction over [intermodal] tariffs, the FMC staff nevertheless chose not to reject these tariffs.[1]

[1] See 1972 and 1974 testimony of Chairman of the FMC, Mrs. Helen Delich Bentley, to Congressional Committee as quoted in Exh. 1, p. 8: . . . there is no statutory basis for *approval of agreements* entered into between parties subject to the Federal Maritime Commission and those subject to the Interstate Commerce Commission. (Emphasis added.)

Lack of jurisdiction to approve an agreement between parties in a tariff does not of course even imply lack of jurisdiction to accept for filing a tariff between two such parties. The only other "authority" cited by CONASA as supporting its proposition is first a letter from Admiral John Harllee, then Chariman of the Federal Maritime Commission, to the Honorable Warren G. Magnusson, Chairman, Committee on Commerce, dated June 10, 1968, wherein Harllee stated:

> Classical single factor rates entered into between carriers of different modes presently cannot be filed with the Federal Maritime Commission or with the Interstate Commerce Commission. Hearings S. 3235, 90th Congress, Second Session, Serial No. 90–78, p. 15;

and a statement Alan S. Boyd, then Secretary, Department of Transportation, who testified at the above hearings:

> On movement from a point in this country to a point in Europe the shipper will find that the Interstate Commerce Commission believes it cannot accept any rate which incorporates ocean transportation, while the Federal Maritime Commission belives it cannot accept a rate which includes inland movement in the United States. Id., at p. 18.

From the above quotes it is obvious that the rates referred to are single-factor rates which do not "break-out" the water or land portion of the total single-factor rate for showing the agreed divisions between the land and water carrier. Where this is done the ICC as early as 1931 was accepting such rates, *Lewis-Simus-Jones Co. v. Southern Pacific Co.*, 238 U.S. 654 (1931). The Commission itself in 1963 found a tariff of Matson Navigation Co. publishing single-factor rates which included pick-up and delivery charges of a land carrier lawful under section 2 of the Intercoastal Shipping Act, 1933, so long as the specific amounts or allowances for the pick-up and delivery service were stated separately. *Matson Navigation Co.–Container Freight Traffic,* 7 F.M.C. 480 (1963). *See also Disposition of Container Marine Lines,* 11 F.M.C. 476 (1968), where the Commission found lawful under section 18(b) which provided a through service including inland transportation in the United Kingdom so long as the charge for the water portion was broken out and stated separately.

Finally, in 1970 Amendment 4 to General Order 13 was promulgated (35 F.R. 6394). This amendment set forth the requirements for the Filing of Through Routes and Through Rates. See 46 CFR 536.16.

It is a little late in the day—particularly in view of CONASA's failure to discuss or even acknowledge the existence of the above precedents—to challenge the Commission's acceptance of intermodal (including minibridge) tariffs. The Commission's jurisdiction to accept minibridge tariffs is clear.

For the reasons set forth above this proceeding should be dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D.C.
July 11, 1977

APPENDIX A

Intervening on the side of complainants were the Port Authority of New York and New Jersey, the Board of Commissioners of the Port of New Orleans, the Gulf Ports Association, Inc., the Port of Houston Authority, the Houston Port Bureau, the Texas Ports Association, the Board of Trustees of the Galveston Wharves, the Galveston Cotton Exchange and Board of Trade, the Board of Commissioners of Lake Charles (La.) Harbor and Terminal District, the Port of Beaumont, the Port of Corpus Christi (Nueces County Navigation District No. 1), the Greater Baton Rouge Port Commission, the North Carolina State Port Authority (which subsequently withdrew from the case), the New Orleans Traffic and Transportation Bureau, the Brazos River Harbor Navigation District, the Virginia Port Authority, the State of Texas, the Commonwealth of Pennsylvania, the Internationl Association of Great Lakes Ports, U.S. Senator Tower and Congressman Bill Archer from Texas.

Intervenors in support of respondents are the American Importers Association, the City of Oakland, the Alabama State Docks Department, the City of Long Beach, the Atchison, Topeka & Santa Fe Railway Co., the City of Los Angeles, the Southern Pacific Transportation Co., the Penn Central Transportation Co., the Lehigh Valley RR Co., the Erie Lackawanna Railway Co., the Chessie System, the Norfolk & Western Railway Co., the Missouri Pacific Railroad Co., the Texas Pacific Railroad Co., the Union Pacific Railroad Co., the Department of Transportation and Hearing Counsel.

Other intervenors are the Port of Seattle, the Maryland Port Administration, the Military Sealift Command (Department of Defense), the Port of Seattle, and the Port of Portland.

FEDERAL MARITIME COMMISSION

DOCKET NOS. 73–42, 73–61, 73–69, 74–4

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, ET AL.

v.

SEATRAIN INTERNATIONAL S.A.

REPORT AND ORDER ADOPTING INITIAL DECISION

August 8, 1978

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

I. THE CONSOLIDATED PROCEEDING

These proceedings arose out of separate complaints filed by the Board of Commissioners of the Port of New Orleans; the Port of Houston Authority and Houston Port Bureau, Inc.; The Port of Beaumont Navigation District of Jefferson County, Texas; and the Board of Trustees of the Galveston Wharves (Complainants or Gulf Ports). Complainants request that the Commission declare the transportation of cargo via a joint rail/water service offered by Seatrain International, S.A. (Seatrain), in conjunction with the Southern Railway System and the Southern Pacific Transportation Company, between the United States Gulf Coast rail terminals in New Orleans, Houston, Beaumont, and Galveston, and ports in Europe and the United Kingdom utilizing the Port of Charleston, South Carolina, constitutes an unfair cargo diversion practice proscribed by Shipping Act sections 16, 17 and 18, (46 U.S.C. 815–817), and section 8 of the Merchant Marine Act, 1920, (46 U.S.C. 867).[1]

The proceedings were consolidated and several parties were granted leave to intervene.[2]

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*Concurring in final result.

[1] Seatrain, in conjunction with Southern Railway filed tariffs with both the FMC and the ICC proposing a joint rail/water container service (minibridge) from New Orleans via Charleston, South Carolina to the United Kingdom, Europe and Baltic Range, effective July 15, 1972. Subsequently Seatrain, in conjunction with the Southern Pacific, added rail terminals in Beaumont, Houston, and Galveston. These tariffs delineate a joint through service wherein the water carrier receives the total freight charges from the shipper and in turn pays the railroad a proportional amount (division).

[2] The intervening parties are: State of Texas, Lykes Brothers Steamship Company, Inc., South Atlantic and Gulf Coast District of International Longshoremen's Association, AFL-CIO, New Orleans Traffic and Transportation Bureau, Port of Port Arthur Navigation District of Jefferson County, Texas, Greater Baton Route Port Commission, The Honorable John Tower, The Honorable Bill Archer, Southern Railway System (Southern) and the Southern Pacific Transportation Company (Southern Pacific).

Hearings which produced an evidentiary record totaling 1,202 pages of transcript and 102 exhibits, were held before Administrative Law Judge Stanley M. Levy (Presiding Officer) in New Orleans and in Washington, D.C. A Notice of Intent to Make an Environmental Assessment pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, *et seq.*, was published initiating a Threshold Assessment Survey (TAS) and resulting in an Environmental Negative Declaration served August 31, 1976. A "Comment" alleging errors in the TAS was filed by Complainants following which a Response was issued by the Commission's Office of Environmental Analysis (OEA).[3]

Oral argument was conducted before the Commission on June 13, 1978.

II. EXCEPTIONS TO INITIAL DECISION

The Presiding Officer found that (a) no minibridge cargo was diverted from the complaining ports naturally tributary cargo areas as there was no direct showing of minibridge cargo origins or local areas tributary to the Gulf Ports; (b) even if all minibridge tonnage were the result of diversion from the Gulf Ports it was *de minimus* in comparison with the ports' total tonnage; and (c) no absorptions of inland freight charges were proven.

Exceptions to the Initial Decision were filed by each of the Complainants and several intervenors supporting Complainants.[4] Seatrain filed a Reply to Exceptions. Complainants argue that the Presiding Officer erred because:

(1) undue weight was given to the amount of container traffic moving by minibridge; the true measure of economic detriment is not a comparison of the diverted container tonnage to all general cargo tonnage, but rather to all *container* tonnage handled by the Gulf Ports;

(2) the diversion of any cargo, regardless of amount, is illegal *per se* under section 8 of the 1920 Merchant Marine Act;

(3) Complainants did demonstrate the existence of severe economic detriment in both specific and general terms;

(4) a resolution of the Texas Industrial Traffic League opposing minibridge, indicative of shipper opinion and the direction of the public interest in this instance, was improperly excluded from the record:

(5) the collection of the rail divisions of the joint through rate by Seatrain represents an absorption of inland freight charges;

(6) Complainants need not show that minibridge cargo carried by Seatrain would be carried on a direct all-water service "but for" the minibridge service in order to prove a diversion of cargo;

(7) Seatrain was engaged in absorption because it pays drayage and wharfage charges at Charleston normally paid by the shipper;

(8) minibridge is not a faster transportation service than all-water service;[5]

[3] The OEA's "Notice of Response to Comments on Environmental Negative Declaration," served July 17, 1978, did not constitute Commission action on Complainants' objections to the TAS. Complainants' "Comments" have been independently reviewed by the Commission without reliance on the OEA's supplemental statement.

[4] Separate Exceptions were filed by the Houston Port Bureau and the Port of Houston. Because many arguments were repeated by more than one party or were otherwise redundant, the various Exceptions have been consolidated to facilitate discussion.

[5] One Complainant also argues that because factors *other than cost* make minibridge service more attractive, a premium rate should be imposed.

(9) the Presiding Officer was unfairly biased in resolving the absorption issue;

(10) section 8 of the Merchant Marine Act confers substantive rights upon ports to "naturally tributary cargo areas";

(11) the cargo carried on the minibridge is not naturally tributary to Charleston, but is artificially induced there by low inland freight rates;

(12) naturally tributary cargo is not necessarily local cargo as mileage alone is not determinative and historical movements must be given great weight; local cargo is being diverted by minibridge; if the cargo were not local to the ports initially it would not move on minibridge;

(13) minibridge is not an Overland/OCP type system as it does not serve inland areas, but is restricted to a 200-300 mile range of the Gulf Coast;

(14) the Presiding Officer was required to consider an Environmental Impact Statement (EIS) in making his Initial Decision; evidence was submitted showing that all-water service is more fuel efficient than rail/water movements and less detrimental to the environment; complainants submitted an environmental study (the Cooper Study) that was not considered prior to the rendering of the Initial Decision.

(15) Miscellaneous Exceptions. A group of 13 general and highly redundant "sub-exceptions" was submitted as "Exception No. 10" by the State of Texas. Respondent correctly notes that this Exception does not comply with the requirements of the Commission's Rules of Procedure, 46 C.F.R. 502.227, and it will therefore not be considered further.

Respondent vigorously opposes all of these arguments, claiming that they were properly resolved by the Initial Decision. Respondent contends that the charge of bias is both untimely lodged under section 502.149 of the Commission's Rules and incorrect; and that the resolution of the Texas Industrial Traffic League was properly excluded under section 502.156 of the Rules because it was not susceptible to cross-examination, did not concern the Euro/Gulf minibridge service and contained erroneous assumptions.

Respondent also claims that there is no real environmental impact from the new service because both the trains and ships involved would move with the same frequency without the joint through rate tariff; there is a net reduction in fuel consumption as Gulf Coast port calls are eliminated; a comparison of water miles to rail miles or a comparison to other minibridge services is not proper; and there is no requirement that an EIS be submitted before an initial decision is rendered.

III. Discussion

Most of Complainants' arguments are matters which were presented to the Presiding Officer and adequately resolved by the Initial Decision. The Commission has determined, therefore, to adopt the Initial Decision except to the extent its findings and conclusions concerning Euro/Gulf minibridge are modified by the following discusison of Complainants' Exceptions.

A. Economic Detriment from Cargo Diversion

Diversions of cargo become unlawful within the meaning of Shipping Act sections 16, 17, and 18(b)(5), only if they are substantial and the result of unjustified absorptions, equalizations or other practices. *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500 (1941); *Beaumont Port Commission v. Seatrain Lines, Inc.*, 3 F.M.B. 556 (1951); *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664, 674 (1955); *Rates From Jacksonville to Puerto Rico*, 10 F.M.C. 376, 383 (1967); *Agreement Nos. T-2108 & T-2108-A;* 12 F.M.C. 110, 123 (1968). Assuming that some naturally tributary cargo is being diverted from the Gulf Ports (and there is no direct evidence of this in the record),[6] and that this diversion is accomplished by inland freight absorptions or rate equalizations (see section B, below), there remain the critical question of whether Euro/Gulf minibridge is covering significant injury to the Gulf Ports.

An adverse effect on the general economy of the various Gulf Ports was alleged. The only proof in this regard was tendered by the Houston Port Bureau,[7] however, this was limited to an analysis of the theoretical development of the Port area's economy from the revenue generated by handling a single container. These calculations are then applied to the 772 containers "diverted" by minibridge in the last three months of 1973 (Ex. 12, Table 13)[8] from which a revenue loss to Houston of $2,804,784 annually and $109.3 million and 500–600 jobs over a ten-year period was projected. This statistical projection fails to consider that portion, if any, of the lost revenues which would be recouped by increased rail activity in the Houston area or to reveal whether inter-port competition was causing Houston to lose any cargo (see Tr., at 728). Complainants have approached the public interest issues in this case solely from the viewpoint of particular port facilities and have advanced only limited and generalized arguments in support of their position.[9] The net effect has been a lack of competent evidence of appreciable economic detriment to the ports[10] and their local economies.

The Port of Houston Authority made much of the asserted fact that a $40 million bond issue, $29 million of which was to be used to build container handling facilities (Ex.9(b)), was floated for the development of Barbours Cut in

[6] "Diversion" requires proof of specific cargo origins and destinations, and of distorted overland transportation patterns. See *Sea-Land Service, Inc. v. Atlantic and Caribbean Line*, 9 F.M.C. 338 (1966), where the Commisson rejected the contention that cargo is not diverted unless it was proven that it would otherwise pass through the complaining port, *Id.*, at 350, but did require proof that the cargo would *not* move through *a more distant port* "but for" the alleged diversionary practice, *Id.*, at 346. In the instant case, the evidence submitted only permits a general inference of diversion based upon the assumption that if minibridge did not exist, some minibridge cargo would have otherwise passed through one of the complaining Gulf Ports. Cargo origins and destinations were not established.

[7] Galveston alleges that the direct call service by Lykes Bros. is jeopardized; but this is unsupported by the record. (Tr. 1168, Ex. 18R.) Lykes, an intervenor, presented no evidence on this issue.

[8] The statistical source of the containers "diverted" was purportedly Seatrain's "Responses to Interrogatories", which are not part of the instant record.

[9] *E.g.*, Complainants allege that the mere intervention of Congressional Representatives on their behalf indicates that minibridge is contrary to the public interest. Port Arthur alleges that the lack of container service there indicates that minibridge is inhibiting the development of this port facility even though this condition pre-dates minibridge (I.D., 20).

[10] The Port of Houston Authority admitted that its revenue loss in 1973–74 was only $26,270.50 less associated expenses (Tr., 1080–81, 1086; Ex. 17 A & B) and that the increased frequency of Seatrain's minibridge service may in fact stimulate the general economy of the area. (Tr., at 583, 1158.)

reliance on continued Seatrain direct water calls. Absent clear proof to the contrary, it must be assumed that a local investment decision of this magnitude was dependent upon a number of factors other than the unsecured assurances of continued vessel calls by a single containership operator. It has been long recognized that, absent unique circumstances, the Shipping Act does not require ocean carriers to provide service to a particular port. *See, Lucking v. Detroit and Cleveland Nav. Co.*, 265 U.S. 346 (1924). Moreover, the Port of Houston failed to equate Seatrain's cessation of service with any particular failure of the Barbours Cut project or the Port's inability to meet its bond obligations.

Alleged specific commodity diversions were rubber at Beaumont and cattle hides at Houston. The only statistical evidence as to rubber showed a large decline between the *total* shipments (breakbulk and container) handled during the last quarter of 1972 and those handled during the last quarter of 1973, (Exs. 16C and 18Q). There was no evidence connecting this decline in any manner with Seatrain's minibridge activities. Nor was specific evidence submitted substantiating the claimed cattle hide diversion at Houston.

Comparison of all minibridge tonnage to the Gulf Port's total cargo volume reveals that the effect of the presumed diversions is insignificant.[11] Complainants, however, contend that the greater percentages obtained by comparing the Gulf Ports' *container* tonnage with the entire minibridge tonnage more accurately portray the diversionary impact of minibridge, and that this amount of diversion is more significant.[12]

Previous Commission decisions indicate that the proportion of diverted traffic to the tonnage of the ports involved have generally been more substantial than that indicated by either of the above tests.[13] We conclude that the diversion of naturally tributary cargo in this case, if any in fact exists, is sufficiently minor in nature so as not to constitute a violation of Shipping Act sections 16 or 17.

B. Absorptions of Cost

The absorptions alleged in this case fall into two categories: (a) direct absorptions of shippers' port charges, and (b) indirect absorptions of rail freight charges by a reduction of the *rail division* of the through rate below the corresponding local rail rate and the passing on of these charges without a mark-up for providing the service of incorporating these charges into one bill of lading.

It was alleged that Seatrain was paying drayage and wharfage charges at Charleston without charging shippers for these services, and Seatrain admitted paying the charges (Tr., at 998). However, it was not shown that the normal practice at Charleston or the Gulf Ports is for shippers and not carriers to pay this cost[14] and a finding of absorption of any specific shippers charges is not supported by the record.

[11] New Orleans, .075% (I.D. 21); Houston, .73% (I.D. 22); Galveston, .07% (I.D. 23); Beaumont, 1.8% (I.D. 24); Port Arthur had no container movement at least six months prior to the new service and no Seatrain cargo could be traced to that Port (I.D. 20).

[12] New Orleans, 4.23% (I.D. 21); Houston, 5.21% (I.D. 22); Galveston, 2.9% (I.D. 23). No figures available for Beaumont and Port Arthur.

[13] *E.g., Beaumont Port Commission v. Seatrain Lines Inc.*, 2 U.S.M.C. 500, 504 (1941); *Intermodal Service to Portland, Oregon*, 17 F.M.C. 106, 130 (1973); *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, 201 (1969); *Stockton Port District v. Pacific Westbound Con.*, 9 F.M.C. 12, 22–23 (1965).

[14] Wharfage may properly be a charge against cargo *or* vessel. See 46 C.F.R. 533.6(d) (2). Complainants' assertion of absorption rests entirely upon a conclusory averment by the Houston Port Bureau's counsel (Exceptions, at 9).

The indirect absorption argument of the complaining ports is more difficult to fathom. The essence of the argument appears to be that the collection of freight charges for the through movement by Seatrain and the payment to the railroad of a divisional share of the through rate that is substantially lower than the otherwise applicable *local rail rate* constitute an absorption unless Seatrain adds a markup for its administration of the joint arrangements.

Seatrain's tariffs disclose the components of the through movement. No deviation from the published divisional shares or hidden payments to the railroads occurs (Tr., at 560, 602–3, 969–70, Ex. 18), and there is no precedent, argument, or evidence indicating that the mere payment of an agreed upon divisional share by one carrier to another constitutes an absorption of freight charges.[15] In the context of this case, an absorption of inland freight costs by a water carrier would occur if Seatrain had filed a tariff indicating that it serves a given port and offered a *local* rate from that port, but is actually calling at a different port and paying out of its *local* rate revenues the costs of inland shipping of cargo from the port named on the tariff to the one at which its vessels actually called. *Sea-Land Service, Inc. v. S. Atlantic & Caribbean Line, Inc., supra.* Euro/Gulf minibridge does not involve this practice.[16]

C. Loss of Naturally Tributary Cargo

As previously stated, Complainants have made only a sparse showing that any Gulf Coast cargo is being diverted to Charleston. However, Complainants argue that section 8 of the Merchant Marine Act of 1920 makes *any* diversion of naturally tributary cargo an unlawful practice under the Shipping Act unless justified by a lack of adequate service.

The Commission has previously recognized that the mere diversion of cargo originating in locally tributary areas does not establish a violation of the Shipping Act. *See Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184 (1969); *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.*, 18 F.M.C. 234 (1975), *aff'd* 536 F.2d 391 (1975); *Sea-Land Service, Inc., supra*, at 344.

The recitation of section 8 does not alter the Shipping Act standard that there must be a showing of *significant* detriment due to the diversions. *Beaumont Port Comm. v. Seatrain Lines, Inc., supra.* Section 8 does not require the Commission to incorporate any specific concept of "naturally tributary cargo" into its Shipping Act considerations, nor does it otherwise create substantive rights in Shipping Act proceedings.[17]

[15] The ICC and not this Commission has jurisdiction over the rail division of the through rate and its relationship to the rail carriers' local rates. *See Commonwealth of Pennsylvania v. United States*, 561 F.2d 278, 15 S R R 195 (D C Cir. 1975).

[16] Complainants did not show that the minibridge rate structure was an unfair or unreasonable method of attracting cargo, whereas Seatrain demonstrated that shippers received certain benefits from the service (Tr., at 408–413). The Presiding Officer properly precluded Complainants from introducing a resolution of the Texas Industrial Traffic League opposing minibridges (Tr., at 1176–86). The resolution assumed all the factual elements of Complainants' case and was clearly not reliable and probative. Moreover, the Presiding Officer's statement as to his understanding of "absorption law" after a full discussion of the subject at the hearing (Tr., at 1183) may have been disagreeable to Complainants, but cannot be reasonably construed as bias

[17] *Section 8 is not a statute administered by the Federal Maritime Commisson's Reorganization Plan No 7 of 1961*, 75 Stat. 840, and contains no directives or prohibitions aimed at water carriers. It merely states a national concern for the development and protection of the economic interests of ports. *Intermodal Service to Portland, Oregon*, 17 F.M.C. 106, 134 (1973). As a broad policy statement it

The general purpose of section 8 is to encourage the movement of cargo through those ports, which because of a combination of transportation considerations, would best serve such cargo. Naturally tributary cargo is basically cargo from a geographical area local to a given port. A naturally tributary zone does not describe a general territory which may be served competitively by a range of ports, and it specifically does not include cargo originating from or destined to the central United States. *Intermodal Service to Portland, Oregon, supra,* at 126. Regardless of historical movement patterns and comparative geographic proximity, the term "naturally tributary cargo" cannot be extended to the point where a port or range of ports can claim a multi-state inland region as its exclusive "territory." This, however, is precisely what the Complainants are attempting to do in this case. (See Ex. 15b; Ex. 6)

The Gulf Ports were basically satisfied to assert that because minibridge cargo was loaded at the Gulf Ports' rail heads it necessarily was local to those ports; they did not attempt to prove that it was locally originated. The record shows that much of the cargo shipped from the Gulf Ports originates from a wide range of mid-southwestern states and as far away as Nebraska, California, and New York, with the majority originating in Texas and Louisiana (Ex. 6). Even if it were assumed that all minibridge cargo originates in Texas and Louisiana, the Gulf Coast ports all lay *equal* claim to these areas and no individual port has established an area locally tributary to it alone. The Commission once recognized geographical boundaries delineating separate tributary areas between the Galveston Bay ports (Galveston and Houston) and Beaumont. *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 699, 703 (1943). New Orleans has yet another distinct tributary area.

The theory that an entire region of the country might "belong" to a range of ports is not a tenable basis upon which to build a regulatory framework of fair competition between the interests of ports and carriers. Historical movements of cargo are not without some relevance, but it cannot be seriously maintained that Congress intended that section 8 freeze international transportation movements into their 1920 patterns. Merely stating that the inland freight rate economics drawing the cargo to the Gulf Coast determines that cargo as naturally tributary to Complainants is meaningless, when it is considered that it is the inland freight rates that are rerouting this cargo to Charleston. While there may be an inland distance factor giving a "natural advantage" to Gulf Ports, there is an offsetting water distance factor giving a "natural advantage" to Charleston. The Charleston route enjoys a "natural advantage" of a 5% reduction in total mileage savings over the all-water Gulf route from New Orleans, the shortest all-water route in question (Ex. 8).

Section 8 simply authorized the former Shipping Board—whose functions included the promotion and development of the United States Flag carriers and United States port facilities—*to inform the ICC* of inland rate structures that were

must be flexible and adaptable to changing methods, needs and patterns of transportation in a "volatile, changing national economy." *Id.*, at 125, citing *American Trucking Associations, Inc., v. Atchison, Topeka and Santa Fe Railway, Co.*, 387 U.S. 397, 416 (1967), and the meaning and application given the "naturally tributary cargo" concept by the Commission has shifted over the years. See discussion in *Counsel of North Atlantic Shipping Associations v. American Mail Lines, Ltd.*, FMC Docket 73-38, served simultaneously herewith, at pages 44-75 of the Initial Decision.

injurious to a particular port.[18] The right of ports to grow and fairly compete for cargo was and is fully reflected in the language of Shipping Act sections 16 and 17.[19] Independent consideration of the policies reflected in section 8 adds little to those considerations, and in most cases is superfluous.

D. Environmental Considerations

This proceeding involved various factual and legal disputes regarding compliance with the requirements of the National Environmental Policy Act, *supra*. The relative fuel efficiency of rail and water transportation was litigated at the hearing of this case, and objections were also raised to the issuance of the Initial Decision prior to the promulgation of a Draft Environmental Impact Statement. Both arguments are rendered moot, however, if the instant proceeding is not a "major federal action significantly affecting the quality of the human environment" within the meaning of NEPA.

The Supreme Court has held that before a detailed analysis of the environmental impact of an agency action is commenced there must be a threshold determination made to determine whether the proposed action constitutes a "major federal action," and that the agency has the primary and sole responsibility of determining whether NEPA is applicable to a particular proceeding.[20]

Although Complainants would have us transform the instant Threshold Assessment Survey into an in-depth and detailed analysis tantamount to an Environmental Impact Statement, the latest guidelines issued by the Council on Environmental Quality (CEQ) as to Federal Agency compliance with the NEPA procedural requirements contemplate a brief document discussing the need for the agency action, the alternatives, the potential environmental impacts of the proposed action and alternatives and a list of agencies and persons consulted—enough to provide a sufficient basis for a rational decision as to whether or not an EIS is needed. *Proposed Amendments to 40 C.F.R. 1508.9*, 43 Fed. Reg. 25244 (1978). The TAS in this case is a substantial document of 81 pages plus numerous exhibits and attachments. It clearly complies with the CEQ guidelines and adequately examines the potential environmnental effects of the minibridge service. After reviewing the TAS, and the other environmental documents and evidence in the record, the Commission concluded that the OEA's Environmental Negative Declaration should be adopted. Because a decision as to whether Seatrain's joint rail/water service does or does not violate the Shipping Act is not a federal action significantly affecting the quality of the human environment,

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[18] The legislative history of the 1920 Act reveals only a single statement concerning the amendment which eventually became section 8:

> Amendment No. 53 This amendment confers general powers upon the board to investigate terminal facilities at ports, and in case it finds that rates of rail carriers are detrimental to the upbuilding of such ports or that new rates or additional terminal facilities should be made by carriers it may submit its findings to the Interstate Commerce Commission *Joint Conference* Committee on H R. 10378, *American Merchant Marine*, H R. Rep. No 1093, H R No 1102, and H R No 1107, 66th Cong., 2nd Sess 27–28, 27–28, and 25–26 (1920)

[19] Section 17's specific reference to *ports* should be contrasted with the absence of such language in original section 3 of the Interstate Commerce Act, 49 U S.C. 3 The Supreme Court eventually ruled that the ICC lacked the power to protect ports from undue *preference or prejudice by carriers* with respect to export and import traffic *Texas & P. Ry. Co v. U S.*, 289 U.S 627 (1933) Immediately following this pronouncement, the Interstate Commerce Act was amended to provide for such authority in the ICC, 49 Stat 607, effective August 12, 1935

[20] *Kleppe v. Sierra Club*, 427 U S. 390 (1976) Once such a determination is made, it will not be overturned unless shown to be "arbitrary." Such a finding is a prerequisite to the preparation of the environmental impact statement broadly outlined in EPA.

preparation of a detailed environmental impact statement is not required under 42 U.S.C. 4332(2) (c).

THEREFORE, IT IS ORDERED, That Complainant's Exceptions are denied; and the Initial Decision is adopted; and

IT IS FURTHER ORDERED, That the Environmental Negative Declaration served August 31, 1976, is adopted; and

IT IS FURTHER ORDERED, That the complaints of the Board of Commissioners of the Port of New Orleans, the Port of Houston Authority and Houston Port Bureau, Inc., the Port of Beaumont Navigation District of Jefferson County, Texas, and the Board of Trustees of the Galveston Wharves, are denied and these proceedings discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

NOS. 73-42, 73-61, 73-69, 74-4

BOARD OF COMMISSIONERS
OF THE PORT OF NEW ORLEANS, ET AL.

v.

SEATRAIN INTERNATIONAL S.A.

Adopted August 8, 1978

The joint rail/water service between New Orleans, Louisiana, Houston, Beaumont and Galveston, Texas, and ports in Europe and the United Kingdom utilizing the port of Charleston, South Carolina, is not unlawful, unfair, unjustly discriminatory or illegal within the meaning of sections 16, 17, and 18 of the Shipping Act, 1916 [46 U.S.C. § § 815, 816, and 817] or violative of section 8 of the Merchant Act of 1920 [46 U.S.C. § 867].

Joint rail/water service is an inter-related transportation system, offered jointly by ocean carriers and railroads pursuant to joint through tariffs filed at both the FMC and ICC for the movement of containerized cargo by rail and water in the foreign commerce of the United States.

Section 8 of the Merchant Marine Act of 1920 was never intended to stifle development of maritime commerce if such development were to result in innovations whereby shippers would be offered alternative services and which could result in faster, better or lower cost transportation. The public interest is much larger than the needs or desires of a particular port area.

The joint rail/water service does not violate the concept of naturally tributary cargo in that it does not preclude the development of the Gulf ports and taking into consideration the economies of transportation and the natural direction of the flow of commerce the joint rail/water service between New Orleans, Houston, Beaumont and Galveston and ports in Europe and the United Kingdom utilizing the Port of Charleston, South Carolina, is not detrimental to the commerce of the United States and such service is in the public interest.

The joint rail/water service rebounds to the benefit of the shipper, causes no significant detriment to the Gulf ports and is in the public interest.

Intermodality and the joint rail/water service are the logical extensions of the containerization revolution. To prevent this and require rigidity based on outmoded transportation concepts will redound to the detriment of the maritime commerce of the United States and would be contrary to the public interest.

There is a regulatory obligation to be flexible in adapting to new developments in the transportation art.

The joint rail/water service is a new, additional and innovative service at rates roughly comparable to an all-water service.

No serious detriment has occurred to any port where joint rail/water service is offered in competition to an all-water service.

The amount of tonnage carried in the joint rail/water service is minuscule in relation to total port tonnage; it is minuscule in relation to total containerized tonnage in each port; it is minuscule in relation to containerized tonnage in the particular trade wherein the joint service is offered.

Seatrain's participation in the joint rail/water service and the division between Seatrain and the railroads does not constitute an illegal diversion or absorption practice since neither mode pays the other to perform services which the first mode is obligated to perform. The rates set forth in the tariffs filed with the Commission with respect to such service are comparable to the rates for all water service and are not unreasonable, unfair or discriminatory.

Shippers are not primarily concerned with whether their cargo moves all-water or by joint rail/water service, or whether it goes across the wharves of any particular port. They are concerned with rate structures as well as frequency and quality of service.

In weighing the quality of service, joint rail/water service versus all-water service, the various factors to be weighed are costs of service compared to the other, time of transit, damage potential and processing of claims, frequency of service and availability (capacity). Comparison of these factors by shippers, rather than regulatory fiat, will ultimately determine the degree of utilization of the competing services.

C. C. Guidry and *G. B. Perry* for Board of Commissioners of the Port of New Orleans, complainant, and New Orleans Traffic and Transportation Bureau, intervenor.

F. William Colburn for Port of Houston Authority, complainant.

G. E. Strange and *L. K. White* for Houston Port Bureau, Inc., complainant.

Warner F. Brock for Port of Beaumont Navigation District of Jefferson County, Texas, and Board of Trustees of the Galveston Wharves, complainants, and for Port of Port Arthur Navigation District, South Atlantic-Gulf Coast District of the International Longshoremen's Association, AFL-CIO, and Lykes Bros. Steamship Co., intervenors.

John L. Hill, Rex H. White, Jr., and *David Hughes* for State of Texas, intervenor.

Neal M. Mayer and *Paul D. Coleman* for Seatrain International, S.A., respondent.

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

These proceedings, consolidated by orders, dated November 23, 1973, and January 28, 1974, arise out of complaints filed by the Board of Commissioners of the Port of New Orleans (Docket No. 73–42); the Port of Houston Authority and Houston Port Bureau, Inc. (Docket No. 73–61); the Port of Beaumont Navigation District of Jefferson County, Texas (Docket No. 73–69); and the Board of Trustees of the Galveston Wharves (Docket No. 74–4) in which the complainants have requested the Federal Maritime Commission to declare that the movement of cargo by way of joint rail/water service offered by respondent Seatrain International, S.A., in conjunction with the Southern Railway System and the Southern Pacific Transportation Company between United States Gulf Coast rail terminals in New Orleans, Louisiana, Houston, Beaumont and Galveston, Texas, and ports in Europe and the United Kingdom utilizing the Port of Charleston, South Carolina, constitutes an illegal absorption practice by diverting naturally tributary cargo from the complaining ports by use of improper rates and tariffs in violation of sections 16, 17, and 18 of the Shipping Act, 1916, 46 U.S.C. §§ 815–817, and section 8 of the Merchant Marine Act, 1920, 46 U.S.C., § 867.

Permission to intervene has been granted to the State of Texas, Lykes Bros. Steamship Company, Inc., South Atlantic and Gulf Coast District of the International Longshoremen's Association, AFL-CIO, New Orleans Traffic and Transportation Bureau, Port of Port Arthur Navigation District of Jefferson County, Texas, Greater Baton Rouge Port Commission, John Tower, Bill Archer, the Southern Railway System and the Southern Pacific Transportation Company.

Hearings were held in New Orleans April 1–5, 1974, for the purpose of complainants' and supporting intervenors' direct case and cross-examination; on

[1] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission (Rule 13(g), Rules of Practice and Procedure, 46 CFR 502.227).

June 17 and 18, 1974, in Washington, D.C., for respondents' and supporting intervenors' direct case and cross-examination; and hearing for taking of rebuttal testimony was held August 26, 1974, in Washington, D.C. In all, the transcripts of the hearings total 1202 pages, and 102 exhibits (numbered 1a – 25) were received in evidence.

BACKGROUND

Seatrain, in joint submission with Southern Railway, filed tariffs with the Interstate Commerce Commission and Federal Maritime Commission. These tariffs[2] offered a service between the New Orleans terminal of Southern Railway and ports in the United Kingdom, Europe, and the Baltic Range.[3] Published on statutory notice of thirty days, the tariffs became effective July 16, 1973, subsequent to denial by Division Two of the ICC, on appeal, of New Orleans' petition for suspension and investigation of Southern Railway's race between New Orleans and the point of interchange with Seatrain, that being the Port of Charleston, S.C., Subsequently, Seatrain, in combination with the Southern Pacific Railroad, added rail terminals in Beaumont and Houston effective September 16, 1973. Finally, on February 11, 1974, the rail terminal in Galveston was added to the tariff.

The pertinent tariffs and the joint rail/water service offered and performed by Seatrain and the railroads pursuant thereto are currently subject to the concurrent jurisdiction of the ICC and the FMC.[4] Joint rail/water service is an inter-related transportation system, offered jointly by ocean carriers and railroads pursuant to joint through tariffs filed at both the FMC and ICC for the movement of containerized cargo by rail and water in the foreign commerce of the United States.[5] The joint rail/water tariff provides that the shipper is to pay the water carrier the full transportatin cost, as a matter of convenience, and the water carrier is then to pay over to the railroad its divisional basis in accordance with the tariff on file with both the ICC and FMC.[6] The joint service rates are the same or reasonably comparable to all-water rates out of the Gulf ports.[7]

In addition to the joint rail/water service here in question betwen Gulf Coast rail terminals and Europe, Seatrain provides joint rail/water services between West Coast ports and Europe (Euro-Cal), between Atlantic and Gulf Coast ports and the Far East (Far East), and between Europe and the Far East.

The Joint rail/water service between Gulf Coast ports and Europe operates in the following manner: a shipper, having chosen to utilize the service, arranges for the delivery by Seatrain of a container to wherever the shipper is located.[8]

[2] Seatrain Container Freight Tariff FMC Nos. 38, 39, 40, 41, 42 and 43; I.C.C. Nos. 9, 10, 11, 12, 13, 14. See Exhibits 1a, 1b, 1c, 2a, 2b, 2c, 3a, 3b, and 3c.

[3] Referred to herein as the Gulf/U.K. or Gulf/Europe trade.

[4] The concept of joint through rail/water service containing joint through rates in the international trade was developed in late 1971 and early 1972 and required unique tariff publications acceptable to both the ICC and the FMC in accordance with the requirements of the Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* and the Shipping Act, 1916, 46 U.S.C. § 801 *et seq.* See also CFR 536.16.

[5] Sometimes referred to as land-bridge or mini-bridge service.

[6] Ex. 18, pp. 3–4; Tr. 560; 602–03; 969–70.

[7] There have been some rate increases since the joint rail/water service was established which has resulted in some instances in higher rates than the all-water service. Ex. 18, p. 34, Ex. 23a, b, Ex. 18L. Tr. 370–371, 607; 654; 802–803; 879; 929; 951; 981; 1032, 1104; 1107; 1132; 1136–37; 1137; 1147–8. See also Appendix A.

[8] No shipper is precluded from utilizing a direct all water service if the shipper so desires. See all-water service currently available out of New Orleans, Houston, Galveston, Beaumont. FNS. 12, 20, 57, 75.

After the container is packed or stuffed by the shipper it is delivered at the shipper's expense to the rail terminal at either New Orleans, Houston, Beaumont, or Galveston, for movement by the joint rail/water service. The container is then transported on regularly scheduled trains and vessels.[9] The joint rail/water service generally, however, takes less time than the all-water service from Gulf ports because the Atlantic crossing is shorter from Charleston. Seatrain's Charleston operation to Europe effects a reduction of 23 percent in water miles.[10] With the four containerships Seatrain operates in this trade it offers weekly service from Charleston; this would not be possible with four ships calling directly at Gulf Coast ports.[11]

New Orleans

The joint rail/water tariff between New Orleans and Europe became effective on July 16, 1973.

Direct all-water service through the Port of New Orleans to the United Kingdom, the Continent and Baltic in competition with Seatrain's joint rail/water service is currently being provided by Lykes Bros. Steamship Company, Sea-Land and Combi Lines, in full container vessels, and in partial containerships by Polish Ocean line, UniGulf Lines, Mexican Lines, Central Gulf Lines, Atlantic Gulf Service, Baltic Shipping Company, and Harrison Lines. Frequency of service by these carriers as of April 1974 totalled approximately 22 sailings per month.[12] The annual container capability in these services is estimated at 70,000 units.

The Deputy Port Director of New Orleans testified that despite Seatrain's discontinuance of direct calls at the Port the regularity and frequency of these direct all-water sailings by Sea-Land, Combi, and others are more than sufficient to meet the needs of shippers.[14]

The Port of New Orleans has a total investment in facilities for the handling of waterborne commerce of $158.5 million, of which about $23 million is devoted to the needs of containerized cargo. In 1973, a total of $63,719 containers (94,603 20-foot equivalents) were handled through all port facilities. In terms of capability, an additional 18,600 (25,750 20-foot equivalents) containers could have been handled without taxing these facilities. To meet the forecasted demand attached to container growth, further expenditures totalling $39,750,000 are anticipated.

The Port of New Orleans has a container capability at other-than-full container berths of approximately 44,000 (53,371 20-foot equivalents) units to accommo-

[9] For example, the train carrying the containers being transported in the joint rail/water service departs Houston every evening, seven days per week. Tr. 583. Vessel sailings, picking up rail/water cargo, are weekly from Charleston, S.C. Regularly scheduled train service from Beaumont, see Tr. 774.

[10] Exhibit 8, p. 5

[11] Seatrain's sailing frequency from Charleston of once per week is the same or more often than the direct water service to the Port of New Orleans by Combi Lines, Inc., Sea-Land Service, Inc., Lykes Bros. Steamship Company, or the other direct water carriers, all of whose vessels also make stops at other Gulf Coast ports during the same sailing. These other stops also serve to lengthen the transit time for the all-water service. Seatrain's Atlantic crossing takes 6 days; Sea-Land's New Orleans-Bremerhaven crossing takes 13 days. Tr. 150–153.

[12] See fn. 8.

[13] 20-foot equivalents.

[14] Exhibit 4, p. 2.

date carriers involved in a combination service of containerized and noncontainerized cargoes.[15]

In order to attract cargo through the Port of New Orleans the Port maintains sales offices in Chicago, St. Louis, New York and overseas, and regularly advertises its services in the paper in New York, Chicago, and San Francisco.[16]

Normal steaming time between New Orleans and Europe is generally ten days if the vessel goes direct from New Orleans to Europe. If the carrier makes calls at other Gulf ports after New Orleans the cargo loaded at New Orleans would have a longer transit time.[17]

In 1973 foreign trade for all types of cargo through the Port of New Orleans totalled 31,636,000 tons; of this, 6,552,467 tons were general cargo; of the general cargo, 564,453 tons were containerized; of containerized cargo, 375,246 tons were in the Gulf/Europe trade.[18]

The 375,246 tons of containerized cargo in the Gulf/Europe trade moved in 32,160 containers; an average of 11.67 tons per container.[19]

HOUSTON

The joint rail/water tariff supplement adding Houston as an origin or destination point for rail/water service through Charleston to or from Europe became effective September 16, 1973.

In addition to Seatrain's joint rail/water service Sea-Land, Combi, and Atlantic Gulf Service provide regular container service between Houston and Europe, offering a total of 7 sailings a month. Lykes offers LASH barge service in this trade with three monthly sailings. All these carriers call at other Gulf ports and the avertised sailing time from Houston to Europe for these lines varies from eleven to sixteen days. Altogether these carriers provide a total potential monthly capacity of 4,767 containers (20-foot equivalents) through 10 sailings.[20] This potential is, however, limited by the number of containers handled by these ships at other Gulf ports of call.[21]

In 1969, approximately three years before Seatrain began direct service at Houston,[22] an unexpected surge of container activity in Houston began and the Port Authority determined that further expansion of Port facilities was vitally necessary. This culminated in April 1973, in the issuance of a $40 million general obligation bond issue for the development of Barbour's Cut, of which $29 million was committed to container facilities.[23]

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[15] Exhibit 5, p. 3

[16] Tr. 126, 130.

[17] Some carriers call first at New Orleans and then other Gulf ports, before sailing to Europe; others call first at other Gulf ports and lastly at New Orleans before sailing to Europe. Tr. 49–50; 150–153.

[18] Exhibit 18f—amended. These figures differ somewhat from the volumes set forth in the testimony of Mr. Perry, consultant to the Port of New Orleans [Exhibit 8], but since they are based on material subsequently furnished by the Port they are relied on. The figures in Exhibit 8 include domestic general cargo as well as foreign [Tr. 136 et seq.] which probably explains the difference between Exhibit 8 and Exhibit 18f—amended. See also Tr. 215 et seq.

[19] Tr. 229.

[20] Exhibit 10, p. 2

[21] Tr. 396.

[22] Subsequently discontinued with the institution of joint rail/water service in 1973.

[23] Tr. 296–97; 320; 1082–83.

As of April 2, 1974, about 95 acres were available at the Port of Houston for containership operations, of which approximately 35 acres were being utilized.[24] None of the marshalling areas are immediately adjacent to shipside;[25] Sea-Land's area, for example, is about a half-mile from the berthing site.

Approximately $18–20 million in Port revenues are needed to operate the Port and meet revenue bond requirements. The Port, however, does not make an analysis on tonnage required to meet its revenue needs.[26] The Port funnels all of its income into one pot from which it pays all of its obligations.[27]

The Port of Houston is presently able to earn enough money to meet its bond commitments[28] but nevertheless contends, "The diversion of cargo caused by Mini-Bridge rates to Charleston threatens the future of the Port of Houston."[29] Mr. Bullock, General Manager—Operations, of the Port of Houston Authority further testified that:

> *** We think except for the fact that there has been an increase in business, export and import, that we would be in trouble now on account of diversions, which have been caused, and loss of business we lost with Seatrain on these commitments. And it is doubtful that we would earn our subscribed amount of money to pay off our abundant indebted service charge if things remained as they were.[30]

Mr. C. A. Rousser, Sales Manager, Port of Houston Authority, testified that:

> Continuation of mini-bridge rates over Houston via Charleston for the European Theatre and return creates a complete denial of all of the initiative, effort and investments by both the Port of Houston Authority and Maritime Industry in trying to build an adequate, functional and efficient facility in our port to serve the growing market. Other solutions must be found to protect the growth of coastal ranges, one versus the other so that the commerce flow native to the port's local market and hinterland is protected. Failure to protect coastal ranges through the mini-bridge rates would ultimately result in the development of the east and west coast ports, denying the continued growth of Gulf and Great Lakes Ports.[31]

Neither Mr. Bullock or Mr. Rousser presented any definitive evidence from which economic detriment of the joint rail/water service could be measured. The record reveals that the Port of Houston is presently prospering, its volume is increasing, it is meeting its debt obligations.[32]

When asked for a definitive statement regarding the amount of cargo loss which would be fatal Mr. Bullock stated that a loss of 15,000–20,000 tons or more annually would make it doubtful if the Port could meet its indebtness.[33] Such estimate was not based on any financial statements or economic analysis[34] though in 1973 a projection was made that the Port would need to handle 150,000 containers in 1975.

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[24] Tr. 286.

[25] Tr. 288.

[26] Tr. 299–200.

[27] Tr. 311.

[28] Tr. 291.

[29] Ex. 9, pp. 8–9.

[30] Tr. 292.

[31] Ex. 10, p. 5.

[32] Tr. 306. In 1973, the Port's reserves increased from 1972.

[33] Tr. 293–294.

[34] Although Houston was asked to provide a pro forma financial analysis to demonstrate the break-even point for the Port in terms of the number of tons of cargo handled totally, whether from containers, bulk cargo or general cargo the Port failed to provide such information for this record. Tr. 307.

Approximately a total of 86 million short tons of cargo—bulk, grain, petroleum, general—moved through the Port of Houston in 1973,[35] of which about 12 million tons were handled through the Port of Houston Authority.[36] In 1972 the Port of Houston Authority handled approximately 10,373,000 tons.[37]

Of the 12 million tons handled by the Port Authority in 1973, only 1,400,367 tons were containerized, of which 802,592 tons was foreign trade cargo.[38] As recently as 1972 only 7.5 percent of Houston cargo was container cargo—all trades.

In 1972 41 percent of the cargo handled at the Port Authority wharves was breakbulk cargo; 4.4 percent bulk grain; 17.0 percent bulk plant; 17.3 percent liquid bulk; and 2.8 percent other dry bulk.[39] None of these cargoes are subject to the joint rail/water service.

Although breakbulk cargo may continue to be subject to inroads of containerization, the realities are that containerized cargo is still a small percentage of the total of general cargo through Houston. Even after the event of the joint rail/water service the number of containers moving through the Port of Houston in 1973 continued to grow.[40] In 1973, tonnage of container cargo through Houston nearly doubled that of 1972.[41] Of this containerized general cargo which moved through Houston in 1973, 43 percent (600,000 tons) was moving in the domestic trade. The 800,000 tons of containerized general cargo which moved in the foreign trades comprised only 13.9 percent of the foreign trade general cargo tonnage. Of this 800,000 tons only a portion is involved in the Europe/U.K. trade.[42]

After Seatrain began calling at Houston in January 1972, the Port used this service, along with pre-existing service provided by Sea-Land, Combi, and other lines, to promote acceptance of the pending bond issue at the upcoming election.

The Port of Houston did not build any facilities which were not otherwise in existence at the time Seatrain offered its joint rail/water service from Oakland to Europe via Houston as an inducement to Seatrain to utilize them for that service.[43]

There is no evidence that the decision to develop the Port facility with its underlying bond issue nor the voters' approval was tied to Seatrain providing direct service at the Port.[44] The bond issue was approved on April 14, 1973. On April 1, 1973, the Port Authority had received a letter from Seatrain, dated March 27, 1973,[45] in which Seatrain expressed an intention to lease terminal

[35] Tr. 305.

[36] Tr. 364.

[37] Ex. 9, p. 5. Trs. 262–64.

[38] Ex. 9, p. 6; Ex. 18f; Tr. 264, 266.

[39] Ex. 9, p. 5. No similar breakdown is provided by the port for 1973.

[40] Some Doubt is expressed whether 1974 containers will be as great as 1973. Tr. 301.

[41] Tr. 302; Exhibit 9, p. 6. 1,400,367 tons up from 773, 116 tons.

[42] Total foreign trade in 1972 was 19,387,776 short tons; U.K.-Europe share was 23 percent for imports and 33 percent for exports. Tr. 627; Ex. 13, p. 4. Of a total of 5,798,423 tons in the U.K.-Europe trade, 49,907 tons moved in the joint rail/water service. Tr. 629.

[43] Tr. 326.

[44] Ex. 9, p. 3; Tr. 327–329; 364–365.

[45] Ex. 9b, Tr. 329.

facilities then under construction if certain modifications were undertaken by the Port. The letter stated that if the Port would agree to Seatrain's suggestions then the matter would be presented to Seatrain's Executive Committee for approval. In the letter Seatrain "understood that the Port of Houston's offer to proceed on the above basis would be conditional upon satisfactory passage of the $40,000,000 bond issue which is being voted upon by the Harris County voters on April 14, 1973." It is apparent from this letter that the pending bond issue was not dependent on Seatrain utilizing the Port; if anything Seatrain was dependent on the bond issue. In any case, the arrangements discussed in the letter were contingent on the approval by Seatrain's Executive Committee and could be not deemed to be a firm commitment. For a variety of reasons, including Seatrain's financial position and capital requirements, the lease negotiations were never consummated.[46]

When Seatrain began calling at Houston in January 1972, it began to develop new business for the Port.[47] Mr. Rousser, Sales Manager for the Port of Houston Authority, on cross-examination, admitted, "I think Seatrain helped to a large degree in developing new markets."[48] He also was of the opinion that there is a lack of containership service out of Houston which was why shippers were using the joint rail/water service but that if the joint service was stopped the shippers would find it more difficult to move their cargo until additional service was again calling at Houston.[49] At the same time the Port of Houston is attracting shippers from the Ports of Galveston and Beaumont because service is better out of Houston than those ports.[50]

In April 1974, the availability of container bookings at Houston was tight.[51] To the degree that Seatrain makes direct calls at Houston or to the degree that Seatrain offers an alternative, i.e., joint rail/water service, to that degree the booking situation is eased at Houston.[52]

If all the joint rail/water volume for the first three quarters of 1973, 114,263 tons, was business which had previously moved through the Port of Houston, the total possible loss to Houston would be only $26,270.50, less reduced overhead expenses, based on a gross profit to the Port of 23 cents per ton with which to meet overhead and general administrative and other charges of the port.[53]

Before the advent of the joint rail/water service in issue in these proceedings Seatrain filed a tariff with FMC and ICC providing for joint rail/water service from Oakland through Houston to Europe.[54] As early as December 4, 1972, the Port of Houston itself advertised and promoted this service offered by Seatrain.[55]

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[46] Tr. 348–349.

[47] Tr. 368.

[48] Tr. 370.

[49] Tr. 379.

[50] Tr. 380–381; 743–744.

[51] Tr. 400.

[52] Tr. 401; 407–408.

[53] Exhibit 17b; Tr. 1080–81, 1086.

[54] Seatrain began a full container service to Europe from Houston on January 26, 1972; it discontinued this service in September 1973. Ex. 10a; Tr. 316, 325.

[55] Exhibits 11; 11a (order, April 15, 1974); Tr. 279, 342. See also Tr. 564.

Since Seatrain no longer calls at Houston this tariff is inoperative. Presumably cargo from Oakland that now moves to Europe via a joint rail/water service can utilize Seatrain's minibridge service through the Port of New York.[56]

BEAUMONT

The joint rail/water tariff supplement adding Beaumont as an origin or destination point for rail/water service through Charleston to or from Europe became effective September 16, 1973.

No full container ships made any calls at Beaumont in 1972 or 1973. Container service in 1972 and 1973 was provided by partial container ship or Lykes Seabee barges (Lash).[57]

Cargo movement through Beaumont is unbalanced. Approximately 95 percent is export; 5 percent import. This imbalance presents a particular problem relating to container equipment and may affect carrier decisions with regard to making direct calls at the Port.[58]

Exclusive of military cargo, a total of 5,189 tons of general cargo were exported from Beaumont to U.K./Europe during the period September-December, 1972, of which 509 tons were containerized.[59] No general cargo originating in U.K./Europe was received at Beaumont during the period September-December, 1972.[60]

Cargo movements through Beaumont in 1973, excluding bulk grain, but including bulk scrap, bulk shell, etc., totalled 628,134 tons. Of this, all foreign trades general cargo (breakbulk and containerized) accounted for about 288,273 tons.[61] Military cargo comprises the largest item in the general cargo category moving through Beaumont. No military cargo moves in the joint rail/water service.[62]

Regular rail service from Beaumont is twice daily.[63] In the period October 1973–July 1974 inclusive, 345 containers moved from Beaumont in the joint rail/water service. None came in.[64] During the period May–July 1974, 112 containers moved. On an annualized basis this amounts to 448 containers, a slight increase over the October 1973–July 1974 period when 345 containers for 10 months (414 annualized) were carried. Based on an average of 11.67 tons per container,[65] 448 containers would carry 5,228 tons, approximately 1.8 percent of the 288,273 tons of Beaumont's foreign trade general cargo movements.

Actual general cargo through Beaumont decreased in 1973 from 1972.[66] The

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[56] Tr. 317.

[57] Tr. 758.

[58] Tr. 765–766.

[59] Exs. 16c, 16d; Tr. 758.

[60] Ex. 16b. Possibly 10 containers, totalling 222 tons and 14 empty containers received during September-December 1972 may have originated in U.K./Europe.

[61] Ex. 16c; Tr. 742–43.

[62] Tr. 779–80.

[63] Tr. 777.

[64] Exs. 18e, additional 18e.

[65] No tonnage figures per container are available. The average tonnage per container is based on average tonnage for New Orleans and Houston.

[66] Tr. 743.

basis for the decline in 1973 general cargo tonnage is not specifically ascertainable.[67] However, a decrease in movement of military cargo in 1973 from 1972 may be a significant factor. Another factor may be that the Beaumont area experienced industrial strikes during the last four months of 1973.[68] Also, Houston has been attracting cargo from Beaumont for regular all-water service.[69] This problem of competition between Gulf ports is also indicated in the Galveston-Houston area.[70]

The joint rail/water competition accounts for only a minor part of the loss of tonnage through Beaumont in 1973. In that it offers what amounts to daily service from Beaumont, coupled with a weekly service from Charleston, it increases service available to the Beaumont area.

GALVESTON

The jont rail/water tariff supplement adding Galveston as an origin or destination point for rail/water service through Charleston to or from Europe became effective on February 11, 1974.[71] Through June 1974 only 22 containers moved from Galveston in the joint rail/water service, and none inbound.[72]

Galveston's container terminal opened in 1972. Container movements increased in 1973 and continued to grow in 1974, despite the institution of the joint rail/water service.[73] In 1973, Galveston handled 9,162 40-foot equivalent containers, of which 1,998 were in the U.S. Gulf and Europe trade. In contrast, 6,658 containers, of which only 14 containers were in the Gulf/Europe trade were handled in 1972.[74]

Direct full container service to Galveston is provided every ten days by Lykes Bros. Steamship Company's Seabee Service.[75] These Lash type vessels send barges to Houston, Beaumont, and Freeport, Texas, which do not receive calls by the mother ship.[76] The average call at Galveston generates about 200 containers inbound and outbound combined, though the trade is not balanced, there being somewhat more inbound than outbound.[77]

Although Lykes Bros. Steamship Company is an intervenor in this proceeding it presented no witness. All testimony regarding Lykes operations at Galveston emanated from witness Parker, Traffic Manager for the Galveston Wharves.[78] He testified that 18 or 20 containers every ten days at Galveston would be insufficient to warrant a direct ship call[79] and that Seatrain would have to attract

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[67] Tr. 785.

[68] Tr. 761.

[69] Tr. 380–381; 743–744.

[70] Tr. 728.

[71] Tr. 697.

[72] Ex. 18r.

[73] Tr. 698.727.

[74] Ex. 15, p. 5; Tr. 697.

[75] Tr. 728, 1160, 1167.

[76] Tr. 1171. The mother ship also makes a direct call at New Orleans.

[77] Tr. 1167.

[78] Tr. 728.

[79] Probable limit of Seatrain potential.

at least 40 containers away from each Lykes call to even jeopardize the Lykes call at Galveston.[80] Such a volume would equal 2,000 containers annually—an amount equal to all the containers moved in the Gulf/Europe trade through Galveston in 1973. No witness ventured that Seatrain would ever come close to accomplishing this.[81] Lykes Bros. Steamship Co. has actually added a call per month to Galveston since Seatrain filed its Galveston tariff supplement.[82]

Total tonnage handled through the Port of Galveston in 1973 was 4,268,830 short tons. This includes bulk grains, ores, sugar, etc., and other non-containerable commodities but does not include sulphur moving through the Deval Sulphur Terminal.[83]

Out of a total of 414,427 tons of foreign trade general cargo (containerized and breakbulk) moving through Galveston in 1973, it is estimated that 181,677 tons were destined for Texas consignees and 166,109 tons originated in Texas.[84]

Of the approximately 415,000 tons of foreign trade general cargo moving through Galveston in 1973,[85] approximately 26 percent (107,000 tons) was containerized.[86] Of this approximately 107,000 tons of foreign trade containerized cargo, approximately 23,319 tons were in the Gulf/Europe trade.[87] This 23,000 tons are approximately 5.6 percent of the foreign trade general cargo (414,427 tons) and approximately 0.55% of the port's total tonnage (4,268,830 tons). Galveston's witness claimed that if Galveston were to lose 20 percent of its foreign trade general cargo it would destroy that service.[88] If so, based on the volume of 414,427 tons of foreign trade general cargo which moved through Galveston in 1973, a loss of 82,885 tons would be fatal to the Port's foreign trade general cargo business.[89] However, since only approximately 23,319 tons of container cargo moved through Galveston in 1973 in the Gulf/ Europe trade, even if the joint rail/water service captured all the container cargo it would result in a loss of only 5.6 percent of the foreign trade general cargo tonnage, substantially less than the 20 percent level forecast as destructive of foreign trade service.

The contention by the Port that it cannot survive if the joint rail/water service is allowed to continue is unsupported by the record. At the present time diversion of cargo from Galveston to Houston in regular port versus port competition appears to be a far greater problem to Galveston than loss of business to Galveston as a consequence of the joint rail/water service.[90]

PORT ARTHUR

There is no tariff for joint rail/water service naming Port Arthur as a starting or

[80] Tr. 1166–1168.

[81] Ex. 18, p. 7. Seatrain has very little excess capacity which would enable it to benefit from any meaningful increase in its current volume.

[82] Tr. 1170. 10-day call instead of 15-day.

[83] Late-filed Ex. 15c.

[84] Late-filed Ex. 15c. General cargo constitutes only 25 percent of Texas generated cargo through Galveston. Tr. 716.

[85] Late-filed Ex. 15c.

[86] Tr. 697. Based on an average of 11.67 revenue tons per container as at New Orleans and Houston; there was no testimony on tonnage per container at Galveston. 9,162 containers (Ex. 15, p. 5) × 11.67 = 106,920 tons.

[87] Tr. 697. 1,998 containers (Ex. 15, p. 5) × 11.67 = 23,319 tons.

[88] Tr. 707, 713, 1154–1155, 1166, 1168.

[89] Late-filed Ex. 15c; Tr. 713, 1154–1155.

[90] Tr. 728.

terminating point. There is rail/water traffic from Port Arthur which utilizes the port of Beaumont, Texas, approximately 20 miles distant.[91] Seatrain originated joint rail/water service from Beaumont on September 16, 1973.[92]

In the 12 month period ending March 31, 1974, only one ship and two barges made a direct call at Port Arthur in the LeHavre-Hamburg trade. The barges were for LASH service out of Galveston or Houston.[93] Neither the ship nor the barges picked up any containers; only break-bulk cargo.[94]

No containers moved through Port Arthur between March 1973, and September 16, 1973. Some containers may have moved from Port Arthur to Houston or Galveston between March 1973, and September 1973, but, in any event, one to Beaumont.[95] These movements, all prior to the institution of the joint rail/water service (Houston, Beaumont, September 16, 1973; Galveston February 11, 1974) is another manifestation of the inter-port competition in the Gulf.

The institution of joint rail/water service from Beaumont had no effect on container service at Port Arthur inasmuch as direct container service had ceased at least by March of 1973, six months before the advent of the joint rail/water service. Seatrain has never served Port Arthur nor does it issue Port Arthur bills of lading.[96]

ECONOMIC FACTORS

The Gulf ports contend that the joint rail/water service diverts cargo to Charleston that otherwise would go through their ports to such a degree that it threatens the economic existence of the ports. Whether the drawing away of traffic results in unjust or unfair discrimination or undue or unreasonable preference is a question of fact for determination in each instance.[97]

The simple arithmetic reveals that the ports' contention is unrealistic. At the Port of New Orleans in 1973 the inbound and outbound waterborne foreign trade for all types of cargo totalled 31,636,000 short tons; of this only 6,552,467 tons were denominated general cargo; of the general cargo only 563,453 tons were containerized; of the containerized cargo only 375,246 tons were in the Gulf/Europe trade.[98] The containerized cargo in the Gulf/Europe trade is 1.2 percent of the cargo moving through the Port in 1973.[99]

In 1973 the total number of containers that moved through the Port of New Orleans was 64,020 containers, of which 32,160 containers were utilized in the Europe and U.K. trade to move the 375,246 tons through the Port; an average of 11.67 tons per container.

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[91] Tr. 668-69.

[92] Tr. 671.

[93] Tr. 669.

[94] Tr. 671.

[95] Tr. 672-73.

[96] Tr. 688.

[97] *Rates From Jacksonville, Florida, to Puerto Rico,* 10 F.M.C. 376, 383 (1967); *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955); *Beaumont Port Commission v. Seatrain Lines, Inc.,* 3 F.M.B. 556 (1951).

[98] Exhibit 18f—amended. These figures differ somewhat from the volumes set forth in the testimony of Mr. Perry, consultant to the Port of New Orleans [Exhibit 8], but since they are based on material subsequently furnished by the Port they are relied on. The figures in Exhibit 8 include domestic general cargo as well as foreign [Tr., p. 136 et seq.] which probably explains the difference between Exhibit 8 and Exhibit 18f—amended. See also Tr. 215 et seq.

[99] 375,246 ÷ 31,636,000 = 1.18613 percent.

If Seatrain's carriage in the joint rail/water service from or to New Orleans for the months of May, June, and July 1974,[100] the latest figures available in this record, are annualized it will carry 2,044 containers, totaling 23,853 tons. This 23,853 tons is 6.36 percent of the 375,246 tons of containerized cargo in the Gulf/Europe trade; it is 4.23 percent of containerized cargo (all trades); it is 0.36 percent of the total general cargo; and 0.075 percent of the total waterborne cargo which moved through the Port of New Orleans in 1973.

The total cargo potentially jeopardized at New Orleans by the joint rail/water service [i.e., 375,246 tons of containerized cargo in the Gulf/Europe trade] amounted to approximately 1.2 percent of the foreign trade [31,636,000 tons] moving through the Port in 1973. If Seatrain increased its present share [6.35 percent] of the containerized cargo in the Gulf/Europe trade to 100 percent of that trade [from 23,853 tons to 375,246 tons] it would still only impact 1.2 percent of the Port of New Orleans' foreign trade.

The same exercise for the Port of Houston reveals a similar minimal impact on its waterborne commerce. At Houston a total of some 802,592 tons of containerized general cargo moved through the port for all foreign trade in 1973.[101] Annualized Seatrain's 1974 container carrying for Houston the joint rail/water service would amount to 3,584 containers[102] totalling 41,825 tons.[103] This tonnage equals only 5.21 percent of the total containerized cargo in all foreign trades and compares with 4.2 percent in New Orleans.[104] In comparison with Houston's 1973 total of 6,653,193 tons of general cargo (excluding barges)[105] Seatrain's 41,825 tons (annualized) of container cargo carried in the joint rail/water service is only approximately 0.63 percent. In relation to Houston's 1973 5,779,050 tons of foreign trade general cargo[106] Seatrain's 41,825 tonnage is approximately 0.73 percent.

The same pattern is reflected at Galveston. In 1973 Galveston handled 9,162 40-foot equivalent containers, of which 1,998 were in the U.K. and Europe trade.[107]

The joint rail/water tariff supplement adding Galveston as an origin or destination point for rail/water service through Port of Charleston to the U.K./Continent was effective on February 11, 1974.[108] Thereafter, no containerized cargo moved through the rail terminal in the trade until June 19, 1974, when the joint rail/water service carried 22 containers.[109] Annualizing the 22 containers would result in some 264 containers moving in the joint rail/water service. This would amount to approximately 13.2 percent of the U.K./Continent[110] trade and

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[100] Ex. 18c—added.

[101] Exhibits 9, p. 6, and 18f.

[102] Exhibit 18d—added.

[103] Based on an average of 11.67 tons per container.

[104] The amount of containerized tonnage for the Europe/U.K. part of foreign trade is not broken out in Houston's Ex. 9, p. 6.

[105] Ex. 9, p. 6.

[106] Ex. 9, p. 6.

[107] Ex. 15, p. 5; Tr. 697.

[108] Tr. 697.

[109] Exhibit 18r.

[110] Galveston witness, Mr. Parker, testified that loss of 20 percent of the Gulf/European trade would destroy that trade insofar as Galveston was concerned. Tr. 713; 1154–1155.

approximately 2.9 percent of the total foreign containerized carriage. In terms of 4,268,829 total tons which were handled through the Port of Galveston's facilities in 1973[111] the 3,081 tons annualized carriage in the joint rail/water service (based on the average of 11.67 tons per container)[112] would amount only to approximately 0.07 percent of Galveston's tonnage.

If we postulate that Seatrain could capture the entire Gulf/Europe containerized business—1,998 containers in 1973 totalling 23,319 tons—such volume would only amount to 22 percent of the total containerized cargo; 11.3 percent of the total foreign general cargo, and 0.55 percent of the total cargo moving through Galveston. From the foregoing we would have to conclude that only if Seatrain siphoned off Galveston's entire containerized Gulf/Europe trade would it approach the twenty percent which has been postulated as the level of loss which would destroy such service at the Port. No evidence in this record even suggests that Seatrain has the capability anywhere near that magnitude. The record indicates, rather, that Seatrain has little capacity to increase its present carryings.[113]

At Beaumont a total of 112 containers moved in the joint rail/water service in the period May-July 1974.[114] Annualized this would amount to 448 containers. In 1973 the total general cargo in all trades totalled 288,278 tons.[115] The 448 containers (at an average of 11.67 tons) would carry 5,228 tons and would be approximately 1.8 percent of Beaumont's general cargo.

Thus from an overall view of the tonnage moving through the ports Seatrain's carriage in the joint rail/water service is comparatively minuscule. Even if Seatrain were to increase its carryings in this service its capability for growth is limited as it does not have extensive excess vessel capacity to move additional cargo.[116]

Mr. Perry, consultant to the Port of New Orleans, testified that the Port was essentially self-sustaining and that "the revenues of the Port are sufficient to pay the cost of operations of the Port, to meet the daily operations of the Port, and that the Port made a profit in 1973, and that it hoped to make a profit in 1974."[117]

When asked if it was fair to state that as of April 1, 1974, the Port of New Orleans was economically healthy, viable, and growing, Mr. Perry answered, "Yes."[118] Asked further whether the Port of New Orleans was healthier now from a traffic income standpoint than any other standards that the witness could think of from any other time in the last five years he replied, "yes," with this explanation:

> . . . The ports have experienced an unusual growth in 1973 that relates to the very unusual growth of cargo by the simple fact that export traffic in this country in 1973 has hit all time highs. So therefore to qualify New Orleans as being unusually healthy or healthy and all those good things in

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[111] Late-filed Ex. 15c.

[112] Fn. 87, *supra*. Similar to average per container at New Orleans. Tr. 229.

[113] Ex. 18, p. 7

[114] Ex. Additional 18e. 345 moved during the 10 month period October 1973-July 1974. Annualized this would amount to 414 containers. See Ex. 18e.

[115] Ex. 16e.

[116] Fn. 113, *supra*.

[117] Tr. 122–123.

[118] Tr. 124.

1973, is to say the ports generally are. This is not to say that New Orleans couldn't have done substantially better had it not been subjected to any loss of cargoes.[119]

Also illustrative of this lack of detriment and the same point of view is the following, as set forth in the reply brief on behalf of conplainant, Port of Houston Authority:

> At page 38 [Reply Brief] Respondent attempts to excuse its conduct by pointing to the fact that this Complainant has realized an increase in container traffic since the advent of the joint rail/water service. This gambit ignores the thrust of the complaint in this matter which is that Respondent is diverting cargo from the naturally tributary area of the Port of Houston to Charleston, South Carolina. But for such diversion, the increase experienced by Complaint [sic] would have been even greater.[120]

Houston sponsored an economic witness, Mr. Bragg, who testified regarding the economic impact of the Port on the Houston community.[121] His calculations, however, are based on theory, rather than being factually based.[122] His conclusions are based on the assumption that all cargo carried in the joint rail/water service was cargo which previously had moved in the all-water service.[123] He also had no familiarity with the condition of the traffic or the volume moving in the joint rail/water service.[124] His economic conclusions relied on data published by the American Association of Port Authorities[125] and a State of Texas input-output study and were not the result of any independent study.[126] The AAPA data, in any event was not developed for the Port of Houston but is a national average.[127] In addition, the AAPA data is an extrapolation of a study published by the Maritime Administration in 1956. It is unfortunate that the assumptions underlying the methodology of the Marad study cannot be ascertained. In any event, the witness assumed that every ton of container goods shipped across the wharves of the Port had an impact of $20[128] on the community of Houston multiplied by a factor of 2.81 (ripple-effect).[129] The witness, on cross-examination, conceded that cargo moving through the Houston rail terminal in the joint rail/water service would have an economic impact on the Houston community but did not know what it was because his study was limited to cargo moving across the wharves of the Port. He also conceded that many of the factors which entered into his economic impact study of the cargo crossing the wharves were also present in regard to cargo moving through the rail terminal in the joint rail/water service.[130]

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[119] Tr. 124.

[120] Reply brief, p. 2.

[121] Exhibit 12, 12a-o; Tr. 485–487.

[122] Tr. 422. For example—see colloquy regarding loss of 47 jobs in Houston. Tr. 421.

[123] Tr. 423; 466. But see Tr. 368. 370.

[124] Tr. 423–424; 469; 485.

[125] Tr. 351. The AAPA considers that each ton of container cargo represents $20 in economic impact to a community. The record does not reveal how much of this is direct benefit to a port authority and how much is a ripple effect; nor, indeed, how much represents the cargo itself.

[126] Tr. 426.

[127] Tr. 426.

[128] Based on AAPA data.

[129] State of Texas input-output study. See also Tr. 548.

[130] Tr. 432–452. See also Tr. 439–443, 447, 450–452, 455, 457, 461, 465, 468, 471, 473, 531, 570–574, 592.

Although in an administrative proceeding great latitude is permitted in admission of evidence into the record, the problems raised by the testimony of Mr. Bragg is exemplified by the following colloquy:

> MR. MAYER: Your Honor, I would just, for the record, note that I have the same objection to the use of the State of Texas Input-output study as I have to the $20 AAPA figure on the same grounds and I am assuming that you will rule the same way on it but I do not want my objection to be in the record on that.
>
> JUDGE LEVY: Well, Mr. Mayer, I understand your concern. And it's a concern to me because these are premises which this witness used that are not subject to proper cross-examination to determine the validity of it because you can't get back to the basis for it. As I said before, I am going to allow it, but it's going to the weight of how much reliance we can put on the basic premises without being able to properly evaluate them. You may continue, if you will.[131]

In any event, whatever the validity of the premises and conclusions of the witness regarding the economic impact on the Houston community of a ton of container cargo moving across the wharves, he did not make any similar study of the economic impact on the Houston community of a ton of container cargo moving through the rail terminal in the joint rail/water service [132] though admitting there was an impact.[133] To the extent that a ton of container cargo moving through the rail terminal has an economic impact such impact serves to soften the economic loss to the Houston community of cargo which might otherwise move in the all water service.[134] If the impact of a ton of cargo moving through the rail terminal is equal to the impact of a ton of cargo moving across the wharves the net economic impact on the Houston community would be the same whether the cargo moved through the rail terminal or across the wharves. If anything, the record herein indicates that the joint rail/water service serves to stimulate commerce by offering certain advantages to the shipper.[135] Cargo moves in the foreign commerce of the United States whether by an all-water service or by a joint rail/water service. To the degree that joint rail/water service stimulates commerce it may actually result in increased cargo movements. Certainly no less tonnage will move by reason of the joint rail/water service.

Professor of International Economics Flammang, sponsored by the Port of New Orleans, on cross-examination, testified: " . . . basically my statement [Exhibit 7] says I think that foreign trade is very important to the State of Louisiana and its growth and that [of] the ports of Louisiana are very important to the growth of the State of Louisiana on a historic basis and probably for the foreseeable future."[136]

Asked, "what is your understanding of the joint rail-water service being challenged by ports here?" Professor Flammang replied, "I don't know anything about it. Q. Nothing at all? A. Not really."[137]

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131 Tr. 453.

132 Tr. 460, 483.

133 Tr. 470; 473–474.

134 Tr. 461. Although the Gulf ports have asserted loss of jobs in the ports caused by the loss of volume siphoned off by the joint rail/water service no witness could substantiate this. See Tr. 521–33, 584–85; also 1092 (stipulation).

135 Exs. 11, 11a.

136 Tr. p. 99.

137 Tr. 99–100.

Professor Flammang also testified that the Port of New Orleans is especially important as a conduit for a majority of Louisiana's exports of manufactured goods and agricultural as well.[138]

There is no serious dispute that the Port of New Orleans plays an important part in the commerce of Louisiana and even beyond. There is serious dispute whether the joint rail/water service in issue here seriously jeopardizes the commerce of the Port and of Louisiana or areas beyond. Certainly Professor Flammang did not assert that such service jeopardizes the commerce of the Port or of Louisiana. In fact Professor Flammang knew nothing about the service or its impact. This raises the question whether, if such service were a serious threat to the area's international commerce and economic well-being, an expert on Louisiana's foreign trade would be unaware of such threat?

We may reasonably conclude that the joint rail/water service does not jeopardize the international commerce of Louisiana. The reason being that the commerce flows out of or into Louisiana whether moved through the Port by all-water service or moved through Charleston via the joint rail/water service.

A further factor which cannot be overlooked in determining the impact of the joint rail/water service on the maritime commerce of the United States is that whatever the economic impact this service may have on the Gulf Ports there must of necessity be a counterbalancing impact on the Port of Charleston.[139] Thus, if viewed from a national point of view, as this Commission by statute must, rather than a sectional point of view, the economic impact of a joint rail/water service is balanced.

NATURAL TRIBUTARY AREAS

Complainants seek to have the joint rail/water service found to violate section 8 of the Merchant Marine Act, 1920. On the issue raised in this proceeding, section 8 states in pertinent part:

> Sec. 8. That it shall be the duty of the board [now the FMC], in cooperation with the Secretary of War, with the object of pomoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce;*** and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports.[140]

The Commission in Intermodal Service to Portland, Oregon, Docket 7019, mimeo p. 40, 14 SRR 107, 132 (October 29, 1973), interpreted the function of section 8 as follows:

> Moreover, as observed by the Court of Appeals for the Fifth Circuit in *Port of New York Authority v. Federal Maritime Commission*, 429 F.2d, *supra* at 670, section 8 is only a statement of congressional policy *** to be given weight by the Commission *** It does not, like section 205, Merchant Marine Act, 1936, for example, proscribe any particular conduct.

It is clear, therefore, that section 8 cannot operate as a statute which confers

[138] Tr., 101–102.

[139] Tr. 470. To this end it is noted that the Port of Houston and Seatrain stipulated that "to the extent that the same amount of cargo would move through the Port of Charleston, that a similar number of [longshoreman] man-hours and similar amounts of wages would be paid." The West Gulf and the South Atlantic are in the same I.L.A. district and have the same contract. Tr. 1092.

[140] This has commonly been expressed as the concept of naturally tributary cargo.

any substantive rights on the complainants. Nevertheless, a consideration of the concept of naturally tributary cargo and its application to the issues raised in this proceeding is necessary for a proper understanding of the role of joint rail/water service in the maritime commerce of the United States.

The question of what constitutes a port's natural tributary area is in large measure similar to the question which came first, the chicken or the egg. Mr. Vianna, the expert witness on natural tributary areas, sponsored by the Gulf ports, defined it as the geographic area within the United States which has historically depended on the port for services. He continued, "In defining the natural tributary area of the Port, then, the question is *not* how important is that area to the Port's cargo movement but rather, how important is the port relative to all shipments to or from the area in question."[141]

If this definition is adapted to its logical conclusion it would mean that once an area ships its first cargo and that first cargo goes through a given port, by definition that port at that moment becomes the most important port relative to all shipments [one] from the area in question. As such, the area—by the witness' definition—becomes naturally tributary to the port. When the second cargo is ready for shipment it must go to the port on which the area has historically depended—that is, the port through which its previous cargo has moved. Thus even though new ports may come into being, though new facilities may be available at other ports, though new modes of transportation may become available whereby other ports may thence be utilized, no cargo may be shipped except through the historic port to which by the witness' concept it is naturally tributary. This concept ignores developing technology, even if such technology were to result in serving shippers faster, better, or at lower cost.

In determining whether cargo is or should be denominated naturally tributary to a particular port a number of obvious questions present themselves, and which, it seems, must be answered in the affirmative to sustain a holding of naturally tributary cargo.

Are the cargo's origin or destination geographically proximate to that port? In what way is the flow of cargo through that particular port in the public interest? What economic factors bind cargo inextricably to a particular port?

None of the complaining ports was able to establish that cargo moving in the joint rail/water service originated in or was destined for areas so geographically proximate to the port as to be susceptible of objective delineation, *i.e.*, a radius within which the cargo can *ipso facto* be denominated naturally tributary.[142]

None of the complaining ports were able to establish that the flow of cargo through that particular port was in the public interest either because the port's financial stability would otherwise be jeopardized, or that unemployment of a serious or substantial nature would occur in that port by reason of the existence of the joint rail/water service or that the port area's economy would be seriously or

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[141] Exhibit 6a, p. 1. The Vianna Study on naturally tributary cargo, oriented to origination of cargo and destination by state via specified port, is based on 1970 data which is the latest year in which that particular type of data has been accumulated. Containerized cargo movements through Gulf ports in 1970 were minimal; the overwhelming volume of general cargo was break-bulk. Cargo flows in the study must be construed in that context.

[142] Late-field Ex. 15c estimates cargo originating in or destined for Texas. This cargo is not necessarily that carried in the joint rail/water service nor was such Texas cargo claimed as naturally tributary to any specific port. None of the 1,998 containers that moved *through* Galveston *in* 1973 to the UK/Europe could be identified as specifically having originated at a Texas point or were destined to a Texas point. Tr. 702–3.

substantially harmed by reason of the existence of the joint rail/water service.[143]

There is no evidence in this record respecting what economic factors bind cargo inextricably to a particular port. To assert that a service is unreasonble or unjust or unduly prejudicial is insufficient; facts establishing the assertion are required to make such a finding. This record is devoid of economic facts which show that certain cargo is so naturally tributary as to be bound to a particular port and that the public interest would be circumvented if that cargo did not flow through a particular port.

The great advantage of the container is its flexibility. From this stems its greatest utilization—intermodality.

Enabling statutes were conceived before there was any intermodal capability. The legislative history of those statutes does not concern itself with the problems of containerization and intermodality. It is inconceivable that the Congress should have intended to stifle development of maritime commerce if such development were to result in innovations whereby shippers would be offered alternative services and which could result in faster, better or lower cost transportation.[144] Whether intermodality and joint rail/water service offers faster, better or lower cost transportation—as its backers believe—or whether it will change historic traffic patterns to the detriment of present beneficiaries [albeit to the benefit of present non-beneficiaries] as the Gulf ports contend—is presently an open question since the development is in its infancy. But the important thing is that it gives shippers a viable alternative. A choice. As the competing services and competing ports vie for the shippers' consideration they will each strive to improve their attractiveness. This must necessarily redound to the benefit of the shipper, the maritime commerce of the United States and, in the largest and best sense, to the benefit of the public interest. All within the meaning and context of the Shipping Acts.

Intermodality and the joint rail/water service are the logical extensions of the containerization revolution. In order to fully develop this transportation concept "it is imperative that containership cargo be accumulated, through the use of feeder services, in as few of the larger ports as reasonably possible, thus minimizing containership time in port and enhancing frequency and regularity of service. Only through the utilization of load centers can containerships realize their true productive potential. Inevitably, a territory which has been naturally tributary to a port for break-bulk services will not be tributary for full container-

[143] The economic aspects and impact of the joint rail/water service were previously discussed in detail in the section ECONOMIC FACTORS.

[144] The Commission has aptly put it thusly: We have always striven to administer our regulatory authority in a manner most conducive to the development of the full potential of newly emerging transportation phenomena. *Intermodal Service to Portland, Oregon*, Docket No. 70–19, mimeo p. 34, 14 SRR 107, 128 (October 29, 1973). Similarly in *Disposition of Container Marine Lines*, 11 F.M.C. 476, 489 (1968), the Commission stated: In fact the Federal Maritime Commission can and must play an important role in encouraging improved services for shippers. As was said in the Order of Investigation, the Commission does not intend to create or permit impediments to the improvement of shipping services. Enlightened regulation is the key to effective regulation: no regulatory agency can permit regulation to be outstripped by new techniques in the industry. Progressive regulation is required in the interest of encouraging the modernization of shipping services. Outmoded principles and rules will surely stifle advancements in all fields, and especially transportation where developments have followed so quickly upon each other.

It is indisputable, therefore, that the Federal Maritime Commission must assume a flexible posture and must view broadly, when necessary, its regulatory purposes and governing laws and rules.

See also dissenting opinion: We are now entering an era in transportation when concepts such as "naturally tributary" may no longer suit the needs of transportation. The Commission should make it clear that these concepts cannot prevail if they prevent substantial benefits from inuring to the shipping public or obstruct innovative action in transportation. *Overland & OCP Rates & Absorptions*, 12 F.M.C. 184, 232 (1969).

ship services."[145] Joint rail/water service enables full containership operators to minimize shuttling expensive ships back and forth between ports, and at the same time enables the handling of containers over a broad, geographical range.[146] This method of operating comports with the innovative nature of containerized shipping. If containership operators are able to utilize joint rail/water service in serving shippers, containerized shipping will develop to its full potential. To prevent this and require rigidity based on outmoded transportation concepts will stifle intermodal advances in ocean transportation to the detriment of the maritime commerce of the United States and would be contrary to the public interest.

In determining a definition of natural tributary cargo the ports' expert witness, Mr. Vianna, was asked:

Q. Did you analyze any of the decisions of the Federal Maritime Commission in determining what the legal definition of naturally tributary cargo was?

A. Not to any extent. I did read over excerpts of the *Portland* case. I don't know the number of it. From my understanding of these excerpts I could not find a very rigorous explicit definition of what is naturally tributary based strictly on the data on domestic origin and destination. So they couldn't use this particular approach.

Q. The excerpts were supplied by counsel?

A. Yes, Mr. Perry.[147]

Thus it is clear, that whatever the Commission's concept of "naturally tributary cargo" is it is not the concept utilized by the witness—that is, a definition based on data on domestic origin and destination.

Let there be no misunderstanding regarding the Commission's conception of the term "naturally tributary" as utilized in *Portland.*[148] Recognizing that it was faced with the issue of the extent to which the peculiar features of large, highly specialized containerships should alter the criteria which the Commission had evolved for examining the lawfulness of practices under which carriers serve ports without making direct calls, the Commission in *Portland* continued:

In determining the validity of such practices, we of course recognize our regulatory obligation to be flexible in adopting our procedures to new developments in the transportation art. As the Supreme Court has observed:

> . . . this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of law and of fair and prudent administration, to adopt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.[149]

The concept of naturally tributary cargo has as its purpose the maintenance of the movement of cargo through those ports which, because of a combination of geographic, commercial, and economic considerations, would naturally serve such cargo. *See, e.g., Stockton Port District v. Pacific Westbound Conference*, 9 F.M.C. 12 (1965), aff'd *sub nom., Stockton Port District v. Federal Maritime Commission*, 369 F. 2d 380 (9th Cir. 1966), *cert. den.* 386 U.S. 1031 (1967); *Sea-Land Service, Inc. v. South Atlantic and Caribbean Line, Inc.*, 9 F.M.C. 338 (1966); *Pacific Coast*

[145] Initial Decision, served October 5, 1970, in Docket No. 70-24, *Agreement No. 9835-Japanese Lines' Pacific Northwest Containerships Service Agreement*, 11 SRR 994; ultimate conclusions adopted by the Commission, 14 F.M.C. 203 (1971).

[146] Ex. 18, p. 7.

[147] Tr. 84-85.

[148] *Intermodal Service to Portland, Oregon*, Docket No. 70-19, mimeo p. 27 et seq., 14 SRR 107, 124 et seq. (1973).

[149] *American Trucking Association, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1957).

European Conference–Rules 10 and 12, 14 F.M.C. 266, 285–288 (1971). It cannot rationally be applied, and has in fact been specifically rejected, in a situation in which the cargo for which ports compete is destined for or moving to the central United States, *i.e.*, OCP/overland cargo. As we observed in *Investigation of Overland/OCP Rates and Absorptions, supra*. "The naturally tributary concept based upon section 8 of the 1920 Act has to do with the territory *locally* tributary to a particular port; not with the general territory which an entire range of ports, or more than one range or seaboard, may serve competitively." (at 224).[150] The Court of Appeals for the Fifth Circuit affirmed this approach to the "naturally tributary" concept, stating " . . . we are not prepared to hold that the midwestern portion of the United States is naturally tributary to petitioner ports. No authority has been called to our attention which would extend the natural tributary scope of §8 to such limits." *Port of New York Authority v. Federal Maritime Commission*. 429 F. 2d, *supra*, at 670.

The Commission further stated:

. . . we have applied the naturally tributary concept to containerized cargo in the past and would continue to do so here were only local cargo involved. But, as shown by the *OCP* case, *supra*, the concept has no materiality to cargo moving to or from the central United States. Such cargo cannot be said to move "naturally" through any particular ocean gateway. The problem with respect to such cargoes is not one of determining through which gateway they would naturally move, but rather one of attempting to define the extent to which carriers may adopt various practices designed to enable them to compete for these cargoes. (Mimeo, p. 31; 14 SRR 127).

In this regard, the testimony of Mr. Perry, consultant to the Port of New Orleans and General Manager of the New Orleans Traffic and Transportation Bureau, intervenor herein, is particularly pertinent:

Q. Of the containerized cargo in the foreign trade that moved from New Orleans or across the wharves of the Board of Commissioners of the Port of New Orleans to Europe and the United Kingdom, do you know how much of the 375,246 tons originated within the local port area of New Orleans? And by local use a radius of 50 miles, if you will.

A. No, but I have an opinion.

Q. What is your opinion, Mr. Perry?

A. I believe that dealing with the fact that you—that Europe and the United Kingdom have opened foreign quite a bit we have experienced a growth in '72 and '73. A substantial volume of this was from approximately a 350-mile range of New Orleans and perhaps to some extent beyond that. But I doubt very seriously if it was within close proximity to New Orleans as within 100 miles, say, being close proximity.

Q. You think most of it was in excess of 100 miles from New Orleans?

A. Yes, I do.

* * *

JUDGE LEVY: Since you are—you were talking about cargo originating. You are talking about cargo ultimately destined. That's what I am trying to say.

Q. Did you mean destined?

A. I did indeed. Originating and destined.

Q. If someone were to pick up that number, what is it? 100 miles from New Orleans, 200 miles?

A. I stated that my range at that point in time would be in the vicinity of 300 miles.

Q. 300 miles or more?

A. Uh-huh. With the substantial part of the increase.[151]

Thus, whatever the merits of the Port's contention, the bulk of the cargo complained of as being carried, or which could be carried in the joint rail/water service, originates in or is destined for areas distant from New Orleans and should not be denominated local cargo.

[150] *See also, Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 699, 703 (1943).

[151] Tr., pp. 142-143.

Insofar as the historical movement of cargo is concerned, Mr. Vianna's study is based on 1970 movements, the latest figures available at the time of the study. In 1970, however, container movements in the Gulf/U.K. and Continent trade were not included in the Department of Commerce's issue of a compilation entitled "Foreign Ocean Borne Trade of the United States, Containerized Cargo on Selected Trade Routes."[152] The report states that it is "designed to cover those trade areas which have the highest concentration of container shipping. The Gulf-U.K. and Continent are not included in the issue concerning the 1970 year." Statistics for the Gulf-U.K. and Continent were not included until 1972.[153] It would thus appear that whatever validity Mr. Vianna's historical flow concept has it was not based on any historical flow of appreciable amounts of container cargo in the Gulf-U.K. and Continent trade. Whatever history container cargo flow has is of recent origin and, to a degree, that history includes the history of the joint rail/water movement.

Seatrain's witness, Mr. Flitter, disputes the Vianna theory of "history" in determining naturally tributary cargo.[154] Mr. Flitter is of the view that "History has no bearing." He admits that geographic proximity may well be a factor in determining naturally tributary cargo but inland mileage rates are also a factor. He points out that the advent of FAK railroad rates between inland points and North Atlantic ports was a tremendous stimulant in funneling container cargo to North Atlantic ports. Thus inland mileage rates were a strong determinant in establishing cargo flow. It is his contention that the growth and development of containerization has radically changed the entire concept of naturally tributary cargo. Old concepts of naturally tributary cargo are practically outmoded, inasmuch as containerization can change cargo flow in accordance with changing economic factors rather than historic factors.[155]

From the foregoing there emerges the proposition that the Commission does not conceive of cargo being "captive" to a port whether it be denominated "naturally tributary cargo" or otherwise.[156] A combination of factors always enter into consideration of whether cargo may lawfully pass through one port as distinguished from its claimed passage through another. The ultimate determination of what is the public interest involves a balancing of these various factors. Economic soundness is a factor which heavily weighs in favor of allowing cargo to flow through either of competing ports as being in the public interest.

As the Commission succinctly put it: "The problem with respect to such cargoes is not one of determining through which gateway they would naturally move, but rather one of attempting to define the extent to which carriers may adopt various practices designed to enable them to compete for these cargoes."[157]

In considering the historic flow of cargo which becomes denominated naturally tributary it must be remembered that various factors have contributed to

[152] Ex. 20.

[153] Ex. 21.

[154] Tr. 986–89.

[155] Ex. 18, pp. 13–14.

[156] A contrary position is taken by Houston witness, C.E. Strange. Tr. 634–636.

[157] *Intermodal Service to Portland, Oregon*, Docket No. 70–19, mimeo p. 31, 14 SRR 107, 127 (1973).

such flow; for example, the location of the shipper, the frequency of service he requires; the in-land rate structure; the in-land transportation network. Undoubtedly other specific factors have influenced specific shippers of specific cargoes at specific times.

Mr. Strange, General Manager of Houston Port Bureau, Inc., testifying on cargo naturally tributary to Houston,[158] stated that from a shipper's point of view, in determining natural flow, you simply look to the service available from the port to the foreign country and determine your total transportation costs. He said, "economics dictate to that shipper's transportation manager to make the best profit for his company."[159] Inventory needs in the foreign country and frequency of service are also factors for the shipper's consideration.

Analysis of this testimony indicates that a shipper's concept of naturally tributary cargo is, "How do I get my cargo from my plant to my consignee in the cheapest, fastest and easiest manner?" A shipper is not primarily concerned with whether his cargo moves all-water or by joint rail-water or whether it goes across the wharves of Port H. or Port C. It would be unreasonable, and not in the public interest, to preclude a shipper from having a choice of alternative services whereby he could make an economic judgment of how "to make the best profit for his company." If the respondent were the only carrier offering container service from the Gulf to the U.K. and Northern Europe its decision whether to call it a particular port or ports would deprive a shipper of the ability to reach an economic judgment of how "to make the best profit for his company." He would simply have to utilize that carrier's port of call and that carrier's frequency of service. If, on the other hand, as is the actual case, a number of carriers offer container service from the Gulf to the U.K. and the Northern Europe, then the shipper has the capability of reaching an economic judgment of how "to make the best profit for his company." The shipper is not dependent on a single port of exit or entry, a single frequency of service. He can freely determine which offered service it is in his best interest to utilize. The total costs of transportation, frequency of service, service, and each and every other factor with which he is concerned can be analyzed and a weighted judgment reached. To the extent that any factor is precluded, to that extent his judgment is boxed in to a predetermined result. If ports, as well as carriers, are obliged to compete, not in cost but in service, then the competition must necessarily redound in improved service and increased benefit to the shipper and to the public interest. If ports direct their efforts to attracting shippers and carriers by increased facilities and service, by eliminating traffic congestion, by increased security, in short by making it desirable to utilize that particular port, then the public interest as well as the port's is advanced and enhanced. If, on the other hand, a port's interest is protected so that competition and alternative services are eliminated, the port may temporarily benefit, but the shipper and the public interest in the largest, best and purest sense of the term will surely suffer.

The Commission has stated that carriers and consignees also have interests which the Commission must strive to protect and that "the public interest is

[158] Tr. 534–538.

[159] Tr. 537.

much larger than the needs or desires [of a particular port area.]''[160] It is unlikely that the Congress, representing all of the people, intended to construe the public interest as the port's interest. What is good for the port may or may not be good for the public. But what is good for the public is certainly good for the maritime commerce of the United States.

The Shipping Act was never intended to eliminate competition. It was intended to eliminate destructive competiton. Competition which benefits a shipper by offering alternatives cannot be said to be destructive. To eliminate the alternative would be a destructive act.

It is found that the joint rail/water service does not preclude the development of the Gulf ports and taking into consideration the economies of transportation and the natural direction of the flow of commerce such service is not detrimental to the commerce of the United States and such service is in the public interest.

ABSORPTIONS

The complainant Ports allege that the joint rail/water service is an unlawful absorption of inland transportation costs by Seatrain.

The joint rail/water tariff provides that the shipper is to pay the water carrier the full transportation cost, as a matter of convenience, and the water carrier is then to pay over to the railroad its divisional share of the revenue. The railroad payments are made on a divisional basis in accordance with the tariff on file with both the ICC and FMC.[161]

The joint rail/water service is in many respects similar to the overland/OCP rate system which this Commission has approved.[162] *See, Port of New York Authority v. Federal Maritime Commission*, 429 F. 2d 633 (5th Cir. 1973), *cert. denied*, 401 U.S. 909 (1971). *See also, Pacific Westbound Conference v. Federal Maritime Commission*, 440 F. 2d 1303 (5th Cir. 1971), *cert. denied*, 404 U.S. 881 (1971). *Board of Commissioners, Port of New Orleans v. Federal Maritime Commission*, 404 F. 2d 1312 (5th Cir. 1971). In the overland/OCP cases, the Commission concluded that the practice of combined usage of rail and water carriers to move cargo in international trade did not violate sections 16 and 17 of Shipping Act, 1916. The Commission found that this practice was designed to meet and foster competition and was not unlawful. *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, 187 (1969); aff'd 429 F. 2d 633 (5th Cir. 1973).

Although the joint rail/water service is similar to the rail/water transportation system known as the overland/ OCP rate system, it has several innovative features which increase its flexibility. Instead of two tariffs and two bills of lading as required in the overland/OCP system, joint rail/water service involves a single tariff and a single through bill of lading.[163] If offers a simplified service for

[160] *Intermodal Service to Portland, Oregon*, Docket No. 70–19, mimeo p. 39 (October 29, 1973), 14 SRR 107, 131. *See also Stockton Port District v. Pacific Westbound Conference*, 9 F.M.C. 12, 28 (1965).

[161] Ex. 18, pp. 3–4; Tr. 560; 602–03; 969–70.

[162] Overland/OCP rates are ocean or water rates covering only the water portion of the freight movement. The rail counterpart of these rates are the export/import rates filed by the railroads and approved by the Interstate Commerce Commission.

[163] The Seatrain specimen bill of lading, required to be filed as part of the tariff, provides for joint responsibility for the goods being shipped.

shippers and provides for payment to one of the participants in the joint service, usually the water carrier, who acts as a conduit for railroad revenue, thereby enabling the shipper to make one payment for rail and water freight charges. As such, the joint through service represents a true joint rate situation.

In a joint rail/water service, the divisions to be paid to each carrier are not in themselves illegal nor can they be deemed to be absorptions unless it can be established that one carrier is paying another carrier for services which the first carrier is obligated to perform and which the second carrier is not obligated to perform. In all cases where the Commission has forbidden absorptions, equalizations, or proportional rate practices the carrier has assumed costs which the shipper otherwise would have borne. In no case has the Commission found such alleged practices to be improper where the carrier has not assumed any costs which would otherwise be borne by shippers. *See Pacific Coast Equalization Rule*, 7 F.M.C. 623 (1963), aff'd sub nom. *American Export Isbrandtsen Lines v. Federal Maritime Commission*, 334 F. 2d 185 (9th Cir. 1964); *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, aff'd sub nom. *Port of New York Auth. v. Federal Maritime Com'n.*, 429 F. 2d 663 (5th Cir. 1970), cert. den. 401 U.S. 909 (1971). There is no evidence in this record of inland freight costs being paid by a water carrier or a railroad that should be for the account of the shipper.[164] Even so, Mr. Doyle G. Owens, Traffic Manager/Sales, for the Port of Beaumont, contended that an absorption exists whenever a carrier's division of the joint rail/water charge is less than the carrier's local rate.[165] The same witness, antithetically, does not consider a railroad export rate to be an absorption even though it is lower than the railroad's local rate.[166] Ultimately, the witness rationalized the contradiction by explaining that in one case there was a diversion from a port and there was no diversion in the other case. Thus, absorption is not really absorption but diversion. And diversion really is the practice complained of. The issue of the course is whether there is a diversion, and if so, whether it is unlawful.

The cases relied upon by the complainants do not support their position. In each case cited, the practice held to violate the Shipping Act involved diversions of cargo by the device of absorption by a water carrier of a shipper's overland transportation costs. In this proceeding, it has already been shown that the shipper pays the full transportation cost, and the participating carriers then split the revenue on the basis of the divisions contained in their filed joint rail/water tariff. There has been no supportable contention in this case that Seatrain absorbs inland freight charges.

The *Portland* decision is not supportive of the complainants' position. That case dealt with inland absorptions by water carriers while joint rail/water service is a true joint rate, though route service not involving absorption of inland costs. The Commission in *Portland* made it clear that the practices there in question, including the ocean carrier paying the freight charges for the inland transportation of cargo from Portland to Seattle (absorption), were different than those involved in joint through service. The Commission stated:

[164] Tr. 680.

[165] Tr. 746.

[166] Tr. 747–48.

. . . *our regulation with respect to the filing* of through routes and through rates was not intended to apply to a service like that under consideration. Mimeo p. 46; 14 SRR at 136.

[The concept of naturally tributary cargo] cannot rationally be applied, and has in fact been specifically rejected, in a situation in which the cargo for which ports compete is destined for or moving to the central United States, i.e. OCP/overland cargo. As we observed in *Investigation of Overland/OCP Rates and Absorptions, supra,* "The naturally tributary concept based upon section 8 of the 1920 Act has to do with the territory *locally* tributary to a particular port; not with the general territory which an entire range of ports, or more than one range or seaboard may serve competitively." (Mimeo p. 28; 14 SRR at 125).

Complainants also rely on *City of Mobile v. Baltimore Insular Line, Inc.* 2 U.S.M.C. 474 (1941). Again, the case simply is not supportive of their position. In that case the Commission's predecessor agency prohibited a conference practice in the U.S./Puerto Rico trade which permitted unlimited equalization between all U.S. Atlantic and Gulf Ports.

Given the unqualified and unjustified nature of the conference's equalization absorption practices in *City of Mobile,* the relative length of the overland and ocean portions of the total movement therein, the different statutory basis for judging domestic tariffs, and the vast changes in transportation techniques since the ruling of *City of Mobile,* this case in no way should be deemed a precedent to be applied in this proceeding.

The Commission's decision in *Sea-Land Service, Inc. v. South Atlantic Caribbean Line, Inc.,* 9 F.M.C. 338 (1966), cited by complainants, does not change this result. The service of the respondent water carrier in that proceeding involved the absorption of freight charges between Jacksonville and Miami, Florida, on substantial amounts of cargo destined for Puerto Rico. The water carrier continued to show Jacksonville as one of its terminal ports, with ocean rates between Jacksonville and San Juan identical with those between Miami and San Juan, yet when goods arrived overland to Jacksonville through substituted service, they were reloaded and sent by rail and truck to Miami, with the water carrier, for the most part, paying an extra amount for the substituted service to the land carrier.

There is no similarity between the service in *Sea-Land* and the joint rail/water service. No "extra" amount is being paid to the railroads in the joint rail/water service; they receive only the division expressed in the ICC and FMC approved tariffs. The joint service is not a "substitute service"; Seatrain does not hold out an all-water service and then perform part of that service by substitute truck service. The rail/water service in issue in this proceeding is the service provided without any deviations from the published tariffs on file at the FMC and the ICC. The record is devoid of any payment by Seatrain of any expenses attributable to the shipper or to the railroad.

In a joint rail/water service the obligations of each carrier mode are clear—to transport the goods between given points. And this performance is not an absorption even if the division between the carriers is not based on a precise cost-of-service formula. The division is a matter of contractual agreement between the modes, subject to approval by the regulatory agency having appropriate jurisdiction, and neither mode pays the other to perform services which the first mode is obligated to perform. Accordingly, it is concluded that Seatrain's participation in the joint rail/water service and the division between Seatrain and the railroads does not constitute an illegal diversion or absorption practice.

Although the Gulf ports in these proceedings oppose the joint rail/water service via Charleston they do not oppose similar services from the West Coast via Gulf ports to Europe or Gulf/Far East joint rail/water service.[167] Apparently the basis for opposition or non-opposition is that the Gulf ports consider the Charleston service to be a diversion whereas they do not consider the others which benefit the Gulf ports as ports of entry or departure as diversions. However, there appears to be no substantive difference in the tariffs for the Gulf/Far East joint rail/water service which the Gulf ports favor and the Gulf/Europe joint rail/water service which they oppose and the testimony reveals no rational basis for concluding one service is a diversion and the other is not.[168]

The complainant ports allege that Seatrain's rates are non-compensatory. The record, however, establishes that Seatrain's share of the joint service revenues is substantially equal to its gross revenue for direct water service from Charleston on a per box basis.[169] As its division share, during the period from October 1973 when the joint rail/water service became operational, to July 1974, Seatrain's net revenue per container increased substantially. The net to vessel per container in the joint rail/water service is $1,341.00;[170] in an all-water service $1,370.00.[171]

The ports introduced no evidence on whether Seatrain's revenues bore a reasonable relationship to costs. Absent evidence on cost or expenses, allegations of non-compensatory rates cannot be upheld. The Commission in *Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade,* 11 F.M.C. 168 (1967), held that rates are compensatory if they exceed out-of-pocket expenses. Any finding that Seatrain's share of the division is less than its out-of-pocket expenses and therefore non-compensatory simply cannot be supported on this record.

Seatrain's minimum rate provisions of the joint rail/water tariffs have been increased in some instances. The effect of these increasing charges is to keep them competitive with all-water service from the Gulf ports.[172] The tariff itself is the basis for concluding that the service does not discriminate nor contain prejudicial or unreasonable rates.

CONCLUSIONS

In line with the Supreme Court's directive in *American Trucking Association, Inc. v. Atchison, Topeka & Santa Fe Railway Co.,* 387 U.S. 397, 416 (1967), an

[167] Exs 11, 11a; Tr 183–187, 204.

[168] Tr 184 et seq —see particularly 199–201 for position that no diversion is inherent in a joint rail/water service from Oakland, California, to Europe via Port of New Orleans See also fn. 55, *supra*.

[169] Exs 18c, 18c—added, 18i, Tr. 1057

[170] See additional Exhibits 18c, 18d, 18e and 18r For the latest period which figures are available—July 1974 for containers from or to the rail terminals in New Orleans, Houston and Beaumont and June 1974 from Galveston—a total of 468 containers were carried by Seatrain whose net revenue share was $627,713 $627,713 + 468 = $1,341 net to vessel in the joint rail/water service.

[171] Exhibit 18i. This is based on container net to vessel from Charleston in regular all-water non-intermodal service One would expect the joint rail/water containers to return substantially less but the evidence does not support any such conclusion. In considering the longer voyage distances and time involved in a Gulf-Europe service compared with the Charleston-Europe service the greater total carrying capacity potential by reason of the shorter voyage weigh heavily in favor of a potentially increased total net to vessle from containers in the joint rail/water service than would be realizable from an all-water service to/from the Gulf even if the samples utilized in added Exhibits 18c, d and e and 18i contain variable error because of small size of the sample.

[172] Exs. 18c, 18j

approach of dynamic realism is required. To this end, in *Japan Line, Ltd. v. I.C.C.* and *N.Y.K. Lines, Inc. v. ICC,* Nos. C–74–1511 SC and C–74–2029 SC, USDC No. Calif., January 22, 1975, in a case involving intermodal transportation services the court found that the ocean carriers "implemented programs which permit their customers to realize significant savings in transit time, freight charges, documentation costs, and insurance losses, when shipping goods from Japan to Chicago via inter-connecting transportation services." In concluding that such programs did not thereby convert the carriers into Part IV freight forwarder subject to ICC jurisdiction the court, citing *American Trucking Association,* said "In closing we note that plaintiffs' services will provide a vital improvement to intermodal transportation service without any added expense to shippers and that not burdening plaintiffs with the complexities of regulation by two separate federal agencies advances the Supreme Court's determination that 'encouragement of [intermodal] coordination is in the public interests."

This nation's growth is vibrant proof that, as a people, we have not been afraid of innovation. It would strain the interpretation of the Shipping Acts beyond credulity to conclude that they require the Federal Maritime Commission to destroy and prevent a significantly innovative development in the maritime commerce of the United States[173] which redounds to the benefit of the shipper [i.e., the consumer—in that the consumer utilizing the goods which move in commerce ultimately absorbs the cost]. Not only does the innovative service redound to the benefit of the shipper but on this record no significant detriment can be shown to redound to the ports.

What we have here is a new, additional and innovative service at rates roughly comparable to an all-water service. The public interest and the economy as a whole is enhanced anytime the public is offered an additional service which it may or may not utilize at its own discretion.

The tide of events by which new and efficient operating modes come into existence cannot be held back by the dead hand of outmoded conventions. Even if we were to try to do so we would be doomed to failure. The public interest cannot be perverted by precluding the utilization of more economically efficient and effective transportation modes and services.[174] And nowhere in the statutes can there be found any language which would lend credence to a doctrine of economic inversion. Like Lot's wife, we would find looking back a fatal act. Our economy cannot afford additional shackles.

There is no specific evidence that any particular cargo which moved in the joint rail/water service had previously moved in direct water service from/to any particular Gulf port and would have continued to do so but for the new service. No shipper testified that cargo moving by the joint service would otherwise have moved through any specific port. All testimony to this effect was conjecture. By any standard of burden of proof the complainants have failed. Surely if com-

[173] The Commission has stated that "we have always striven to administer our regulatory authority in a manner most conducive to the development of the full potential of newly emerging transportation phenomena." *Intermodal Service to Portland, Oregon,* Docket No. 70–19, Mimeo. p. 34, 14 SRR 107, 128 (October 29, 1973).

[174] Anything which impedes a free choice among constantly changing alternatives provided by technical changes in traffic and transportation methods is a deteriment to commerce in the long run. *Swift & Co., v. Gulf and South Atl., Havana Conf.,* 6 F.M.B. 215, 226 (1961).

plainants' theory of diversion had any substance they should have been able to introduce some tangible evidence in support thereof.

Nothing in this record indicates any death blow or even serious detriment to any port where the joint service is offered in competition to an all-water service. What specific evidence there is in this proceeding shows that the amount of minibridge tonnage in relation to total port tonnage is in every case minuscule. The amount of minibridge tonnage in relation to containerized tonnage in all trades in each port is minuscule. The amount of minibridge tonnage in relation to containerized tonnage in the particular trade wherein the joint service is offered is minuscule. The record in this case shows that less than 1 percent of all the cargo moving out of these ports is moved by rail/water service and such service should, therefore, constitute no threat to investments in port facilities. It must be concluded that the competition between direct water service at complaining Ports and the joint rail/water service now and for the foreseeable future comprises such a small fraction of port tonnage that the joint rail/water service does not constitute any unjust or undue discrimination against the Ports.

Even if the joint rail/water service were to multiply many times over the tonnage presently involved, in comparison to total port activities it would still remain a comparatively small fraction. And even if the growth were so great, and even if the service expanded into the other trades to the point where the impact on the ports became substantial we would then have to ask ourselves why has this come about? Would it have been caused by any unconscionable, unscrupulous, underhanded, undercutting competitive methods or because a better mousetrap has been fashioned? On this record there is no showing of any unconscionable, unscrupulous, underhanded, undercutting competitive method.

Whether the all-water service through the Port of New Orleans or the joint rail/water service is superior is a matter in dispute. Mr. Perry, for the Port of New Orleans, was of the opinion that the service through the Port was superior and that the joint rail/water service performed no useful purpose.[175] Asked why, if the Port service was superior, would a shipper select the joint rail/water service, Mr. Perry answered:

> Well, we keep telling the shipper but we continue to lose some service because of it. I think it's best that we rid ourselves of the situation I think that's the best answer.[176]

In determining the quality of the service, joint rail/water versus all-water service, from the shippers' point of view, the various factors to be weighed are costs of one service compared to the other; time of transit; damage potential; frequency of service; availablity (capacity).[177]

Seatrain contends that when shippers are given a choice of all-water or joint rail/water, the greater service frequency and shorter transit time, coupled with the single bill of lading and single rate, at no greater cost, make the intermodal joint service uniquely attractive to shippers. It is additionally attractive because it combines simplicity of documentation, easy ascertainment, of total transit charges with single bookkeeping and insurance entries. In addition, the shipper need look only to a single carrier regarding damage claims; the carriers will

[175] Tr 156

[176] Tr 157.

[177] Tr. 408-13.

ascertain liability as between themselves.[178]

The complainants cannot expect the Commission to find that the public interest is served by concluding that the all-water service is superior and banning the inferior service if shippers have the choice, use the joint rail/water service because in their opinion it serves their interest better than the all-water service. If they thought otherwise it is reasonable to believe they certainly would utilize the all-water service. It is concluded, therefore, an option of service has been offered the shipping public which the shipping public believes in its own best interest to utilize.

For every man hour of labor lost by one port a man hour of labor is gained by another port.[179] In addition, rail man hours are brought into existence by the service which could not have been realized but for the offered service. The record indicates a more efficient fuel and energy allocation by reason of the joint service by eliminating the need of ships to transit the Gulf.[180] On no basis but self-interest can the position of the ports be justified on the record in this proceeding. In the larger arena of the public interest and general economic welfare of the nation as a whole, the joint rail-water service should be welcomed and encouraged rather than condemned.[181]

The joint rail/water service does not violate the concept of naturally tributary cargo in that it does not preclude the development of the Gulf ports and taking into consideration the economies of transportation and the natural direction of the flow of commerce the joint rail/water service between New Orleans, Houston, Beaumont and Galveston and ports in Europe and the United Kingdom utilizing the Port of Charleston, South Carolina, is not detrimental to the commerce of the United States and such service is in the public interest.

Seatrain's participation in the joint rail/water service and the division between Seatrain and the railroads does not constitute an illegal diversion or absorption practice since neither mode pays the other to perform services which the first mode is obligated to perform. The rates set forth in the tariffs filed with the Commission with respect to such service are comparable to the rates for all-water service and are not unreasonable, unfair or discriminatory.

The joint rail/water service between New Orleans, Louisiana, Houston, Beaumont and Galveston, Texas, and ports in Europe and the United Kingdom utilizing the Port of Charleston, South Carolina, is not unlawful, unfair, unjustly discriminatory or illegal within the meaning of sections 16, 17, and 18 of the Shipping Act, 1916 [46 U.S.C. §§ 815, 816, and 817], or violative of section 8 of the Merchant Marine Act of 1920 [46 U.S.C. § 867].

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
September 5, 1975

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[178] Tr. 942.

[179] See fns. 134 and 139, *supra*.

[180] Tr. 584.

[181] O. E. Strange, General Manager, Houston Port Bureau, admitted on cross-examination that the public interest concept must extend to shippers and other port areas and necessarily extends beyond the parochial view of the Port of Houston or the Houston Authority. The public interest encompases the "whole benefit of the United States as to the various means of shipping." Tr. 594–5.

APPENDIX A

A comparability rate study was made by Houston's witness, White, in an attempt to establish that Seatrain's rates were undercutting all-water rates.

Witness White sponsored Exhibits 23a and 23b which purported to compare joint rail/water rates with all-water rates. These exhibits, after being corrected to reflect bunker surcharges and with an understanding that minimum revenue provisions in the tariffs may apply, showed that the charges for the service and those of Combi Lines, the only carrier that was compared, were extremely competitive, and in a large number of instances, Combi's charges were lower.[1]

Mr. White's comparisons, however, were selective and were less than half of the rates on file, with no valid reasoning behind selecting the pattern of choice in the rates used. The White thesis was contradicted by Witness Flitter's statement that joint service rates were indeed equal or higher than all-water rates.[2] Also, since the time of the drafting of White's exhibits, all rates for Seatrain shown as lower than Combi have been brought up to the level of the Combi rates effective August 8, 1974.

Mr. White also sponsored Exhibit 24gg. In carrying out his statistical analysis, White assumed that all rates are the same, only differing in amount. You cannot, however, compare the Seatrain house-to-pier rates with Combi's pier-to-house rates, as they are entirely different services to shippers.

Aside from the problem of comparing two different services, Exhibit 24gg is a comparison of only hypothetical movements of traffic. The witness had no knowledge that the cargo moved under the rates shown.[3] Taking the hypothetical, for bicycle parts moving under the minimum revenue provisions, Seatrain's rate is approximately $62 a ton higher than Combi's[4] and could be more if a railroad other than the Southern Pacific was used, as a drayage charge is incurred.[5] By the same procedure of comparison and using a drayage charge, the rates on automobile tires would be equal for the two services.[6] Finally, there can be no comparison of rates on bowling equipment and feed bran in bags, as the services are different for each carrier.[7]

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[1] Tr. 1136–37.

[2] Tr. 879.

[3] Tr. 1112.

[4] Tr. 1113.

[5] Tr. 1114.

[6] Tr. 1114, 15.

[7] Tr. 1116–17.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-60

PETITION FOR DECLARATORY ORDER OF
SEATRAIN INTERNATIONAL, S.A.

ORDER

August 9, 1978

Seatrain International, S.A., (Seatrain) has filed a Petition for Declaratory Order (Petition) requesting the Commission to rule that section 14(b) of the Shipping Act, 1916, limits applications of the 15% maximum spread between contract and noncontract rates to the *ocean segment* of joint through intermodal rates, and not to the entire through rate.[1]

Section 502.68 of the Commission's Rules provides that "[t]he Commission may issue a declaratory order to terminate a controversy or to remove uncertainty."[2] It is generally in appropriate, however, for the Commission to "terminate" a controversy in a pending adjudicatory proceeding by independently issuing a declaratory order. The question Seatrain seeks to have resolved by declaratory order was squarely raised by the Order of Investigation in FMC Docket No. 76-11, *In Re Agreements Nos. 150 DR-7 and 3103 DR-7*. That case is presently pending decision by an Administrative Law Judge and involves some 1570 pages of transcript and 35 exhibits, a record which should prove valuable to the Commission in analyzing and resolving the important issues of law and public policy presented in that proceeding.

No compelling reason was offered as to why the Commission should prejudge the section 14(b) issues raised in Docket No. 76-11, especially since Seatrain is itself a party thereto. Moreover, as Seatrain itself acknowledges, a resolution of this question "results in certain legal *and factual* issues concerning tariff format and the possibility or impossibility of carriers maintaining a fixed dual rate spread . . . ."[3] Declaratory orders are not suited to dispose of contested factual issues.

THEREFORE IT IS ORDERED, That the Petition for Declaratory Order of Seatrain International, S.A., is Denied.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[1] Replies were received from: the U.S. Department of Justice (Antitrust Division); the Pacific Coast European Conference and the Pacific Straits Conference; fourteen conferences in the Atlantic-European trades (eastbound and westbound), filing jointly with the Mediterranean North Pacific Coast Freight Conference and the U.S. Atlantic and Gulf/Australia-New Zealand Conference; the Japan/Korea-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan/Korea; and the Far East Conference. Comments were received from: the L.A. Parish Company; the Atlantic and Gulf-Indonesia Conference and the Atlantic and Gulf-Singapore, Malaya and Thailand Conference; the Pacific Westbound Conference; Sea-Land Service, Inc.; Seatrain International, S.A.; the Bureau of Hearing Counsel; and the Council of European and Japanese Shipowner's Associations.

[2] 46 C.F.R. 502.68.

[3] *Petition*, page 4 [Emphasis supplied].

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–20

PUERTO RICO MARITIME SHIPPING AUTHORITY— RATES ON GOVERNMENT CARGO

Domestic offshore carrier's rates for government cargo found not to violate the Shipping Act.

Domestic offshore carrier's classification system for rating government cargo found to violate Shipping Act section 18(a) and the purposes of P.L. 93–487 insofar as it permits government shippers to choose between "Government Cargo" rates and individual commercial commodity rates, and to employ shipping documents which do not reveal the contents of each shipment in terms readily convertible to commercial cargo classifications.

Domestic offshore carrier's commodity classifications system for government cargo found not to otherwise violate the Shipping Act.

Mario F. Escudero, Dennis H. Barnes and *Wayne M. Lee* for Puerto Rico Maritime Shipping Authority.

David F. Anderson and *Peter P. Wilson* for Matson Navigation Company.

Alan F. Wohlstetter and *Edward A. Ryan* for Household Goods Forwarders Association of America, Inc.

Dudley J. Clapp, Jr., Milton J. Stickles, Jr., John L. Degurse, Jr., and *E. Duncan Hamner, Jr.* for Military Sealift Command.

Harold S. Trimmer, Jr., Maurice J. Street and *Francis X. Davis* for General Services Administration.

Russell T. Weil and *James P. Moore* for United States Lines, Inc.

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

REPORT AND ORDER

August 9, 1978

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

This proceeding was commenced on June 6, 1975, by an Order of Investigation and Suspension directed at those portions of Puerto Rico Maritime Shipping Authority's (PRMSA) Tariff FMC-F No. 1 containing rates and commodity classifications for "Government Cargo, N.O.S.," "Government Cargo, Vehicles," and "Government Cargo, Refrigerated."[1]

Protests to the instant tariff matter were filed by the Household Goods

[1] Tariff Items 6A, 13 and 14 as they appeared at 1st Revised Pages 172–179, 516 and 517, and Original Pages 518–521. The Commission suspended PRMSA's government rates until October 8, 1975 Except for increases in the level of rates, the subject tariff items continue in effect today in substantially their 1975 form. PRMSA is a common carrier by water in interstate (domestic offshore) commerce within the meaning of Shipping Act section 1.

Forwarders Association of America, Inc. (HGFA) and Matson Navigation Company (Matson) which were made parties to this proceeding. United States Lines, Inc. (USL) intervened in support of Complainants. The Military Sealift Command (MSC) and the General Services Administration (GSA) intervened in support of the tariff rates.[2]

BACKGROUND

Both the classification scheme and the particular rates under investigation had been employed by PRMSA since at least January 1, 1975, pursuant to a contract between PRMSA and the Military Sealift Command,[3] but were not published in the carrier's tariff until May 1, 1975. Prior to 1975, greatly relaxed tariff filing requirements for government cargoes had been in effect, 32 *Fed. Reg.* 12753 (1967).[4] The Commission's former tariff filing policy was based on former section 6 of the Intercoastal Shipping Act (47 Stat. 1427) which effectively precluded economic regulation of government rates.[5] On October 26, 1974, section 6 was repealed and Intercoastal Shipping Act section 5 was amended to provide for full Shipping Act regulation of government cargo. P.L. 93–487, 88 Stat. 1463.[6]

At issue in the instant proceeding was whether PRMSA's Government Cargo Tariff contained "just and reasonable" rates and regulations pursuant to Shipping Act section 18(a),[7] or subjected nongovernment shippers to "undue or unreasonable prejudice or disadvantage" pursuant to Shipping Act section 16 First.[8] In making these determinations, it was necessary to examine the effect of P.L. 93–487 upon sections 16 First and 18(a). An evidentiary hearing was conducted in which 808 pages of transcript and 27 numbered exhibits were produced.

On February 10, 1978, Administrative Law Judge Seymour Glanzer (Presiding Officer) issued an Initial Decision invalidating PRMSA's Government Cargo Tariff. He interpreted P.L. 93–487 as barring special commodity classification for government shippers and found the following violations of section 18(a): (1) the ability of government shippers to "pick and choose" between government and commercial rates by tendering different shipping documents made the overall level of revenues derived from PRMSA's government rates unreason-

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[2] Those parties, including the Commission's Bureau of Hearing Counsel (Hearing Counsel), opposing PRMSA's Government Cargo Tariff are categorically referred to as "Complainants."

[3] MSC is the principal shipper using PRMSA's "Government Cargo Tariff."

[4] By Domestic Circular Letter No. 1–75, dated February 7, 1975, the Commission announced that domestic offshore carriers must file their government cargo rates in regular tariff form upon the expiration of any existing contracts with the government. PRMSA's contract with MSC (CA 1870) terminated June 8, 1975 and the suspended tariff matter was to have taken effect on that date.

[5] Section 6 provided that: [N]othing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or municipal Governments or for charitable purposes.

[6] The stated purpose of P.L. 93–487: [P]rovide for economic regulation by the FMC of ocean freight rates applicable to the transportation of Government and charitable cargo in the domestic offshore trades of the U.S. in order to insure that such rates meet the same statutory standards of reasonableness and fairness as presently apply to rates charged for the transportation of commercial cargo in these trades. H.R. Rep. No. 93–1348, *Intercoastal Shipping Act, 1933*, 93rd Cong., 2d Sess. (1974), at 1; S. Rep. No. 93–1278, *Economic Regulation by Federal Maritime Commission of Government and Charitable Cargo In U.S. Domestic Offshore Commerce*, 93rd Cong., 2d Sess. (1974), at 1.

[7] 46 U.S.C. 817 (a).

[8] 46 U.S.C. 815 First.

able;[9] and (2) PRMSA's government cargo classification scheme unreasonably discriminated against similarly situated shippers because the classifications were based solely on shipper identity.[10]

POSITION OF THE PARTIES

Exceptions to the Initial Decision were filed only by MSC, which seeks reversal of all findings of Shipping Act violation. Hearing Counsel, USL and HGFA submitted Replies to Exceptions urging adoption of the Initial Decision.

MSC makes the following allegations of error: (1) the burden of proof was improperly placed on PRMSA; (2) the level of PRMSA's government rates was reasonable because MSC did not in fact pick and choose between commercial and government rates; (3) if wharfage and "arrimo" charges were considered in determining the difference between PRMSA's commercial and government rates; the government rates would have produced greater revenues; (4) Public Law 93-487 was not intended to preclude all simplified tariff structures for government cargoes; (5) Shipping Act section 18(a) does not preclude carriers from charging rates which are unjustly discriminatory within the meaning of Shipping Act section 17; (6) PRMSA's government cargo classification scheme cannot be considered unreasonable merely because commercial rates change frequently and make rate comparisons difficult; (7) the practice of publishing "alternate" rates for government shipments is not an unjust or unreasonable *practice* within the meaning of section 18(a).

DISCUSSION

Section 3 of the Intercoastal Act places the burden of proof on the carrier when "new" rates or practices are being investigated and the matters in issue involve information uniquely in the possession of the carrier.[11] Despite PRMSA's previous application of the instant "Government Cargo" rates and classifications, these matters were "new" from a regulatory standpoint when they first appeared in the carrier's tariff. It was not until the passage of P.L. 93-487 and the issuance of Domestic Circular Letter No. 1-75 that PRMSA could have been required to justify the level of its government rates under section 18(a). The fact that its June-December, 1975 rates were identical to its January-June, 1975 rates is coincidental under the circumstances.[12] PRMSA has the burden of establishing that its Government Cargo Tariff is in compliance with section 18(a).

PRMSA has not met this burden in certain respects and its government cargo

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[9] During 1975, PRMSA's rates on several commercial commodities, including beer, disposable diapers, bakery goods, refrigerators, soap and Coca-Cola, were less than its $992 per container rate for "Governmental Cargo, N.O.S." MSC is capable of identifying and describing the items in ships under commercial tariff nomenclature, at least in the case of single commodity shipments.

[10] The Presiding Officer held that section 18(a) incorporates the prohibition against "unjust discrimination" found in section 17 first paragraph, thereby applying it to domestic offshore commerce. By its terms, Shipping Act section 17 applies only to foreign commerce, 46 U.S.C. 816.

[11] *See Commonwealth of Puerto Rico v. Federal Maritime Commission*, 468 F.2d 872 (D.C. Cir. 1972). The carrier does not necessarily bear the burden of proof on all questions which might result in the suspension and investigation of a rate under Intercoastal Shipping Act section 3. For example, information concerning injury to or competitive relationships between shippers is not ordinarily in the possession of the carrier. A carrier is expected to produce the cost, revenue, rate base, and similar data necessary to determine the "justness and reasonableness" of a rate.

[12] MSC contracts for ocean transportation in six month periods and the suspended rates were those applicable to a new MSC contract period. PRMSA's government rates have changed several times since the June-December, 1975 contract period.

classification system will be enjoined for noncompliance with section 18(a) to this extent. The Commission does not, however, interpret P.L. 93–487 as broadly as do the Complainants or the Presiding Officer.

P.L. 93–487 requires that government rates and practices meet the same standards of "reasonableness and fairness" as commercial rates.[13] It does not flatly prohibit the practice of establishing a separate commodity classification for "Government Cargo," and the Commission has previously recognized that carriers may employ such a commodity description if it is based upon legitimate transportation factors and not solely upon the identity of the shipper. See *Department of Defense and Military Sealift Command v. Matson Navigation Company,* 17 S.R.R. 1, 6 (1977); *Report and Order in Docket No. 76–40,* 42 Fed. Reg. 54810, 54811, (1977); *Household Goods Forwarders Association of America, Inc. v. American Export Lines,* 17 S.R.R. 499, 503 (1978).

The rate charged for transporting legitimately described "Government Cargo" is evaluated under section 18(a) in the same fashion as any other commodity rate. It may be neither unreasonably high nor low, but need not exactly equal the carrier's commercial rates for comparable commodities. In this instance, PRMSA demonstrated that its government shipments produced *greater* total revenues (*including* wharfage and "arrimo" charges) at the "Government Cargo" rates than would have been produced if they were transported at the various commercial rates otherwise applicable. This showing is sufficient to establish that the level of PRMSA's "Government Cargo" rates is just and reasonable within the meaning of section 18(a). It is not significant that some items shipped by MSC as "Government Cargo" would have yielded higher freights if individually rated under commercial cargo commodity descriptions.[14] Other items would have yielded less, and the net result compares reasonably to PRMSA's commercial rate structure.

PRMSA's "Government Cargo" commodity description contemplates the transportation of "trailerload" containers loaded with a single commodity as well as containers of mixed commodities in situations where a government agency is both shipper and consignee and the goods are tendered with government prepared shipping documents. Cargo rating activities by ocean carrier personnel are minimized under this system. Although not so stated in the tariff, "Government Cargo" is essentially noncommercial in nature, and noncommercial cargo generally has a different "value of service" than does commercial cargo.[15] "Government Cargo" is also characterized by certain other actual or

[13] Congress was primarily concerned with the level of government rates, especially those for Defense Department cargo. The legislative history reveals that P.L. 93–487 was a reaction to the allegation that Armed Services Procurement Regulations disallow certain fixed operating costs (*e.g.*, interest expense) customarily considered in setting commercial rates, thereby lowering a carrier's overall profit, putting upward rate pressure on commercial shippers and increasing consumer costs in the "island" economies of Hawaii, Alaska, Guam, Puerto Rico and other domestic offshore locations. H.R. Rep. No. 93–1348, *supra*, at 2–3; S. Rep. No. 93–1278, *supra*, at 3; Senate Committee on Commerce, Ser. No. 93–101, *Amend the Intercoastal Shipping Act, 1933* (Hearing on S. 3173, August 9, 1974), at 11, 12, 27–29, 31; House Committee on Merchant Marine and Fisheries, Ser. No. 93–47, *Merchant Marine Miscellaneous, Part 3*, (Hearings on H.R. 13561, H.R. 13615, July 10, 1974), at 4–5, 7, 34–35, 36, 40, 42–43, 43 (Question No. 2), 47–52.

[14] The potential for alternating between "Government Cargo" and commercial rates—a practice not followed by MSC in the instant trades—is not a matter which directly reflects upon the reasonableness of the "Government Cargo" *rate*, but goes instead to the reasonableness of the commodity description scheme which permits such alternate arrangements to be employed.

[15] A significant portion of MSC's shipments are items destined for military commissaries and post exchanges, but no "Government Cargo" carried by PRMSA appears to be offered for resale by or to a conventional commercial enterprise.

potential efficiencies, including large and frequent shipments, reduced holding time on piers, and reduced solicitation expense.[16]

The presence of these distinguishing transportation characteristics—to the extent they are set forth in the carrer's tariff—would ordinarily be adequate to justify the establishment of a separate commodity classification for "Government Cargo." PRMSA's classification scheme is rendered illusory, however, by the fact that government shippers need only tender shipments with a bill of lading rather than a shipping order to obtain a commercial rate.[17] Under PRMSA's present tariff arrangements, the sole factor differentiating "Government Cargo" from other commodity descriptions is the Goverments's choice of shipping documents, *a matter to which no transportation significance can be said to attach based on the instant record.*[18]

For "Government Cargo" to be considered a separate and distinct commodity, all government shipments possessing the same transportation characteristics must be rated as "Government Cargo." PRMSA's establishment of a "Government Cargo" commodity description which permits shippers to alternate between government and commercial rates simply by switching the form of the shipping document employed is unreasonable within the meaning of section 18(a) because demonstrably different transportation circumstances do not attach to the choice of shipping documents. A carrier may not allow a specified commodity the same transportation service at whichever of two rates the shipper finds advantageous.[19] Consequently, the "Government Cargo" description adopted by PRMSA may not be employed unless it is modified to require that *all* shipments of qualifying items tendered by government agencies be rated as "Government Cargo."[20]

The Commission further finds that section 18(a) and the purpose of P.L. 93–487 require that commodity descriptions limited to government, noncommercial, or other generic types of cargo include an express requirement that the shipping documents employed identify each item shipped in a manner which permits the shipment to be accurately rated under any more specific tariff classification otherwise applicable. Routine preparation of this information will allow the carrier, the shipper and the Commission to better determine the reasonableness of the rates assessed for such generic commodities,[21] and reduce

[16] Different credit or collection procedures which result in cost savings to, or more efficient handling by the carriers may also apply to government shipments, but PRMSA has failed to demonstrate that such procedures exist in this instance. Moreover, despite the testimony of PRMSA's Vice President for Traffic (Ex. 4) regarding the tendency of MSC shipments to move off PRMSA's terminals quickly, PRMSA's tariff allows "Government Cargo" shipments of two or three containers a longer free time period than it allows commercial shipments of two or three containers.

[17] The Commission adopts the findings of the Presiding Officer concerning MSC's ability to identify the items it ships under commercial tariff nomenclature. Initial Decision, at 12–13, 13–16, 40. See also "Military Standard Transportation and Movement Procedures," Vol. I, at G–11(b), G–12(b), which contemplates use of both Government and commercial bills of lading for transportation of Defense Department cargo, as circumstances require (Ex. 2).

[18] The shipping order prescribed by section 6A or PRMSA's tariff may actually prescribe *greater* responsibilities upon the carrier than the bill of lading used when MSC ships at commercial rates. All things being equal, greater carrier responsibility should result in higher Government Rates.

[19] The tariff matter under investigation is subject to section 531.5(g) (1) of the Commission's Rules until PRMSA files a new tariff in compliance with revised Part 531 or until January 1, 1979, whichever comes first. 42 Fed. Reg. 54810, 54813 (1977). Section 531.6(a) of the revised regulations was not intended to remove the prohibition against "optional" rates found in former section 531.5(g). Multiple rates for the same commodity and same service are also duplicative, conflicting and equivocal, within the meaning of the revised regulation, and continue to be grounds for tariff rejection or suspension.

[20] PRMSA may, however, completely excludes certain commodities from its tariff description of "Government Cargo."

[21] Such determinations must be made promptly because of the relative shortness of both the MSC contract period (six months) and the Intercoastal Shipping Act's rate suspension period (four months).

the likelihood that military cargo rates will unjustifiably generate less revenues than the publishing carrier's rates for comparable civilian shipments. A more precise cargo identification procedure is also consistent with 10 U.S.C. 2631, which requires that ocean transportation rates for military supplies not exceed the charges for transportation of "like goods" for private persons. By requiring full commodity identification of MSC shipments, the Commission hopes to forestall violations of the Shipping Act and to advance the national military procurement policy represented by 10 U.S.C. 2631.

The Initial Decision relies in part upon the conclusion that PRMSA's "Government Cargo" commodity description is based exclusively upon the identity of the shipper, and therefore an "unjustly discriminatory" practice within the meaning of Shipping Act section 17.[22] This conclusion was not accompanied by findings as to the similarly situated shippers allegedly discriminated against, and such findings cannot be made on the record before us. As indicated above, the instant commodity descriptions possess transportation characteristics which could distinquish them from most commercial commodities shipped under PRMSA's tariff if alternation with commercial rates were precluded. Under such circumstances, unjust discrimination would not be present. "Government Cargo" is a different commodity than "Beer." Before a violation of section 17 could be found, it would be necessary to show that a person shipping assorted noncommercial cargoes similar to those shipped by MSC has been denied access to similar simplified rating arrangements or that a shipper of commodities which possess all the qualifying transportation characteristics of "Government Cargo" has been denied a rate equal to the "Government Cargo" rate.

THEREFORE, IT IS ORDERED, That the Exceptions of the Military Sealift Command are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That sections 6A, 13 and 14 of Puerto Rico Maritime Shipping Authority's Tariff FMC-No. 1 establishing commodity descriptions and rates for "Government Cargo" are cancelled effective September 15, 1978; and

IT IS FURTHER ORDERED, That Puerto Rico Maritime Shipping Authority cease and desist from publishing or filing government cargo commodity descriptions or rates which do not: (1) forbid qualifying government shipments from employing any other PRMSA rate item; and (2) require the use of shipping documents which fully identify the items tendered for transportation in terms which would allow the items to be accurately classified and rated under PRMSA's commercial tariff (i.e., at non "Government Cargo" rates).

(S) FRANCIS C. HURNEY
Secretary

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[22] The Presiding Officer held that "unjust discrimination" was subsumed by the "unjust and unreasonable" language of section 18(a) and therefore applicable to domestic offshore commerce as well as foreign commerce. Because the Commission finds no "unjust discrimination" present in PRMSA's creation of the instant "Government Cargo" commodity description, it is unnecessary to answer MSC's contention that Congress intended to allow such discrimination in domestic offshore commerce. Nonetheless, it should be noted that commodity rates may be unreasonable under section 18(a) if they inexplicably vary from those charged to similarly situated shippers. Discriminations between shippers may also result in "undue prejudice" under Shipping Act section 16 First, even in situations where competitive injury is not present. *See General Mills, Inc. v. State of Hawaii*, 17 F.M.C. 1, 4 (1973; *Nonassessment of Fuel Charges*, 15 F.M.C. 92, 98 (1972). It is doubtful, however, that the broad interpretation given *Pacific American Fisheries, Inc. v. American-Hawaiian S.S. Co.*, 2 U.S.M.C. 270 (1940), by the Presiding Officer (Initial Decision, at 44), reflects the true relationship between section 18(a) and sections 17 and 18 First. *See also*, note 11, *supra*.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-3

SEA-LAND SERVICE, INC., SEATRAIN LINES, INC.
TRANSAMERICAN TRAILER TRANSPORT, INC., GULF
PUERTO RICO LINES, INC., PUERTO RICO
MARITIME SHIPPING AUTHORITY*

v.

ACME FAST FREIGHT OF PUERTO RICO, ET AL.

Respondent non-vessel operating common carriers by water found to have violated sections 16 and 18(a) of the Shipping Act, 1916.

Respondents ordered to pay Complainants the amounts of demurrage found due and owing plus interest at the rate of eight percent per year from and after 30 days of each bill for container demurrage charges.

John Mason and *Paul J. McElligott* for Maritime Services Corporation.
Ruben O. Figueroa, Enrique Nassar Rizek and *Carlos Rodriguez* for Capitol Transportation, Inc.
Raymond P. deMember for El Faro Shipping Co., Inc.

REPORT AND ORDER ADOPTING INITIAL DECISION

August 14, 1978

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

This proceeding is before the Commission on exceptions from Respondents Capitol Transportation, Inc. (Capitol) and El Faro Shipping Co., Inc. (El Faro) to the Initial Decision of Administrative Law Judge Charles E. Morgan (Presiding Officer) in which he determined that Respondents were, at times pertinent to the complaint, non-vessel operating common carriers by water (NVOCCs) in the trade between the United States and Puerto Rico and, that while so engaged, Respondents had violated sections 15, 16, 17 and 18 of the Shipping Act 1916 (the Act). The Presiding Officer concluded that each Respondent owed and must pay certain outstanding demurrage charges.

For the reasons set forth below, we conclude that the Presiding Officer's findings and conclusions were proper and well founded with respect to the section 16 and 18 violations, but were erroneous with respect to the section 15 and 17 violations. Without disturbing any of the findings of facts with which we

* Maritime Service Corporation (MSC) which filed the complaint as authorized agent of the carriers under agreement DC—38 approved by the Commission has since been dissolved. Accordingly, the named carriers are substituted as complainants.

agree, we find that certain matters raised on exceptions warrant discussion. Exceptions not specifically considered or discussed have nevertheless been reviewed and found to be rearguments of contentions already made before the Presiding Officer and properly disposed of by him.

On exception Capitol and El Faro maintain that there is no basis in the record for a finding that Capitol and El Faro were NVOCCs subject to the Act. These two Respondents carefully avoid alleging that they are not NVOCCs, but insist there is no evidence in the record to support a finding that they are NVOCC's. Respondents are incorrect in this assertion.

Capitol by its own account acknowledges that it is:

> A Puerto Rican corporation devoted mainly to the movement of household goods in between the different points of the world and Puerto Rico. During the time covered by the complaint, Capitol was a prime mover of household goods for members of the Armed Forces of the United States Air Force and United States Navy.

Further, in citing MSC'c refusal to separate government shipments from commercial shipments in billing demurrage[1] as the "real cause for the situation presented in this case," Capitol in effect admits that it carried cargo for the military and for the government, both under special government contracts and under commercial bills of lading. In fact, Capitol advises that 80 percent of its carriage was military and 20 percent was commercial. Because Capitol is not a vessel operating common carrier, it must be concluded that Capitol carried those shipments as an NVOCC by using the services of the ocean carrier represented by MSC.

The same can be said of El Faro, which at one time was a member of the Pan American Movers Association of Puerto Rico, an association which, the Presiding Officer found, was composed of NVOCCs and forwarders. Testimony in the record shows that El Faro maintained a principal office in New York from which it *arranged shipments* from the United States to Puerto Rico and that bills for demurrage charged in Puerto Rico were sent for payment to the New York office. Consequently, Capitol's and El Faro's contentions that the record does not support the Presiding Officer's determination that they were NVOCCs are without merit.[2]

Capitol and El Faro insist that with respect to matters alleged in the complaint they were acting as shippers and consignees, and were therefore beyond Commission jurisdiction under section 22 of the Act. The Commission has heretofore considered and rejected this argument[3] and the Presiding Officer properly concluded that Respondents were not merely shippers, NVOCCs subject to the Act.

Capitol and El Faro also take issue with the Presiding Officer's finding that

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[1] The Presiding Officer, however, found that MSC had billed demurrage to Capitol only for commercial shipments on which the listed consignee is Capitol.

[2] With the exception of Nunez Express which neither answered the complaint nor in any manner participated in the proceeding, the remaining five Respondents either confirmed their status as NVOCCs (Alvarez Shipping Co., Inc. and Rico Shipping Co.) or did not deny it (Columbus Shipping Co., Inc., Malabe Shipping Co., Inc., and Rodriguez Shipping (Rodriguez Trucking)).

[3] In its Order of July 23, 1973 denying motions to dismiss Puerto Rico Forwarding Co., Inc. and Twin Express, the Commission refused to accept the proposition that because an NVOCC is a "shipper" vis-a-vis the underlying ocean carrier, the Commission has no jurisdiction, at least under section 22 of the Act, over the NVOCC's dealings with the underlying water carrier. The Commission reaffirmed that when handling transportation of property subject to regulation under the Act, the NVOCC retains its common carrier status even when it assumes the role of a shipper vis-a-vis the underlying ncean carrier. Puerto Rico Forwarding Co., Inc. and Twin Express were later dismissed from the proceeding.

they violated section 16 of the Act.[4] The Presiding Officer held that Respondents, by knowingly and wilfully refusing to pay demurrage accrued under the carrier's published tariffs, in effect obtained transportation at less than the applicable rates and charges;[5] that they collectively conspired to withhold demurrage for the purpose of coercing concessions or rebates in the amounts due; and that Capitol misled MSC by first suggesting that auditors be jointly appointed to review the accounts and then, upon completion of the audit, refusing to honor the conclusions of its own auditors or to pay even a portion of any undisputed claim.

Citing *Hohenberg Bros. v. Federal Maritime Commission*, 316 F2d 381, 385 (D.C. Cir. 1963), Capitol and El Faro argue that the record fails to indicate that their refusal to pay disputed transportation charges was clothed with the element of concealment, falsification, deception or fraud, which, they insist, must be present before a violation of section 16 can be established. We do not agree. First, section 16 is not so limited.[6] Secondly, even were we to accept Capitol's and El Faro's argument, we find that the requisite element of fraud or concealment is established by Capitol's and El Faro's unexplained and apparently unjustified avoidance of any payment of the amounts found due and owing.

Furthermore, while all Respondents assert in general terms that MSC's billing is inaccurate and deny that they owe the amounts found to be due, none has specifically indentified any alleged errors or proven the inaccuracy of MSC's billings, even though the information regarding those charges is peculiarly within the knowledge of the Respondents. This indicates to the Commission that in order to avoid payment of owed demurrage charges due and owing, Respondents made claims they knew or should have known were false. We believe that this clearly is the type of knowing and wilful conduct proscribed by section 16.[7]

With respect to violations of section 15, although there is some indication of at least a tacit understanding among the Respondents to oppose dealing with MSC and disregard its billings, we find the record inadequate to support the Presiding Officer's conclusion that Respondents have in fact violated section 15 of the Act.[8] Ordinarily, we would remand the proceeding for the purpose of supplementing the record in this respect. However, in the interest of resolving an already protracted matter expeditiously, and because the record establishes violations of other sections of the Act sufficient to sustain an order directing the payment of the demurrage charges in controversy, we see no purpose in further delaying the proceeding by pursuing the section 15 issue.

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[4] Section 16 reads in part: That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person . . . knowingly, and wilfully . . . by means of false billing, false classification, false weighing, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise applicable. 46 USC 815.

[5] In view of the pendency of this proceeding Respondents' refusal to pay demurrage can only be viewed as an attempt to pay less than due under the applicable tariffs.

[6] In *Hohenberg* the court held that a claim the plaintiff knew or should have known was false can be considered similar in nature to "false billings", "false classifications" etc., and "may properly be covered by the phrase 'any other unjust or unfair device or means.'" It concluded that "while section 16 covers the situation where the carrier is deceived or defrauded, *it is not so limited.*" 316 F.2d at 385 (Emphasis added)

[7] "Wilfully . . . means purposely or obstinately and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." *U.S. v. Illinois Cont. R. Co.*, 303 U.S. 239, 242 (1938) citing *St. Louis & S.F.R. Co. v. U.S.*, 160 Fed. 69 (9th Cir., 1908).

[8] Nor do we find any violation of section 17 on the facts and circumstances presented here.

The Commission also has before it at this time a Motion to Substitute Parties Complainant filed by MSC, and Capitol's Petition to Include Additional Information to its earlier Motion to Dismiss. In view of the fact that MSC acted solely as agent of the carriers and the substitution of the parties would neither change the cause of action, which rests on the same claims, nor prejudice the Respondents in the case, MSC's motion is hereby granted and Sea-Land Service, Inc., Seatrain Line, Inc., Transamerican Trailer Transport, Inc., Gulf Puerto Rico Lines, Inc. and Puerto Rico Maritime Shipping Authority are named in place of Maritime Service Corporation as Complainants herein.

Capitol's Petition to Include Additional Information is denied as untimely filed. The Petition comes approximately five years after the filing of the Motion to Dismiss during which time Capitol has had ample opportunity to introduce the information in the record. Moreover, as set forth herein, the Commission has determined that at times pertinent to the complaint, Capitol acted as an NVOCC and was, therefore, subject to the Commission's authority under section 22 of the Act. That it may have acted without a tariff on file is, while possibly forming the basis for a separate violation of the Act, irrevelant to the purpose of this proceeding.

Therefore, subject to the aforesaid modifications, we adopt the Initial Decision, a copy of which is attached hereto and made a part hereof.

The proceeding is discontinued.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

ATTACHMENT

FEDERAL MARITIME COMMISSION

No. 73–3

MARITIME SERVICE CORPORATION

v.

ACME FAST FREIGHT OF PUERTO RICO, ET AL.

Adopted August 14, 1978

Eight respondent non-vessel operating common carriers found subject to sections 15, 16 17 and 18 of the Shipping Act, 1916, and said eight respondents found to be in violation of those sections. Said eight respondents ordered to pay complainant certain amounts of demurrage found due and owing by said respondents, plus interest at the rate of eight percent per year from and after 30 days of each bill for container demurrage charges.

John Mason and *Paul J. McElligott* for complainant, Maritime Service Corporation.
Ruben O. Figueroa and *Enrique Nassar Rizek* for respondent, Capitol Transportation, Inc.
Raymond P. deMember for respondent, El Faro Shipping Co., Inc.

INITIAL DECISION OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

The complainant, Maritime Service Corporation (MSC), filed the subject complaint against 23 respondents, all of whom were at times pertinent to the complaint non-vessel operating common carriers (NVOCC's) in the trade between the Atlantic and Gulf Coasts of the United States and Puerto Rico (Puerto Rico Trade).

Under Agreement DC–38, approved by the Commission, MSC is the authorized agent for the billing and collecting of certain demurrage due to four vessel operating common carriers in the Puerto Rico trade, namely Sea-Land Service, Inc. (Sea-Land), Seatrain Lines, Inc. (Seatrain), Transamerican Trailer Transport, Inc. (TTT), and Gulf-Puerto Rico Lines, Inc. (GPRL). These four vessel operating carriers left the Puerto Rico trade on or about October 1974, when the Puerto Rico Maritime Shipping Authority (PRMSA) was organized and entered the trade. On behalf of these four carriers, MSC issued its first demurrage invoice on October 3, 1970, and the last on March 31, 1975. Since its inception MSC issued a total of 80,919 demurrage invoices to numerous shippers and consignees, including many others besides the respondents herein. MSC estimates that it invoiced demurrage on about 400,000 trailers with an average demurrage of $40 per trailer, or a total estimated billing of $16 million. Collecting all the demurrage due has not been an easy task for MSC, but it has persisted diligently in its duty.

The complainant alleges that the respondents have failed and refused to pay demurrage due under the terms of the tariffs of the four vessel operating common carriers.

In addition, the complainant also alleges that the respondents acted in concert in refusing to pay demurrage, either directly, or by conscious parallel deeds, or by membership in organizations having that purpose, in violation of section 15 of the Act. It also is alleged that the respondents subjected property entrusted to them as NVOCC's to liens for unpaid demurrage without the knowledge or consent of the owners of the property, an unreasonable practice related to the receiving, handling, storing and delivering of property in violation of sections 17 and 18(a) of the Act. Further, it is alleged that the respondents by withholding payments of accumulated unpaid demurrage charges have attempted by unjust means or device to obtain transportation by water at less than the lawful rates, and have had the aim and purpose of coercing concessions or rebates, in violation of section 16 of the Act.

Prehearing conferences were held on June 16, 1975, and on September 23, 1975. Before, and after, the prehearing conferences upon motions by MSC 10-½[1] of the respondents were dismissed because, either they were not served with the complaint and were no longer in existence, or had settled MSC's claims. These dismissed respondents were Acme Fast Freight, Maritime Trucking, El Seis de Mayo, La Flor de Mayo Express, Sea Freight Express, San Lorenzo Express, Los Hermanitos, Brito Shipping Company (final dismissals effective June 16, 1975), El Sol de Mayo (dismissed July 8, 1975), La Rose del Monte (August 22, 1975), and Set Forwarders, Inc. (September 15, 1975).

An initial hearing was held on October 14, 1975, with testimony from witnesses for the complainant. At this time testimony and exhibits regarding one group of the remaining respondents were presented, with testimony regarding the other remaining respondents being set for a later time. After this initial hearing settlement was made with certain respondents. Puerto Rican Forwarding and Twin Express were dismissed as respondents on February 2, 1976. Drake Marine Division (Drake Motor Lines) was dismissed on April 8, 1976. Acme Fast Freight (Dolphin Forwarding, Inc.) was dismissed on April 14, 1976. Consolidated Express, Inc. (Conex), was dismissed on June 8, 1976.

Of the eight respondents remaining not dismissed, the only two which offered testimony and exhibits were Capitol Transportation, Inc., and El Faro Shipping Co., Inc.[2]

The remaining six respondents not offering any testimony or exhibits are Alvarez Shipping, Columbus Shipping, Malabe Shipping, Nunez Express, Rico Shipping, and Rodriguez Shipping. Based on unrefuted testimony and exhibits, it is found and concluded that these six respondents owe unpaid demurrage as follows:

Alvarez Shipping	$45,440.00
Columbus Shipping	5,290.00

[1] Acme's ownership was split time-wise, resulting in its partial dismissal at one time, and remaining dismissal at a later time as Acme (Dolphin).

[2] After the hearings were closed and after opening and reply briefs had been filed, El Faro Shipping Co., Inc., pleaded that it believed that it had settled its obligations, and sought time to obtain an attorney. The matter was reopened on a limited basis on August 12, 1977, to receive the testimony of two witnesses for El Faro Shipping. They testified on September 13, 1977.

Malabe Shipping	8,320.00
Nunez Express	1,500.00
Rico Shipping	12,490.00
Rodriguez Shipping	1,760.00

By the terms of the tariffs of Sea-Land, Seatrain, TTT and GPRL, consignees and shippers of containers were allowed a "freetime" within which to unload or to load the containers at destinations and origins without any charge in addition to the ocean freight rate charges. However, consignees and shippers were subject to container demurrage charges for each day a container was retained after the expiration of the free time.

The complainant over a long period sought payment of the demurrage bills from the respondents. Some of the NVOCC's stated that they would not pay the demurrage because these NVOCC's would not deal with the complainant as an agent for Sea-Land, Seatrain, TTT or GPRL.

The complainant has been diligent in correcting or adjusting the demurrage bills submitted to the respondents, so as to correct any errors in the bills, to reflect payments already made, and to make any changes required by applicable tariff rules.

In Special Docket No. 456, *Plaza Provision v. Maritime Service,* 17 F.M.C. 47, 48, the nature and purpose of MSC was stated as follows:

Uniformity in the practices of ocean common carriers in the allowance of free time and the collection of container demurrage, including the publishing of appropriate tariff rules relative to free time and container demurrage, is both desirable and necessary to insure that shippers and consignees are treated equally and fairly.

MSC was formed in the summer of 1970 to take over the task of billing and collecting container demurrage charges for the four carriers herein on all arrivals at, and all sailings from Puerto Rico on and after September 6, 1970.

MSC's first invoices were mailed in October 1970, but its collection efforts were met with widespread shipper and consignee resistance.

By the bill of lading contracts relevant to this complaint, which are parts of their filed tariffs, Sea-Land, Seatrain, TTT and GPRL have liens for the ocean freight and other charges including demurrage on the property carried by them.

In Docket No. 71–32, *Puerto Rico Trades–1968,* 17 F.M.C. 251, 257, it was stated:

To eliminate the practice of shipper favoritism which naturally flows from a system where compromises and concessions on demurrage are obtained by playing one carrier against another, Puerto Rico Ocean Service Association has, among other things, established the Maritime Service Corporation (MSC), a central collection agency, which handles the billing and collection of all the demurrage charges due the member lines. Agreement No. DC–38 in permitting the consolidation of demurrage in a central agency, has served to eliminate a very real demurrage related malpractice which flourished when the individual carriers billed and collected their own demurrage.

All of the respondents withheld payment of container demurrage charges. Collectively the respondents appeared to have conspired with one or more of the other respondents and with other persons, not parties hereto, to boycott the payment of container demurrage charges. This boycott was done apparently with the purpose of either avoiding the payment of any part of the accumulated demurrage charges, or with the purpose of coercing a concession or rebate in the amount of some part or all of the demurrage charges.

The free time and demurrage charges in issue herein applied in Puerto Rico on the ocean carriers' containers or trailers, and varied according to the type of container or trailer. For example, more free time was allowed on dry cargo trailers than on refrigerated cargo trailers, and the demurrage charge per 24 hours was higher on refrigerated trailers than on dry trailers. The tariff rules also varied depending on whether the shipper on outbound loads or the consignee on inbound loads had shipments on the same sailing of not more than three trailers, or of four or more trailers. The free time periods for four or more trailers were 120 hours for dry trailers and 96 hours for refrigerated trailers, whereas for three or less trailers the free time periods were 72 hours for dry trailers and 48 hours for refrigerated trailers. Also for shipments of four or more trailers on one sailing, there were certain free time credits for consignees for trailers released or returned before the free time expired, such credits being applied to extend the free time on trailers received on the same sailing and held in excess of the free time.

Generally, the demurrage charge for each 24 hour period beyond the free time was $10 on dry trailers, $12.50 for the first 24 hour period and $25 for each succeeding 24 hour period on refrigerated trailers.

Of MSC's demurrage billings it was estimated that the average demurrage per trailer was $40.

Generally, no demurrage was applicable for any delay caused by the ocean carrier in the receipt or delivery of trailers.

Free time generally commenced on inbound loads at the first 8:00 A.M. following complete discharge of the ocean-going vessel or arrival of the trailers at destination terminal, and on outbound loads at the first 8:00 A.M. following removal of the trailers from the ocean carrier's premises, excluding Saturday, Sunday, and Holidays.

Trailers received by the ocean carrier at its terminal not later than 10:00 A.M., by tariff rule, were considered as having been received prior to 8:00 A.M. of that day for the purpose of computing free time and demurrage.

The complainant alleges that Capitol Transportation owes $57,940.00 in unpaid demurrage. The complainant and Capitol Transportation appointed auditors to review demurrage billings. The complainant furnished additional documents and invoices to Capitol Transportation, and Capitol's auditor informed the complainant that he had completed the audit of Capitol's account. Nevertheless, Capitol Transportation has not paid any demurrage, not even any portion of any undisputed demurrage.

On September 20, 1970, a group of shippers and consignees, organized under the name of the "Import and Export Council of Puerto Rico," passed a resolution suggesting that Council members "not recognize, or honor, billings for demurrage submitted by Maritime Services Corporation which is a subsidiary of Prosa." Capitol Transportation was an early member and organizer of the Import and Export Council. Mr. Charles Darmanin, the president of Capitol Transportation, was secretary of the Import and Export Council of Puerto Rico.

A number of the remaining respondents are members of the Pan American Shippers and Movers Association (PAMA), an association of NVOCC's and freight forwarders, organized in May, 1970, for the common interests of the members, particularly movements of household goods. Mr. Malabe of respondent Malabe Shipping was the first Chairman of this association. Respondents who are PAMA members are Malabe Shipping, Rico Shipping and Columbus Shipping. It is understood by complainant's witness Vasquez that Alvarez Shipping and Rodriguez Shipping also were members of PAMA.

Mr. Vasquez was informed that Alvarez had suggested to another respondent, La Rose del Monte, not to pay demurrage, but to go to hearing in this. La Rose del Monte however paid its demurrage and was dismissed as a respondent.

Some respondents have offered to settle demurrage for a fraction of the amount due and owing. Capitol Transportation offered to settle for one-third of its account. Malabe sought to settle its accounts for 25 percent. These two offers of settlement were rejected by the complainant. In fact the complainant was compelled by law to reject these offers, inasmuch as it must charge the amounts specified in the appropriate tariffs, so as to treat all shippers and consignees fairly and equally.

The Commission already has determined that it has jurisdiction over the subject complaint. It has been determined that as NVOCC's and forwarders, the respondents are both common carriers and other persons subject to the Shipping Act, and that under section 22 of the Act, a complaint may be filed against these respondents. (Order of the Commission served July 23, 1973, denying motion to dismiss.) The fact that the NVOCC was technically a shipper in relation to the vessel operating water carrier did not take away the jurisdiction of the Commission over the NVOCC, because in relation to the real shipper of the goods the NVOCC retained its status as a common carrier. The NVOCC had no proprietary or beneficial interest in the cargo, and the NVOCC's primary business was the furnishing of transportation facilities, and the NVOCC's entire operation was subject to the Commission's jurisdiction.

The exclusive primary jurisdiction of the Commission over MSC's complaint was acknowledged by the United States District Court for the District of Puerto Rico on January 22, 1975, when it granted a motion by Capitol Transportation to dismiss an action by MSC based on Capitol's refusal to pay demurrage.

Section 16 of the Act provides in part that it is unlawful for any shipper, consignee, forwarder or other person subject to the Act, knowingly and willfully, directly or indirectly, by unjust or unfair device or means to obtain or to attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

Demurrage is a transportation rate, *Agreement No. 8905–Port of Seattle and Alaska S.S., Co.*, 7 F.M.C. 792, 797 (1964).

The respondents by knowingly and willfully refusing to pay demurrage applicable under the published tariffs in effect have obtained transportation by water for property at less than the applicable rates and charges in violation of section 16 of the Act.

Capitol Transporation joined the Export and Import Council. Other Council members have honored MSC's demurrage billings, but Capitol has refused. Capitol Transportation mislead MSC by suggesting that joint auditors be appointed, and upon completion of the audit Capitol Transportation refused to honor the conclusion of its own auditor. Other remaining respondents who are members of PAMA have refused to pay the remaining demurrage claims of MSC.

A number of the remaining respondents joined the Pan American Movers Association, which had as one condition of membership a limitation on competition among members. Rule 14 of PAMA was "No open competition with other member or members of the Association." The PAMA agreement between its members appears to provide a cooperative working arrangement among persons subject to section 15 of the Act. This Association agreement was not submitted to or approved by the Commission.

Capitol Transportation joined with other companies in the Export and Import Council of Puerto Rico. A primary purpose of this Council was concerted action of its members in refusing to honor MSC billings and failure to pay proper demurrage charges. Other members of the Export and Import Council included companies such as Plaza Provision Company (Plaza). Mr. J.J. Teale of Plaza was president of the Export and Import Council of Puerto Rico. As noted in Special Docket No. 456, *Plaza Provision v. Maritime Service,* 17 F.M.C. 47 (1973), Plaza agreed to settle its demurrage bills. Other shippers or consignees, such as Grand Union Stores, Sears Roebuck, and R.J. Reynolds Industries, apparently periodically paid in full MSC's invoices. *Same,* 17 F.M.C. 47, at 52. In fact it appears that the remaining respondents in this proceeding, such as Capitol Transportation, are some of the few remaining holdouts who have refused to pay their legitimate demurrage bills, or even any undisputed portions of those bills.

The remaining respondents, by entering into agreements within the scope of section 15 and not filing those agreements for approval, or by acting in concert pursuant to unfiled agreements, or by participating as members of organizations having the purpose of refusing to honor MSC's billings for demurrage, or otherwise engaging in conscious parallel actions with other NVOCC's in refusing to pay demurrage to MSC without an approved section 15 agreement, have violated section 15 of the Act.

Section 17 of the Act in part requires certain persons subject to the Act to establish, observe and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Section 18(a) of the Act in part requires that common carriers by water in the domestic trades to observe and enforce just and reasonable regulations and practices relating to the delivering of property for transportation, the facilities for transportation, and all other matters related to or connected with the receiving, handling, transporting, storing, or delivering of property.

Respondent NVOCC's hold themselves out to the public to provide transportation facilities between the United States and Puerto Rico. Respondents carry the property of the shipping public which utilizes their services. That carriage of property is subject to the tariffs of the vessel-operating common carriers engaged by the respondents. The bill of lading contracts, a part of the filed tariffs of the vessel-operating common carriers for which MSC acts as agent, provide for liens against the cargo for ocean freight and other charges for the transportation.

The respondents' failure to pay applicable demurrage charges subjected the property of the shipping public vessel-operating common carriers' liens, and this practice resulted in the respondents' failure to establish, observe and enforce just and reasonable practices in connection with the receiving, handling or delivering of property, in violation of section 17 and section 18(a) of the Act.

The arguments of respondent Capitol in defense of its refusal to pay demurrage are two-fold. Capitol first contends that the Federal Maritime Commission has no authority to order respondent Capitol to pay demurrage or reparation. Capitol argues that the purpose of the Shipping Act is to regulate the carriers, and not to regulate the consignees. Capitol emphasizes that it was a shipper or consignee, but intentionally overlooks the fact that also it was a carrier (NVOCC) and freight forwarder, and thereby was subject to the Shipping Act. The Commission turned down the same argument of other respondents in its order in this proceeding served July 23, 1973, denying motion to dismiss.

The second argument of respondent Capitol is that MSC has charged demurrage to Capitol for shipments which clearly belonged to the Armed Forces of the United States, that none of the other respondents herein are similarly situated with respect to MSC's demurrage bills, and "that the refusal of M.S.C. to separate the government shipments from the regular commercial shipments when billing Capitol Transportation is the real cause for the situation presented in this case." Capitol does not have its facts straight. MSC has billed demurrage to Capitol only for commercial (non-governmental) shipments on which the listed consignee is Capitol. A review of the TIR's (Trailer Interchange Receipts) shows that Capitol is the customer and consignee for all of the containers listed, and is thus, liable for all of the demurrage billed. MSC has not billed demurrage to Capitol where some other person, military or otherwise, was shown to be the customer or consignee of the containers.

While it is possible that Capitol may have made arrangements with the military for the delivery of certain containers of household goods and Capitol may have some claims against the military, nevertheless such arrangements and claims cannot defeat MSC's rights as the agents of the vessel operating water carriers herein, such as Sea-Land, to collect billed demurrage due from Capitol where Capitol was the named consignee. As consignee Capitol was the party responsible for the demurrage. Capitol cannot escape its liability for demurrage incurred on containers consigned to Capitol.

In the past, military or government cargoes could be carried either (1) by contracts or tenders between the vessel operating water carriers and the military or government agencies under section 6[3] of the Intercoastal Shipping Act on government bills of lading, or (2) by regular commercial bills of lading under the usual commercial tariffs.

MSC did not have the responsibility for the first category of cargoes above, that is, the government bill of lading type of traffic. The vessel operating common carriers billed and collected the ocean freight charges and demurrage charges from the appropriate military or government agency on this type of cargo.

What is pertinent in this proceeding is that MSC was responsible for the billing and collection of demurrage on the second category of cargo above, that is,

[3] While section 6 of the Intercoastal Act is no longer effective, it formerly provided, "That nothing in this Act shall prevent the carriage, storage, or handling free or at reduced rates, for the United States, State, or municipal Governments, or for charitable purposes." Section 6 was repealed by P.L. 93–487, effective October 26, 1974.

where the cargoes moved on commercial *bills of lading, including* commercial bills of lading for the household goods of military or government personnel.

To sum up, where there was a commercial bill of lading naming Capitol as consignee, Capitol was and remains responsible for the appropriate demurrage. The demurrage billed Capitol subject to this complaint is all in connection with commercial bills of lading.

In correspondence between MSC and Capitol about the demurrage bills, Capitol over a period of years did not claim that it was not responsible for the demurrage on movements of household goods. It is apparent that Capitol, in belatedly raising the issue, is merely continuing its policy of refusing to pay any demurrage, using whatever excuse or "strawman" which came or comes to Capitol's mind.

Capitol insists that it has never refused to pay the correct amount of demurrage, and contends that MSC has been unable to demonstrate that it has complied with the tariff, pointing out that the tariff requires that a "notice of arrival" be given by mail no later than the day when the free time begins. This arrival notice issue is another one belatedly raised by Capitol.

Capitol's attorney sought copies of the arrival notices for the first time on September 23, 1975, at the second prehearing conference. None of the correspondence from Capitol to MSC for the five years prior to that conference alleged that Capitol had not been notified of the arrival of the containers. The president of Capitol in his testimony did not allege that Capitol did not receive timely notices of arrival of containers.

The vessel operating common carrier's tariff, using Sea-Land's as an example, item 580, note 4 (Sea-Land Tariff No. 158, FMC-F-No. 21) provides:

No demurrage is applicable for delay caused by ocean carrier in receipt or delivery. Claims for waiver or demurrage in such instances shall be filed in writing, stating all facts upon which the claim is based, with the carrier's agent, Maritime Service Corporation, P.O.. Box 1986, San Juan, Puerto Rico 00903. Such claims shall be allowed where carrier fault is established.

Capitol never filed any such statement with MSC during the many years of MSC's existence. No other party has pursued requests for arrival notices. Capitol's request at the second prehearing was made nearly five years after MSC first billed demurrage to Capitol.

MSC's counsel explained the difficulty in obtaining arrival notices for a specific consignee. For example, Sea-Land's documents were put in storage after the time Sea-Land left the Puerto Rico trade, and in order to obtain copies of arrival notices to Capitol, it would be a tremendous task just to try to indentify such notices among the thousands of documents in storage. TTT's documents in storage in Puerto Rico are not separated by shippers or consignees, especially since the period in issue goes back into 1970, 1971, and 1972.

Furthermore, there was a ruling made that there would be no additional discovery by Capitol because of its unconscionable delay in commencing discovery. Ruling by the Administrative Law Judge, served August 22, 1975, also citing the expense of the investigation sought, and the fact that Capitol's auditor had been supplied all information as early as September 13, 1973, as then requested by the auditor. The ruling of August 22, 1975, was appealed, and reconsideration was denied by ruling served September 15, 1975. So far as the record shows, Capitol's trailers in most instances were picked up on the first day when free time started, and it must be concluded that Capitol received timely notices of arrival. Capitol has waived its rights to object by its failure to comply with the tariff requirements of the vessel operating common carriers regarding claims for waiver of demurrage, and by its failure to promptly seek discovery. Furthermore, in view of the facts that many of Capitol's trailers were very promptly picked up by Capitol, and yet incurred substantial demurrage, none of which has been paid by Capitol, it is reasonable to conclude that Capitol received timely notices of arrival, and it is concluded that the vessel operating common carriers have complied with the tariff requirements in respect to Capitol's trailers. The record is convincing that the appropriate arrival notices were given to Capitol, that copies somewhere are in storage, but that retrieving them from storage is impractical and unnecessary in the circumstances. Common sense dictates this finding in view of the probable expense and difficulty of finding particular copies of Capitol's arrival notices especially in view of Capitol's long delay in raising the issue of arrival notices.

There remains the issue of demurrage allegedly due by El Faro. This demurrage relates primarily to TTT, but also to Sea-Land and Seatrain. Respondent El Faro contends that payment has been made for the demurrage billings of TTT, whether billed by TTT or billed by MSC for TTT. El Faro is a small family run business conducted by a father and his daughter, who conducted the business without great formalities. The father and daughter met informally from time to time with a vice president of TTT to go over various invoices and bills for demurrage making amicable adjustments of disputed bills. Counsel for El Faro states that it is understandable that El Faro took too lightly the formal proceedings in this matter, and that El Faro assumed that there was no need to hire lawyers to participate in matters already settled in the view of El Faro. Checks dated January 1972, and January 1974, in the total amount of $4,250 were given to TTT by El Faro, and according to El Faro these checks covered all of its obligations as to TTT demurrage.

On the other hand, MSC's witness showed that no part of the $4,250 above applied to billings of demurrage by MSC, that El Faro owed $14,810 to TTT which was incurred between January 1969, and September 30, 1970, all prior to any MSC billings of TTT demurrage. That is, the settlement of $4,250 applied only to the $14,810 billings of demurrage by TTT to El Faro prior to October 1970. Even as to this $4,250 agreed settlement sum, TTT had to sue El Faro in Superior Court in San Juan, Puerto Rico, and that it was not until 1974 that El Faro paid the balance of that agreed settlement.

El Faro never paid anything to MSC, and in fact never contacted MSC about MSC's billings to El Faro. These billings total $8,390, running from October 3, 1970, to Februrary 15, 1974.

El Faro's witness had no answer when queried why El Faro had not paid the Sea-Land and Seatrain demurrage billed by MSC, which El Faro acknowledges that El Faro owes. The MSC-Sea-Land billing was for $110 on December 15, 1970, and MSC-Seatrain billings were for $40 total on September 13, 1971, and September 27, 1971.

El Faro was a member of the Pan American Movers Association, an organization with a number of members who have refused to pay demurrage to MSC.

El Faro has produced no document to show that its payment of $4,250 to TTT covered any part of MSC's invoices to El Faro. El Faro's witnesses could only speak in generalities, and when specific critical questions were asked could only say they did not know or that someone else would have to answer.

Generally it appears that El Faro always failed to pay demurrage billed by MSC. El Faro had no explanation for its failure of paying demurrage which it acknowledges that it owes (the demurrage relating to Sea-Land of $110.00 and to Seatrain of $40.00 billed by MSC), and the record is completely convincing that El Faro has paid nothing on the demurrage of $8,240 which El Faro owes relating to TTT, all billed by MSC on and after October 1970.

Ultimate Conclusions

The record as a whole is completely convincing that the remaining eight respondents owe the demurrage listed on brief and billed by MSC. Six of these respondents offered no defense. The other two respondents (Capitol and El Faro) have a history of either not paying or of a consistent pattern of evasiveness of their obligations to pay demurrage. These eight listed respondents apparently are some of the last holdouts or stragglers against paying demurrage. In these circumstances justice requires that they not only pay demurrage, but also pay interest on the demurrage at the rate of eight percent as suggested by MSC.

It is concluded and found that the eight remaining respondents owe demurrage to MSC as follows:

Alvarez Shipping	$45,440
Capitol Transportation, Inc.	57,940
Columbus Shipping	5,290
El Faro Shipping Co., Inc.	8,390
Malabe Shipping	8,320
Nunez Express	1,500
Rico Shipping	12,490
Rodriguez Shipping	1,760

It is further concluded and found that the said eight respondents listed next above are non-vessel operating common carriers subject to sections 15, 16, 17, and 18 of the Shipping Act, 1916; and that the said eight listed respondents are in violation of those sections.

It is ordered that the said listed eight respondents pay the complainant MSC the amounts of demurrage listed under these ultimate conclusions, plus interest at the rate of eight percent per year from and after 30 days of each bill for container demurrage charges.

(S) Charles E. Morgan
Administrative Law Judge

January 18, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–45

AGREEMENT NO. 8005–7 BETWEEN MEMBERS OF THE NEW YORK TERMINAL CONFERENCE

Proponents of section 15 agreement extending terminal conference's price fixing authority have burden of demonstrating that their agreement is required to meet a serious transportation need, confer an important public benefit or further a valid regulatory purpose.

A reduction in the number of tariffs containing free time and demurrage provisions applicable at New York terminals is not alone sufficient justification for an anticompetitive section 15 agreement in the absence of evidence that a multiplicity of tariffs was causing signficant commercial or regulatory difficulties.

Terminal conference members failed to demonstrate an abuse of ocean carrier conference authority to set free time and demurrage rates or the existence of other justifying factors sufficient to confer the right to set such rates upon the terminal conference.

Thomás D. Wilcox for New York Terminal Conference.

Stanley O. Sher and *Howard A. Levy* for ocean carriers belonging to twelve North Atlantic freight conferences.

Paul J. McElligott for Sea-Land Service, Inc.

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

John Robert Ewers, Patricia E. Byrne, and *Aaron W. Reese* for Bureau of Hearing Counsel.

REPORT AND ORDER

August 14, 1978

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

This proceeding was initiated on October 2, 1974, by a Commission Order of Investigation into the approvability of Agreement No. 8005–7 (Agreement) under section 15 of the Shipping Act, 1916. The proposed Amendment No. 7 would *delete* existing language from the organic agreement of the New York Terminal Conference (NYTC) which prohibits NYTC members from concertedly fixing free time and demurrage rates on certain types of cargo.[1]

Sea-Land Service, Inc. (Sea-Land), a group of ocean carriers comprising the membership of twelve North Atlantic Steamship Conferences (Carrier Confer-

[1] The language to be deleted from Agreement No. 8005–6 took its present form following a negotiated settlement terminating a previous dispute on this subject. *New York Terminal Conference Agreement,* 10 F.M.C. 314 (1967). Agreement No. 8005 was first approved in 1955, but did not include any free time and demurrage provisions until April 25, 1960 (Amendment No. 2). Since that time the Agreement has expressly limited NYTC's free time and demurrage authority to *trades* where carrier conference tariffs do not contain such provisions. The 1967 dispute concerned Amendment No. 4 which proposed, *inter alia,* to add provisions concerning free time and demurrage on *export cargoes.* As finally approved, export cargo was added, but the carrier tariff exclusion was broadened to include trades with nonconference carrier tariffs.

ences), and the Commission's Bureau of Hearing Counsel appeared in opposition to the Agreement.[2] Sea-Land and the Carrier Conferences regularly serve the Port of New York and New Jersey (New York) as common carriers by water under FMC tariffs containing carrier established free time and demurrage rules. The Maryland Port Administration intervened on behalf of NYTC.

Paragraph 1 of NYTC's presently approved Agreement No. 8005-6 states, in pertinent part, as follows:

> 1. The parties shall establish, publish and maintain a tariff and/or tariffs containing just and reasonable rate charges, classifications, rules, regulations and practices with respect to the service of:
>
> Storage of waterborne import and export freight on pier facilities, including the fixing of free time and demurrage thereon, *provided, however, that no tariff or tariffs so issued shall include trades covered by tariffs now or hereafter published and filed by, or pursuant to agreements among, common carriers by water, [insofar as the latter tariffs cover free time and demurrage]*; [emphasis supplied].

Protestants asserted that deletion of the underscored proviso clause would extend NYTC's price fixing authority without adequate justification and alter longstanding practices in New York for the worse by causing confusion, discrimination and disruptive competition between carriers.

Following a hearing which produced 834 pages of testimony from nine witnesses and 27 Exhibits, Administrative Law Judge Stanley M. Levy (Presiding Officer) rejected Protestants' contentions and entered an Initial Decision holding that Amendment No. 7 should be approved. This result was based upon the following major conclusions of law and fact:

1. Free time and demurrage practices are, by their nature, more a function of onshore terminal operations than of ocean transportation. NYTC members—as terminal operators—have a "greater" and more logical interest in fixing free time and demurrage practices at their piers than do the ocean carriers using these piers.
2. If NYTC members were allowed to jointly establish all free time and demurrage practices at their facilities, the number of *tariffs* applicable to these facilities would be reduced. A reduction in the number of tariffs would lessen the possibility of confusion concerning free time and demurrage applicable to any given shipment.
3. If NYTC members were to jointly establish all free time and demurrage practices at their facilities, the potential for undue preference or prejudice to shippers using the same terminal facilities would be significantly reduced. Greater uniformity in the free time and demurrage provisions applicable at NYTC terminals would be a public benefit and meet a serious transportation need.
4. It would generally serve the public interest if NYTC members were able to jointly determine all free time and demurrage practices at member facilities. NYTC should not be handicapped in negotiating use charges with ocean carrier conferences which are themselves allowed to act concertedly in such matters.
5. Although Amendment No. 7 falls within the *Svenska* rule, circumstances place the burden on the Protestants to demonstrate why Amendment No. 7 should be disapproved. NYTC members should not be denied the right to determine how free time and demurrage rules will be established at their own terminals unless the Protestants can demonstrate that the public interest requires such denial.

Exceptions to the Initial Decision were filed by each of the three Protestants. A joint "Reply to Exceptions" was filed by NYTC and the Maryland Port Administration (Proponents). Oral argument was conducted before the Commission on June 20, 1978.

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[2] The complaining parties are hereafter referred to as "Protestants." The American Importers Association, Inc.; Barber Steamship Lines, Inc.; Dafra Lines; Black Star Line, Ltd.; Compagnie Maritima Belge, S.A./Compagnie Maritime Congolaise, SCCL (jointly); and Farrell Lines, Inc., were granted leave to intervene, but introduced no evidence and filed no Exceptions. The Green Coffee Association of New York City, Inc., was also granted leave to intervene, but withdrew from the proceeding at an early stage.

POSITION OF THE PARTIES

Protestants advance eight arguments for overturning the Initial Decision and disapproving Agreement No. 8005–7: (1) NYTC has not met its *Svenska* burden of justifying a price fixing agreement; (2) Agreement No. 8005–7 is unapprovable because it does not provide for "adequate policing"; (3) Agreement No. 8005–7 is unapprovable because NYTC's present tariff permits NYTC members the choice of applying "3 to 5 days" free time on import cargo; (4) Agreement No. 8005–7 is contrary to the public interest because it would tend to create destructive competition among carrier conference members; (5) the Presiding Officer incorrectly concluded that terminal operators have a greater interest in establishing free time and demurrage provisions than do ocean carriers; (6) the Presiding Officer incorrectly concluded that where more than one ocean carrier tariff applies at a terminal, an undue or unreasonable preference to similarly situated consignees may result; (7) the Presiding Officer made and relied upon several findings of fact not supported by the record;[3] and (8) the Presiding Officer refused to make several relevant findings of fact which are supported by the record.[4]

In reply, Proponents' principal contentions are that: (1) NYTC met the burden of justification contemplated by the *Svenska* decision by demonstrating that the Agreement allows NYTC members the *choice* of deferring to ocean carrier tariffs on free time and demurrage matters, and that the availability of this choice serves a valid regulatory purpose by offsetting the concerted bargaining power of the conferences; (2) assuming that *Svenska* hurdle has been cleared, Protestants failed to demonstrate that the Amendment should be disapproved; (3) ocean carriers have no preeminent right to set free time and demurrage and frequently do not do so; (4) approval of Agreement No. 8005–7 would not preclude the carrier conferences from controlling intra-conference competition on free time and demurrage matters; (5) carrier-set free time and demurrage arrangements prevent NYTC members from providing equal treatment to all users of their services; (6) if the flexible "3 to 5 day" free time provision in NYTC's tariff is improper, the Commission should not disapprove the Amendment, but order the "3 to 5 day" rule amended; (7) the fact that the Carrier Conferences self-police their members and NYTC does not, does not justify a prohibition against NYTC members establishing free time and demurrage rates and practices for the use of their own property.

DISCUSSION

Amendment No. 7 proposed a major extension of NYTC's authority to concertedly establish free time and demurrage rates and practices at terminal

[3] *Protestants attack 19 factual findings of the* Presiding Officer and assert that these findings have a relevant, material effect on the Initial Decision. Most of Protestants' allegations in this regard are erroneous, misleading, trivial, or irrelevant when read in context. None were critical to the Presiding Officer's ultimate conclusion.

[4] Protestants describe some 28 findings of fact which allegedly should have been made by the Presiding Officer. Several of these requested findings have been made by the Commission. The remaining requests relate to the Carrier Conferences' assertion that there is a legal and factual necessity for ocean carriers to control free time and demurrage of New York terminals rather than terminal operators. Although a majority of Protestants' proposed findings are supported by the record, the record as a whole fails to support the conclusion that Protestants have or should have a superior *right* to control free time and demurrage practices.

facilities controlled by its members. Because price fixing is per se violative of the antitrust laws,[5] a section 15 agreement to fix prices is contrary to the public interest unless specially justified by the persons seeking approval of the agreement. Justification requires a showing that the proposed activity is required to meet a serious transportation need, confer an important public benefit or further a valid regulatory purpose. *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 243 (1968); *Canadian-American Working Arrangement,* 16 S.R.R. 733, 736–737 (1976). The burden of demonstrating the necessary connection between a proposed agreement and such a need, benefit, or purpose is always upon the Proponents. In the instant case, however, the Presiding Officer not only found that Amendment No. 7 was necessary to confer an important public benefit and meet a serious transportation need, but further indicated (I.D., at 18) that the *Svenska* burden of justification was inapplicable because NYTC's members were only proposing to exercise the basic right of terminal operators to establish free time and demurrage practices at their own facilities.

The right of an *individual* terminal operator to establish free time and demurrage cannot be reasonably challenged.[6] However, this superior right to control the operation of one's own facilities—subject to Shipping Act regulation—does not govern the disposition of a proposal to concertedly conduct such operations in violation of the Sherman Act. Amendment No. 7 must be justified by its Proponents in the same fashion as any other agreement which is anticompetitive *per se*. The principal question before the Commission is whether NYTC has supplied that justification. Upon examination of the entire record in this proceeding, it is concluded that the *Svenska* standard has not been met and that Amendment No. 7 must be disapproved.

The record reveals that import shippers occasionally request NYTC or its member terminals to adjust free time and demurrage practices applicable to a particular commodity and that Agreement No. 8005-6 precludes NYTC from accommodating these requests because ocean carrier tariffs govern most import shipments.[7] If the ocean carriers do not adjust their tariffs in accordance with such shipper requests, NYTC terminals could lose business to other ports with more favorable free time and demurrage practices.[8] Some ocean carriers also make free time and demurrage arrangements which NYTC members consider burdensome or of questionable validity.[9] Finally, there are approximately 40 ocean carrier conference tariffs applicable to NYTC, many (but not all) of which

[5] 15 U.S.C. 1; *United States v. Trenton Potteries,* 273 U.S. 392 (1927).

[6] The Commission fully adopts the Presiding Officer's findings and conclusions that the rights and interests of a single terminal operator in free time and demurrage matters are ordinarily superior to those of an ocean carrier, and that Protestants have not proven that special conditions exist in New York which warrant deviation from this general principle.

[7] Steamship lines using NYTC piers rarely publish free time and demurrage rules on export cargo.

[8] NYTC Chairman Jesse A. Chebuske testified that NYTC had been approached by importers of green coffee and rubber requesting free time adjustments on import cargo. [Tr., at 67–71] Mr. Chebuske further stated that rubber once handled through New York now passes through Norfolk, but failed to establish the volume and nature of such shipments, the ocean carriers and terminals involved, the free time arangements in question, or how Amendment No. 7 would necessarily remedy the situation. [Tr., at 71–72, 151–152, 298–301]

[9] NYTC views the "multiple container" exceptions in many Carrier Conference tariffs as unjustified concessions to large shippers and that calculating demurrage on an "as freighted by the ocean carrier" basis could distort a terminal's cost of storing and handling a particular shipment. [Tr., at 99–101, 239–240, 445–446]

contain different free time and demurrage provisions, especially for containerized import cargoes.[10]

The Presiding Officer found that this situation could *potentially* lead to shipper confusion, additional administrative work for NYTC members and unreasonable discrimination among shippers using the same terminals. Nonetheless, it is clear such undesirable results have not actually occurred to any measurable extent.[11] NYTC is satisfied with the level of revenues it receives from existing free time and demurrage arrangements. It primarily wishes to control these practices so it can better compete for cargoes by responding to the special needs of local consignees when it would be advantageous to do so.[12]

Although the inability to directly set free time and demurrage provisions in the NYTC terminal tariff causes minor annoyances to NYTC's members, NYTC's evidence leaves no doubt that the purpose of Agreement No. 7 is to improve its ability to promote the interests of NYTC terminals, vis-a-vis both other New York terminals and terminals in other ports. The instant record does not demonstrate that NYTC terminals are suffering any competitive disadvantage under the present system whereby NYTC members must individually negotiate free time and demurrage arrangements with their ocean carrier clients. The mere potential for minimizing shipper confusion and lessening the possibility that ocean carriers will violate Shipping Act section 16 First or section 17, second paragraph,[13] is not the type of showing which establishes that an anticompetitive section 15 agreement is *necessary* to meet a serious transportation need or confer an important public benefit.[14] Because NYTC failed to establish a basis for approving Amendment No. 7 under the *Svenska* doctrine, it is unnecessary for us to reach Protestants' other exceptions.

[10] It is unlikely any terminal operator applies as many as 39 different tariffs to its facilities, and of those which do apply, not all of them differ on free time and demurrage. [Tr., at 254–255, 389–393]

[11] Errors in applying ocean tariffs by terminal operators occur infrequently, free time and demurrage provisions in ocean carrier tariffs change infrequently, and NYTC receives only five or so shipper complaints concerning free time and demurrage practices annually. [Tr., at 171–172, 182, 511–513.] Amendment No. 7 was motivated not by shipper complaints, but by the business judgment of NYTC's Chairman. [Tr., at 353–354.] No single demurrage clerk would be involved with all 40 ocean carrier tariffs applicable at New York [Tr., at 404, 485], and additional terminal employees are not retained to administer the varying free time and demurrage provisions in ocean carrier tariffs. [Tr., at 511, 565–566, 568.] Managers of carrier owned terminals do not view the application of several free time and demurrage tariffs to be confusing or administratively difficult. [Tr., at 645, 803]

[12] Mr. Chebuske stated that uniformity in ocean carrier tariff provisions would not solve NYTC's "basic problem." This problem is not the difficulty in applying divergent tariffs, but the absence of the *right* to concertedly establish free time and demurrage rates for NYTC facilities. [Tr., at 152–154, 198–201.]. Shippers tend to be more interested in flexibility than in uniformity. [Tr., at 366–368; see also Harry R. Alford's statements regarding NYTC's use of special free time provisions. Tr., at 506–507]

Mr. Chebuske also indicated that NYTC desired to have the "penalty" of demurrage payments fall directly on the shipper and not be absorbed by the carrier [Tr., at 327–328] because this would more effectively prevent congestion. No evidence showing the presence of congestion at NYTC facilities was introduced, however.

[13] NYTC's stated concern that its members could violate the Shipping Act because different shippers are assessed different demurrage charges for using NYTC piers overlooks the fact that NYTC members do not assess the charges. The ocean carriers are responsible. Should a New York shipper believe it is being subjected to undue prejudice by an ocean carrier offering discriminatory free time and demurrage arrangements under one or more tariffs, the shipper may file a complaint with the Commission seeking relief from the practice. *See generally, Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 544–547 (1966).

[14] Serious transportation need and important public benefit were the bases for the Presiding Officer's recommendation of approval. NYTC has also failed to show that the Amendment No. 7 would further a valid regulatory purpose—the third basis for justification under the *Svenska* test.

THEREFORE, IT IS ORDERED, That the Exceptions of the Protestants are granted to the extent indicated above; and

IT IS FURTHER ORDERED, That Agreement No. 8005-7 is disapproved; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–45

MADEPLAC S.A. INDUSTRIA DE MADERIAS

v.

L. FIGUEIREDO NAVEGACAO, S.A.
A/K/A FROTA AMAZONICA, S.A.

ORDER ON RECONSIDERATION

August 15, 1978

By Order served April 12, 1978 (April Order), the Commission adopted the Initial Decision on Remand of Administrative Law Judge William Beasley Harris denying the complaint of Madeplac, S.A. Industria de Madeiras (Madeplac or Petitioner) against L. Figueiredo Navegacao, S.A., a/k/a Frota Amazonica, S.A. (Amazonica). Petitioner had sought reparation for overcharges allegedly paid by it and received by Amazonica in violation of section 18(b)(3) of the Shipping Act, 1916. Madeplac has now filed a Petition for Reconsideration requesting reversal of the April Order and the payment of reparations in the amount of $24,461.18, plus interest. A "Reply to Petition for Reconsideration" was filed by Amazonica.

Our April Order held that Madeplac failed to establish a misclassification or misrating of the cargo in question, and the instant Petition contains no allegations not previously considered by the Commission. There is no factual dispute as to the *physical description* of the items shipped. Rather, the controversy concerns the *characterization* of those items under Amazonica's tariff. Inquiry into the meaning of a tariff provision is not limited to *Webster's Collegiate Dictionary;* analysis of available commodity classifications in light of reasonable commercial usage is also required. The item shipped constituted all the necessary parts for one prefabricated free-standing "LRF II Special Butler Building." The building, albeit a large structure, was properly classified under the tariff provision for "*Buildings, Portable, Knocked Down, In Sections or Set-Up.*"* No tariff ambiguity is present as a matter of law.

THEREFORE, IT IS ORDERED, That the relief requested by the "Petition for Reconsideration" of Madeplac, S.A. Industria de Madeiras is denied, and the Commission's "Order of Adoption of Initial Decision" is affirmed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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* Any notion that Petitioner's building should not have been rated as a single commodity rather than as numerous individually rated component parts is dispelled by Amazonica's Tariff Rule 1(b), which provides: Commodities shipped disassembled shall be rated as a unit instead of applying rates for various parts comprising the unit unless otherwise specified.

Moreover, if Petitioner had argued successfully that its shipment was not properly classified as a "knocked down" or "portable" building, it still would have failed to make a case for reparations. Petitioner's expert witness testified that he could not determine whether there was an overcharge and, based upon the record, would have assigned a "Cargo, N.O.S." classification. The "Cargo, N.O.S." rate was substantially higher than that paid by Madeplac.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-4

KUEHNE & NAGEL, INC.

v.

VAASA LINE

NOTICE OF DETERMINATION NOT TO REVIEW

August 15, 1978

Notice is given that the Commission on August 9, 1978, determined not to review the order of dismissal of the Administrative Law Judge in this proceeding served July 13, 1978.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–4

Kuehne & Nagel, Inc.

v.

Vaasa Line
(Hanseatic-Vaasa Line)

MOTION TO DISMISS COMPLAINT GRANTED

Finalized on August 15, 1978

On *July 13, 1978*, the following letter, dated and postmarked New York, N.Y., July 10, 1978, and signed by counsel for the complainant in this proceeding, was received:

> I have been informed by my client that the Vaasa Line has commenced proceedings in Finland to have itself declared bankrupt. This being so, my client has decided no useful purpose would be served by continuing the above-cited proceeding.
>
> Accordingly, it is requested that the complaint herein be dismissed. Should you so desire, you may consider this letter as a motion requesting such action.

As indicated, the letter is considered a motion to dismiss, and there are no circumstances in this proceeding which in any way vary the right of a complainant not to proceed with an action instituted by it.

Wherefore, upon consideration of the above and the record herein, it is Ordered:

(A) The motion to dismiss the complaint be and hereby is granted.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

July 13, 1978

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FEDERAL MARITIME COMMISSION

DOCKET NO. 77-5

IN RE: AGREEMENT NO. 9973-3—
JOHNSON SCANSTAR SERVICE VOTING PROVISION

The "Equal Terms and Conditions" clause of section 15 of the Shipping Act, 1916, requires that a joint service which acts as a single carrier exercise no greater conference voting power than any other single carrier.

The determination of when a joint service, or other such amalgamation of carriers, must be treated for conference voting purposes as a single carrier is to be made on a case by case basis, and depends upon a number of specific factors.

There is no requirement that the exercise of unequal voting power by a single carrier be shown to have resulted in "actual harm" to other carriers; unequal voting power is violative of the Shipping Act, 1916, section 15, as a matter of law.

John R. Mahoney and *Wade S. Hooker, Jr.*, of Burlingham, Underwood & Lord, New York, New York, for Johnson ScanStar, Blue Star Line, Ltd., the East Asiatic Company, Ltd., and Rederiaktiebolaget Nordstjernan (Johnson Line).

Russell T. Weil and *James P. Moore* of Kirlin, Campbell & Keating, Washington, D.C. for United States Lines, Inc.

Edward M. Shea and *C. Michael Tarone* of Ragan and Mason, Washington, D.C., for Sea-Land Service, Inc.

John Robert Ewers and *Deana C. Rose* for the Bureau of Hearing Counsel.

REPORT AND ORDER

August 15, 1978

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

I. BACKGROUND

Agreement No. 9973 is an agreement among Blue Star Line, Ltd. (BSL), East Asiatic Company, Ltd. (EAC), and Johnson Line to form the Johnson ScanStar Combined Service (JSS). Johnson ScanStar now operates between U.S. Pacific ports and ports in the United Kingdom, Eire and the European Continent except the Mediterranean, and also serves inland points in the United Kingdom, Eire and the European Continent, via such ports. Agreement No. 9973 was first approved by the Commission on March 30, 1972, for five years.

As originally filed on October 20, 1976, Amendment No. 3 restated the basic agreement among the parties, as amended, and extended its term through December 31, 1981. Separate protests were submitted by United States Lines, Inc. and Sea-Land Service, Inc. (Protestants). Ultimately, the Protestants op-

posed only the existing JSS voting provision allowing each party to the Agreement an individual vote in any conference of which Johnson ScanStar Service is, or becomes, a member.[1]

By Order dated March 31, 1977 (March Order), the Commission found that the basic Agreement, as modified by Amendment No. 3, continues to be in the public interest by meeting a serious transportation need and/or conferring important public benefits, but that a hearing on the contested voting provision was required. Accordingly, Agreement No. 9973–3 was approved pending a hearing on the voting provision. By Order dated May 2, 1977 (May Order), the proceeding was limited to the submission of affidavits of fact and memoranda of law, and Protestants having the burden of proof were required to file the opening affidavits and memoranda.

By Order dated August 18, 1977 (August Order), the Commission ruled that discovery was available, and an Administrative Law Judge subsequently was appointed for the limited purpose of supervising discovery. Discovery is now complete, the affidavits and memoranda of Proponents and Protestants have been filed,[2] and the matter is ripe for decision.

II. POSITIONS OF THE PARTIES

A. *Positions of Protestants*

1. *Burden of Proof*

U.S. Lines is the only Protestant objecting to the Commission's allocation of the burden of proof to Protestants. U.S. Lines contends that because the joint service agreement (as a whole) would be violative of the antitrust laws, the Commission cannot approve the voting provisions unless Proponents prove a serious transportation need, important public benefit, or valid regulatory purpose exists to justify the voting provisions; placing the burden of proof with Protestants assertedly is contrary, *inter alia,* to the Shipping Act, the Supreme Court's holding in *FMC v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, and existing FMC regulations and policy.

2. *Nature of Proof*

Maritime Fruit Carriers Ltd. and Refrigerated Express Lines (A/Asia) Pty., Ltd., is cited as the only reported case wherein the Commission has attempted to address the question of multiple votes for joint services or cooperative working agreements.[3] Protestants observe that the opinion of the Commission, which was

[1] Several of Protestants' original objections were eliminated when Proponents modified Amendment No. 3 to limit chartering of additional space for JSS use and to limit the term of the Agreement to March 30, 1980.

[2] The Bureau of Hearing Counsel is also a party to the proceeding and is included within the term "Protestants" unless otherwise indicated by the context.

[3] 15 F.M.C. 233 (1972), *affirmed per curiam sub nom. Farrell Lines, Inc. v. Federal Maritime Commission*, 475 F.2d 1332 (D.C. Cir. 1973), hereinafter cited as *Maritime Fruit Carriers*. This decision involved an integrated service composed of two member lines. One of the contested issues was whether these two lines should be characterized as a "joint service." The key issue was whether any set consequence should follow from a determination that "joint service" status exists. In a plurality formed by the joint opinion of Chairman Bentley and Vice Chairman Barrett, with Commissioner Morse concurring separately, the Commission allowed the integrated service to exercise two votes. Chairman Bentley and Vice Chariman Barrett took the approach that "actual harm" to other carriers from multiple voting is the critical factor, not "labels" such as "joint service" or "cooperative working arrangement." Commissioner Morse did not look to "actual harm," but rather turned to the four criteria spelled out in section 15; in doing so, he found that nothing in the record enabled him to find the proposed voting provision violative of these four section 15 standards, and therefore be concurred with the result reached by Commissioners Bentley and Barrett. Commissioner Day, dissenting, would have applied the *Svenska* standards to the voting provisions, and found that the voting provisions were not justified under these standards, and therefore not approvable under section 15. Commissioner Hearn, dissenting, found that the agreement in question, taken as a

a plurality opinion with Commissioner Morse concurring separately, turned specifically upon the factual setting of the case. Protestants suggest that the case should be limited to its facts, and would distinguish it from the instant case because: (1) in *Maritime Fruit Carriers*, it did not matter whether the two members of the integrated service in that case had one-sixth or two-sixths of the votes because the integrated service did not have enough voting power to compel affirmative conference action in either event; (2) the record in the *Maritime Fruit Carriers* case was devoid of evidence as to the past or future operational impact of multiple voting on conference operations; and (3) there was a serious dispute as to the nature of the arrangement between the parties, *viz.*, whether or not they were operating as a joint service, whereas in the instant case, it is clear that JSS is a joint service, and hence an analysis of the impact of its voting is unnecessary, although an adverse impact could in fact be shown.

3. *Johnson ScanStar's Status as a Joint Service*

Protestants chide JSS for belatedly suggesting that it is not a joint service within the definition of FMC General Order 24 (46 C.F.R. section 522.2(a)(4)), and argue that JSS's denial that it is a joint service is procedurally improper, since JSS acquiesced in being referred to as a joint service throughout the proceedings. Protestants observe that Johnson ScanStar, in addition to operating as a single carrier, holds itself out to the public as a joint service by advertising "Johnson ScanStar, a joint service of Johnson Line, the East Asiatic Company and Blue Star Line." They argue that Proponents' interests outside JSS are minimal, and have been exaggerated by Proponents. None of the JSS members has individual sailings outside the joint service but within the trade covered by the North Europe/U.S. Pacific Freight Conference (NEUSPFC) or Pacific Coast/European Conference (PCEC) sufficient to meet the sailing requirements for membership in those conferences. Allowing JSS members individual votes is therefore not only violative of the Shipping Act, Protestants argue, but also contrary to the membership requirements of the conferences. Additionally, Protestants note that Article 4 of the JSS agreement provides that the parties to it "shall concentrate their efforts upon cargo suitable for carriage in [JSS] container vessels," and each party covenants not to compete with JSS for cargoes. Proponents' evidence boils down, in Protestants' view, to proof that Blue Star Line and Johnson Line have selectively entered the trade only on isolated occasions, while EAC has not participated at all in the trade, except through JSS. Protestants conclude that since JSS is a joint service, the guidelines articulated in FMC General Order 24 (46 C.F.R. section 522.6(b)(1)) are opposite, and should be applied to accord the joint service a single vote in conference activities.

4. *Evidence of Actual Harm*

Protestants claim that direct proof of actual harm from Proponents' exercise of multiple voting rights is difficult to obtain because the main impact of the multiple voting rights is to "pre-censor," or exercise a chilling effect upon, the activities of individual lines. In the eastbound (PCEC) conference, two joint services together have veto power over conference activity and each joint service

whole, warranted the conclusion that a single operating entity was created in the trade. This being so, Commissioner Hearn found that allowing joint service members a separate vote would violate that separate provision of section 15 which guarantees conference membership on equal terms and conditions.

has veto power if it can secure one other vote.[4] In the westbound (NEUSPFC) conference, JSS has veto power over conference action when it is allowed to have multiple votes.[5] The effect of this voting power allegedly has been to cause Protestants to despair of introducing measures for conference approval when it knows that JSS would oppose it.

Additionally, Sea-Land cites two specific examples in the NEUSPFC and one in the PCEC where it alleges that rate action proposed by it was blocked by JSS (although JSS disputes these facts). Sea-Land points out that the voting statistics presented by JSS are based upon a "total number of votes taken" at conference meetings that falls far short of the number of annual agenda items before the conferences in question. According to Sea-Land, JSS's statistics therefore refer to only a fraction of the conference votes taken, and the inferences JSS attempts to draw from them are therefore unreliable and should be rejected.

Finally, Protestants observe that, despite the existence of these eastbound and westbound conferences in the trade, separate rate agreements have been necessary as "safety valves" to assure truly equal participation. This assertion is verified in Protestants' view by the fact that the corresponding 48 hour rate agreement, (No. 10023), was permitted to expire after NEUSPFC adopted a "one carrier, one vote" amendment, while the 48 hour rate agreement, (No. 10052), corresponding to the PCEC, remains in effect in the trade covered by the PCEC, which still allows multiple votes for joint services. The inference is that separate rate agreements are needed when joint services dominate a particular conference. Sea-Land states that one reason for its resignation from the PCEC and the NEUSPFC was the multiple vote allowed joint services, and points out that three carriers who had been members of the corresponding rate agreement joined NEUSPFC after NEUSPFC amended its voting provisions to allow only single votes for joint services.

5. *"Multiple Votes" for Joint Services as a Matter of Law*

Protestants seek to distinguish the *Maritime Fruit Carriers* case on the ground that it dealt more with the question of how to resolve a factual dispute as to whether two parties constitute a joint service than it did with how to handle joint services, and because the decision in that case was, after all, reached by a plurality joined by Commissioner Morse in a separate opinion. It is suggested that ICC cases be consulted for persuasive authority on the matter of voting by joint services. Section 5(a) of the Interstate Commerce Act has basically the same legislative purpose as section 15 of the Shipping Act, and Protestants argue that the ICC has held repeatedly that no carrier may have greater representation than any other carrier. ICC cases cited by U.S. Lines for the foregoing proposition include *Oil Capital Bureau, Inc.—Agreement*, 321 I.C.C. 263 (1963), *Eastern Railroads–Agreement*, 277 I.C.C. 279 (1950), and *Columbia River Tariff Bureau–Agreement*, 294 I.C.C. 303 (1955).

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[4] In the PCEC, decisions at duly called meetings are to be made by a three-fourths vote of members present and entitled to vote; otherwise they are to be made by three-fourths vote of all members entitled to vote. Changes in the agreement require a unanimous vote of all members. Three fourths of the members constitute a quorum. During U.S. Lines' membership, there were 15 total votes, with 12 needed to pass and 4 votes needed to block a measure when all members were present. JSS with three votes thus needed only one other vote to join it in order to prevent a motion for passing. With three votes, the Euro-Pacific Joint Service would have the same potential.

[5] In the NEUSPFC, all decisions require a three-quarters vote of all members entitled to vote, except that alteration of the basic agreement requires unanimous consent of all members. A quorum consists of three quarters of the members. During U.S. Lines' membership, there were ten members, with 8 votes required to pass a motion, and 3 votes required to block a motion. With its 3 votes, JSS could block, or "veto" any action in the conference.

Hearing Counsel argues that Proponents want "the best of both worlds" by acting as a single joint service while at the same time exercising three conference votes. Hearing Counsel states that this is inherently unfair, and that the "price" for being allowed to amalgamate into an anticompetitive arrangement such as a joint service is that the joint service have only a single vote to reflect its status as a single carrier.

Hearing Counsel disputes JSS's position that there are numerous examples of other joint services with multiple votes[6] and contends that FMC precedent does not preclude a ruling that joint services, if they constitute a single party in interest, should be accorded only one vote in conferences in which they participate.

Protestants argue that the "equal terms and conditions" requirement in section 15 of the Shipping Act implicitly requires equal terms for participation following membership. Voting rights are said to be the essence of participation, and unequal voting rights therefore constitute unequal participation.[7] Protestants maintain that the prospect of unequal participation discourages individual carriers from entering conferences with joint services exercising multiple votes, and that this constitutes a barrier to entry. They assert that there has been specific injury to the conference system as a result of multiple voting provisions, as evidenced by dissension in the conferences and by the air of controversy leading to proceedings such as this one.

B. *Position of Proponents Blue Star Line, East Asiatic Company, and Johnson Line*

1. *Burden of Proof*

The parties to the Johnson ScanStar Agreement (hereinafter referred to collectively as "JSS") concur with the allocation of the burden of proof contained in the Commission's May Order and further assert that the Protestants have failed to meet this burden.

2. *Nature of Proof*

JSS relies heavily upon the plurality opinion of Commissioners Bentley and Barrett in the *Maritime Fruit Carriers* decision, *supra*, in analyzing the evidentiary issues of the present case. JSS observes that the writers of this opinion refused to establish a set rule prohibiting multiple votes for joint services and refused to read the General Order 24 guidelines as establishing such a rule. The plurality was hesitant, JSS notes, to fix a set rule for "joint services" because of the difficulty of determining when a particular agreement constitutes a "joint service," and called for a case-by-case analysis of the actual operational impact of individual voting by members of an approved agreement upon conference operations, particularly with respect to the impact upon other conference members. In the case before the Commission in *Maritime Fruit Carriers*, JSS argues that no proof of adverse impact upon other carriers in the conferences in

[6] These examples, contained in Proponents' affidavits, are all, according to Hearing Counsel, either defunct agreements or not joint services, with two exceptions—Agreements Nos. 9902 and 10162. Agreement No. 9902 is the Euro-Pacific Joint Service, which is itself currently under FMC investigation, including the issue of voting. Agreement No. 10162 is the Trans-Royal Joint Service, which is presently not a member of any conference.

[7] Sea-Land cites as being apposite here landmark cases in the area of voters' rights and equal protection of the laws, such as *Baker v. Carr*, 369 U.S. 186 (1962), *Gray v. Sanders*, 372 U.S. 368 (1963), and *Reynolds v. Simms*, 377 U.S. 533 (1964).

question was found to be present, and therefore the right of the individual members of the alleged "joint service" to separate votes in conference activities was approved. JSS maintains that Protestants' affidavits establish no palpable harm of the type required by the *Maritime Fruit Carriers* case, but constitute speculative and unfounded allegations of possible harm. JSS points out that the Commission has repeatedly held that the mere possibility that a section 15 agreement may result in some future violation of the Shipping Act is not a sufficient basis for disapproving an agreement.

3. *Johnson ScanStar's Status as a Joint Service*

In its memorandum of law, JSS asserts that, even if the suggestion in General Order 24 that joint services share only one vote were taken as mandatory, JSS does not fall within General Order 24's definition of a "joint service." JSS notes that it does not fix rates or publish tariffs, since these matters are controlled by the conferences of which JSS is a member. JSS also points out that its members each maintain their own ships and equipment contributed to JSS and engage in separate marketing activities to promote their individual specialty services outside the scope of the JSS agreement. JSS also objects to the conclusory statements in William Jarrel Smith, Jr.'s affidavit regarding JSS's status as a joint service because they constituted an expression of opinion on the ultimate legal issues in the proceeding.[8]

4. *Evidence of Actual Harm*

JSS has submitted data to establish that its multiple votes have caused virtually no results adverse to Protestants in conference voting, and that disagreements have been over relatively inconsequential matters. The completeness and validity of JSS's data were challenged by Protestants, but they presented, in JSS's view, no clear evidence of past harm from JSS votes. JSS further states that Protestants never objected to the voting arrangements while conference members, nor can they establish any pattern of voting by JSS which reflects an effort to put them at a disadvantage. On the other hand, JSS argues that it needs separate representation of its component carriers so that they can maintain and protect their separate interests that are outside the JSS agreement, but within the scope of conference activity. If JSS's "veto power" in a particular conference is objectionable, this can be remedied, JSS states, by requiring modification of the conference agreement. The FMC assertedly should not use "overkill" by modifying JSS's organic agreement.

5. *"Multiple Votes" for Joint Services as a Matter of Law*

The inflexible rule resulting from the "one man, one vote" analogy was implicitly rejected in the *Maritime Fruit Carriers* case in favor of a case-by-case approach, JSS asserts, and in any case that doctrine has no application in a commercial context. Contrary to the approach of Sea-Land and U.S. Lines, JSS argues that there is no central principle of law imposed by the Shipping Act in the matter of voting rights; only a case-by-case factual analysis of the type set forth in the *Maritime Fruit Carriers* case is required in JSS's view.

[8] Hearing Counsel introduced the affidavit of the then Director of the Bureau of Compliance to establish that JSS was in fact a joint service. Large portions of this affidavit constitute opinions as to the ultimate legal and policy issues before the Commission, and as such do not constitute evidence.

JSS claims that multiple votes for joint services have been approved in the past by the Commission and by the Interstate Commerce Commission.[9]

III. Discussion

A. *Burden of Proof*

In its May Order, the Commission stated that "while the burden of going forward with evidence may shift from time to time during the consideration of the approval of . . . agreements, the burden of proof never departs from those opposed to the agreement." U.S. Lines takes issue with this allocation of proof, citing the *Svenska* case and its progeny. *Svenska,* however, applies only in cases where the concerted activities proposed would violate the antitrust laws. In such cases, there is *prima facie* evidence that the proposed activities are contrary to the public interest, which can be overcome only if proponents come forward with evidence establishing a serious transportation need, important public benefit, or valid regulatory purpose to be derived from the proposal. U.S. Lines argue that because Amendment No. 3 in its *entirety* would require justification under the *Svenska* standards, the specific voting provisions now before the Commission must also be so justified.

Amendment No. 3, taken as a whole, admittedly would be *per se* violative of the antitrust laws, but the March Order of Interim Approval specifically found the basic Agreement to be in the public interest because its continued existence provides important benefits that overcome the *Svenska* presumption. A hearing was ordered to determine *only* whether the separate voting provisions of the proposed agreement comply with the standards of section 15. *The separate voting provisions do not, in and of themselves, violate the antitrust laws.* There is no presumption against their approval under the *Svenska* case, and Protestants therefore have the burden of coming forward with evidence to establish that the proposed agreement is violative of the Shipping Act. As will be explained below, the specific matter to be proved is that JSS constitutes a single carrier.

B. *Applicable Standard for Approval of Multiple Voting Arrangements*

Maritime Fruit Carriers, supra, note 3, is the only reported FMC case which presented the multiple votes for joint services question that is raised here. A majority of three Commissioners approved the multiple voting arrangement there in issue, with two Commissioners holding that *actual harm* to other conference carriers must be shown before multiple voting provisions can be disapproved. In a separate concurring opinion, Commissioner Morse noted that nothing in the record enabled him to make any of the findings required by section 15 of the Shipping Act as a condition precedent to disapproval. Both Commissioner Morse and the plurality expressed reluctance to establish a set rule applying to "joint services" because of the difficulty of defining that term, and preferred a case-by-case approach.

The approach taken in *Maritime Fruit Carriers* avoids the problem of determining when a group of carriers should be treated as a single carrier for voting

[9] *I.e.*, FMC Agreement Nos. 9925, 9714, 9715, 9944, 9718, 9731, 9835 and 9975, 277 I.C.C. 279 (1950), 279 I.C.C. 40 (1950), and 278 I.C.C. 525 (1950).

purposes, but it calls for a more difficult, and more subjective, determination instead, *viz.*, whether the joint service is "abusing" its voting power by taking positions harmful to other carriers. The determination of "actual harm" will fluctuate continually with the membership and voting provisions of the conferences involved, and matters can change upon short notice.

Section 15 of the Shipping Act requires that all conference agreements provide "reasonable and equal terms and conditions for admission and readmission to conference membership. . . ." Equal access to membership would have little meaning without equal participation after membership, and voting is the essence of participation after membership, and voting is the essence of participation. Consequently, the principle of equal voting power for every member must be inherent in the conference system.

The hegemony of large carriers in the trade over smaller carriers is a feature of unbridled competition that the conference system is designed to avoid. Unequal voting power violative of section 15's "equal terms and conditions" clause exists where one conference member is granted more votes in the conference than another member merely because of its size or composition.

Indeed, JSS does not seriously assert that it should have three votes because of its large investment in the trade. Rather, it claims three votes so that the JSS component carriers can protect their "separate interests" in the trade.[10] JSS apparently would have the Commission weigh the value to its members of having their "separate interests" in the trade reflected by individual votes in conference activity against the *actual harm* done to Protestants by multiple representation. Protestants advocate weighing Proponents' interest as a joint service against their other interests in the trade to determine whether they should be treated as a single party.

We find the latter approach to be prefereable becaue it best reflects the principle that voting power that is in fact unequal is violative of the Shipping Act. The manner in which the power has been previously exercised is of little relevance if the potential for injury or unfairness continues to exist. It is not administratively feasible for the Commission to monitor continually the exercise by one party of a triple vote in a conference, yet this would be required by JSS's approach.

Where the members of a joint service have a community of interest so that they constitute, in effect, a single carrier, provisions in the joint service agreement allowing for multiple votes foster a violation of the Shipping Act if the joint service joins any conference not limiting it to one vote. The ultimate issue in this case, therefore, is not whether "actual harm" has resulted from JSS's exercise of multiple votes,[11] but whether JSS should be treated as a single carrier.

C. *Johnson ScanStar's Status as a Joint Service*

The ultimate question in this case is whether the JSS members have formed a single carrier in the trades covered by the PCEC and the NEUSPFC. The

[10] To the extent *JSS merely wishes each of its members to have* an individual voice at conference meetings, this could be accomplished by sending three representatives who would share a single vote.

[11] This was the primary *issue addressed in the conflicting* affidavits of the parties referring to JSS's voting record and its effect upon Protestants. The extent and significance of the JSS members' carryings *outside* the service but in the trade was also in dispute, and retains some relevance under our holding in this case.

plurality opinion in the *Maritime Fruit Carriers* case recognized that labels, such as "joint service" or "cooperative working arrangement," are not determinative of this issue, but offered no guidelines as to the factors which collectively determine when carriers should be treated as operating a single service. In order to provide greater guidance to the industry, the Commission will henceforth use a case-by-case approach in which the following indicia of single carrier status will be considered:

(1) coordination of sailings;
(2) pooling or other mutual allocation of costs, revenues, or profits;
(3) covenants not to compete with the joint venture;
(4) limitations of tonnage used in the joint venture;
(5) common offices or direction by a jointly owned corporation;
(6) common agents;
(7) common tariffs;
(8) common bill of lading;
(9) common name for combined service;
(10) common vessel identification;
(11) common arrangements with terminals, stevedores, and other parties;
(12) joint advertising and/or solicitation;
(13) lack of significant individual interests in the trade outside the joint venture;
(14) the duration of the joint venture; and
(15) limitations, if any, on the type of cargo carried by the service.

These factors are not, of course, all of equal weight, nor can any fixed formula be used to determine which combinations of factors will compel the conclusion that the members of the joint service or similar arrangement are a single party in interest entitled to a single vote. They will be useful in analyzing such questions, however, and the presence of several factors may well create a rebuttable presumtpion of "single carrier status."

Turning to the JSS agreement and the available facts, it is indisputable that factors (1), (2), (3), (6), (9), and (12), at the very least, apply to JSS. Additionally, close analysis of the record appears to establish the existence of factor (13). Cargo movements by individual JSS members outside the joint service and in the trade do not appear to be of sufficient regularity to meet the sailing requirements for any conference in the trade, [18] and these individual interests are relatively insignificant compared to the parties' interest in Johnson ScanStar. Johnson ScanStar holds itself out to the public as a joint service and acts in important respects like a single carrier; it should be treated as such.

IV. Conclusion

Johnson ScanStar (JSS) is a joint service operating in the U.S. Pacific Coast/ European trades as a single carrier. Because the Agreement presently before the Commission for renewal allows it, JSS exercises three votes in the Pacific Coast European Conference (PCEC) and is precluded from doing so in the Northern Europe/U.S. Pacific Freight Conference (NEUSPFC) only by a temporary amendment to that conference's agreement. The individual members of JSS have minimal interests in the trade outside their interest in JSS, and these fall far short of meeting the sailing requirements for individual conference membership. Protestants Sea-Land Service and United States Lines were entitled to only one vote in the PCEC and NEUSPFC. As a result, they were not afforded the membership on "equal terms and conditions" required by section 15 of the Shipping Act. The Commission will remedy this violation by requiring modification of that portion of the Agreement allowing the joint service a triple vote as a condition of continued approval. This will bring the JSS Agreement into conformity with other such joint service agreements, as well as assuring that other conference members are protected against the exercise of unequal power.

THEREFORE, IT IS ORDERED, That Agreement No. 9973-3 is approved, on condition that paragraph one thereof be modified to read as follows:

1. The parties agree either to belong to, or operate independently from, any conference as a group, so as to insure uniformity of rates for the Service. *In any conference, or other such voting body of which the parties to this agreement are members as a group, the parties collectively, and/or as a joint service, shall not exercise a greater total number of votes than that number (normally one) which is accorded a single carrier member of such conference or other voting body. The parties may develop a joint position regarding conference votes and membership.*

IT IS FURTHER ORDERED, That the approval in the first ordering paragraph hereof shall become effective upon receipt by the Secretary of the Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573, of an original and certified copies of Agreement No. 9973-3 modified as specified in the first ordering paragraph hereof and signed by the parties thereto; and

IT IS FURTHER ORDERED, That, if Agreement No. 9973-3 is not modified as specified in the first and second ordering paragraphs hereof within sixty days from the date of this Order, then Agreement No. 9973-3 is disapproved, effective 60 days from the date of this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 557

NEW JERSEY ZINC COMPANY

v.

ORIENT OVERSEAS CONTAINER LINE

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

August 15, 1978

No exceptions have been filed to the initial decision in this proceeding and the Commission has determined not to review that decision. Notice is given that the initial decision became the decision of the Commission on August 9, 1978.

It is Ordered, That applicant is authorized to waive collection of $3,467.00 of the charges previously assessed New Jersey Zinc 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. 557 that effective July 29, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period July 29, 1977, through August 21, 1977, the Group 1 rate on 'Titanium Dioxide' is $88.00W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further Ordered, That waiver of the charges shall be effectuated within 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.

(S) FRANCIS C. HURNEY
Secretary

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FEDERAL MARITIME COMMISSION

Special Docket No. 557

New Jersey Zinc Company

v.

Orient Overseas Container Line

Adopted August 15, 1978

Application to waive collection 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), Orient Overseas Container Line (Orient or Applicant) has applied for permission to waive collection of a portion of the freight charges on two shipments of titanium dioxide, which moved from Baltimore, Maryland, to Keelung, Taiwan, under Orient bills of lading dated July 29 and August 18, 1977. The application was filed December 16, 1977, and later amended by letter (with attachments) dated March 28, 1978. Additional documentation (affidavits) also was submitted with letter of June 22, 1978, from Eckert Overseas Agency, Inc. (Eckert), the general agents for Orient.

It should be noted that New Jersey Zinc Company, the shipper, is a subsidiary of Gulf & Western Industries (Eckert letter of March 28, 1978, and amended application attached thereto).

The subject shipments moved under Orient Freight Tariff No. 44, 1st revised page 387, item no. 4635, according to the rate for titanium dioxide (to Group 3 ports), effective May 24, 1977. The aggregate weight of the shipments was identical: 123,300 pounds (55.929 kilos) each. The rate applicable at time of the shipments was $119 per 1000 kilograms (W only). The rate sought to be applied is $88 per 1000 kilos (W only) less $3 H/H allowance, or a net of $85 per 1000 kilos in this instance. See Orient Freight Tariff No. 44, FMC No. 44, 2nd revised page 387, item no. 4635 (Group 3 ports), effective August 23, 1977.

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

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $12,975.52. Aggregate freight charges at the rate sought to be applied amount to $9,507.92. The difference sought to be waived is $3,467.60. The Applicant is not aware of any other shipment of the same commodity which moved via Orient during the same period at the rates involved in these two shipments.

The clerical error involved in the publication of an already-agreed special rate for this commodity was in not filing the agreed rate in its proper port-group column, i.e., $88.00 was filed in the Group 1 (Japan Base Ports) column, instead of in the Group 3 (Kaohsiung/Keelung) column. (See Eckert letter dated March 28, 1978, at p. 2.)

Orient, through Eckert, its general agent, further explains in its application the meeting where the special rate was agreed to by the parties and the eventual, later clerical error as follows:

(4) At a meeting, March 9, 1977, between complainant and respondent it was agreed to publish a rate on titanium dioxide from USEC to Taiwan of $88.00 per 1000 kgs., subject to $3.00 house to house discount. This rate was to be published upon booking of cargo.

Through clerical error publication was not made at time of cargo booking and cargo was billed at the then applicable tariff rate $119.00 per 1000 kgs. Subsequent to the shipments in question the error was discovered and the $88.00 per 1000 kgs. rate was filed by telex filing effective August 22, 1977.

On November 15, 1977 we received letter from complainant and payment was made on basis of rate of $88.00 per 1000 kgs. as previously agreed to publish in tariff.

In addition to the facts set forth in and attested to by the Special Docket application, at the request of the presiding Administrative Law Judge, Eckert also transmitted two affidavits attesting to the occurrence of the March 9, 1977, meeting referred to in the application. (See attachments to Eckert letter of June 22, 1978). Further amplification and explanation of some of the confusing details are set forth in the Eckert letter of March 28, 1978, from Robert G. Jufer to Chief Judge Cograve.

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

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

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

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

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

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the special rate in the proper ports-group column for shipments of titanium dioxide destined for Keelung, Taiwan, as had been agreed-to in advance with the shipper.

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

3. Prior to applying for authority to waive collection of a portion of the freight charges, Orient 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 Orient Overseas Container Line to waive collection of a portion of the freight charges, specifically the amount of $3,467.60. An appropriate notice will be published in Orient's tariff.

(S) THOMAS W. REILLY
Administrative Law Judge

WASHINGTON, D.C.
July 17, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-16

UNION CARBIDE CORPORATION

v.

JAPAN LINE, LTD.

NOTICE OF ADOPTION OF INITIAL DECISION

August 15, 1978

No exceptions were filed to the initial decision in this proceeding and the Commission has determined not to review that decision. Notice is given that the initial decision became the decision of the Commission on August 9, 1978.

The following corrections should be made in the initial decision:

1. The references to "$7,589.19" on lines three and four of page two should read "$7,585.19."

2. The references to "$2,360.22" on line four of page two and in the findings and conclusions on page four should read "$2,364.22."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–16

UNION CARBIDE CORPORATION

v.

JAPAN LINE, LTD.

Adopted August 15, 1978

Reparation awarded.

Warren Wytzka, Manager—Liner Services, Union Carbide Corporation, for complainant.
David Snow, Manager, Rates and Conferences, Japan Line (USA), Ltd. for respondent.

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

The respondents ". . . agree with cargo data as submitted by complainant." (Reply served June 15, 1978, p. 1). The complainant asserts the shipment consisted of 3850 bags Sevin Technical, measuring 4849 cubic feet, weighing 217,174 pounds or 98.509 thousand kilos; the shipment originated at South Brunswick, N.J., destined for Tokyo, Japan, on respondent's vessel *Queensway Bridge* under Bill of Lading Number MNYKB-OY020 dated April 27, 1977; that the freight rate assessed was $101.00 per 1000 kilos ($101.00 × 98.509 thousand kilos = $9,949.41) per item 512.0672.10 of Pacific Westbound Conference Tariff No. 8, FMC No. 15, the total freight was $9,949.41 which the complaint paid (complaint, p. 2 and 3). According to the complainant the correct freight rate is $77.00 per 1000 kilos per item 512.0672.60 of the said tariff, for a correct total freight of $7,589.19. The alleged overcharge ($9,949.41 — $7,589.19 = $2,360.22) is $2,360.22. The complainant says the correct Bill of Lading description of the goods should have been: "5–40' containers STC 19 pallets of 40 bags total 95 pallets STC 3850 bags." (Note: 19 pallets × 40 bags = 760 bags. 760 bags × 5 containers = 3800 bags as does 95 pallets × 40 bags = 3800 bags.)

Bill of Lading Number MNYKB-OY-020 shows, *inter alia*, "5–40' containers each said to contain 19 pallets of 40 bags—Sevin Technical Insecticides, Sevin Unfinished (Naphthyl Methyl Carbamate) IMCO page 9028 UN 1615 No Label Total 95 pallets said to contain 3850 bags—freight prepaid. Booking No.

[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).

1-MU3.108 Oakland House to House Containers Service. Gross Weight 217174 pounds, Measurement 4849'."

The respondent says the shipment had two tariff descriptions on the covering documents, i.e., "Sevin Technical" and "Naphthyl Methyl Carbamate," tariff items No. 512.0672.10 and 512.0672.12 respectively. On the other hand the 7th Revised Page 427 of the applicable tariff lists "Insecticides, viz: Sevin Unrefined, Item 512.0672.10; Naphthyl Methyl Carbamate, Item 512.0672.12; and 1-Naphthyl-N-Methyl Carbamate, Item 512.0672.60." The respondent in its reply, p. 3, stated, "For reasons not determinable at this time, the general category rate of *napthyl methyl carbamate* in the conference tariff was reduced below the level of the brand name specific item of *Sevin*."[2] The complainant contends such listing created an ambiguity which requires resolution thereof to be in favor of the shipper. The respondent's statement quoted above tends to admit an ambiguity. It is found and concluded the ambiguity is to be resolved in favor of the shipper as supported by complainant's citing of *United Nations Children's Fund v. Blue Sea Line*, Docket No. 71-25, 15 F.M.C. 206 (1972), supporting the well established rule of law that in a matter of contractual interpretation, any ambiguity is construed most strongly against the writer of the contract. (*Ibid*., p. 208.)

The 8th Edition of the *Condensed Chemical Dictionary*, page 781, lists Sevin as the trademark of Union Carbide Corporation for 1-naphyl-N-methyl carbamate, and says see Carbaryl. Carbaryl at page 166 of the said dictionary is the "Generic name for 1-napthyl N-methlycarbamate $C_{10}H_7$ 00CNHCH."

It is reiterated there is basically no dispute as to the goods shipped or as to the presence of ambiguity.

Respondent does invoke Rule 19 of the pertinent tariff which requires claims based on changes in description to be submitted to the carrier before the cargo leaves the custody of the carrier at destination; all other types of claims to be submitted within 6 months; that the shipment in question originated April 27, 1977, and that complainant's initial claim to the carrier was dated November 11, 1977; that respondent was advised by Staff of Pacific Westbound Conference that any refund claim honored by payment after 6 months proviso of Rule 19 had passed, would be violative of Tariff Rule 19.

The Shipping Act, 1916, in section 22, provides for filing of a complaint setting forth any violation of the Act, within two years after the cause of action accrued. Bill of Lading No. MNYKB-04-020 herein dated 4/27 indicates prepayment of $9,949.41 freight charges. (The Bill of Lading does not show the year, however, the Dock Receipt in support shows the 1977 year as to the shipment.) The complaint in this proceeding was served May 18, 1978. It is found and concluded the complaint was filed timely. A carrier tariff limitation on the time for filing claims such as Rule 19 in this instance, may not be construed, without consideration of the merits, as a foreclosure of the right to seek remedy for overcharges during the entire two-year period of limitations provided by law. Docket No. 115(I)—*Colgate Palmolive Co. v. United Fruit Co.*, 11 SRR 979 (1970).

[2] Respondent stated in its reply, page 2, "The conference took further action to eliminate the item 'Sevin'."

Procedural Background

The complainant having requested that this proceeding be conducted under the shortened procedure (complaint served May 15, 1978, p. 4, Mailgram of June 26, 1978, confirming choice) and the respondent having consented thereto (letter dated June 15, 1978), the Presiding Administrative Law Judge, pursuant to the consent and Rule 181 of the Commission's Rules of Practice and Procedure, 46 CFR 502.181, approved this proceeding being conducted under the shortened procedure without the taking of oral testimony.

Findings and Conclusion

Upon consideration of all the aforesaid, the Presiding Administrative Law Judge *finds* and *concludes*, in addition to the findings and conclusions hereinbefore stated:

Reparation in the amount of $2,360.22 should be awarded to complainant for respondent's violation of section 18(b)(3) of the Shipping Act, 1916.

Wherefore, it is ordered:

(A) Reparation in the amount of $2,360.22 is awarded to complainant against respondent.

(B) This proceeding be and hereby is discontinued.

(S) William Beasley Harris
Administrative Law Judge

Washington D.C.
July 12, 1978

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 573

CAMPBELL SOUP

v.

PACIFIC WESTBOUND CONFERENCE

DENIAL OF REQUEST FOR PERMISSION TO REFUND

August 15, 1978

This proceeding involves an application by Pacific Westbound Conference for a determination by the Commission that Note 1 of PWC Tariff Item 099 0500 49, as it appeared on November 11, 1977, read incorrectly as a result of a clerical error and that refund of charges based on that error should be authorized.

Note 1 applied to a $50.00 special rate on "Soups, Packed N.O.S." and read:

> When shipped in 6.096 m (20 ft.) containers, rate is subject to minimum of 17.5 Kilo Tons Shipments failing to meet this minimum will be subject to the $78.00 WT rate.

PWC suggests that Note 1 was intended to read:

> When shipped in 6.096 m (20 ft.) containers, rate is based on actual weight of the shipment but not less than 17.5 Kilo Tons. If lower charges result from assessing the $78.00 Wt Rate based on the actual weight shipped, such rate will apply.

The $78.00 Wt Rate also appeared in the Special Rate on this tariff item.

Upon review of the initial decision we determined that the record afforded an inadequate basis for concluding that there was an error of an administrative or clerical nature in Note 1. The initial decision had concluded there was such an error, apparently because application of Note 1 as it read at the time of shipment would result in an inequity whereby shippers of lesser quantities could be required to pay more than shippers of greater quantities. We found, however, that the resulting inequity, standing alone, does not prove that inclusion of the provision was unintended or resulted from a clerical or administrative error. It could have been intended and merely resulted from poor judgment which the Conference later wanted to correct. Nothing had been submitted to reflect the Conference's intent. The conference minutes of September 28, 1977, of which official notice was taken, further confused the matter. The minutes show that the Conference in fact intended a third version of Note 1. Under this version shipments failing to meet the minimum would be subject to rates in Item 099.0500.09, the regular rate for "Soups, Packed N.O.S." This provision was filed by PWC Tariff Circular 41-77 but was later amended effective October 5, 1977, to reflect the version of Note 1 which was in effect at the time of shipment.

No minute entry for the latter change could be located.

In view of the lack of corroborative evidence regarding the Conference's intention and in view of the mentioned inconsistency and confusion reflected in the Conference minutes and subsequent tariff filings we determined to vacate the initial decision and provided applicant with an additional opportunity to clear the confusion. Applicant was directed to submit additional information to show its actual intent in establishing Note 1 and to support its allegation of clerical error.

Applicant has now submitted a sworn statement from its Executive Assistant. This sworn statement describes the intent of the Conference in establishing Note 1 and credits the "mistake" in the tariff to the Executive Assistant's own failure to give clear instructions to the tariff typist. The affidavit furnishes no details, however, to explain all the differences between the actions said to have been intended, the intention as reflected in the Conference minutes, and the intention as reflected in the subsequent tariff revisions 7, 8, and 9 of page 298.

To find in applicant's favor we must infer that there was a series of different mistakes in recording the Conference's action in the minutes, in implementing the action in a tariff filing, and in later amending the tariff filing.

We think the record leaves too much to inference and, accordingly, deny the application for refund. The affidavit of the conference representative is insufficient to establish good cause for awarding the refund where, as here, many questions are left unanswered. Applicant was alerted by the Commission's order on review that these areas of concern existed and has failed to adequately explain the discrepancies as to the true intent of the Conference in establishing Note 1.

Accordingly, it is ordered that the application for refund is denied and the proceeding is discontinued. This action is without prejudice to the filing by nominal complainant of a formal complaint under Section 22 of the Shipping Act, within the limitation period, alleging a violation of the Act.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 521

TEXAS FIBERS, INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

ORDER PERMITTING WAIVER OF CHARGES

August 15, 1978

This proceeding involves a request by Lykes Bros. Steamship Company for permission to waive collection of a portion of freight charges pursuant to Section 18(b)(3) of the Shipping Act. Lykes had alleged that due to an error of an administrative nature it inadvertently failed to file an extension of its rate on cotton linters to cover the shipment in question.

Upon review of the initial decision we found that applicant had not substantiated its allegations of inadvertent error. We provided further oportunity for Lykes to correct this deficiency. Lykes was also directed to clarify when the cargo in question was received on board.

Lykes has now submitted affidavits from its Director of Market Development and its Dallas District Manager who personally were involved in the decision to extend the rate in question. The affidavits establish such intention and explain the circumstances regarding the failure to implement such intention. The affidavits also clarify when the cargo was received on board.

These affidavits, from officials of Lykes who actually participated in the decision to extend the rate, cure the deficiencies previously found in the record. The application complies with all of the other requirements of Section 18(b)(3) and, accordingly, applicant is authorized to waive collection of $2,916.37 of the charges otherwise applicable.

It is 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 521 that effective January 1, 1977 for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from January 1, 1977, through June 13, 1977, the rate on 'cotton linters', in compressed bales, measuring up to and including 75 cft. per ton minimum 300 tons per barge Houston/Worms is $78.50 WFO subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

It is further ordered, that waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify

ion of the date and manner of effectuating the waiver and furnish a
ariff notice.
mmission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 582

DOME EAST CORPORATION

v.

SEA-LAND SERVICE, INC.

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

August 15, 1978

No exceptions have been filed to the initial decision in this proceeding and the Commission has determined not to review that decision. Notice is given that the initial decision became the decision of the Commission on August 9, 1978.

It is Ordered, That applicant is authorized to waive collection of $6,016.19 of the charges previously assessed Dome East 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 of the Federal Maritime Commission in Special Docket No. 582 that effective February 3, 1978, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period February 3, 1978, through March 22, 1978, Sea-Land Service, Inc. Tariff No. 256-A, FMC-136 should include the following project rate: 'Machinery, Equipment and Supplies (Proprietary Cargo) for the construction and maintenance of Eurosystems Hospitalier—Riyadh, Bill of Lading to be claused accordingly. In carrier's 35 ft. container as described in Rule 298: Minimum 50 M.T. per container $104.00M (not subject to Rule 225) (Subject to a maximum charge of $5200.00 per container). In carrier's 40 ft. container as described in Rule 298: Minimum 60 M.T. per container $100.50M (not subject to Rule 225) (Subject to a maximum charge of $6030.00 per container). Exceptions: Dangerous or Hazardous Cargo, Refrigerated Cargo, Non-Containerizable Cargo, Household Goods and Personal Effects' subject to all other 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.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SECIAL DOCKET NO. 582

DOME EAST CORPORATION

v.

SEA-LAND SERVICE, INC.

Adopted August 15, 1978

Permission to waive collection of $6,016.19 of aggregate freight charges of $27,646.19, granted.

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

The aggregate freight charges in this proceeding were $27,646.19. By affidavit subscribed and sworn to April 17, 1978, the complainant Dome East Corporation certified that charges of $21,630.00 on the shipments involved herein were paid and borne as such by it. (Copy of complainant's check No. 5837, drawn on the Chase Manhattan Bank, N.A. shows date of 3/17/78, the amount of $21,630.00 payable to Sea-Land Service, Inc., with notation "B/L 901-793439 Short payed per Paul Davis Mid East Pricing." The application of Sea-Land, Inc., for waiver states the $21,630.00 was collected from Dome East Corporation on 2/10/78.)

Sea-Land Service, Inc., the carrier or respondent, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916, has filed a timely application (within 180 days of involved shipment) seeking permission to waive collection of $6,016.19 of the aggregate freight charges of $27,646.19, (the $21,630 collected + $6,016.19 sought to be waived total $27,646.19) for the benefit of Dome East Corp., the complainant. The $6,016.19 would be, if not waived, in addition to the $21,630 paid by the complainant to the carrier, for shipment of project cargo for Eurosystem Hospitalier from New York, N.Y., to Damman, Saudi Arabia, on the carrier's vessel *Sea-Land Market 90 E* under Bill of Lading No. 901-793439 dated February 3, 1978.

[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).

The said Bill of Lading describes 1-40 foot container and 3-35 foot containers said to contain proprietary cargo for Eurosystems Hospitalier Riyadk, Saudi Arabia.

The carrier asserts charges should have been assessed as follows:

3-35 ft. containers at $104.00 per 40 cf minimum 50 M.T. per 35 foot container. Subject to a maximum charge of $5,200.00 per container = $15,600.00.

1-40 ft. container at $100.50 per 40 cf minimum 50 M.T. per 40 foot container. Subject to a maximum charge of $6,030.00 per container = $6,030.00.

Total charge = $21,630.00.

Tariff authority—Item No. 4, 14th RP 73, Sea-Land Service, Inc., Tariff No. 256-A, FMC-136.

It was on the above basis that freight charges of $21,630.00 were collected. However, the rate applicable at the time of shipment was $152.50 per 40 cf min 40 M.T. per container Item #15—5th R.P. 74 Sea-Land Tariff 256-A, FMC-136—for aggregate freight charges of $27,646.19. The rate sought to be applied is that rate on which freight charges of $21,630.00 were collected.

In support for waiver of the $6,016.19 the application states as facts the following:

A. On January 14, 1978, Mr. E. W. Aldridge, a Sea-Land salesman met with Mr. Thomas of Dome East Corp. concerning his movement to Damman. From Mr. Thomas' office, Mr. Aldridge called Mr. Davis, Sea-Land's Pricing Manager, for its Mid-East service, requesting the rate to be applied on the shipment. Mr. Davis advised Mr. Aldridge to quote $5,200 per 35′ van and $6,030 per 40′ van to Mr. Thomas, and if Mr. Thomas accepted, to confirm in a teletype to Mr. Davis. Mr. Davis is located at Iselin, New Jersey.

B. January 16, 1978—a teletype confirming the request was sent by Mr. Aldridge from New York to Mr. Davis in Iselin, N.J. The telex was never received in Iselin and, consequently, the agreed to rates were not filed. The day the telex was sent there was a power failure in the Iselin office which may account for the lost message.

C. On January 3, 1978, Dome East Corp. booked four containers, three 35′ and one 40′.

D. January 28, 1978—Dome East made a shipment of four containers of project material. Sea-Land supplied two 35′ and two 40′ containers. Sea-Land substituted one 40′ for a 35′ at its convenience.

E. February 23, 1978—Mr. Thomas of Dome East advised Mr. Aldridge that the shipment had moved and it was not rated at the agreed to basis.

F. March 23, 1978—the agreed to rate of $5,200 per 35′ container and $6,030 per 40′ container was published in Item 4, 14th RP 73 to Sea-Land Tariff No. 256-A, FMC-136.

Upon consideration of the above, and the documents submitted with the application, the Presiding Administrative Law Judge deems the application for permission to waive collection of portions of the freight charges comports with Rule 92, Special Docket Applications, Rules of Practice and Procedure, and with section 18(b)(3) of the Shipping Act, 1916, referred to above, and that the error was one within the contemplation of said rule and section of the Act.

Therefore, it is found and concluded:

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

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

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

Wherefore, it is ordered:

(A) The application be and hereby is granted to waive $6,016.19 of the aggregate freight charges.

(B) An appropriate notice shall be published in Sea-Land's tariff.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
July 13, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–21

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY OF THE PORT OF HOUSTON, TEXAS

REPORT AND ORDER ADOPTING INITIAL DECISION

August 16, 1978

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

This is a complaint proceeding instituted by West Gulf Maritime Association (WGMA or Complainant), alleging violations of Shipping Act sections 15 and 17 by the Port of Houston Authority (PHA). The Commission's Bureau of Hearing Counsel (Hearing Counsel) and the Board of Commissioners of the Port of New Orleans (New Orleans) intervened in support of PHA.[1]

WGMA is a trade associaton composed of: (1) almost all steamship agents representing operators of deep sea cargo vessels using ports from Lake Charles, Louisiana to Brownsville, Texas; (2) the owners of some of these vessels; and (3) stevedoring firms associated with these vessel interests. Its complaint lies against revisions to PHA Tariff No. 8, effective July 1, 1975, which shifted the responsibility for billing and collecting wharfage charges from PHA to the vessel owners *and their agents,* imposing upon the latter the duty of acting as guarantors of collection, and allowing them a 4% "discount" on the charges collected to compensate them for their efforts and obligations in this regard. Complainant seeks an order declaring these provisions unlawful. Reparation is not requested.

PHA is an agency of the State of Texas charged with administering the public facilities at the Port of Houston under the Texas Water Code. Texas law also requires that PHA establish fees and charges sufficient to produce the revenue necessary to carry out its responsibilities and functions.

The hearing held before Administrative Law Judge Seymour Glanzer (Presiding Officer), consumed four days and generated 535 pages of transcript and 27

[1] Two additional parties, Georgia Ports Authority and South Carolina Ports Authority, were granted leave to appear specially at the hearing of the case, but did not actually participate in the proceeding.

numbered exhibits. The Initial Decision served April 12, 1978, found for the Respondents. Exceptions were filed by WGMA. Replies to Exceptions were submitted by PHA, New Orleans and Hearing Counsel (hereinafter jointly referred to as "Respondent").

The Presiding Officer held that terminal tariffs are not agreements within the meaning of section 15.[2] He also determined that the PHA tariff provisions were not unjust or unreasonable, because the carrier's obligation to the shipper requires it to provide terminal facilities, the vessel agents separately *agreed* to be liable for the charges, and port efficiency is promoted by making the carrier's agent responsible for payment of the vessel's charges for the use of the facility.[3] The 4% allowance was found to be reasonable and compensatory to the vessel interests.

The Presiding Officer also decided that PHA violated its own tariff by continuing to collect wharfage charges directly from cargo interests on certain direct movements of bulk cargo pursuant to written leases, without remitting the 4% commission to the vessel agents who had in fact billed for these charges pursuant to the tariff requirement. PHA was ordered to pay the allowance on these items to vessel interests, prospectively and retroactively, and to amend its FMC tariff to define the services rendered under the "terminal charge" provisions thereof.

POSITION OF THE PARTIES[4]

Complainant alleges the following errors in the Initial Decision: (1) The Initial Decision contains three erroneous findings of fact;[5] (2) the burden of proof was improperly imposed on Complainant when the Presiding Officer found a "rebuttable presumption of reasonableness" to be present; (3) PHA's terminal tariff provisions should have been held subject to section 15 filing and approval requirements; (4) the imposition of wharfage charges on vessel owners and agents is unreasonable and unjust regardless of whether agents have independently agreed to be liable for wharfage through credit arrangements provided for their convenience; and (5) state law is determinative of the reasonableness of the PHA conduct in question.

In reply, Respondents contend that: (1) the factual errors alleged are irrelevant to the Initial Decision; (2) *Rorie, supra,* and *Kerr, supra,* are dispositive of the

[2] *City of Galveston v. Kerr Steamship Co., Inc.*, 366 F. Supp 280 (S.D. Tex. 1973) and *Rorie v. City of Galveston*, 471 S.W. 2d 789 (Tex. 1971), were cited as dispositive of the instant section 15 question. Part 533 of the Commission's Rules (General Order 15; 46 C.F.R. Part 533) requires terminal operators to file tariffs for informational purposes on or before the tariff's effective date. Terminal tariffs may be implemented without prior Commission approval.

[3] This practice was found to be prevalent at U.S. ports, *e.g.*, Galveston, Miami and Puget Sound, and virtually identical tariff provisions have been adjudged lawful by courts and the Commission alike.

[4] The Commission has promulgated rules regulating the presentation of exceptions to initial decisions which have not been complied with by the Complainant. The Exceptions filed by Complainant do not indicate with particularity the alleged errors, many of the Exceptions are not briefed, and numerous allusions to the record are unsupported by specific citations. Exceptions filed in violation of 46 C.F.R. 502.227(a) may be rejected without further consideration. *Inter-American Freight Conference Pooling Agreements*, 11 S.R.R. 48 (1969).

[5] Complainant's specific exceptions were: (1) PHA performed unloading operations not loading; (2) PHA did have contacts with freight forwarders and custom house brokers; (3) PHA billed from service orders not delivery orders. It was not stated how these Exceptions (Nos. 1–3) relate to the ultimate issues or outcome of the case. The record does indicate that: (1) PHA engaged in loading operations as well as unloading operations (Tr., at 326), but stopped all operational functions by 1973; (2) If PHA had some limited contacts with freight forwarders and customhouse brokers as "persons shipping the cargo" the contacts were certainly not as pervasive as those of vessel owners and agents and were not of the type that would facilitate effective collection of wharfage as were those of the vessel interests; and (3) PHA billed by delivery orders (Tr., et 326), but service orders are directly based on delivery orders.

section 15 issue; (3) the *Boston Shipping* cases[6] are dispositive of the section 17 issue; (4) the record clearly supports the ultimate finding that PHA's wharfage practices are fair and reasonable.

The majority of WGMA's present arguments were raised before and resolved by the Presiding Officer. The Commission has reviewed the entire record in this proceeding and concluded that the result reached by the Initial Decision was essentially correct. Accordingly, the findings and conclusions of the Initial Decision shall be adopted and made a part hereof except as they may be modified or clarified by this Report.

DISCUSSION

Prior to 1964, steamship agents in Houston were billed for wharfage charges which accrued to cargo. By 1964, pressure from WGMA and several carriers resulted in a change in the terminal practice wherein PHA assumed the burden of billing cargo interests directly. In February 1975, PHA initiated discussions with both cargo and vessel interests that eventually led, over WGMA's protests, to a new tariff being issued on June 1, 1975, effective July 1, 1975, reinstituting the practice of billing vessel owners and agents for wharfage charges. Although the tariff retained the language that the cargo was "liable" for the wharfage charges the vessel owners and agents were made responsible for billing and for payment as "guarantors" of collection.

The change in practice allows the number of invoices mailed to be significantly reduced by aggregating wharfage invoices on a per-ship rather than per-shipment basis and requiring the vessel interest to bill the individual cargo interests. Moreover, because vessel interests in Houston remain in direct contact with shippers and have more extensive physical control over the cargo through their retained stevedoring agents, they are in a better position to enforce collection. WGMA attempted to prove that the new practice was unfair and neither efficient nor better suited for collection enforcement, but the evidence presented on this point supported the PHA's position and not WGMA's. (Tr. 96–110, 140–158, Ex. 20)

1. *Factual Issues*

WGMA excepts to three factual findings of the Presiding Officer (see footnote 5 above). There is merit in exception #2 to the extent that there were some limited contacts between PHA and "persons shipping the cargo," but inasmuch as all three findings are irrelevant to the proper disposition of the proceeding, they need not be discussed further.

2. *The Presumption of Reasonableness and the Burden of Proof*

The Commission has recognized that the historical usage of the term "wharfage" referred to a charge against either the cargo or the vessel[7] *or* both, in accordance with local customs.[8] Recognition of historical diversity might lead

[6] *Boston Shipping Association v. Port of Boston*, 11 F.M.C. 1 (1967); *Boston Shipping Association v. Port of Boston*, 10 F.M.C. 409 (1967).

[7] 46 C.F.R. 533.6(d) (a), wherein wharfage is defined as a "charge assessed against cargo *or* vessel."

[8] *See Baton Rouge Contractors, Inc. v. Cargill, Inc.*, 18 F.M.C. 140, 173 (1975), *aff'd* 530 F.2d 1062, 15 SRR 62 (D.C. Cir. 1976), *Report and Order in Docket No. 875*, SR 325:52, 30 Fed. Reg. 12681 (1965). In the instant case, the tariff imposed a form of liability on both cargo *and* vessel interests.

one to conclude that a *legal* "presumption" has been created favoring the reasonableness of any wharfage assessment practice, especially in light of the deference which may be afforded to the managerial expertise of terminal operators. *See In the Matter of Agreement No. T-2598*, 17 F.M.C. 286, 297 (1974). Such a conclusion would not be accurate, and was not made in the Initial Decision. The Presiding Officer's statement concerning the burden of proof (I.D., at 22) does not fairly indicate that Complainant bore any greater or different burden than that imposed by the Administrative Procedure Act, 5 U.S.C. 556(d), and section 502.155 of the Commission's Rules. The burden of proof in adjudicative proceedings is upon the party proposing the rule or order, unless otherwise provided by statute. Because WGMA is the party proposing to halt existing tariff practices of PHA, and, no statute places the burden of proof on the Respondent, the burden of proof is squarely on the Complainant.[9]

3. *The Section 15 Issue*

It is established Commission policy that business arrangements of the type ordinarily contained in terminal tariffs are not agreements subject to Shipping Act section 15. *Rorie v. City of Galveston*, 471 S.W. 2d 789, 8 S.R.R. 20,713 (Tex. 1971); *City of Galveston v. Kerr Steamship Co., Inc.*, 362 F.Supp. 280, 8 SRR 20,925 (S.D. Tex. 1973).[10] The applicability of this policy to the present proceeding is clear. First, the terminal tariff is a unilaterally promulgated and uniformly applicable directive of the Port Authority.[11] Secondly, the "consent" language that Complainant relies on as indicative of an agreement is not an integral part of the tariff and adds no independent validity to the imposition of liability provisions.[12] Third, vessel agents are not an entity included in section 1 of the Act,[13] a fact which precludes any independent significance being given to the credit "agreements" negotiated between PHA and the vessel agents. Finally, even if the tariff were characterized as a section 15 agreement, the act of shifting liability from the cargo to the vessel interests would most probably be deemed a

[9] The practices in question do not require prior approval to be effective and terminal tariffs are not subject to suspension. In *Commonwealth of Puerto Rico v. Federal Maritime Commission*, 468 F.2d 872, 8 SRR 20,852 (1972), the court reversed a Commission ruling that the burden of proof will be imposed upon the proponent of a rule or order, in all instances, including carrier rate cases arising under Intercoastal Shipping Act section 3 and Shipping Act section 18(a) where no suspension of the rate had been ordered. The court reasoned that there is a "common lore of basic approach in rate regulation" derived from the various federal enabling statutes wherein a regulated company seeking to increase its rates and having sole possession of the relevant evidence, has the burden of proof in any such proceeding. This case has been followed in other types of regulatory proceedings in a broader context, *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (1973); *Alabama Power Co. v. Federal Power Comm.*, 511 F.2d 383, 391, n. 14 (1974); *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 548 F.2d 998, 1017 (1976). In the instant case, however, there is no indication that PHA has sole possession of all relevant evidence concerning the "reasonableness" of its collection practices.

[10] In *Rorie*, the essential issue was whether a crane operator was a borrowed servant subject to the control of a stevedore who rented the crane with its operator, both furnished by the port, under a lease that, *pursuant to the requirements of the terminal tariff, essentially* placed him under the stevedore's control. The stevedore defended, in part, on the theory that the tariff, and hence the lease term controlled by the tariff, was void as it had not been approved by the FMC pursuant to section 15. On this issue the Texas Supreme Court accepted the opinion expressed in the Commission's *"Memorandum Amicus Curiae" that terminal tariffs, as such, do not need section* 15 approval to be valid and enforceable. This same rule concerning the section 15 status of terminal tariffs was again relied upon in a fact situation more analogous to the instant case. In *Galveston*, the port authority sued vessel interests for strike demurrage charged to them under the provisions of the terminal tariff. The vessel interests defended on the ground that the tariff provisions were unenforceable as they had not been approved by the Commission.

[11] The mere use of the terms "acceptance and acknowledgement" does not indicate a bilateral agreement within the meaning of section 15, but is more akin to the concept of "consent" or "acquiescense" to conditions unilaterally imposed without the exchange of consideration usually indicated by the term "agreement". *See Rorie* and *Kerr, supra.*

[12] *See State of Israel v. Metropolitan Dade County, Fla.*, 431 F.2d 925, 927 (5th Cir. 1970), *indicating that consent provisions of* tariffs are "probably superfluous".

[13] There must be an agreement between two or more persons subject to the Act before section 15 jurisdiction attaches. *Grace Line, Inc. v. Skips A/S Viking Line*, 7 F.M.C. 432, 448 (1962); *Hong Kong Tonnage Ceiling Agreement*, 10 F.M.C. 134, 140 (1966).

routine commercial adjustment rather than an agreement modification requiring prior section 15 approval. *Boston Shipping Association v. Port of Boston* (strike storage), 10 F.M.C. 409, 413–414 (1967); *Boston Shipping Association v. Port of Boston* (wharfage assessment), 11 F.M.C. 1, 5–6 (1967).

4. *The Section 17 Issue*

The core issue in this proceeding is whether the tariff provisions in question are unjust or unreasonable within the meaning of Shipping Act section 17, and on that issue *Boston Shipping Association v. Port of Boston Marine Terminal,* 11 F.M.C. 1 (1967) is solidly on point. There, the Massachusetts Port Authority, by amending its tariff provisions, had shifted the imposition of wharfage charges from the cargo to the vessel. This was attacked by the Boston Shipping Association, a group of the same interests as comprise WGMA, on the ground that, *inter alia,* it violated section 17. The Commission essentially found that wharfage was an appropriate charge against the vessel interests because the terminal provided a service which furthered the carriers' transportation obligation to provide shippers with adequate terminal facilities.

WGMA seeks to distinguish the *Boston* wharfage case by showing that PHA *elected* to assess wharfage against cargo in 1964, and, having made that election, is stopped from now holding vessel interests liable as well. Nothing in *Boston Shipping* or any other authority cited by Complainant mandates such an irrevocable election by a terminal operator, and the Commission rejects this rigid interpretation of section 17. Shipping industry practices should be flexible and innovative as long as they are also fair. If it can be reasonable for vessel interests to be made *primarily* liable for wharfage as users of the service, it can be equally reasonable to make them jointly liable with the cargo interests (who are likewise users of the service).

The reasonableness of PHA's tariff amendment becomes manifest when scrutinized under section 17 standards. The test of reasonableness as applied to terminal practices is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view. *Investigation of Free Time Practice—Port of San Diego, Cal.*, 9 F.M.C. 525, 547 (1966); *Boston Shipping, supra,* at 9; *Assembly Time–Port of San Diego,* 13 F.M.C. 1, 13–14 (1969); *Agreement No. T–2598–Port Canaveral and Luckenbach S.S.,* 17 F.M.C. 286, 300 (1974).[14] A just and reasonable allocation of charges is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service. *Boston Shipping Association v. Port of Boston,* 10 F.M.C. 409, 414 (1967). There is no question that vessel owners, agents and cargo interests are "users" of the terminal facilities and derive a benefit therefrom, at least in a vicarious sense. It is irrelevant that steamship agents do not directly use the facility, they are agents for persons who do. The only things that actually physically use the facilities are inanimate objects (the ships and the goods) and the loading and unloading crews. It would be contrary to all common sense to say that only those physically using the facility can be liable for the charges associated therewith. *Boston Shipping Association* (strike storage), *supra,* at 416–417.

[14] The level of charges must also be reasonably related to an actual service performed or a benefit conferred on the person charged. *Volkswagenwerk A. G. v. F.M.C.*, 390 U.S. 261, 282, 8 SRR 20,109, 20,132 (1968); *Indiana Port Commission v. Federal Maritime Commission*, 521 F.2d 281, 15 SRR 45, 49 (1975); *Baton Rouge Contractors, Inc. v. Cargill, supra*, at 174.

There is no question of the level or apportionment of the charges presented here as this issue has not been raised in the proceeding. It only remains to determine whether the practice is reasonably related to the ends in view. PHA's objective is to promote overall port efficiency by reducing the costs of facility operations. The practices of imposing the billing and collection of wharfage on the party who can most efficiently effectuate and enforce the same, insuring all revenues due the port are collected by extending the liability for wharfage to all persons who derive a benefit from the use of the wharves, and looking first to the parties over whom the port has the highest degree of collection leverage, all bear a reasonable relation to these stated ends.

Several other West Gulf Ports follow these practices, particularly the Port of New Orleans where a similar tariff provision has proven to be most reasonable, efficient, and capable of achieving "the ends in view" (Ex. 23). Personnel from PHA testified as to the advantages of the new system and the disadvantages of the old (Tr., at 322, *et seq.;* Ex. 20), indicating that duplicitious re-billing was eliminated, credit arrangements were facilitated, problems of determining responsible parties were eliminated, and the volume and costs of invoicing wharfage charges were drastically reduced. Conversely, WGMA personnel admitted (Tr., at 127, *et seq.;* 184, *et seq.*) that by utilizing good business practices no substantial losses were incurred from uncollectible wharfage charges, and no appreciable added expenses had actually been experienced.

The record does not contain substantial evidence indicating that WGMA is experiencing undue costs or risks under the new collection system. Moreover, the burden of establishing the unreasonableness of the practice is squarely upon WGMA.

5. *Agency Law and State Law Contentions*

Complainant relies heavily on principles of legal duress, business coercion and agency in an attempt to establish that the terms of the tariff under attack are unlawful under section 17, as a matter of law. That is, they assert that if the tariff provisions run afoul of state law concerning business duress and coercion principles or common law agency principles that this is a *per se* violation of section 17.[15]

The simple answer to both these assertions is that, while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not alone dispositive of Shipping Act issues, absent a showing that these principles directly apply to Shipping Act considerations. *Terminal Lease Agreement at Long Beach, Cal.* 11 F.M.C. 12, 26 (1967). WGMA has not demonstrated that the alleged transgressions of Texas or common law have such an application, and the Commission could end its inquiry into these Exceptions at this point.

The Presiding Officer, however, dealt with these "issues" at length, and to ensure full exposition of WGMA arguments, some discussion of these matters is warranted.

[15] Federal Court decisions concerning agency law principles establish *state rather* than federal law. Although certain specific subjects of "federal common law" may still exist following *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), see annotation 31 L. Ed. 2d 1006, agency principles are determined by the law of the situs of the agency arrangement. RESTATEMENT OF CONFLICT OF LAWS, sections 342, 343; 3 Am. Jur. Agency, section 8.

As to the issue of duress under Texas law, the gist of Complainant's theory appears to be that the imposition of terms of a terminal tariff upon a party using the terminal when deemed onerous by that party constitutes unlawful duress and business coercion. PHA, however, is a public facility open to all comers willing to be subject to its terms and conditions of usage. If one finds PHA's tariff terms unbearable, the record indicates that one may simply utilize the private facilities at the port and eschew the public facility.[16] All who do decide to use the public facilities are users of their own free will. If WGMA's theory were accepted by the Commission, no terminal tariff at any public facility in the State of Texas would be enforceable unless each and every user of the facilities found all terms acceptable to it. This does not appear to be the import of Texas law. *Rorie* and *Kerr,* both Texas decisions, allowed the imposition of unilaterally promulgated tariff terms upon parties unwilling to accept the force of law behind those provisions.[17]

As to the issue of the application of agency law principles in finding vessel agents lawfully liable under the tariff, the factual circumstances of this case fail to indicate anything illegal about PHA's practice. The best justification under agency law to find the vessel agents liable for wharfage charges is their prior course of conduct, normal business practices, and continuing and voluntary use of the facility, all of which indicate that they have in fact separately agreed to be liable. The prior practice between the parties has been that the agents established independent credit arrangements with the port on behalf of their principals with the understanding that PHA was extending the credit "knowingly and exclusively."[18] *to the agent* rather than going through the burdensome routine of having the vessel owners post adequate security for each ship berthing at the port. (Tr., at 330–331, Ex. 20.)

Even without the prior course of conduct, agency law does not prohibit an offeror of services to the public to condition the rendering of services to any party upon that party agreeing to be personally liable for the charges regardless of whether they are using the service on their own behalf or for a principal, disclosed or not. That is, there arises an agreement outside the scope of the agent's agreement with its principal that is not controlled by agency principles. This is exactly the situation presented in this case and is the principle embodied in the tariff impliedly agreed to by the agents when utilizing the facility. *Folgner v. Italian Line,* 383 F.Supp. 816, 818 (D.C. C.Z. 1974). There is nothing to prevent the agent from obtaining an indemnification agreement from its principal or requiring the principal to furnish advance security directly to PHA.

6. *Miscellaneous Matters*

Several issues initially pursued by WGMA, were not raised on Exceptions and will be deemed to have been abandoned. However, to make the record complete

[16] Of thirteen private facilities at Houston the record discloses that only Manchester Terminal Company has not adopted the subject PHA Tariff Provision (Ex 10, Tr at 133–138). The other private facilities are Adams Terminal, Anchortank, Inc., Bethlehem Steel Corp., GATX Terminals Corp., Goodpasture, Inc., Greens Bayou Terminal, Houston International Terminal, Intercontinental Terminal, New Terminal Warehouse, Oiltanking of Texas, Wisco Terminal, Todd Shipyard Corp

[17] *See also* Annotation 79 ALR 655, wherein it appears that there must be the threat of *serious* financial injury, no *viable alternative* business course of conduct and a *lack of resort* to the courts, to constitute unlawful business coercion

[18] This would seem to fulfill the requirements of liability under Texas agency law as stated by WGMA in its Exception No. 31 (Exceptions, at 9) citing *American Appraisal v. Constantin,* 985 S.W. 2d 1003 (Ft Worth Civ. App. 1936).

a summary of these matters is in order. The 4% commission to the vessel interests was found to be compensatory by the Presiding Officer. Nothing in the record suggests error in this regard. Similarly, the 4% commission due the vessel interests on certain direct movement bulk cargoes of terminal lessees still billed directly by PHA should be paid in accordance with the tariff provisions for those items actually billed by vessel interests. The tariff should be amended to reflect the actual practice at which time no further payments need be made in this regard. Also the definition of "Terminal Charge", a "service" for which users of the facility are assessed, should be stated in PHA's tariff, pursuant to 46 C.F.R. 533.6, as all services for which users of a terminal are billed must be defined in the tariff.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted, as supplemented herein, and the Exceptions of West Gulf Maritime Association are denied; and

IT IS FURTHER ORDERED, That the complaint of West Gulf Maritime Association is denied; and

IT IS FURTHER ORDERED, That within 30 days following the service of this Report, the Port of Houston Authority amend its Terminal Tariff No. 8 to accurately reflect the actual practices employed in direct billing and collection of wharfage charges on certain direct loading movements of bulk cargo or to cease and desist from following collection practices not stated in said tariff; and

IT IS FURTHER ORDERED, That the Port of Houston Authority promptly pay collection commissions, without interest, on direct movement cargoes to all vessel interests that have complied with Terminal Tariff No. 8's provisions regarding the billing and collection of wharfage charges on such movements between July 1, 1975, and the 30th day following the service of this Report; and

IT IS FURTHER ORDERED, That the Port of Houston Authority file with the Commission's Secretary within sixty (60) days from the service date of this Report a full accounting of all collection commission payments made pursuant to the preceding ordering paragraph; and

IT IS FURTHER ORDERED, That the Port of Houston Authority amend its Terminal Tariff No. 8 to include a definition of "terminal charge"; and

IT IS FURTHER ORDERED, That this proceeding be discontinued.

(S) FRANCIS C. HURNEY
SECRETARY

FEDERAL MARITIME COMMISSION

No. 75-21

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY OF THE
PORT OF HOUSTON, TEXAS

Adopted August 16, 1978

PHA's practices and tariff provisions making the vessel, vessel owners and vessel agents responsible for payment of wharfage charges found not to violate sections 15, 16 First or 17 of the Shipping Act.

Complaint ordered dismissed and proceeding ordered discontinued.

PHA ordered to comply with provisions of its tariff requiring payment of 4% allowance to vessel interests on wharfage charges collected by PHA from lessees at PHA's terminal.

Robert Eikel, for West Gulf Maritime Association, complainant. *F. William Colburn*, for Port of Houston Authority, respondent. *Edward Schmeltzer, Edward J. Sheppard, J. Thomas Esslinger* and *George Weiner*, for the Board of Commissioners of the Port of New Orleans, intervenor.

John Robert Ewers and *Lizann Malleson Longstreet*, as Hearing Counsel.

Sam H. Lloyd, for Georgia Ports Authority, appearing specially. *Marion S. Moore, Jr.*, for South Carolina Ports Authority, appearing specially.

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

This is a complaint proceeding, filed June 11, 1975, pursuant to the provisions of section 22 of the Shipping Act, 1916,[2] by West Gulf Maritime Association (WGMA), complainant, alleging violations of sections 15 and 17 of the Shipping Act, 1916,[3] by Port of Houston Authority of the Port of Houston, Texas (PHA),[4] respondent, and requesting that specified tariff matter published by the respondent be declared void, unjust, unreasonable, discriminatory, and unlawful and further requesting the issuance of an order requiring respondent to cease and desist from putting that tariff matter into effect or acting in conformity with that tariff matter or seeking to enforce that tariff matter against complainant's members and requesting still further the issuance of such orders as may be

[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] 46 U.S.C. 821.

[3] 46 U.S.C. 814 and 816.

[4] PHA's proper name is Port of Houston Authority of Harris County, Texas.

necessary to secure compliance with the law by respondent. Reparation is not requested.

PHA answers that the tariff matter is just and reasonable and not discriminatory and that it is not violative of any provision of law.

WGMA is a trade association composed of (1) almost all the steamship agents representing operators of deep sea cargo vessels using the ports of the Gulf of Mexico from Lake Charles, Louisiana, to Brownsville, Texas, inclusive, (2) the owners of some of those vessels and (3) stevedoring firms whose employees load and unload those vessels. The complaint is on behalf of the steamship owner and agent members engaged in business operations at the Port of Houston.

PHA is a governmental agency and body politic of the State of Texas, established under authority of Article 3, Section 52 of the Texas Constitution. Under provisions of the Texas Water Code[5] PHA is authorized, among many other things, to acquire land and purchase, construct, enlarge, extend, repair, maintain, operate or develop wharves and docks and all other facilities or aids incidental to or useful in the operation or development of its ports or waterways or in aid of navigation and commerce in the ports and on the waterways (Section 60.101). PHA is also empowered to prescribe fees and charges, to be collected for use of its land, improvements and facilities. The fees and charges must be reasonable, equitable, and sufficient to produce revenue adequate to pay expenses set forth in the Code (Section 60.103).

In particular, WGMA's complaint lies against certain revisions in PHA's tariff dealing with billing and collection of "wharfage charges assessed by the respondent against cargo moving outbound and inbound across respondent's wharves" which were issued June 1, 1975, and became effective July 1, 1975. The complaint places in issue the following tariff provisions which appear in PHA's Tariff No. 8 at Thirteenth Revised Page No. 14, Item 3:

> 3. Terminal Charges, set forth in item No. 59, and Wharfage Charges, set forth in Item No. 65, are liabilities of the owner of the cargo; however, the collection and payment of same to the Port Authority must be guaranteed by the vessel, her owners and agents, and the use of Port Authority facilities by the vessel, her owners and agents, shall be deemed an acceptance and acknowledgement of this guarantee.
>
> 3.2. As compensation to said vessel, her owners and agents, for such collection and payment of terminal and wharfage charges, as specified in Items 59 & 65, the Port Authority shall pay a fee of four per cent (4%) of the total terminal and wharfage charges incurred and billed to the vessel, her owners and agents.
>
> 3.3. Wharfage charges on cargo shall be assessed on the basis of manifest weights, unless otherwise provided herein.[6]
>
> Wharfage is defined in the tariff[7] as follows: A charge on any commodity placed in a transit shed or on a wharf, or passing through, over, or under a wharf; or transferred between vessels, or loaded to or unloaded from a vessel at a wharf, regardless of whether or not wharf is used. It does not include sorting, piling, weighing, handling, insurance, custom charges, revenue stamps, or fees of any nature imposed by the State or Federal Government against the shipments or vessels transporting them.

Neither the definition of wharfage, the wharfage charge nor the levels of charges for wharfage set forth in Item No. 65 of PHA's tariff[8] are under attack.

[5] The cited provisions of the Texas Water Code formerly appeared in Article 8247a, Sections 1 and 2, V.T.C.S. .

[6] Although mentioned in the complaint, the validity of Item 3.3 is not assailed.

[7] PHA's Tariff No. 8, First Revised Page No. 11.

[8] *Id.*, beginning at Twenty-Third Revised Page No. 72.

Therefore these matters are not in issue. However, it may be observed that both the definition and method of computation of wharfage charges appear to comport with the requirements of regulation.[9]

Terminal Charge is not defined in PHA's tariff. As is the case with wharfage, neither the terminal charge itself nor the level of any charge thereunder in Item No. 59 is in issue. According to the tariff,[10] terminal charges are in addition to wharfage charges, but there are only two commodities, automobiles and bananas, subject to terminal charges. WGMA proffered no testimony or argument in opposition to the terminal charge.

There are two intervenors, Hearing Counsel and the Board of Commissioners of the Port of New Orleans (New Orleans). New Orleans is an agency of the State of Louisiana created for the purpose of regulating and promoting the commerce and traffic at that port and administering and maintaining its public wharves and other terminal facilities. Both participated in the proceeding. Two other persons were allowed to make special appearances at the hearing. They are the Georgia Ports Authority and South Carolina Ports Authority. Neither of them participated in the proceeding.

There were four days of hearing. The record comprises 535 pages of transcript and 27 numbered exhibits. All participating parties submitted briefs.

POSITIONS OF THE PARTIES

WGMA urges that the guarantee in Item No. 3 and another provision of PHA's tariff, Item No. 2, entitled Application and Interpretation of Tariff,[11] which has been in effect since, at least, 1959, and which provides—"The use of the waterways and facilities under jurisdiction of the Navigation District shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified and be governed by all rules and regulations herein contained."—are nullities because lawful tariff provisions do not rest upon consent and therefore should be given no consideration in the determination of the complaint; that those provisions, which have not been approved by the Commission, constitute a violation of section 15; that only those tariff provisions which are required by law to be included within a tariff are binding upon persons dealing with a public utility or government agency. Therefore tariff provisions like those in Item Nos. 2 and 3 which are not required to be filed and which impose upon vessels and vessel's agents the duty to bill for and collect from cargo interests wharfage charges owing to the port by such interests and the duty to guarantee payment of those charges are illegal and void; that tariff provisions requiring vessels and vessels' agents to bill and collect cargo charges constitutes duress and business coercion, therefore those provisions are void and unenforceable; that Item No. 3 is discriminatory, unjust and

[9] The Commission's Regulations for Filing of Tariffs by Terminal Operators define wharfage as follows, 46 CFR 533.6(d)(2): A charge assessed against the cargo or *vessel* on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service. (Emphasis supplied.)

[10] PHA's Tariff No. 8, Thirteenth Revised Page No. 58.

[11] *Id.*, Original Page No. 12.

unreasonable, hence unlawful and in violation of sections 16[12] and 17 of the Shipping Act. In its reply brief WGMA also urges that Item Nos. 2 and 3 have the effect of unlawfully making vessels and vessel's agents the agents of the port without consent.

PHA asserts that the tariff provisions constitute fair and reasonable measures adopted by it in the discharge of statutory duties placed upon it in the operation of public port facilities and that the tariff provisions and wharfage billing pratices are not in violation of sections 15 and 17. New Orleans argues that the tariff provisions are necessary to the efficient operation of ports, are not precluded by General Order 15[13] and are not discriminatory or unreasonable and that questions of Texas law are irrelevant. Hearing Counsel contends that the tariff matter is consistent with the requirement of law, are not discriminatory, preferential, prejudicial or unreasonable and are lawful.

HISTORICAL BACKGROUND OF THE TARIFF AND COMPARISON WITH OTHER PORTS' TARIFFS

Going back as far as 1933 and continuing to 1964, wharfage charges were billed to and collected from the vessels, vessel owners or vessel agents by PHA.[14] During that time, the tariff provision relating to wharfage provided (Item 3(c)).

> All vessels and their owners receiving any commodity on a wharf or in a transit shed, or loading or unloading any commodity while at a wharf, hereby contracts to pay and are responsible for the wharfage on such commodities, at the rate provided herein, to be collected either from vessels, their owners or their agents.

In 1964, in response to requests made by vessel owners and agents, PHA changed its wharfage billing and collection practices by shifting liability for wharfage charges to the owner of the cargo and placing responsibility for payment of invoices upon the cargo owner or his agent—the freight forwarder on outbound cargo and the customs broker on inbound cargo. This was accomplished by substituting a new Item 3(c), effective April 1, 1964. It provided:

> Liability for wharfage charges, set forth in item number 65, will be the responsibility of the owner of the cargo and the Port Authority will invoice and collect from such owner or authorized agent.

About 1972 or 1973 PHA made another changeover in its practices. Until then it had performed as an operating terminal, loading outbound cargoes aboard vessels. When it stopped those terminal operations, PHA advised vessel owners and agents that it was contemplating a further change in its wharfage billing practices by way of reversion to tariff provisions similar to those in effect until April, 1964. PHA did not implement that change immediately. The matter remained dormant for a while, but PHA's interest in effectuating the change revived in 1975. There then ensued numerous discussions involving PHA officials and staff members, vessel owners and agents, freight forwarders and others. The outcome of those discussions was a revocation of Item 3(c) as it

[12] 46 U.S.C. 815. N.B. The complaint does not invoke section 16. Even if evidence of undue preference or prejudice had been adduced, complainant made no motion to amend the complaint or to have the pleadings conform to the proof.

[13] 46 CFR 533.1 et seq.

[14] Formerly, PHA was known as Harris County Houston Ship Channel Navigation District.

existed since 1964. It was replaced by Item Nos. 3 and 3.2, the tariff provisions in issue here.

The net effect of Item Nos. 3 and 3.2 is to assess wharfage charges on the cargo according to its manifest weight, but to make the vessel, its owner or agent, directly responsible for collection and payment of those charges to PHA. In consideration of the collection and payment efforts of vessel owners and agents, PHA commits to pay them compensation at the rate of 4% of the total of wharfage and terminal charges collected by PHA.

Tariff provisions, virtually identical to Item Nos. 3 and 3.2, are published by New Orleans. However, New Orleans pays only a 3% fee for collection and payment to vessel owners and agents. The practice of looking to vessel owners and agents at New Orleans dates back to a time at least before World War I, and probably goes back to the creation of New Orleans in 1896.

Provisions similar to Item No. 3 appear in tariffs published by the Port of Lake Charles, Louisiana, Port of Corpus Christi, Texas, and Port of Port Arthur, Texas, since, at least, 1968, 1974 and 1972, respectively.

WGMA vessel owner and vessel agent members serve one or more of the ports named above.

FACTS

PHA reinstituted the practice of looking to vessel owners and agents for collection and payment of wharfage charges on the basis of staff recommendations for various reasons. Generally, PHA took into account that collecting from the cargo interests was inefficient because it required redundant administrative procedures in order to insure collection; and that collecting from cargo interests was costly because of that redundancy and because all too often PHA was unable to collect the charges from cargo interests—sometimes not at all and other times only after repetitious solicitation—due mostly to the fact that many cargo interests were beyond the jurisdiction of Texas for the service of legal process. PHA also recognized that while it had no direct contact with the persons shipping the cargo, shipowners and their agents almost invariably did. E.g., 99% of the cargo transported out of New Orleans and PHA by Hellenic Lines Limited, a ship owner, was booked by Hellenic following solicitation of that cargo from shippers by Hellenic employees or Hellenic's network of agents.

The particular difficulties encountered by PHA under the tariff provisions in effect from 1964 to 1975 and the anticipated benefits under the new tariff provisions were explained by PHA's Controller.

Under his supervision in 1974, there were 52 employees whose major responsibility was insuring that PHA be paid the charges due PHA for the use of its facilities. In that year PHA spent more than $400,000 in salaries and fringe benefits for those employees. Approximately half of those salary expenses were occasioned by the need to redundantly oversee the billing, collection, and audit of wharfage charges due PHA from cargo interests.

The Comptroller pointed out the more notable deficiencies of the old system.

A basic document used by PHA in billing wharfage charges was the delivery order. But, delivery orders, prepared by the cargo interest or cargo representative, frequently showed estimated volume. Thus, because wharfage charges under the tariff are based on actual volume, a second invoice often became necessary, but the required adjustment could not be made until PHA received a copy of or audited the vessel manifest which showed the actual volume of the shipment. By the time PHA obtained the manifest or audited it, the vessel was at sea.

Vessel owners or their agents in Houston or other cities often booked shipments for cargo interests which had not established credit or had no previous business experience with PHA. This created processing delays because PHA service orders could not be issued until credit arrangements were made. Making those arrangements entailed added expense to PHA. Anomalously, in view of the nature of the complaint, in most instances those arrangements were made with WGMA vessel owners and vessel agents who volunteered to accept on behalf of the cargo interests the billing of wharfage and other terminal charges to their credit accounts with PHA.

Vessel owners or their agents permitted stevedores to load outbound cargo directly from the overland surface carrier to the vessel and inbound cargo directly from the vessel to the overland surface carrier without advising PHA nor providing PHA with information identifying the cargo interests responsible for payment of wharfage charges. These facts would come to PHA's attention only after a detailed audit of the vessel manifest. But by the time the audit could be conducted, a task which in itself involved substantial clerical time and effort and which was often subject to further delay because of failure to provide the manifest promptly, collection of wharfage charges from cargo interests would become difficult even in the case of cargo interests located in Houston. If the cargo interest was located beyond Houston or had no local representative or had no credit arrangement with PHA, collection was frequently impossible or uneconomical and had to be written off. This drawback to the old system was particularly severe in the case of inbound cargo because, once the customs broker had released the cargo from the dock his relationship with the cargo interest terminated and there remained no local cargo interest to look to for payment.

Not only did the practices under the former rule adversely affect PHA's efforts to collect wharfage promptly and efficiently, but they also impeded PHA's wharf demurrage efforts because PHA had to rely upon documents in the possession of vessel interests which were either not turned over to PHA in time to bill the cargo interests while the shipment was at the terminal or did not become available until PHA's audit.

The changeover to billing the vessel interests was productive of immediate benefits to PHA. This was revealed statistically. During the months of April, May, and June 1975, the last three months prior to the change PHA issued 14,888, 17,269 and 15,320 original wharfage invoices, respectively. Afterwards, in July and August 1975, PHA issued but 6,149 and 3,888 original wharfage invoices, respectively. Also, during April, May, and June 1975, PHA issued 772, 567 and 753 wharfage adjustment invoices, respectively. However, in August 1975, only 467 wharfage adjustment invoices were issued. It was estimated that the number of adjustment invoices will be further reduced to about 100 per month after all the pre-changeover adjustments have been accounted for.

Another estimate, based upon 1974 statistics shows that the net annual reduction in PHA's expenses to be achieved by the changeover will amount to $195,000. The 4% allowance to vessel interests will absorb about $155,000 of that sum per year. Thus, PHA is expected to save $40,000, annually, on salaries, in addition to insuring collection of all wharfage charges due it.

Although vessel owners and vessel agents will incur greater bookkeeping expenses under the changeover, most, if not all, of those expenses will be recouped by the 4% allowance. This is evidenced by the experience of one vessel owner operating at both New Orleans and PHA. At New Orleans, that vessel owner would have been fully compensated by the 3% allowance provided by New Orleans, had it recovered all wharfage charges from cargo interests. Because that vessel owner will not release inbound cargo until all wharfage is paid,[15] it is the collection of outbound cargo wharfage, primarily from freight forwarders, which makes the 3% allowance less than fully compensatory. But that vessel owner sometimes does not press its claim for outbound wharfage out of fear of loss of business from freight forwarders who represent the cargo interest in the selection of water carriers.

There is ample evidence that the 4% allowance will be fully compensatory to vessel owners and vessel agents if they collect all wharfage charges from cargo interests and if PHA pays the 4% allowance on all wharfage it collects. In some instances PHA does not pay that allowance, that is—where, under written lease agreements between PHA and lessees, the wharfage is paid directly to PHA by the lessee. However, vessel interests are not informed of those lease provisions. Consequently, they do incur the expense of billing PHA's lessees for wharfage and collection until the lessee advises that the charges have been paid directly to PHA. Contrary to the requirements of its tariff, PHA has not paid the vessel interests the 4% allowance in those situations. PHA stated that it would correct this situation which it had overlooked prior to the hearing. As of the time of this initial decision no correction has been made.

THE STATUTES

As pertinent, section 17 provides:

> Every * * * other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

As pertinent, section 13 provides:

> That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or

[15] The practice of not releasing inbound cargo until wharfage is paid is followed by at least one vessel agent at PHA.

cooperative working arrangement. The term "agreement" in this section includes understanding, conferences, and other arrangements.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation;***

Discussion and Conclusions

A: General

The underpinning of WGMA's complaint alleging that PHA's tariff violates sections 15 and 17 of the Shipping Act seems to lie in a deep rooted conviction that, under both the common law and the Shipping Act, terminals are bound to look only to the cargo and never the vessel for payment of wharfage charges and that any departure from that principle somehow must be in violation of law. WGMA's preoccupation with its theory, for which it cites no supporting common law authority nor any Commission or Court decisions under the Shipping Act, is what leads WGMA astray in this proceeding,[16] the common law has been preempted by the statutory provisions of the Shipping Act and the rules and regulations promulgated pursuant to that Act. *See, e.g., Adams Express Co. v. Croninger,* 226 U.S. 491 (1913); *Boston and Maine RD. v. Hooker,* 233 U.S. 97 (1914). It is well settled by case law and the Commission has sanctioned by regulation that wharfage is an appropriate charge against the vessel. Indeed, tariff provisions, of the very type in issue here, have received approbation of the Commission and the Courts in the past. I will explain.

B: Wharfage as a Charge Against the Vessel

Those persons, including governmental instrumentalities, like PHA, who operate terminal facilities are "other persons subject to this [Shipping] Act" as defined in section 1 of the Act, 46 U.S.C. 801. The quoted phrase covers "any persons not included in the 'term common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." Thus, "there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission." *California v. United States,* 320 U.S. 577 586 (1944). "[A]s the expert body established by Congress for safeguarding this specialized aspect of the national interest, [the Commission] may, within the general framework of the Shipping Act, fashion the tools for so doing." *Id.*

Under its mandate, the Commission formulated regulations governing the filing of tariffs by terminal operators. 46 CFR 533.1 et seq. Recognizing that wharfage is a terminal service which is provided "in furtherance of the *carriers* obligation," *see, Boston Shipping Assn. v. Port of Boston Marine Terminal,* 11 F.M.C. 1, 9 (1967), the Commission determined that "wharfage is an appropri-

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[16] Inasmuch as, historically, the ocean common carrier's transportation obligation extended beyond carriage on the high seas and included the obligation to provide terminal facilities which could be made accessible to consignors and consignees of cargo, see discussion, *infra,* it is difficult to perceive how, at common law, the cargo interests and not the vessel interests would be considered primarily liable for wharfage charges.

ate charge against the vessel." *Id.* Consequently, the regulations governing terminal operators' tariffs expressly sanction the practice of assessing wharfage charges against vessels. See text of 46 CFR 533.6(d)(2) at n. 9, *supra,* in which wharfage is defined as a "charge assessed against the cargo or *vessel.*" The rationale of the regulation and *Boston Shipping Assn.* conforms to principles laid down in a host of other cases, as will be seen.

The validity of assessing wharfage against the vessel interests, under section 17, is subject to a test of reasonableness, that is—whether the practice is "fit and appropriate to the end in view." *Investigation of Free Time Practices–Port of San Diego,* 9 F.M.C. 525, 547 (1966); *Boston Shipping Assn. v. Port of Boston Marine Terminal, supra.* Reasonableness under this standard turns on whether the charge is assessed by the terminal against the user of the service. In other words, "A just and reasonable allocation of charges under section 17 is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service (citations omitted)," *Boston Shipping Assoc., Inc. v. Port of Boston,* 10 F.M.C. 409, 414 (1967). Failure to impose wharfage charges on users causes mischief because it makes that service parasitic on other terminal rates. "Where the users of a particular service do not provide their share of essential terminal revenues a disproportionate share of the burden is unjustly and unreasonably shifted to users of other terminal services." *Id.*

In urging that wharfage should be assessed against the cargo interests (that is, shipper, consignee, freight forwarder, broker or other cargo representative), complainant appears to lock on the words in PHA's tariff that "Wharfage Charges . . . are liabilities of the owner of the cargo" as dispositive of the question of user. However, complainant is in error for this assumption overlooks the nature of the obligation of the carrier to the shipper. It is well settled that the carrier's responsibility to the cargo does not end when the vessel ties up at the dock. Judge Prettyman stressed the extent of the obligation in *American President Lines v. Federal Maritime Board,* 317 F. 2d 887, 888 (D.C. Cir. 1963):

> Ships bringing transoceanic freight into port are required by their transportation obligation, absent a special contract, to unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee and afford the consignee a reasonable opportunity to come and get it. This was settled by the courts many years ago. (Footnote citations omitted.)

Thus, on inbound cargo, the vessel's obligation does not end until it makes a tender of the cargo for delivery to the consignee at the pier. Afterwards, "Consignees are obligated, after notice and reasonable opportunity to come and pick up their goods at the pier." *American President Lines, v. Federal Maritime Board, supra,* this allowance by the carrier to the consignee of a reasonable opportunity to come and get 'his cargo' is what is known in the industry as 'free time'."[17] *Investigation of Free Time Practices–Port of San Diego,* 9 F.M.C. 525, 529 (1966).

[17] Wharf demurrage charges, or those charges which accrue after the expiration of free time, are not involved in this proceeding. Therefore, it is unnecessary to discuss the circumstances, like strikes, under which the carrier's obligation might be extended beyond normal free time periods. *Cf. The Boston Shipping Assoc., Inc. v. Port of Boston, supra; The City of Galveston, v. Kerr Steamship Co., Inc.,* 362 F. Supp. 280 (S.D. Tex 1973), *aff'd* 503 F. 2d 1401 (5th Cir. 1974), *Cert. denied* 420 U.S. 975 (1975).

Responding to an argument similar to the one urged here by complainant, the Commission offered a further explanation of why the obligation for wharfage lies with the vessel, despite the euphemism that wharfage is a liability of the cargo, in *The Boston Shipping Assoc., Inc. v. Port of Boston, supra*, 10 F.M.C. at 416–417:

> When the cargo is in free time, the terminal facility—the pier—is being provided by the terminal to the carrier so that the carrier may discharge its full transportation obligation to the consignee. It is the duty of the carrier to provide this service to the consignee and it has chosen to do so through an arrangement with the terminal. No one would argue that the carrier should pay the terminals' cost of providing the pier for the free time period itself.* * *
>
> That the services in question were supplied to the cargo is in one sense a valid statement. In transportation all the services, be it the actual carriage or the variety of attendant services, are performed for or supplied to the cargo, the ultimate object being to move the cargo from the point of origin to its ultimate destination. But the cargo cannot be divorced from the persons owing obligations to it. In the past when considering the proper allocation of terminal charges, it has been customary to divide terminal services into two general categories: those performed for the "vessel" and those performed for the "cargo." While we have no desire to change this customary usage, it must always be borne in mind that the cargo is not some separate entity which is itself capable of paying for services rendered. The charges must be paid by some person standing in a prescribed relationship to the cargo.[[18]] Thus, where the terminal is the intermediate link between the carrier and the shipper or consignee, one of these two persons must pay the terminal's costs of providing the services rendered. The question here in which of these two should pay the charge in issue. [Footnotes omitted.] We would place the burden upon him who * * * owes an undischarged obligation to the cargo.

Heretofore in this discussion, the carrier's obligation for wharfage has been canvassed in the context of inbound cargo. But it is settled that the same principles are applicable to outbound cargo as well. The vessel is required, as part of the obligation of carriage, to provide terminal facilities for the receipt of outbound cargo and to afford a reasonable free time period for the shipper to assemble the cargo prior to loading aboard ship. Therefore, the terminal becomes, in effect, the agent of the carrier for this service. Accordingly, it is appropriate to place liability for payment of outbound wharfage on the vessel—the user of the service. *See, e.g., Investigation of Free Time Practices–Port of San Diego, supra*, in which the Commission explained, at 539:

> It is the carrier's obligation not only to afford the necessary free time but also to provide terminal facilities adequate to render such free time meaningful and realistic. *Intercoastal Rates To and From Berkeley, Etc.*, 1 U.S.S.B.B. 365 (1935). This obligation may be fulfilled either by the carrier itself or through an agent. *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400 (1935).
>
> The tariffs on the ocean carriers in the foreign offshore trades calling at San Diego make no provision for free time, nor do the carriers provide wharfs or piers at San Diego for the receipt and delivery of cargo. [Footnote omitted.] The port of San Diego provides these facilities, and the free time in question is provided for in its tariff. Under these circumstances the port becomes in effect the agent of the carrier for the performance of these obligations of the carrier.[19]

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[18] By way of footnote, the Commission indicated it assumed "that convenience alone led to the substitution of 'cargo' for the term 'shipper or consignee' depending *inter alia* whether the shipment was inbound or outbound." 10 F.M.C. at 417. n. 10. Another aspect of the origins of the custom of assessing charges against "cargo" is offered in *Middle Atlantic Conference v. United States*, 353 F. Supp. 1109 (D.C. D.C. 1972). There, the court expressed the belief it "is an outgrowth of a legal concept, peculiar to contracts of shipment at maritime law 'under which the vessel is deemed to contract' in respect to the freight, rather * * * than with the shipper." *Id.* at 1114.

[19] *Cf. Intercoastal S.S. Frt. Ass'n. v. N.W.M.T. Ass'n.*, 4 F.M.B. 387 (1953), in which the principles, expressed earlier in *Terminal Rate Increases–Puget Sound Ports*, 3 U.S.M.C. 21 (1948), and *Terminal Rate Structure–California Ports*, 3 U.S.M.C. 57 (1948), that allocation of terminal charges is to be determined by the nature of the transportation obligations of the carrier to the

Next, complainant urges that the tariff provisions placing liability on the vessel interests are unlawful because those provisions are not required by law to be filed and therefore have no binding effect. In support of this argument complainant cites a provision of the Commission's terminal tariff rules, 46 CFR 533.3 and three court cases, *Port of Tacoma v. S.S. Duval,* 364 F. 2d 615 (9th Cir. 1966); *Pacific S.S. Co. v. Cackette,* 8 F. 2d 259 (9th Cir. 1925), *cert. den'd* 46 S. Ct. 203; *Middle Atlantic Conference v. United States, supra.* The cited cases are inapposite. The rule, as I read it in conjunction with 46 CFR 533.2 and 46 CFR 533(d)(2), mandates a statement in the tariff concerning the identity of the person liable for wharfage.

Complainant's statement of the rule of law in the three cited cases is, of course, correct. In *Middle Atlantic Conference v. United States, supra,* the court expressed the rule this way, 353 F. Supp. at 1122:

> A long line of cases have held under various transportation acts that attempts by carriers to engraft onto a tariff a gratuitous unilaterial provision not contemplated or required by the statute authorizing the filing of tariffs is entirely ineffectual.

Thus, in *Middle Atlantic Conference,* the court affirmed a decision of the Interstate Commerce Commission prohibiting motor carriers from specifying in their tariffs that particular persons, generally referred to as warehousemen, who were not named in the bill of lading as consignors or consignees of shipments, are liable under certain circumstances for charges for undue detention of trucks being loaded or unloaded at their premises. Obviously, the carriers sought to create a new rule of liability by means of a tariff and thereby to effectuate a legislative change in the law which places liability for motor transportation charges on the parties to the contract for transportation.

In *Port of Tacoma v. S.S. Duval, supra,* the court held invalid a lien arising from a tariff provision making vessel interests liable for wharfage because the tariff provision had the effect of nullifying a notice provision of the Maritime Lien Act, 46 U.S.C. 971–975, and particularly, section 973.[20] However, the court struck down only the tariff provisions which conflicted with the lien law. It did not invalidate another tariff provision virtually identical to the one at issue here.

In *Pacific S.S. Co. v. Cackette, supra,* the court held a tariff provision invalid which, contrary to the applicable law at that time, required a passenger to give written notice of a baggage claim within ten days after landing.

Unlike the circumstances in the three cases cited by WGMA which involved tariff provisions in conflict with the law, here, in my opinion, the Commission's rules implementing section 17[21] constrain terminal operators to set forth in their tariffs the identity of the person or persons liable for payment of charges for the different services provided. Under 46 CFR 533.3 terminal operators are required

shipper or consignee and the identity of the user of the terminal services, were reaffirmed. Accordingly, upon findings that the terminal operators, in receiving lumber for outbound movements, were performing a service for shippers and not for carriers, it was held improper to allocate the charge to the carriers. The allocation of charges for a similar service provided by terminal operators for general cargo for the use of carriers was left undisturbed.

[20] That provision has since been deleted. See discussion in *Gilmore & Black, The Law of Admiralty,* §§ 9–41 through 46a at 672–688 (Second Ed. 1975).

[21] The regulations governing the filing of tariffs by terminal operators, 46 CFR 533.1 et seq., are promulgated pursuant to the general rule making authority of section 43 of the Shipping Act, 1916, 46 U.S.C. 841a, which provides: "The Commission shall make such rules and regulations as may be necessary to carry out the provisions of this Act."

to file a "tariff showing all its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities." That rule also carves out an exemption from terminal charges covered by *negotiated* agreements, as follows: "*Provided, however* that rates and charges for water carriers pursuant to negotiated contracts * * * need not be filed for purposes of this part."

Clearly then, absent a negotiated contract with vessel interests, and none has been shown on the record, the tariff must show the rates and charges for wharfage. Recalling that 46 CFR 523.6(d)(2) defines wharfage as a charge assessed against *cargo* or *vessel*, it is imperative for PHA, or any other terminal facility similarly situated, to have its tariff distinguish, by tariff rule or regulation, with clarity, whether it is the cargo or vessel interest which is liable for wharfage. Otherwise one of the major purposes of the terminal tariff regulations—keeping the Commission and the public informed of terminal practices[22]—could not be satisfied. Thus, the tariff provision serves to comply with, rather than being in defeat of regulation, and is entirely necessary and proper.

Given the carriers' transportation obligation to provide accessible terminal facilities, including the use of the wharf, for inbound and outbound cargo, in my opinion 46 CFR 533.6(d)(2) should be construed to mean that ordinarily the wharfage charge in a terminal tariff must be stated as the liability of the vessel interests because the carriers' vessels ordinarily are the users of the wharves.[23] On the other hand, where there is a special contract[24] *(see American President*

[22] See 46 CFR 533.2, which provides: *The purpose of this part is to enable* the Commission to discharge its responsibilities under section 17, Shipping Act, 1916, by keeping informed of practices and rates and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices.

WGMA also focuses a part of its argument on Item No. 2 of PHA's tariff, entitled "Application and Interpretation of Tariff" which provides: The use of the waterways and facilities under jurisdiction of the Navigation District shall constitute a consent to the terms and conditions *of this tariff, and evidence an agreement* on the part of all vessels, their owners and agents, and other users of such waterways to pay all charges specified and be governed by all rules and regulations herein contained.

WGMA urges that Item No. 2 is a nullity because tariffs have the force and effect of law, *see Atlantic Coast Line R. Co. v. Atlantic Bridge Co.*, 57 F. 2d 654, 655 (5th Cir. 1932), and do not rest upon agreement or consent. It is correct to say, as WGMA does, that consent cannot alter the effect of a tariff, but that principle and the supporting authorities cited by WGMA have no application to Item No. 2. *Pittsburgh & C. Ry Co. v. Fink*, 250 U.S. 577 (1919), one of the cases cited by WGMA, will serve to illustrate the misapplication of the principle to PHA's tariff.

In *Pittsburgh v. Fink*, the consignee argued that he did not have to pay the railroad's tariff charges because of an agreement he had with the consignor. The Court held that the agreement could not "lessen the obligation of the consignee to pay *the legal tariff rate when* he accepted the goods." 250 U.S. at 582. It is obvious that WGMA misreads the rule of that case which stands for the proposition that a *separate contract entered into* between a consignor and consignee for payment of transportation charges did not supersede the carrier's tariff provisions invoked by the bill of lading, insofar as the liability imposed by law for the payment of transportation charges is concerned. This is so because "the provisions of the tariff enter into and form a part of the contract of shipment." *Boston & Maine RD v. Hooker, supra*, 233 U.S. at 111. (This Commission's tariff rules applicable to *domestic and foreign commerce require* carriers to include specimen copies of their bill of lading in their filed tariffs. 46 CFR 531.5(b)(8)(vii), 46 CFR 536.5(d)(8).)

But, by *custom* and usage, ports, like PHA, do not enter into a written contract with vessels for the use of port and terminal facilities. The obligation of the vessel interest to PHA arises from the use of PHA's facilities and this is all Item No. 8 establishes. In so providing in its tariff, PHA carries out its obligation, under 46 CFR 533.2, to keep the Commission and the public informed of the terminal's practice. I cannot visualize any benefits to be gained from upsetting an *efficient practice* by *requiring* PHA to eliminate Item No. 2 from its tariff and force it to enter into written contracts instead. I do foresee that if written contracts were required to be substituted for Item No. 2 that there would ensue a more costly and less efficient operation with resultant additional expenses to shippers. See discussion concerning vessel agents, *infra*.

Moreover, tariff provisions, substantively the same as Item No. 2 of PHA's tariff, have been upheld in the past by the Commission and by the courts. *See, e.g., Selden & Co. v. Galveston Wharves*, 7 F.M.C. 679 (1964); *City of Galveston v. Kerr Steamship Co., supra*, and other cases referred to in the text.

[23] *Accord, Terminal Rate Structure–Pacific Northwest Ports*, 5 F.M.B. 53 (1956), "where such services are performed, the terminal is entitled and obliged to recover compensation therefor, *from the person for whom the services have been performed.*" *Id.* at 57.

[24] *But see, Terminal Rate Structure–Pacific Northwest Ports*, 5 F.M.B. 326 (1957), amending 5 F.M.B. 53, in part. Recognizing that the language in the earlier decision, quoted in n. 23, *supra*, could be construed to require terminals to bill the cargo interest in a

Lines v. Federal Maritime Board, supra,) or special circumstances (as with lumber shipments in *Intercoastal S.S. Frt. Assn. v. N.W.M.T.Assn., supra,)* the liability for wharfage may be that of the cargo or cargo interests.

This means that in a proceeding to determine the lawfulness of a terminal tariff provision placing liability for payment of wharfage on the vessel interests, there arises a rebuttable presumption of reasonableness of that tariff provision and the burden of proof to overcome that presumption lies with the party assailing the tariff provisions.[25] Here, WGMA adduced no evidence to overcome that presumption by showing that vessel interests were not the users of the wharves or that there existed special contracts or other special circumstances tending to establish the unreasonableness of the wharfage liability provisions in PHA's tariff. WGMA has failed its burden of proof.

C: The Agent's Liability for Wharfage

Although not entirely clear, WGMA seems to contend, as it has in a related proceeding against PHA and other Texas ports,[26] that whatever may be the responsibility of the vessel to the terminal, the vessel agent cannot be made responsible for payment of vessel charges to the terminal because he is an agent for a known principle. The rule of law relied upon is well established. "Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable *unless he agreed to be so.*" (Emphasis supplied.) *Whitney v. Wyman,* 101 U.S. 392 (1880). The rule has been construed to mean that vessel agents acting for a vessel (rather than for the vessel owner) act for a known principal—the theory being that by naming the ship, the agent has sufficiently disclosed the identity of the principal for whom he acted. *See, e.g., Valkenburg, K.-G. v. The S.S. Henry Denny,* 295 F. 2d 330, 333 (7th Cir. (1961)); *Instituto Cubano De Establizacion Del Azucar v. The SS Theotokos,* 155 F. Supp. 945, 948 (S.D.N.Y. 1957); *Hudson Trading Co. v. Hasler & Co., Inc.,* 11 F. 2d 666, 667 (S.D.N.Y.) 1926). The implication which WGMA would draw from this familiar rule of agency law is that its agent members, acting for vessels, are immunized from becoming liable for the vessel's obligation to pay for wharfage and that PHA's tariff provisions holding them liable somehow amount to unlawful coercion and duress under Texas law. I am unable to reach the conclusion suggested by WGMA.

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case where the contract of affreightment involves a tackle to tackle rate, but noting, too, that terminals are not parties to that contract and are unable in any given case to determine the identity of the party ultimately liable, the Board authorized the terminals to bill and collect from the carriers all handling and service charges incurred between point of rest and ship's hook, both inbound and outbound. Point of rest is defined as "that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading." 46 CFR 533.6(c).

[25] Under the Administrative Procedure Act, 5 U.S.C. 551 et seq., which governs proceedings before regulatory agencies and the Rules of Practice of this Commission, 46 CFR 502.1 et seq., the burden of proof is on the proponent of a rule or order. "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d). To the same effect, see 46 CFR 502.155.

[26] Docket No. 74-15, *West Gulf Maritime Association v. Port of Houston Authority, et al.*, pending initial decision.

[27] In *Valkenburg*, the court said, "The identity accorded by maritime law to a ship as a person also charges those who deal in maritime commerce with the knowledge as to the ownership and operation of a named ship which accepted maritime publications as Lloyd's Registry of shipping would disclose. 295 F. 2d at 233. *But see Port of Tacoma v. S.S. Duval, supra,* also *Puamier v. Barge BT1793*, 395 F. Supp. 1019, 1030 (E.D. Va. 1974), where the court commented, "The Supreme Court and various lower courts have held repeatedly that the true ownership of a vessel is not dependent upon its registry." (Citations omitted.)

To begin with, it should be understood that "public wharves, piers and marine terminals are affected with a public interest." *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission,* 444 F. 2d 824, 828 (D.C. Cir. 1970).[28] Because terminals are of vital importance to transportation, they may be deemed public utilities for purposes of regulation by this Commission. *Id.*, at 829. The court continued, also at 829:

> The power thus conferred [on the Commission] is to be used for the purpose of facilitating the free flow of commerce by guaranteeing an efficient terminal system.

Earlier, that court explained what is meant by an efficient terminal system, *Id.*, at 828:

> Efficiency of manpower, ships and vehicles is dependent upon the prompt handling of such cargo and determines whether the flow of interstate and foreign commerce is obstructed or facilitated. The public interest in their efficient operation is unquestioned.

If a terminal is, in effect, a public utility, it follows that it must render service—including the use of its facilities like berths and wharves—to all vessels which call at the port. However, this does not mean that the terminal may not fix some standards which must be adhered to in order to promote efficiency of the terminal's operation. This requires the terminal to take such action as is necessary, whether by the device of a tariff or otherwise, to insure that berthing, unloading, loading, and vessel departure be accomplished with dispatch so as not to impede the flow of traffic and the movement of cargo. In the same manner, the terminal is required to ensure that it is paid for the use of its facilities so that costs properly allocated to the vessel do not, by nonpayment, become a charge on other terminal services or impair the terminal's ability to keep, maintain, and improve its facilities so that it may continue to serve the public interest.[29]

As seen, wharfage is the liability of the vessel interests and PHA is required to collect wharfage charges from those interests. But, may the tariff make the vessel agent, as an agent for a known principal, liable for the principal's obligations? The teaching of *Whitney v. Wyman, supra,* is that this may be done if the agent agrees to be bound. In my opinion, vessel agents have agreed, both factually and legally, to accept the obligation to pay PHA for wharfage.

It is clear that PHA deals not with vessel owners, except those owners who maintain a physical presence at the port, but with their agents. Agents usually represent more than one shipowner and are in daily contact with the port to obtain berth assignments for their principals' vessels. At Houston, the agents, alone, know the identity of the principal and the nature and ownership of the cargo carried by the vessel and the berthing and wharfage requirements. PHA relies on the expertise of those agents in assigning berths and wharves to the vessels they represent. Of at least equal importance, PHA cannot afford to nor does it, in fact,

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[28] *See also Perry's Crane Service v. Port of Houston Authority of Harris County, Texas,* 16 SRR 1459, 1484 (1976) (initial decision), partially adopted, ____ SRR ____ (February 25, 1977).

[29] This mandate is also imposed by the State of Texas. PHA, as a state agency, acts in a fiduciary capacity and is bound by the Texas Constitution to operate essentially on a cash basis. Article 3, Section 50 of the Texas Constitution provides: The Legislature shall have no power to create or to lend, or to authorize the given or lending, of the credit of the State, in aid of, or to any person, association or corportion, whether municipal or other, or to pledge the credit of the State in any manner whatsoever for the payment of liabilities, present or prospective, of any individual, association of individuals, municipal or other corporations whatsoever.

Article 11, Section 3, of the Texas Constitution, provides: No county, city or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit. . . .

rely on the credit of absentee vessel owners for payment of charges allocated to vessels. Rather, PHA deals with the agent and relies on the credit of the agent for payment of the vessel's charges.

It must be understood that shipowners are located around the globe and if PHA were to be forced to bill and collect for charges incident to each vessel call, the administrative cost of obtaining payment would soar and charges would correspondingly increase. Moreover, many of the charges cannot be accurately determined until after the vessel is gone. It would then be a difficult task, indeed, to collect without the security of the vessel.[30] Without that security, the port would be placed in the position of maintaining law suits around the world in order to collect its charges. It is manifest, then, that PHA and the vessel agents mutually understand their undertaking with each other. Instead of delaying the berthing, unloading, loading and departure of the vessel to await the filing of a bond or other security by the vessel owner to guarantee payment of charges, PHA extends the use of its facilities to the agent's vessels in reliance on the agent's credit and its implied agreement to be bound by the terms of the tariff.

In other words, what has occurred is that PHA, New Orleans and other terminals, which publish similar tariff provisions making the vessel agents liable for vessel charges, have let it be known they recognize that vessel agents hold themselves out to be agents for known principals, but that the terminals will not do business with the agent *qua* agent. The terminals have offered another choice which the agents are free to accept or reject, that is, the terminals will serve the principal directly, but only if the transaction is secured in advance, or, the terminals will extend credit to the agents as independent contractors. By arranging for and using terminal facilities for vessels, without prior security having been furnished by the vessel owner or operator, the agents have accepted the terminals' offer and, as independent contractors using the terminals' facilities, the agents become bound by the terms and conditions of the tariffs.[31]

The understanding between the port and the agent has been reduced to a tariff provision, stating that the use of the port's facilities shall constitute a consent to the terms and conditions of the tariff and evidence the consent of the vessel agent to pay the tariff charges accruing to the vessel. At law, it is probably not necessary to include the provision in the tariff, although I have previously implied that it serves a useful regulatory purpose. Referring to virtually the same tariff provision, as is assailed here, in a Miami port tariff, Chief Judge Brown observed that it was "probably superfluous [that] the tariff contained a contractual consent clause." *State of Israel v. Metropolitan Dade County, Florida*, 431 F. 2d 925, 927 (5th Cir. 1970). It is probably superfluous because, by making use of the terminal facilities in its own behalf, the agent impliedly consents to be bound

[30] Under some circumstances the vessel itself may not be subject to a lien, *see Gilmore and Black, The Law of Admiralty, supra; Port of Tacoma v. S.S. Duval, supra.*

[31] This does not appear to be contrary to principles of Texas law. See comments at 2 Tex. Jur. 2d, Sec. 212: Ordinarily, however, though the facts of the case may be such as to put the third party on notice that the agent has a principal who must bear the liability, it is usually the agent's duty, if he would escape personal liability on the agreement, to make a disclosure of the agency relationship himself, rather than to rely on any discovery of this fact by the third party. In any event, in cases of this character, the paramount question to be determined is simply this: To whom was the credit knowingly extended, according to the understanding of both parties to the contract? *For he to whom such credit was extended, knowingly and exclusively, by the other party to the Contract is the one who will incur liability on the agreement, regardless of whether he is the principal or the agent.* (Emphasis supplied.)

by the tariff terms. This was confirmed in *Folgner v. Italian Line,* 383 F. Supp. 816 (D.C.C.Z. 1974), where the court stated, at 818:

> A party who makes use of the facilities or services offered by another, which are offered or rendered under the terms of a lawfully established tariff, impliedly consents to be bound by the tariff terms. *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 59 S. Ct. 612, 83 L. Ed. 953 (1939). The terms of a lawfully promulgated tariff become (in essence) the only agreement permitted between the party who supplies the facilities or services and the party who utilizes them. *Union Wire Rope Corp. v. Atchison, T. & S.F. Ry.*, 66 F.2d 965 (8th Cir. 1933). These rules apply with equal force to tariffs governing terminal operations. *United States v. ICC,* 91 U.S. App. D.C. 178, 198 F.2d 958 (1952); *State of Israel v. Metropolitan Dade County, Florida*, 431 F.2d 925 (5th Cir. 1970).

The tariff places no unreasonable onus on the agent. If he wishes to avoid binding himself to the obligation to pay, he is free, under his agency agreement, to require the vessel owner to furnish satisfactory security to the port to cover all port charges properly allocated to the vessel in advance of berthing.

D: Duress Under Texas Law

WGMA calls upon the Commission to determine that under Texas law the provisions of the tariff making agents responsible for payment of wharfage constitutes duress and business coercion. Assuming, for the moment, that the tariff provision may be contrary to Texas law, because they impose duties and obligations on persons without their consent,[32] this issue is not before the convenient forum. Moreover, it is also incorrect to characterize the business relationship between the port and the agents as non-consensual. As seen, the initial consent here arises not from the tariff provision but from the terms of the bargain struck by PHA and the agent whereby the agent's vessels are given the use of the port's facilities without a security deposit. Further, reliance on Texas law is not a proper basis for an adverse finding under the Shipping Act, particularly where, as here found, the tariff provisions pass muster under the Shipping Act. *See Agreement Nos. T-4, T-5,* 8 F.M.C. 521, 533–534 (1965); *Terminal Lease Agreement at Long Beach, California,* 11 F.M.C. 12, 26 (1967), where the Commission states:

> While we might consider State or local law in determining what the public interest may be, we cannot in this case disapprove the agreements on this basis. The record does not show that any adverse ramifications will ensue upon approval of the agreements. Since we cannot anticipate any consequences which might be contrary to the public interest, the legality of the terms of the leases under California law is a matter for the State, not for the Commission in a section 15 proceeding.

The principle of those cases fully applies to this proceeding involving section 17 as well as section 15 issues.

E: The Section 15 Issue

Complainant raises the section 15 issue at only one place in the text of its opening brief. The argument, in its entirety, is phrased by WGMA as follows:[33]

> Is not such relief of cargo and its representatives (as well as the port itself of course) of the cost of collection, and liability for payment of, cargoes' charges clearly giving to the port, to cargo, and to

[32] In view of the decisions by the Texas Supreme Court in *Rorie v. The City of Galveston*, 471 S.W. 2d 789 (Tex. 1971), and by the United States Disctict Court for the Southern District of Texas in *The City of Galveston v. Kerr Steamship Co., Inc., supra,* upholding tariff provisions virtually identical to those under attack here, see discussion, *infra*, it is rather doubtful that the duties and obligations of the agents to PHA would be construed as having been imposed by PHA by means of duress and business coercion under Texas law.

[33] WGMA's opening brief, p. 12.

cargoes' representatives "special privileges and advantages", expressly forbidden by Section 15 of the Shipping Act of 1916 (46 U.S.C.A. §814) (if this be a matter of "agreement", as the tariff provision reads).

The short answer to the question posed is that a tariff is not an agreement within the meaning of section 15 but is governed by the provisions of 46 CFR 533.1 *et seq.* issued pursuant to section 17, This is the position of the Commission as it was stated in an amicus brief filed in *Rorie v. City of Galveston, supra,* and its was adopted by the Texas Supreme Court in that case. The Commission's position upheld as "obviously most reasonable" in *The City of Galveston v. Kerr Steamship Co., Inc., supra,* 362 F. Supp. at 293, by the United States District Court for the Southern District of Texas. At issue in the Kerr case was a Galveston terminal tariff provision virtually identical to Item 3 of PHA's tariff, but concerning strike demurrage charged to the vessel. Galveston sued vessel owners and agents and therefore the principles enunciated there apply with full force and effect here, not only with regard to the section 15 issue, but the section 17 issue and the section 16 First[34] matter as well. The District Court concluded as a matter of law, 362 F. Supp. at 292–294:

The tariff in question was promulgated by the Galveston Wharves to govern the operation of the wharves facility. First, although the statute is to be construed most broadly, *Volkswagenwerk Akt. v. F.M.C.*, 390 U.S. 261, 88 S.Ct. 929, 19 L.Ed.2d 1090 (1968), a tariff is obviously not a multi-party agreement. Nothing in the record suggests that this tariff is anything other than a set of rates, rules and regulations unilaterally issued by the owner of the facility. Secondly, *neither the tariff provisions relevant here, nor any other tariff provision, fit the categories enumerated in the statute* [*section 15*]. In *Rorie v. City of Galveston*, 471 S.W. 2d 789 (Tex. 1971), the Texas Supreme Court adopted the view that Section 15 of the Shipping Act does not apply to a Galveston Wharves tariff. The court there enforced a provision in a predecessor to Circular No. 4–D against the claim of unenforceability for lack of F.M.C. approval under Section 15.

Counsel for the Federal Maritime Commission filed an amicus brief in the *Rorie* case supporting enforcement of the statute. Although the courts are the final authority on issues of statutory construction, *F.T.C. v. Colgate-Palmolive*, 380 U.S. 374, 385, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965), the construction put on a statute by the agency charged with administering it is entitled to deference by the courts. *N. L.R.B. v. Hearst Publications*, 322 U.S. 111, 131, 64 S.Ct. 851, 88 L.Ed. 1170 (1944). This is particularly so if the construction has been consistent and of long duration.

In the amicus brief, the Commission contended *the tariff was not an agreement within the meaning of Section 15 but was instead governed by the Commission's General Order 15*, 46 C.F.R. § 533, issued pursuant to Sections 17 and 21 of the Shipping Act, 46 U.S.C. § § 816, 820. That order requires all persons carrying on the business of furnishing wharfs, docks, warehouses, or other terminal facilities to file a schedule or tariff showing all rates, charges, rules and regulations governing the operation of the facility with the F.M.C. The order does not require the Commission's explicit approval of any tariff. The Commission reviews the filed tariff, considers any objectives and contacts the filing party if any changes are necessary. The predecessor to the Galveston tariff was challenged and upheld in *Selden & Co. v. Galveston Wharves*, 7 FMC 679, 1964 A.M.C. 1621 (1964).

The Commission's interpretation of the Act is obviously most reasonable. Section 15 (46 U.S.C. § 814) applies to a broad range of agreements between parties who are subject to the Act. This section requires filing and approval of such agreements by the Commission. Section 17 (46 U.S.C. § 816) and the Commission orders issued pursuant thereto apply to unilaterally fixed rates, rules and regulations. This section requires filing but no formal approval. Tariff Circular No. 4–D plainly falls into the second category; it must be filed but needs no formal approval to be enforceable.

* * *

[34] As stated earlier, section 16 First was not put in issue in the proceeding. Nevertheless, WGMA argues that the tariff provisions are violative of its provisions, as an undue preference because the tariff shifts the burden of payment and collection of wharfage charges to vessel interests from cargo interest (payment) and PHA (collection). In essence, it is the same argument made by WGMA in regard to section 17. Neither section has been violated.

In accord with Item #30 of the Tariff, pier demurrage charges for cargo remaining beyond free time may be assessed *against vessels and their agents.*

Defendants refer to the Item #5 definition of pier demurrage as "a charge assessed against cargo remaining in or on the terminal facilities after the expiration of free time unless arrangements have been made for storage." Defendants also point to other charges which are charged against the vessel. Defendants conclude that these definitions preclude plaintiff from charging vessels or vessel agents with pier demurrage.

The definitions only deal with the manner in which charges are accrued. They do not purport to establish which parties are liable for the charge. Liability for the various charges is fixed by Item #30 of the Tariff, quoted in Finding of Fact 1. Items #5 and #30 are neither conflicting nor ambiguous. [[35]]

A provision with similar language to that of Item #30 was found effective and binding on the parties in *Selden & Co. v. Galveston Wharves,* supra.

Obviously, the charge which the City of Galveston assesses against a party must be reasonably related to the party's use of the facility. As discussed in Findings of Fact 5, 6 and 7, *assessment of pier demurrage against the vessel's agent is a reasonable charge.* (Emphasis supplied.)

F: The 4% Allowance

In its complaint, but not in its opening brief, WGMA alleges the 4% allowance to be a "pittance." I have previously found it to be reasonably compensatory.

Nevertheless, the tariff issued by PHA does require it to pay vessel interests a 4% allowance for collection and payment of wharfage charges. PHA must comply with the terms and conditions of its own tariff. Although PHA, pursuant to written leases with some cargo interests, collects wharfage directly from them, and does not pay the 4% fee to vessel interests which attempt to collect wharfage in those situations, the facts of record show that the vessel interests have complied with the tariff's requirements and should be paid the fee, in accordance with Item 3.2 of the tariff, for wharfage paid directly to PHA by lessees. Therefore, unless and until PHA changes the terms of Item 3.2,[36] PHA will be required to pay the allowance to vessel interests, prospectively and retroactively.

G: Terminal Charge

Item No. 59 of PHA's tariff publishes rates for what is called a Terminal Charge. That term is not defined in PHA's tariff. The record fails to disclose what service is rendered or what facility is provided to justify the charge. However, the lawfulness of the charge was not placed in issue and PHA was not obligated to come forward with evidence to show the kind of service or facility it offered to earn that charge. Nevertheless, the Commission's tariff regulations applicable to terminal operators, 46 CFR 533.1 *et seq.*, do require terminal tariffs to set forth a definition of all services or facilities provided, 46 CFR 533.6. PHA is remiss in this regard insofar as the definition of terminal services is concerned and is admonished to correct the situation forthwith.

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[35] Similarly, I find that Item No. 3 of PHA's tariff is not ambiguous and does not conflict with other provisions in its tariff or with 46 CFR 533.1 *et seq.* Nevertheless, I believe the language of Item No. 3 can be improved to reflect its intended result. I would change "Wharfage Charges . . . are liabilities of the owner of the cargo" to "Wharfage Charges are assessed against the cargo."

[36] Inasmuch as the issue is not before me, I express no opinion concerning the validity of a particular change deleting the allowance in a written lease situation.

H: SUMMARY OF THE DOMINANT ISSUES

The practice of placing liability for payment of wharfage charges on vessel owners and vessel agents is prevalent at many United States ports and in all probability the practice has been dictated by the same considerations shown here, that is: the carrier is the user of the facility pursuant to its transportation obligation and port efficiency is promoted by having the agent agree to be responsible for payment of the vessel's charges for the use of the facility. The record discloses that virtually identical tariff provisions reflecting the practice appear in tariffs published by terminals at the ports of New Orleans, Lake Charles, Corpus Christi and Port Arthur. In addition, court and Commission cases reveal that nearly identical tariff provisions have been reviewed without being found in violation of law at Galveston, Miami and Puget Sound. There is nothing in the record to warrant a different conclusion in regard to PHA's tariff.

One other comment is warranted. In bringing this complaint proceeding, WGMA is, essentially, relitigating the issues in *The City of Galveston v. Kerr, supra,* and *Rorie v. The City of Galveston, supra,* and contending that the decisions handed down in those cases are wrong and should be overturned. The proper method to be used to achieve that result is to distinguish those cases from the proceeding at bar on the facts of the law. That method would be particularly appropriate in this proceeding in the light of WGMA's insistence that, over and beyond Shipping Act issues, the action of PHA contravenes Texas law. In these circumstances it is remarkable that WGMA makes no attempt to explain why the *Rorie* and *Kerr* cases should not be controlling or, at least, not be persuasive. Indeed, WGMA totally ignores *Rorie* and *Kerr* in its opening and reply briefs, having failed to cite either case or the conclusions reached by the Texas Supreme Court and the United States District Court for the Southern District of Texas in those cases.

CONCLUSION

I find that the practices of the Port of Houston Authority of Harris County, Texas, and the provisions of its tariff, Item Nos. 2, 3, 3.2 and 3.3, which dictate the practices and are in issue in this proceeding directly or indirectly, and which make the vessel, vessel owners and vessel agents responsible for payment of wharfage charges, do not violate sections 15, 16 First or 17 of the Shipping Act, 1916.

I find that PHA has inadvertently failed to comply with Item No. 3.2 of its tariff in that it has not paid the appropriate vessel interests the 4% allowance for wharfage charges paid directly to PHA by persons occupying facilities under written leases from PHA.

ORDER

It is ordered that the complaint is dismissed and the proceeding is discontinued.

It is further ordered that PHA make payment prospectively and retroactively, of the 4% allowance to the appropriate vessel interests for wharfage charges collected by PHA from lessees, occupying facilities pursuant to written leases with PHA, in accordance with the terms of Item No. 3.2 of PHA's tariff.

(S) SEYMOUR GLANZER
Administrative Law Judge

WASHINGTON, D.C.
April 12, 1978