# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 585

MR. EDOUARD HAZAN—GENERAL MANAGER
SOCAFEX, AGENTS AND FORWARDERS

*v.*

LYKES BROS. STEAMSHIP CO., INC.

## NOTICE OF ADOPTION OF INITIAL DECISION

*August 17, 1978*

No exceptions were filed to the initial decison in this proceeding served July 24, 1978. Notice is given that the Commission having determined not to review the initial decision, it became the decision of the Commission on August 16, 1978.

It is ordered that applicant shall waive collection of freight charges, publish a tariff notice (and provide a copy for the record), and give notice to the Commission of compliance, in the time and manner required by the initial decision.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

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*v.*

LYKES BROS. STEAMSHIP CO., INC.

*Adopted August 17, 1978*

Application for permission to waive a portion of freight charges in the amount of $8,706.14 granted. Carrier applicant found to have negotiated special reduced rates on oil and gas well drilling equipment, related supplies and parts, with a French importer, on which rates the importer relied, but to have failed through inadvertence to file a conforming tariff page reflecting the negotiated rates prior to the time of shipments. This inadvertence found to be the type of error contemplated by P.L. 90–298, amending section 18(b)(3) of the Shipping Act, 1916.

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

This proceeding began with the filing of an application by Lykes Bros. Steamship Co., Inc. (Lykes), in which Lykes seeks permission to waive a portion of freight charges on various shipments. Such applications are permitted under section 18(b)(3) of the Shipping Act, 1916 (the Act), as amended by P.L. 90–298 and are processed under Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

The application was filed (received by the Commission's Secretary) on June 30, 1978, and involves nine shipments of oil and gas well drilling equipment and related supplies and parts which moved under bills of lading dated January 5 and 8, 1978, from Houston, Texas, to Le Havre, France. They were carried on the Lykes' vessel *TILLIE LYKES* which sailed out of Houston on January 9, 1978. Lykes seeks permission to waive a total of $8,706.14 in freight charges in order to carry out its agreement with the French importer and nominal complainant in this case, "Socafex," represented by the latter's general manager, Mr. Edouard Hazan. As stated in the application, although Lykes had agreed to charge special lower rates on the shipments, through inadvertence, Lykes failed to file a new tariff with the Commission prior to the time of the shipments. At the tariff rate in effect at the time of shipments, the freight would be $30,527.22. At the tariff rate

[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).

which Lykes negotiated with Mr. Hazan, however, and now wishes to apply, the freight would amount to only $21,821.08. This was the freight which Mr. Hazan actually paid. The difference between the two figures ($8,706.14) is the amount of freight which Lykes seeks permission to waive.

The above summary of the factual situation which gave rise to the filing of this application is amply supported by a wealth of materials which Lykes has attached to its application, including pertinent rated bills of lading, invoices, manifest correction notices, telexes, and tariff pages. These materials demonstrate a classic example of one type of error which P.L. 90–298 was designed to cover, namely, a carrier's inadvertent failure to file a new tariff reflecting a rate which both carrier and shipper had agreed upon through negotiation. A more complete description of the facts follows.

Some time in December of 1977, Mr. Hazan visited Houston, Texas, and met with officials of Lykes to discuss the possibility of shipping oil and gas well drilling equipment and related parts and supplies via Lykes' vessels at mutually agreeable rates. Mr. Hazan met with Messrs. J. G. Tompkins, III (who verified Lykes' application), Senior Vice-President West Gulf Group, and with Mr. Gerardo Coterillo, General Traffic Manager-Houston. Mr. Hazan was interested in shipping these goods on a Lykes vessel sailing out of Houston for discharge in Le Havre, France, and wished to book additional shipments during the year with Lykes. The goods were destined for France and other countries[2] and were associated with a project known as "Focos Project."

The parties appear to have been aiming for a voyage of the *TILLIE LYKES* (No. 42 E) which sailed out of Houston on January 9, 1978. Under the tariff then in effect, the rate for shipments of oil and gas well drilling equipment, supplies and parts, etc., was $116.50 W/M (which included a general rate increase effective January 1, 1978) plus a 4.5% currency adjustment factor plus heavy lift charges of $83.50 W/M and $34.75 W/M. The parties were able to reach agreement, however, to reduce these rates and charges so that the rate would be $116.50 W/M less 20% plus the 4.5% currency adjustment factor and 50% of heavy lift charges. No charge would be made for extra lengths.

News of the agreement with Mr. Hazan was sent to the New Orleans headquarters of Lykes from Houston. From New Orleans, Mr. S.A. LeBlanc, Vice-President of Lykes' Seabee Division, advised Lykes' European headquarters of the negotiated rate.[3] Although not technically required to obtain the consent of the members of the Gulf European Freight Association (GEFA), of which Lykes is a member, because GEFA's agreement specifically permits each member to file its own rates,[4] Lykes nevertheless notified and obtained the concurrence of the other member lines. Apparently believing that the negotiated

[2] According to the information shown on the rated bills of lading, most of the shipments were destined for France but others were ultimately destined for Libya, Iraq, Cameroun, and Dubai, United Arab Emirates.

[3] The facts concerning the agreement reached in Houston and the communication from Mr LeBlanc in New Orleans confirming this agreement on behalf of Lykes are shown in a telex sent by Mr. LeBlanc attached to the application as "Attachment #1." Since this telex contained numerous initials rather than names and was thus not completely clear on its face, I telephoned Mr Tompkins, Lykes' Senior Vice-President of Lykes' West Gulf Division, who had filed the application, for a more complete explanation as to who the various parties who were mentioned by initials happened to be Mr. Tompkins provided clarifications and confirmed his conversation in writing by letter to me dated July 7, 1978, which I have transmitted to the official docket file

[4] The GEFA agreement in effect during the relevant time period specified that each member carrier reserved the right to file its own rates subject only to the condition that it notify the other members of its action *See* GEFA Agreement No 9360–3, paragraph 2.

*rates had become effective, Lykes' rating personnel actually* rated the shipments loaded on the *TILLIE LYKES* at Houston which sailed on January 9, 1978, at the negotiated rate, as shown in the copies of the rated bills of lading which Lykes furnished. Despite all of these developments, however, the employee of Lykes headquarters in New Orleans responsible for the carrying out of Mr. LeBlanc's ratification of the negotiated rate failed to cause the new tariff page to be filed prior to the time of the shipments. However, within three days after the *TILLIE LYKES* sailed out of Houston the oversight was noticed and Lykes telexed a filing of the tariff page to the Commission reflecting the negotiated rate, effective January 12, 1978. *See* GEFA Tariff FMC-3, 6th Revised page 186-A.[5] Unfortunately, Lykes' agents in Le Havre, France, despite the fact that the bills of lading had been rated according to the negotiated fee, and despite the fact that Mr. LeBlanc had notified Lykes' agents in Europe by telex dated December 16, 1977, that a special rate had been negotiated, sought to apply the tariff rate in effect at the time the ship left Houston and billed Mr. Hazan accordingly. However, on February 20, 1978, Mr. Hazan, understandably puzzled, telexed Mr. Tompkins in Houston, asking clarification and billing in accordance with the agreed rate. Following this communication, Lykes' agents in Le Havre billed Mr. Hazan at the negotiated rate. Mr. Hazan thereafter paid the freight at the agreed-upon rate.

The following table summarizes the freight actually collected on the nine shipments involved by bills of lading at the negotiated rate, the amount of freight calculated on the basis of the higher tariff rate in effect at the time of these shipments, and the amount of waiver requested. These figures are corroborated by copies of each rated bill of lading and other documents which Lykes has furnished.[6]

| | At Negotiated Rate | At Tariff Rate | Waiver Requested |
|---|---|---|---|
| B/L 24 | $17,514.31 | $25,143.73 | $7,629.42 |
| B/L 13 | 212.71 | 265.88 | 53.17 |
| B/L 18 | 326.27 | 407.84 | 81.57 |
| B/L 2 | 277.57 | 346.97 | 69.40 |
| B/L 23 | 267.83 | 334.80 | 66.97 |
| B/L 16 | 1,175.73 | 1,469.66 | 293.93 |
| B/L 15 | 321.40 | 401.75 | 80.35 |
| B/L 14 | 1,462.30 | 1,827.89 | 365.59 |
| B/L 11 | 262.96 | 328.70 | 65.74 |
| TOTAL | $21,821.08 | $30,527.22 | $8,706.14 |

[5] This tariff page bears an effective date on the top of the page of January 27, 1978. However, opposite the commodity item "Oilwell, Gaswell Drilling Equipment . . ." there appears the notation "(Eff Jan 12, 1978)." Furthermore, a footnote reference is made to the statement at the bottom of the page announcing "Filed by telex to teh (sic) FMC January 12, 1978." As I note below, telexed filings are permitted under the Commission's regulations (46 CFR 536.10(c)(1) and 536.10(c)(5), effective January 1, 1978).

[6] In addition to the nine shipments affected by the error in failure to file the new tariff, there were 11 bills of lading involving very small-sized shipments which were not subject to the negotiated rate and were rated as required by the tariff's minimum bill of lading rules. These small shipments are therefore not part of the request for waiver. However, Lykes has furnished all of these rated bills of lading together with related documents as well as the pertinent tariff page containing the minimum bill of lading rules, GEFA Tariff FMC-3, original page 46.

## DISCUSSION AND CONCLUSIONS

As in all special-docket cases, the question to be decided is whether the application shows that the carrier committed the type of error contemplated by the remedial provisions of section 18(b)(3) of the Act contained in P.L. 90–298. Moreover, the application must show that the other requirements of that law are met, namely, that the application was filed within 180 days after date of shipment, that a new tariff has been filed prior to the filing of the application, and that no discrimination among shippers will result if the application is granted. In my opinion, these requirements have been met. The ample evidence furnished by Lykes demonstrates clearly that Lykes had entered into an agreement with Mr. Hazan representing the French importer "Socafex," that Mr. Hazan had relied upon the agreement, that Lykes had fully intended to carry it out, but that an employee in the New Orleans headquarters of Lykes inadvertently failed to have the proper tariff page filed on time. This error, furthermore, has not only caused Lykes to go to great pains to assemble a massive amount of materials showing every detail of the situation but has caused Lykes additional embarrassment because of the fact that Lykes' agents in Le Havre initially billed Mr. Hazan at rates other than those agreed. This is unfortunate especially since Lykes, although not technically required to do so, fully advised other members of GEFA and obtained their concurrence, and filed the corrective tariff effective only three days after the *TILLIE LYKES* sailed out of Houston.

Public Law 90–298, which amended section 18(b)(3) of the Act, was designed precisely to afford an avenue of relief in situations of the kind described above. Before the enactment of this law shippers were required to pay higher rates on file in tariffs at the time of shipment even if carriers had agreed to charge and file lower rates, shippers had relied upon the carriers' word, and the carrier, through its own fault, had failed to file the tariff on time. *See Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *United States v. Columbia S.S. Company,* 17 F.M.C. 8, 19–20 (1973). Congress recognized the inequities and hardships resulting from the above situation and identified the source of the problem and the purpose of the amending legislation as follows:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.[7]

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

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.[8]

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

[7] House Report No. 920, 9th Cong. 1st Sess., November 14, 1967 [to accompany H.R. 9473], pp. 3, 4.

[8] Senate Report No. 1078, 90th Cong. 2d Sess., April 5, 1968 [to accompany H.R. 9473], p. 1.

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

As I have remarked above, Lykes has furnished ample evidence that it committed an error of the type envisioned by the Congress in enacting this remedial legislation. It is abundantly clear that after agreeing to charge rate payer, Mr. Hazan, special lower rates on oil and gas well drilling equipment, parts, supplies, etc., Lykes inadvertently failed to file the new tariff rates on time. This is a classic example of "an error due to an inadvertence in failing to file a new tariff" in the statutory language. Furthermore, the record is also clear that Lykes had fully intended to charge and file the new rate prior to the time of shipment, i.e., that this case does not involve merely a mistake in judgment or an illicit decision to reward a shipper with a cash refund after the shipment. This element of prior intent is critical to support a finding of bona fide inadvertence remedial under P.L. 90–298. *See* Senate Report, cited above, p. 1, referring to an "intended" rate; House Report, cited above, pp. 3, 4, referring to the situation in which the carrier "intends to file a reduced rate and thereafter fails to file;" Hearings Before the Subcommittee on Merchant Marine and Fisheries, 90th Cong. 1st Sess., August 15, 16, 1967, p. 103, in which this question of intent is emphasized; *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191, 1193 (1977), emphasizing a "prior intended rate;" Special Docket No. 573, *Campbell Soup v. Pacific Westbound Conference*, Order on Review of Initial Decision, June 8, 1978, again emphasizing the need to show bona fide intent, not merely "poor judgement" on the part of the carrier filing the tariff.

Having found that there was an error due to inadvertence in failing to file a new tariff, I must now determine whether the other statutory requirements have been met, namely, that the application was filed within 180 days after date of shipment, that Lykes filed a new tariff prior to filing its application, and that discrimination among shippers will not result if the application is granted. I find that all of these requirements have been met.

The application was filed (received by the Commission's Secretary) on June 30, 1978. The shipments all moved under bills of lading dated either January 5 or 8, 1978. This time period is well within the 180-day period.

Prior to filing the application, Lykes telexed a filing of its new tariff with the Commission, effective January 12, 1978, as I have noted earlier. This was followed by a permanent tariff page, as permitted by Commission regulations.[9]

Lykes' application states that there were no shipments of the same or similar commodity which moved via respondent during approximately the same period of time as the shipments in question. This statement is corroborated by other

[9] See 46 CFR 536.10(c)(1) and 536.10(c)(5), effective January 1, 1978.

facts. Specifically, the shipments involved oil and gas well drilling equipment, supplies, and parts, which were connected with a particular project known as "Focos Project." Mr. Hazan, on behalf of "Socafex," which paid the freight, had negotiated the special rates with Lykes for this particular project. It does not seem likely that there was another "Focos Project" during this period of time. Even if so, however, the tariff notice which Lykes will cause to be published in the GEFA tariff will be applicable to any other similar shipment which might have been involved in the "Focos Project," thus assuring that discrimination among shippers will not occur.

Therefore, the application for permission to waive a portion of freight charges in the amount of $8,706.14 in connection with shipments of oil and gas well drilling equipment, supplies, parts, etc., that moved on the *TILLIE LYKES* which sailed out of Houston, Texas, on January 9, 1978, is granted. If this decision is adopted by the Commission and subject to whatever modifications the Commission may make, it is ordered that:

1. Lykes is authorized to waive collection of a portion of freight charges as described above for the benefit of "Socafex," the nominal complainant and importer who was responsible for and paid the freight, represented by its general manager, Mr. Edouard Hazan.

2. Lykes shall cause to be published the following notice in an appropriate place in the GEFA tariff:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 585, that effective January 5, 1978, and continuing through January 11, 1978, inclusive, the rate on Oilwell, Gaswell Drilling Equipment, Supplies and Parts, etc., as described in Item No. 718.4202, for Cargo designated "Focos Project" is $116.50 WM, extra lengths to be waived, heavy lift per tariff scale less 50 percent, min 250 payable tons tariff AQ rate less 20 percent (Rate includes GRI 1/1/78), subject to all applicable rules, regulations, terms and conditions in this tariff. This Notice is efffective for purposes of refund or waiver of freight charges on any shipments of the goods described which may have been shipped during this period of time.

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

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

WASHINGTON, D.C.
*July 24, 1978*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 76-41

## BERTHING OF SEATRAIN VESSELS IN SAN JUAN, PUERTO RICO

Puerto Rico Maritime Shipping Authority and Puerto Rico Ports Authority found in violation of section 16 First and section 17 of the Shipping Act, 1916 for failing to provide for secondary use of privately owned cranes situated on public property.

*Amy Loeserman Klein, William Karas, Morris R. Garfinkle,* and *Thomas A. Johnson* for Puerto Rico Ports Authority.

*Mario F. Escudero, Karol L. Newman,* and *Edward J. Sheppard* for Puerto Rico Maritime Shipping Authority.

*Neil M. Mayer, Charles L. Haslup III,* and *Paul D. Coleman,* for Seatrain Lines of Puerto Rico, Inc; and Seatrain Gitmo, Inc.

*John Robert Ewers, C. Douglass Miller, Joseph B. Slunt, Jack E. Ferrebee,* and *Alan Jacobson,* for the Bureau of Hearing Counsel.

## REPORT AND ORDER ADOPTING INITIAL DECISION

*August 18, 1978*

BY THE COMMISSION:* (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* James V. Day, *Commissioner;* Leslie L. Kanuk, *Commissioner,* dissenting)**

This investigation was instituted as a result of a Petition for Directive Order filed by Seatrain Lines of Puerto Rico[1] (Seatrain), on August 2, 1976. In its Petition, Seatrain alleged that the Puerto Rico Ports Authority (PRPA or Ports Authority) is violating sections 16 First and 17 of the Shipping Act, 1916 (the Act) by failing to provide adequate berths to Seatrain vessels and requests the Commission to immediately direct PRPA to make a berth at the Isla Grande terminal, San Juan, Puerto Rico available to Seatrain vessels. A supplemental Petition for Directive Order requesting the Commission to direct the Puerto Rico Maritime Shipping Authority (PRMSA) to make its container cranes at Isla Grande available to Seatrain on a noninterference basis was also filed by Seatrain, on August 4, 1976.

* Commissioner Karl E. Bakke not participating.

** Commissioner Kanuk will file a separate dissenting opinion.

[1] Seatrain Lines of Puerto Rico provides terminal facilities and support activities to Seatrain vessels calling in Puerto Rico. Seatrain Gitmo, Inc. and Seatrain Lines, Inc. are common carriers serving Puerto Rico in the domestic and foreign trades respectively and were granted leave to intervene in this proceeding. All of the Seatrain companies are collectively referred to herein as Seatrain.

PRMSA and PRPA filed replies to the Seatrain Petitions in which they argued, *inter alia,* that the Commission lacked the authority to grant the relief sought by Seatrain. By Order served September 7, 1976, we referred the Seatrain Petitions, together with the responses thereto, to an Administrative Law Judge for hearing and decision. On August 10, 1977, Administrative Law Judge Stanley M. Levy (Presiding Officer) served his Initial Decision in which he found PRPA and PRMSA in violation of sections 16 First and 17 of the Act (46 U.S.C. 815 and 816). PRMSA and PRPA filed exceptions to the Initial Decision to which Seatrain and the Commission's Bureau of Hearing Counsel have replied. We heard oral argument on June 27, 1978.

## DISCUSSION

In our Order initiating this proceeding, we directed the Presiding Officer to address fourteen (14) specific issues in considering Seatrain's requested relief and its allegation that PRPA and PRMSA were in violation of the Act by PRPA's refusal to assign Seatrain an adequate berth at Isla Grande and by PRMSA's refusal to grant Seatrain access to its container cranes located on Isla Grande. Also at issue in this proceeding is whether the Commission has jurisidiction over terminal operators and facilities located in Puerto Rico and the extent to which private property situated on the public terminal at Isla Grande becomes dedicated to public use.

In addressing the jurisdictional issue, the Presiding Officer concluded that terminal operators and their facilities in Puerto Rico are subject to the Commission's jurisdiction. In discussing the 14 issues raised in the Order of Investigation, the Presiding Officer found that, for the purpose of this proceeding, PRPA and PRMSA are so closely related as to be considered one person. He held the Isla Grande facility to be a public facility that is virtually inoperable without the use of shoreside gantry cranes situated thereon and that Seatrain has not been offered these facilities at Isla Grande or any other adequate facility in the Port of San Juan, Puerto Rico. He determined that while PRPA has the statutory authority to control berthing assignments in San Juan, PRPA has, through inaction, surrendered its control over the Isla Grande facility to PRMSA. He reached this determination on the basis of finding that PRPA will not assign a vessel to Isla Grande "unless such vessel may be feasibly worked at the berth." He concluded that because a vessel can *not* feasibly be worked without the use of the shoreside cranes, and because PRMSA refuses to permit secondary use of its cranes, PRMSA effectively controls berthing assignments at Isla Grande.

The Presiding Officer also found that both Seatrain and PRMSA could "practicably" utilize the Isla Grande terminal facilities providing Seatrain altered its arrival schedule to avoid PRMSA's "peak utilization" of the facilities.[2]

On the basis of his finding that Isla Grande was a public facility which may not be feasibly utilized without PRMSA's shoreside cranes, the Presiding Officer concluded that PRMSA's cranes had become vested with a public interest

[2] In support of this finding, the Presiding Officer relied principally upon Exhibit No. 96, which, as PRMSA notes in its Exceptions, *was not admitted into evidence. This error is harmless, however,* because as PRMSA also recognizes, Exhibit No. 115 was admitted into evidence, *in lieu* of Exhibit No. 96, and contains essentially the same data found in Exhibit 96

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The Presiding Officer also found that both Seatrain and PRMSA could "practicably" utilize the Isla Grande terminal facilities providing Seatrain altered its arrival schedule to avoid PRMSA's "peak utilization" of the facilities.[3]

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thereby *subjecting their use to government regulation.* For failing to establish just and reasonable regulations concerning berth assignments and the utilization of public areas, and for giving undue and unreasonable advantage to PRMSA by permitting public areas, which have private fixtures thereon to become dedicated to private and exclusive use, the Presiding Officer found PRPA to be in violation of sections 16 First and 17 of the Act. Likewise, because PRMSA failed to establish just and reasonable regulations for the use of its cranes situated on public property and because PRMSA granted unto itself an unreasonable preference by its exclusive utilization of the public areas at Isla Grande and by its exclusive use of the cranes situated on public property, the Presiding Officer found PRMSA in violation of sections 16 First and 17 of the Act.

The exceptions filed by PRPA and PRMSA to the Presiding Officer's Initial Decision constitute nothing more than a recapitulation of contentions already exhaustively argued before the Presiding Officer and properly disposed of by him. Upon consideration of the entire record in this proceeding, including the exceptions, replies and matters presented at oral argument, we are adopting the Initial Decision in this proceeding. In so doing, we deem it appropriate, however, to clarify certain matters addressed on Exceptions as they relate to the violations found.

*Section 16 First*

As found by the Presiding Officer, and admitted by PRPA, Isla Grande is a "public" marine terminal facility for which, insofar as is pertinent to this proceeding, there exists no approved section 15 agreement permitting any carrier or "other person" (as that term is used in the Act) preferential or exclusive use in whole or in *any* part.[3] The record reveals, however, and the Presiding Officer found, that notwithstanding PRPA's claim that vessels are assigned to Isla Grande on a first come, first serve basis, PRPA will not assign vessels, other than those of PRMSA, to Isla Grande unless such vessels "can feasibly work at the berth." Yet, PRPA acknowledges that a vessel berthing at Isla Grande cannot feasibly be worked without the use of shoreside cranes and that PRMSA, whose cranes are situated on Isla Grande by PRPA's sufferance, will not permit secondary use of those cranes.[4] Thus, the only carrier which may "feasibly" berth and work a vessel at Isla Grande is PRMSA. PRPA, by its acquiescence in PRMSA's refusal to allow secondary crane use by other carriers, which prevents such carriers from using Isla Grande, has thereby in effect granted unto PRMSA exclusive use and control of an otherwise public marine terminal without the benefit of an approved section 15 agreement.[5]

On exception, PRPA argues that its relationship with PRMSA should be measured by that line of cases in which we held that not all exclusive or

[3] Section 15 of the Shipping Act, 1916 (46 U.S.C. 814) makes it unlawful to implement any agreement between carriers or other persons subject to the Act prior to Commission approval.

[4] While we realize, as PRPA notes in its Exceptions, that even without the shoreside cranes, container operations are difficult because of the physical characteristics of Isla Grande, the fact is that the cranes *are* situated on Isla Grande and it is the *failure to provide* for secondary crane use of these cranes that prevents other carriers from using this public facility.

[5] See our Report in Docket No. 76-38—*Arrangements Relating to the Use of Isla Grande Marine Terminal, San Juan, Puerto Rico,* also decided this date in which we find PRPA and PRMSA in violation of section 15 of the Act for implementing an agreement relating to PRMSA's use of Isla Grande prior to Commission approval.

preferential terminal lease agreements are violative of section 16 First.[6] Although we agree with PRPA's analysis of the cases cited, those authorities do not preclude us from finding a section 16 First violation where, as here, the preference or advantage is undue or unjust.

As we have stated, Isla Grande is a public facility open to all on a first come, first served basis that may not feasibly be utilized without benefit of PRMSA's shoreside cranes. PRMSA's cranes are situated on the facility with PRPA's permission. PRPA has the authority and in the past has required owners of the cranes to provide for secondary use of the cranes situated on Isla Grande. PRPA, by failing to exercise this authority and by refusing to assign other vessels to the facility, unless such vessel makes arrangements to use PRMSA's cranes, which use PRPA knows will not be granted, has granted PRMSA an undue preference and advantage by effectively allowing PRMSA to control and use exclusively the public marine terminal facilities at Isla Grande.

PRPA's failure to ensure that the public areas at Isla Grande do not become dedicated to private and exclusive use is found to be in violation of section 16 First as is PRMSA's exclusive utilization of these public areas at Isla Grande. PRMSA's argument that a triangular relationship between the preferred, the preferring, and deferred persons is always necessary before a violation of section 16 First can be established was rejected in *Investigation of Free Time Practices —Port of San Diego,* 9 F.M.C. 525, at 547 (1966); and *Violation of Sections 14, 16 First and 17 Shipping Act, 1916,* 15 F.M.C. 92 at 98. It was determined in those cases that a competitive relationship is *not* a prerequisite to a section 16 First violation where terminal type services are involved.[7]

As we stated in *A.P. St. Philip v. Atlantic Land and Improvement Company,* 13 F.M.C. 166, at 174, with respect to section 16 and its application to terminals:

> The manifest purpose of section 16 of the Shipping Act is to impose upon persons subject to this Act the duty to serve the public impartially. In no other area is this requirement of equality of treatment between similarly situated persons more important than in the terminal industry. . . . [for] terminals are for all practical purposes public utilities.

Likewise, in *Pittston Stevedoring Corporation v. New Haven Terminal, Inc.*, 13 F.M.C. 33, at 35, we stated that the language of section 16 forbidding any undue or unreasonable prejudice or disadvantage in any respect whatsoever is specifically directed against *every* form of unjust discrimination against the shipping public irrespective of the competitive relationship.

In this proceeding, PRMSA, through its purchase of certain assets from Seatrain, has placed upon a public marine terminal shoreside gantry cranes. PRMSA has refused other carriers the use of its cranes and is thereby precluding any other carrier from being assigned the use of this public area. Because Isla Grande is a public area, the exclusive or preferential use of which is not approved pursuant to section 15, PRMSA's right to utilize Isla Grande is no greater than any other carrier wishing to use that facility. By depriving others of the use of this facility, PRMSA has granted itself in violation of section 16 First of the Act,

[6] *E.g., Agreement No. T-2598,* 17 FMC 286; *Terminal Lease Agreement at Long Beach,* 11 F.M.C. 12; *Terminal Lease Agreements Oakland,* 9 F.M.C. 202.

[7] Because we find PRMSA to be an "other person" for the purposes of this proceeding, *infra,* it is unnecessary to address PRMSA's argument that the triangular relationship cannot be satisfied by a finding of self preference.

an undue and unreasonable preference and advantage over others who are entitled to the use of this facility.

*Section 17*

On exception, PRMSA argues that the Presiding Officer erred in finding a section 17 violation because that section only applies to carriers in foreign commerce and to "other persons," as that term is defined in the Act, and that PRMSA is allegedly neither. We disagree.

PRMSA's attempted distinction completely ignores its role at Isla Grande. As previously noted, the Isla Grande facilities are virtually inoperable without the use of PRMSA's shoreside cranes. Further, PRPA will not assign another vessel a berth at Isla Grande unless such vessel may be feasibly worked at the berth, which in practical terms means making arrangements to utiilize PRMSA's cranes. Because PRMSA refuses to permit secondary use of its cranes, PRMSA in effect controls berthing assignment at the Isla Grande piers, and thus is furnishing terminal facilities at those piers. By definition, this makes PRMSA an "other person," within the meaning of sections 1 and 17 of the Act.

In *A.P. St. Philip, supra*, respondent there owned certain terminal facilities which it leased to its parent company. The lease provided the parent the sole and exclusive right and power to hold, occupy and use the facilities. By virtue of this lease, the presiding officer found that respondent had divested itself of any control of the facility and that as to the leased facilities, respondent was no longer an "other person" within the meaning of the Act. In rejecting this argument, we found that while respondent had granted its parent exclusive use and control over the facilities, a measure of control was retained because carriers using the facility were required to utilize a tugboat service employed by respondent.

The situation in *A.P. St. Philip* can be analogized to the one here for although PRMSA is not the lessor of the facilities at Isla Grande PRMSA's significant degree of control of the berthing assignments at those facilities renders it an "other person" subject to the requirements of section 17.[8]

*Adjudication v. Rulemaking*

We now turn to PRPA's contention that the findings and conclusions of the Presiding Officer, which we have adopted, are so novel and have such far-reaching and unknown consequences that a formal rulemaking proceeding is required. PRPA argues that there are a growing number of judicial expressions which favor rulemaking proceeding over adjudication in cases involving a rule or policy of general application to a given industry. *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

PRPA's reliance on these authorities is misplaced. While the Court in those decisions did express concern over the use of adjudicatory proceedings in lieu of rulemaking proceedings, the Court nevertheless specifically upheld an agency's

[8] We also find PRMSA to be an "other person" because it owns and operates the only feasible means of working a vessel at Isla Grande. As we said in *Phillipine Merchants Steamship Co., Inc. v. Cargill, Inc.*, 9 F.M.C. 155 at 163; "[o]ne who operates an important link in the chain of tranference of goods furnishes a terminal facility."

right to proceed through either forum.[9] Indeed, the Court in *Chenery, supra* at 202, 203, recognized that:

Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.

In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. . . . Or the problem may be so specialized and varying in nature, as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problem on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.

Thus, the cases relied upon by PRPA uphold an agency's right to formulate new standards and "make new law" through adjudication. In any event, we do not share PRPA's fears that our decision is so novel and will have such far reaching and unknown consequences on "property situated on docks all over the country" so as to require a rulemaking proceeding. Our decision in this proceeding is based on a particular set of facts and circumstances and is intended to right a wrong which we found to exist at Isla Grande, San Juan, Puerto Rico. It is not intended to apply indiscriminately to "docks all over the country."

Accordingly, upon careful consideration of the entire record in this proceeding, we conclude that the Presiding Officer's findings of facts and legal conclusions are supported by the record and correct. Exceptions not specifically discussed herein have nevertheless been reviewed and found either to constitute a reargument of contentions already properly disposed of by the Presiding Officer or to be otherwise without merit. We therefore adopt the Initial Decision, as clarified herein, as our own and make it a part hereof.

THEREFORE IT IS ORDERED, That the Initial Decision in this proceeding be adopted.

IT IS FURTHER ORDERED, That this proceeding be discontinued.

(S) FRANCIS C. HURNEY
*Secretary*

[9] See also 3 Mezines, Stine, Gruff, Administrative Law, Section 16.01.

# FEDERAL MARITIME COMMISSION

## No. 76–41

## BERTHING OF SEATRAIN VESSELS IN SAN JUAN, PUERTO RICO

*Adopted on August 18, 1978*

The Federal Maritime Commission, pursuant to section 1 of the Shipping Act, 1916, has jurisdiction over the Puerto Rico Ports Authority with respect to the issues set forth in its Order of Investigation.

PRMSA and the Ports Authority are so closely connected in the matters which are the subject of this proceeding as to be considered as one person.

None of the facilities offered by the Ports Authority to Seatrain can be considered as adequate for servicing full container ships.

The labor unions would serve Seatrain at Puerto Nuevo if Seatrain is otherwise in compliance with the union rules in the Port of San Juan. The Ports Authority's duty to provide adequate facilities is not involved in union rules in the Port of San Juan.

Other than a few limited calls by Seatrain, the facilities at Isla Grande have not been used by carriers other than PRMSA since PRMSA acquired Seatrain's assets at Isla Grande.

PRMSA has made an offer to carriers, other than Seatrain, to utilize PRMSA cranes at Isla Grande and to furnish terminal facilities and services to such common carriers at Isla Grande, but no action has yet occurred pursuant to such offer.

The Isla Grande facility is inadequate for Seatrain's container service without the use of PRMSA's container cranes.

Since PRMSA acquired Seatrain's assets at Isla Grande, that facility has not in fact been operated as a public terminal.

Two carriers, whose calls do not coincide, can, as a practical matter, operate at Isla Grande.

Other than leased areas, there is presently very limited and marginal space available at Puerto Nuevo for marshalling containers. The Ports Authority by a policy of inaction has passed to PRMSA effective control of terminal assignments, at least insofar as it concerns Isla Grande.

PRMSA and the Ports Authority are not jointly furnishing container crane services at Isla Grande to common carriers.

Equal access to and use of a public terminal is an essential requirement for the free flow of the maritime commerce of the United States.

The Ports Authority's failure to require secondary-use clauses in its terminal agreements results in a situation whereby public areas which have private fixtures and property thereon become effectively dedicated to private and exclusive use. Such private and exclusive use of public areas constitutes the giving of an undue and unreasonable advantage to the owner of such fixture and property as to be in violation of section 16 First of the Shipping Act, 1916.

The exclusive utilization by PRMSA of public areas by the erection thereon of container rails and cranes constitutes the giving to itself an unreasonable preference and subjects other potential users of such public areas to an unreasonable disadvantage to be in violation of section 16 First of the Shipping Act, 1916.

The Ports Authority is in violation of section 17 of the Shipping Act, 1916, by its failure to establish and enforce just and reasonable regulations concerning assignment of berths and utilization of public areas at Isla Grande in connection with the delivery, handling and storage of property.

PRMSA is in violation of section 17 of the Shipping Act, 1916, by its failure to establish just and reasonable regulations concerning secondary utilization of its container cranes and rails located in the public areas at Isla Grande.

*Amy Loeserman Klein, William Karas, Morris R. Garfinkle,* and *Thomas A. Johnson* for Puerto Rico Ports Authority.

*Mario F. Escudero, Karol L. Newman,* and *Edward J. Sheppard* for Puerto Rico Maritime Shipping Authority.

*Neal M. Mayer, Charles L. Haslup, III,* and *Paul D. Coleman* for Seatrain Lines of Puerto Rico, Inc.; Seatrain Gitmo, Inc.

*John Robert Ewers, C. Douglass Miller, Joseph B. Slunt, Jack E. Ferrebee,* and *Alan J. Jacobson,* Hearing Counsel.

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

On August 2, 1976, Seatrain Lines of Puerto Rico, Inc. (Seatrain) filed with the Federal Maritime Commission a Petition for Directive Order. The Petition requested that the Commission direct the Puerto Rico Ports Authority (PRPA or Ports Authority) to make an adequate berth available immediately to Seatrain at Isla Grande terminal, San Juan, Puerto Rico, and to make similar berths available for subsequent calls by other Seatrain vessels and barges at Isla Grande on a noninterference basis at least until its vessels may once again call at the Pan American Docks.

A Supplemental Petition for Directive Order was filed on August 4, 1976, which in addition to the relief sought against the Ports Authority, Seatrain also requested that the Puerto Rico Maritime Shipping Authority (PRMSA) be directed to make its cranes at Isla Grande available to Seatrain on a noninterference basis.

The Commission determined that it had no interlocutory or injunctive powers and while it may issue orders to cease and desist, it may do so only after a hearing and upon a finding of a violation of the Shipping Act, 1916. It declared that the relief requested in this proceeding could therefore only be granted after finding as a matter of law that a violation is occurring. The Commission stated that it could not then make such a finding inasmuch as the various pleadings before it raised a number of disputed factual issues which must be resolved before a determination on the merits of Seatrain's Petitions could be made. Accordingly, by Order served September 7, 1976, it referred the Petition and the Supplemental Petition for a Directive Order, together with the responses thereto, to an Administrative Law Judge for hearing and Initial Decision.

In its Order, the Commission directed that the parties address themselves specifically to the following enumerated issues and such additional issues as the Presiding Administrative Law Judge might find were relevant and material to the violations alleged:

1. Whether PRMSA and Ports Authority were so closely connected or related that they should be considered as one person;

2. Whether the facilities offered by Ports Authority to Seatrain are adequate for a container carrier service;

3. Whether the labor unions at Puerto Nuevo have refused to service Seatrain's vessels and what the effect of that refusal is with regard to the Ports Authority's duty to provide adequate facilities;

[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).

4. Whether the facilities at Isla Grande have been used by carriers other than PRMSA since PRMSA acquired Seatrain's assets at Isla Grande;

5. Whether PRMSA has offered its container cranes at Isla Grande to other carriers;

6. Whether carriers other than PRMSA have used the container cranes at Isla Grande since PRMSA acquired title to the container cranes;

7. Whether PRMSA has been furnishing terminal facilities at Isla Grande to common carriers by water;

8. Whether the Isla Grande facility is adequate for Seatrain's container service without the use of PRMSA's container cranes;

9. Whether Isla Grande has in fact been operated as a public terminal since PRMSA acquired Seatrain's assets at Isla Grande;

10. Whether two carriers can practically operate at Isla Grande;

11. Whether there is marshalling space available at Puerto Nuevo;

12. Whether PRMSA has any control over Ports Authority which would influence the terminal assignments;

13. Whether the Ports Authority has any control over the container cranes at Isla Grande; and

14. Whether PRMSA and Ports Authority are jointly furnishing container crane services at Isla Grande to common carriers.

Two prehearing conferences were held and, after a period of discovery, twenty-three days of hearings were held beginning in San Juan, Puerto Rico, on November 30, 1976, through December 3, 1976, and intermittently in Washington, D.C., from December 7, 1976, to February 2, 1977. In the course of the hearing, 166 exhibits were identified, of which 151 in whole or in part were admitted in evidence. Of the 151 exhibits in evidence, 21 were denominated "confidential." The transcript of the hearings totaled 3,608 pages.

Pursuant to agreement of counsel and rulings made at the conclusion of taking of testimony in this proceeding, Seatrain and Hearing Counsel served Opening Briefs, PRPA and PRMSA served Answering Briefs, and Seatrain and Hearing Counsel served Reply Briefs.

## PARTIES

The Puertó Rico Ports Authority (Ports Authority or PRPA) is a public corporation established by Act of the Puerto Rico Legislature (Law No. 125, May 7, 1942, as amended, 23 *Laws of Puerto Rico Annotated*, §1331, *et seq.*). PRPA has jurisdiction over marine terminal areas in Puerto Rico, including facilities known as Isla Grande and Puerto Nuevo.[2] The Ports Authority was vested with responsibility to, *inter alia*, "develop and improve, own, operate, and manage any and all types of transportation facilities and . . . marine services in, to, and from the Commonwealth of Puerto Rico . . ." (23 L.P.R.

[2] Ex. 28, p. 4.

§333) and charged with "making available the benefits of transportation facilities in the widest economic manner" (23 L.P.R. §336).

The Governing Board of PRPA consists of a single member, who at all times pertinent herein was Rafael L. Ignacio, the Secretary of Transportation and Public Works at the Commonwealth of Puerto Rico, who is appointed by the Governor.[3]

The Secretary appoints the Executive Director, who is responsible for carrying out the day-to-day functions of the Ports Authority. The Executive Director has total power to act on behalf of the Ports Authority.[4]

At all times pertinent to this proceeding, Julio Maymi Pagan was the Executive Director of PRPA.[5]

The Puerto Rico Maritime Shipping Authority (PRMSA) is a non-stock public corporation created on June 10, 1974, by Law No. 62 of the Legislative Assembly of the Commonwealth of Puerto Rico. PRMSA was established for the purpose of providing ocean transportation service between Puerto Rico and the exterior.[6]

PRMSA is governed by a Board of seven, one of whom is the Secretary of Transportation and Public Works, with a Chairman selected by the Governor. Policy directives of the Governing Board are delegated to the Executive Director (at all times pertinent to this proceeding, Esteban Davila Diaz).[7] The day-to-day PRMSA operations are performed under a management contract by Puerto Rico Marine Management, Inc. (PRMMI).[8]

On or about September 30, 1974, PRMSA became a common carrier by water in the U.S. Atlantic and Gulf/Puerto Rico trades utilizing the vessels and equipment formerly operated by Sea-Land Service, Inc., Seatrain Lines, Inc., and Transamerican Trailer Transport, Inc. These assets were acquired by purchase, lease or stock acquisition.[9]

In addition to the vessels and related rolling stock, PRMSA acquired certain terminal leasehold improvements from the three private carriers.[10]

Seatrain Gitmo, Inc., is a direct subsidiary of Seatrain Lines, Inc., and is a common carrier by water in the U.S. domestic containership trade. Seatrain International, S.A. is an indirect subsidiary of Seatrain Lines, Inc., and is a common carrier by water operating in the foreign containership trade. Seatrain Lines of Puerto Rico provides the terminal facilities and services operating and marketing activities to support all vessels of Seatrain Gitmo, Inc., and Seatrain International, S.A., calling at Puerto Rico.[11] (In this Initial Decision, all Seatrain companies are referred to as Seatrain.)

[3] Exs. 12, p. 1; 28, p. 5.

[4] Ex. 28, pp. 5–6; Tr. 1025–1029.

[5] Ex. 28, p. 1.

[6] Exs. 59, p. 2; 60.

[7] Exs. 59, pp. 3–4; 60.

[8] Ex. 59, p. 4.

[9] Ex. 59, pp. 5–6.

[10] Ex. 59, pp. 6–8.

[11] Ex. 1, p. 3.

## PORT OF SAN JUAN

In order that the issues hereinafter set forth may be more easily followed, a description of various facilities in the Port of San Juan, Puerto Rico, is deemed appropriate.[12]

## ISLA GRANDE

The Isla Grande Terminal Facility, roughly bounded by San Juan Bay to the West, San Antonio Channel to the North, and Isla Grande Airport Runway to the South, consists of (a) two berths, 663 feet in length each, suitable for container vessels; (b) two parallel crane rails, supported by foundations, extending 1,185 feet along the wharf; (c) two 45 ton moving rail gantry container cranes placed on the rails; (d) a ramp (32′ × 43′, 8° slope) at the Eastern end of the facility is used for small roll-on/roll-off vessels; (e) a paved area of approximately 1,800,000 square feet (approximately 35 acres); (f) an office building, a maintenance shed, a guardhouse, several trailers for employee services and employee parking; and (g) fences encircling the property with gates.[13]

Paralleling the wharf, there is an area of 15 to 22 feet in width which is some 1½ to 3 feet lower than the wharf. This area is known as the "dip." Located about every 100 feet along the center of the dip are "bitts," steel piles 2 feet in diameter and 2½ feet to 3 feet in height.[14]

The acreage of the terminal at Isla Grande is approximately 34.95 acres.[15] Of this amount, nearly 14 acres are denominated a "transit" area.[16]

The marshalling area at Isla Grande used for parking loaded containers covers approximately 21 acres.[17] This area is being used pursuant to an alleged oral lease between PRPA and PRMSA.[18]

As a general rule, each acre of marshalling area can be used to store (or park) 40 or more containers.[19] With block stowage of empties, the capacity per acre can be increased to as much as 58 containers.[20]

The number of spaces available for containers at the Isla Grande facility is 1,057.[21] The 1,057 spaces at Isla Grande work out to almost 50 containers per acre. An area designated as E-2 on Ex. 16 is also available for enlarging the marshalling area. This would permit an estimated 50 or 60 additional spaces.[22] With block stowage of empties, the marshalling area could accommodate as many as 1,217 containers, increasing utilization to 58 per acre.[23]

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[12] In the course of this hearing, a tour of these facilities was made by the presiding Judge, accompanied by representatives of all the parties.

[13] Exs. 14, pp. 5-6; 16; 95; 135; Tr. 2346; 3475-80.

[14] Exs. 5, p. 15; 14, p. 6.

[15] Ex. 135; Tr. 3475.

[16] Tr. 3479.

[17] *Id.*

[18] Ex. 135; Tr. 1782; 3475.

[19] Tr. 187; 213; 2000-2001.

[20] Ex. 93; Tr. 2700; 3481.

[21] Ex. 96; 115; 135; Tr. 3471-82.

[22] Tr. 2701.

[23] Tr. 3481. Seatrain, by stacking at Pier 16, has achieved a density of 65-70 per acre; albeit at the price of reduced efficiency and higher handling cost.

PUERTO NUEVO

The Puerto Nuevo marine terminal in San Juan Harbor consists of one 600-foot berth suitable for roll-on/roll-off vessels (Berth C); three berths for break-bulk vessels (Berths A, B and D); and eight and ½ 600-foot berths (Berths E, F, G, H, J, K, L, M, ½N).

Berths E, F, G and H are operated as fully developed container facilities (including associated back-up areas for marshalling containers.)[24]

Berths J and K have crane rails but no cranes and no improved back-up facilities.[25] These crane rails were built for Sea-Land and PRPA has agreed to reimburse Sea-Land for the cost of the crane rails if they are used by another carrier.[26]

Berth L has one crane rail; Berths M and ½N have no crane rails. Neither Berth L nor M or ½N has improved back-up facilities.[27] Berths L, M and ½N were designed mainly for roll-on/roll-off operations.[28]

Prior to PRMSA's inception in 1974, Sea-Land utilized the container terminal at Berths E–H at Puerto Nuevo by virtue of various leases and other agreements entered into between PRPA and Sea-Land at various times between 1962 and 1968.[29]

Sea-Land's current lease with PRPA relating to Berths E and F at Puerto Nuevo gives Sea-Land exclusive use of certain parcels of marshalling area at Puerto Nuevo[30] and preferential use of the berths and adjacent transit areas on the dates reflected on a monthly schedule to be furnished to PRPA.[31]

Sea-Land still utilizes Berth E under this agreement.[32] PRMSA utilizes Berth F under the terms of the Sea-Land lease by virtue of FMC Agreement DC–75.[33]

Berths G and H at Puerto Nuevo are currently under lease from PRPA to Sea-Land by virtue of a lease contract dated November 20, 1968,[34] which provides for the preferential use of the berths and adjacent transit areas on the dates reflected on a monthly schedule[35] and exclusive use of approximately 23 acres of land—to be reclaimed—immediately behind the transit areas.[36] However, as with Berth F, PRMSA currently utilizes Berths G and H under FMC Agreement No. DC–75.[37]

Under the terms of FMC Agreement No. DC–75, PRMSA currently has no

[24] Ex. 14, pp. 10–11; 17.

[25] Ex. 33.

[26] Ex. 18, p. 1; Tr. 500–134; 500–137.

[27] Tr. 735.

[28] Tr. 500–123.

[29] Ex. 104; 105; 114; 131; Tr. 3433–36.

[30] Ex. 131, pp. 2–5.

[31] Ex. 131, pp. 5–7.

[32] Tr. 500–126 to 500–128; 2141.

[33] Ex. 128.

[34] Ex. 105.

[35] Ex. 105, pp. 4–5.

[36] Ex. 105, pp. 2–3.

[37] Ex. 128.

greater rights to the berths and cranes at Berths F–H at Puerto Nuevo than the rights granted to Sea-Land by PRPA under the various existing agreements.[38]

The term of the lease for Berths E and F is for fifteen years from approximately 1963, with a right in Sea-Land to renew the lease for an additional five-year period.[39] The term of the lease for Berths G and H is for fifteen years from approximately 1968.[40]

The leases for Berths E–H at Puerto Nuevo give PRPA the right to berth other vessels at the facilities at times other than those shown on the monthly schedule.[41]

With respect to the marshalling areas adjacent to Berths F, G and H, PRMSA is currently using Lots B, C and D (among others) situated behind Berth F.[42] Sea-Land has an option to take over preferential use of Berth F and acquire the use of Lots B, C and D. Lot D[43] contains PRMSA's control building, maritime operations building, maintenance garages, container yard gate, scales and exit/entry control facilities.[44] If Sea-Land exercises its options, PRMSA would be in a difficult operational situation and would immediately have to build new facilities.[45] PRMSA has an option for a 32-acre tract behind Berths J and K.[46]

PRPA has offered to negotiate a preferential use agreement with Seatrain for Berths L and M.[47] Seatrain has refused because it contends an investment of up to $8 million would be required of it to turn Berths L and M and back-up areas into a modern container terminal.[48]

The unimproved marshalling areas adjacent to Berths L and M at Puerto Nuevo consist of Parcels X, VIII, IV and parts of VII and V.[49] The total area of Parcels X, VIII and IV is 25.7 cuerdas,[50] or 25 acres, while the combined area of those parts of Parcels VII and V are 19.3 cuerdas, or 18.7 acres.

To install crane foundations and rails and develop marshalling areas for container operations at Berths L and M would require extensive capital investment and a period of time to construct.[51]

There are five container cranes at Berths E–H at Puerto Nuevo. Four of the cranes were installed in 1965 and 1966 by Sea-Land pursuant to an agreement between Sea-Land and PRPA dated September 21, 1965. These cranes serve Berths E, F and G.[52] The fifth crane was installed at Puerto Nuevo on November

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[38] Exs. 128; 129; 130.

[39] Ex. 131, p. 3.

[40] Ex. 105.

[41] Exs. 105, pp. 4–5; 131, pp. 6–7.

[42] Ex. 17

[43] B-2 on Ex. 17.

[44] Exs. 129, pp. 4–5; 141, p. 1.

[45] Exs. 141, p. 1; 142, p. 2.

[46] Exs. 17; 41.

[47] Ex. 33.

[48] Tr. 500–124—500–125.

[49] Ex. 17.

[50] A cuerda is equal to .9712 acres. See Ex. 16.

[51] Tr. 14; 237; 500–139; 500–141; 500–159; 509–511; 1923–1936; 2125; 3042; 3485–3488.

[52] Exs. 104; 125; Tr. 3425–26.

2, 1971, and currently serves Berth H. The authority to install such crane is contained in an agreement between Sea-Land and PRPA dated November 20, 1968.[53] This crane was subsequently sold to PRMSA.

The 1965 agreement under which the first four cranes were installed at Berths E, F and G gives PRPA the right to request Sea-Land to operate those cranes for other vessels provided that such operations would not, in Sea-Land's view, interfere with Sea-Land's operations.[54] Since 1974 Sea-Land has allowed PRMSA the use of these cranes at Berths F, G and H.[55] And pending approval by the Federal Maritime Commission, Sea-Land and PRMSA Have agreed to interchange their respective cranes at Puerto Nuevo as the need arises.[56]

## PAN AMERICAN DOCK

When Seatrain reentered the U.S. East Coast Puerto Rico trade in January 1976, it was assigned berthing by PRPA at the Pan American Dock, a facility in close proximity to Isla Grande on the San Antonio Channel. This is a breakbulk terminal, ill-suited for containership operations in that it has no container cranes and insufficient marshalling area.

Seatrain employed mobile truck cranes to work the vessel and leased supplemental marshalling space several miles from the berth.[57]

Seatrain could move on the average only 6.5 containers per crane per hour at the Pan American Dock.[58] Because of lack of modern off-loading and loading facilities, Seatrain alleges that because of utilization of mobile truck cranes, it incurred $39,849 per vessel voyage in stevedore expense beyond that it would have incurred had it berthed at Isla Grande and utilized high speed container cranes.[59]

At Pan American Dock, Seatrain had access to a very congested common-user terminal of 4 acres, plus two sub-lots totaling 2 acres.[60]

## FRONTIER

Because of the collapse of the Pan Am Dock on July 27, 1976, Seatrain was assigned berthing facilities at the Frontier Pier, another PRPA breakbulk facility located across the San Antonio Channel from the Pan Am Dock.[61]

For container operations, Frontier is the least adequate of all facilities in San Juan on which there was evidence introduced in this proceeding.[62] There are no container cranes at Frontier, forcing the use of mobile cranes. The marshalling

[53] Exs. 114; 125.

[54] Ex. 104, p. 6.

[55] Exs. 128; 130; Tr. 3501-2.

[56] Ex. 79; Tr. 1661; 3519-20.

[57] Ex. 1, p. 8.

[58] Ex. 1, pp. 9-10.

[59] Ex. 1, p. 75.

[60] Tr. 142.

[61] Ex. 1, p. 9; Tr. 369.

[62] Tr. 762.

yard (about 5 acres) is unpaved and has no lighting. Further, several raised concrete slabs inhibit access to and movement of containers.[63] Seatrain made two calls at Frontier.[64] Seatrain alleges that these calls resulted in additional stevedoring expense above the costs at the Pan Am Dock.[65]

### PUERTO RICAN DRYDOCK

On August 29, 1976, Seatrain leased Pier 16, located South and East of the Isla Grande terminals, from the Puerto Rico Drydock and Terminal Company.[66] Built originally as a breakbulk facility and one time used by self-contained container ships, Pier 16 lacks container cranes. Seatrain's vessel has no self-loading or unloading equipment and Seatrain utilizes three mobile truck cranes at this facility.[67]

Seatrain rents 7 acres at Pier 16, part of which is occupied by a transit shed abutting the apron. The shed inhibits the free movement of containers from the apron to the open area.[68] With a total area of only 7 acres, Seatrain, by stacking containers, realizes a utilization of 65 to 70 containers per acre.[69] Seatrain leases additional lots for marshalling but even so, overall lack of marshalling space contributes in limiting the number of containers Seatrain presently can carry in the trade.[70]

By utilizing three truck cranes at Pier 16, the maximum number the apron can accommodate, Seatrain achieves a total of approximately 24 moves per hour.[71]

There is also a lack of sufficient water depth alongside Pier 16, causing occasional bottoming by the *Transindiana*.[72]

Pier 16 is considered only marginal as a container terminal[73] because (a) it lacks sufficient marshalling area, (b) it lacks sufficient stevedoring area on the apron, (c) it does not have shoreside cranes on rails, and (d) it has minimal length at the berth and minimal draft to accommodate container vessels.[74]

### HISTORY AND OPERATIONS

Prior to October 1974, Seatrain utilized the container terminal at Isla Grande by virtue of a lease between PRPA and Seatrain dated December 26, 1972.[75] Said lease was neither filed with nor approved by the Federal Maritime Commission and is a subject of the Order to Show Cause proceeding in FMC Docket 76–38.

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[63] Exs. 1, p. 9; 7, p. 1.

[64] Ex. 5, pp. 5–6.

[65] Tr. 617–618.

[66] Exs. 1, p. 9; 3; 94; Tr. 303.

[67] Ex. 1, pp. 9–10.

[68] Tr. 101; 143; 202. See Ex. 94.

[69] Tr. 184; 208–210. Forty to fifty containers per acre is considered the optimum operation for modern facilities.

[70] Tr. 208–10; 305; 2011; 3079.

[71] Ex. 1, pp. 9–10; Tr. 76; 227; 2543.

[72] Tr. 500–9.

[73] See Ex. 94.

[74] Ex. 1, p. 9; Tr. 9; 100–101; 202; 209–211.

[75] Ex. 8.

The lease under which Seatrain operated at Isla Grande gave Seatrain exclusive use of the marshalling yard at that terminal, subject to the right of ingress and egress of other carriers[76] and preferential use of the berths and transit area on the dates reflected on a monthly schedule to be furnished to PRPA.[77]

The lease under which Seatrain operated at Isla Grande also gave PRPA the right to berth other vessels at the facility at times other than those reflected on Seatrain's monthly schedule[78] and the right to require Seatrain to operate the container cranes at that facility for such other vessels, provided that such operation would not substantially reduce the capacity and efficiency of Seatrain's operations.[79]

Seatrain's lease for Isla Grande was for a period of fifteen years from December 26, 1972, with an option for Seatrain to renew for two additional terms of five years each.[80]

On or about September 30, 1974, PRMSA became the successor to four common carriers (including Sea-Land Service, Inc., and Seatrain Lines, Inc.) which had served Puerto Rico from the East and Gulf Coasts of the United States.[81]

Seatrain helped develop the terminal facilities at Isla Grande, installing crane rails, cranes, paving and other leasehold improvements. On October 11, 1974, Seatrain sold the cranes, the crane rails and the other leasehold improvements at Isla Grande to PRMSA and left the trade.[82] PRMSA is now the owner of the improvements located on the Isla Grande facility.[83]

However, before PRMSA purchased Seatrain's assets at Isla Grande, Seatrain requested that all Seatrain obligations with respect to its Isla Grande lease with PRPA be terminated.[84] PRPA refused to terminate the Seatrain Isla Grande lease until it received assurances from PRMSA that PRMSA would assume all obligations of Seatrain's lease.[85] By letter of September 30, 1974, Teodoro Moscoso, Chairman of the Board of PRMSA, advised PRPA that PRMSA would enter into a contract with PRPA assuming all obligations under the Seatrain lease at Isla Grande.[86] After receiving assurances from PRMSA that it would assume all of Seatrain's obligations under the Isla Grande lease, PRPA agreed to and did terminate the Seatrain lease on October 4, 1974.[87]

Although PRMSA had bought the improvements at Isla Grande, there were no negotiations at that time between PRPA and PRMSA concerning the use of Isla Grande by PRMSA vessels, even though PRMSA began calling at that facility

[76] /Ex. 8, pp. 4–5.

[77] Ex. 8, pp. 1–3.

[78] Ex. 8, p. 3.

[79] Ex. 8, pp. 10–11.

[80] Ex. 8, p. 14.

[81] Ex. 59, p. 5.

[82] Exs. 30; 59, pp. 7–8; 63; Tr. 258; 312.

[83] Tr. 259.

[84] Ex. 59, p. 7.

[85] Tr. 882.

[86] Ex. 34.

[87] Ex. 29.

on October 13, 1974,[88] and currently uses one berth on Wednesday and Sunday of each week.[89] Except for calls by certain Seatrain vessels in 1974 and 1975, no vessels other than PRMSA vessels have berthed at the Isla Grande terminal since October 1974.[90]

No lease for the use of Isla Grande was entered into between PRMSA and PRPA until May 13, 1976.[91] This lease between PRPA and PRMSA for use of Isla Grande has been submitted to the Federal Maritime Commission for approval and is still pending Commission action.[92] Pending such action, there is purported to be an oral lease agreement between PRMSA and PRPA at Isla Grande.[93]

There have not been nor are there presently any FMC-approved preferential or exclusive use agreements for PRMSA's use of the Isla Grande terminal.[94]

Seatrain reentered the U.S. East Coast–Puerto Rico trade in January of 1976, with a converted C4 U.S.-flag vessel, the *Transindiana*, with a capacity of 481 40-foot containers.[95] The *Transindiana* is the sister-ship of the three vessels currently being utilized by PRMSA which call at the Isla Grande container terminal in San Juan.[96]

Seatrain operates the *Transindiana* on a fourteen-day cycle between the ports of New York, New York; San Juan, Puerto Rico; Guantanamo Bay, Cuba; Charleston, South Carolina; and Norfolk, Virginia.[97] It also presently operates a weekly barge service between San Juan and the Dominican Republic to and from which cargo is transshipped at San Juan via the *Transindiana*.[98]

The barge currently utilized has a capacity of 72 40-foot containers. Since October 1974, Seatrain has served San Juan with various feeder vessels ranging in capacity from 58 to 88 40-foot containers.[99]

Prior to reentering the U.S. East Coast–Puerto Rico trade, Seatrain requested from PRPA the use of the Isla Grande facility,[100] the same facility Seatrain operated in its previous service at Pueto Rico.[101] Seatrain requested preferential berthing rights, coordinated with PRMSA (who is currently calling at Isla Grande), the use of both cranes at Isla Grande for loading and discharging, a marshalling area of 7 to 10 acres, and office space.[102]

Caribbean Overseas Lines (Carol), a consortium composed of French Line,

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[88] Exs. 13; 103.

[89] Ex. 89, pp. 13, 18.

[90] Ex. 89, p. 13.

[91] Exs. 48; 59, p. 12; Tr. 891; 899.

[92] Originally Agreement T-3308. Subsequently withdrawn and replaced by Agreements AP-76-77-(4)100 and AP-76-77-(4)101. Exs. 28; 143; 144.

[93] Tr. 500–62; 822; 1843; 1871–72.

[94] Tr. 687–89.

[95] Ex. 1, p. 4.

[96] Ex. 1, pp. 4, 13; Tr. 2064; 2337.

[97] Ex. 1, pp. 4–5; Tr. 3036.

[98] Ex. 1, p. 3.

[99] Exs. 1, p. 5; 5, pp. 10–11; Tr. 317–318.

[100] Ex. 35.

[101] Tr. 257–8.

[102] Ex. 35.

Hapag-Lloyd Line, Harrison Line and K.N.S.M. Line, has been planning to and has introduced a fully containerized service between Europe and Puerto Rico.[103]

On August 23, 1976, PRMSA submitted a proposal to Carol for use of PRMSA facilities at Isla Grande.[104] PRMSA would rent its cranes for Carol's use and "is prepared to consider the return of . . . property [at Isla Grande] for release [by PRPA] to Carol Lines."[105]

The commitment by PRMSA to Carol was considered as a possible "checkmate Seatrain's request to use Isla Grande?"[106]

The offer to permit Carol to utilize Isla Grande establishes that utilization there by another carrier is feasible. The objection to Seatrain is based on competition with Seatrain, not unfeasibility.[107]

## EMERGENCY: JULY 29–AUGUST 22, 1976

On July 29, 1976, PRPA instructed Seatrain not to use the Pan American dock facility because of damage that had occurred to the berth and apron.

On July 30, 1976, Seatrain believed it impossible to work at Frontier Pier because 840 cars were parked on it.[108]

Seatrain requested PRPA to make the berth and cranes at Isla Grande available to Seatrain for the *Transindiana* call scheduled for August 3, 1976.[109]

The berths at Isla Grande were not occupied from 0200 August 2, 1976, to 2000 August 5, 1976.[110]

The berths at Isla Grande were not occupied from 0800 August 6, 1976, to 1100 August 8, 1976.[111]

PRPA refused to make Isla Grande available and suggested La Botella. Seatrain berthed the *Transindiana* at La Botella on August 3, 1976, without working the vessel. Seatrain then sailed the *Transindiana* to Guantanamo Bay to discharge military cargo and returned to San Juan on August 7, 1976, at which time it berthed at the Frontier Pier and worked the vessel using mobile truck cranes.[112]

Seatrain was able to use Frontier Pier only because it worked the vessel during weekend hours, prestaged containers from the Pan Am Dock and returned them to the Pan Am Dock. Despite all its efforts, Seatrain had one container turn over and was forced to sail without containers which had been scheduled for loading.[113]

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[103] Conf. Ex. 9; Tr. 1856.

[104] Conf. Exs. 4; 7; 14. As of the close of the record herein, this proposal had not been acted upon. See discussion of Questions IV, V, VI, VII.

[105] Conf. Ex. 7.

[106] Conf. Ex. 17.

[107] Ex. 88, p. 2.

[108] Ex. 6, p. 4; Tr. 399.

[109] Ex. 5, p. 3.

[110] Exs. 5, p. 4; 12; 13.

[111] Exs. 12; 13.

[112] Ex. 5, pp. 3–5; Tr. 395.

[113] Ex. 7.

After the experience at Frontier Pier on August 7-9, Seatrain continued its requests for use of Isla Grande based on its hope that access to Isla Grande would be obtained.[114]

On August 8, 1976, Seatrain requested use of Berths J, K, L, M and N at Puerto Nuevo for a vessel arriving August 17, 1976. This request was for "interim use" and Seatrain advised PRPA on August 10, 1976, that Seatrain understood it might have to use mobile truck cranes at these berths.[115]

On August 13, 1976, PRPA advised Seatrain that only Frontier Pier was available to Seatrain.[116] Pursuant to schedules of PRMSA and known to PRPA, the berths at Isla Grande were not to be and in fact were not occupied from 0130 on August 16, 1976, to 0600 on August 18, 1976, covering the period when the *Transindiana* was originally scheduled to call in San Juan.[117]

On August 13, 1976, Seatrain advised PRPA it was altering the *Transindiana* schedule so that the vessel would arrive in San Juan on August 20, 1976, at 0900 instead of August 17, 1976.[118]

On August 16, 1976, the Ports Authority answered Seatrain's request by offering Seatrain Berths L and M, or both, but no back-up area for the August 20 call.[119]

On August 16 the area in back of Berths L and M (as well as the areas in back of J, K and ½N) were under a month-to-month lease to PRMSA. PRMSA was using the area for container storage while it was installing equipment on and paving marshalling areas behind Berths F through H. The Ports Authority stated that upon concluding arrangements with Seatrain, it would give PRMSA 30-days notice to remove all vehicles from the back-up areas to Berths L and M.[120] The Ports Authority subsequently offered Seatrain the preferential use of Berths J or K (or both) on an interim basis provided Seatrain would enter into a long-term lease and develop the back-up areas to Berths L and M and install a crane.[121]

On August 21, 1976, the *Transindiana*—originally scheduled to call August 17, 1976, but based on Seatrain's hope of obtaining access to Isla Grande, rotated to Guantanamo first—called and was worked again at Frontier Pier.[122]

The berths at Isla Grande were not occupied from 1900 on August 18 through 1430 on August 22, 1976.[123]

## JURISDICTION

Although the Commission has directed that evidence shall be taken with respect to at least fourteen matters deemed necessary of resolution in this proceeding, PRPA has raised a threshold issue which, by its nature, might

[114] Ex. 5, p. 6.

[115] Exs. 9; 10; Tr. 415.

[116] Ex. 32.

[117] Exs. 12; 13.

[118] Ex. 32.

[119] Ex. 33, p. 1.

[120] Ex. 33, p. 2.

[121] Ex. 37.

[122] Exs. 1, p. 4; 5, p. 6; Tr. 415.

[123] Ex. 2, p. 5.

preclude resolution of any of the matters the Commission specified. PRPA asserts that the Commission lacks jurisdiction under section 1 of the Shipping Act of the subject matter of this proceeding.

This case involves alleged violations of sections 16 and 17 of the Shipping Act which, insofar as they are applicable to PRPA, are applicable only because these sections speak to "other person[s] subject to this Act." The Shipping Act defines these other persons to include:

> . . . any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

It is undisputed that PRPA supplies wharfage and dock facilities to common carriers by water.

PRPA argues that Congress has placed Puerto Rico harbor facilities under the control of the government of Puerto Rico and that sections 16 and 17 are no more applicable to persons furnishing dock and wharfage facilities in Puerto Rico than they are applicable to such persons operating in Rotterdam, Tokyo, or any other port not under U.S. sovereignty. PRPA, in essence, argues that Puerto Rico is not under U.S. sovereignty.

In support of its contention, PRPA relies upon sections 7 and 8 of the Jones Act, 48 U.S.C. §§747 and 749,[124] incorporated as part of the Puerto Rican Federal Relations Act, 48 U.S.C. §731.

In 1950 Congress passed Public Law 600, Act of July 13, 1950, Ch. 446, 64 Stat. 319, providing for Puerto Ricans to draft a constitution. In Public Law 447, Act of July 3, 1952, Ch. 567, 66 Stat. 319, Congress approved the Puerto Rican Constitution.

Relying on *Alcoa Steamship Co. v. Perez,* 295 F. Supp. 187, 197 (D.P.R. 1968), *vacated on other grounds* 424 F.2d 433 (1st Cir. 1970), wherein the Federal District Court for the District of Puerto Rico declared:

> The Commonwealth of Puerto Rico is a body politic which has received, through a compact with the Congress of the United States, full sovereignty over its internal affairs in such a manner as to preclude a unilateral revocation, on the part of Congress, of that recognition of power.

PRPA concludes that sovereignty over internal affairs is equivalent to sovereignty from the United States in matters which are the subject matters of the Shipping Act, 1916. Certain aspects of the Shipping Act involve a territory physically within the geographic limits of a State or a Commonwealth, such as ports and terminals. Yet, jurisdiction with respect to ports and terminals in such

[124] Section 7 of the Jones Act, 48 U.S.C. §747, provides: . . . all the harbor shores, docks, slips, reclaimed lands, and all public lands and buildings not reserved by the United States for public purposes prior to March 2, 1917, is placed under the control of the government of Puerto Rico, to be administered for the benefit of the people of Puerto Rico; and the Legislature of Puerto Rico shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable. Section 8 of the Jones Act, 48 U.S.C. §749, provides: The harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters, owned by the United States on March 2, 1917, and not reserved by the United States for public purposes, are placed under the control of the government of Puerto Rico, to be administered in the same manner and subject to the same limitations as the property enumerated in sections 747 and 748 of this title. All laws of the United States for the protection and improvement of the navigable waters of the United States and the preservation of the interests of navigation and commerce, except so far as the same may be locally inapplicable, shall apply to said island and waters and to its adjacent islands and waters. Nothing in this chapter contained shall be construed so as to affect or impair in any manner the terms or conditions of any authorizations, permits, or other powers lawfully granted or exercised in or in respect of said waters and submerged lands in and surrounding said island and its adjacent islands by the Secretary of the Army or other authorized officer or agent of the United States prior to March 2, 1917.

States or Commonwealths involved in the maritime commerce of the United States cannot be deemed interference in the internal affairs of such entities.

In *Caribtow Corporation v. Occupational Safety and Health Review Commission*, 493 F.2d 1064 (CA–1, March 18, 1974), *cert. denied* 419 U.S. 480 (1974) the Court held that the fact that the Commonwealth now possesses its own Constitution, and is governed with the consent of its inhabitants, does not establish that it is now so independent of the federal government that it may ignore or nullify national legislation and exert powers in this regard that are denied to the states, each of which also possesses a Constitution and a republican form of government (p. 1066).

Federal statutes otherwise applicable to Puerto Rico may not be nullified by any unilateral action of the Puerto Rican legislature. *Guerrido v. Alcoa Steamship Company*, 234 F.2d 349 (CA–1 1956); *Feliciano v. United States*, 297 F. Supp. 1356 (D.P.R. 1969).

Since the passage of the Shipping Act, 1916, the Commission and its predecessor agencies have consistently exercised their authority in Puerto Rico, often in proceedings in which Puerto Rico itself was a litigant.[125] Other persons subject to the Shipping Act, as defined by its first section, have often been the subject of the Commission proceedings which focuses on the Puerto Rican trade.[126] The jurisdiction of the Commission over transportation activities in the Puerto Rico trade has frequently been acknowledged by the federal courts, both in the mainland United States and in Puerto Rico.[127]

Whether PRPA in its terminal operation is subject to Commission jurisdiction was presumably answered in the affirmative by the Commission in *J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416, 418 (1962).

PRPA had argued in *Altieri* that section 17, Shipping Act, 1916, was not applicable to it because it was not a "common carrier by water in foreign commerce." Even so, the Commission, in distinguishing the first and second paragraphs of section 17 stated:

By its terms, the second paragraph of section 17 applies to "other persons subject to this act." This includes persons providing terminal facilities, according to the definition of the phrase "other

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[125] See *e.g.*, *Fares and Charges for Transportation by Water of Passengers and Baggage Between the United States and Puerto Rico*, 1 U.S.M.C. 739 (1938); *Puerto Rican Rates*, 2 U.S.M.C. 117 (1939); *The People of Puerto Rico v. Waterman S.S. Corp.*, 2 U.S.M.C. 407 (1940); *U.S. Atlantic and Gulf/Puerto Rico Rate Increase*, 5 F.M.C. 426 (1958); *Pacific Coast/Puerto Rico Rates*, 7 F.M.C. 525 (1963); and *Reduced Rates on Autos-North Atlantic Coast to Puerto Rico*, 8 F.M.C. 404 (1965).

[126] See *e.g.*, In *Re Rubin, Rubin & Rubin Corp.*, 6 F.M.C. 235 (1961) violation of section 16 of the Shipping Act, 1916, by a freight forwarder in Puerto Rican Trade; *Freight Forwarder Investigation*, 6 F.M.C. 327 (1961) freight forwarder rules replaced by P.L. 87–254; *Misclassification of Goods–Containerized Vans*, 8 F.M.C. 453 (1965) violation of section 16 by forwarder in Puerto Rico Trade.

[127] In *Federal Insurance Company and Robert A. Clair Co., Inc. v. Transconex, Inc.*, Civil No. 74–1379, July 12, 1976, D.C. D.P.R., the Court categorically stated "Neither the statute or any case we know indicates that the Shipping Statutes (Shipping Act of 1916, *supra*, and the Intercoastal Shipping Act of 1933, *supra*) or the Rules and Regulations of the Federal Maritime Commission are inapplicable to Puerto Rico. . . ." In *Air-Mar Shipping, Inc., v. F.M.C.*, D.C. D.P.R., August 11, 1972, 8 SRR 20,847, the plaintiff contended that section 44 of the Shipping Act, 1916, relating to freight forwarders did not apply to Puerto Rico because it was enacted after Puerto Rico became a Commonwealth and did not make specific reference to Commonwealth. The plaintiff argued that Puerto Rican legislation on the matter would exclude federal legislation, citing *Fonseca v. Prann*, 282 F.2d 153. The Court held that jurisdiction of the Federal Maritime Commission was not so nebulous as to warrant enjoining the Commission from enforcing the statute with respect to freight forwarders located in Puerto Rico. The Court said that while the issue was debatable, the Court was persuaded to find a congressional intent of including Puerto Rico in the statute. See *e.g.*, *South Atlantic & Caribbeon Line, Inc., v. F.M.C.*, 424 F.2d 941 (D.C. Cir. 1970), affirming order of FMC requiring carrier to cease and desist from enforcing embargo in Miami-Puerto Rico trade, see *South Atlantic and Caribbean Line, Inc.*, 12 F.M.C. 237 (1969); *Commonwealth of Puerto Rico v. F.M.B.*, 288 F.2d 419 (D.C. Cir. 1961), authority over rates of carriers in Puerto Rican trade recognized, case remanded for further Commission action; *Maldonado v. Sea-Land Service, Inc.*, 240 F. Supp. 581 (D.P.R. 1965) and *Carlos Crespo Trucking Service, Inc., v. Sea-Land Service, Inc.*, 260 F. Supp. 858 (D.P.R. 1966) where the Court acted to allow the FMC to assert its primary jurisdiction under the Shipping Act.

persons subject to this act" in section 1. See *California v. United States*, 320 U.S. 577 (1944). This paragraph does apply to domestic commerce insofar as *Charges and Practices, etc.*, 2 U.S.M.C. 143 (1939).

It is concluded that pursuant to section 1 of the Shipping Act, 1916, the Commission does have jurisdiction over PRPA to determine the issues set forth in its Order of Investigation.

Having concluded that the Commission had jurisdiction over the parties and of the subject matter of this proceeding, it now becomes necessary to resolve the question which the Commission set forth in its order of September 7, 1976:

I.

*Whether PRMSA and Ports Authority are so closely connected or related that they should be considered as one person?*

The evidence in this proceeding establishes that PRMSA is directed by a seven-member Governing Board whose Chairman was Teodoro Moscoso from shortly after PRMSA's inception on June 10, 1974, until at least November 19, 1976.[128]

Teodoro Moscoso was also a member of the *ad hoc* committee appointed by the Governor of Puerto Rico to negotiate the acquisition of shipping assets for PRMSA.[129]

In addition to his membership on the Board of PRMSA, Teodoro Moscoso, from at least June 10, 1974, and possibly before that date, until June 22, 1975, was a member of the Board of Directors of PRPA.[130]

In August 1976, when the Pan Am Dock had collapsed and Seatrain was seeking berthing at Isla Grande, PRPA's only director, Rafael Ignacio, was also a PRMSA director.[131]

Rafael Ignacio either as Chairman of the Board or as sole director of PRPA during the period from at least September 1974 through December 7, 1976, and Teodoro Moscoso as Chairman of PRMSA during the period from at least June 10, 1974, through November 19, 1976, were each members of the Board of Directors of both PRMSA and PRPA during such periods as are critical to the relations of PRMSA, PRPA and Seatrain to each of the other insofar as they relate to the issue in this proceeding.[132]

In 1974 Mr. Moscoso, a representative of the Commonwealth of Puerto Rico, and at that time on the Board of PRPA, entered into a nonbinding memorandum of understanding with Sea-Land, looking to the leasing to Sea-Land of facilities at Isla Grande previously owned by Seatrain and to be acquired by the Commonwealth or PRMSA, if and when a PRMSA enabling statute was enacted. The terms of Sea-Land's lease were to be the same as Seatrain's lease at Isla Grande, except the term should be twenty-five years and wharfage charges as set forth in the memorandum of undertaking.[133]

[128] Exs. 13, pp. 1, 2; 59, p. 3.

[129] Tr. 1849.

[130] Ex. 12, p. 2.

[131] Exs. 12, pp. 1, 2; 13, p. 1; 28, p. 5.

[132] Exs. 12, pp. 1, 2; 13, p. 1; 28, p. 5.

[133] Ex. 46.

*On May 8, 1975, PRMSA's general counsel requested* Mr. Moscoso, Chairman of PRMSA, that since Mr. Moscoso was also a member of PRPA's Board of Directors he expedite for consideration by PRPA a matter involving leasing by PRMSA of port facilities.[134]

The original concept that Sea-Land would transfer its operations to Isla Grande[135] could not be carried out due to labor difficulties. Accordingly, another tentative arrangement between PRMSA and Sea-Land was worked out. Mr. Ignacio, a director of both PRPA and PRMSA, at a meeting of the PRMSA Board on November 10, 1975, approved the tentative agreement. The key to approval required the PRMSA Board to make certain improvements at Puerto Nuevo for PRMSA needs in the event Sea-Land exercised certain options in the tentative agreement. PRMSA Board approved the expenditure of funds for such improvement on the representation of Mr. Ignacio that PRPA did not then have the resources to do so. The resolution for PRMSA expenditure, moved by a Mr. Hernandez and seconded by Mr. Ignacio, was then unanimously approved.[136]

The nature of the connection between PRMSA and PRPA is in part revealed by the circumstances surrounding an application by PRMSA for federal assistance under the Public Works Employment Act of 1976. In order for PRMSA to meet the requirements of the Act, it requested PRPA to grant it three options to renew upon their expiration lease contracts for certain parcels of land at Puerto Nuevo. Three options without any charge therefore, were thereupon granted by PRPA to PRMSA.[137]

Of all the dealings which bear on the issue whether PRMSA and PRPA are so closely connected or related that they should be considered as one person are the circumstances relating to the use of the container cranes at the Isla Grande.

Prior to October 1974, Seatrain utilized the container terminal at Isla Grande by virtue of a lease between PRPA and Seatrain dated December 26, 1972.[138]

The lease under which Seatrain operated at Isla Grande also gave PRPA the right to berth other vessels at the facility at times other than those reflected on Seatrain's monthly schedule[139] and the right to require Seatrain to operate the container cranes at that facility for such other vessels, provided that such operation would not substantially reduce the capacity and efficiency of Seatrain's operations.[140]

Seatrain sold all of the Isla Grande terminal assets to PRMSA when PRMSA acquired Seatrain's vessels, equipment and facilities on October 11, 1974.[141]

PRPA refused to terminate the Seatrain Isla Grande lease until it received assurances from PRMSA that PRMSA would assume all obligations of Seatrain's lease.[142]

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[134] Ex. 54.

[135] See Memorandum of Understanding, Ex. 46.

[136] Ex. 142.

[137] Exs. 39; 40; 41.

[138] Ex. 8.

[139] Ex. 8, p. 3.

[140] Ex. 8, pp. 10–11. Often referred to as the "secondary-user" clause.

[141] Exs. 30; 59, p. 7–8; 63; Tr. 259.

[142] Tr. 882.

By letter of September 30, 1974, Mr. Moscoso, the Chairman of the Board of PRMSA, advised PRPA that PRMSA would assume all obligations under the Seatrain lease at Isla Grande.[143]

After receiving assurances from PRMSA that it would assume all of Seatrain's obligations under the Isla Grande lease, PRPA agreed to and did terminate the Seatrain lease on October 4, 1974.[144]

PRMSA began calling at Isla Grande on October 13, 1974, although no lease for its use thereof was entered into between PRMSA and PRPA until May 13, 1976.[145]

Pursuant to PRMSA's agreeing "to enter into contracts with the P.R. Ports Authority assuming all obligations under Lease AP 72–73–111 dated December 26, 1972, by and between Seatrain Lines of Puerto Rico and the P.R. Ports Authority"[146] negotiations for execution of a lease between PRMSA and PRPA were begun. Despite Mr. Moscoso's assurances on behalf of PRMSA that "we will be happy to execute at your earliest convenience any and all instruments that you deem necessary to effectuate this agreement,"[147] the negotiations were not concluded until May 13, 1976.

PRPA originally took the position that the new lease be identical in all respects to the former Seatrain lease. However, despite the prior assurances of Mr. Moscoso, PRMSA was unwilling to assume the obligation regarding "secondary use" of the container cranes. Thereupon, whereas previously it had been the policy of PRPA to insist upon crane-sharing provisions as being in the best interest of the Port of San Juan,[148] it did not so insist insofar as its lease with PRMSA was concerned. By way of rationalization, PRPA now contends that the inclusion of such crane-sharing provisions served an important purpose when the Seatrain terminal lease was executed because the Puerto Nuevo containership berths were not then fully developed; other than the facilities used by Sea-Land and Seatrain, there were no berths, wharves or land suitable for containership operations. Hence, the Ports Authority found it in the best interest of the Port of San Juan to negotiate for crane-sharing provisions with its container-carrier lessees to assure that no containership operator need be turned away. With the proper development of Puerto Nuevo, however, crane-sharing provisions not only became unnecessary, it contends they became unwise as well. Now, the Ports Authority envisions Puerto Nuevo, not Isla Grande, as the major container terminal in San Juan. Inasmuch as the use of Puerto Nuevo as a container terminal clearly must be encouraged by the Ports Authority if its overall plan of port development is to succeed, it claims that the inclusion of a crane-sharing provision in the Isla Grande lease would substantially undermine that policy by giving containership carriers the opportunity to berth at Isla Grande rather than Puerto Nuevo.

[143] Ex. 34.

[144]. Ex. 29.

[145] Exs. 13; 48; 59, p. 12; 103.

[146] Ex. 34.

[147] Ex. 34.

[148] Ex. 28, pp. 15–16; Tr. 891–92.

Although Mr. Maymi, the Executive Director of PRPA, testified that an economic analysis of the situation revealed that a crane-sharing provision at Isla Grande would run counter to the Ports Authority's master plan for development of the Port of San Juan, no such analysis was ever documented and submitted as an exhibit in this proceeding in support thereof. Further, the documentation of the negotiations between the parties fails to evidence any reason for deleting the crane-sharing provision except PRMSA intransigence.

The drafts of the lease show PRPA's inclusion of such provision, PRMSA's refusal and the final deletion.[149] At no time did PRPA preclude PRMSA from using the facility nor did PRPA ever suggest that it had recourse against PRMSA for having released Seatrain in reliance on the written assurance that PRMSA would assume "all obligations of Seatrain" including obligations relating to crane-sharing and not limited to PRMSA assuming only "financial" obligations.

What the record does support is a conclusion that the community of interest of both Mr. Moscoso and Mr. Ignacio, at all times material to negotiations for the obtaining of and the use thereof of the facilities at Isla Grande, supports the conclusion that insofar as Isla Grande terminal and its facilities are concerned, PRMSA and PRPA are so closely connected or related that they should be considered one person.

## II.

*Whether the facilities offered by Ports Authority to Seatrain are adequate for a container carrier service?*

The answer to this question lies primarily in a definition of "adequate."

Containers can be loaded or off-loaded in a variety of ways by a variety of equipment. Yet the means and equipment available can spell the difference between an efficient, effective and economically viable service and one that is slow, susceptible to damage and economically unsound.

Under any reasonable definition of adequate for container carrier service, the facility must be capable of permitting an efficient and economically viable operation. The container age has seen a shift from a labor intensive to a capital intensive maritime industry. It has been said in many contexts, but in none is it more apt that "time is money" when it is applied to the operation of full container ships. As will be set forth elsewhere in this Initial Decision, one of PRMSA's principal objections to sharing the facilities at Isla Grande is that tight scheduling and fast turn arounds are so essential to its operation that any possible impediment by way of others using the facility would have grave economic consequences for PRMSA.

The evidence in this proceeding[150] establishes that an adequate container facility requires:

(a) A berth with sufficient draft of water and length to accommodate a container vessel of the type and size generally utilized in the trade.

(b) Shore-side container cranes of sufficient capacity and capability to handle containers of a size and type generally utilized in the trade; less desirable but marginally adequate in specific situations

[149] Exs. 81; 82.

[150] Exs. 1, p. 7; 28, p. 10; 89, pp. 3-5; Tr. 213; 2104.

are berths without permanent cranes but with aprons of sufficient strength and width to accommodate mobile cranes or to permit utilization of ship's cranes.

(c) Adequate clear stevedoring area alongside the vessel to allow efficient traffic patterns by vehicles used to transport containers between shipside and marshalling area.

(d) A marshalling area of adequate size relative to the operation involved and reasonably close to the berth. The marshalling area, in turn, should be reasonably accessible to public roads and highways.

Marshalling areas should permit all weather and round-the-clock operation which normally requires secured paved areas and utilities.

The co-efficient between utilization of container cranes and mobile truck cranes is 2.6 or 2.7 to 1.[151]

By the foregoing standards, only the Isla Grande terminal and Berths E, F, G, and H at Puerto Nuevo can be considered adequate for container service in the Port of San Juan. None of these facilities were offered by PRPA to Seatrain.

A marginally adequate container facility in the Port of San Juan is Puerto Rican Drydock Pier 16.[152] Seatrain now operates at that facility by utilization of mobile cranes. The apron and marshalling area at Pier 16 cannot be deemed adequate for an efficient container service operation.

The Pan American Dock, before collapse of a portion of the apron, was a marginally adequate facility. Seatrain operated there with mobile cranes prior to collapse of the apron.

By no stretch of the imagination can the Frontier Dock be deemed an even marginally adequate facility for container service. The two calls made available by PRPA to Seatrain at this facility can only be characterized as an emergency situation analagous to "any port in a storm." Such calls cannot be deemed support for a contention that such facility is adequate.

PRPA has offered Seatrain use of Berths L and M at Puerto Nuevo. Whatever the potential of L and M as an adequate facility for container service, it now lacks cranes, crane rails, and paved marshalling areas. These berths have an apron susceptible of permitting the use of mobile cranes and they are sufficient in length and have depth of water to permit berthing of Seatrain container vessels.

## III.

*Whether the labor unions at Puerto Nuevo have refused to receive Seatrain's vessels and what the effect of that refusal is with regard to the Ports Authority's duty to provide adequate facility?*

Labor for loading and unloading container vessels in the Port of San Juan falls under the jurisdiction of the International Longshoremen's Association (ILA). ILA Local 1740 has exclusive jurisdiction over the Isla Grande area, and ILA Local 1575 has exclusive jurisdiction over the Puerto Nuevo area.[153]

In the Port of San Juan, a stevedore can contract with only one local at a time. That is, Local 1575 will not sign a contract with Stevedore X if Stevedore X is already in contract with Local 1740 and *mutatis mutandis*. Thus, a stevedore conducting operations at the Pan Am or Isla Grande docks, which are under the

[151] Tr. 3524.

[152] Isla Grande compared to Pier 16 in terms of marine operation is probably "2 to 1." Tr. 3527.

[153] Ex. 5, pp. 11-12; Tr. 461-62; 464; 484.

*jurisdiction of Local 1740, cannot simultaneously stevedore at Puerto Nuevo,* because the latter is under Local 1575's jurisdiction.[154]

Although a stevedore cannot sign concurrent contracts with Locals 1575 and 1740, there is no impediment against a carrier signing separate contracts with two stevedores, one of whom has a contract with Local 1740 and the other a contract with Local 1575.[155] In such event, a carrier could make calls at Isla Grande and be stevedored by a firm that has a contract with Local 1740 and also make calls at Puerto Nuevo and be stevedored by a firm that has a contract with Local 1575.[156]

The prototype of the union contract is identical for both local unions (the present union contract runs for three years and expires on September 30, 1977) and is available to any interested person at the local union hall.[157]

A carrier desiring to start a service to Puerto Rico can either negotiate with the relevant ILA local directly or it can engage the services of a stevedore to negotiate with the appropriate ILA local.[158]

In either event, neither Local 1575 nor 1740 will work a vessel without a contract, even if the vessel call involves only a single berthing.[159]

Seatrain does not have a contract with either ILA local in San Juan. Rather, its vessels are worked by an independent stevedoring company, Maritima Del Caribe, which has a contract with ILA local 1740 to work the *Transindiana*.[160]

Because Maritima Del Caribe had a stevedore contract for Seatrain's *Transindiana* with Local 1740, it could not contract with Local 1575 to engage in stevedoring activities at Puerto Nuevo.

Seatrain would prefer to continue its stevedoring relationship with Maritima Del Caribe because its experience with this contractor has been very satisfactory and it, therefore, prefers to make calls at terminals which would permit it to continue to utilize Maritime Del Caribe and its stevedore.

There would be no impediment to working the *Transindiana* at Puerto Nuevo if (a) Seatrain were to employ a stevedore who had a contract with Local 1575 or (b) Seatrain itself were to enter into a contract with Local 1575 and perform its own stevedoring.[161]

Although it now appears that under the circumstances as given above it would be possible for Seatrain to be served at Puerto Nuevo, the labor problem is even now after extensive testimony not entirely free from doubt. Mr. Ortiz, president of Local 1575, testified regarding whether his union would service Seatrain vessels at Puerto Nuevo. He testified in Spanish and although an official translator was present, it was, nevertheless, difficult to comprehend his position. Nor did questions put to him for clarification by the Presiding Judge seem to

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[154]. Tr. 2783; 2805.

[155] Tr. 2781–82.

[156] Tr. 492.

[157] Tr. 2766–67; 2770–71.

[158] Tr. 2565; 2772.

[159] Tr. 486; 490; 495; 498; 500; 2769.

[160] Ex. 5, p. 12; Tr. 479–81; 500–23; 500–24.

[161] Conf. Tr. 592.

assist in any way. Mr. Ortiz's answer to the bottom-line question whether Local 1575 would serve Seatrain at Puerto Nuevo at times seemed to be yes, at other times seemed to be no;[162] who knows; it depends, possibly.

Thus, although the conclusions set forth above are believed to be accurate as to the labor situation in the Port of San Juan, they were determined only after a careful consideration and analysis of a complex and often confusing record. It is not surprising, therefore, that Seatrain may have had concerns whether their vessels would be faced with a labor "problem" at Puerto Nuevo.

Seatrain never having called or attempted to call at Puerto Nuevo, the labor unions have never in fact refused to service its vessels. Under appropriate conditions, they apparently would service Seatrain vessels. They would not service Seatrain vessels at Puerto Nuevo if Seatrain retained its current stevedore.

For reasons elsewhere set forth in this Initial Decision, the Ports Authority's duty to provide adequate facilities is, in any event, not dependent on labor factors.

IV, V, VI, VII

*Whether the facilities at Isla Grande have been used by carriers other than PRMSA since PRMSA acquired Seatrain's assets at Isla Grande; whether PRMSA has offered its container cranes at Isla Grande to other carriers; whether carriers other than PRMSA have used the container cranes at Isla Grande since PRMSA acquired title to the container cranes; and whether PRMSA has been furnishing terminal facilities at Isla Grande to common carriers by water?*

Prior to October 1974, Seatrain utilized the container terminal at Isla Grande by virtue of a lease between PRPA and Seatrain dated December 26, 1972.[163]

In 1974 Seatrain sold the cranes, the crane rails and other leasehold improvements at Isla Grande to PRMSA and left the trade.[164]

PRMSA has been berthing its vessels at the Isla Grande terminal since October 1974 and currently uses one berth on Wednesday and Sunday of each week.[165]

Between December 1974 and September 1975, while Isla Grande was operated by PRMSA, Seatrain vessels called at the Isla Grande facility and utilized the container cranes for loading and discharging on twenty different occasions. Included in these calls was one call by the *Transindiana* shortly after Seatrain sold its assets to PRMSA, on which the vessel discharged some 180 revenue loads, picked up six revenue loads and discharged and picked up certain empty equipment. The purpose of the call was to pick up loose-end cargo and retrieve some containers tendered to but not accepted by PRMSA.[166]

The remaining nineteen calls were pursuant to a transshipment agreement then in effect between Seatrain and PRMSA and involved vessels, principally barges,

[162] See for example Confidential Tr p. 485, line 5; p 486, lines 14 and 20, p 487, line 17, p. 488, line 3, p 489, line 19; p 492, line 17; p 496, lines 2–9, Tr. 499–50-1.

[163] Ex. 8.

[164] Exs 30, 59, pp. 7–8, 63, Tr. 258; 312.

[165] Exs. 13; 89, pp. 13, 18; 103.

[166] Exs. 5, pp 10–11, 89, p. 13; Tr. 122; 315–16; 2214

*having one-sixth of the capacity of the Transindiana*. No more than forty to fifty containers were loaded or unloaded on any of these calls.[167]

PRMSA cranes were used for all of the above vessel and barge calls.[168]

Other than the foregoing calls by Seatrain vessels, no carrier has used either the facilities at Isla Grande or the cranes at Isla Grande since October 1974.[169]

However, between May or June 1975 and August 1976, PRMSA negotiated with Carol Line for the use of the facilities at Isla Grande, including the container cranes.[170]

PRMSA made an offer to Carol on August 23, 1976, which would permit Carol, *inter alia*, to use the Isla Grande cranes at a fixed rental per hour.[171]

Also, PRMSA "is prepared to consider the return of . . . property [at Isla Grande] for re-lease [by PRPA] to Carol Lines."[172]

At the close of this record, PRMSA and Carol had not entered into any final agreement regarding Carol berthing at Isla Grande, and at the close of the record Carol had not berthed at Isla Grande.

## VIII

*Whether the Isla Grande facility is adequate for Seatrain's container service without the use of PRMSA's container cranes?*

The container cranes at Isla Grande rest on and move along two parallel crane rails, supported by foundations, extending 1,185 feet along the wharf. Extending alongside the wharf, there is an area of 15 to 22 feet in width which is some 1½ to 3 feet lower than the wharf. This area, known as the "dip," is bounded on one side by the first of the two parallel crane rail foundations and on the other side by water. Located about every 100 feet along the center of the dip are "bitts," steel piles 2 feet in diameter and 2½ feet to 3 feet in height.[173]

Other than using the container cranes on rails, there are possibly two other methods of discharging container vessels at Isla Grande—(1) by mobile truck cranes; and (2) by vessel self-loading and unloading equipment.

Mobile crane operations, however, cannot feasibly or practicably be operated at the Isla Grande facility.[174] In order to feasibly load or discharge a vessel by use of mobile truck cranes, several problems would have to be resolved. First, the "dip" area would need reinforcement by means of platforms alongside the "dip." Second, a ramp would have to be constructed between the area adjacent to the "dip" and the "dip" to allow the mobile truck cranes to move into and out of the "dip," because the cranes would not reach the vessel from any area beyond the "dip." Third, the mobile cranes would have to work around the "bitts," an extremely cumbersome and time-consuming process. Fourth, the

[167] Ex. 89, p. 13; Tr. 1477; 1489.

[168] Ex. 5, p. 11.

[169] Ex. 89, p. 13; Tr. 1422.

[170] Ex. 89, p. 14; Conf. Tr. 1434–35; 1460; 1535; 2218–19; Tr. 1427.

[171] Conf. Exs. 4; 7, p. 2; 14; Ex. 88; Tr. 1462; 1476; 1483; 1509; 1516–17; 2240–41.

[172] Conf. Ex. 7.

[173] Exs. 5, p. 15; 14, p. 6.

[174] PRPA Brief, p. 94.

containers could not be placed on the crane rails immediately beyond the "dip" without rendering the container crane system unusable.[175]

Similarly, vessel self-loading and unloading equipment cannot feasibly or practicably be operated at the Isla Grande facility for much the same reasons as preclude use of mobile truck cranes.[176]

The dip area is 22 feet wide. Vessel self-loading and unloading equipment would either have to unload the cranes onto the "dip" or reach from the vessel across the width of the dip to the crane rail area to deposit the container. To unload the container onto the "dip" would then present the difficult problem of removing the container from the "dip" for transit to consignee. To straddle the "dip" and deposit the container on the crane rails not only may be beyond the reach of the equipment,[177] but depositing the containers on the crane rails would render the container crane system unusable.

In any event, the Seatrain vessel has no self-container loading and unloading equipment.

For all of the foregoing reasons, it is concluded that the Isla Grande facility without the use of PRMSA's container cranes would not be adequate for Seatrain's container service.

## IX.

*Whether Isla Grande has in fact been operated as a public terminal since PRMSA acquired Seatrain's assets at Isla Grande?*

Prior to October 1974, Seatrain utilized the container terminal at Isla Grande by virtue of a lease between PRPA and Seatrain dated December 26, 1972.[178]

The lease under which Seatrain operated at Isla Grande gave Seatrain exclusive use of the marshalling yard at that terminal, subject to the right of ingress and egress of other carriers[179] and preferential use of the berths and transit area on the dates reflected on a monthly schedule to be furnished to PRPA.[180]

The lease under which Seatrain operated at Isla Grande also gave PRPA the right to berth other vessels at the facility at times other than those reflected on Seatrain's monthly schedule[181] and the right to require Seatrain to operate the container cranes at that facility for such other vessels, provided that such operation would not substantially reduce the capacity and efficiency of Seatrain's operations.[182]

On September 30, 1974, PRMSA, through Teodoro Moscoso, advised PRPA that PRMSA would enter into contracts with PRPA assuming all obligations under the former Seatrain lease for Isla Grande.[183] In fact, PRMSA subsequently

[175] Exs. 14, p. 7; 28, p. 28

[176] PRMSA, through PRMMI, considers that container vessels "cannot be served at this berth with shipboard gantrys " Conf Ex 7.

[177] Tr. 1085

[178] Ex. 8.

[179] Ex 8, pp. 4–5

[180] Ex. 8, pp. 1–3.

[181] Ex. 8, p. 3.

[182] Ex. 8, pp. 10–11.

[183] Ex. 34.

refused to accept a lease containing an obligation to permit secondary use of the cranes and resists efforts of Seatrain to obtain nonconflicting preferential berthing at Isla Grande. Technically, PRMSA says it does not oppose nonconflicting berthing of other lines but that berthing of other lines always presents a conflict with PRMSA schedules. PRMSA says in any event preferential berthing is within the province and control of PRPA. PRPA says it cannot grant such preferential berthing to Seatrain since Seatrain would only block the berth and be unable to unload and that it would have no objection otherwise to permitting Seatrain to berth at Isla Grande. Thus, we see the game of Alphonse and Gaston. PRMSA says it is up to PRPA; PRPA says that as a practical matter it is up to PRMSA. Each says they don't control or have common cause with the other.

After PRMSA had bought the improvements from Seatrain at Isla Grande, it began calling at that facility on October 13, 1974.[184]

PRMSA witnesses contend that it entered into an oral lease for PRMSA's use of Isla Grande pending execution of a written lease. Assuming the possibility that pursuant to Puerto Rican law there could be an oral lease regarding real property, there is no evidence that such was ever entered into between PRMSA and PRPA for the use of Isla Grande.

Mr. Ysern, Executive Assistant, Puerto Rico Ports Authority, on cross-examination, testified as follows:[185]

Q. Is it the policy of the Ports Authority to have all of their agreements for land in writing?
A. Yes, sir.
Q. Do you have any oral agreements at the present time for marshalling space?
A. Not that I recollect.

Mr. Maymi, Executive Director of PRPA, testified on direct examination with regard to the marshalling area at Isla Grande as follows:[186]

Q . . . is it the Ports Authority's position that the marshalling area at Isla Grande is part of a public terminal?
A. In a sense, yes. As you know, we have negotiated an agreement at Isla Grande, submitted for approval . . .
Q. Is it the Ports Authority's position that pending such approval the marshalling area is a public terminal, part of a public terminal?
A. I would say yes.[187]

Mr. Maymi, on cross-examination, testified with regard to the transit area at Isla Grande as follows:[188]

Q. Do you have an agreement with PRMSA concerning whether or not they may use the transit area at Isla Grande for the marshalling area?
A. I don't remember that we have that type of agreement with PRMSA.

Mr. Davila, Executive Director of PRMSA, testified on cross-examination as follows:

Q. When you refer to an oral lease at Isla Grande, Mr. Davila, were you referring to the marshalling area at Isla Grande?

[184] Exs. 13; 103.

[185] Tr. 500–62.

[186] Tr. 687.

[187] See also Ex. 28, p. 12. "At the present then, we have a container facility at Isla Grande which is a public container terminal."

[188] Tr. 822.

A. I am referring to the marshalling area at Isla Grande. (Tr. 1835.)

Q. Now you were asked whether or not you used the marshalling area under an oral lease, and your position was yes. Can you explain . . . whether it is your position that Mr. Mayami is wrong, that it is not a public terminal?

A. My position is it is not.

Q. When was it [the oral lease] entered into, Mr. Davila, when?

A. At the time that we closed the transaction with Seatrain.

Q. Who negotiated the oral lease?

A. My staff basically.

Q. With whom?

A. With the Ports Authority.

Q. Who on the Ports Authority made the agreement for the oral lease?

A. That was part and parcel of the closing. That was with the request of Seatrain obligations. (Tr. 1836.)

Q. Who on behalf of PRMSA negotiated the lease?

A. Our lawyer did.

Q. With whom did they negotiate a lease?

A. With Ports Authority lawyers.

Q. Did they give you a memorandum of the terms of that oral lease?

A. No. (Tr. 1837.)

Judge Levy: Who on behalf of PRMSA executed the oral lease?

A. There was no execution of an oral lease. (Tr. 1838.)

Judge Levy: Who authorized and bound PRMSA on the oral lease?

A. [unresponsive.]

Judge Levy: Who said that PRMSA will be responsible?

A. Our lawyers did.

Q. Who authorized the lawyers?

A. I did.

Judge Levy: You did, and what did you authorize them to be responsible for? What terms and conditions?

A. Basically the terms and conditions that the Port Authority had established. In general, they had established that they wanted a lease which would be similar to what Seatrain had.

Judge Levy: Did the oral lease include the crane sharing agreement which was in the Seatrain?

A. No.

Judge Levy: How do you know that?

A. Because it was not bargained for. (Tr. 1838–9.)

Q. Is the understanding basically that PRMSA will use the marshalling area at Isla Grande and pay for that use under the rates in effect under the old Seatrain rates?

A. That is pretty much the case.

Q. And there is nothing in the oral lease, as you understand it, that gives you an absolute exclusive use of that area, is there?

A. . . . we basically have the right to use it exclusively until such a point as the former lease is approved. (Tr. 1841.)

Q. Who told you that you had exclusive use lease of the marshalling area at Isla Grande? Who told you that?

A. It was understood that way all the time.

Q. Understood. How did you understand that, from whom?

A. We pay for all of the improvements in that area, and I guess it goes without saying it, that you pay for the improvements that are contained within the leased area. It is not for you to share it with whomever the Ports Authority wants.

Q. What day was the lease negotiated?

A. At the time that the release of Seatrain from its obligations.

Q. Is it your testimony that you authorized your lawyers to negotiate and enter into a binding agreement, binding PRMSA to spend substantial sums of money for a lease of marshalling area, is that your testimony?

A. Yes.

Q. Did they give you a memorandum that said, yes, we entered into an oral lease?

A. No.
Q. This is all done orally?
A. Yes. (Tr. 1842.)
Q. Did you report to your governing board that you had exclusive oral lease there?
A. Yes.
Q. When did you do that?
A. At various points.
Q. Is there minutes to support that?
A. There is a lot of things that are not reflected in the minutes, Mr. Mayer. I don't think we keep a stenographic record of what goes on in the Board meetings. (Tr. 1843.)
Q. Are you telling me that there is no place anywhere in PRMSA files or in your lawyers' files or anywhere else that contains the written oral memorandum of the terms of this oral agreement, that it was entered into orally, that it was executed on oral authority, the terms were reported to you orally, is that your testimony?
A. Yes. (Tr. 1844.)

From the foregoing, it is concluded that PRMSA in fact occupied exclusively the marshalling area at Isla Grande from October 1974 until the close of the record herein. It is concluded that PRPA considers the entire terminal at Isla Grande to be a public terminal until such time as an agreement permitting exclusive use is approved by the FMC pursuant to section 15 of the Shipping Act, 1916. It is concluded that the PRPA does not, as a matter of policy, enter into oral leases for use of PRPA properties. It is concluded that no documentation exists which establishes that there is an oral lease for the use of Isla Grande terminal.

It is concluded that the ownership of improvements in or on public terminal areas convey no exclusive right to use or preempt those areas absent an express agreement approved by the FMC which would permit the exclusive use of such areas and the exclusive use of the improvements and properties thereon which by their nature inhibit the use of the public areas by any other party.

On the basis of the record in this proceeding, it is concluded that PRPA has officially always considered Isla Grande to be a public terminal. Thus, when leased to Seatrain, pursuant to PRPA policy, it required that although Seatrain was granted exclusive use of the marshalling yard at that terminal, it was subject to the right of ingress and egress of other carriers[190] and granted preferential use of the berths and transit areas only on the dates reflected on a monthly schedule to be furnished to PRPA.[191]

Further, the lease under which Seatrain operated at Isla Grande also gave PRPA the right to berth other vessels at the facility at times other than those reflected on Seatrain's monthly schedule[192] and the right to require Seatrain to operate the container cranes at that facility for such other vessels, provided that

[189] Tr. 1835–1844.

[190] The Seatrain lease, Article II, EXCLUSIVE RIGHTS, contained the following provision:

> When and if a water carrier or vessel operator is granted the right of use by the Authority provided hereinabove, then in that event, the water carrier, vessel operator or the applicable trucker shall have the right to traverse and cross the involved portions of the exclusive use area designated by Seatrain and Seatrain may, during the term of this Agreement, amend, revise, change or alter said designated portions of the exclusive use area. Seatrain, however, expressly agrees that it will make available such right of ingress and egress at all required time. By the terms of this Article the parties hereto expressly agree that this right being granted by Seatrain is limited to the right of ingress or egress and that all parking, storing, staging or other use of the involved use area is prohibited.

[191] Ex. 8, pp. 1–3.

[192] Ex. 8, p. 3.

such operation would not substantially reduce the capacity and efficiency of Seatrain's operations.[193]

Nevertheless, despite its claimed policy that Isla Grande was a public terminal, PRPA did not when PRMSA began to use the facility and does not now—require in its lease arrangements that PRMSA's rights to the marshalling is subject to the right of ingress and egress by other carriers.[194]

Most importantly, despite PRPA considering that Isla Grande is a public terminal, it had entered into an agreement with PRMSA with respect to the use of the container cranes which negates such policy and which it did not negate when Seatrain was the lessee.

Seatrain's lease, Article IV—CONSTRUCTION AND USE OF CONTAINER CRANES, also contained the following provision:[195]

B. 4) Seatrain shall operate the shoreside cranes for vessels belonging to or Operated by another company if so requested, but the use by others in no way would substantially reduce the capacity and efficiency of Seatrain's own operations at the berthing area. If the Authority determines that shipping containers destined to move across the berthing area, carried or to be carried by vessels belonging to or operated by another company, can be loaded or unloaded with the crane without substantially reducing the capacity and efficiency of Seatrain's operations. Seatrain shall, if requested by the Authority, furnish to such other company crane service under the following conditions.

a) Submission of a hold harmless and indemnity receipt in favor of the Authority and Seatrain by such other company.

b) Evidence of insurance by such other company satisfactory to the Authority and Seatrain.

c) The operation of the cranes for loading or unloading of vessels belonging to or operated by shipping companies other than Seatrain does not release Seatrain of any responsibilities assigned by this Agreement, or of any liability to the Authority due to the operation of the cranes.

However, Seatrain shall have the right to request such other shipping companies to take over the responsibilities and liabilities due to the operation of the cranes as a condition precedent to said loading or unloading.

d) Charges for use of the crane by others may be made by Seatrain and all such charges shall accrue to the account of Seatrain. Seatrain shall charge no more for the use of the crane than is allowed by the Public Service Commission or any other (Gobernmental) [*sic*] body having jurisdiction.

No such comparable provision is contained in PRMSA's proposed lease.[196]

Whatever PRMSA's rights to the use of its own cranes are, they are no more than Seatrain's rights were when Seatrain owned the cranes. Then PRPA required Seatrain to make them available to other users under the conditions set forth in the lease. PRPA has not required this of PRMSA. By not so requiring, Isla Grande in fact has not been operated by PRPA as a public terminal as required by its enabling statute since PRMSA began operations there.

Oral lease or not, PRMSA has in fact occupied Isla Grande since October 1974 until the present. And whatever its status as a tenant may be, the record discloses that it has asserted exclusive domain over the premises. Except for the Seatrain calls by permission of PRMSA and for the mutual benefit of Seatrain and PRMSA, no other carrier has been given berthing rights at Isla Grande by PRPA since October 1974. Further, PRMSA has undertaken to negotiate with Carol

[193] Ex. 8, pp. 10–11.

[194] Exs. 143; 144.

[195] Ex. 8, pp. 10–11.

[196] Exs. 143; 144.

shared use of Isla Grande without making PRPA a party to the negotiations despite the fact that PRPA is the owner/lessor of the terminal and PRMSA does not occupy the premises pursuant to any lease which has been approved by the FMC nor by any other lease which this record can ascertain. The arrogation of proprietorship of Isla Grande terminal by PRMSA since October 1974 is inconsistent with any concept that Isla Grande or any part thereof is being operated as a public terminal.

## X.

*Whether two carriers can practically operate at Isla Grande?*

The Isla Grande Terminal Facility, roughly bounded by San Juan Bay to the West, San Antonio Channel to the North, and Isla Grande Airport Runway to the South, consists of (a) two berths, 663 feet in length each, suitable for container vessels; (b) two parallel crane rails, supported by foundations, extending 1,185 feet along the wharf; (c) two 45-ton moving rail gantry container cranes placed on the rails; (d) a ramp (34′ × 43′, 8° slope) at the Eastern end of the facility is used for small roll-on/roll-off vessels; (3) a paved area of approximately 1,800,000 square feet (approximately 35 acres) utilizable for transit or container marshalling space.[197]

Seatrain is presently calling at San Juan with the *Transindiana,* a converted C-4 U.S.-flag container vessel having a maximum capacity of 481 40-foot containers. This vessel is the sister-ship of the three vessels currently being utilized by PRMSA which call at the Isla Grande container terminal in San Juan.[198]

Considering the requirements for a container terminal[199] and the facilities available at Isla Grande, it is concluded that Isla Grande is a terminal adequately equipped to service full container ships of the class presently employed by PRMSA and Seatrain in their calls at San Juan.

Of the 35 acres of space at Isla Grande, 21 acres are now being used by PRMSA for marshalling containers.[200]

The marshalling area has a capacity of 1,057 container spaces—non-block stow.[201] This works out to almost fifty containers per acre. With block stowage of empties, the marshalling area has a potential capacity of 1,217 spaces, a utilization factor of fifty-eight containers per acre.[202] Approximately fifteen or twenty additional spaces might be utilized at the extreme western end of the terminal.[203]

It is possible for two vessels the size of the *Transindiana*[204] to berth at Isla Grande at the same time.[205] It is also quite feasible to berth and work the

[197] Exs. 14, p. 5; 16; 48, p. 2; 95; 135; Tr. 3475–80.

[198] Ex. 1, pp. 4, 13; Tr. 2064; 2337.

[199] Exs. 1, p. 7; 28, p. 10; 89, pp. 3–5; Tr. 213; 2104. *See also* discussion of question II *elsewhere.*

[200] Tr. 2015; 3466; 3479.

[201] Ex. 96.

[202] Tr. 3481.

[203] Ex. 195; Tr. 3509.

[204] The vessel is 633 feet in length. Tr. 2348.

[205] Ex. 5, p 9; Tr. 2564; 2570.

*Transindiana* and the Caribbean feedership at the same time.[206] However, two vessels the size of the *Transindiana* cannot be worked by the PRMSA container cranes at Isla Grande at the same time.[207] This is because although the wharf is over 1,300 feet, permitting berthing of two ships, the crane rails extend only 1,185 feet along the wharf. This 1,185 feet is further diminished in terms of crane lift mobility. The cranes are constructed somewhat on an outrigger basis so that the actual lift may be 50 feet or more from the bumper at the end of the rails.[208] Thus, taking into consideration the minimum distance necessary between ships on the berth,[209] the lesser length of the crane rails, the still shorter length for actual crane lift capability, the net result is that with two ships on berth, several rows of containers on each ship furthest from the center line of the rails could not be serviced by the cranes.

However, consideration must now be given to whether Isla Grande is capable of handling the operation of both PRMSA and Seatrain calling at different times.

PRMSA has been berthing its vessels at the Isla Grande terminal since October 1974 and currently uses one berth on Wednesday and Sunday of each week.[210] In 1976 its average time on berth was between thirteen and fourteen hours.[211] Thus, the Isla Grande berths are currently unoccupied approximately ten out of every fourteen days.[212].

The *Transindiana* currently makes a fortnightly call at San Juan every other Tuesday, operating between San Juan, Charleston, Norfolk, New York, and Guantanamo Bay. [213].

Ex. 115, Isla Grande Yard Utilization, indicates that at peak times[214] during the period October 4-November 26, 1976, an average 978 containers or chassis occupied the marshalling area. Of these 978 spaces, an average of 374 were empties, chassis, or "deadlined" containers. These 374 spaces constitute 38 percent of yard utilization.[215]

PRMSA has a very fast delivery of cargo to its customers. "For example, 90 percent of our cargo moved from the docks in San Juan to Mayaguez and Ponce on the first day, 9 percent on the second day, and only one percent on the third day."[216] Therefore, the peak number of containers in the marshalling area "would normally either be the ship day or the day immediately after or preceding."[217] During this peak period, as many as 1,514 containers, including empties and chassis, may be in or pass through the terminal in a twenty-four hour

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[206] Ex. 5, p. 9; Tr. 2345.

[207] Tr. 2345–49.

[208] Tr. 2348.

[209] *Id.*

[210] Ex. 89, pp. 13, 18; Tr. 2061; 2609.

[211] Ex. 2; Tr. 2328.

[212] Ex. 5, p. 9.

[213] Ex. 1, pp. 4–5.

[214] Sailing days.

[215] Ex. 115; Tr. 2978. Based on a yard capacity of 1,057 spaces. Ex. 96.

[216] Ex. 76; Tr. 2066.

[217] Tr. 2039.

period, though with containers entering or departing, being loaded or unloaded, the number in the terminal at any given moment is constantly changing.[218]

PRMSA's witness, Mr. Katim, testifying on terminal operation, stated that the efficiency of a terminal operation is "probably about the same" whether the boxes which move through the terminal in two weeks are handled by reason of a biweekly service or when an equal amount is handled by reason of two calls on a weekly service.[219] In other words the capability of the terminal to handle the flow is determined by the amount of boxes at any given moment rather than the total during any time period. The evidence in this proceeding is that 21 acres of marshalling area have a capability to handle more containers than are actually moving through the terminal at any given moment. In PRMSA's operation the marshalling area is often by-passed; the evidence being that many containers depart the terminal on the ship arrival day, moving out directly from the transit area.[220]

The average number of container movements by PRMSA per berthing at Isla Grande during the period October-November 1976 was 600; 503 southbound loads and 97 northbound loads.[221] On that basis the movement of 600 containers through the marshalling area by reason of a given sailing should not unduly congest the terminal or the marshalling area. Put another way, the movement of 1,200 containers per week through the terminal by reason of two sailings per week does not strain the capacity or capability of the terminal particularly when most of the containers do not remain in the terminal more than a day. Outbound containers arrive at the terminal either on ship day or the day before. Inbound containers depart the terminal either on ship day or the day after.

Inasmuch as PRMSA has a throughput of 600 containers per sailing,[222] the terminal a capacity of at least 1,057 on a non-block stow basis,[223] and during sailing days an average of 374 empties or chassis are parked in the marshalling area—38 percent of the total units there during peak days,[224] it is apparent that the Isla Grande marshalling area has a capability of accomodating a second user even if an overlap should occur on occasion. The problems of overlap would be diminished to the degree that the number of empty or deadlined units were stacked or stored in less critical areas, for example Puerto Nuevo.

The marshalling area, in any event, is ample for the handling of three vessel calls a week when the carriers utilize vessels no larger than the vessels currently in the service and utilize a chassis system[225] which permits fast throughput.

There is little doubt that the marshalling area would be strained if peak utilization by both carriers was simultaneous. PRMSA has two peak periods during the week coincident with ship berthings. It has valleys at the time interval furthest from such berthings. Seatrain arrivals, if scheduled for a Friday, for

[218] Ex. 96.

[219] Tr. 2180.

[220] Ex. 76; Tr. 2039.

[221] Ex. 96.

[222] *Id.*

[223] *Id.*

[224] Ex. 115; Tr. 2978.

[225] Both PRMSA and Seatrain utilize such a system.

example, would be most distant in time from Wednesday or Sunday, scheduled arrivals of PRMSA's vessels. Even allowing for the vagaries on occasion of ship arrivals, there would appear to be sufficient latitude in such a schedule as to permit use by both carriers without unreasonable interference by either of the other's activity.

If we assume that no excess marshalling space is available at Isla Grande, to prevent congestion Seatrain would need to move a maximum of 960 containers through the gate in a twenty-four hour period—480 outbound and 480 inbound. The capability of the cranes to discharge and load this number is indicated by the fact that PRMSA can discharge, load and turn a full shipload in far less than twenty-four hours.[226] *Transindiana* calls, working with mobile truck cranes, required an average of 30.5 hours at the Pan Am dock, 25.6 hours at Frontier and 27 hours at Pier 16.[227] Seatrain estimates that if permitted to call and use the highspeed container cranes at Isla Grande, its time on berth would average 14.45 hours per call.[228] This compares with PRMSA average time on berth at Isla Grande of between thirteen and fourteen hours.[229]

PRMSA disputes this, alleging that Seatrain's stevedore could not be expected to utilize the cranes as efficiently and effectively as PRMSA's stevedoring operation.[230] Therefore, PRMSA asserts that Seatrain's estimate of time on berth, which compares favorably with PRMSA's experience, cannot be deemed reliable.[231] And if Seatrain is on berth for a longer period, it could disrupt PRMSA's tight schedule at Isla Grande. Further, PRMSA contends that necessary downtime for crane maintenance takes up substantial periods of time between PRMSA calls, thus making them unavailable even if Seatrain's vessel could be shoehorned in between PRMSA calls.[232]

PRMSA realizes a productivity of thirty-eight boxes per hour.[233] Under stevedoring conditions which had previously prevailed at Isla Grande, Seatrain productivity was less.[234] But given the changed stevedoring conditions under which PRMSA now operates, it is reasonable to conclude that Seatrain's producitivity under the same conditions with the same cranes should be reasonably comparable to PRMSA productivity.

As to berthing conflicts, if Seatrain were scheduled to arrive on a day of the week—Tuesday—Ex. 91 establishes that such a hypothetical arrival by Seatrain at Isla Grande in the period 6 January-20 July 1976, would have presented a conflict with PRMSA actual berthings during that period on only one occasion—the 13th of April. While ships do not always arrive and depart on schedule, the nature of liner service requires a carrier to constantly strive to that end. During the last five months of 1976, PRMSA's "schedule was very well

[226] Thirteen to fourteen hours. Ex. 2; Tr. 2328.

[227] Ex. 1, p. 40. Less containers were handled at Frontier.

[228] Ex. 1, p. 15; Tr. 58.

[229]. Ex. 2; Tr. 2328; 2558.

[230] Tr. 2612.

[231] Ex. 89, p. 27; Tr. 2608; 2610.

[232] Ex. 89, pp. 21-22; Tr. 2583-97.

[233] Tr. 2339; 2543; 2567; 2583.

[234] Tr. 2340.

kept."[235] Potential berthing conflicts with a four-day interval between PRMSA calls—Wednesday to Sunday—would be less than conflicts which might result during the three-day interval—Sunday to Wednesday.

Thus, in order to ameliorate potential berthing conflicts as well as minimizing terminal congestion at Isla Grande, Seatrain should schedule San Juan arrivals for Friday rather than Tuesday as now.

PRMSA's witness, Mr. Katim, contended that Pier 16 was a suitable facility to handle Seatrain's container service.[236] This despite the fact that Pier 16 has no high-speed container cranes and a marshalling area of only 7 acres, including a shed.[237] Inasmuch as Isla Grande has two high-speed container cranes and a total area of approximately 35 acres, of which at least 21 acres are open, paved and otherwise unimpeded for utilization in the handling, storing or through movements of containers, it is reasonable to conclude that Isla Grande could handle an operation of at least three times the capacity of the *Transindiana*. That is to say, Isla Grande could reasonably handle and move through the terminal approximately 2,880 40-foot containers a week. This is the optimum capacity of three vessels, each capable of carrying 480 40-foot containers. Thus, if PRMSA makes two calls a week, it could carry as many as 960 containers inbound and 960 outbound; Seatrain could carry 480 inbound and 480 outbound.[238] For no voyage would more than 960 boxes impact the terminal. The terminal is more than capable of handling this amount in any twenty-four hour period. Even with three voyages, in the week that Seatrain would be scheduled to call at San Juan, the average of terminal time allowable for each voyage's cargo would be fifty-six hours. Fifty-six hours is more than sufficient time to receive, handle and move 960 40-foot containers through Isla Grande. Even allowing for outbound containers which arrive as early as a day and half before departure and inbound containers which are not dispatched to consignees until a day and a half after arrival, the capability of the 21 acres of usable marshalling space at Isla Grande to handle the containers for three equally spaced voyages a week is a reasonable conclusion.

There would be an overlap of marshalling area utilization by a Seatrain arrival in the interval between PRMSA's Wednesday and Sunday arrivals. But such overlaps would occur during the valley operation of both PRMSA and Seatrain.

This is demonstrated as follows:

PRMSA's vessels averaged thirteen to fourteen hours on berth during 1976.[239] Most outbound containers are received the day of ship arrival or the day before; most inbound containers are dispatched to consignees the day of ship arrival or the next day.[240] Thus, a period of thirty-six hours plus or minus ship arrival is the period for greatest terminal utilization by PRMSA. Assuming a noon Wednesday arrival, peak periods are the twenty-four hours from 00:01 Wednesday until

[235] Ex. 134; Tr. 3452. Earlier, in May 1976, Mr. Diaz, Executive Director of PRMSA, was proclaiming in the *Journal of Commerce* "Navieras' [PRMSA] sailing schedules are being maintained faithfully." Ex. 76.

[236] Ex. 89, p. 11; Tr. 2159.

[237] See photo, Ex. 94.

[238] These optimum capacities are not now being utilized.

[239] Ex. 2; Tr. 2328; 2558.

[240] Tr. 2039.

23:59 Wednesday, with outbound loads arriving as early as thirty-six hours before ship arrival (00:01 Tuesday) and the bulk of inbound loads dispatched by thirty-six hours after ship arrival (23:59 Thursday). Assuming a Seatrain vessel at noon Friday, and an operation similar to PRMSA, the peak terminal utilization by Seatrain would be the twenty-four hours 00:01 Friday to 23:59 Friday. Outbound loads arriving thirty-six hours previously (00:01 Thursday) would overlap with PRMSA inbound cargo not yet dispatched to consignees; and Seatrain's inbound loads not dispatched to consignees until Saturday would overlap with PRMSA outbound loads beginning to arrive for shipment on Sunday's vessel.

Isla Grande's marshalling areas could probably handle overlapping peak periods of PRMSA and Seatrain. It is more than adequate to handle overlapping valley periods.

It is recognized that business conditions can fluctuate between the carriers. It is also recognized that on some voyages a carrier will carry more or less than on others and also that there are seasonal fluctuations. Nevertheless, it is reasonable to assume that two carriers in the same trade operating the same type of vessels will have approximately the same volume per voyage and occupy a berth for approximately the same time and have similar operating and stevedoring problems. Accordingly, it is concluded that the physical aspects of the Isla Grande terminal do not preclude or prevent an operation by both PRMSA and Seatrain in the magnitude of that susceptible with two vessel calls a week by PRMSA and a biweekly call by Seatrain each using vessels of the *Transindiana* class.

Caribbean Overseas Lines (Carol), a consortium composed of French Line, Hapag-Lloyd Line, Harrison Line and K.N.S.M. Line, has been planning to and has introduced a fully containerized service between Europe and Puerto Rico.[241]

PRMSA has extended two offers to Carol to make its container cranes at Isla Grande available to Carol.[242] In addition, PRMSA would consider returning to PRPA a portion of the land it now occupies at Isla Grande for Carol's use.[243]

No studies have been made by PRMSA regarding berthing and terminal operations at Isla Grande either with regard to use thereof by Seatrain or by Carol.[244] In Seatrain's case, PRMSA was, and continues to be, opposed to sharing use of that facility.[245] In Carol's case, however, PRMSA has striven to negotiate an accommodation for shared use.

To the extent that PRMSA has considered accomodating Carol at Isla Grande,[246] to that same extent it weakens whatever validity PRMSA argument may have that no excess capability exists at Isla Grande to accommodate any more than PRMSA carryings.

[241] Conf. Ex 9; Tr. 1856.

[242] Conf. Exs 4, 7

[243] Conf. Ex 7

[244] Tr 2647–2648.

[245] Ex. 136—PRMSA staff negative position

[246] Tr. 2569–2573.

XI.

*Whether there is marshalling space available at Puerto Nuevo?*

There are eight and ½ 600-feet berths at Puerto Nuevo which are suitable or potentially suitable for container ships; Berths E, F, G, H, J, K, L, M, ½N.[247]

Of these, Berths E, F, G, and H are fully developed container facilities, with high-speed shore-side container cranes and large adjacent paved and fully equipped marshalling areas.

The marshalling areas at E, F, G, and H are under lease by PRPA to either Sea-Land or PRMSA and are not otherwise available.

Berths J, K, L, M and ½N are not fully developed in that Berths J and K have crane-rails but no cranes; Berth L has only one crane rail; Berths M and ½N have no crane rails; the areas adjacent to Berths J, K, L, M and ½N are large enough for use as a marshalling area for container ship service but none of the areas are paved or otherwise developed. PRMSA has an option for a 32-acre tract adjacent to Berths J and K.[248]

To pave and otherwise fully develop the marshalling areas adjacent to Berths L and M would cost between $1,000,000 to $1,400,000.[249]

To pave and otherwise fully develop the marshalling areas adjacent to Berths L and M would take four or five months time.[250]

The marshalling areas adjacent to Berths L and M consist of Parcel X, VIII, IV and parts of VII and V.[251] The total area of Parcels X, VIII, and IV is 25.7 cuerdas, or 25 acres.[252] The area of Parcels VII and V totals 19.3 cuerdas, or 18.7 acres.[253] Altogether the back-up area adjacent to Berths L and M total approximately 43.7 acres.

PRPA offered Seatrain an exclusive lease of the undeveloped marshalling areas behind Berths L and M and asserts that improvements thereon, such as paving, drainage, installation of lighting and other facilities are to be borne by the lessee carrier. This is the manner in which other marshalling areas at Puerto Nuevo have been developed.

To the extent that Berths J and K are now not being utilized, the apron of Berths J, K, L and M could be utilized as a transit and marshalling area.[254] Such utilization would only be in conjunction with mobile cranes for off-loading or loading since there are no container cranes at those berths, and in the case of Berth L, only one rail has been installed and no rails at all at Berth M.

The use of the apron of Berths J, K, L and M and ½N (approximately 2,700 feet in length by 250 feet in width) as a transit and marshalling area is marginal. Ingress and egress is circuitous. The apron is not a secure area. There are no utilities. Marshalling and transiting in the same long narrow area would present

[247] Exs. 14, pp. 10–11; 17.

[248] Exs. 17; 41.

[249] Ex. 26.

[250] Tr. 500–139.

[251] Ex. 17.

[252] A cuerda is equal to .9716 acres. Ex. 16.

[253] Ex. 17.

[254] Ex. 37, p. 1; Tr. 731; 975.

serious maneuvering problems. And if mobile cranes are to be utilized in this narrow strip, the problem is compounded as they move up and down the apron alongside the ship.

## XII.

*Whether PRMSA has any control over Ports Authority which would influence the terminal assignments?*

PRPA is required by Puerto Rican law to assign berths in a non-discriminatory manner.[255] " . . . until such time as the Ports Authority/PRMSA lease is approved by this Commission, we [*i.e.*, PRPA] have the responsibility for determining whose vessels will be assigned to the berth."[256] "However, so long as the facility is public, we will also berth at the Isla Grande facility any other carrier's vessels provided that such vessels may be feasibly worked at the berth. In practical terms, this means that such other carriers either will have to make their own arrangements for use of the mechanized cranes owned by the prospective lessees or, alternatively, must arrange for the loading and discharge of their vessel by some other workable method. Such appropriate arrangements must be made because the Ports Authority, as a furnisher of marine real estate, does not own, operate, or control container loading and discharging equipment or provide related terminal services."[257]

The key to answering the question posed by the Commission is to be found in the words "provided that such vessels may be feasibly worked at the berth. . . . carriers will have to make . . . arrangements for the use of . . . cranes owned by the prospective lessees [*i.e.*, PRMSA]." This clearly is the Alphonse-Gaston syndrome. PRPA says we control the berth assignment but we will not assign if PRMSA will not permit the berth to be feasibly worked. Then despite the claim by PRPA that Isla Grande is indeed a public terminal and PRPA indeed controls terminal assignments, it permits PRMSA to monopolize the apron by abdicating any PRPA control under the cover that cranes on the public apron are owned by PRMSA and PRPA does not thereby have any control over their use in the public terminal.

Stripped of all its verbiage and self-pity, PRPA has by its policy of inaction at this terminal passed to PRMSA effective control over PRPA in terminal assignments.

Further support for such conclusion can be found from the fact that in January 1976, PRMSA determined that " . . . we cannot allow preferential berthing at this facility [*i.e.*, Isla Grande] by another steamship carrier."[258] This is, however, the province of PRPA and not PRMSA.

It indicates that the relationship between PRMSA and PRPA was such that PRMSA was capable of believing and arrogating to itself control of berthing at Isla Grande. In fact, PRMSA has no preferential rights to the use of the berth at Isla Grande though there are presently pending before the Commission agreements to this effect.[259]

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[255] 23 L.P.R. §394, *inter alia*. "No one but the Ports Authority has authority to assign berths or anchoring places to vessels. . . ."

[256] Ex. 28, p. 12.

[257] Ex. 28, p. 13.

[258] Ex. 103; Tr. 2624, *et seq.*

PRPA is fully cognizant that there are no other workable methods for Seatrain to load or discharge the *Transindiana* except by use of the PRMSA cranes. This is true also for any other carrier, even those whose container ships have ship gantrys for loading or off-loading.[260] Nor can mobile cranes be utilized at Isla Grande. PRPA by its policy thus precludes not only Seatrain from using Isla Grande, but any other carrier—except, of course, at the sufference of PRMSA.

## XIII.

*Whether the Ports Authority has any control over the container cranes at Isla Grande?*

PRPA takes the position it has no control over the container cranes because the title thereto rests solely in PRMSA.

PRPA chooses to ignore the fact when title to the container cranes rested solely in Seatrain, PRPA exerted control through the secondary-user provision of its lease to Seatrain.

This secondary-user provision is so critical to statutory responsibility under the statute creating PRPA setting forth that it shall " . . . own, operate and manage . . . transportation facilities . . . and to make available the benefits thereof in the widest economic manner . . . ,"[261] it is incompatible therewith to exclude such a provision in its lease with PRMSA, or for that matter with any other lessee where the utilization of private property will otherwise preempt for private use areas, as is the case at Isle Grande, which are otherwise public transit areas.

Indeed, there is a serious question whether it is in fact *ultra vires* by reason of its enabling statute for PRPA to enter into a lease with PRMSA which deletes such a secondary-user clause. And, despite any conflicting views whether absence of such a clause would or would not be contrary to Puerto Rican law, deletion is contrary to one *condition precedent* for approval of a lease pursuant to section 15[262] in that a secondary-user clause is necessary to secure important public benfefits, to wit, free access to and utilization of the apron and transit area of a public terminal.

In 1965 PRPA and Sea-Land entered into an agreement regarding preferential berthing privileges at Berths E and F at Puerto Nuevo.[263] The agreement permitted Sea-Land to install two or more cranes (not to exceed four)[264] for the loading or unloading of its vessels at Berths E and F. Terms and Conditions Paragraph 5 requiring secondary use of the cranes, provided " . . . the use of others in no way impair Sea-Land's right of preference for use of the berths and the cranes, and Sea-Land may refuse use of the crane by others if such requested use would interfere with the operations of Sea-Land."

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[259] Agreement Nos. AP-76-77-4(100); AP-76-77-4(101).

[260] PRMSA, through PRMMI, its operations arm, considers that container vessels "cannot be served at this [Isla Grande] berth with shipboard gantrys." Conf. Ex. 7.

[261] 23 L.P.R. §336.

[262] *FMC v. Svenska Amerika Line*, 390 U.S. 238, 243 (1968).

[263] Ex. 104.

[264] Four were installed by 1966. Ex. 125; Tr. 3429.

On September 24, 1968, PRPA and Sea-Land entered into an agreement for preferential berthing by Sea-Land at Berths G and H.[265] In order to operate at G and H, Sea-Land requested PRPA to construct foundation beams and rails at G and H for which Sea-Land would pay but title to which would be in PRPA. The agreement further provided that Sea-Land would have the right to install its own cranes at G and H "subject to terms and conditions to be negotiated by the parties at the time of such installation."[266] Despite such provision, a fifth crane was subsequently installed and operated by Sea-Land without any subsequent negotiation by the parties of terms and conditions relative to the use of the cranes.[267]

Cranes number 251 and 252 are two of the four cranes installed in 1966 pursuant to agreement dated September 2, 1965, for Berths E and F.[268] They are now serving Berth G[269] and used by PRMSA. Accordingly, cranes 251 and 252 are subject, *inter alia,* to secondary-user clause contained in the agreement of September 2, 1965.

The subsequent agreement of November 20, 1968, for Berths G and H, is incomplete; to the same extent that the cranes at G are incorporated into the provisions of the earlier agreement, so also crane number 393 at Berth H, installed in 1971 pursuant to incomplete agreement of November 20, 1968, is deemed by use to be governed by the secondary-user provisions of the earlier agreement.

In 1972 PRPA and Seatrain entered into a lease under which Seatrain operated at Isla Grande. This lease provided that PRPA retained the right to berth other vessels at the facility at times other than those reflected on Seatrain's monthly schedule and further, PRPA had the right to require Seatrain to operate the container cranes at that facility for such other vessels, provided that such operation would not substantially reduce the capacity and efficiency of Seatrain's operations.[270]

At the outset of its negotiations with PRMSA, the Ports Authority included the "secondary user" provision of the Seatrain lease in the proposed agreement.[271] It was not successful in this negotiation. PRMSA's Executive Director was opposed to such a provision, and he refused to sign a lease with that provision.[272] PRPA thereupon agreed to delete the secondary-user clause from the lease. It now says it determined not to press for a secondary-user provision for two reasons:

1. It was very concerned that, having canceled its lease with Seatrain, it had no written lease for this important facility.[273] The Ports Authority's financial supervisors and consultants, who were responsible to the Ports Authority's bondholders and hence always maintained close watch over the Ports Authority's

[265] Ex. 114.

[266] Ex. 114, Article VI, A.

[267] Tr. 3418; 3528–3530. This fifth crane was sold by Sea-Land to PRMSA.

[268] Ex. 104.

[269] Ex. 125.

[270] Exs. 8, pp. 3, 10–11; 28, p. 15–16; Tr. 951–52.

[271] Exs. 59, p. 12; 65, p. 2; 81; 82; Tr. 882; 880–90; 1371–72.

[272] Ex. 59, p. 12; Tr. 890.

[273] Tr. 883; 894–96; 1296; 1308.

activities to assure their financial soundness, pressed the Ports Authority for a signed lease. The pressure was continuous and constant.[274] It must be noted, however, no documents support this contention of "pressure."

2. More important, upon reflection it was clear to the Ports Authority that such a provision was not only presently unneeded, but was inconsistent with the Ports Authority's overall policy as to the proper development of the Port of San Juan.[275] This had not always been the case. In the past, it was in the best interests of the Port of San Juan to insist upon crane-sharing provisions in terminal leases. In the Ports Authority's original lease with Seatrain in 1972, the Ports Authority insisted upon a provision whereby the Ports Authority could require Seatrain to operate its cranes for vessels of other companies provided it did not interfere with Seatrain's operations.[276]

The inclusion of such crane-sharing provisions served an important purpose when the Seatrain terminal lease was executed because the Puerto Nuevo containership berths were not fully developed. Other than the facilities used by Sea-Land and Seatrain, there were no berths, wharves or land suitable for containership operations. Hence, the Ports Authority found it in the best interest of the Port of San Juan to negotiate for crane-sharing provisions with its container-carrier lessees to assure that no containership operator need be turned away.[277]

With the proper development of Puerto Nuevo, however, crane-sharing provisions not only became unnecessary, they became unwise as well.[278] Contrary, however, to this assertion by PRPA as the basis for its changed attitude on secondary-user clauses, the record clearly establishes that the development at Puerto Nuevo now is not substantially different than it was in 1972 when the Seatrain lease was executed for Isla Grande. Container Berths E, F, G, and H and the five container cranes there were all operational at Puerto Nuevo[279] in 1972. No additional container berths or cranes are operational in Puerto Nuevo today. Berths J and K have crane rails but no cranes; the back-up areas of J and K have not been improved. Berth L has one crane rail; Berths M and ½N none. Back-up areas for Berths L, M and ½N have not been improved.

Now, the Ports Authority envisions Puerto Nuevo, not Isla Grande, as the major container terminal in San Juan. The Puerto Nuevo facility is losing money even though the Ports Authority has invested $60 million in developing it.[280] Desiring that the use of Puerto Nuevo as a container terminal be encouraged by the Ports Authority if its overall plan of port development is to succeed, the inclusion of a crane-sharing provision in the Isla Grande lease, it argues, would substantially undermine that policy by giving containership carriers the opportunity to berth at Isla Grande rather than Puerto Nuevo.[281] As an analysis of the sit-

[274] Tr. 894–96; 905; 1309; 1320; 1345–66; 1382

[275] Tr. 891–92.

[276] Ex. 28, pp. 15–16; Tr. 951–52.

[277] *Id.*

[278] Ex. 28, p. 18; Tr. 953–56.

[279] Ex. 125.

[280] Ex. 14, p. 12; Tr. 891; 903.

[281] Ex. 28, p. 32.

uation revealed that a crane-sharing provision at Isla Grande would run counter to the Ports Authority's master plan for development of the Port of San Juan, it determined to sign a lease with PRMSA for Isla Grande which did not contain a crane-sharing provision.[282]

This second reason is without basis in fact, patently illogical, contrary to "pressure" as the reason, and contrary to the previously stated and pursued policy of PRPA. But most important, as with the first reason, no documentation contemporary with the negotiations with PRMSA supports the second reason now put forth as the basis for deletion.

There is no documentary evidence to support any change to what now is claimed as its reason for deleting the secondary-user clause in the PRMSA lease. Nor any for the proposition that a secondary-user clause is unnecessary and unwise. All the documentation, including the early drafts of the lease between PRPA and PRMSA, support the proposition that a secondary-user clause was deemed appropriate by PRPA and was to be included in agreements for use of container berths.[283] Not until the oral testimony in this proceeding has there been any contention that a secondary-user clause is deemed unnecessary and unwise. If such policy was ever determined by PRPA to be its new and present policy, such policy was never set forth or in any way delineated in any document or minutes of PRPA or in any form until contended in this proceeding. It is concluded that the deletion of a secondary-user clause in the agreement with PRMSA was not for the reason that port development necessitated such deletion, but rather that PRPA and PRMSA are not independent parties dealing at arm's length but in fact are pursuing a single interest and are for all practical purposes a single entity insofar as their dealings regarding Isla Grande are concerned.

Despite PRPA's desire that use of Puerto Nuevo is to be encouraged, it never encouraged such use by requiring PRMSA to have secondary-user clauses in the agreements for berths at Puerto Nuevo. If, as PRPA now claims, a secondary-user clause at Isla Grande would give other carriers the opportunity to use Isla Grande to the detriment of use at Puerto Nuevo, then a secondary-user clause at Puerto Nuevo berths should induce carriers to berth at Puerto Nuevo.

The domination of PRPA by PRMSA is repugnant to any concept of PRPA independence from PRMSA control.

It is concluded that PRPA has the statutory and legal capacity and capability of exercising control over the container cranes. While it formerly excercised such control, it is presently failing to assert any such right to control, asserts it has no right to control, and is not, in fact, now experiencing any control.

## XIV.

*Whether PRMSA and Ports Authority are jointly furnishing container crane services at Isla Grande to common carriers?*

The operation of the container cranes at Isla Grande are presently carried out by PRMSA and those within its employ. There is no evidence that the PRPA

[282] Tr. 953–56.

[283] In fact, in 1975 and 1976, when it began negotiating with PRMSA, it included a secondary-user clause and only deleted it when faced with opposition from PRMSA to its inclusion. Exs. 59. p. 12; 65, p. 2; 81; 82; Tr. 882; 888–890; 1371–72.

actively engages in any plan of furnishing container crane services at Isla Grande.[284]

No PRPA personnel are actively engaged in any of the terminal operations at Isla Grande.

## CONCLUSIONS OF LAW

PRPA admits that Isla Grande is being operated as a public terminal[285] pursuant to terminal tariffs filed with the Commission. PRMSA currently pays dockage and wharfage in accordance with that tariff. There are presently pending before the Commission Agreement Nos. AP-76-77-(4) 100 and AP-76-77-(4) 101[286] for preferential berthing and lease of marshalling areas at Isla Grande.

There is no dispute that the PRMSA cranes at Isla Grande are located in the transit area, otherwise a public area.[287] Thus, the issue in dispute is whether private ownership or public area is the controlling factor in determining the utilization of the cranes. Put another way, under what circumstances, if any, may private property be subject to governmental control? In deciding the particular issue herein, two cases are relied on as being applicable. *Munn v. Illinois,* 94 U.S. 113 (1876) and a case involving this Commission which relied on it, *American Export Isbrandtsen Lines, Inc., v. F.M.C.,* 444 F.2d 824 (D.C. Cir. 1970).

In upholding the power of the state to regulate privately owned grain warehouses located in public terminals, the Supreme Court in *Munn* found that:

> . . . when private property is "affected with a public interest," it ceases to be juris private only" . . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest in that use, one must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. 94 U.S. at 126.

In *American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commision,* 444 F.2d 824, 825 (D.C. Cir. 1970), in dealing with truck detention rules, the Court of Appeals said:

> The law for centuries has recognized that public wharves, piers and marine terminals are affected with a public interest.[*] These terminals stand athwart the path of trade. A substantial part of all ocean-going export and import cargo that flows through the Port of New York passes over their piers.
>
> 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.
>
> The terminal here stands in the same relation to commerce as the grain elevators in *Munn v. Illinois, supra,* and the stockyards in *Stafford v. Wallace, supra.* They are a related service to public transportation, are charged with a public interest and are properly subject to the type of regulation here ordered in accordance with the Shipping Act of 1916.
>
> *Lord Chief Justice Hale (1609-1676) in one of his famous treatises, De Portibus Maris, pointed out that duties imposed for cranage, wharfage, pesage, etc. of a public wharf were required to be reasonable and moderate because the "wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris private* only; as if a man set out a street in a new building on his own land it is now no longer bare private interest but is affected with a public interest." Hargrave Tracts 77-78. (Italics added.)

[284] Tr. 2600.

[285] Ex. 12, p. 2; Tr. 687; 689.

[286] Exs. 143; 144.

[287] PRPA Brief, p. 29; PRPA Proposed Finding of Fact 60.

PRPA suggests that rather than reliance on *Munn* or *American Export Isbrandtsen*, the issue is better considered in *Louisville & Nashville Railroad Co. v. West Coast Naval Store Co.*, 198 U.S. 483 (1905), and *Weems Steamboat Co. of Baltimore City v. People's Steamboat Co.*, 214 U.S. 345 (1909).

In *Louisville & Nashville* the railroad was granted authority by the city of Pensacola and the State of Florida to build a wharf at the foot of a public street. The court held the wharf could not be used by any vessel without the consent of the railroad.

PRPA is on weak ground in its reliance on *Louisville v. Nashville* as controlling in this proceeding. The reason why it is not controlling is set forth in *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U.S. 498 (1911). In *Southern Pacific*, the court found that the Interstate Commerce Commission had jurisdiction and control over an alleged private terminal because of its use in public commerce. In rejecting the Southern Pacific's contention that the decision in *Louisville & Nashville* was controlling, the Supreme Court dismissed the argument by stating in reference to *Louisville & Nashville:*

> In the latter case there was no discrimination against the West Coast Company by the railroad company or a preference given to any person. The West Coast Company had the same privilege of using the wharves of the railroad company as other shippers were given. It asserted other privileges. 219 U.S. 498, 518.

In the situation before us, neither PRMSA nor the PRPA contend that Seatrain is being given the same privilege of using the cranes of PRMSA as others are given, unless it be the same non-privilege.

Nor is *Weems*, upon which PRPA relies, a strong reed. *Weems* was the exclusive lessee of the wharves in question and utilized it for its own purposes. The court held that this was a private wharf. "The right to use the property has been withdrawn by the owner as to the public in general." 214 U.S. 345, 359. But the wharf at Isla Grande is not a private wharf but, even PRPA admits, a public one.[288] One cannot convert a public transit area into a private one by construction of a private facility thereon and thereby attempt to preclude the use of the area to the public. It does not unduly paraphrase *Munn* by stating that one erects private facilities in public areas at the peril of being required to make such facilities reasonably available to the public.[289] That is not to say that such are to be made available without compensation. To the contrary, a reasonable and proper charge may be made.[290] Indeed, it would be the taking of property without due process otherwise.

The secondary-user clauses utilized in the Sea-Land and Seatrain agreements follow the rationale of *Munn* and *American Export Isbrandtsen*. They permit utilization of public areas for private use with private equipment and at the same time make such accessible and reasonably available for use by others on a nondiscriminatory compensatory basis.

Private cranes located on a public container terminal which thereby preclude

[288] Ex. 12, p. 2; Tr. 687; 698. See also PRPA Brief, p. 95.

[289] This was required of Seatrain by PRPA. Ex. 8, pp. 10–11.

[290] This was also set forth in the Seatrain agreement with PRPA.

the effective use of that terminal except by the crane owner do not occupy the same status accorded private property as exemplified by *Weems*.

Equal access to and use of a public terminal is an essential requirement for the free flow of the maritime commerce of the United States.

If the PRPA and PRMSA are to be permitted to enter into an agreement for the utilization of Isla Grande, then it is the responsibility of this Commission to assure that such utilization does not give any undue or unreasonable preference or advantage to any common carrier or as a consequence of such utilization subject any other common carrier to undue or unreasonable prejudice or disadvantage. Further, such utilization must be pursuant to just and reasonable regulations and practices.

PRPA's failure to insure that public areas which have private fixtures and property thereon do not become effectively dedicated to private and exclusive use constitutes the giving of an undue and unreasonable advantage to the owner of such fixture and property as to be in violation of section 16 First of the Shipping Act, 1916.

The exclusive utilization by PRMSA of public areas by the erection thereon and the exclusive use of such container rails and cranes constitutes the giving to itself an unreasonable preference and subjects other potential users of such public areas to an unreasonable disadvantage as to be in violation of section 16 First of the Shipping Act, 1916.

The private rights of PRMSA to own and operate container cranes on a public terminal are by their very nature vested with a public interest. As such, those rights are subject to regulation.

PRPA argues that unless PRMSA is permitted exclusive use of its cranes, it is tantamount to transforming private property of public property.[291] Nothing could be further from reality. Such argument is rejected since its premise is fallacious. A requirement that PRPA mandate a secondary-user clause for cranes at the Isla Grande terminal is nothing more than assuring that the public aspect of the terminal and public use thereof is preserved. This is no more than PRPA has done in the past and as it originally conceived it should do. Under such a provision PRMSA would not thereby be precluded from the proper use and enjoyment of its property, nor precluded from receiving reasonable compensation for its use by others. PRPA cannot allow PRMSA to preempt the use of a public area and prevent the use thereof by others under the guise that use by others will thereby interfere with private property. The interference occurred in the first instance by placing private property in the public area. When it was originally placed by Seatrain, the public was protected against Seatrain preemption by a secondary-user clause.[292] This was necessary and proper. The same circumstances mandate that it is necessary and proper for a secondary-user clause to be imposed on PRMSA ownership and use.

PRPA is in violation of section 17 of the Shipping Act, 1916, by its failure to establish and enforce just and reasonable regulations concerning assignment of

[291] See Brief of PRPA, p. 79.

[292] Ex. 8, pp. 10–11.

berths and utilization of public areas at Isla Grande in connection with the delivery, handling, and storage of property.

PRMSA is in violation of section 17 of the Shipping Act, 1916, by its failure to establish just and reasonable regulations concerning secondary utilization of its container cranes and rails located in the public area at Isla Grande.

Assuming, *arguendo,* that there is presently sufficient room at the Isla Grande facility, or in its environs, to accommodate vessels presently used by Seatrain and PRMSA and to provide back-up areas for their respective services, and further assuming that there is sufficient time available for the cranes, even including maintenance time, to service PRMSA vessels and Seatrain vessels now in service, PRPA asks, what happens when (1) PRMSA expands its service; and/or (2) Seatrain expands its service; and/or (3) a third carrier comes in; and/or (4) the third carrier expands its service; and/or (5) a fourth carrier comes in, etc.?

These are reasonable questions and they pose situations which do not lend themselves to easy solutions. The geographical and physical limitations of Isla Grande are well documented in this record. No one doubts that the steamship industry is a dynamic one with changing patterns of trade. Thus the short and direct response to PRPA's inquiries is that the resolution reached in this decision is based on the record and situation as it presently exists. The decision in this proceeding is one designed to eliminate current prejudicial practices. Problems which may arise if the situation changes must be approached and resolved in the same manner as was the present problem—*i.e.*, how will the public interest be best served.

Ordered:

The Ports Authority is hereby Ordered and Directed to make an adequate berth available immediately to Seatrain at Isla Grande terminal for calls by Seatrain vessels and barges on a noninterference basis.

The Puerto Rico Maritime Shipping Authority is Ordered and Directed to make its cranes at Isla Grande available to Seatrain vessels on a noninterference and reasonably compensatory basis.

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

WASHINGTON, D.C.
*August 10, 1977*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 76–38

ARRANGEMENTS RELATING TO THE USE OF
ISLA GRANDE MARINE TERMINAL, SAN JUAN, PUERTO RICO

The Puerto Rico Ports Authority and Seatrain Lines of Puerto Rico found in violation of section 15 of the Shipping Act, 1916 by implementing a 1972 agreement relating to Seatrain's use of the Isla Grande Marine Terminal prior to Commission approval.

Puerto Rico Ports Authority and Seatrain Lines of Puerto Rico found in violation of section 15 of the Act by implementing the Lease Termination Agreement prior to Commission approval.

Puerto Rico Ports Authority and Puerto Rico Maritime Shipping Authority found in violation of section 15 of the Act by implementing an agreement relating to use of the Isla Grande Marine Terminal prior to Commission approval. Respondents ordered to cease and desist from implementing such agreement until approved.

*Amy Loeserman Klein, William Karas* and *Olga Boikess* for the Puerto Rico Ports Authority.

*Mario F. Escudero, Karol L. Newman, Dennis N. Barnes, George M. Weiner, Edward J. Sheppard, Louis A. Rivlin, John T. Schell* and *Lawrence White* for the Puerto Rico Maritime Shipping Authority.

*Neal M. Mayer* and *Paul D. Coleman* for Seatrain Lines of Puerto Rico and Seatrain Gitmo, Inc.

*John Robert Ewers, C. Jonathan Benner, Joseph B. Slunt,* and *Alan J. Jacobson,* for the Bureau of Hearing Counsel.

## REPORT AND ORDER

*August 18, 1978*

BY THE COMMISSION: *(Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* James V. Day, *Commissioner;* Leslie L. Kanuk, *Commissioner,* concurring.)**

The Commission by Order served July 12, 1976, (July Order) directed the Puerto Rico Ports Authority (PRPA) and Seatrain Lines of Puerto Rico (Seatrain), and the Puerto Rico Maritime Shipping Authority (PRMSA) to show cause:

(1) Why an agreement executed on December 26, 1972, between PRPA and Seatrain relating to the latter's use of the marine terminal at Isla Grande, San Juan, Puerto Rico should not be found to be subject to section 15, Shipping Act, 1916 (the Act) and why the parties should not be found in violation of section 15 for having implemented this agreement prior to Commission approval.

* Commissioner Karl E. Bakke not participating.

** Commissioner Kanuk's concurring opinion is attached.

(2) Why an agreement executed on September 30, 1974 between PRPA and Seatrain entitled "Lease Termination Agreement" should not be found to be subject to section 15 and why the parties should not be found in violation of that section for having implemented this agreement prior to Commission approval.

(3) Why the Commission should not find the present and previous arrangement between PRPA and PRMSA for the latter's use of the marine terminal at Isla Grande, San Juan, Puerto Rico to be an agreement subject to section 15 and why the parties should not be found to be or have been in violation of section 15 for having implemented or continuing to implement their previous or present arrangement prior to Commission approval.

(4) Why the Commission should not order PRPA and PRMSA to cease and desist from implementing their present arrangement for PRMSA's use and operation of the Isla Grande terminal until said arrangement has been filed with and approved by the Commission pursuant to section 15 of the Act.

(5) Why the Commission should not find PRMSA in violation of section 16 First of the Act for subjecting other carriers, including Seatrain Gitmo, Inc. to an undue or unreasonable prejudice or disadvantage by failing to operate its container cranes on Isla Grande for such carriers on a non-interference basis.[1]

(6) Why the Commission should not find PRPA in violation of section 16 First for having granted PRMSA an undue or unreasonable preference or advantage by granting PRMSA the use of Isla Grande without conditioning such use on PRMSA operating its cranes located on the terminal for other carriers, including Seatrain Gitmo, on a non-interference basis when so requested by PRPA.[2]

In addition, PRPA has questioned our jurisdiction over terminal facilities and operators in Puerto Rico.[3]

Memoranda of Law and Affidavits of Fact were filed by PRPA, PRMSA, Seatrain, Intervenor Seatrain Gitmo, Inc.; and the Commission's Bureau of Hearing Counsel.[4]

## Background

There are three distinct and separate agreements at issue in this proceeding. Two of these agreements, between Seatrain and PRPA, concern Seatrain's use of the terminal at Isla Grande from 1972 to 1974. The other agreement at issue here, between PRPA and PRMSA, relates to PRMSA's use of the Isla Grande facilities from October, 1974, to the present.

### *1972 Agreement*

As early as December 27, 1962, PRPA and Seatrain entered into Agreement, No. T-87, granting Seatrain preferential use of the berths at Isla Grande and

[1] By Order served September 7, 1976, the Commission, amended its July Order by deleting this issue because it was "overlapping" with one raised in Docket No. 76-41—*Berthing of Seatrain Vessels in San Juan, Puerto Rico*, Decision served this date.

[2] Because our decision in Docket No. 76-41, *Berthing of Seatrain Vessels in San Juan, Puerto Rico*, effectively disposes of this issue, we find it unnecessary to address it here. We therefore, insofar as is pertinent here, incorporate by reference our findings in Docket 76-41 with respect to PRPA's violation of section 16 First of the Act.

[3] This issue was also raised and disposed of in a companion proceeding, Docket No. 76-41, *Berthing of Seatrain Vessels in San Juan, Pueto Rico*. We shall not address the question of jurisdiction here, but rather incorporate by reference our findings in Docket No. 76-41, with respect to that question.

[4] Seatrain Lines of Puerto Rico provides terminal facilities and support activities to Seatrain vessels calling in Puerto Rico. Seatrain Gitmo, Inc. is a common carrier by water serving Puerto Rico in the domestic trade.

exclusive use of certain marshalling areas adjacent to the berth. That agreement was filed with the Commission on December 24, 1963, and subsequently determined by the Commission's staff not to be subject to section 15. On December 30, 1968, PRPA and Seatrain filed an amendment to Agreement No. T-87, which was also determined not to be subject to section 15. On December 26, 1972, these same parties entered into an agreement, designated "AP-72-73-111" (hereinafter referred to as the 1972 Agreement), which superseded Agreement No. T-87, as amended. This is one of the agreements at issue in this proceeding.

*Termination Agreement*

On June 10, 1974, the Commonwealth of Puerto Rico through an act of its Legislative Assembly created PRMSA, a nonstock public corporation authorized to acquire, construct, own, operate and maintain maritime shipping lines and terminal facilities. Under terms of an agreement dated October 4, 1974, and entitled "Agreement for Lease and Purchase of Assets" (Assets Agreement) between Seatrain Lines, Inc.[5] and PRMSA, PRMSA acquired certain marine terminal assets from Seatrain Lines, Inc., which consisted of equipment and improvements at, or used in connection with, Seatrain's marine terminal facilities at Isla Grande. The Assets Agreement further provided that PRMSA shall arrange for the termination of the release of Seatrain from any liability arising under the 1972 Agreement. On September 30, 1974, PRPA and Seatrain entered into an agreement entitled "Lease Termination Agreement" (hereinafter referred to as Termination Agreement) which cancelled the 1972 Agreement and which relieved Seatrain of all its obligations and liabilities arising under its earlier agreement. The Termination Agreement also modified the 1972 Agreement by allowing Seatrain to retain title to the crane rail system which Seatrain had constructed pursuant to the 1972 Agreement.

*PRPA/PRMSA Arrangement*

On or about September 30, 1974, PRMSA became a common carrier by water in the trade between ports in Puerto Rico and ports in the continental United States. By letter of September 30, 1974, Teodoro Moscoso, PRMSA's Chairman of the Board, advised PRPA that the governing board of PRMSA had approved a resolution authorizing PRMSA to "enter into contracts with PRPA *assuming* all obligations" under the 1972 Agreement. Upon the commencement of its operation, PRMSA, although initially planning to consolidate its operation at Puerto Nuevo, began using the berth and the backup areas at Isla Grande.

By letter dated May 13, 1976, Julio Maymi Pagan, PRPA's Executive Director, transmitted to the Commission an agreement designated Agreement No. T-3308, between PRMSA and PRPA which granted PRMSA preferential use of the berth at Isla Grande and exclusive use of the adjacent backup area. Though transmitted in May of 1976, the agreement indicated it had been entered into on October 1, 1975, and that it was to be effective from this earlier date.

[5] Seatrain Lines, Inc. is the parent and affiliate company of Seatrain Lines of Puerto Rico.

Seatrain protested approval of Agreement No. T-3308 and requested a hearing. PRMSA, in reply, urged the Commission to deny the Seatrain protest, but requested that in the event a hearing was ordered that such hearing be consolidated with the one in Docket No. 76-38 or, in the alternative, that the Commission hold "any further proceedings with respect to Agreement No. T-3308 in abeyance pending the outcome" of Docket No. 76-38. In March 1977, the parties withdrew Agreement No. T-3308.

## Discussion

*The 1972 Agreement*

Seatrain concedes that the 1972 Agreement between it and PRPA was entered into and implemented by the parties without first having been filed with and approved by the Commission. However, Seatrain argues that because the 1972 Agreement was not discriminatory or "operated in an unfair manner toward other carriers or shippers," the Commission should retroactively approve the 1972 Agreement. Seatrain concludes that, in any event, there are mitigating circumstances surrounding the alleged violation, i.e., the 1972 Agreement would in all likelihood, have been approved if filed and it was being implemented with the knowledge of the Commission.

PRPA contends that: (1) because it and Commission employees believed that the 1972 Agreement had been filed and approved, the Commission should, in all fairness, now be estopped from finding PRPA in violation of section 15; (2) the 1972 Agreement followed the terms of an earlier Seatrain lease executed in December of 1962, i.e., Agreement No. T-87, as amended in 1966, which the Commission determined not to be subject to section 15.

The arguments of PRPA and Seatrain are similar to those we considered and rejected in *Investigation of Practices, Operations, Actions and Agreements—West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade,* 10 F.M.C. 95, (1966); and *Unapproved Section 15 Agreement—South African Trade,* 7 F.M.C. 159, (1962). There the respondents argued that they should not be found in violation of section 15 for having implemented unfiled and unapproved section 15 agreements because: (1) the agreements, if filed, would have been approved and (2) Commission employees were aware of the existence and implementation of the agreements. In rejecting this argument, the Commission stated in *Unapproved Section 15 Agreement, supra,* at 197:

> Respondent's argument that the arrangement . . . was in the public interest and was not objectionable under section 15, is quite beside the point. Such matters were for the Board (now the Commission), the agency administering the Shipping Act, to weigh and determine before and during the time the anticompetitive activities occurred. They were not for the respondents to decide themselves.
>
> It goes without saying that we find untenable the suggestion that respondents' arrangements constituted a technical violation of the law. It should be noted, furthermore, that section 15 affords little room for so called technical violations. To us the breadth and force of its language literally implore attention and obedience or at the very least inquiry if in any doubt as to the propriety of proposed conduct.

Likewise, we find little merit to the Seatrain and PRPA argument that they should not be found in violation of section 15 because the 1972 Agreement was

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Likewise, we find little merit to the Seatrain and PRPA argument that they should not be found in violation of section 15 because the 1972 Agreement was approvable and its existence was well known to Commission employees. As we said in *Unapproved Section 15 Agreement, supra,* these arguments are matters which should be presented in response to any civil penalty claim that may arise from our decision in this proceeding.

We now turn to the PRPA contention that the 1972 Agreement is not subject to section 15 because it tracks the language of Agreement No. T-87, as amended, and that, under the standards applicable in 1972, the Commission would have determined that the Agreement is not subject to section 15. It is well settled that any prior determination made by the Commission or its staff does not bind the Commission in perpetuity. The Commission may modify or even reverse past policies and rulings if a sufficient basis exists, and if that basis is explained. *Marine Space Enclosures, Inc. v. F.M.C.*, 420 F.2d 577 (D.C. Cir. 1969). The 1972 Agreement grants Seatrain preferential berthing rights and exclusive use of certain marshalling areas adjacent to the berth. That agreement further provides that PRPA shall have the right to assign other carriers to the berth when it is not in use by Seatrain and that such carriers shall have the right to traverse the marshalling area leased by Seatrain. In addition, the 1972 Agreement requires Seatrain, if requested by PRPA, to furnish crane service to other carriers using the berth, when PRPA determines that such an operation will not substantially reduce the capacity or efficiency of Seatrain's operation. Finally, the 1972 Agreement provides, insofar as is pertinent to this proceeding, that Seatrain's use of the facility shall be subject to the rules and regulations of PRPA. In short, this agreement allows PRPA to maintain a measure of control over Seatrain's operations.

The 1972 Agreement permits PRPA to retain a measure of control over the operations of the lessee through either unilateral action or mutual agreement. As such, PRPA continues to furnish terminal facilities and is an "other person" within the meaning of section 1 of the Act. 46 CFR 530.5(b) (2). Furthermore, the 1972 Agreement grants Seatrain *exclusive and preferential rights* to the Isla Grande facility within the meaning of section 15 of the Act and accordingly is subject to the filing and approval requirements of that section.[6] Thus, the parties to the 1972 Agreement may not legally implement any of its provisions prior to approval by this Commission. Because the 1972 Agreement grants Seatrain preferential and exclusive rights to the terminal facilities at Isla Grande, and because PRPA retains a measure of control over Seatrain's operations, we find the 1972 Agreement to be subject to section 15. Further, we find PRPA and Seatrain in violation of that section for having implemented the 1972 Agreement prior to filing with, and approval by, the Commission.

*Termination Agreement*

The Termination Agreement amends the 1972 Agreement between these parties by modifying the term of the 1972 Agreement and by permitting Seatrain to retain title to certain improvements situated on Isla Grande including the crane rail system.

[6] The Commission has also advised that "where doubt exists," such agreements "should be submitted to the Commission for examination." 46 C.F.R. 530.5.

Seatrain and PRPA argue that the Termination Agreement is beyond the scope of the Commission's section 15 jurisdiction. They submit that the language of section 15 does not encompass an agreement to cancel a prior section 15 arrangement but rather only encompasses agreements that create ongoing activity or relationships. In this regard, PRPA and Seatrain rely on *Seatrain Lines v. Federal Maritime Commission*, 460 F.2d 932, *aff'd* 411 U.S. 726 (1973), where the court held that the Commission lacks section 15 jurisdiction over an agreement providing for the sale of assets by one common carrier to another. The court there distinguished agreements that reflect a "one time discrete transaction" and those that provide for an ongoing relationship between the parties. Applying the court's rationale here, PRPA and Seatrain argue that because the Termination Agreement only cancelled the 1972 Agreement, and concomitantly the Seatrain-PRPA relationship and did not create any ongoing activities or relationships it is beyond the scope of the Commission's section 15 jurisdiction.[7]

In further support of its position, PRPA relies on a letter dated August 13, 1976, from the Commission's staff which advises that a section 15 agreement is not required to terminate an existing terminal lease. Whatever the basis for this advice, it is clearly contrary to our finding in *Agreement Nos. 10107 and 10108—Rate Agreements in the Trade from Hong Kong and Taiwan to Ports on the West Coast of the United States (Agreement No. 10107) and to Ports on the Gulf of Mexico and East Coast of the United States (Agreement No. 10108)*, 16 S.R.R. 752 (1976). There we held that the cancellation of a section 15 agreement requires affirmative action by the Commission and may be accomplished in one of three ways:[8]

(1) The parties can specifically provide for cancellation in the body of the approved agreement, or;[9]

(2) The parties could submit for Commission approval a modification to the Agreement cancelling the Agreement, or;

(3) The Commission can cancel the Agreement after appropriate proceedings.

The method chosen by PRPA and Seatrain to terminate the 1972 Agreement falls within (2) above and requires Commission approval prior to effectuation.

Moreover, although PRPA and Seatrain attempt to characterize the termination amendment as a "one time discrete transaction" involving the transfer of assets, they ignore the fact that such amendment also provided that Seatrain would retain title to the crane rail system located on Isla Grande. As a result, the so-called Termination Agreement constituted a *modification* of an agreement which was subject to section 15 and should have been filed pursuant to that section.[10] And, as we explained in *In the Matter of Agreement No. T-2455/T-2453*, 18 F.M.C. 115 (1974), once it is determined that a portion of an agreement

[7] PRPA further argues that the term "cancel", as used in section 15, is intended to give the Commission authority to "nullify" a portion of an agreement rather than authorizing it to approve agreements which terminate a prior arrangement.

[8] Section 15 of the Shipping Act, 1916, provides, in pertinent part:

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission . . . every agreement . . . or modification or cancellation thereof, to which it may be a party. . . .

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, . . . .

[9] The 1972 Agreement did incorporate a clause providing for its termination but under circumstances not relevant here.

[10] In *States Marine Lines, Inc. v. Trans-Pacific Freight Conference of Japan*, 7 FMC 204 at 215 we held that parties to a section 15 agreement "are not empowered to alter their terms *inter se*." The parties "must file an amendment and secure Commission approval."

is subject to section 15, the entire agreement must be filed for approval, not just the portion giving rise to jurisdiction. Accordingly, we find PRPA and Seatrain in violation of section 15 for having implemented the Termination Agreement prior to filing with, and approval by, this Commission.

*The PRPA/PRMSA Arrangement*

We will now examine the relationship between PRPA and PRMSA in order to determine if there exists a section 15 agreement between these parties, relating to the latter's use of Isla Grande, which has been implemented prior to filing with and/or approval by this Commission. Before addressing the merits of that issue, however, a discussion of the factual situation surrounding PRMSA's utilization of Isla Grande is in order.

By virtue of the Assets Agreement between Seatrain Lines, Inc. and PRMSA, PRMSA acquired certain marine terminal assets owned by Seatrain Lines, Inc. and its affiliate at the Isla Grande marine terminal. The Assets Agreement also required PRMSA to arrange for the termination and release of Seatrain and its affiliates from any liability resulting from the 1972 Agreement with PRPA. Although the record in this proceeding does not reveal what role if any PRMSA played in arranging for Seatrain's release of liability, on September 30, 1974, Seatrain and PRPA executed the Termination Agreement which released Seatrain from any liability under the 1972 Agreement and which permitted Seatrain to retain title to the crane rail system and certain other improvements at Isla Grande.[11]

PRPA now advises, however, that because it was concerned about "substantial loss of revenue" it would not consent to relieving Seatrain from liability, unless PRPA extracted "a commitment on the part of PRMSA to enter into a new long-term lease." On September 30, 1974, the day the Termination Agreement was executed, PRMSA's Director advised that he was authorized to execute any agreement assuming all of Seatrain's obligations under the 1972 Agreement. PRPA and PRMSA now explain that the agreement between them was not drafted until October 1, 1975, and that this agreement (Agreement No. T-3308) was not executed until May 13, 1976, at which time it was filed with the Commission. In any event, PRMSA, on or about October 11, 1974, initiated its operations in the Puerto Rican trade and began calling at Isla Grande with vessels formerly owned by Seatrain. With the exception of a few calls made by Seatrain vessels, no other carriers have used the Isla Grande facility since PRMSA began its operation.

PRPA alleges that although only PRMSA's vessels have been assigned to Isla Grande, this is a result of efficient port management rather than the implementation of an unfiled section 15 agreement. PRPA argues that container operations, unlike breakbulk operations, require sophisticated equipment including cranes, and substantial marshalling areas in order to be efficient. PRPA explains that, in view of the fact that PRMSA owned such equipment on the area adjacent to the Isla Grande berth, it was clearly appropriate to assign PRMSA's vessels to Isla

[11] By letter of September 27, 1974, PRPA advised Seatrain that it consented to Seatrain's assignment to PRMSA of all "rights, covenants, and obligations" under the 1972 Agreement.

Grande on a vessel-by-vessel basis pending the execution, filing, and approval of a long-term terminal lease agreement. In addition, PRPA submits that it "would be absurd" to assign PRMSA's vessels to any other berth in view of the fact that PRMSA's terminal assets are situated adjacent to the Isla Grande berth, but also because "the backup area behind the public wharves is committed to, and is being used by, PRMSA under an oral temporary landlord tenant arrangement between PRPA and PRMSA until Agreement No. T-3308 (which includes provisions for the exclusive lease of this land area to PRMSA) is approved."[12]

PRMSA's argument with respect to this section 15 issue is essentially identical to that of PRPA. Additionally, PRMSA points out that its arrangements with PRPA, "under which PRMSA utilized the Isla Grande facility, fall into two separate and distinguishable time periods." PRMSA alleges that during the period from October, 1974, to May, 1976, it leased the backup area at Isla Grande pursuant to an "oral arrangement" and docked its vessels at the berth as assigned for which it paid all pertinent wharfage and dockage charges.[13] During the more recent period, May, 1976, to the present, PRMSA denies violating section 15 of the Act by implementing portions of its agreement [Agreement No. T-3308 and presumably its successors T-3453 and T-3453A] with PRPA. However, PRPA does advise that the "portions of the agreement [T-3308] that have been implemented do not require Commission approval." In this regard, PRMSA explains that the provisions of Agreement No. 3308 which relate to the backup area, the exclusive use area, as well as its prior "oral agreement" with PRPA for the use of the adjacent backup area, are merely landlord tenant arrangements that are not subject to section 15 and which do not therefore require Commission approval prior to implementation.

Although PRPA and PRMSA have not admitted the existence of an unfiled section 15 agreement relating to PRMSA's use of the berthing area at Isla Grande, their admission of an "oral agreement" for the use of the adjacent backup area coupled with the evidence adduced in this proceeding and in Docket No. 76-41, *Berthing of Seatrain Vessels in San Juan, Puerto Rico*, of which we take official notice,[14] leads us to find that PRPA and PRMSA have violated section 15 by implementing an agreement relating to PRMSA's use of Isla Grande prior to filing with and approval by this Commission.

On September 27, 1974, PRPA advised Seatrain that PRPA "consents to the assignment by Seatrain of its rights, convenants, and obligations" under the 1972 Agreement to PRMSA.[15] Subsequently, PRMSA's Chairman advised

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[12] After withdrawing Agreement No. T-3308, PRPA and PRMSA submitted separate agreements for PRMSA's use of the Isla Grande terminal areas, *i.e.*, the berth and the adjacent backup area. Agreement No. T-3453 granted PRMSA preferential use of the berth and Agreement No. T-3453A granted PRMSA exclusive use of the backup area adjacent to the berth. Although the parties argue that this latter agreement was not subject to section 15, we have clearly held in the past that where marshalling areas are in the locale of the berth and are *essential* to the operation of the berth, an agreement relating to the lease of the adjacent backup area is subject to section 15. *Agreement No. T-4-Terminal Lease Agreement at Long Beach, California*, 8 F.M.C. 521 at 528, (1965).

[13] We note that Article III(A)(1) of Agreement No. T-3308 requires PRMSA to pay all applicable dockage and wharfage charges even when it berths its vessels at Isla Grande pursuant to the preferential right granted in that agreement.

[14] See Rule 226 of our Rules of Practice and Procedure, 46 C.F.R. 502.226; *Alaska Steamship Co. v. Federal Maritime Commission*, 344 F.2d 810 (1965); *Bakers of Washington, Inc. et al*, Pike and Fischer Administrative Law (2d) 334, Federal Trade Commission, 1964); *National Fire Insurance Company v. Thompson*, 281 U.S. 331, (1930); *Crichton v. United States*, 56 F.Supp. 876 (S.D. N.Y. 1944), *aff'd* 323, U.S. 684(1945); Davis, 2 Administrative Law Treatise, 381-384, section 15.06.

[15] In Docket No. 76-41, we determined that PRPA and PRMSA are to be considered as "one person" insofar as Isla Grande and its facilities are concerned.

PRPA that he was authorized to execute a contract assuming Seatrain's obligation under the 1972 Agreement. Although PRMSA and PRPA did not execute a written agreement, by which PRMSA assumed Seatrain's 1972 Agreement, Mr. Davila, PRMSA's Executive Director, testified in Docket No. 76-41 that when PRMSA closed the transaction with Seatrain, PRPA and PRMSA orally agreed that PRMSA would have the exclusive use of the backup area under terms similar to those found in the 1972 Agreement. Despite Respondents' arguments to the contrary, this oral arrangement which permits PRMSA to exercise *exclusive* control of this *essential* backup area, is clearly the type of arrangement that is subject to the filing and approval requirements of section 15. As the parties themselves admit, this adjacent area is one of the essential ingredients necessary for an efficient container vessel operation at Isla Grande. The backup area provides a container vessel docking at the berth the essential area needed for marshalling containers, or alternatively, if the area is occupied by an exclusive lessee, provides the only efficient means of ingress and egress for carriers who do not have rights to marshall their containers in this backup area adjacent to the berth. As such, any agreement between persons subject to the Act which provides for the exclusive use of this backup area must be filed with and approved by this Commission prior to implementation by the parties to the agreement. *Agreement No. T-4, supra.*

In addition, although the parties have only admitted to an agreement relating to the backup area, the evidence establishes the existence of an unfiled, unapproved agreement relating to PRMSA's use of the berthing area at Isla Grande. Although purportedly a public facility open to all carriers on a first come first served basis, Isla Grande has not been utilized by another carrier since PRMSA began its operations. Situated on this public terminal, with PRPA's acquiescence, are PRMSA's terminal assets, including shoreside gantry cranes, which PRMSA, again with PRPA's acquiescence, will not make available to other carriers. PRPA also acknowledges that it will not consider assigning a vessel, other than PRMSA's, to the Isla Grande berth unless such carrier can "feasibly work at the berth." Because PRPA is fully aware that PRMSA will not allow use of its cranes, and because PRPA realizes that in practical terms shoreside cranes are the only feasible means of working a container vessel at Isla Grande, Isla Grande, for all practical purposes, is not available to other carriers, on a first come first served or any other basis. When this evidence is considered in light of other evidence, including PRPA's "consent to assignment" of September 27, 1974; the Moscoso letter of September 30, 1974; the effective date contained in Agreement No. T-3308; and the unity of PRMSA and PRPA insofar as Isla Grande is concerned, it becomes clear that there has existed, since PRMSA began its operations, an unfiled section 15 agreement relating to PRMSA's use of the berth at Isla Grande.

Even if we assume for the sake of argument that there is insufficient independent evidence to find an agreement between PRPA and PRMSA relating to the latter's use of the berth, from October, 1974, to May, 1976, it would not preclude us from finding PRPA and PRMSA in violation of section 15 with respect to PRMSA's use of the berth at Isla Grande. As heretofore noted, Agreement No. T-3308 granted to PRMSA preferential use of the berthing area at Isla Grande and exclusive use of the adjacent backup area. PRMSA in response to our Order initiating this proceeding advised: "the portions of the agreement that have been implemented do not require Commission approval." Thus, PRMSA, by its own admission, has together with PRPA, implemented part of Agreement No. T-3308 prior to Commission approval pursuant to section 15 of the Act.

PRMSA's admission was offered in support of its argument that the portion of Agreement No. T-3308 that relates to the backup area is not subject to section 15. Even if we concurred with PRMSA's argument, which we do not, the other provisions of the agreement relating to preferential berthing rights are clearly matters that are subject to the filing and approval requirements of section 15. As such, the entire agreement becomes subject to section 15 and may not be implemented prior to filing with and approval by this Commission. This is fully consistent with the rationale expressed by the Commission in *In the Matter of Agreement No. T-2455/T-2453*, 18 F.M.C. 115 (1974) that:

> Once it is determined that a particular part [of an agreement is subject to section 15] the statute is clear that the *entire* agreement must be filed not only the clause giving rise to jurisdiction. And before approval, no part of the agreement may be implemented.

*REQUEST FOR EVIDENTIARY HEARING*

On July 1, 1977, after the record was closed, we granted Hearing Counsel's Petition to Reopen the record in this proceeding for the receipt of additional evidence that purportedly supported their argument that PRMSA and PRPA had implemented an unfiled section 15 agreement relating to PRMSA's use of Isla Grande. We explained then that our purpose in reopening the proceeding was to examine this newly discovered evidence and determine its importance to our decision in this proceeding. We have now examined this evidence, along with the affidavits submitted by Respondents, and find it unnecessary to a decision on the issues raised in this proceeding, nor have we relied, to any extent, on the evidence submitted on reopening.[16]

THEREFORE IT IS ORDERED, That PRMSA and PRPA cease and desist implementing any arrangement which grants PRMSA preferential or exclusive use of any part of the Isla Grande Marine Terminal until such arangement has been filed with and approved by the Commission pursuant to section 15 of the Act.

FURTHER, IT IS ORDERED, That Respondents' request for evidentiary hearing is denied.

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

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

*Commissioner Leslie Kanuk, concurring.* I concur in the result reached by the majority, that the failure to file the two agreements between Seatrain and PRPA concerning Seatrain's use of the terminal at Isla Grande from 1972 to 1974 and

[16] Because this determination obviates the need for any evidentiary hearing on disputed issues of fact that may have been raised by the newly introduced evidence, the request for such a hearing is denied.

*the agreement at issue between PRPA and PRMSA relating to PRMSA's use of* the Isla Grande facilities from October, 1974, to the present constitutes violations of section 15 of the Shipping Act, 1916.

This finding, however, in no way reflects an incorporation by reference of any other conclusion expressed by the majority in their opinion.

# FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

[General Order No. 16, Amdt. 25; Docket No. 78–12]

PART 502—RULES OF PRACTICE AND PROCEDURE

## Simplification of the Rules Governing Special Docket Applications for Permission to Refund or Waive Portions of Freight Charges in the Foreign Commerce

*August 21, 1978*

ACTION: Final Rules

SUMMARY: The Commission's rule governing the filing of applications by common carriers by water in the foreign commerce of the United States or conferences of such carriers seeking permission to refund or waive portions of freight charges because of tariff errors is amended. The amendments are necessary to eliminate unnecessary technicalities and ambiguities in the present rules which have caused undue delay in the processing of such applications. The effect of the amendments will be to eliminate participation of unnecessary parties, clarify when such applications must be filed, simplify the standard form used to submit relevant information, and ensure that applicants furnish adequate evidence justifying the relief sought.

EFFECTIVE DATE: 30 days after publication in the *Federal Register*.

SUPPLEMENTAL INFORMATION:

The Commission instituted this proceeding by Notice of Proposed Rulemaking (Notice) published in the *Federal Register* on May 1, 1978 (43 F.R. 18572) to amend Rule 92(a) of its Rules of Practice and Procedure, 46 CFR 502.92(a). As explained in the Notice, the purpose of the proposed amendments is to eliminate unnecessary delay in deciding special-docket cases caused by the present rule.

The proposed amendments would eliminate the need to obtain concurrences or affidavits from shippers, consignees, or freight forwarders, clarify the re-

*quirement* that applications be filed within 180 days from date of shipment, and simplify the application. The amendments would also ensure that applicants furnish adequate supporting information and that other steps would be taken to carry out the purposes of Public Law 90–298, which amended section 18(b) (3) of the Shipping Act, 1916, 46 U.S.C. 817(b) (3).

Comments were submitted in response to the Notice by three conferences (the Conferences),[1] Sea-Land Service, Inc. (Sea-Land), Elkan Turk, Jr., an attorney who practices before the Commission, E. I. du Pont de Nemours and Company (du Pont), and the United States Department of Agriculture (USDA). All of these commentators except USDA state that they generally support the proposed rule changes. USDA confines its comments to specific proposed changes.

The commentators disagreed on the definition of the term "date of shipment." The Conferences, Sea-Land, and Mr. Turk support "date of sailing" as the definition while du Pont and USDA suggest "date of payment of the freight."[2] The Commission proposed "date of issuance of the rated bill of lading" but specifically invited comments regarding this as well as other definitions.

Neither the Shipping Act nor its legislative history provides a definition of the term "date of shipment" and this omission has caused recurring problems. The Commission believes that it must fix a definition to ensure equality of treatment among applicants and meet the congressional intent to provide equitable relief but only so long as such relief is sought within a certain period of time.

The Commission carefully considered the arguments favoring "date of sailing" and "date of payment of the freight" suggested by the commentators as well as other definitions which have been used, such as "date of issuance of rated bill of lading," "date of loading," and "date of on board bill of lading." We believe the most suitable definition is "date of sailing of the vessel from the port at which the cargo was loaded." This date can be easily ascertained from carrier and other records, e.g., Lloyd's Voyage Record. Dates of bills of lading, especially on board bills of lading, are often found to be unreliable. Use of this definition also gives applicants an additional period of time to seek equitable relief for shippers and consignees beyond that which would apply if date of issuance of rated bill of lading or on board bill of lading were used. Use of this definition also ensures that the shipment was loaded aboard ship and that it commenced its ocean voyage whereas dates appearing on bills of lading do not necessarily indicate that the cargo actually left the carrier's terminal on those dates. As Sea-Land commented: "Many times bills of lading are issued and rated but due to unforeseen operational reasons the cargo is not loaded on the scheduled vessel."

The Commission apppreciates the desire of shippers such as du Pont and USDA to use "date of payment" as the definition. We find this to be unsatisfactory. In some instances, a shipper or consignee may be unwilling or unable to pay

[1] These conferences are: Japan-Puerto Rico & Virgin Islands Freight Conference; Japan/Korea-Atlantic and Gulf Freight Conference; Trans-Pacific Freight Conference of Japan/Korea.

[2] No one opposed the proposed definition of "filing" of applications to mean date the application is received by the Commission or the date it is deposited in the mail, as duly certified by the applicant, whichever occurs sooner.

the freight in whole or in part.[3] In such instances, the time for filing special-docket applications would be prolonged indefinitely, leaving the parties in a state of uncertainty. Furthermore, contrary to USDA's contentions, using date of payment does not necessarily protect shippers or assist them in making prompt and correct payments. As the Record in *Proposed Rule-Time Limit on Filing Overcharge Claims* shows, numerous shippers conduct little or no audit of their freight bills and consequently do not become aware of discrepancies until more than six months after payment has been made. Moreover, even if notice to shippers is the determining factor, although nothing in the statute or its legislative history so indicates,[4] receipt of the freight bill, not date of payment, would be the proper standard. It is the former event which puts shippers on notice of any discrepancies.

Accordingly, we are adopting "date of sailing of the vessel from the port at which the cargo was loaded" as the definition of "date of shipment."

The commentators refer to several other proposed rule changes which they believe require clarification or further amendment. The Conferences contend that the portion of proposed Rule 92(a) (4) referring to other steps which the Commission may order to be taken if an application is denied is too broad and should be restricted to collection of undercharges. The Conferences also suggest that proposed Rule 92(a) (2) be further amended to refer to conferences if conference tariffs are involved. We have considered these comments and believe that the amendments suggested are unnecessary.

If an application for refund or waiver is denied, action other than an order to collect undercharges may be warranted. Such action should be consistent with Public Law 90–298 and the requirements of due process. For example, a finding of violation of other provisions of the Shipping Act could not be made in a special-docket proceeding nor could reparation be ordered because of the notice requirements of the Administrative Procedure Act. However, in some cases it might be appropriate to order an applicant not only to collect undercharges but to file an affidavit of compliance. Furthermore, since shippers and consignees are not required to be parties to special-docket proceedings, it might be appropriate to order carriers to notify the shipper or consignee of the denial or to provide them with copies of the Commission's decision. Such action might be warranted if the record showed that although special-docket relief could not be granted, the shipper or consignee concerned might have the right to file a claim under the carrier's tariff or a complaint under section 22 of the Shipping Act because of an apparent misrating due to arithmetic error, misclassification, misdescription, or similar mistake.

We find no reason to further amend proposed Rule 92(a) (2) by inserting a reference to conferences. The Notice of Proposed Rulemaking, proposed Rule

[3] For example, in Special Docket No. 527, *Ford France, S.A. v. Sea-Land Service, Inc.* (Initial Decision, November 29, 1977), the consignee-complainant has been prevented from making payment on four shipments that occurred in early 1977 because of exchange control restrictions imposed by the French Government. Furthermore, in *Proposed Rule-Time Limit on Filing Overcharge Claims*, 12 F.M.C. 298 (1969), the record showed that shippers such as the U.S. Government, because of its extensive transportation activities, could not always make prompt payment.

[4] In some statutes, notice is expressly made the determining factor. For example, in the Interstate Commerce Act, institution of suits in loss and damage cases must commence within two years, "such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim. . . ." Section 20(11), 49 U.S.C. 20(11).

*92(a) (1), and the revised form incorporated into the new rules indicate that* conferences as well as individual carriers are indispensable parties if conference tariffs are involved. The Commission explained in the Notice that inclusion of conferences in the revised form was necessary because the present form makes no specific provision for conference concurrence or verification. Therefore, the proposed rule provides that both the carrier and the conference join in the application when a conference tariff is involved.

Sea-Land suggests that proposed Rule 92(a) (1) be amended to include consignees as well as shippers and that proposed Rule 92(a) (5) delete the requirement that supporting evidence be furnished regarding date of payment. We find it unnecessary to change the text of proposed Rule 92(a) (1). The portion of the present rule to which Sea-Land refers is unchanged. The Commission has always interpreted the term "shipper," as used in Public Law 90–298, to include consignees if they paid or were responsible for payment of freight charges. The proposed revised form indicates that special-docket applications are filed for the benefit of the "person who paid or is responsible for payment of freight charges." The requirement that supporting evidence regarding date of payment be furnished in proposed Rule 92(a) (5) should be deleted. Such evidence is unnecessary since we are not adopting "date of payment" as "date of shipment."

Mr. Turk suggested clarification of references to "number of shipments" and "aggregate" freight charges. Under the present rule "shipment" refers to the information shown on an individual bill of lading and "aggregate" refers to total freight charges derived by adding separate bills of lading. These are the intended meanings in the revised form.

USDA suggests that the rule should permit the concurrence and participation of shippers in the preparation and filing of applications. USDA fears that because the statute allows only carriers or conferences to file applications, a carrier might not have the incentive to file an application unless the shipper can concur and participate. We cannot amend the statute. There is nothing in the proposed rule to prevent shippers from assisting carriers in preparing applications or from urging carriers to file applications. Shippers may even petition for leave to intervene in the proceeding under Rule 72, 46 CFR 502.72. Consequently, there is no need to amend the rule as recommended by USDA.[5]

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553),and sections 18(b) (3), 21, and 43 of the Shipping Act, 1916, (46 U.S.C. 817(b) (3), 820, and 841a), Part 502 of Title 46, is amended to read:

1. Paragraph (a) of section 502.92 is revised to read as follows:

§502.92 Special Docket Applications.

(a)(1) A common carrier by water in foreign commerce which publishes its own tariff or, if the common carrier does not publish its own tariff, the carrier and the conference to which it belongs, may file an application for permission to refund or waive collection of a portion of freight charges where it appears that there is (i) an error in a tariff of a clerical or administrative nature or (ii) an error due to inadvertence in failing to file a new tariff. Such refund or waiver must not result in discrimination among shippers.

[5] We have, however, made certain minor changes to the proposed form in paragraphs (1) and (4) to conform with our intentions and provide more adequate information.

(2) The Commission must have received an effective tariff setting forth the rate on which refund or waiver would be based prior to the filing of the application.

(3) The application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. An application is filed when it is placed in the mail or, if delivered by another method, when it is received by the Secretary of the Commission. Filings by mail must include a certification as to date of mailing. Date of shipment shall mean the date of sailing of the vessel from the port at which the cargo was loaded.

(4) By filing, the applicant(s) agrees that

(i) if permission is granted by the Commission

(A) an appropriate notice will be published in the tariff or

(B) other steps will be taken as the Commission may require which give notice of the rate on which such refund or waiver would be based and

(C) additional refunds or waivers shall be made with respect to other shipments in the manner prescribed by the Commission's order approving the application.

(ii) if the application is denied, other steps will be taken as the Commission may require.

(5) Application for refund or waiver shall be made in accordance with the form set forth below. Any application which does not furnish the information required by the prescribed form or otherwise comply with this rule may be returned to the applicant by the Secretary without prejudice to resubmission within the 180-day limitation period.

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO.

Application of ______________________________ for
(Applicant(s))

the benefit of ______________________________________________
(Name of person who paid or
is responsible for payment of freight charges.)

(1) Shipment(s)

Commodity (according to tariff description) ______________

Number of shipments
(a) weight or measurement of individual shipment ______________
(b) aggregate weight or measurement of all shipments ______________

Date of shipment (sailing)
(furnish supporting evidence) ______________

Shipper and place of origin ______________

Consignee and place of destination ______________

Name of carrier and date shown on bill of lading
(furnish legible copies of bill(s) of lading) ______________

Names of participating ocean carriers and routing ______________

Name(s) of vessel(s) involved in carriage ______________

Amount of freight charges collected
(furnish legible copies of rated bill(s) of lading or freight bill(s), as appropriate)
(a) per shipment ______________
(b) in the aggregate ______________
(c) by whom paid ______________
(d) who is responsible for payment if different ______________

Rate applicable at time of shipment
(furnish legible copies of tariff page(s)) ______________

Rate sought to be applied
(furnish legible copies of tariff page(s))
Note: Must be on file with Commission prior to application ______________

Amount of freight charges at rate sought to be applied
(a) per shipment ______________
(b) in the aggregate ______________

Amount of freight charges sought to be (refunded) (waived)
(a) per shipment ______________
(b) in the aggregate ______________

(2) Furnish docket numbers of other special docket applications or decided or pending formal proceedings involving the same rate situations.

(3) State whether there are shipments of other shippers of the same or similar commodity which (a) moved via applicant(s) during the period of time beginning on the day the bill(s) of lading was issued and ending on the day before the effective date of the conforming tariff and (b) moved on the same voyage of the vessel(s) carrying the shipment(s) described in (1) above.

(4) Fully explain the clerical or administrative error or error due to inadvertence showing why the application should be granted. Furnish affidavits, if appropriate, and legible copies of all supporting documents. If the error is due to inadvertence, specify the date when applicant(s) intended or agreed to file a new tariff.

________________________________
(Applicant) (Carrier)

By: ________________________________
(Signature)

________________________________
(Typed or printed name of person signing)

________________________________
(Title)

________________________________
(Date)

State of ________________, County of ________________,
ss:

I, ________________, on oath declare that I am ________________ of the above-named carrier-applicant, that I have read this application and know its contents; and that they are true.

Subscribed and sworn to before me, a notary public in and for the State of ________, County of ________________, this ________ day of ________, A.D. 19____.

[SEAL]

________________________________
(Notary Public)

I certify that the date shown below is the date of mailing of the original and three copies of this application to the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

Dated at ________________ this ________ day of ________ ,19____.

(Signature) ________________________________

(For) ________________________________

2. Paragraph (c) of section 502.92 is amended by revising the first sentence to read as follows:

(c) Applications under paragraphs (a) and (b) of this section shall be submitted in an original and three (3) copies to the Office of the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 77–9

UNITED NATIONS

*v.*

HELLENIC LINES LTD.

## NOTICE OF ADOPTION

*August 21, 1978*

No exceptions were filed to the supplemental initial decision in this proceeding served July 19, 1978. Notice is given that the Commission on August 16, 1978, determined to adopt the conclusion of the Administrative Law Judge in this matter.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

No. 77–9

UNITED NATIONS

*v.*

HELLENIC LINES LIMITED

*Conclusion Adopted August 21, 1978*

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

To the July 22, 1977, Initial Decision served in this proceeding shall be added the following reasons for the findings and conclusions contained therein:

1. It was found and concluded that the respondent inadvertently failed to charge for extra length of the freight. The complainant established to the satisfaction of the Presiding Administrative Law Judge that the respondent should have charged the complainant $508.75 under the applicable tariff for the extra length of the freight; and not having done so, the respondent undercharged the complainant that amount. Section 18(b)(3) of the Shipping Act, 1916, frowns upon greater or less being charged than the rates in the tariff on file. Either, greater or less charge, must be corrected. As was pointed out in the Initial Decision, it is the responsibility of the carrier to proceed to collect this undercharge from the shipper.

2. It was found and concluded the complaint was timely filed, the action having accrued in July 1975 when the freight charge was paid. Section 22 of the Shipping Act, 1916, provides for filing of a complaint within two years after the cause of action accrued, and the complaint was so filed.

3. It was found and concluded that the truck mounted 36 duo drill was properly rated under the respondent's tariff. This finding was because upon consideration of the record, and the contentions of the parties, the Presiding Administrative Law Judge is persuaded the contentions of the respondent are supported by documents supplied in the cause. The respondent's contentions, that Item 965 classification is not restricted to the listings as given above by the complainant, that Item 965, Road Vehicles, is not intended to be restricted to vehicles used 10% or 100% of the time on primary or secondary roads and therefore covers any vehicle moved over a primary or secondary road, are regarded as more persuasive than those of the complainant. That further contentions and answers of the respondent also tend to support the respondent applied the proper tariff rate, are agreed to by the Presiding Judge.

The complainant contends for rate of $159.25 per 40 cu. ft. of Item 575 of the tariff. In the said Item 575 (Attachment 8 to Complaint) the respondent points out

[1] Commission's Order herein of July 17, 1978. This decision is supplemental to Initial Decision served herein July 22, 1977.

that the rate requested by the complainant specifically exempts trucks from the machinery rate as this cargo is firstly a truck with special equipment. With this, the Presiding Administrative Law Judge agrees. That the cargo was firstly a truck in part is supported by facts showing the truck without accessories cost more than the drill without accessories but with accessories or special equipment the drill was more.

Finally, there are no contentions or facts as to any ambiguity in the tariff that would warrant construction of the tariff against the carrier and in favor of the shipper, once, as here, it is determined the cargo was firstly a truck properly rated under Item 965 of the applicable tariff.

Orders propounded in the July 22, 1977, Initial Decision are hereby reasserted.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

WASHINGTON, D.C.
*July 19, 1978*

# FEDERAL MARITIME COMMISSION

No. 77–9

UNITED NATIONS

*v.*

HELLENIC LINES LTD.

*Conclusion Adopted August 21, 1978*

Reparation denied.

*Blaine Sloan*, Director, General Legal Division, Office of Legal Affairs, and *John F. Scott*, Acting Director, Office of Legal Affairs, for complainant.
*James E. Ganzekaufer*, Manager, Red Sea/East Africa Service, for respondent.

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

This complaint case, at the request of the complainant United Nations, consent thereto of the respondent Hellenic Lines Limited (Hellenic Lines) and approval by the Presiding Administrative Law Judge, was conducted under the Shortened Procedure as provided in Rule 181 *et seq.* of the Commission's Rules of Practice and Procedure, 46 CFR 502.181, *et seq.*

The United Nations shipped freight, including a 1-piece unit 36 Duo Drill, on the respondent's vessel *SS Hellenic Sky* under Bill of Lading No. T001 dated April 16, 1975, from New York for transportation to Djibouti for transshipment to Aden, "Freight Prepaid to Aden."[2]

Bill of Lading T001 replaced an initial Hellenic Lines Bill of Lading P017 dated April 16, 1975, which was cancelled. Bill of Lading P017 called for transportation of freight from New York to Hodeida. Bill of Lading T001 called for transportation of freight from New York to Djibouti to be transshipped to Aden. The change in routing to Aden via Djibouti was at the request of complainant for which there was a diversion charge of $7.00 per ton as freighted, which charge the complainant regards as having been assessed properly.

The only portion of the shipment in question is the 1-piece unit 36 Duo Drill (complaint, p. 5, 7).

[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] The Presiding Administrative Law Judge under date of June 3, 1977, wrote to the complainant (copy to the respondent) asking the complainant to supply the date payment was made of the freight charges, etc. In a reply dated June 23, 1977 (received June 27, 1977), the complainant enclosed the following material *applicable to the payment of the shipment: (1) a copy of cancelled check* No. 008027 dated July 18, 1975, in the amount of $22,365.72 drawn on the Chemical Bank New York Trust to the order of Schenkers International Forwarders, Inc. The check is stamped paid Chemical Bank July 22, 1975; (2) a copy of Schenkers' invoice dated May 9, 1975.

The 1-piece 36 Duo Drill unit, unpacked, weighed 49,500 lbs. with a cube of 3700 cu. ft. For the 3700 cu. ft., the respondent, using Item 965 of its tariff, Hellenic Lines Limited, U.S. Atlantic and Gulf/Red Sea and Gulf of Aden Freight Tariff FMC No. 4, charged \$181.50 per 40 cu. ft. or \$16,788.75 (3700 cu. ft. ÷ 40 cu. ft. = 92.5 40 cu. ft. \$181.50 × 92.5 = \$16,788.75); Heavy Lift Scale charge 3700 cu. ft. × \$31.00 per 40 cu. ft. \$31.00 × 92.5 = \$2,867.50; Diversion charges, 3700 cu. ft. × \$7.00 per 40 cu. ft. \$7.00 × 92.5 = \$647.50—Total \$20,303.70 (See Bill of Lading No. T001).

The complainant contends the correct tariff rate for the 1-piece cyclone 36 Duo Water Well should be \$159.25 per 40 cu. ft. as per Item 575, 16th Revised Page No. 32 of Freight Tariff FMC No. 4 of Hellenic Lines Limited. Thus, 3700 cu. ft. at \$159.25 per 40 cu. ft. is \$159.25 × 92.5 = \$14,730.62; heavy lift scale 3700 cu. ft. at \$31.00 per 40 cu. ft. is \$31.00 × 92.5 = \$2,867.50 and Diversion charge 3700 cu. ft. at \$7.00 per 40 cu. ft. is \$7.00 × 92.5 = \$647.50. Sub-Total \$18,245.62. Complainant alleges further the freight was 37 feet in length, that being over 35 feet in length and not exceeding 40 feet it was subject to \$5.50 W/M Extra Length charges per Rule 17, 8th Rev. Page 16 of the applicable tariff, which charge inadvertently was omitted in the original freighting by the respondent. The extra length charge (\$5.50 × 92.5) would amount to \$508.75 bringing the total to \$18,754.37. The respondent, as shown above, charged \$20,303.70. Under the complainant's view the charge would be \$18,754.37, a difference of \$1,549.33 for which reparation is sought by the complainant from the respondent carrier.

The complainant alleges the difference for which reparation is sought is a payment by it to the carrier of a rate for transportation of the freight in question, which is unjust and unreasonable in violation of section 18(b)(3) of the Shipping Act, 1916.

The respondent, on the other hand, insisting the rate charged was correct, objects to the allegations of the complainant.

## DISCUSSION

Patently, the complainant has introduced overcharges and undercharges into this proceeding. Undercharges enter the picture as the complainant contends the carrier inadvertently failed to charge for extra length of the freight in an amount of \$508.75. Since only a single bill of lading, No. T001, is involved, offsetting is permissible and does not constitute an award of reparation against the shipper but is merely a consideration of all elements of the total transaction, i.e., the overcharges and undercharges under a single bill of lading in determining whether injury to the shipper resulted from the carrier's violation. If a proven charge under a single bill of lading exceeds a proven undercharge under that bill of lading then an award of reparation is authorized for an amount by which the overcharge exceeds the undercharge. *Colgate Palmolive Co. v. The Grace Line*, Docket No. 194(I), 17 F.M.C. 279, 280 (1974).

The respondent made no reply as to the alleged inadvertent failure to charge for extra length of the freight. The complainant has satisfactorily established that the \$508.75 should have been charged, and that there was an undercharge. Section 18(b)(3) of the Shipping Act, 1916, provides, in part, "No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or lesser or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time. . . . "

The complainant argues in support of the $159.25 per 40 cu. ft. rate that the Packing List (Attachment 5 to complaint) shows that 1-piece 36 Duo Drill that was shipped, was a 36 Duo Drill, S/N–75–10 Rotary Type, for drilling water wells, with the detailed components comprising this 1-piece unit. Complainant describes the unit as "Rotary Type Water-Well Drilling Truck Mounted and Powered Drill Rig, heavy in weight and large in size, in excess of regular road and highway weight limitations, geared and designed for rough terrain exploration and drilling for water-wells in all types of remote and rugid *(sic)* areas." Complainant insists it is not a road vehicle and that it was error for the carrier to have applied its tariff provision Item 965 for "Road Vehicles with Special Mechanical or special equipment or Devices NOS up to and including 8960 lbs." Complainant insists that provision is for special purpose vehicles for the road such as ambulances, armored cars, crash trucks, hearses, mobile health clinics, police patrol wagons, radar trucks, and the like, that are vehicles for regular everyday use on the roads and highways.

The respondent contends the Item 965 classification is not restricted to the listings as given by the complainant, but applies to any vehicle that is specially equipped, unless classified elsewhere in the tariff. Respondent says ambulances and hearses are cases in point, being listed under Item 75m, p. 18 of the tariff. Further, the respondent argues Item 965, Road Vehicles, is not intended to be restricted to vehicles used 10% or 100% of the time on primary or secondary roads and therefore covers any vehicle moved over a primary or secondary road. Also says respondent the rate the complainant requests under Item 575 specifically exempts trucks from the machinery rate as this cargo is firstly a truck with special equipment. In addition the respondent argues that the complainant at page 5 of the complaint confirms the machine is "truck mounted" and that attachment 5 to the complaint shows both the mud pump and the air compressor of the drilling machine are powered from the truck engine and apparently cannot be operated without power being received from the truck.

Attachment No. 3 to the complaint, Classification of Exports, Schedule B718.4262 Well-drilling machines, n.e.c., directs that for truck-mounted drilling machines, see 7320330. The latter, in Attachment No. 4, refers to non-military trucks, with derrick assembly, winches and similar equipment, for drilling, and respondent says this was used.

Complainant contends the documentary evidence determines clearly that the well-drilling machine with the complete Drill Rig was a truck-mounted drilling machine comprising the consist of subject shipment, with water-well drilling machine components in 3 crates for the truck-mounted Drill Rig for a two-year period of operation.

Attachment No. 6 to the complaint, the invoice, shows the Drill costing $33,511, F.O.B. Orrville, Ohio, and the Ford Model LT9000 truck, $37,500.

*The drill price with accessories was $71,760. The price of the truck and* accessories was $66,091.91.

FINDINGS AND CONCLUSIONS

Upon consideration of all the aforesaid, the Presiding Administrative Law Judge *finds* and *concludes*, in addition to the findings and conclusions hereinbefore stated:

(1) That this action accrued when the freight charge was paid in July, 1975. Complaint was filed and served in April, 1977, and was timely having been filed within two years of the time the right to action accrued.

(2) That this truck mounted 36 duo drill was properly rated under the respondent's tariff.

(3) That the respondent inadvertently failed to charge for the extra length of the freight as provided in its tariff, a sum of $508.75, but reparation is not permissible against a shipper, nor is this a situation of a single bill of lading where overcharge and undercharge are permissible set offs, because

(4) Reparation should be denied.

(5) The carrier should proceed to collect the undercharge referred to in (3) above and keep the Commission advised of the efforts and results.

(6) The complaint should be dismissed and the proceeding discontinued.

*Wherefore, it is ordered,*

(A) Reparation is denied.

(B) The carrier shall proceed to collect from the shipper the undercharge occasioned by carrier's inadvertence in not charging as per tariff requirement for extra length of freight. Carrier shall keep the Commission informed of the carrier's efforts and results in collecting undercharge.

(C) The complaint be and hereby is dismissed.

(D) The proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

WASHINGTON, D.C.
*July 22, 1977*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 75–22

ROBINSON LUMBER COMPANY, INC.

*v.*

DELTA STEAMSHIP LINES

## NOTICE OF DETERMINATION NOT TO REVIEW

*August 28, 1978*

Notice is given that the Commission on August 24, 1978 determined not to review the order of discontinuance in this proceeding served July 31, 1978.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

*July 31, 1978*

No. 75–22

ROBINSON LUMBER COMPANY, INC.

*v.*

DELTA STEAMSHIP LINES, INC.

## SETTLEMENT APPROVED; COMPLAINT DISMISSED WITH PREJUDICE; AND PROCEEDING DISCONTINUED

*Finalized on August 28, 1978*

At the opening of the hearing, the parties announced that they had agreed upon terms of settlement of their dispute and, in substance, requested dismissal of the complaint, with prejudice, and discontinuance of the proceeding upon approval of the settlement by the Commission.

In my judgment, the settlement should be approved, the complaint should be dismissed, with prejudice, and the proceeding should be discontinued.

### BACKGROUND

The complaint alleged violations of sections 15, 16, 17, and 18 of the Shipping Act, 1916, 46 U.S.C. 814, 815, 816 and 817, arising from the carriage of numerous shipments of particular varieties of lumber (mahogany, guatambu and ipe tabaco) from South American (Brazil) ports to United States Gulf Coast ports between April 18, 1973, and January 31, 1974. Reparation in the amount of $23,377.55 was sought.[1]

The record does not disclose with utmost clarity all the factual details of the case or the precise nature of the alleged violations of law. Nevertheless, several documents read together, primarily the complaint, the joint statement of the parties and the further joint statement of the parties, may fairly be construed to

[1]The amount of reparation would have to be reduced by about $500.00 inasmuch as reparation for some of the shipments was time barred under the two year jurisdictional requirement of section 22 of the Shipping Act, 1916, 46 U.S.C. 821. This is so because the complaint was not filed within two years after the cause of action accrued, i.e.—the charges for some shipments were *paid* more than two years before the complaint was filed. See *U.S. ex rel Louisville Cement Company v. I.C.C.*, 246 U.S. 638, 644 (1918). Cf. *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 611 (1959), and *United States of America v. Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971).

mean[2] that complainant's principal claim alleges facts and circumstances similar to those found to have constituted a violation of section 16 First of the Shipping Act, 1916, 46 U.S.C. 815 First, in *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16 (1970).

Briefly, the facts in *Valley Evaporating* were that the conference, in an effort to eliminate "paper rates" on nonmoving commodities, published a new tariff which did not include dried fruit as a specific commodity in the new tariff although it had moved in volume for some time. Because the complainant was not a subscriber to the conference tariff it did not receive notice of the proposed rate change.

In the instant matter, the conference[3] undertook a survey of lumber categories, to determine which commodities were moving in the trade, to simplify the tariff and to eliminate "paper rates." Like the shipper in *Valley Evaporating,* the complainant, here, was not a subscriber to the tariff and did not receive notice of the rate changes based on the conference's survey. Whether or not the rates on mahogany, ipe tabaco and guatambu were included in the changes because of "oversight" is not clear, but it is evident that those three varieties have moved in quantity since 1973.[4]

After complainant instituted this proceeding, the respondent filed a lawsuit against complainant in the United States District Court for the Eastern District of Louisiana[5] alleging damages of $100,000 arising from the same shipments which formed the basis for this proceeding.[6]

In addition, the respondent has another outstanding claim against complainant arising from a lumber shipment which it carried in September, 1975, in the amount of $1,928.73.

## The Settlement

The respondent has, in effect, agreed to pay complainant the sum of $2,000 to resolve all the outstanding claims of both parties.[7] If approved by this agency, the parties have agreed to seek dismissal of both this complaint and the court action, with prejudice.[8]

If not approved, of course, the compromise is without prejudice to the parties. The compromise is "solely for the purpose of effecting a satisfaction of all . . . claims to avoid further costs and expenses of litigation and the prolongation of the controversies. . . . "[9]

[2] "It is the duty of the Commission to look to the substance of the complaint rather than its form and it is not limited in its action by the strict rules of pleading and practice which govern courts of law." *Stockton Port District v. Pacific Westbound Conference*, 9 F.M.C. 12, 33 (1965); *City of Portland v. Pacific Westbound Conference*, 5 F.M.B. 118, 129 (1956).

[3] The respondent is a member of the Inter-American Freight Conference which had on file, at the times relevant to the complaint, Tariff No. 1 (FMC #3) for Section C covering Trade from Brazilian ports to United States Atlantic and Gulf ports.

[4] During the period to which the complaint relates, freight was charged by the respondent and paid by complainant in the amount of $148,314.08.

[5] Civil Action No. 76–677.

[6] It was alleged that the plaintiff was injured because it undercharged the defendant due to misstatements in measurements.

[7] The financial details require respondent to pay $3,928.73 to complainant and simultaneously therewith, complainant is to pay $1,928.73 to respondent.

[8] Whatever inequities resulted from the tariff changes designed to eliminate "paper rates" were subsequently removed by publication of remedial tariff provisions satisfactory to complainant.

[9] Exhibit 1, p. 2.

## Discussion

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 in a case arising under provisions of the Shipping Act, 1916, other than section 18(b)(3). *Com-Co Paper Stock Corporation v. Pacific Coast-Australasian Tariff Bureau*, 18 SRR 619 (1978) (The Commission determined not to review on July 27, 1978). However, as implied earlier, although the complaint alleged a violation of section 18(b)(3),[10] it is manifest that the principal claim alleged a violation of section 16 First. Thus, the instant money settlement, despite the absence of a determination of violation, may be approved if the terms of settlement are meritorious. *Id.*

The record discloses that the terms of settlement warrant approval. The overall agreement was effected through negotiations by counsel. It was based on a weighing of several disputes, including claims for unliquidated amounts which claims are not within the jurisdiction of the Commission, and counsel's assessment of the prospects of winning or losing coupled with the expense of litigating the several cases.

There is no likelihood of discrimination against other shippers who did not institute proceedings against respondent or other members of the conference, for the obvious reason that those other shippers sat on whatever rights they may have had and for the additional reason that most, if not all, of the moneys will go toward the costs of litigation already incurred by the complainant.[11]

I am satisified that the settlement will not result in rebates or other violations of the Shipping Act; that the settlement agreement reflects pragmatic judgments by managements of both parties; and that the settlement agreement warrants approval as an appropriate compromise of differences. "The law, of course, encourages settlements and every presumption is indulged in which favors their fairness, correctness and validity generally." *Merck Sharp and Dohme v. Atlantic Lines*, 17 F.M.C. 244, 247 (1973).

Therefore, it is ordered that the settlement agreement be approved.

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

(S) SEYMOUR GLANZER
*Administrative Law Judge*

*July 31, 1978*

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[10] Although the complainant did not specify section 18(b)(3), it invoked section 18 and alleged overcharges. Thus, it may be concluded that section 18(b)(3) was intended. See n. 2, *supra*.

[11] The proceeding was hotly contested prior to the scheduled hearing. Numerous pleadings, including a complex motion for summary judgment were filed, replied to and ruled upon.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 77-58

TRAILER MARINE TRANSPORT CORPORATION (TMT)—PROPOSED REVISED AND REDUCED TRAILERLOAD RATES ON SYNTHETIC YARN FROM PORTS IN PUERTO RICO TO UNITED STATES ATLANTIC PORTS

## NOTICE OF DETERMINATION NOT TO REVIEW

*August 28, 1978*

Notice is given that the Commission on August 24, 1978,determined not to review the order of discontinuance in this proceeding served July 31, 1978.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

*July 31, 1978*

No. 77–58

TRAILER MARINE TRANSPORT CORPORATION (TMT)—PROPOSED REVISED AND REDUCED TRAILERLOAD RATES ON SYNTHETIC YARN FROM PORTS IN PUERTO RICO TO UNITED STATES ATLANTIC PORTS

## DISCONTINUANCE OF PROCEEDING

*Finalized on August 28, 1978*

All parties are in agreement that this proceeding should be discontinued. Certain facts have been stipulated and received as late-filed exhibits in this proceeding. (Separate ruling this date.)

The Commission's order of investigation served December 8, 1977, stated that three questions were left unanswered by the protests to TMT's proposed rates and the replies to these protests.

One question was whether TMT's rates on synthetic yarn from Puerto Rico to Jacksonville, Florida, would unduly divert cargo from the port of Charleston, South Carolina. During a longshoremen's strike in 1977 which shut down PRMSA, TMT continued to operate because it employed teamster labor. TMT carried 73 containers of synthetic yarn during the strike. Since the strike TMT carried only nine containers of yarn. Most of the yarn has been routed via PRMSA and to the Port of Charleston since the end of the strike. PRMSA has filed rate revisions which would eliminate any rate advantage which TMT might have had in the past. There is little or no likelihood that TMT rates will unlawfully divert cargoes of yarn from Charleston in the future. PRMSA withdrew from this proceeding, and the South Carolina State Ports Authority, while challenging the diversion of nine containers of yarn, states that this is an insignificant diversion and agrees that further diversion is now unlikely.

A second question which the Commission sought to be resolved was whether TMT's rates are discriminatory and burdensome to local traffic. TMT carries far more loaded containers southbound to Puerto Rico than it carries northbound. TMT's northbound proportional rates in issue herein apparently recover the incremental costs of carriage of the trailers and make some contribution to overall revenue, thereby reducing the expense of repositioning containers (which moved southbound) which expense must be borne by other cargoes including northbound local cargo. Since the TMT northbound proportional rates on yarn exceed the incremental costs of carriage, they do not burden local cargo.

A third question which the Commission sought to be resolved was what are the applicable inland motor carrier rates from Jacksonville and from Charleston to four destinations in North Carolina and South Carolina. Answers are found in late-filed exhibit nos. 5-M and 5-N.

Inasmuch as all of the issues herein have been resolved, and since all parties agree that the proceeding be discontinued, there appears no good cause for continuing this matter. The subject proceeding hereby is discontinued.

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

*July 31, 1978*

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 576

PERRY H. KOPLICK AND SONS, INC.

*v.*

SEA-LAND SERVICE, INC.

## NOTICE OF ADOPTION OF INITIAL DECISION

*August 28, 1978*

No exceptions were filed to the initial decision in this proceeding served July 26, 1978. Notice is given that the initial decision was adopted by the Commission on August 24, 1978.

It is ordered that applicant shall waive collection of freight charges, publish a tariff notice (and provide a copy for the record) and give notice to the Commission of compliance, in the time and manner required by the initial decision.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 576

PERRY H. KOPLICK AND SONS, INC.

*v.*

SEA-LAND SERVICE, INC.

*Adopted August 28, 1978*

Waiver of collection of a portion of freight charges in the aggregate amount of $16,533.90 on two shipments of wastepaper granted.

Carrier found through inadvertence to have failed to file lower rate applicable to two shipments of wastepaper.

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

This proceeding was commenced by an application filed by Sea-Land Service, Inc. (Sea-Land), pursuant to section 18(b) (3) of the Shipping Act, 1916 (Act), 46 U.S.C. 817(b) (3), as amended by P.L. 90–298, and pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

In its application, received June 2, 1978, Sea-Land requests permission to waive collection of a portion of freight charges for the benefit of the shipper, Perry H. Koplick and Sons, Inc., the nominal complainant in this proceeding, incurred on two shipments[2] of wastepaper from New Orleans, Louisiana, to Leghorn, Italy.

On shipment No. 1, December 12, 1977, freight bill numbers 031–733553 and 031–736187, the charges assessed total $13,059.95, of which $7,657.25 has been paid and of which $5,402.70 is requested to be waived.

On shipment No. 2, December 19, 1977, freight bill 031–734117, the charges assessed are $15,505.99, of which $4,374.79 has been paid and of which $11,131.20 is requested to be waived.

The payments, totalling $12,032.04 were paid on February 24, 1978, on behalf of the shipper by Francesco Parisi, Inc., freight forwarder.[3]

The tariff involved in this application is Sea-Land Tariff 233, FMC–105, Item 5860, 7th Revised Page 111.

[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] The shipments on December 12 and 19, 1977, were 172 days and 165 days respectively prior to the filing of the application and thus within 180 days from the "date of shipment" as required by law.

[3] Per check No. 21346, a copy of which, with endorsement on reverse thereof, was requested by the Administrative Law Judge and transmitted under separate cover on July 11, 1978.

*The rate applicable for wastepaper at the time of shipments was $104.50W*—measuring up to and including 80 cubic feet per ton.[4]

On November 1, 1977, a special rate on wastepaper of $50.00/W minimum 20 WT per container was deleted from Sea-Land Tariff No. 233, FMC-105, 5th Revised page 111.[5]

During the period November 1 and November 7, 1977, discussion between H. Thomas, Jr., of Sea-Land and J. Pryne of Koplick (shipper), together with F. Spielman of Parisi (freight forwarder) revealed that if Sea-Land would approve a rate of $60.00 per long ton with a minimum of 18 tons per trailer a considerable amount of wastepaper could be moved. The shipper indicated that at the then current rate of $90.00 the rate was too high to move any cargo. Sea-Land thereupon agreed to file a $60.00 rate effective November 14, 1977.[6]

However, because of layoff of clerical personnel during the longshoremen's strike, it was the intent to keep the actual publication pending till the end of the strike, but unfortunately in the mass of paperwork accumulated during the strike the request was mislaid and rate of $60.00W was inadvertently not filed until January 10, 1978.[7] Consequently, when shipper on December 12, 1977, offered Sea-Land a shipment of wastepaper, Sea-Land had no alternative but to charge $104.50/W in accordance with the measurement scale on 6th Revised Page 111.

On the basis of the foregoing Sea-Land has requested that it be granted permission to waive a portion of the ocean charges to conform to the intention to file a $60.00 rate to be effective November 14, 1977, prior to the shipments in December, 1977, but because of error due to inadvertence was not filed until January 10, 1978.

Sea-Land avers that it does not believe that any discrimination among shippers will result from a waiver of the amount involved. Sea-Land further agrees to publication of a notice, or of such action as the Commission may direct, if permission to a waiver of freight charges is granted.

## DISCUSSION

The question to be decided in this case is simply whether the application for permission to waive a portion of freight charges and the supporting evidence establish that the type of error contemplated by P.L. 90-298 occurred and that the application meets all other requirements in that law regarding the time of filing the application and corrective tariff and the assurance that no discrimination among shippers will result if the application is granted. All of these requirements appear to have been met.

P.L. 90-298, which amended section 18(b)(3) of the Act, was designed to remedy inequities and financial harm visited upon shippers which resulted from inadvertent errors in tariff-filing by carriers. Thus, when a carrier intended to apply a lower rate on a particular shipment but failed to file an appropriate tariff conforming to the carrier's intention and usually the shipper's understanding,

[4] Sea-Land Tariff 233-FMC No. 105, Item 5860, 6th Revised page 111. See attachment No. 4 to application.

[5] See attachment No. 1 to application.

[6] See Sea-Land inter-office correspondence, dated November 7, 1977—attachment No. 2 to application.

[7] See TWX filing—102019—attachment No. 3 to application.

prior to the enactment of P.L. 90–298, the carrier was bound to charge the higher, unintended rate even if the shipper had relied upon the carrier's representations that a lower rate would be charged and that an appropriate tariff would be filed.

This inequitable result was unavoidable because of the governing principles of law requiring strict adherence to tariffs effective at the time of shipment regardless of equities. *See Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *United States v. Columbia S.S. Company*, 17 F.M.C. 8, 19–20 (1973).

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

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rate.[8]

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

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.[9]

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

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further*, That the . . . carrier . . . has, prior to applying for authority, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further*, . . . That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

In the application herein Sea-Land failed to file the specific commodity rate of $60 through inadvertence. It is clear that it was Sea-Land's intention to apply the $60 prior to the shipments involved. Such intention is a necessary element to establish that there was an error in a tariff due to an inadvertence in failing to file a new tariff, as the legislative history to P.L. 90–298 demonstrates.[10] See also *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191, 1193 (1977), in which case the Commission stated:

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

I therefore find that there was an error in Sea-Land's tariff due to an inadvertence in failing to file a new tariff.[11]

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[8] House Report No. 920, 9th Cong. 1st Sess., November 14, 1967 [to accompany H.R. 9473], pp. 3, 4.

[9] Senate Report No. 1078, 9th Cong. 2d Sess., April 5, 1968 [to accompany H.R. 9473], p. 1.

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

[11] The new tariff has been filed prior to application for waiver, in conformity with statutory requirement.

The application sets forth that Sea-Land does not believe that any discrimination among shippers will result from a waiver of the amount involved. No evidence has been presented to indicate that other shippers of wastepaper shipped via Sea-Land during the period November 14, 1977, and the effective date as actually subsequently filed. Even if other shippers might have been involved, however, the possibility of discrimination will be eliminated by the publication of a notice in Sea-Land's tariff, as ordered below, which will mean that any other shipments of the commodity in question will be entitled to the same rate. Therefore, permission to waive a portion of the freight charges in this case will not result in discrimination among shippers.

With respect to the requirement that the carrier file a new tariff prior to filing its application for permission to refund or waive, I find that this requirement has been met inasmuch as the new tariff was filed, effective January 10, 1978, whereas the application was filed (received by the Commission's Secretary) on June 2, 1978.

## Conclusions and Order

Sea-Land failed to file a tariff conforming to its intentions to charge complainant a $60 rate through inadvertence, a type of error which is contemplated by P.L. 90-298.

Sea-Land has met the other statutory requirements regarding the filing of its application within the 180-day period prescribed by law and the filing of its corrective tariff prior to the filing of its application.

No discrimination among shippers will result if the application is granted since there do not appear to be any other shipments of the commodity in question which were similarly affected by Sea-Land's inadvertence and the tariff notice to be published, as ordered below, will insure that even if such shipments did in fact occur, they will be treated similarly.

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

1. Sea-Land is authorized to waive collection of freight in the aggregate amount of $16,533.90 in connection with two shipments of wastepaper on December 12 and 19, 1977, for the benefit of the shipper Perry H. Koplick and Sons, Inc.

2. Sea-Land shall publish promptly in an appropriate place in its tariff the following notice:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 576 that the rates and charges for Item 5860, Sea-Land Tariff No. 233, FMC-105, as shown on seventh revised page 111, shall be deemed to be applicable during the period November 14, 1977 and January 9, 1978, inclusive, subject to all applicable rules, regulations, terms and conditions in this tariff, for purposes of refund or waiver of freight on any shipments which may have been shipped during this period of time.

In addition to publishing the foregoing tariff notice, Sea-Land shall send a copy of such tariff notice to each and every shipper of wastepaper, if any, who during the period November 14, 1977-January 9, 1978, shipped commodity Item 5860 pursuant to Tariff No. 233, FMC-105, 6th revised page 111.

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

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

WASHINGTON, D.C.
*July 26, 1978*

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 578

INTERNATIONAL HARVESTER COMPANY

*v.*

ATLANTIC CONTAINER LINE

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

*August 29, 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 24, 1978.

It is Ordered, That applicant is authorized to refund $6,380.00 of the charges previously assessed International Harvester 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. 578 that effective March 23, 1978, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period March 23, 1978 through April 4, 1978, the rate on 'Model 241 Hay Baler' is $685 L.S., subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further Ordered, That refund of the charges shall be effectuated within thirty (30) days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the refund and submit a copy of the published tariff notice.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 578

INTERNATIONAL HARVESTER COMPANY

*v.*

ATLANTIC CONTAINER LINE

*Adopted August 29, 1978*

Application to make refund granted.

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

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), the Atlantic Container Line (ACL or Applicant) has applied for permission to refund a portion of the freight charges on a shipment of forty-four hay balers, which were moved from Portsmouth, Virginia, to Liverpool, England, under ACL bill of lading dated March 25, 1978. The application was filed June 16, 1978.

The subject shipment moved under North Atlantic United Kingdom Freight Conference (NAFC) Tariff No. 48, FMC–3 (ACL Open Rate Section), 4th revised page 323, effective February 1, 1978, under the rate for agricultural implements (by cubic range). The aggregate weight of the shipment was 151,419 pounds and total measurements were 22,924 cubic feet. The rate applicable at time of shipment was $830 each. The rate sought to be applied is $685 each, per prior written agreement between the parties and the late-filed tariff, NAFC Tariff No. 48, FMC–3 (ACL Open Rate Section), 13th revised page 321, effective April 5, 1978.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $36,520. Aggregate freight charges at the rate sought to be applied amount to $30,140. The difference sought to be refunded is $6,380. The Applicant is not aware of any other shipment of the same commodity which moved via ACL during the same time period at the rates involved in this shipment.

Atlantic Container Line offers the following as grounds for granting the application:

[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.

On December 16, 1977, ACL quoted $685.00 Each for 50 Model 241 Hay Balers to be shipped by International Harvester Company from Portsmouth, Va. to Liverpool, England. On March 23, 1978, ACL issued Bill of Lading No. C-62014 on the Atlantic Conveyor Voyage No. 219 for 44 Model 241 Hay Balers rated at $830.00 Each.

It was brought to our attention that we had failed to file the quoted rate of $685.00 Each in the tariff and were therefore required to charge the rate on file at the time of shipment of $830.00 Each.

Effective April 5, 1978, ACL filed the quoted rate of $685.00 Each in the tariff. We hereby request permission to refund $6380.00 to International Harvester Company, Chicago, Illinois as overpaid freight due to the fact that 44 Model 241 Hay Balers were shipped twelve days before ACL filed the rate that was quoted for the movement of this cargo.

It should be noted that the letter from ACL to International Harvester (December 16, 1977) which confirms the special rate for "Model 241 Big Row balers" also refers to an understanding that *fifty* balers will be shipped and on *one* vessel; however, the agreement does *not* make the special rate contingent upon "at least fifty" balers being shipped, nor does the filed tariff specify any minimum number for the shipper to qualify for the special rate. The carrier points out in a supplemental affidavit[3] that their policy is *not* to make their special rates dependent upon any minimum quantities[4] to be shipped, as this might tend to discriminate against the small shippers. Indeed, a close examination of other tariffs in this carrier's Open Rate Section discloses that minimum quantities are never specified. Coincidentally, the carrier points out that if the number "50" were somehow regarded by the Commission to be essential to this shipper qualifying for the special rate, another six units of this same commodity ("Model 241 Big Row balers") were shipped on April 14, 1978 (ACL voyage #223, vessel: *Atlantic Causeway,* bill of lading #C-62007, supplemental exhibit). This latter shipment was not referred to in the original application because the corrective tariff had, by then, already been filed and, accordingly, that later shipment was correctly billed at the agreed and intended special rate. However, the carrier maintains that the "understanding" in the letter of December 16th referring to 50 balers and one ship was merely that—a general understanding between the parties of approximately how many units would probably be involved and that they would probably be shipped on one vessel, but that neither the number "50" nor the "one vessel" were essential prerequisites for the special rate agreement. Since the shipper was not able to arrange for all fifty balers to arrive at dockside in time to go on one vessel, they left on two vessels (44 on the *Atlantic Conveyor* on March 23; 6 on the *Atlantic Causeway* on April 14). Thus, all fifty balers were shipped within the same 30-day period, which also seems to be part of the understanding in the December 16 letter.

After due consideration of the application, the supplementary documentation submitted and a review of the carrier's existing tariff structure, I conclude that the parties did not intend to establish a minimum number requirement for the special rate, nor was it deemed essential that all units be shipped on one vessel.

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

[3] Now marked "Item E" to conform to the four earlier exhibits marked Items "A" through "D."

[4] This should be clearly distinguished from the repeated references in the tariffs to unit weights and cubic measurements, and also should be distinguished from those commodity items that are customarily shipped in another container or on a flatbed trailer, in which latter case minimums may be specified of the number of units *per container* or on *each flatbed* (e.g., Reels, empty, min. 3 per flatbed; or boats, 2 or more disassembled, with cradle). Note that in these cases no minimum *shipment* is required to qualify for the listed rates.

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.[5]

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

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

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the special rate for shipments of the Model 241 Big Row hay baler, as had been promised the shipper.

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

3. Prior to applying for permission to refund a portion of the freight charges, ACL filed a new tariff which set forth the rate on which such refund would be based.

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

Accordingly, permission is granted to the Atlantic Container Line to refund a portion of the freight charges to the International Harvester Company, specifically, the amount of $6,380. An appropriate notice will be published in ACL's Open Rate Section of the North Atlantic United Kingdom Freight Conference Tariff.

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

WASHINGTON, D.C.
*July 31, 1978*

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

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 531(F)
L. BRAVERMAN & COMPANY

*v.*

LYKES BROS. STEAMSHIP COMPANY

## NOTICE

*September 12, 1978*

Notice is given that the time within which the Commission could determine to review the initial decision in this proceeding has expired with no such determination being made. Accordingly, review will not be undertaken.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

## INFORMAL DOCKET NO. 531(F)
## L. BRAVERMAN & CO.

*v.*

## LYKES BROS. STEAMSHIP CO., INC.

*Finalized September 12, 1978*

Request for Commission Order compelling carrier to pay brokerage denied.

Complaint by freight forwarder alleging violation by carrier of §44(e)) of the Shipping Act, 1916, and General Order 4, for refusal of carrier to pay brokerage to forwarder, after carrier already paid brokerage to ocean freight broker, held to not constitute a cause of action for reparation.

Carrier is prohibited by statute (§44(e)) and Commission's Regulations (46 CFR 510.24(h)) from paying a freight forwarder any compensation on the same cargo whereon the carrier has already paid brokerage to an ocean freight broker, or where the carrier has incurred an obligation to pay brokerage to said broker.

*David W. Gray,* Executive Vice President of L. Braverman & Co., for complainant L. Braverman & Co.

*Edward S. Bagley, Esq.,* of Terriberry, Carroll, Yancey & Farrell, for respondent Lykes Bros. Steamship Co., Inc.

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

This proceeding initially started as a formal complaint proceeding (Docket No. 77-62), was later referred to a Settlement Officer for adjudication under the informal procedures of Subpart S[2] of the Commission's Rules of Practice (46 CFR 502.301 *et seq.*) at the request of the complainant, and still later was transformed into a Subpart T[3] proceeding (46 CFR 502.311 *et seq.*) at the request of the respondent.

By complaint dated December 9, 1977, the complainant, L. Braverman & Co. (Braverman), a licensed independent ocean freight forwarder, charges that the respondent, Lykes Bros. Steamship Co., Inc. (Lykes), a common carrier by water in foreign commerce, engaged in transportation between the ports of Houston, Texas, and Rotterdam, Netherlands, violated section 44(e)[4] of the Shipping Act, 1916, and the Commission's General Order 4,[5] by failing and

[1] Pursuant to the Commission's Rules of Practice, Subpart T–Formal Procedure for Adjudication of Small Claims, this decision will become the decision of the Commission unless, within 22 days from the date of service, either party requests review thereof, or unless, within 45 days, the Commission exercises its discretionary right to review See 46 CFR 502.318, as recently amended

[2] Subpart S–Informal Procedure for Adjudication of Small Claims, 46 CFR 502 301–304

[3] Subpart T–Formal Procedure for Adjudication of Small Claims, 46 CFR 502.311–321.

[4] Section 44(e), 46 U S.C. 841b, 75 Stat. 522.

[5] General Order 4 (Rev.), 33 Fed. Reg. 12654, September 6, 1968, 46 CFR Part 510, §510 1 *et seq.*

refusing to pay brokerage to the complainant on a particular shipment of black beans that moved from Houston to Rotterdam under Lykes bill of lading dated July 27, 1976. (More precisely, Lykes at first paid the disputed brokerage to Braverman, then later debited Braverman's account for that amount, withholding other brokerage payments until the amount of the "mistaken" brokerage payment was made up.) Braverman alleges that this constitutes a violation of the Shipping Act and General Order 4, entitling it to reparation in the form of reimbursement for the lost brokerage ($543.75), costs of time spent "researching the claim" ($150), and the cost of the "accounting time spent adjusting 25 brokerage bills" ($78.05). The complainant, Braverman, requests the Commission to order the respondent carrier, Lykes, to pay the total reparation amount of $771.80, "or such other sum as the Board may determine to be proper as an award of reparation."

The Answer of the respondent denies the violation allegations in the complaint, and further states that space for the cargo in question was booked by the Bresnan Shipping Co., Inc. (Bresnan), as ocean freight brokers; that brokerage was paid to Bresnan therefor; that Bresnan's authority to book the space was confirmed in writing with the shipper; and that having paid Bresnan the brokerage or incurred an obligation to pay Bresnan, the respondent carrier was not only justified in not paying brokerage (again) to Braverman but, in fact, the carrier was precluded from doing so by its tariffs,[6] the Commission's General Order 4, and section 44 of the Shipping Act, 1916.

Both the Complaint and Answer have attached thereto copies of several documents relating to the disputed transaction. There are also many other documents that were submitted later at the request of the earlier-assigned FMC Settlement Officer and the present presiding Administrative Law Judge (ALJ).

For the convenience of the parties, pertinent portions of the applicable statute (§44(e), 46 U.S.C. 841b)[7] and the Commission's Regulations (46 CFR 510.21, 510.24)[8] are set forth in footnotes below:

[6] Gulf European Freight Association (GEFA) Tariff item 24, para 2, FMC-2

[7] 46 U.S.C. 841b, 75 Stat 522, Shipping Act, 1916, 44(e). A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others when, and only when, such person is licensed hereunder and has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, and at least two of the following services

(1) The coordination of the movement of the cargo to shipside;

(2) The preparation and processing of the ocean bill of lading,

(3) The preparation and processing of dock receipts or delivery orders,

(4) The preparation and processing of consular documents or export declarations;

(5) The payment of the ocean freight charges on such shipments:

*Provided, however*, That where a common carrier by water has paid, or has incurred an obligation to pay, either to an ocean freight broker or freight forwarder, separate compensation for the solicitation or securing of cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, then such carrier shall not be obligated to pay additional compensation for any other forwarding services rendered on the same cargo. Before any such compensation is paid to or received by any person carrying on the business of forwarding, such person shall, if he is qualified under the provisions of this paragraph to receive such compensation, certify in writing to the common carrier by water by which the shipment was dispatched that he is licensed by the Federal Maritime Commission as an independent ocean freight forwarder and that he performed the above specified services with respect to such shipment. Such carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect

[8] 46 CFR §510.21—Definitions

(a) The term "licensee" means any person licensed by the Commission as an independent ocean freight forwarder, or any independent ocean freight forwarder who, on September 19, 1961, was carrying on the business of freight forwarding under a valid registration number issued by the Commission, or its predecessors, who filed an application for such a license (Form FMC-18) on or before January 17, 1962, and whose application has not been denied.

## DISCUSSION

At the outset, I can find no justification in the law or the Commission's Regulations for the award, in an FMC reparation case, of such consequential damages as the last two items recited in the "damages" portion of the complaint (i.e., cost of research time and cost of accounting time), even assuming that this complaint otherwise spelled out a valid, meritorious reparation claim.

This proceeding, in essence, boils down to a dispute over whether an "independent ocean freight forwarder" or an "ocean freight broker" is entitled to the brokerage commission arising from the "solicitation and securing of (a) cargo (of beans) for the ship or the booking of, or otherwise arranging for space for, such cargo."[9] The complainant, a freight forwarder, insists that he should have been paid the brokerage while the respondent ocean carrier argues that an "ocean freight broker" performed the brokering service, billed the carrier for the brokerage fee, and the carrier properly paid said fee to the broker. The carrier also points to the statute and Commission Regulation that prohibit the carrier from (again) paying the brokerage to a forwarder once the carrier has paid such a fee to an ocean freight broker or become obligated to do so.[10]

There is a difference between freight forwarding services rendered to a shipper and ocean freight broker service rendered for a carrier. Freight forwarding services include a long list of paperwork and document preparation, transportation arrangements, arranging for warehouse storage, dealing with Customs, insurance companies and banks relative to a particular cargo, and *can* include the booking of cargo space. (See 46 CFR 510.2(a) & (c) for definitions of "independent ocean freight forwarder" and "freight forwarding service.") The term

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* * *

(e) The term "principal" means the shipper, consignee, seller, purchaser who employs the services of a licensee

(f) The term "ocean freight broker" means any person who is engaged by a carrier to sell or offer for sale transportation, and who holds himself out by solicitation or advertisement as one who negotiates between shipper and carrier for the purchase, sale, conditions and terms of transportation

(g) The term "freight forwarding fee" means payment by a shipper, consignee, seller purchaser, or any agent thereof, to a licensee for the performance of a freight forwarding service as defined in §510 2(c)

(h) The term "compensation" means payment by an oceangoing common carrier for the performance of services as specified in §510 24(e)

(i) The term "brokerage" means payment by a common carrier by water to an ocean freight broker for the performance of functions specified in paragraph (f) of this section

* * *

46 CFR §510 24:

(d) No oceangoing common carrier shall compensate a licensee when such carrier has reason to believe that receipt of such compensation by the licensee is prohibited by these rules, or by the Act.

(e) Before any compensation is paid by an oceangoing common carrier to a licensee, or before a licensee may accept any such compensation, the licensee shall incorporate the certification set forth below on one copy of the ocean bill of lading, parcel receipt, or forwarder's invoice covering such shipment and endorse the certification Where certification is made on a copy of a bill of lading such copy shall be referred to as the "Line Copy" and shall be retained in the possession of the carrier The oceangoing carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect. The form of certification follows

* * *

(f) An oceangoing common carrier may compensate a licensee to the extent of the value rendered such carrier in connection with any shipment forwarded on behalf of others when, and only when, such carrier is in possession of a certification in the form prescribed in paragraph (e) of this section Every tariff filed pursuant to section 18(b)(1), Shipping Act, 1916, shall specify the rate or rates of compensation to be paid licensed forwarders certifying in accordance with paragraph (e) of this section and the conditions of payment

* * *

(h) Where an oceangoing common carrier has paid, or has incurred an obligation to pay brokerage to an ocean freight broker, or compensation to a licensee, then such carrier shall not pay additional compensation for any other forwarding services rendered on the same cargo

[9] See Shipping Act, 1916, §44(e), and 46 CFR 510.24(e).

[10] Shipping Act, 1916, §44(e), and 46 CFR 510.24(h).

"ocean freight broker" means "any person *who is engaged by a carrier* to sell or offer for sale transportation, and who holds himself out by solicitation or advertisement as one who negotiates between shipper and carrier for the purchase, sale, conditions and terms of transportation." (46 CFR 510.21(f), emphasis added.) The term "freight forwarding fee" means "*payment by a shipper,* consignee, seller, purchaser, or any agent thereof, to a licensee (forwarder) for the performance of a freight forwarding service as defined in §510.24(e)." (46 CFR 510.21(g), emphasis added.) The term "brokerage" means "payment by a common carrier by water to an ocean freight broker for the performance of functions specified in paragraph (f) of this section" (referring to 510.21). (46 CFR 510.21(i).)

It should be noted in reviewing the above definitions that *either* an ocean freight broker or an independent ocean freight forwarder (i.e., "licensee") may perform the brokering service and become entitled to the brokerage. It should also be noted that there are fees paid for both types of service, and it is possible for a freight forwarder to collect *both* fees for the same shipment, e.g., a "freight forwarding fee" *from the shipper* for freight forwarding services rendered to the shipper, and a brokerage commission *from the carrier.* However, the carrier is protected by law and Commission Regulation from being obligated to pay any such brokerage commission to a broker or freight forwarder *after* he has already paid or become obligated to pay the brokerage to some *other* broker or forwarder. Where there are dual claims to such brokerage, obviously we must look to the facts to determine which party actually performed[11] the brokering service (i.e., who was engaged by the carrier to sell or offer for sale transportation on the carrier's vessel, or who "booked the space" for the cargo).

Since the sole issue in this proceeding is the brokerage commission and *not* the fee for the freight forwarding services, the complainant had the burden of proving: (1) that complainant Braverman provided the brokerage service to the carrier entitling him to the brokerage commission from the carrier, and (2) that no prior payment or obligation to pay arose which would absolve the carrier from any further liability for brokerage pursuant to 46 CFR 510.24(h) of the Commission's Regulations and section 44(e) of the Shipping Act, 1916.

The complainant supplied copies of documents and correspondence which established that Braverman: (1) did indeed perform a myriad of freight forwarder services relating to the subject shipment, and (2) Braverman repeatedly *claimed* he was entitled to the brokerage commission and had performed the brokerage service. However, aside from *claiming* to have performed the brokerage service (including certification on the bill of lading), there were no documents indicating or supporting the actual *performance* of such brokerage service.

On the other hand, the carrier supplied documents, contemporaneous with the time cargo space was being negotiated and arranged for on the carrier's vessel, which clearly established that both the carrier and the shipper (Benson Quinn-Joseph Export Co. of Minneapolis) were aware of and dealing directly with the

[11] The answer to this question is controlling, *not* the question of who got paid the brokerage *first*

Bresnan Shipping Company of New York, as broker for the cargo space for the shipper's shipment of beans to the Netherlands.[12] In addition to those documents, the carrier later supplied, at the request of the presiding ALJ, a copy of the brokerage commission invoice sent by the Bresnan Shipping Company to the carrier (Lykes) on August 12, 1976, and marked "Approved For Payment" by Lykes on October 21, 1976.[13] Lykes voucher #CV–11–2690 and check number 75311 were used in payment of the Bresnan brokerage invoice.[14]

The confusion that generated this conflict arose when Lykes' brokerage department mistakenly *also* approved the complainant's request for brokerage, undoubtedly relying on complainant's rubber stamped certification on the bill of lading that he (Braverman) had performed all the items listed in 46 CFR 510.24(e), including the "booking of space." Another factor that might have led the complainant into believing that it had some sort of "vested interest" in the brokerage commission for this cargo was the long-standing connection this forwarder had with handling, storing and processing virtually all the papers connected with it, including acting as U.S. Customs Brokers for the Guatemalan government (the original owner of the cargo) when it first arrived in this country, and placing the cargo in and withdrawing it from a U.S. bonded warehouse after a year of storage. The complainant also made complicated and extensive efforts in transporting the shipment from the warehouse to dockside. However, all these efforts come under the heading of freight forwarder services and not freight brokerage, as defined in the Commission's Regulations.[15] A freight forwarder has no right to "automatic" collection of brokerage payments from carriers simply by virtue of having had a long-standing pre-existing connection with the cargo or having provided a long series of freight forwarder services *to the shipper* on such cargo. *Cf., N.Y. Foreign Freight Forwarders & Brokers Association v. FMC,* 337 F.2d 289, 300 (2d Cir. 1964). A licensed forwarder must have actually solicited and secured the cargo, or booked it or arranged for its space on a ship

[12] Respondent's Exhibit "A" to Answer is comprised of three documents

(1) Confirmation of Booking, dated 7-1-76, listing shipper as "Benson Quinn Company," broker: "Bresnan Shpg. Co., Inc.," signed by James J. Ham for the Bresnan Shipping Co., "as Brokers only," and by L. M. Sanders for the Lykes Steamship Co., Inc., and also starting under the description of "3 SeaBee barges black beans in bulk", "Brokerage Payable as Costomary (sic) IE 1–¼% As Per Tariff Rule 24 GEFA Tariff #2 FMC 2 Copy Attached."

(2) Letter from Bresnan Shipping Co "As Brokers Only" to L. M. Sanders of Lykes Bros. Steamship Co., Inc., dated July 2, 1976, acknowledging receipt of Lykes booking note and adding amendments to the booking note "after discussion with our Principals," again listing Benson Quinn Co. as shipper, again referring to the Seabee Barges of black beans in bulk, and again referring to the commission of 1.25%.

(3) Letter from Bresnan (A.A. Mintoo) to Lykes, dated July 19, 1976, transmitting the original of the Liner Booking Note, now duly signed on the Charterer's behalf, and seeking the (ship)owner's signature.

Exhibit "B" to Answer is a copy of July 15, 1976, letter from the shipper, Benson Quinn-Joseph Export Co. of Minneapolis, to the Bresnan Shipping Company, thanking Bresnan for the Lykes booking note "in accordance with our booking," and asking Bresnan to sign the original "in our behalf" (the shipper's behalf).

[13] Now marked "Resp. Exhibit D"

[14] Respondent's Exhibits "E" and "F," respectively.

[15] See, e.g., Report from the Committee on Merchant Marine & Fisheries, 87th Cong., 1st Sess., Rep. No. 1096, *Report on Providing for Licensing Independent Ocean Freight Forwarders,* (Comm. Print, 1961), at 3.

> Section (e) of the bill, as amended, sets out certain prescribed duties which the forwarder must perform *for the carrier* in order to be entitled to receive compensation from the carrier in the form of brokerage. In this connection "the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo," are mandatory prerequisites to the receipt of brokerage from the carrier. * * * (I)t goes back to the age-old concept of the services for which brokerage was paid, thar is, the bringing together of the cargo and the ship." (Emphasis added.)
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> * * *
>
> To summarize the feeling of the committee, we might say that services which have been performed by forwarders *for shippers* should be compensated for *by the shippers* and that where brokerage fees have been earned by the forwarders or brokers, then the carriers in turn should pay for these services at the historical rate" (Emphasis added.)

(and not merely "certified" that he did so), as well as performing at least two of the additional services itemized in section 44(e), Shipping Act, 1916, *for the carrier* before the forwarder is entitled to claim brokerage from the carrier. It is the value of the service rendered *to the carrier* that triggers the right to brokerage—not the series of forwarder services provided for the *shipper.*[16] The providing of freight forwarding services to a shipper entitles the forwarder to a fee (from the shipper) for such services, but there is no automatic "tie in" to the brokerage commission for securing cargo space on a vessel. In this case, the shipper and owner of the cargo never asked Braverman to perform that latter service; on the contrary, the shipper clearly and unambiguously arranged with Bresnan & Company to do so, only Bresnan & Company performed the ocean freight brokering service, and the documentation clearly establishes that the carrier dealt only with Bresnan on the booking of space. It is true that the complainant furnished its rubber stamp certification (for brokerage purposes) on the bill of lading reciting all the required elements of 510.24(e), which probably triggered the mistake in the carrier's busy book-keeping department (brokerage department), but the carrier is not bound to accept the bald assertion of the rubber stamp as conclusive proof on who gets the brokerage. §510.24(e) expressly states that the "carrier shall be entitled to rely on such certification *unless it knows that the certification is incorrect.*" From its course of dealing with Bresnan & Company, the carrier knew that the Braverman certification was incorrect. The forwarder cannot bootstrap its rubber stamp coupled with a book-keeping error into a valid claim for brokerage in the face of documented proof that another party actually performed the brokerage.

Beyond the foregoing discussion of the factual merits of the claim, there is an interesting legal question on whether section 44(e) can properly be used to grant the relief requested, i.e., whether the statute was ever intended to authorize the Commission to be used as a "collection agency" in compelling payment between carriers and such middle-men as forwarders and brokers. That is, if we were to assume *arguendo* that every allegation made by the complainant were true (and ignore all the contrary documentation), does the Commission have the jurisdiction to order a carrier to make payment in what is, in essence, a simple contract matter (express or implied contract) between the ocean carrier and a freight forwarder? This is not a tariff reparation dispute between a shipper and a carrier. (This case of a freight forwarder seeking a brokerage commission should be clearly distinguished from those cases wherein a *shipper* seeks reparation from a carrier for cargo misdescription, misclassification of cargo or misapplication of tariff rates.) I can discern no compelling regulatory purpose in the FMC intruding into the ordinary judicial functions and judicial remedies of the established courts of law in routine commercial contract enforcement matters,

[16] See *Hugo Zanelli d/b/a Hugo Zanelli & Co.*, 18 F.M.C. 68, 73 (1974):

As a result of its investigation, the Board revised its earlier forwarder regulations dating from 1950 and promulgated new regulations as General Order 72 Revised, which among other things, would have absolutely prohibited the payment of brokerage. * * * Faced with what the forwarding industry described as a substantial loss of revenue because of the proposed ban on brokerage, the forwarders appealed to Congress for the enactment of legislation which would permit such payments under appropriate safeguards. The ultimate result was Public Law 87-254. Instead of a total ban on brokerage as the Board has proposed, Congress decided to permit compensation from carriers, i.e., brokerage, but only where the forwarder rendered specified services of value and remained independent, i.e., free of any affiliation with a shipper, consignee, seller, purchaser of the shipment, or with any person having a beneficial interest in the goods shipped, in order to eliminate indirect rebates to shippers.

which can involve complex counter-claims and set-offs. Such traditional contract matters would appear not to require the special technical expertise of this agency to enable adjudication.

There is also some difficulty in pinning down precisely what the statutory violation is that Braverman is alleging the carrier committed, so as to give this Commission jurisdiction over the matter. Complainant's Exhibit "F"[17] attached to the Complaint states succinctly: "The point in question is whether or not brokerage on this shipment is due us. Lykes feels it is not and we contend that it is." What portion of section 44(e) does that conclusion of the carrier violate? Section 44(e) was designed to protect ocean carriers from dual claims for brokerage commission and from claims for brokerage where no brokerage service had been rendered. (See *N.Y. Foreign Frt. F. & B. Assn., supra.*) To this extent, the statute and the Regulations thereunder appear to be permissive in nature (e.g., setting forth when a carrier "*may* compensate" a freight forwarder, when a carrier *may* rely on a certificate alleging brokerage is due, and telling a carrier when he may *not* pay compensation or dual compensation), but neither the statute nor the Regulations *order* the carrier to make such payments nor specify when it *must* make payment.

## FINDINGS OF FACT AND CONCLUSION OF LAW

Assuming that this Complaint properly falls within the Commission's jurisdiction to entertain, after due consideration of the documents submitted by the parties, I make the following findings and conclusions of the factual merits of the claim:

1. There is no evidence that the complainant supplied brokerage service on the subject shipment.
2. There is evidence that the Bresnan Shipping Company of New York, an ocean freight broker, performed the brokerage service.
3. There is no evidence that the complainant was requested or authorized by the shipper to perform brokerage service, i.e., book the space on a ship for the subject shipment.
4. There is evidence that the Bresnan Shipping Company was requested and authorized by the shipper to perform the brokerage service.
5. There is evidence that the Bresnan Shipping Company was engaged by the carrier to perform the brokerage service.
6. There is evidence that the complainant was requested and authorized by the shipper to perform several freight forwarding and transportation services for the shipper, and that the complainant did perform such services for the shipper—but the forwarder (complainant) must look to the shipper for his fee for such services, and not to the carrier.
7. The complainant forwarder had no "vested interest" or other right in the subject shipment by virtue of its earlier services on the shipment performed for the shipper which would "automatically" entitle the complainant to expect the brokerage service and brokerage commission to belong to him.

[17] Complainant's Exhibit "F": Letter dated May 10, 1977, from David W. Gray, Executive Vice President of Braverman, to Charles L. Clow of the Federal Maritime Commission.

8. Based on the documents supplied to the carrier, the carrier (respondent) had the right to rely on the Bresnan Shipping Company's written representation that it alone was performing the brokerage and was entitled to the brokerage commission.

9. The carrier properly became obligated to pay the Bresnan Shipping Company of New York the brokerage fee, and did pay such fee to the Bresnan Shipping Company.

10. Once having become obligated to pay the brokerage fee to Bresnan, the carrier was not only *absolved* from any obligation to pay such fee to the complainant, the carrier was *prohibited* from making any such payment to complainant by virtue of its filed tariffs, Commission Regulations and §44(e) of the Shipping Act, 1916.

Accordingly, the Complaint is ordered DISMISSED.

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

WASHINGTON, D.C.
*August 8, 1978*

# FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

[General Order 7; Docket No. 73–64]

Part 507—Self-Policing Systems

*September 14, 1978*

ACTION: Reconsideration and Modification of Final Rules

SUMMARY: Several modifications in language and numbering were made throughout the rules in the interest of clarity and simplification. The standards applicable to requests for exemption from the independent or neutral body requirement were relaxed. Reporting requirements were simplified. The term "associate" was more clearly defined and its use restricted. A provision was added which prohibits rate-fixing agreements from preventing the release of self-policing body records to the Commission.

DATES: To become effective January 1, 1979

SUPPLEMENTAL INFORMATION:

The Commission has before it 19 Petitions for Reconsideration of its April 26, 1978, Report and Order (April Order) amending Part 528 of its Rules. General Order 7, 46 C.F.R. Part 528, 43 Fed. Reg. 181875.[1] A Reply to Petitions was filed by the Commission's Bureau of Hearing Counsel (Hearing Counsel).

[1] Petitions were filed by Sea-Land Service, Inc., and the ocean carriers comprising the membership of the following section 15 organizations:

Gulf/Mediterranean Ports Conference; Far East Conference; Pacific Westbound Conference; Atlantic and Gulf-Indonesia Conference and Atlantic and Gulf-Singapore, Malaya and Thailand Conference (jointly); seven conferences serving areas of India, Pakistan, Ceylon, Burma, East Africa, South Africa, Bangladesh, the Red Sea and the Gulf of Aden (jointly); Marseilles North Atlantic U.S.A. Freight Conference, Med-Gulf Conference, and West Coast of Italy/North Atlantic Conference (jointly); North Atlantic Mediterranean Freight Conference and Greece/U.S. Atlantic Rate Agreement (jointly); Mediterranean-North Pacific Coast Freight Conference and New Zealand Rate Agreement (jointly); U.S. Atlantic & Gulf/Australia-New Zealand Conference and Australia/Eastern U.S.A. Shipping Conference (jointly); Spanish Eastbound Freight Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement; Rate Agreement No. 8900; Pacific Coast European Conference; Japan/Korea-Atlantic & Gulf Freight Conference and Trans-Pacific Freight Conference of Japan/Korea (jointly); Agreement Nos. 7190, 192, 8190, 90, 191, 8100 and 9474 (jointly); Agreement Nos. 10107, 10108, 7190, 192, 9190, 90, 191, 5700, 5600, 8100, 9474 and 14 (jointly); and 15 North Atlantic Conferences (jointly). United States Lines, Inc., disassociated itself from several of the Petitions. The viewpoints of various conference members occasionally diverged on specific issues raised in their joint petitions.

Petitions for exemption from the requirement of establishing an independent self-policing body were received from the ocean carriers comprising the South Sea Islands Rate Agreement, Pacific Coast Rate Agreement, Pacific Coast Australasian Tariff Bureau, and Australia Pacific Coast Rate Agreement. These carriers contend that their activities meet the standards for

Part 528 of the Rules prescribes standards for self-policing by ocean carriers participating in rate fixing agreements approved under section 15 of the Shipping Act, 1916.[2] The April Rules were adopted after analysis of comments received in response to regulations proposed on October 17, 1973 (Proposed Rules).[3]

The instant Petitions urge the retraction of all or part of provisions modified by the April Order and raise the following general objections to that Order: (1) the Commission lacks authority to require an independent self-policing authority or to direct any specific type of self-policing activity; (2) some of the regulations are vague and unlikely to produce uniform or reliable results; (3) inadequate notice was given of certain features contained in the final regulations, especially the reporting requirements; (4) self-policing should also be required for carriers which do not belong to rate-fixing agreements; and (5) the rules may not be implemented until General Accounting Office review has been completed pursuant to the Federal Reports Act, 44 U.S.C. 3512(c).

The Commission stayed the effective date of Part 528 through September 15, 1978 and will not implement the finally revised version adopted today until January 1, 1979, or 30 days following the completion of General Accounting Office review, whichever is later. Nothing more is required to comply with the Federal Reports Act.

Petitioners' jurisdictional argument (1) and their claim that independent carriers should also be subject to Part 528(4) were fully considered in the April Report. In 1961 Congress concluded that carrier conferences must be adequately self-policed in order to continue receiving an exemption from the antitrust laws. P.L. 87–346, 75 Stat. 764. Independent carriers are not subject to section 15's express self-policing requirement. The conferences therefore cannot claim that the Commission's failure to place identical self-policing requirements on carriers not fixing rates in violation of the Sherman Act is an arbitrary administrative action.

Petitioners' jurisdictional objection to the imposition of minimum self-policing requirements—inconsistent as it is with their request for the replacement of general phrases like "adequate staffing" with detailed specification—fails to recognize that Part 528 does not permit the disapproval of an agreement without the notice and hearing required by law. Over ten years experience in reviewing bare bones self-policing reports has made it evident to the Commission that existing self-policing systems rely primarily upon member initiated complaints, and have failed to confront or control major incidents of rebating in both the

exemption found in section 528.4(b)(3) of the rules published on April 26, 1978 (April Rules), but alternatively request that if exemption is denied under the April Rules, that section 528.4(b)(3) be modified to whatever extent the Commission deems necessary to grant them an exemption. These petitions add nothing of substance to the instant proceeding and are being processed solely as exemption petitions.

Several Petitioners, as well as a number of other carriers not seeking reconsideration, requested a stay of the July 1, 1978, effective date of revised Part 528. On June 26, 1978 the Commission postponed the effective date until September 15, 1978, 43 Fed. Reg. 28496 (1978).

[2] 46 U.S.C. 814 states, in pertinent part, that:

"The Commission shall disapprove [a section 15 agreement], after notice and hearing, on a finding of inadequate policing of the obligations under it, or failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints."

[3] 38 Fed. Reg. 28841. The Proposed Rules were themselves a modification of earlier self-policing proposals contained in a broader section 15 rule making. Docket No. 73–5, 38 Fed. Reg. 4982. Unless otherwise indicated, references to particular section numbers are to the numbers designated in the April Rules.

Atlantic and Pacific trades.[4] Under such circumstances no evidentiary hearings or detailed factual findings are necessary to support our determination that independent self-policing bodies with broad investigatory powers and more detailed reporting responsibilities are necessary features of adequate self-policing—as a general rule. To the extent a particular factual setting may warrant a different result, the Commission has provided a procedure for exempting smaller conferences operating in relatively "clean" trades from the requirement of retaining an independent self-policing body.

Petitioners' remaining objections (2 and 3) should be met by the modifications in the April Rules being adopted today. The Commission's 1973 Notice of Proposed Rule Making informed all parties of the general scope of this proceeding. Although that notice emphasized the independent body issue and the document availability issue,[5] it also discussed the need for more thorough investigations and specific self-policing reports than had previously been required. The Commission clearly proposed that the nature and basis of each investigation conducted, the findings of each investigation, the identity (coded) of the member investigated, the exact violation found, and the exact sanction imposed be set forth in every semiannual report.[6] The April Rules merely added detail to these requirements. The majority of Petitioners' complaints concerning lack of notice also allege that certain of the reporting details added by the April Order were ambiguous or unrealistic. Upon reconsideration, the Commission has clarified and simplified the reporting requirements in accordance with Petitioners' comments whenever feasible. A section by section discussion of these comments and modifications follows.

*Section 528.1 Scope and Purpose.* The last two sentences of section 528.1 were not found in the 1973 proposal. Several Petitioners requested deletion of both sentences because they purportedly reflect an intention to disapprove section 15 agreements without the prior notice and hearing required by law and impose illogical and improper standards for judging agreements. The first concern is unfounded, but in the course of revising and shortening section 528.1, we have eliminated the penultimate sentence. The last sentence has also been relocated and modified to more accurately reflect the Commission's intention. The existence of a vigorous self-policing system which uncovers an appreciable number of violations during a reporting period does not create an evidentiary presumption that an agreement is or is not "adequately policed" within the meaning of section 15. Such circumstances are, however, reliable evidence of the nature and extent of malpractices in a trade and of the adequacy of a given self-policing system in curbing malpractice.

*Section 528.2 General Requirements.* Several commentators objected to the definition of the term "associates" found in section 528.2, and to its use in sections 528.3(a), (b) and (d) and 528.6(10) (ii), where it could be construed as

[4] Some 30 settlement agreements have been reached in FMC rebating investigations since January 1, 1977. The civil penalties incurred under these agreements exceed $5,000,000. An equal number of FMC enforcement claims seeking another $5,000,000 for alleged rebating violations is currently outstanding. Still other rebeting cases are currently being processed by the Commission's staff.

[5] The manner in which the conferences would make their self-policing records available to the Commission.

[6] See sections 528.2(b) and 528.4(a) of the Proposed Rules. The April 25, 1974 reply comments of the North Atlantic Conferences illustrates Petitioners' awareness that greater specificity in semiannual reporting was under consideration.

imposing self-policing *sanctions* upon persons not subject to a rate fixing agreement. Revisions have been made in former sections 528.3 and 528.6 to clarify the Commission's intention that only agreement *members* are subject to self-policing sanctions.

The fact remains that members may violate an agreement through a number of devices, including the use of intermediaries, and it is important that self-policing authorities be empowered to examine the activities and records of those intermediaries most likely to be employed. Accordingly, the definition of "associates" has been revised to eliminate the allegedly unnatural phrase "corporate relation," and include all agents, employees, or other persons subject to the *control* of a member, persons *controlling* a member, and persons *controlled by* persons who control a member.[7] Members must arrange for self-policing authorities to have access to and the cooperation of such "associates." Protection against the possibility that self-policing investigations might result in unrestricted invasions of the non-Shipping Act activities of corporate parents and subsidiaries has been provided by the inclusion of a limited challenge for relevancy procedure in final section 528.2(c).

*Section 528.3(c) and 528.4(c) Duty to Investigate Complaints.* Exception was taken to language in sections 528.3(c) and 528.4(c) stating that the self-policing authority must investigate all complaints received from any source. It was contended that these provisions could be read as requiring all complaints to be investigated in the same manner, no matter how "frivolous, unreliable, stale or malicious" they might be. This was not the Commission's intention. Self-policing authorities are expected to be both thorough and energetic, but need not adhere to unrealistic and nondiscretionary standards. Former sections 528.3 and 528.4 have been modified to clarify this situation and accommodate some of Petitioners' complaints.

The final regulations shall require self-policing bodies to promulgate reasonable procedures for the submission of complaints and to investigate all complaints. Self-initiated on-site investigations must also be conducted regularly (*e.g.*, annually) into the activities of each member line. It is unnecessary, however, for all investigations to be identical in scope. Self-policing bodies are expected to possess reasonable discretion in conducting their investigations. It is sufficient that each allegation be examined in a manner and to an extent which is reasonable under the circumstances.

Self-policing bodies may establish procedures for investigating written complaints, provided that oral and other informal communications (including anonymous messages) continue to be received and investigated. A self-policing body shall not require a complaint to be in writing or the identity of the complainant to be revealed before commencing an investigation. Petitioners failed to demonstrate a reasonable basis for limiting the class of persons who may lodge complaints and the final rules allow no such restrictions.

*Section 528.4(b)(3) Exemption Petitions.* The April Rules provided for exemptions from the independent self-policing body requirement of section 528.4(b) when it is demonstrated that an agreement has few members, applies to

[7] The Commission considers it unnecessary to define the term "control" in Part 528, but intends that the term shall include all incidents of "working" or "*de facto*" control, whether achieved through ownership, common management or both.

a narrow range of ports, handles only a small percentage of cargo *in the trade,* and the trade has been relatively free of malpractices. It is now alleged that these factors are rigid and unrealistic—especially the "percentage of the trade" standard—and will preclude many, if not all, small conferences from qualifying.

Modifications have been made in the final rules to provide a more flexible approach to the granting of waivers. Determinations will be made on a case-by-case basis where it appears that maintaining an independent self-policing body would unfairly burden a conference because of the size and condition of the trade and the probable effectiveness of the alternative self-policing arrangements proposed.

*Section 528.3(e) Identity of Complainant.* Two petitioning conferences requested that the provisions allowing self-policing bodies to withhold the name of a complainant be amended to *require* the deletion of this information from any materials furnished an accused member. The only support offered for this request was the unclear assertion that the existing language is "inconsistent with the Commission's effort to give the industry effective self-policing" (emphasis supplied). The Commission believes it preferable to permit divergent practices in this area. Self-policing bodies may reveal or withhold the names of complainants as may best enable them to effectively investigate, and curb, malpractices. They should not, of course, reveal identities in circumstances which encourage retaliation by or against members, or withhold identities when it would unfairly prejudice the member's ability to rebut any material allegations made against it (*e.g.*, if a case depended upon the statement of an unknown accuser).

*Sections 528.4(b) and 528.6(a) Application of Part 528 to "Misrating Programs."* Some conferences maintain special programs for inspecting cargo carryings and shipping documents, ascertaining cargo misdescriptions or mismeasurements, and requiring that member lines correct any misratings so discovered. These misratings are typically unintentional tariff deviations resulting from clerical errors or reliance upon cargo measurements and descriptions provided by a shipper. It appears that most misrating programs are not presently conducted by self-policing authority personnel, in part because the conferences do not consider misratings to be "malpractices."[8] The April Report firmly rejected the notion that "malpractices" could be limited to intentional breaches, but did state that conferences could establish separate investigative bodies for detecting misratings provided that such bodies also complied with Part 528 of the Rules. Several Petitioners commented upon an alleged lack of clarity concerning the status of "misrating programs" under the April Rules, but proposed no amendments to correct the purported problem.

The reporting requirements of section 528.6 have been modified to differentiate between unintentional misratings discovered by the self-policing authority and those discovered by other organizations. This modification does not alter the requirement that misratings be treated as a breach of the rate-fixing agreement, but should further indicate that a nonindependent "misrating program" may co-exist with a self-policing authority. A conference is welcome to take additional

[8] Petitioners recognize that not all misratings are innocent or unintentional, and at least some of them provide for repeated or otherwise suspicious incidents to be referred to the self-policing body for investigation.

steps to curtail misratings. The critical factor is whether the conference has clearly authorized its self-policing authority to investigate any and all misratings, the self-policing body actually exercises this authority when circumstances reasonably require it, and appropriate damages are assessed for both unintentional overcharges and undercharges. When a "misrating program" is not independent of the conference and its membership, the self-policing authority must be assured of regular and complete access to all of the "misrating program's" findings, reports, and records.

*Section 528.6 Disclosure of Carrier Identity.* One of Petitioner's major interests throughout this proceeding has been to avoid exposing conference members to civil or criminal penalties under the Shipping Act by virtue of their compliance with section 15's self-policing requirement. Consequently, objections were raised to some of section 528.6's reporting requirements because of the possibility that literal compliance would permit the Commission to ascertain the identity of the accused member.[9] The semiannual report is not intended to routinely reveal *which* members might have violated the Shipping Act during the reporting period. Although the Commission intends to make appropriate use of semiannual reports in its enforcement activities, the reports will neither be examined for the purpose of ascertaining carrier identity nor be treated as evidence that a violation has occurred. Modifications have therefore been made in the final rule which should lessen its alleged susceptibility to "identity disclosure."

This does not mean, however, that carrier identities are not of legitimate interest to the Commission in a variety of contexts and may not be obtained under the Shipping Act. Accordingly, a new provision has been added to final section 528.1 stating that rate-fixing bodies shall not forbid compliance with a Commission request for self-policing authority records. This requirement merely restates existing Commission policy in this area.[10]

One of the primary justifications for the conference system is its potential for curbing malpractices. Section 15 plainly requires self-policing. Congress also intended the Shipping Act to be enforced. It is neither improper nor unfair for the Commission to employ self-policing data in aid of its wider responsibility to fairly and effectively enforce the Shipping Act.[11] A conference imposed penalty for breach of a rate fixing agreement is conceptually and legally distinct from a penalty for Shipping Act violations. Both are a means toward the common end of eliminating malpractices.

However, because the Commission's enforcement activities are not revenue generating measures, and because the Commission wishes to promote effective self-policing to the greatest extent practicable, it shall henceforth be our policy to afford significant weight to any self-policing damages paid by a carrier when the same conduct of that carrier becomes the object of an FMC civil penalty claim.

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[9] Disclosure of the "location" of investigations and listing all past violations within a five year period were particularly mentioned in this regard

[10] See *Agreement No 5600-36 and Agreement No 5600-23* Orders Denying Reconsideration, decided simultaneously herewith.

[11] The complaint of "unfairness" in disclosing member identities appears to consist solely of the possibility that members may eventually be required to pay Shipping Act penalties. Examination of self-policing records is not substantially different from the examination of bills of lading or other commonly maintained carrier records

As a minimum, credit shall be given for damages paid under a self-policing system. In the case of isolated, less serious Shipping Act violations, no civil penalty claim shall be pursued when the carrier has cooperated fully with the Commission and reasonable self-policing penalties have been paid. To help effectuate this policy, final section 528.1(c) shall also forbid rate-fixing bodies from prohibiting their member lines from disclosing self-policing sanctions imposed against them (or any other aspect of their own dealings with the self-policing system) should they desire to do so. Such disclosures may be made on the member's own motion or in response to a Commission order.

*Section 528.6(b) Certification of Reports.* Petitioners object to section 528.6(b)'s requirement that self-policing reports be certified for accuracy and completeness by the reporting officer, the head of the policing authority, and any impartial arbitrators employed during the reporting period. It was contended that the various persons involved would not have personal knowledge of the report's entire contents and should therefore limit their certification to those matters over which they do have such knowledge.

The Commission has modified the rule to eliminate the need for three certifications. Final section 528.5(d) now requires the conference "reporting officer" to certify that the document transmitted is the report of the self-policing authority designated by the conference in full conformity with Part 528 of the Commission's Rules. The head of the self-policing authority must certify the accuracy and completeness of the report (including arbitration decisions). Both certifications shall be made under penalty of perjury and may be sworn to before a notary or may be an unsworn declaration pursuant to 28 U.S.C. 1746. It is incumbent upon the reporting officer to oversee the activities of the self-policing authority and to have personal knowledge of its staffing, budget, investigative policies, and general operations. No certification shall be required from the impartial arbitrator. All matters brought before it and all decisions that it renders shall be reported by the self-policing authority.

*Section 528.6(1) Reporting Requirements Generally.* Perhaps the most commonly protested provision of the April Rules was section 528.6. Petitioners claimed that certain terms appearing in the reporting requirements for the first time (*e.g.*, "cargo inspections," "office record examinations," "intelligence gathering activities") were ambiguous and that literal compliance with section 528.6 would be truly burdensome and generate little information of practical value to the Commission. The need to report all of a member's past breaches for a five year period was also viewed as onerous, both because of the length of the period and the rule's failure to indicate whether the requirement arose immediately or was to be applied prospectively.

The Commission has modified section 528.6 to eliminate the allegedly vague terms, reduce the "past violations period" to three years and apply section 528.6(a)(10)(ii) prospectively.

*Other Modifications.* The Commission has generally edited and renumbered the April Rules without intending to alter their substance. One such editorial change was the recognition that the term "impartial adjudicator" and "impartial arbitrator" are considered interchangeable. There have also been certain substantive changes in the Final Rules.

The inclusion of a specific prohibition against agreement provisions which attempt to block the disclosure of self-policing documents or activities to the Commission has already been discussed. Another substantive amendment has been to require self-policing authorities to maintain detailed records of their activities for a five year period (final section 528.3(f)). These records must include the names of the accused members (and any associates) involved in any alleged, potential, or actual breach. Both the self-policing authority records and the semiannual self-policing report must assign case or processing numbers to all investigations, whether instituted by complaint or on the self-policing authority's own initiative.[12] All investigations need not be of the same duration or extent, and it is assumed that self-initiated "investigations" into unintentional misratings would consist of little more than the routine notification of the member of its apparent liability for the penalty prescribed for such breaches.

A further amendment with substantive effect requires a description of the self-policing authority and the impartial arbitrator in the semiannual report (final section 528.5(b)).

THEREFORE, IT IS ORDERED, That the various Petitions for Reconsideration filed in this proceeding are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That pursuant to section 4 of the Administrative Procedure Act and sections 14, 15, 16, 18(b), 21, 35 and 43 of the Shipping Act, 1916, Part 528 of the Commission's Rules is amended as set forth in the attached appendix; and

IT IS FURTHER ORDERED, That revised Part 528 of the Commission's Rules shall become effective January 1, 1979, provided that General Accounting Office review pursuant to 44 U.S.C. 3512(c) has been completed by that date; and

IT IS FURTHER ORDERED, That all conference agreements and other rate-fixing agreements approved under section 15 of the Shipping Act, 1916, shall be amended to conform to the requirements of revised Part 528 of the Commission's Rules and filed with the Commission on or before January 1, 1979; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) JOSEPH C. POLKING
*Assistant Secretary*

[12] A relatively simple approach to this requirement would be to designate complaint cases by the letter "C" and a number, and to designate self-instituted investigations by the letter "I" and a number.

* Commissioner Bakke dissents in part. His views will be issued separately.

# APPENDIX

## PART 528—SELF-POLICING REQUIREMENTS FOR SECTION 15 AGREEMENTS



AUTHORITY: This Part is issued pursuant to sections 14, 15, 16, 18(b), 21, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 812, 814, 815, 817(b), 820, 833a and 841a).

528.0 *Purpose and Scope*

(a) Section 15 of the Shipping Act, 1916, prohibits the approval of agreements which are not adequately self-policed. It also contemplates that self-policing provisions be included in certain agreements subject to the Shipping Act, and that the Commission be kept informed of the manner in which such provisions are being implemented. The provisions of this Part are designed to establish minimum standards for judging the adequacy of self-policing activities, assist ocean carriers obtain expeditious approval of their section 15 agreements insofar as self-policing is concerned, provide the Commission with reliable information concerning the nature and performance of self-policing systems, and curtail rebating and other malpractices by ocean carriers.

(b) This Part shall apply to all conference and other rate-fixing agreements between common carriers by water in the foreign or domestic offshore commerce of the United States (hereafter referred to as "agreements"), whether or not previously approved by the Commission.

528.1 *General Requirements*

(a) Every agreement shall contain provisions establishing and describing a system for self-policing its members. These provisions shall describe the methods employed and the standards used to investigate, adjudicate and penalize breaches of the agreement by the common carriers by water signatory thereto (hereafter referred to as "members"), and shall include within their scope the activities of all persons, firms, associations, or corporations that are agents, employees or affiliates of members, or are otherwise subject to the control of a member, or which themselves control a member, or are commonly controlled by any person, firm, association or corporation which controls a member (hereafter referred to as "associates").

(b) Self-policing provisions shall establish both a policing authority and an impartial "arbitrator" or "adjudicator" and describe the functions and authority of each entity. The impartial arbitrator shall be functionally separate and distinct from the policing authority.

(c) No self-policing system shall contain provisions which purport to:

(1) deny access to or copies of any self-policing records, statistics,

*reports, or other information (including the identity of members)* in contravention of a duly issued order of the Federal Maritime Commission (or a Commmission employee with delegated authority to issue such orders); or

(2) preclude any of its members from disclosing the nature and extent of their *own* involvement with the self-policing authority (*e.g.*, any damages paid by the member) in any administrative or judicial proceeding to enforce the Shipping Act.

(d) Compliance with the requirements of this Part shall not relieve rate fixing bodies of their absolute responsibility to adequately police their activities or preclude the Commission from disapproving an agreement when sufficient evidence of rebating or other malpractices exists to warrant a conclusion that the members' self-policing efforts have been inadequate.

528.2 *Specific Requirements: Self-Policing Provisions*

Agreements shall contain the following self-policing provisions:

(a) *Breaches (general).* A statement that any violation or breach of any provision of the agreement, or any tariff, rules or regulations promulgated thereunder (hereafter referred to as a "breach"), by any member of the agreement (directly or through an associate) shall subject such member to self-policing sanctions;

(b) *Permissable Damages.* A statement specifying the maximum damages, or range of damages, or the method of calculating the damages, which may be assessed against members of the agreement upon finding that such members have committed a breach. Such statement may specify damages for specific breaches and a general category of breaches, or both, and may relate to each and every breach, or to the number of times the member has previously been found guilty of a breach;

(c) *Investigation of Breaches.* An effective procedure for investigating all matters which are the subject of complaints or which otherwise suggest or allege the existence of breaches:

(1) The procedure shall require the self-policing authority to:

(i) receive or gather information concerning breaches from any and all sources;

(ii) make investigations both in response to complaints and upon its own initiative;

(iii) examine, audit or inspect, upon demand, with or without notice and wherever located: any books, records, accounts, invoices, bills of lading or other documents, cargo, containers, ships, property, and facilities owned, used, or transported by any member of the agreement or its associates which *may be* relevant to the member's participation in the trade. Provided, however, that examination of particularly identified materials may be postponed for a reasonable period pending a prompt determination of relevancy by the impartial arbitrator under conditions which assure that the materials in question are sealed or otherwise kept unaltered during the determination period;

(iv) adopt and publicize procedures for the filing of complaints;

(v) compile and retain for at least five years a complete and thorough record of all its investigatory and prosecutorial activities, including a description of all complaints, the basis, nature and scope of all self-initiated investigations, and the disposition of all investigations.

(2) The procedure shall require all officers, employees, and associates (including officers, employees and controlling owners) of members to cooperate with, and freely provide information to, the policing authority and its agents;

(d) *Adjudication of Breaches.* A procedure for adjudicating alleged breaches which affords accused members the right to a hearing before an impartial arbitrator. The impartial arbitrator shall adjudicate such claims solely and finally, either initially or upon review *de novo* on the record of an initial determination by the policing authority. "Review *de novo* on the record" requires the impartial arbitrator to have full authority to affirm, modify or set aside any finding of fact, conclusion of law, or penalty made or imposed by the policing authority;

(e) *Procedural Guarantees.* A statement that fundamental fairness will be afforded all members accused of committing a breach (hereafter referred to as "the accused"), which includes the following specific procedural guarantees:

(1) The accused shall be charged in writing, within a reasonable time prior to the initial hearing, in a manner which fairly and clearly discloses the nature of the alleged breach. Such charges need not reveal the identity of the complainant;

(2) The accused shall be furnished with all evidence within a reasonable time prior to the initial hearing. Evidence developed thereafter shall also be furnished to the accused and a delay granted, if necessary, to allow it an opportunity to use such evidence in its defense. The identity of the complainant may be deleted from any evidence furnished the accused;

(3) The accused shall be given a full and fair opportunity to rebut or explain any evidence introduced against it and to present evidence which might show mitigating or extenuating circumstances;

(4) The impartial adjudicator shall receive and consider only that evidence which has been furnished to the accused by the self-policing authority or has been furnished by the accused in its defense;

(f) *Designated Official.* A statement designating a particular officer or official of the rate-fixing body to be responsible for the filing and certifying of self-policing reports with the Commission in accordance with section 528.5 of this Part;

Section 528.3 *Policing Authorities (Minimum Requirements)*

(a) Policing authorities shall have an adequate and qualified staff, adequate facilities and an adequate budget.

(b) Policing authorities shall be headed by, and composed of, persons not otherwise employed by, having any financial interest in, or affiliated with, the conference or rate-fixing body established by the agreement or any member or associate thereof; Provided, however, that:

(1) An individual or entity may act as the policing authority for more than one rate-fixing body;

(2) An independent certified public accountant (referred to hereafter as an ICPA) may act as the policing authority, even though it has a client which is a member of the agreement or an associate of such member, where such relationship is disclosed prior to being named as the policing authority and it is

*disqualified from acting as the policing* authority with respect to the member which is, or whose associate is, a client of the ICPA. If the ICPA named as the policing authority discloses that it has a member of the agreement or an associate of such member as a client, an alternate policing authority must be appointed to receive and investigate any complaints against such member;

(3) Upon petition to the Commission, an exemption may be sought to allow officers or employees of a rate-fixing body to act as the head of, or be assigned to duties under, the policing authority, if such person or persons are not otherwise employed by, affiliated with, or have any interest in, any member or any associate of a member. Petitions for exemption will not be lightly granted and must include a convincing showing that:

(i) the persons conducting self-policing activities are qualified and their self-policing activities would not substantially conflict with their other duties and responsibilities;

(ii) the agreement is so limited in scope that the retention of an independent self-policing authority would impose an unrealistic financial burden on the members. The number of members, the financial condition of the members, the nature and extent of the trade, and other activities of the members both within and without the trade (*e.g.*, participation in other agreements) are all relevant considerations;

(iii) the trade covered by the agreement has been relatively free of rebating or other conduct violative of the Shipping Act in the five years preceding the year when exemption is sought and is likely to continue to be characterized by a minimal level of such malpractices.

(c) The policing authority of each agreement shall be required to establish reasonable written procedures for the receipt and investigation of complaints which shall be made available to any person upon request. Such procedures may include special provisions for the handling of written complaints and for summary investigation of frivolous or incomplete allegations (whether written or not). These procedures may not, however, require that complaints be in writing or restrict the class of persons entitled to lodge a complaint.

(d) Policing authorities shall be required to investigate all complaints filed in accordance with its established procedures.

(e) Policing authorities shall be required to conduct self-initiated investigations whenever they receive information providing reasonable cause to do so and to periodically conduct self-initiated investigations into the activities of each member. All self-initiated investigations shall include, but not necessarily be limited to, the unannounced inspection of books, records, accounts, shipping documents, invoices, cargo, ships, containers, equipment, and facilities of the member and its associates.

(f) Policing authorities shall compile and retain for at least five years a sufficient written record of their activities to demonstrate compliance with this Part. This record shall include:

(1) all complaints received (written or oral), the processing or case numbers assigned to each complaint, a description of the steps taken to investigate each complaint (including hearings or arbitration proceedings) copies or summaries of the evidence gathered, and the final disposition of each investigation;

(2) a chronological log summarizing all information (other than complaints) received or gathered which alleges or suggests the existence of a breach and describing the consideration given to this information, including all reports of unintentional cargo misdescriptions and mismeasurements, anonymous tips, and rumors of malpractices;

(3) a description of all self-initiated investigations, the processing or case numbers assigned to each investigation, a description of all investigatory measures employed (including hearings or arbitration proceedings), copies or summaries of the evidence gathered, and the final disposition of each investigation;

(4) a brief statement as to why each investigation was finally disposed of in the particular manner chosen. This statement shall include an exact description of any breach found to have occurred, any decision of the impartial arbitrator and the nature and amount of any penalty assessed and paid.

Section 528.4 *Impartial Arbitrators (Minimum Requirements)*

(a) The impartial arbitrator shall be a totally disinterested person or entity, unaffiliated with the rate-fixing body or any member or associate thereof, and may be appointed on permanent basis or selected on an *ad hoc* basis from a panel of arbitrators pursuant to traditional rules of commercial arbitration.

(b) The impartial arbitrator shall be vested with final authority to adjudicate disputes and assess damages within the scope of the self-policing system.

(c) The impartial arbitrator shall not perform any other duties under the self-policing system with regard to any matter before it for adjudication, including investigation or prosecution.

Section 528.5 *Reporting Requirements*

(a) Each rate-fixing body shall mail (air mail postage prepaid) or hand deliver a semiannual report to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, on or before January 31 and July 31 of each year covering that body's self-policing and adjudicatory activities during the six-month period immediately preceding the respective reporting month (*i.e.*, January or June).

(b) Each semiannual self-policing report may exclude the identity of all parties to an allegation of breach, investigation or penalty assessment, but shall contain the following detailed information:

(1) The name and address of the self-policing body employed during the reporting period and a complete description of its staff, facilities, and budget, and the name and address of the impartial arbitrator employed during the reporting period and a descriptoin of its qualifications;

(2) The date, location (community or port area where inspection occurred) and nature of each examination or inspection (including audits) of cargo, facilities, shipping documents, or office records performed during the reporting period. The type and approximate number of accounts, documents, cargo containers, and other items inspected shall also be stated. Each such inspection shall be correlated to a particular investigation bearing a processing or case number;

(3) The number of cargo misdescriptions or mismeasurements detected by:

(i) the self-policing authority or any division thereof;

(ii) any other organization retained by the rate-fixing body to make misrating determinations and regularly report them to the self-policing authority. When such a separate "misrating committee" or similar organization is employed by a rate-fixing body, the self-policing report shall also identify that organization by name, and address, and provide a thorough description of its staffing (including other affiliations with the conference or its members), authority and routine activities, and describe the procedures by which it reports its findings to the self-policing authority;

(4) The number of breaches of the agreement (other than unintentional cargo misdescriptions and mismeasurements) which were detected through the investigation of complaints;

(5) The number of breaches of the agreement (other than unintentional cargo misdescriptions and mismeasurements) which were detected by self-initiated investigations;

(6) A thorough summary of the basis, nature, and scope of each investigation commenced during the reporting period, including any hearings or arbitration proceedings. Each investigation shall be identified by a processing number and the summary shall indicate whether the investigation was initiated by complaint or upon the initiative of the self-policing authority;

(7) A list of information received or gathered during the reporting period alleging or suggesting the existence of a breach, but which was not made the subject of an investigation;

(8) A list (by processing number) of investigations commenced in previous reporting periods and still pending, and a description of the action taken with respect to each during the reporting period (including hearings and arbitration proceedings);

(9) A list and description (by processing number) of all final actions taken with respect to investigations of any type. An action is not "final" unless:

(i) the investigation revealed insufficient evidence to establish a breach; or

(ii) the accused was assessed damages, either based on a voluntary settlement or a decision rendered by the policing authority or the impartial arbitrator.

(10) When a final action involves an assessment of penalties, the report shall also include:

(i) a detailed description of the alleged or adjudicated breach, the amount or type of penalty assessed, and whether the assessment was met;

(ii) a list of all other breaches (other than unintentional cargo misdescriptions and mismeasurements) committed by the member during the period subsequent to the effective date of this Part, but not greater than three years prior to the final action in question.

(c) The report shall clearly indicate those final actions handled by the policing authority and those matters, including rulings on the relevancy of documents or things sought to be examined by the policing authority, handled by the impartial arbitrator.

(d) The reporting officer designated pursuant to section 528.2(f) of this Part shall certify under penalty of perjury that the semiannual report has been prepared by the self-policing authority specifically designated by the rate-fixing body to act in full accordance with the requirements of this Part during the reporting period. The accuracy and completeness of the report shall be sworn to under penalty of perjury by the head of the designated self-policing authority.

(e) If there are no complaints, investigations or final actions during the period, the report shall contain an express statement to this effect as to each category of information required by subparagraph (b) above.

Section 528.6 *Two Party Rate-Fixing Agreements*

Rate-fixing agreements with no more than two signatory parties shall be exempt from the requirements of this Part.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-34

NEW YORK SHIPPING ASSOCIATION—
MAN-HOUR/TONNAGE ASSESSMENT FORMULA

NOTICE

*September 15, 1978*

Notice is given that the time within which the Commission could determine to review the August 11, 1978, order of discontinuance in this proceeding has expired with no such determination being made. Accordingly, review will not be undertaken.

(S) JOSEPH C. POLKING
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

*August 11, 1978*

No. 73–34

NEW YORK SHIPPING ASSOCIATION—
MAN-HOUR/TONNAGE ASSESSMENT FORMULA

## DISCONTINUANCE OF PROCEEDING

*Finalized on September 15, 1978*

This proceeding is an investigation of Agreement No. T–2804, a man-hour/tonnage assessment formula of the New York Shipping Association for the longshoremen's labor contract years 1971–1974, to determine whether Agreement No. T–2804 should be approved, modified, or disapproved pursuant to section 15 of the Shipping Act, 1916, and whether Agreement No. T–2804 violates sections 16 and 17 of the Act.

In the "Tentative Discontinuance" ruling of the Administrative Law Judge served July 14, 1978, it was stated that settlement of the issues in the proceeding apparently should be considered as final and complete. Also, any party opposing discontinuance was directed to so state by motion served by July 31, 1978. No party has responded to the said directive, and it is concluded that no party opposes discontinuance of the proceeding.

Certain agreements previously have been approved by the Commission, settling the so-called Puerto Rican, automobile, and newsprint issues in No. 73–34. Agreement No. T–2804 by its own terms expired in 1974, and there remain no contentions that it is unlawful.

Accordingly, it is found that the record justifies approval of the agreement, and to the extent that any of its terms previously have not already been approved, Agreement No. T–2804 hereby is approved pursuant to section 15 of the Shipping Act, 1916 (the Act), and is further found that the said agreement does not violate sections 16 and 17 of the Act.

Good cause appearing, the subject proceeding hereby is discontinued.

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

# FEDERAL MARITIME COMMISSION

DOCKET No. 70-50

MARINE TERMINAL PRACTICES OF THE PORT OF SEATTLE—POSSIBLE VIOLATION OF SECTION 17, SHIPPING ACT, 1916

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

## REPORT AND ORDER ADOPTING INITIAL DECISION

*September 15, 1978*

This proceeding was instituted by an Order of Investigation served December 16, 1970, to determine whether certain marine terminal practices of the Port of Seattle (the Port) are subject to and violative of section 17 of the Shipping Act, 1916 (the Act).[1] The Commission listed as issues for investigation, *inter alia,* the permissibility of the Port's practices in providing free consolidation services for inbound Overland Command Point (OCP) shipments, and in failing to indicate the availability of its consolidation service in its terminal tariff. Other parties to the proceeding are the Commission's Bureau of Hearing Counsel (Hearing Counsel), and eleven intervenors,[2] all of whom oppose the position taken by the Port.

The consolidation service in question is provided by the Port for the inbound cargo[3] of interested consignees, for a 1½ percent service charge based upon the inland shipment invoice.[4] If consolidation is requested, the necessary information is placed into the Port's computer, which keeps an inventory of cargo available for consolidation. Port personnel can then locate and select cargo for consolidation, and the computer prints out a pick-up order (for the inland carrier) and master bill of lading, adjusts its cargo inventory, and prints out a final movement order to notify the customer of the manner and time of the inland

[1] 46 U.S.C. 816.

[2] The California Association of Port Authorities, the City of Los Angeles, the Port of San Francisco, the Port of Oakland, the Port of Long Beach, the San Diego Unified Port District, the Port of Portland, the Port of New York and New Jersey Authority, Import Freight Carriers, Inc., Traffic Board of the North Atlantic Port Association, and Frank P. Dow, Inc.

[3] OCP cargo is usually, but not always, involved.

[4] At the time of the Order of Investigation, the service was provided without charge. In the fall of 1974, a 1 percent charge was assessed. Since May 1, 1977, the charge has been 1½ percent.

shipment. The computer and paperwork related activities, but not the actual physical loading and unloading, are performed by Port personnel in the Port's administrative offices. Consignees generally pay freight all kinds (F.A.K.) rates on the consolidated inland shipments.

A threshold issue in this investigation was whether the Commission has jurisdiction over the Port's consolidation services. The parties filed stipulations of fact (set forth in the Initial Decision) detailing the services involved and agreed to litigate only the issue of jurisdiction, reserving the question of reasonableness until such time as jurisdiction was determined to exist. No other evidence was presented. The stipulations, along with other documents[5] admitted to record, comprise the entire factual record in this case.

Administrative Law Judge Norman D. Kline (Presiding Officer) issued an Initial Decision on March 9, 1978, which found Shipping Act jurisdiction to be present and further ruled that in not describing the consolidation service and the charges assessed in its FMC terminal tariff, the Port had violated both section 17 of the Act and Part 533 of the Commission's Rules.[6]

## POSITION OF THE PARTIES

The Port filed Exceptions to the Intitial Decision which take issue with most of the Presiding Officer's findings and conclusions. Hearing Counsel and Intervenor California Association of Port Authorities filed Replies to the Port's Exceptions, which generally supported the findings and conclusions in the Initial Decision.

The Port's Exceptions raise the following arguments:

1. The Port is not an "other person" subject to the Shipping Act in providing its consolidation service;
2. The consolidation service does not constitute providing terminal services;
3. The record supports the factual findings and conclusion that the consolidation service is a "totally separate, independent service with no physical, operational or data connection with any other Port operation," and which:
    a. does not utilize data from the Port's other terminal operations;
    b. is provided for cargo at any location, not just terminals operated by the Port or its lessees; and
    c. does not involve the lessees;
4. Section 1 of the Shipping Act distinguishes forwarding and consolidation activities from "other terminal facilities";
5. "[L]egislative, decisional and statutory history" prohibits Commission jurisdiction over the service;
6. The service could not be found subject to the Shipping Act unless it were a terminal service under section 1; and
7. By providing the consolidation service, the Port is not performing an ocean carrier's obligation to provide a reasonable opportunity for consignees to take possession of their property.

[5] These include answers to interrogatories, an affidavit by a Port Traffic Manager, correspondence among counsel, a Seattle Harbor Pier Directory, and sample rail and truck consolidation documents.

[6] General Order 15, 46 C.F.R. Part 533.

## Discussion

For the most part, the Port's Exceptions constitute reargument of contentions already considered at length and properly disposed of, in the Initial Decision. The Commission agrees with the Presiding Officer's finding that the consolidation service is part of a broader marine terminal process, to the extent that the Port, in providing it, is furnishing terminal facilities in connection with common carriers by water. We also concur that the service relates to the receiving, handling, storing, or delivering of property. We find that the Commission has Shipping Act jurisdiction over the consolidation service offered by the Port, and that the Port is in violation of section 17 and General Order 15 in not including the service in its terminal tariff.

The service plainly appears to be a convenient and efficient means to facilitate the transfer of cargo from one mode of transportation to another, a primary function of a marine terminal. Moreover, in most instances, the cargo consolidated is part of a continuous stream of transportation to overland common points. We find, therefore, no error in the Presiding Officer's treatment of the service as part of a general ocean terminal operation rather than a separate inland operation, especially since the service is performed prior to the time the cargo is released to inland carriers.

A broad view of the Port's operation is justified here. The Port is a terminal operator in other respects, and this fact calls for closer scrutiny of the service in light of the Port's overall operations. Such an approach indicates that the movement of cargo through the Port is facilitated because of the service, which utilizes computer facilities which already serve other terminal functions of the Port. Consignees who have had OCP cargo shipped via the Port and who use the service take advantage of lower freight all kinds rates. The service benefits not only the consignees, but also the Port and its lessees, as terminal operators, by promoting the use of the Port's other terminal facilities for inbound and especially OCP cargo. It is, therefore, connected with the Port's overall terminal process in its purpose, operation, and effect. The fact that separate data are fed into the computer for the consolidation service does not alone defeat Commission jurisdiction over the service. The presence of Shipping Act jurisdiction here is in no way inconsistent with that Act's legislative history, which indicates that the term "other person" in section 1 is to be broadly construed.

The argument raised in item 3(b) above is without merit. Stipulation No. 2 indicates that the Port either owns and operates, or owns and leases to other operators, the marine terminals which the service involves. We also reject as meritless and unfounded the Exceptions listed as 4 and 5 above.

The Port's allegations of two specific errors in the Initial Decision (6 and 7 above) will be discussed individually.

Item 6 refers to the following conclusion in the Initial Decision:

> Even if the Port's computerized equipment and personnel working the equipment were not terminal facilities within the meaning of section 1 of the Act, the Port furnishes such facilities on its own and through its lessees and a consolidation service relates to the delivering of property from the various terminal facilities and locations owned or operated by the Port.

What the Presiding Officer said, in effect, was that even if the Port were not an "other person" solely on account of its consolidation service, its consolidation activities would still be subject to section 17. This statement was initially made in the context of a discussion refuting the Port's contention that "terminal facilities" have to be physical structures in the nature of docks and warehouses. The Presiding Officer apparently meant that the Port was a terminal operator, furnishing structures such as docks and warehouses, and was, therefore, an "other person" irrespective of its consolidation activities. Because it performed other services constituting the provision of the terminal facilities, reasoned the Presiding Officer, the consolidation service, which relates to the facilities, is also subject to section 17.

The above rationale places undue emphasis on the significance of the Port's other terminal facilities. The Port's Exception is granted, and the above-quoted portion of the Initial Decision is not adopted. Because the providing of the service does constitute furnishing terminal facilities, however, it is irrelevant that the Presiding Officer considered that the service could be subject to section 17 even if it did not constitute furnishing terminal facilities. Therefore, our rejection of the objectionable language does not alter the outcome of this proceeding.

The seventh item refers to the following sentence in the Initial Decision:

> The terminal operator is in reality only performing the obligations of common carriers by water who must arrange a convenient location for consignees to take possession of their property.

The Port characterizes this statement as a significant conclusion about the specific practices of the Port. The context indicates that it was merely a continuation of a general comment about the duty of ocean carriers and/or terminal operators to provide inland carriers adequate access to inbound cargo. There is nothing inaccurate or objectionable about the comment unless, as was done here, it is taken out of context and interpreted as a finding or conclusion specifically describing the Port's consolidation service. Moreover, the statement is not essential to the ultimate conclusion reached in the Initial Decision. The Exception is denied.

This leaves the question of future proceedings. It is noted that there have been no allegations of discrimination by the Port in performing its service, and that the Port no longer provides the service free of charge. We do not consider further proceedings, formal or informal, to be necessary at this time. We are satisfied that at such time as a new investigation is necessary it can be instituted promptly.

THEREFORE, IT IS ORDERED, That the Exceptions of the Port are granted to the limited extent indicated above, and denied in all other respects; and

IT IS FURTHER ORDERED, That the Initial Decision of the Presiding Officer is adopted except as indicated above; and

IT IS FURTHER ORDERED, That, within 30 days from the date of service of this Order, the Port of Seattle publish in its terminal tariff a description of its consolidation service and the applicable service charge; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) Joseph C. Polking
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

No. 70–50

## MARINE TERMINAL PRACTICES OF THE PORT OF SEATTLE—POSSIBLE VIOLATION OF SECTION 17, SHIPPING ACT, 1916

*Adopted September 15, 1978*

Respondent Port of Seattle offers a consolidation service in which its personnel use computerized equipment to locate cargoes on marine terminals, select cargoes for inland consolidation, and prepare relevant documents for inland movement. The Port does not publish this service in its terminal tariff and contends that the service is *not* subject to the jurisdiction of the Federal Maritime Commission. It is held that:

(1) The Port in performing this service is furishing terminal facilities in connection with common carriers by water within the meaning of section 1 of the Shipping Act, 1916, and the service relates to the delivering of property within the meaning of section 17 of that Act.

(2) Even if the service does not constitute furnishing terminal facilities, the Port otherwise furnishes such facilities as owner or operator of terminals and the service relates to the delivering of property.

(3) The Commission's jurisdiction over the subject service continues until the cargo is relinquished to an inland carrier. In performing the subject service, the Port is merely carrying out the obligations of common carriers by water and the obligations of terminal operators to promote the efficient flow of cargo through their terminals.

(4) The Commission's jurisdiction cannot be defeated by advances in technology such as that employed by the Port. Sections 1 and 17 of the Act are remedial statutes and should be read broadly to effectuate their purposes.

(5) The Port is in violation of section 17 of the Act and the Commission's General Order 15 for failure to publish the service in its terminal tariff.

There is no evidence that the Port has granted excessive free time or otherwise departed from published rates in its tariff.

The Port now publishes a drayage charge in its terminal tariff which it had not previously published and the tariff is not ambiguous. If there is any need to improve the tariff in this particular regard, the Commission's staff ought to consult with the Port informally.

Further formal evidentiary proceedings regarding the question of the reasonableness of the Port's charges for its consolidation service ought to be avoided if possible and less formal procedures employed to determine that question.

*Edward G. Dobrin, Peter D. Byrnes, Ronald T. Schaps, Richard D. Ford,* and *Gerald B. Grinstein* for respondent Port of Seattle.

*Leslie E. Still, Jr.*, for interveners California Association of Port Authorities and the Ports of Los Angeles, Long Beach, Oakland, San Diego, and San Francisco.

*Ellen K. Carver* for intervener California Association of Port Authorities.

*J. Kerwin Rooney* for Port of Oakland.

*H. Neil Garson* for intervener Import Freight Carriers, Inc.

*Gary Koecheler* for intervener Traffic Board of the North Atlantic Ports Association.

*Rowland C. Hong* for intervener City of Los Angeles.

*Mary Edwards* for intervener Frank P. Dow, Inc.

*S. H. Moerman* for intervener Port of New York and New Jersey Authority.

*Thomas T. Soules* for intervener Port of San Francisco.
*Thomas J. White* for intervener Port of Portland, Oregon.
*Joseph D. Patello* for intervener San Diego Unified Port District.
*John Robert Ewers*, Director, Bureau of Hearing Counsel, *Paul J. Kaller*, Deputy Director, and *Bert I. Weinstein* as Hearing Counsel.

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

This proceeding was initiated by the Federal Maritime Commission by Order of Investigation and Hearing served December 16, 1970. The Commission stated that it was beginning the investigation because it had become aware that "current marine terminal practices, particularly consolidation practices, of the Port of Seattle (Port) may be unlawfully affecting the established cargo patterns at Pacific Coast ports with the Port of Seattle obtaining a disproportionately high share of such cargoes." (Order, p. 1.) The Commission further stated on the basis of "[i]nformation available to the Commission" that there were indications that the Port was performing marine terminal services free of charge on inbound OCP traffic and was assessing a drayage charge for movement of cargo from piers to warehouses that did not appear to be based upon any item in its terminal tariff. Therefore, the Commission stated that it wished to determine if the Port's consolidation service and any other services performed in connection therewith might be prohibited by section 17, Shipping Act, 1916, (the Act) as being unjust or unreasonable. The Commission framed four specific issues arising under section 17 of the Act as follows:

1. Whether the Port's practices in providing consolidation services and any other services in connection therewith free of charge and only for inbound OCP shipments are permissible under section 17, Shipping Act, 1916.
2. Whether the assessment by the Port of a drayage charge, as an element of its per carton fee for movement of cargo from piers to warehouses for sorting, segregating, and labeling prior to dispatch, should be included in its terminal tariff as a service performed in connection with the receiving, handling, storage, or delivery of property at its terminal facilities.
3. Whether the failure of the Port to indicate the availability of its consolidation service in its terminal tariff is contrary to the Commission's General Order 15, 46 CFR 533, and section 17, Shipping Act, 1916.
4. Whether the Port has failed to bill for, or collect, applicable terminal charges which have occurred on cargo in amounts prescribed by its terminal tariff.

Finally, the Commission ordered that should the Port's consolidation practices or other services performed in connection therewith be found not just and reasonable under section 17, Shipping Act, 1916, the Commission may determine, prescribe, and order enforced just and reasonable practices.

The Port of Seattle was named as respondent. The Commission's Bureau of Hearing Counsel became a party automatically as provided by the Commission's

[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).

rules. 46 CFR 502.42. In addition several other ports, Associations, and companies were granted leave to intervene.[2]

HISTORY OF THE PROCEEDING

A number of events occurred following commencement of the proceeding which prevented the case from proceeding to prompt decision. The following recitation of these events will explain the lengthy history of the case.

Early in the proceeding two problems arose, one regarding the scope of the investigation, the other concerning the question of the Commission's jurisdiction to investigate the Port's consolidation practices. The first problem was settled by then Presiding Examiner John Marshall who ruled at the first prehearing conference and later that the proceeding would be limited to the four specified issues because the general reference in the Commission's Order to "such others [i.e., issues] as may rise in the course of the proceeding" was meaningless as a matter of law under the Administrative Procedure Act. See Petition for Further Ruling Denied, April 14, 1971, and prehearing transcript, pp. 30–34. No appeal was taken.

The second problem proved to be the main reason for the inordinate passage of time in this case. This dealt with the Port's contention that the Commission lacked jurisdiction to investigate its consolidation practices, a position which the Port maintains to this day. On March 23, 1971, the Port moved to terminate those portions of the investigation referring to its consolidation practices and more specifically, issues (1) and (3) set forth above. The Port maintained then as it does now that its consolidation activities were those of "shippers' agents" conducted in connection with the inland dispatch of shipments, not in connection with common carriers by water, and that such activities therefore fell outside the scope of the Shipping Act. After replies in opposition to the motion were filed by Hearing Counsel and certain interveners and a reply by the Port was filed, Examiner Marshall denied the motion. He found that since the record did not then show whether the practices in question related exclusively to inland forwarding rather than ocean terminal functions, he would note "probable jurisdiction" of the Commission, as suggested by Hearing Counsel, reserving final decision until completion of the evidentiary hearing. At the same time he denied the Port's request for leave to appeal. (See Motion to Terminate Denied, May 3, 1971.)

This ruling of Examiner Marshall did not dispose of problems, however. Although the Port generally produced information in response to Hearing Counsel's discovery requests as regards issues and matters other than its consolidation practices, it resisted production of information regarding such practices, again on jurisdictional grounds. (See Hearing Counsel's Motion for Order Requiring Production of Documents and Application for Order Compelling Answers, June 14, 1971.) Therefore, Hearing Counsel filed the Motion pre-

[2] By March 8, 1971, 11 interventions had been granted to the following parties: Import Freight Carriers, Inc., the Port of Long Beach, Calif., the Port of Oakland, Calif., the Traffic Board of the North Atlantic Ports Association, Inc., the California Association of Port Authorities, the City of Los Angeles, Frank P. Dow Co., Inc., the Port of New York Authority, the Port of San Francisco, the Port of Portland, and the San Diego Unified Port District. See Interventions, March 8, 1971 (John Marshall, Presiding Examiner). Only six of the above interveners filed briefs after closing of the evidentiary record, namely, the California Association of Port Authorities, and the Ports of Los Angeles, Long Beach, Oakland, San Diego, and San Francisco.

viously mentioned, seeking answers and production to numerous questions and requests which had not been answered out of an original list of 123 questions. The Port opposed the motion not only on the basis of lack of jurisdiction but because of failure to show good cause, inadequacies in the requests, excessive broadness and irrelevancies, etc.

On August 6, 1971, Examiner Marshall granted Hearing Counsel's motion, ordered answers and production and denied oral argument, but granted protective orders to prevent disclosure of sensitive competitive information. However, on September 29, 1971, the Commission remanded the matter to the Examiner for further explanation which could form the basis for possible court enforcement but agreed with his treatment of the jurisdictional problem. Thereafter, in February 1972, Hearing Counsel recast their discovery requests, filing 41 interrogatories and a motion for production of documents primarily related to the consolidation practices. After replies to these requests were filed and oral argument was heard, on April 28, 1972, Presiding Examiner Stanley M. Levy, to whom the case had been reassigned, issued orders directing the Port to respond as requested. The Port respectfully declined to comply, however, choosing to defend its position before the courts. Thereafter, on July 5, 1972, the Commission commenced an action seeking enforcement of the Examiner's orders in the United States District Court for the Western District of Washington. Federal Maritime Commission v. Port of Seattle, Civil Action No. 22-72H2. The Port provided some information pursuant to agreement among counsel and court order. However, after the Port had furnished certain information, the District Court, in the person of Judge Walter T. McGovern, to whom the case had been reassigned, concluded in a letter dated August 15, 1973, that the Commission lacked jurisdiction with regard to issues (1) and (3). After entry of a formal judgment by the District Court in October 1973, the Commission appealed to the United States District Court for the Western District of Washington. *Federal Maritime Commission v. Port of Seattle,* Civil Action No. 22-72H2. The Port discovery orders provided that the lower court determined that such orders were regularly made and duly issued. *Federal Maritime Commission v. Port of Seattle,* 521 F.2d 431 (9 Cir. 1975).

On January 29, 1976, pursuant to stipulation and order of the District Court, the Port agreed to make available for inspection and copying certain documents and, with certain modifications and amendments, agreed to furnish other information, all to be accomplished on or before March 1, 1976, unless otherwise ordered or agreed by the parties. *See* Stipulation, *F.M.C. v. Port of Seattle,* U.S. D.Ct. Civil No. 22-72H2, January 29, 1976.

## THE MODERN PHASE OF THE PROCEEDING

Hearing Counsel visited Seattle to inspect the documents as provided by the stipulation and order cited above sometime in March 1976. Nothing further was reported to me, to whom the case had been reassigned (on April 19, 1973). Accordingly, on September 27, 1976, I issued an order instructing Hearing Counsel to make known their intentions to proceed. (See Order to Submit Status Report, September 27, 1976.) Hearing Counsel responded, stating that they had verified Seattle's answers to interrogatories and suggested that the jurisdictional issues could be resolved on the basis of affidavits of fact and memoranda of law, with Seattle taking the initiative in filing such documents. Hearing Counsel also suggested that other parties be permitted to enter into settlement discusssions. The Port suggested that the case be dismissed without prejudice to any party's position should a similar investigation commence in the future. The various replies demonstrated that a discussion among the parties was necessary. Accordingly, a prehearing conference was scheduled for January 5, 1977, to determine the future course of the proceeding. (See Notice of Prehearing Conference and Matters to be Discussed Therein, November 10, 1976.)

At the prehearing conference, several matters were decided. Issues (1) and (3) referring to Seattle's consolidation practices involved the question of the Commission's jurisdiction over such practices as well as the reasonableness of those practices. The Port's motion to dismiss these issues was denied but the question of reasonableness was deferred pending on the question of jurisdiction. The parties were instructed to prepare stipulations of fact on these issues and, absent factual disputes, the filing of briefs would be scheduled.

Issues (2) and (4) referring to drayage and terminal (free time) practices were, according to Hearing Counsel, amenable to dismissal based upon the information obtained by Hearing Counsel in the discovery phase. Accordingly, Hearing Counsel were instructed to prepare and file motions to dismiss these issues, replies to be filed by the Port and interveners. (See Notice of Procedural Rulings Made at Prehearing Conference, January 11, 1977.)[3]

With some modifications, the above procedure was carried out. Hearing Counsel moved for dismissal of issue (4) relating to the question whether the Port had failed to bill for applicable terminal charges, but did not file a comparable motion regarding issue (2), as I had instructed, regarding the publication of a drayage charge in the Port's tariff, stating that the Port was in a better position to prepare the relevant facts and file the motion. Hearing Counsel and the Port indicated that such motion could be filed by the Port on September 26, 1977, and permission was granted to do this. (See Procedure Established for Disposition of Proposed Stipulation and Motions to Dismiss Certain Issues, September 12, 1977.)

Ultimately, stipulations of fact were filed and admitted into evidence together with underlying materials as to issues (1) and (3) regarding the Commission's jurisdiction and all motions and replies regarding dismissal of issues (2) and (4) were filed. The former stipulations and materials were admitted by ruling served October 25, 1977. Opening and reply briefs as to issues (1) and (3) were filed (mailed) by Hearing Counsel, the Port, and the California Association of Port Authorities for itself and the Ports of Los Angeles, Long Beach, Oakland, San Diego, and San Francisco (CAPA, *et al.*) in early December 1977 and mid-January 1978. Replies to the Port's motion to dismiss issue (2) and to Hearing Counsel's motion to dismiss issue (4) were filed by CAPA *et al.*, by letter dated

[3] Other rulings not relevant here were also made. Thus, I denied the Port's request that other ports, especially those in California, be required to answer discovery requests made by Seattle, Seattle contending that it had information that other California ports were carrying on practices similar to those at Seattle. I found these requests rather belated and cited the well-known principle that an agency need not investigate everybody engaging in similar practices at the same time. The record does not show furthermore, nor need it, exactly what other ports are doing which might resemble Seattle's consolidation practices, although the record before the Court of Appeals seems to suggest that similar activities may be going on at other ports. *See* Brief for Petitioner-Appellant Federal Maritime Commission, July 5, 1974, p. 32, citing portions of the record before that Court.

October 21, 1977. Hearing Counsel filed a reply to the Port's motion to dismiss issue (2) on October 26, 1977. None of the replies opposed the granting of these motions.

## FINDINGS OF FACT

The evidentiary record developed for the purpose of determining issues (1) and (3) regarding the question of the Commission's jurisdiction over the Port's consolidation practices consists of a stipulation of facts supported by pertinent documentary materials. The stipulation is the culmination of efforts by the parties to avoid unnecessary trial-type hearings and to utilize the sizeable amount of information obtained by Hearing Counsel from the Port pursuant to court rulings enforcing administrative discovery orders. The source material for the stipulation in large measure was not only furnished under oath but was scrutinized by numerous intervening parties, including parties whose interests were adverse to Seattle's. See Admission into Evidence of Stipulation and Other Materials, October 25, 1977.

The following narrative contains the stipulations:

1. The Port of Seattle (Port) is a municipal corporation with a wide variety of responsibilities and operations, ranging from parks and marinas to industrial development and operation of the Seattle-Tacoma International Airport. The Port's data processing equipment is utilized for all Port functions as necessary, including accounting, administration, engineering, maintenance, real estate, airport operations, etc.

2. One aspect of the Port's overall operations is the operation and/or ownership of marine terminals and piers. In this regard, the Port is both an operating (i.e., owns and operates marine temrinals) and a non-operating (i.e., owns marine terminals which are not operated by the Port but which are leased to other entities who operate them under their own tariff arrangements) port. The record contains a Seattle Harbor Directory showing various piers, terminals and other developments and their ownership. The Port only operates Terminals 18 (portion), 19, 20, 37, 90–91 (portion), and the container freight stations located on site 102. The container freight station had been operated by another entity until about August 1972. The Port also operates warehouses on Site No. 106. The Port publishes tariffs applicable to each of the above operations. No vessel can, or does, dock, load or unload at site 106.

3. Three to four days in advance of a vessel's arrival, the Port receives a copy of the ship's manifest by mail and/or messenger from the local steamship offices. Production of such manifests in advance of a vessel's arrival is pursuant to Port tariff 2–F, Item 10280.

4. Data from the ship's manifest is fed into a computer which produces sort books for use by cargo checkers. Upon the vessel's arrival, discharged cargo is checked and entered into the sort books. The data from the sort books is fed into the computer which automatically feeds out any variation between the ship's manifest and the cargo actually received. The ship is informed of any overage or shortage of cargo or damaged cargo. None of this information is utilized for any solicitation purposes or to consolidate cargo.

5. The Port's Marine Terminal Department uses data processing equipment to record the inbound cargo received (and its condition), to maintain inventory control of such cargo, to print delivery receipts for such cargo and to record delivery of such cargo to inland carriers. The data processing equipment is not used for outbound cargo except for after-the-fact tonnage statistics. The data processing equipment is also used to compute stabilization on outbound vessels.

6. Where the Port receives a request from the owner of the cargo or his agent for the cargo to be warehoused, container(s) are brought to Port operated warehouses to be unstuffed and their contents stored by Port employees pursuant to tariff. When a container is unstuffed, a van unloading slip is manually prepared. From that slip a warehouse receipt is prepared manually. The warehouse receipt is keypunched into the computer for inventory control purposes. After storage for whatever period of time the owner desires, the goods in the warehouse will be picked up by an inland carrier for inland transportation. Storage charges on the cargo are assessed pursuant to tariff.

7. The Port does not furnish manpower for loading inbound LTL OCP cargo into containers. If an inland carrier was to pick up cargo at the Port's container freight station, manpower for rail car loading would be provided by the container freight station if requested by the carrier. Charges would be assessed pursuant to tariff. However, West Coast truckers load their own trucks.

8. Information as to cargo placed into the computer as outlined in the previous paragraphs is not available to Port personnel, or anyone else, for any purpose relating to the consolidation or shipment inland of any cargo. Information as to availability for consolidation or inland shipment of cargo stored in a Port operated warehouse or located on a Port operated terminal is available from the computer only after (and based upon) the receipt by the Port of letters of instruction and supporting documents and the separate placement of that information into the computer as outlined below.

9. A letter of instructions is received by the Port from the ultimate consignee or its agent requesting either consolidation or straight dispatch of the cargo. The Port generally receives simultaneously a copy of the ocean bill of lading, a check for the ocean freight or evidence of payment, and evidence of customs clearance or "Immediate Transportation" entry (for movement in-bond). The information with respect to the cargo is entered into the computer and is used in consolidating shipments of OCP cargo for inland delivery.

10. If a straight dispatch is involved, the computer automatically prints out a pick-up order and a master inland bill of lading for the inland carrier.

11. If consolidation is requested, the computer places the information into its inventory of cargo available for consolidation.

12. The cargo is not released from the computer for dispatch or consolidation until payment of the ocean freight and proper customs papers are received from the customer. If the customer does not surrender the ocean bill of lading, any arrangement for a bank guarantee that it will be surrendered is strictly a matter between the customer and the ocean carrier. The Port does not guarantee, or arrange for the guarantee of, the surrender of any original ocean bill of lading. Any statement on Port forms relating to the inland carrier's protecting the

surrender of the original bill of lading, is simply an outdated statement with reference to historical practices of inland carriers.

13. In making up consolidations, the computer furnishes Port personnel, upon command, with information as to all cargo awaiting consolidation to a certain area.

14. Port personnel select cargo for a particular consolidation and place that selection into the computer which then automatically prints out a separate pick-up order to the inland carrier for each item of cargo in that consolidation and a master bill of lading. The computer then automatically withdraws that cargo from its inventory of cargo awaiting consolidation. The pick-up orders and master bill of lading are delivered to the various inland carriers, who pick up the cargo at various terminals or warehouses. The inland carrier furnishes the Port with information as to each item picked up for a given consolidation and issues its bill of lading and waybills. This information is then placed into the computer which automatically prints out a final movement order ready for mailing to the customer to notify him of the manner (including rail car or trailer number) and time of the inland shipment of his cargo.

15. The Port is shown on the master bill of lading as the shipper, but is not shown as the consignee, rather the owners of the cargo are shown as split delivery consignees. The Port does not consolidate or dispatch for multiple consignees by boxcar.

16. No specific charge is assessed by the Port for preparation of inland bills of lading. Some inland bills are prepaid and charges are prorated to the various ultimate consignees, others are sent collect and charges paid by the consignee. Advances are paid out of a Port general fund. Service charges and delinquent charges are assessed.

17. At the time of institution of the consolidation service and until the fall of 1974 no charge was assessed for the consolidation service. A 1 percent service charge was assessed thereafter until May 1, 1977, when the service charge was increased to 1½ percent. The service charge is based upon the invoice for the inland shipment.

18. The Port offers consolidations by truck and by rail piggyback service. With respect to consolidation shipments, the Port allocates inland transportation charges between multiple consignees based on individual weight of shipments as compared to the total, and takes into consideration stop charges and multiple delivery charges. The inland rates are generally based on the freight all kinds rate which provides the basis for the transportation charge assessed by the inland carrier for a specific pool.

19. Delivery to final destination is dependent on, and the responsibility of, the inland carrier service.

20. The Port activities described in paragraphs 9 through 19 above are all performed in the Port's administrative offices by personnel employed exclusively at that location. With regard to the activities described in paragraph 5 above, whenever any carrier arrives at a Port operated marine terminal, a remote computer terminal is used to print a delivery receipt and after delivery, to record the fact of delivery and any notations as to shortage or damaged cargo.

21. The Port does not physically consolidate any cargo and does not provide any area or facility for the physical consolidation of any cargo. In the event two or more lots of cargo belonging to separate consignees are picked up by an inland carrier at the Port operated container freight station for shipment in the same rail car and rail car loading is requested, such cargo would be loaded in accordance with paragraph 7. Rail carriers, however, do not spot rail cars at the Port's CFS or at any Port terminal or warehouse, and have not done so at any time herein relevant. All rail carriers serving the Port of Seattle pickup cargo by truck and reload the cargo into containers or onto rail cars in their own yards.

22. The Port performs the functions described in paragraphs 9 through 19 above, for both OCP and non-OCP inbound cargo when requested to do so, although requests relating to non-OCP cargo are substantially fewer than requests relating to OCP cargo.

23. The functions performed by the Port as described in paragraphs 9 through 19 above frequently involve cargo located at terminals or warehouses operated by entities other than the Port, such as, for example, Sea-Land or privately operated warehouses and container freight stations.

## DISCUSSION AND CONCLUSIONS

The two jurisdictional issues relate to issues (1) and (3) in the Commission's Order of Investigation and Hearing. These are:

(1) Whether the Port's practices in providing consolidation services and any other services in connection therewith free of charge and only for inbound OCP shipments as permissible under section 17, Shipping Act, 1916; and

(3) Whether the failure of the Port to indicate the availability of its consolidation service in its terminal tariff is contrary to the Commission's General Order 15, 46 CFR 533 and section 17, Shipping Act, 1916.

If the Port's consolidation services are not those contemplated by section 1 or 17 of the Shipping Act, 1916, and the Commission consequently lacks jurisdiction over any such activities, it makes no difference whether the Port charges for these services, whom it charges, or whether the Port publishes anything about the services in its terminal tariff.

If these activities are within the regulatory scheme of the Act, then the Commission's authority must stem from sections 1 and 17 of the Act, i.e., the Port must be found to be acting as an "other person subject to this act" as defined in section 1 and its consolidation activities must be found to be "practices relating to or connected with the receiving, handling, storing, or delivering of property" within the meaning of section 17 of the Act.

Section 1 defines an "other person subject to this act" as follows:

> The term "other person subject to this act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. 46 U.S.C. 801.

Section 17 states in pertinent part:

> Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission 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. 46 U.S.C. 816.

*The Nature of the Issues Further Described*

The Port does not dispute that it is an other person subject to the Act, or, as such person is commonly known, a "terminal operator." Admittedly the Port owns or operates marine terminals, warehouses, piers, and container freight stations in connection with common carriers by water and publishes a terminal tariff when operating these facilities. (Port's Opening Brief, p. 2.) However, the Port contends that its consolidation service is a separate activity not conducted in connection with common carriers by water. Essentially, the Port claims that its consolidation service relates to the inland dispatch of cargo which is facilitated by its computerized equipment. The Port does not provide any physical handling or moving of cargo in its consolidation service but merely arranges for inland movement at the request of inland consignees and deals exclusively with such consignees and inland rail or motor carriers. The Port characterizes these activities as those of a "shipper's agent" or as those resembling a forwarder or broker with regard to inland dispatching. The Port cites numerous cases in which the Commission has disclaimed juridiction over storage of grain in grain elevators, leases of "back up areas" behind marine terminals, persons engaging in forwarding-type activities on inbound movements of cargo, terminals which carry on separate inland forwarding services, and truckers picking up inbound cargo at ports.[4] The common thread in all of these cases, according to the Port, is that ocean transportation had ended and that the activities were not being performed in connection with water carriers, a jurisdictional prerequisite.

Hearing Counsel contend that the Port's consolidation services are almost entirely performed after the cargo is discharged from the vessel and prior to release to an inland carrier. Therefore, Hearing Counsel argue that the terminal character of the service is maintained, citing Investigation of Storage Practices, 6 F.M.B. 301 (1961). Hearing Counsel also contend that the Port's consolidation services are performed in order to facilitate transfer of cargo to inland carriers, thereby operating terminal facilities, as defined by the Commission in *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 767 (1946). Finally, Hearing Counsel argue the necessity of finding the practices in question to be within the Commission's jurisdiction so that the regulatory purposes of the Act can be effectuated, for example, by preventing possible noncompensatory rates and discriminatory practices. Without regulation, they argue, there would be "an open door to the very abuses which section 17 was intended to prevent." (Hearing Counsel's Opening Brief, p. 12.)

CAPA *et al.* contend that the Commission has jurisdiction over the practices in question and that if such practices are found to be unjust or unreasonable, the Commission should take remedial action including the prescription and enforce-

[4] The cases cited are: *Investigation of Wharfage Charges at Pacific Coast Ports*, 8 F.M.C. 654, 656 (1965) (storage of grain in elevators); *Agreement Nos. T-1685, Etc.*, 16 SRR 887, 905–908 (1976), affirmed, 16 SRR 1677 (1977) (leases of back up areas behind marine terminals); *United States v. American Union Transport, Inc.*, 327 U.S. 437 (1946); *Port of New York Freight Forwarder Investigation*, 3 U.S.M.C. 157 (1946); *Freight Forwarder Investigation*, 6 F.M.B. 327 (1961) (outbound forwarding only); *Portalatin Velasquez Maldonado v. Sea-Land Service, Inc.*, 10 F.M.C. 362, 370–371 (1967) (truckers picking up inbound cargo at ports).

*ment of just and reasonable practices.*[5] CAPA *et al.* argue that it is beyond question that the Port is an "other person" and that it is clear from the facts of record that it is carrying on the business of forwarding or furnishing terminal facilities in connection with common carriers by water with respect to the subject services. CAPA *et al.* state that the root of the problem which competing ports are facing is that the Port was providing the subject services free of charge or at noncompensatory rates. This situation is the type of problem which the Commission is authorized to remedy, according to CAPA *et al.*, citing *California v. United States,* 320 U.S. 577 (1944). CAPA *et al.*, furthermore argue that the Commission has jurisdiction with respect to a variety of practices at terminals, such as free time and demurrage, method of establishing charges at grain elevators, truck and lighter loading, and also forwarding activities which are intimately connected with the receiving, handling, storing, or delivering of property.[6] Therefore, argue CAPA *et al.*, it must be concluded that the Commission has jurisdiction over the subject practices. Furthermore, CAPA, as do Hearing Counsel, view the subject practices as existing in a continuum of transportation connected with ocean transportation and agree with Hearing Counsel that so long as cargo has not been relinquished to the custody of an inland carrier, consolidation activities which facilitate this relinquishment are terminal practices within the meaning of sections 1 and 17 of the Act.

In rebuttal, the Port reiterates its contention that the subject services consist solely of paper work relating to the inland dispatch of cargo and are not connected with common carriers by water. Furthermore, the Port vigorously disputes the contention that because the Port's consolidation services may be conducted while cargo is still physically located somewhere on the Port's premises, such services can be considered to be those in connection with common carriers by water. The Port calls this contention Hearing Counsel's "terrestrial time coincidence theory of expanded jurisdiction." It argues that in the cases cited by Hearing Counsel, the respondents were providing terminal services physically and that in other cases the Commission found no jurisdiction over a separate service even though it was being performed while goods were on a marine terminal's premises.[7]

In my opinion, the Port's contentions are not persuasive. On close analysis it appears that they focus almost exclusively on the inland-related area of the activity in question, ignore the primary reason for institution of the consolidation service, underestimate the significance of the point in time when cargo discharged from oceangoing vessels is placed in the custody of inland carriers, and

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[5] As mentioned above, it was agreed that the question of reasonableness of the subject practices was to be deferred until the question of jurisdiction was decided.

[6] The cases cited are: *California v. United States,* 320 U.S. 577 (1944); *Free Time and Dumurrage Charges at New York,* 3 U.S.M.C. 89 (1948) (free time and demurrage); *Rates and Practices of the Pacific Northwest Tidewater Elevators Association,* 11 F.M.C. 369 (1968) (method of establishing charges at grain elevators); *Truck and Lighter Loading and Unloading Practices at New York Harbor,* 12 F.M.C. 166 (1969) (truck detention); *Proposed Rules Governing Business Practices of Freight Forwarders,* 5 F.M.B. 328 (1957) (forwarding activities). *Truck and Lighter Loading* was affirmed *sub. nom. American Export Isbrandtsen Lines, Inc. v. F.M.C.,* 444 F.2d 824 (D.C. Cir. 1970).

[7] *Status of Carloaders and Unloaders,* 2 U.S.M.C. 761 (1946); *Portalatin Velasquez Maldonado v. Sea-Land Service, Inc.,* 10 F.M.C. 362 (1967); *G.C. Schaefer v. Encinal Terminals,* 2 U.S.M.C. 630 (1942); *Agreement Nos. T-1685 As Amended and T-1685-6,* 16 SRR 887 (1976), affirmed, 16 SRR 1677 (1977); *Investigation of Wharfage Charges at Pacific Coast Ports,* 8 F.M.C. 654 (1965).

disregard the legislative history and statutory purposes of those portions of the Shipping Act in question.

*Why Consolidation Practices are Terminal Services*

It is true, as the Port maintains, that an agency cannot confer jurisdiction on itself if its parent statute fails to confer such jurisdiction. As the Commission itself stated in this regard:

. . . [W]e wish to point out that this agency's jurisdiction is as set out in statute, and we cannot, by our own act or omission enlarge or divest ourselves of that statutory jurisdiction. *American Union Transport v. River Plate & Brazil Confs.*, 5 F.M.B. 216, 224 (1957).

See also *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–214 (1976).

If no authority was granted by the Congress, the obvious remedy is to seek appropriate legislation. However, it is also true that the Shipping Act, like the Interstate Commerce Act and other regulatory statutes, is remedial in nature and that it should be broadly construed to effectuate the remedies intended. In this regard the Commission has stated in *Tariff Filing Practices, Etc. of Containerships, Inc.*, 9 F.M.C. 56, 69 (1965):

In order to effectuate the remedies intended by the enactment of a regulatory statute such as these, [i.e., the Shipping Act and Intercoastal Act] it is necessary to allow flexible and liberal interpretation of the statute. In this respect the court, in *I.C.C. v. A.W. Stickle and Co.* 41 F. Supp. 268, 271 (1961) . . . stated:

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

*See also*, *Freight Consolidators Co., Inc. v. U.S.*, 230 F. Supp. 692, 699 (S.D.N.Y. 1964) emphasizing that exemptions from a remedial statute like the Interstate Commerce Act should be strictly construed.

It is therefore proper to interpret legislative intent in terms of the problems which the framers of the legislation had in mind and to consider the legislative purposes, the mischief intended to be eliminated, and the machinery established to do so. *Reduced Rates—Atlantic Coast Ports to Puerto Rico*, 9 F.M.C. 147, 149 (1965), *Richland Development Co. v. Staples*, 295 F.2d 122, 128 (5 Cir. 1961), *Gemsco, Inc. v. Walling*, 327 U.S. 244, 260 (1945). Furthermore, if a statute is drafted in broad language, an agency should not construe it narrowly so as to frustrate congressional intent. *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261, 273 (1968), *United States v. American Union Transport, Inc.*, 327 U.S. 437, 457 (1946), 90 L. ed. 772, 782.

There are two key phrases in sections 1 and 17 of the Act which are at the heart of this controversy. The first is the phrase "other terminal facilities in connection with a common carrier by water" in section 1. The second is the phrase "practices relating to or connected with the receiving, handling, storing, or delivering of property" in section 17.

It seems reasonable to link the determination of the status of an other person subject to this act (for the sake of convenience, a "terminal operator") defined in section 1 of the Act to the type of activity set forth in section 17. After all, the major reference to practices of terminal operators in the Shipping Act, other than in section 15, which is not relevant here, is section 17.

The Port argues correctly, I believe, that merely because a person happens to be a terminal operator does not mean that everything he does is to be regulated by the Commission. For example, no one would argue that the Port's operation of the Seattle-Tacoma International Airport is subject to the jurisdiction of a water-transportation regulatory agency. Nor would one argue that the Port's operation of parks or marinas unrelated to ocean transportation would fall under the Commission's regulation. Obviously there must be some "connection with common carriers by water" as defined in the Shipping Act and the practices in question must be "relating to or connected with the receiving, handling, storing, or delivering of property" which will move or has moved via common carriers by water. The Commission has long realized that a person would subject himself to Commission regulation only by engaging in such practices or activity. *See Wharfage Charges and Practices at Boston, Mass.*, 2 U.S.M.C. 245, 247 (1940); *Portalatin Velasquez Maldonado v. Sea-Land Service, Inc.*, 10 F.M.C. 362, 371 (1967); cf. *Intercoastal Investigation, 1935*, 1 U.S.S.B. 400, 432 (1935).

If there is one principle that is well settled, however, it is that the status of a person is not determined by his own declarations as to what he is but by what he is in fact doing. *See Possible Violations of Shipping Acts*, 16 SRR 425, 434–435 (1975), and cases cited therein. Very briefly, the Supreme Court stated with regard to regulated common carriers:

> . . . whether a transportation entity is a common carrier depends not upon its corporate character or declared purposes but upon what it does *United States v. California*, 297 U.S. 175, 181 (1936), cited in *Possible Violations of Shipping Acts*, cited above, 16 SRR at p 435

It is sometimes necessary to pierce surface appearances to determine the real character of a business. *Lifschultz v. United States*, 144 F. Supp. 606, 611 (S.D.N.Y. 1956). It is also necessary to make sure that a person subject to regulation is not segregating his activities for the purpose of avoiding lawful regulation and engaging in discriminatory activities. *New Orleans Steamship Association v. Bunge Corp.*, 8 F.M.C. 687, 695 (1965); *Agreement 9597*, 12 F.M.C. 83, 101–102 (1968).[8]

The fact that the Port calls itself a "shipper's agent" when performing its consolidation services or believes that it resembles a type of inland forwarder has no legal significance. Self-designations do not control, as the cases cited show. Interestingly, persons have called themselves "shipper's agents" in past cases to avoid regulation under the Shipping Act but have not prevailed. *See, e.g., Possible Violations of Shipping Acts*, cited above; *New York Freight Forwarder Investigation*, 3 U.S.M.C. 157, 164 (1949); *United States v. American Union Transport, Inc.*, cited above, 90 L. ed. at p. 773 (summarizing this argument by independent freight forwarders erroneously claiming not to be subject to Shipping Act regulation).[9]

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[8] There is absolutely no evidence that the Port has deliberately set up its consolidation services either in order to avoid lawful regulation or to perpetrate discriminations In fact as I discuss later, the motivation for instituting such services seems to be purely economic and promotional, i e., to enhance the attractiveness of the Port

[9] Under the Interstate Commerce Act, a "shippers's agent" is a recognized entity and is specifically not regulated as a Part IV

Let us therefore examine closely what the Port is really doing when performing its consolidation services. The Port emphasizes that it furnishes no labor in moving cargo from its premises when performing these services but rather fills out documents and arranges for inland pickup by inland carriers. The Port claims that it is performing only paper work and some type of inland forwarding on behalf of consignees. Therefore, according to the Port, it is not furnishing a terminal service in connection with common carriers by water nor a service relating to receiving, storing, delivering, etc., as set forth in section 17. Furthermore, these services are supposedly performed when ocean transportation has ended.

But these claims are simplistic and distorted. For one thing they ignore the fact that the property which the Port is assisting to dispatch from its premises has originated in the Far East, has traveled thousands of miles by water via common carriers, has been discharged from vessels, stored in warehouses and marine terminals owned by the Port, and is destined in most instances for distant inland locations, as "OCP" cargo.[10] In other words, the cargo is moving in a continuous stream of transportation, the largest segment of which is, by far, ocean transportation. This situation casts serious doubt on the Port's claim that the consolidation services have no connection with common carriers by water. But let us look further.

Even before the cargo arrives at the Port, the Port receives a copy of the ships' manifests by mail or messenger from the local steamship offices. Production of such manifests is even provided by the Port's tariff 2–F, Item 10280. Information from the manifests is fed into the Port's computer. This is done to determine overages, shortages or damages to cargo, not for consolidation purposes. The Port also uses this data processing equipment to record inbound cargo received, print delivery receipts and record delivery to inbound carriers. The Port operates warehouses and provides labor for rail car loading from the container freight stations which it operates, if requested. West Coast truckers provide their own labor for truck loading.

The Port thus maintain an inventory on all cargo stored at marine terminals and warehouses and the container freight station which it operates. Its consolidation service is triggered by a request from an inland consignee or his agent who sends a letter of instruction and supporting documents. At that point the information stored in the Port's computer showing cargo locations is made available to Port personnel for purposes of consolidation and facilitation of inland dispatch via inland carriers. The computer specifically furnishes Port personnel with information as to all cargo awaiting consolidation to a certain area. Port personnel select cargo for a particular consolidation and place that selection into the computer which then prints out a separate pick-up order to the inland carrier for each item of cargo in that consolidation and a master bill of lading, such cargo

Freight Forwarder. But a person must truly be performing the limited functions of such an "agent" to be free of regulation under that Act. *See Columbia Shippers and Receivers Association, Inc. v. U.S.*, 301 F. Supp. 310, 321–322 (D.Del. 1969); *Metropolitan Shipping Agents of Ill., Inc. v. United States*, 342 F. Supp. 1266 (D.N.J. 1972); *Chicago R. Co. v. Acme Fast Freight Co.*, 336 U.S. 465, 484–485 (1949); 49 U.S.C. 1002 (c) (2).

[10] "OCP" cargo is explained in Investigation of *Overland/OCP Rates and Absorptions*, 12 F.M.C. 184 (1969), affirmed *sub.nom.*, *Port of New York Authority v. F.M.C.*, 429 F.2d 663 (5 Cir. 1970). "OCP" cargo is cargo arriving from the Far East and adjacent areas which is destined to inland points in the United States, roughly east of the Rocky Mountains. The conferences which employ "OCP" rates design them with the intention of causing cargo to be routed through West Coast ports on its way to the inland territory.

*then being withdrawn from the inventory of cargo awaiting consolidation.* The pick-up orders and master bill of lading are delivered to inland carriers who pick cargo up at various terminals or warehouses. The inland carriers give the Port information as to each item picked up for a given consolidation and issue their bills of lading and waybills. The Port's computer then uses this information to print out a final movement order ready for mailing to the customer, notifying him of the manner and time of the inland shipment of his cargo. Some inland bills are prepaid (advanced by the Port from its general fund) and charges prorated to various ultimate consignees. Others are sent collect. The Port offers consolidations by truck and by rail "piggy-back" service. Inland rates are generally based on freight all kinds rates offered by inland carriers. The Port allocates inland charges among multiple consignees on the basis of individual weights compared to totals. Port personnel involved in the above activities are employed at the Port's administrative offices. No physical labor is provided by the Port as to actual loading or consolidating by the inland carriers. Frequently the Port's consolidation services described above involve cargo located at terminals, warehouses, or freight stations operated by lessees of the Port and sometimes involve non-OCP cargo.

The above services are essentially a sophisticated form of maintaining an inventory by computer, which aids in the preparation of documents and assists Port personnel in selecting cargo for consolidation, and preparing shipping documents for inland carriers and ultimate consignees. The benefits are obvious. Cargo movement is facilitated, inland carriers are given instructions promptly, and ultimate consignees enjoy the benefits of lower FAK rates through consolidation. Are these "terminal" services "in connection with water carriers" which are "relating to . . . delivering property" or merely inland dispatching? Although it is tempting to concentrate merely on the inland dispatching feature of the service, it is nevertheless impossible to ignore as does the Port, the fact that the cargo is moving in a stream of transportation, the bulk of which is transoceanic and that the essential purpose of the service is to facilitate the exchange of cargo between two modes of transportation, something which epitomizes the function of any terminal.

That the operations of the Port in connection with consolidation and inland dispatch are those of terminals is apparent on the basis of numerous cases defining the functions of terminals and terminal facilities. The essential nature of a marine terminal as a point of interchange designed to make transfer of goods from one mode or phase of transportation to another has long been recognized. In *Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.*, 9 F.M.C. 155, at p. 163 (1965), the Commission defined "terminal facilities" to mean "all those arrangements, mechanical and engineering, which make an easy transfer of passengers and goods at either end of a stage of transportation service." The Commission cited the same definition in an early case, *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 767 (1946). The Commission further explained the nature and role of one furnishing terminal facilities, stating:

In that case [i.e., *Status of Carloaders and Unloaders*] independent contractors who transferred property between railroad cars and place of rest on a pier were held to be "furnishers of terminal facilities" because the equipment and labor they furnished did provide for such easy transfer. . . . One who operates an important link in the chain of transference of goods "furnishes" a terminal facility whether or not he owns that link. *Id.*, p. 163.

The very essence of a terminal operation is that of a point of interchange or a link between one mode of transportation and another. Indeed that is its reason for being. The vital role of such operations as a link in the stream of transportation has been recognized by the Commission and the courts not only in the cases cited above but in others as well. For example, in *The Boston Shipping Assoc., Inc. v. Port of Boston*, 10 F.M.C. 409, 414 (1967), collateral appeal denied, *sub. nom., Marine Terminal vs. Rederi. Transatlantic*, 400 U.S. 62 (1970), the Commission stated:

Terminal operators form an intermediate link between the carriers and the shippers or consignees. In consequence *the terminal operators perform some services for the carriers and some services for the shippers*. (Case citation omitted.) (Emphasis added.)

The Commission said virtually the same thing regarding the function of a terminal as constituting an "intermediate link" performing "some services for the carriers and other services for the shippers" in *Terminal Rate Increase—Puget Sound Ports*, 3 U.S.M.C. 21, 23 (1948).

In *American Export Isbrandtsen Lines, Inc. v. F.M.C.*, 444 F.2d 824 (D.C. Cir. 1970), the Court emphasized the terminal operator's status as tantamount to that of a public utility and its duty to maintain efficiencies so as to facilitate the flow of cargo over its piers. In this regard the Court stated:

The law for centuries has recognized that public wharves, piers and marine terminals are affected with a public interest. (Footnote omitted.) These Terminals stand athwart the path of trade. . . . 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. 444 F.2d at p. 828.

The Court proceeded to discuss the duties of the Commission to insure that the public interest in efficiencies at terminals be safeguarded, stating:

Because of the vital importance of these Terminals to interstate and foreign commerce, Congress in the Shipping Act of 1916 provided for their regulation by the Federal Maritime Commission and authorized it to promulgate and enforce just and reasonable regulations and practices related to or connected with the receiving, handling, storing, or delivering of property at harbor terminal facilities. . . . The power thus conferred is . . . to be used for the purpose of facilitating the free flow of commerce by guaranteeing an efficient terminal system. *Id.*, at p. 829.

Again, in *American Export Isbrandtsen Lines, Inc. v. F.M.C.*, 389 F.2d 962, 968 (D.C. Cir. 1968), the Court not only recognized the importance of facilitating movement of cargo through marine terminals but emphasized that the Commission acted well within its authority under section 17 of the Act in ordering terminal operators to devise rules which would penalize the operators for causing undue delay in making cargo available for trucks at the terminals. The court stated in this regard:

Imposing liability for truck detention on the terminal operators will create an incentive for them to take whatever steps they can to reduce the congestion and the costly, wasteful delays which now characterize pier operations on the New York waterfront. Savings from efficiencies will presumably be passed on to shippers and receivers and, ultimately, will accrue to consumers. *Obviously the order of the Commission bears directly on a practice or rule relating to the handling of cargo and is clearly within its statutory authority.* (Emphasis added.)

There are several greatly significant points to remember when reading the above cases as well as cases I will discuss below. First, the Commission's *jurisdiction over activities of terminal operators* is to be broadly construed because of the vital importance of marine terminals in the stream of transportation and the congressional intent to prevent unreasonable or discriminatory practices at such terminals. Secondly, section 17 of the Act is not confined to practices involving physical labor in moving cargo around piers and terminals. It extends also to activities affecting terminal efficiencies and matters involving facilitation of cargo through the terminals, regardless whether some of the services are performed for consignees rather than for carriers; that is, some activities falling under the purview of section 17 may be ancillary or auxiliary to physical services performed by others at the terminals. There are many cases illustrating these principles in addition to those cited above.

In *American Export Isbrandtsen Lines, Inc. v. F.M.C.*, cited above, 389 F.2d 962, and further discussed below, the terminal practice involved payments of penalty moneys for detaining trucks and referred additionally to an "appointment system" to schedule trucks for service. Such payments and appointments were ancillary to physical labor provided in loading trucks and were designed to improve the flow of cargo through the terminals.

In *Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.* cited above, 9 F.M.C. at p. 159, such non-physical, auxiliary terminal services as the following were published in the respondent's terminal tariff: "checking cargo to or from vessel as required," "ordering cars," "preparing manifests, loading lists or tags covering cargo loaded aboard vessel," "supplying shippers and consignees with information regarding cargo and sailing and arrival dates of vessels," "provide a telephone service."

In *Baton Rouge Marine Contractors v. Cargill, Inc.*, 18 F.M.C. 140 (1975), affirmed, *sub. nom. Cargill, Inc. v. Federal Maritime Commission*, 530 F.2d 1062 (D.C. Cir. 1976), the terminal's "service and facilities" charge imposed on stevedores which was under investigation under section 17 included the furnishing of such things as "water, toilets, telephones and utilities." *Id.*, 18 F.M.C. at p. 163.

Other examples of ancillary or auxiliary services or practices held to fall within the scope of section 17, although they do not directly constitute physical moving of cargo off terminal premises, are free time and demurrage, allocation methods of establishing terminal charges, establishment of truck detention rules, and ocean forwarding. (See cases cited by CAPA *et al.* in footnote 6 above.)

Indeed, in some cases the Commission has upheld the assessment of a terminal charge known as "wharfage" under section 17 even when virtually no services are performed at all. *See Investigation of Wharfage Charges at Pac. Coast Ports*, 8 F.M.C. 653 (1965); *Evans Cooperage Co., Inc. v. Board of Commissioners*, 6 F.M.B. 415 (1961).

Finally, the position of the Port that its consolidation services which promote movement of cargo from terminals to inland carriers should be considered to be services in connection with inland carriers and not in connection with water carriers is difficult to accept in view of the facts in *Terminal Rate Increases—Puget Sound Ports*, cited above, 3 F.M.C. 21, and certain provisions in the Port's present terminal tariff. In the case cited, the Port had proposed to amend the definition of its "service charge" which it had initiated. This was a charge assessed against vessels for the performance of services "incidental to receiving and delivering freight. . . . " *Id.*, p. 25. The Port proposed to define the charge in greater detail and in so doing included as part of the service the following element: "5. Delivering cargo to consignees or connecting lines and taking receipts therefor." Also included in the proposed definition was the following: "9. Giving information to shippers and consignees regarding cargo, sailings and arrivals of vessels, etc." *Id.*, p. 26. Why did not the Port consider that those services were performed in connection with inland carriers and not common carriers by water? On the contrary, they proposed to assess the service charge against the vessel. Yet in this case the Port claims that the use of its computer and preparation of documents to aid in moving cargo from terminals to inland carriers is not connected with common carriers by water.

The proposed definition was found defective and unreasonable by the Commission for reasons unrelated to the specific elements specified above. *Id.*, p. 26. However, even today the tariff published by the Port of Seattle shows a "service and facilities charge" for services designed to assist the movement of cargo "[f]rom vessels to consignees, their agents or connecting carriers. . . . " (See Seattle Terminal Tariff No. 2-F, F.M.C.—T. No. 3, Item 80000, effective July 1, 1974.) Not only is such a charge not performed merely in connection with inland carriers, even though it refers specifically to "connecting carriers" but it is assessed against vessels. In yet another part of the Port's present tariff, furthermore, the Port provides a car loading and unloading service which includes "loading . . . cargo between wharf premises and railroad cars." (See Port's Tariff, Item 35050, effective July 1, 1977.) Why does the Port believe such services to be includable in its terminal tariff, yet contend that its consolidations service which also assists movement of cargo to railroad cars is not really a marine terminal service but one performed in connection with rail carriers? Do not the service and facilities charge and the car loading service have the same ultimate objective as the consolidation service, namely, to facilitate movement from vessel through terminals to inland carriers?

Although the Port may attempt to seek some distinction among these services because physical labor to move cargo may be involved as part of the service charge and the car loading charges, such distinction will not suffice. The Port does provide labor and equipment in performing its consolidation services. Human beings employed by the Port must feed its computer and make use of the computer printouts, select cargo for consolidation, and contact inland carriers, among other things. The Commission has held that one who furnishes equipment and labor to provide for easy transfer between railroad cars and place of rest on piers is furnishing a "terminal facility." *See Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.*, cited above, 9 F.M.C. at p. 163; *Status of Carloaders and Unloaders*, cited above, 2 U.S.M.C. 761, 767. The point is that the terminal labor and equipment need not be only physical laborers pushing cargo around the piers and the equipment is not limited to lift trucks, or other mobile equipment used to move the cargo. In *Status of Carloaders and Unloaders*, the Commission held that terminal facilities constituted "all those arrangements, mechanical and engineering, which make an easy transfer of . . . goods at either end of a stage of transportation service." 2 U.S.M.C. at p. 767. The Commission further stated that "[f]acilities, when 'specifically applied to carriers, means everything necessary for the . . . safety and prompt transportation of freight'." *Id.*, p. 767. Certainly the Port's computer and personnel working with it are being used to assist in the transfer of cargo at one end of a stage of transportation. As I discuss below, the fact that the Port has improved its services by using modern equipment and technology does not mean that the Commission must discontinue the application of section 17.

Finally, the Port contends that cargoes involved in consolidation pass through terminals operated by the Port's lessees, a fact which supposedly means that the Port's service is separate and distinct from any marine terminal service. I have already shown how the Port's service is related to the delivering of property and that the Port is furnishing facilities to promote movement through marine terminals. However, the error of the argument is further illustrated by reference to other cases and to the Port's own tariff.

The fact is that the Port's consolidation services are intimately related to movement of cargo through terminals and furthermore that it makes no difference whether the cargo moved through marine terminals operated by the Port's lessees or by the Port itself. The entire service operates in contemplation of improving movement throughout the Port area, not merely a portion operated by the Port itself. Indeed, the close relationship of the Port and its lessees is shown by the fact that these lessees or other operators of the marine terminals owned by the Port have concurred in the Port's terminal tariff, i.e., they follow the Port's rules, regulations and charges almost entirely. (See Seattle Terminal Tariff No. 2–F, F.M.C.—T No. 3, 10th rev. p. 4, effective August 1, 1977, listing 11 lessee terminal operators in addition to the Port itself.) The Port's consolidation services benefit every terminal operator at the Port since they should attract more business through the Port. In a sense, the Port, with its consolidation services, acts in conjunction with its lessee terminal operators. It would be rather unrealistic and naive to separate or segment the Port into pieces and pretend that the Port acted alone without regard to its lessee terminal operators when arranging for consolidation and pick-up by inland carriers. Cf. *Investigation of Storage Practices,* cited above, 6 F.M.B. at p. 312. As noted above, the Commission has been careful not to permit regulated companies to segregate their activities so as to avoid regulation.

Numerous cases further illustrate that the Port cannot detach itself from its status as an other person subject to the Act merely because it is a lessor. Indeed, terminal leases have often been held to be subject to section 15 of the Act, which means that both the lessor as well as the lessee are considered to be persons subject to the Act. *See, e.g., Greater Baton Rouge Port Commission v. U.S.*, 287 F.2d 86 (5 Cir. 1961); *Agreement No. T–4; Term. Lease Agree., Long Beach, Calif.*, 8 F.M.C. 521, 527 (1965); *Agreement No. T–1768–Terminal Lease Agreement,* 9 F.M.C. 202 (1966); *Terminal Lease Agreement at Long Beach, California,* 11 F.M.C. 12 (1967); *Agreements Nos. T–1953* and *T–1953–A,* 11 F.M.C. 156 (1967). In *California v. United States,* cited above, 320 U.S. at p. 580, the Court found no trouble in stating that the State of California and the City of Oakland were "providing facilities for water-borne traffic" and were doing so "[w]hether the facilities are operated by the City directly or leased to another. . . . " *Id.*, at p. 580.

*The Need to Avoid Reading Section 17 Narrowly*

An unduly narrow reading of the broadly drafted language of section 17 is further shown to be unjustified in view of the statement of Representative Alexander on the floor of the House noted by the Court in *United States v. American Union Transport, Inc.*, cited above, in which he emphasized that the agency administering the Shipping Act must not only regulate common carriers by water but "must have supervision of all those incidental facilities connected with the main carriers." 327 U.S. at p. 451. It must be remembered that section 17 refers to regulations or practices not just "connected with" but "relating to" terminal activities and furthermore that such activities are not confined to "receiving" or "storing" property but to "delivering." Why, then, are activities designed to record inventories of stored cargo, locate such cargo, facilitate their movement off marine terminals in consolidated shipments by assisting delivery to inland carriers, even to the point of preparing documentation in order to facilitate movement off the terminals, not "related" to the delivery of property which had been stored at marine terminals? Furthermore, how can the congressional intent to promote facilitation of commerce by supervising facilities incidental to common carriage by water and to promote efficiencies of marine terminals be fulfilled if the Commission has no authority whatsoever over practices designed by an admitted terminal owner and operator such as the Port to facilitate the flow of ocean-borne cargo through the Port's premises? As the Supreme Court stated in *United States v. American Union Transport, Inc.*, cited above, jurisdiction over persons performing vital functions which are intimately related to practices contemplated by the Shipping Act "would seem essential to effectuate the policy of the Act and the absence of jurisdiction might well prevent giving full effect to that policy." *United States v. American Union Transport, Inc.*, cited above, 320 U.S. at p. 447.

It has long been recognized that there is a duty of terminal operators to provide adequate facilities and promote movement of cargo through their premises and that the Commission has a legitimate concern to insure that this duty is performed. *See Truck Loading and Unloading Rates at New York Harbor*, 13 F.M.C. 51, 55 (1969), *American Export Isbrandtsen Lines, Inc. v. F.M.C.* cited above, 444 F.2d at pp. 828, 829, and 389 F.2d 962, 968 (D.C. Cir. 1968). Furthermore, the Court in *American Union Transport, Inc.*, was especially persuaded that the Commission must be held to have had jurisdiction over independent freight forwarders in that case because such forwarders were in a position to engage in practices which the Shipping Act was attempting to eliminate. 320 U.S. at pp. 450–451. There is no evidence on this record, which was developed primarily to determine the question of the Commission's jurisdiction, that the Port has been or is engaging in predatory or discriminatory practices. However, the Port, by contending that the Commission has no jurisdiction over its consolidation services and by not publishing them in its tariff, is, as were the forwarders in *American Union Transport, Inc.*, in a position to engage in such practices. If it were to do so, furthermore, and the Commission were held to be without jurisdiction, persons suffering from such practices could not turn to the Commission for protection. Again, although the Port cannot be found on this record to have engaged in predatory or discriminatory practices, there is a long history well-known to this Commission, of excessive competitive zeal at West Coast ports which have led to a variety of unreasonable practices usually involving giveaways.[11] CAPA *et al.* have themselves contended that the very genesis of this proceeding was the institution of the Port's consolidation services performed without charge, although since 1974, the Port does charge for the service.

It is significant, furthermore, in view of the previous discussion regarding the extension of section 17 to ancillary, non-physical services that the Court in *American Union Transport, Inc.*, cited above, did not seem concerned that section 17 as well as section 1 of the Act would apply to persons (in that case, forwarders) who had no physical labor to perform in moving cargo and no contractual relationship with carriers. In other words, their activities, even if only in the nature of paper work, were held to be "in connection with a common carrier by water" as defined in section 1.[12] Nor, as we have seen, did indirect relationship to delivery of property convince the Court in *American Export Isbrandtsen Lines, Inc. v. F.M.C.*, cited above, 389 F.2d 962, that rules imposing penalties on terminal operators who detained trucks waiting to pick up cargo were not practices relating to "the handling of cargo." In that case, the terminal operators had argued that no such practices were involved because the rules only affected the settlement of accounts between the truckers and terminal operators. The Court refused, however, to read such a narrow meaning into the words "relating to . . . delivering of property" contained in section 17. *Id.*, p. 968.

### *The Significance of the Port's Performing its Services Before Release of Cargo to Inland Carriers*

A final flaw in the Port's arguments concerns its disregard of the significance of the fact that virtually all facets of the consolidation services performed by the Port's personnel utilizing its computer including the preparation of pick-up orders and master bills of lading for delivery to inland carriers who come to the terminals to take possession of the cargo takes place while the cargo is still in the custody of the various marine terminals on the Port's premises operated by the Port or its lessees. The Port derides Hearing Counsel's contention that until the cargo is relinquished to an inland carrier, the Port's services still fall within the jurisdiction of the Shipping Act. The Port sees no significance to the time of

[11] *See, e.g., Investigation of Free Time Practices–Port of San Diego*, 9 F.M.C. 525, 549 (1966) and the cases cited in footnote 18; see also *Storage Practices at Longview Washington*, 6 F.M.B. 178 (1960), *Practices, etc. of San Francisco Bay Area Terminals*, 2 U.S.M.C. 558 (1941) affirmed *sub. nom. California v. United States*, 320 U.S. 524 (1944), *Investigation of Storage Practices*, 6 F.M.B. 301 (1961). All of these cases illustrate the concern of the Commission over excessive giveaway prctices among West Coast ports, such as free storage, noncompensatory demurrage, noncompensatory rentals on terminal leases, and the like.

[12] The forwarders had argued that they were merely shippers' agents, performed no accessorial services, and had no contractual relationship with carriers. See their arguments summarized in 90 L. Ed. at p. 773. The dissenting opinion in the case pointed out that the forwarders maintained no physical connection with common carriers at all, yet the majority found that their activities were performed "in connection with common carriers by water." 327 U.S. at p. 462.

transfer of cargo to inland carriers since it believes the service in question relates to inland dispatching and not ocean shipping. The Port errs.

It is elemental law that the obligations of a common carrier by water do not terminate merely because it has discharged cargo somewhere at a marine terminal. The carrier, through his agent or contractor, who is usually a marine terminal operator, must provide adequate terminal facilities for deposit of the goods and allow a reasonable period of time for consignees or their agents to pick up the goods at an accessible place. *Truck Loading and Unloading Rates at New York Harbor,* cited above, 13 F.M.C. at pp. 61–62; *American President Lines, Ltd. v. F.M.C.*, 317 F.2d 887, 888 (D.C. Cir. 1962), *The Boston Shipping Assoc., Inc. v. Port of Boston,* cited above, 10 F.M.C. at p. 415. *Terminal Rate Increases –Puget Sound Ports,* 3 U.S.M.C. 21, 23–24 (1948).[13] In effect, the terminal operator becomes the agent of the carrier in performing these obligations, 10 F.M.C. at p. 415; *Free Time Practices–Port of San Diego,* 9 F.M.C. 525 (1966). The carrier or his agent may furthermore be forced to become an involuntary bailee or warehouseman with reduced liability if the consignee fails to come for his cargo within a reasonable time. Cf. Am. Jur. 2d Carriers; §§ 396, 674, 681.

Until the cargo located on marine terminals is relinquished to inland carriers, the Commission has specifically held that its jurisdiction applies. *See Investigation of Storage Practices,* 6 F.M.B. 301, 314 (1961). In that case, a storage company known as "TOA" had created a plan with an ocean carrier and with the cooperation of the Port of Stockton had provided free warehousing to importers as an inducement to use the Port of Stockton.[14] While TOA offered free warehousing, the Port prepared inland bills of lading and provided labor to move cargo to inland carriers. Except for the free warehousing and labor, this joint operation bore some resemblance to Seattle's inasmuch as TOA claimed, as does Seattle, that it was not subject to the Act because ocean transportation had ended when TOA took possession of the goods in its warehouse, which it did after the 7-day free time period allowed by the carrier or port had expired. Nevertheless, because the goods had not yet been relinquished to inland cariers while they rested in TOA's warehouse, the Commission found TOA to be performing a terminal service in connection with common carriers by water. *Id.*, at p. 314. In this regard, the Commission plainly stated:

> The terminal character of the facilities furnished continues until the inland carrier takes possession. The Board has assumed jurisdiction up to this point. (Case citation omitted.) . . . The terminal aspect of handling property is not complete at the time goods are delivered by Stockton to the "lessee" of its assigned warehouse space. *Id.*, at p. 314.

In *G.C. Schaefer v. Encinal Terminals,* 2 U.S.M.C. 630 (1942), a case relied upon by the Port, the significance of the role of an inland carrier in taking possession of goods is vividly illustrated. The Port relies on this case as support for its argument that its consolidation services are separate and distinct from its terminal services and therefore are outside the scope of Shipping Act regulation.

[13] In a case cited by the Port itself, the Commission stated:

> Thus, the transportation service offered by a water carrier, when viewed as an obligation which attaches to common carriage, begins or ends at the place provided on a terminal for the receipt or delivery of property. *Portalatin Velasquez Maldonado v. Sea-Land Service, Inc.*, cited above, 10 F.M.C. at p. 370.

[14] As noted above, this has been a traditional device found among West Coast ports in the exercise of excessive competitive zeal and has been consistently held to be unlawful by the Commission.

Examination of the facts in that case, however, demonstrates the critical fact that the reason why the service offered by Encinal, which in other respects was a terminal operator subject to Shipping Act jurisdiction, was outside Shipping Act regulation, was that it amounted to a full-blown consolidation, delivery and distribution service which shortly thereafter became a Part IV freight forwarder service regulated by the Interstate Commerce Commission. Such separate service was in fact and shortly thereafter in law that of a common carrier (Part IV forwarders being common carriers, unlike Shipping Act forwarders, 49 U.S.C. 1002 (a)(5)); *Japan Line, Ltd. v. U.S.*, 393 F. Supp. 131 (N.D. Cal. 1975).

Encinal had been consolidating cargo brought to its premises by truck, rail, or discharged by vessels, and apparently had been assuming forwarder status. As was noted, this separate operation was on the verge of being regulated as common carriage, as the bill which became Part IV of the Interstate Commerce Act was pending. *Id.*, at p. 631. Of course, if a terminal operator wishes to commence a common carrier operation as an I.C.C.-Part IV forwarder and takes custody of goods somewhere on its premises, previous carriers, whether by ocean, rail, or truck, have relinquished custody of the goods which are no longer in marine terminals but in a common carrier's receiving station.

The same point regarding transfer of the goods to inland carriers is illustrated in a case cited by the Port, namely, *Portalatin Velasquez Maldonado v. Sea-Land Service, Inc.*, cited above, 10 F.M.C. 362. In that case, truckers, i.e., motor carriers who came to a port served by the water carrier to pick up cargo at the terminal were held not to be other persons subject to the Act. But the Commission took pains to explain that the obligations of the water carrier had ended when it provided a place on the terminal for delivery of the cargo. *Id.*, pp. 370, 371. In the instant case, no one is contending that the rail or motor carriers coming to the Port's marine terminals are subject to the Shipping Act. The contention is that the Port, which furnished computerized equipment and personnel operating such equipment for the purpose of facilitating transfer from terminals to the rail or motor carrier is an other person and is performing a terminal service under sections 1 and 17 of the Act.

Nor does anyone contend that the Port, in performing these services, intends to operate as a Part IV forwarder, i.e., as a common carrier.[15] The Port's services therefore are incidental services of marine terminal operators and continue as such until inland carriers take possession.

### *The Need to Keep Abreast of the Port's Technological Innovations*

The instant case presents a situation calling for Commission adaptability to the world of modern technology. What the Port has done in essence is to make use of modern computerized technology to advance the art of providing terminal services. Instead of utilizing old-fashioned cargo checkers or having someone compile an inventory of cargo located at the Port's premises by hand, the Port records this information with its computer, utilizes the computer to locate and consolidate cargoes destined for common inland locations, and prints out pick-

[15] See paragraph 19, in the above findings of fact, in which the Port stipulated that "delivery to final destination is dependent on, and the responsibility of, the inland carrier service."

up orders and master bills of lading for inland carriers. Thus modern technology serves to expedite movement of cargo through the Port's premises and serves the fundamental objective of any marine terminal, i.e., to facilitate interchange of cargo from one mode of transportation to another. This employment of modern technology, however, should not cause the Commission to disregard the terminal nature of the operation nor to ignore the concern of the Congress that enacted the Shipping Act that terminal operators must not engage in certain types of prohibited activities.

The Commission has exhibited an awareness that it must adapt its regulatory policies to meet the changes introduced by modern technology and has met the challenges presented by such changes. The most salient example of this type of flexibility has been seen in the case of intermodalism and the filing of single-factor intermodal tariffs. When these tariffs began to come into use, the Commission quickly adapted itself to receive them and encouraged the employment of new techniques in the shipping industry. In *Disposition of Container Marine Lines*, 11 F.M.C. 476, 489 (1968), the Commission explained its flexible philosophy in language which is equally applicable to the present case as follows:

> In fact the Federal Maritime Commission can and must play an important role in encouraging improved services for shippers. . . . [T]he Commission does not intend to create or permit impediments to the improvement of shipping services. . . . *[N]o 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. (Emphasis added.)

The Commission proceeded to quote pertinent language from the Supreme Court's decision in *American Trucking Assns., Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967), as follows:

> . . . 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 the law and fair and prudent administration, to adapt 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.

Then the Commission summed up its position as follows:

> 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.* (Emphasis added.)

As both the Supreme Court in the *American Union Transport, Inc.*, case, cited above, and the Commission in *Disposition of Container Marine Lines*, recognized, an unduly narrow interpretation of broadly drafted statutory language would frustrate congressional purposes. (See the *American Union Transport, Inc.*, case, 327 U.S. at pp. 443, 447, 456; see also *Disposition of Container Marine Lines*, 11 F.M.C. at pp. 482–483.)[16]

I therefore conclude that the Port's consolidation services are practices relating to or connected with the receiving, handling, storing, or delivering of property within the meaning of section 17 of the Act and that when the Port

[16] In the latter case the Commission demonstrated its concern that it not defeat congressional purposes, stating:

> . . . [T]he Commission need be ever mindful of its responsibilities as a body to which Congress had delegated certain responsibilities. The exercise of that delegated authority was intended by Congress, and must be interpreted by us, to be performed in the most judicious manner in our quasi-judicial capacity and in our best discretion. The administration of the Commission's duties requires flexibility of action and purpose when necessary and possible.

performs such services, they relate to furnishing terminal facilities in connection with common carriers by water within the meaning of section 1 of the Act.

*The Issue Regarding Tariff Publication*

The Commission's issue (3) also questions whether the failure of the Port to indicate the availability of its consolidation services in its terminal tariff constitutes a violation of the Commission's General Order 15, 46 CFR 533, as well as section 17 of the Act. In view of the above finding regarding the nature of the services in question, it must follow that the Port has failed to comply with the General Order and section 17 by failure to publish the service in its terminal tariff. Numerous decisions of the Commission support this finding. *See, e.g., Baton Rouge Marine Contractors v. Cargill, Inc.*, cited above, 18 F.M.C. at p. 164; *Ballmill Lumber & Sales Corp. v. Port of N.Y. Authority*, 12 F.M.C. 29, 33 (1968); *Truck and Lighter Loading and Unloading*, cited above, 9 F.M.C. at p. 517; *Empire State H'W'Y Transp. Ass'n v. American Export Lines*, 5 F.M.B. 565, 590 (1959); *Transportation of Lumber Through Panama Canal*, 2 U.S.M.C. 143, 149 (1939).[17]

The Port argues that there is no violation of the Commission's General Order 15 because that regulation pertains to "port terminal facilities" which the Port argues to mean physical services performed on those physical facilities. This argument of course is consistent with the Port's contention that its consolidation service is an independent service consisting primarily of "computer assisted paperwork." I have already discussed the flaws in this contention. These flaws also undermine the Port's argument regarding General Order 15.

The Port quotes a portion of General Order 15, specifically 46 CFR 533.6(b), as follows:

> (b) These definitions shall apply to "port terminal facilities" which are defined as one or more structures comprising a terminal unit, and including, but not limited to wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers in the interchange of same between land and water carriers or between two water carriers.

The Port proceeds to cite other sections of the regulations such as 533.6(d), which sets forth definitions of "terminal services" such as "dockage," "wharfage," "free time," "loading and unloading," "usage," "checking," etc. The Port argues that these services deal only with physical terminal facilities and the providing of services on those terminals.

Even if the Port were correct that the regulation deals only with physical structures and direct services on those structures, one could argue at best that no violation of the regulation should be found because it had not contemplated a new service. If so, the solution would be to require the filing of the tariff under section 17 and a subsequent modification of the regulation in a separate rulemak-

[17] General Order 15, 46 CFR 533, finally became effective on July 14, 1967, after being affirmed by the Court of Appeals in *Alabama Great Southern Railway Co. v. F.M.C.*, 379 F.2d 100 (D.C. Cir 1967). See Notice of Date for Compliance, 32 Fed. Reg. 7214, May 13, 1967 Later cases thus held failure to publish terminal tariffs to be in violation of both the regulation and the statute, e.g., *Baton Rouge Marine Contractors v. Cargill*, cited above. Even before the regulation, however, failure to publish a terminal tariff was found to be an unreasonable practice under section 17 of the Act. (*See, e.g., Transportation of Lumber Through Panama Canal*, cited above.)

ing proceeding. A very similar event occurred in the case of the first intermodal tariff filed as a result of the Commission's decision in *Disposition of Container Marine Lines,* cited above, 11 F.M.C. 746. After that decision, the Commission codified the result in a rulemaking proceeding which amended its General Order 13. *See Filing of Through Rates and Through Routes,* (*General Order* 13, *Amendment* 4), 11 SRR 574 (1970).

However, the Port ignores certain language in the portions of the regulation it cites and disregards other portions completely which run contrary to its contentions. In section 533.6(b), quoted above, the Port ignores the fact that the regulation states that the definitions are "including, but not limited to" the structures set forth as examples. Furthermore, the same quoted portion states that these facilities are "used for the transmission, care and convenience of cargo . . . in the interchange of same between land and water carriers. . . ." The Port's consolidation services are, of course, offered precisely for the purpose of facilitating interchange of cargo between land and water carriers. But there is more. The definitions set forth in section 533.6(d), which the Port cites, also include such things as "usage" in which no physical service is provided by the terminal operators at all and "checking" which consists merely of "counting and checking cargo against appropriate documents. . . ."[18] What, after all, is the Port's consolidation service, if not a vastly improved advancement over simple checking in which the Port locates cargoes destined for common inland points using information from vessel manifests which has been fed into the Port's computer?

Even more fatal to the Port's contentions, however, is the fact that the Port completely ignores section 533.6(a), which clearly demonstrates that the definitions of terminal services set forth in the portions quoted by the Port were not intended to be all-inclusive. In other words, the regulation contemplated flexibility and adaptibility to the institution of new types of terminal services in the spirit of the Supreme Court's exhortations in *American Trucking Ass'ns., Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, cited above, 387 U.S. at p. 416. Thus, section 533.6(a) states in pertinent part:

> *Provided, however,* That other definitions of terminal services may be used if they are correlated by footnote or other appropriate method to the definitions set forth herein. Any additional services which are offered shall be listed and charges therefor shall be shown in terminal tariffs.

In summary, then the Port is furnishing a computer and personnel to facilitate interchange of cargo through terminals between vessels and inland carriers. Equipment and labor have been held to be terminal facilities since *Status of Carloaders and Unloaders,* cited above, 2 U.S.M.C. at p. 767, and the subject service relates to the delivery of property to inland carriers.[19] Even if the

[18] Section 533.6(d)(8) defines "usage" as follows:

> The use of terminal facility by any rail carrier, lighter operator, trucker, shipper, or consignee, their agents, servants, and/or employees, when they perform their own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

If a terminal owner or operator can charge various people including consignees for using the terminal, merely because the terminal has been built and is available for use and this charge is considered a terminal service charge, why is not the Port's charge against consignees for its computer and personnel working with the computer also a terminal service charge?

[19] The fact that the consolidation service relates to the delivering of property and is therefore a marine terminal service may itself require a finding that such service is subject to Commission jurisdiction and that the person performing the service is furnishing terminal facilities. In promulgating its General Order 15, the Commission stated:

> If the function is of a marine terminal nature, no matter what the identity of the person performing such function, it is subject to Federal Maritime Commission jurisdiction. See G.O. 15 report of the Commission, Fike & Fischer SR, p. 325:53.

*equipment and personnel of the Port could arguably be held not to be terminal facilities* because they are not similar to warehouses or docks and are not located at piers, the Port is nevertheless furnishing such warehouses and docks both on its own and through its lessees and the consolidation service, again, relates to the delivery of cargo to inland carriers. Finally, General Order 15 is not limited to the physical structures or physical services set forth as examples, as section 533.6(a) clearly demonstrates, and even the General Order recognizes that something like "usage" can be considered to be a terminal service even though the terminal operator furnishes no service at all. (See also *Investigation of Wharfage Charges at Pac. Coast Port,* cited above, 8 F.M.C. 653, for a similar holding.)

I therefore conclude that the Port's failure to publish a description of its consolidation services together with the charges therefor in its terminal tariff constitutes a violation of General Order 15 and section 17 of the Act.

The Commission's issue (1) also questions the Port's practice of providing consolidation services "free of charge" and "only for inbound OCP shipments . . . ." Although the question of reasonableness of the practices has been deferred pending decision on the question of jurisdiction, it should be noted that the record shows that the Port has been charging for the service in question since the fall of 1974 and presently charges 1½ percent per inland invoice, effective as of May 1, 1977. Furthermore, the record shows that the service is offered both to OCP and non-OCP shipments, although it is used much more often with OCP shipments.

*Future Proceedings on the Question of Reasonableness*

As discussed above, the question of the reasonableness of the Port's consolidation practices has been deferred pending decision on the jurisdictional issue. Both CAPA *et al.* and Hearing Counsel recommend further proceedings and CAPA *et al.* request the Commission to prescribe just and reasonable regulations and practices relating to the Port's consolidation practices.

No evidence was presented to determine the question of reasonableness of the Port's consolidation practices at this time. As noted, the Port now charges for the service and provides the service both for OCP and non-OCP cargo, facts as to which the Commission's Order was not aware. No shippers have complained about discrimination in connection with the Port's consolidation practices. What little can be gleaned from the record developed for other reasons is that the consolidation service marks an improvement in terminal services which benefits consignees and others and makes the Port more attractive. However, CAPA *et al.* have alluded to the fact that at one time the Port charged nothing for the service and there is the possibility that the present charge may be too low or too high. The question is, if the Commission decides that it has jurisdiction, whether it should continue this formal litigation. I suggest several courses of action.

The original Order of Investigation and Hearing is now over seven years old. Conditions have changed since its issuance and there is even the possibility that other ports on the West Coast might be engaging in similar practices to protect their competitive positions, as I mentioned earlier. Nor have shippers complained. If the Commission simply remands the matter for further evidentiary trial-type hearings several months in the future or more, there is a danger that the proceeding will continue for several more years in addition to the more than seven years that have already elapsed. Furthermore, trial-type hearings involve expense and delay during the prehearing discovery and post-hearing phases as well as the hearing itself. Moreover, if the issue on remand becomes akin to a terminal rate case, something which should be avoided unless truly necessary, much complexity and delay are virtually inevitable. Terminal rate cases usually become extremely time-consuming and complex, involving cost studies, allocation formulas, and the like, as the Commission well knows from many previous terminal rate cases. *See, e.g., Truck Loading and Unloading Rates at New York Harbor,* cited above, 13 F.M.C. 51 (1969) and 17 F.M.C. 21 (1973), a case lasting eight years; *Terminal Rate Increases–Puget Sound Ports,* cited above, 3 U.S.M.C. 21; *Crown Steel Sales, Inc. v. Port of Chicago,* 12 F.M.C. 353 (1967); *Rates of Pacific Northwest Elevators Association,* 11 F.M.C. 369 (1968).

If jurisdiction over the consolidation service is found, the Commission may wish to consider less formal, cost-saving procedures in lieu of a remand for evidentiary hearings. For example, the Commission could employ a non-adjudicatory investigation under Rule 281, *et seq.*, 46 CFR 502.281, *et seq.*, or utilize the shortened procedure for rate cases under Rule 67(c), 46 CFR 502.67(c). Or the Commission could instruct the Port to submit information as was done in *Terminal Rate Increases–Puget Sound Ports,* cited above. Or the Commission could instruct its staff to undertake studies with the Port and make subsequent recommendations as to the need for future proceedings.

All the parties, of course, are free to make suggestions as to the proper procedure which the Commission should employ when they file their exceptions to this initial decision. Whatever method is chosen, however, the point I am making is that this proceeding is now very old and that continuation of formal litigation in the usual trial-type form may well lead to many more years of expensive litigation. Therefore, the parties and the Commission ought to consider these matters in recommending and planning future courses of action, assuming any further proceedings are necessary.

*The Status of Issues (2) and (4)*

As may be recalled, the other two issues framed in the Commission's Order of Investigation and Hearing raised no jurisdictional problems and, after full discovery was had by Hearing Counsel and the interveners, the parties agreed that these issues should be dismissed from the proceeding.

Issue (4) referred to the question whether the Port had failed to assess charges as prescribed by its terminal tariff. The Commission's Order stated the issue:

(4) Whether the Port has failed to bill for, or collect, applicable terminal charges which have occurred on cargo in amounts prescribed by its terminal tariff.

Hearing Counsel, who have the primary responsibility for developing the record in a Commission investigation, examined reports of Commission investigators and the Commission's staff recommendation which caused this isssue to be inserted into the proceeding. Hearing Counsel stated that the issue arose because of complaints that the Port had been allowing excessive free time *contrary to its tariff.* However, reports of Commission field investigators failed to find any evidence that the Port had engaged in such violations. Not having uncovered any evidence of violations, it was appropriate for Hearing Counsel to move to dismiss this issue from the proceeding. *See Philip Carey Manufacturing Co. v. NLRB*, 331 F.2d 720, 734 (6 Cir. 1964). No party objected to the motion. Accordingly, the issue was dismissed. (See Motion to Dismiss Issue (4) Granted, November 10, 1977.)

Issue (2) proved more troublesome. This issue referred to the failure of the Port to publish a drayage charge in its tariff and the question whether such a charge should be published in its terminal tariff. The Commission's Order stated the issue as follows:

(2) Whether the assessment by the Port of a drayage charge, as an element of its per carton fee for movement of cargo from piers to warehouses for sorting, segregating, and labeling prior to dispatch, should be included in its terminal tariff as a service.

As discussed previously, Hearing Counsel believed that this issue was amenable to dismissal as well as issue (4) and were instructed to file an appropriate motion to dismiss both issues. However, on March 23, 1977, they filed a motion only with respect to issue (4), stating that they were not prepared to move for dismissal of issue (2) because of outstanding matters requiring further clarification. They indicated that such motion would follow as soon as practicable. (See Hearing Counsel's Motion to Dismiss Issue No. 4 of the Commission's Order of Investigation, March 23, 1977.) Some time thereafter, Hearing Counsel apparently decided that the Port would be better able to compile the relevant facts and file the motion and reached agreement with the Port that the Port would file the motion on September 26, 1977. (See Procedure Established for Disposition of Proposed Stipulation and Motions to Dismiss Certain Issues, September 12, 1977, p. 2.) The motion was filed by the Port on September 26, 1977. Hearing Counsel and CAPA *et al.* replied to the motion, expressing no opposition.

Despite the lack of opposition to the Port's motion, I found that I could not rule on the motion. Although additional time had been granted to the Port to explain the pertinent facts, the Port's motion consisted of two pages, an attached affidavit of one and one-half pages, and three tariff pages. The motion stated that the issue related to adequacy of notice regarding drayage charges, that the Port was unaware of any confusion or prejudice to anyone, that in almost eight years of litigation in this case, Hearing Counsel had not discovered any basis for litigating the issue, and finally, that the issue was moot because the Port had amended its tariff to publish a drayage charge. The attached affidavit furnishes supporting information.

Hearing Counsel supported the motion. Hearing Counsel stated that the Port furnishes, among other things, a comprehensive terminal service at a "per carton rate," which, according to Hearing Counsel, includes an assessment for drayage services. Hearing Counsel agreed with the Port that its tariff had provided for separate quotation and billings for terminal services at the request of the vessel or cargo owner, although the Port did not break out and publish a separate drayage charge until February 1, 1977. Hearing Counsel found no complaints by shippers or other users of the Port's services and agreed that any possible ambiguity had been removed by publication of the separate drayage charge. Having already published the charge, Hearing Counsel saw no purpose in continuing to litigate the issue.

Nevertheless, because of the paucity of information furnished me and confusion arising out of the information furnished, I ruled that I could not rule on the matter, directing the Port to furnish clarifying information. (See Ruling on Motion to Dismiss Issue (2) Deferred Pending Receipt of Additional Information, November 10, 1977.) The essential problem arose from the fact that the Commission's Order referred to the possible need for publication of a drayage charge as an element of the Port's "per carton fee" in connection with movement of cargo from piers to warehouses. However, the drayage charge published in the Port's tariff (Item 60000) does not refer to its being a part of a "per carton fee" and the Port's brief explanations constantly referred to "per unit" storage charges, or "per unit rates (which includes per carton)." To add to the confusion, Hearing Counsel's reply referred to a "per carton rate." No "per carton fee" to which the Commission's Order referred or "per carton rate" appears in the Port's tariff. It was therefore impossible to determine whether the drayage charge now published in the Port's tariff had any relationship to the "per carton fee" to which the Commission's Order referred. The Port subsequently explained the situation as follows.

The Port's tariff provides that the Port may bill cargo owners on a per unit basis, if requested by the owner and certain other factors are known. If done in this way, the cargo owner receives a single "per unit" billing which covers various charges under the tariff. Most frequently, the unit involved in this type of billing is called a "carton," hence the reference to per carton billing. If the Port's customer, i.e., cargo owner, does not request a per unit billing, then the various tariff charges are billed separately without combining them. The per unit billing, however, is regarded as a more convenient method for the customer's record keeping.

Per unit rates are a billing method for storage charges and are based upon receipt of the cargo at the storage warehouse facility. Any movement of the cargo after receipt at a place of storage, whether called drayage or something else, is a part of the storage charges (except in one instance regarding structural steel, Item 60090 of the tariff). If there is any movement between facilities, i.e., apart from storage, such movement, i.e., drayage, is the responsibility of and for the account of the cargo and billing is separate from billing used in connection with storage.[20]

Drayage, apart from the storage charges, was performed by cartage companies working at the Port. The Port would, upon request, arrange for drayage, and pass on the charges of the drayage or cartage company. The Port did not publish this charge in its own tariff since it was merely considered a pass on of someone else's charge. However, after the Port amended its tariff effective February 1, 1977 (Item 60000), the Port now directly imposes a drayage charge where the cargo is loose and movement to a warehouse is necessary. The Port indicates that the drayage charge is separate from storage charges, whether such

[20] As discussed below, there is some confusion on this point

*storage charges are billed on a per unit combined* basis or by separate item by item basis, although the record is somewhat unclear.

Unfortunately, there is still some uncertainty caused by apparently conflicting statements in the Port's two affidavits, although these uncertainties do not appear to be serious enough to affect the outcome of this case. The problem essentially is that the limited record is not clear whether the per unit billing method includes the drayage charge and therefore, whether the drayage charge is "an element of its [i.e., the Port's] per carton fee for movement of cargo from piers to warehouses . . ." as the Commission's Order states. In the first affidavit filed by Mr. H. J. Levinger, Director of Marketing of the Port of Seattle, he stated that "when a unit price is requested and drayage is involved, all drayage costs and charges together with all other tariff items and factors are included in the quoted per unit price." Affidavit, September 23, 1977, p. 2. However, in the second affidavit Mr. Levinger states that "[a] per carton quotation or billing is a means of quoting and billing storage charges, and is therefore also based upon receipt of cargo at storage position." Affidavit, December 9, 1977, p. 2, paragraph 5. As noted, the Port has stated that storage does not include drayage from CFS or terminal to warehouse.

Whatever these statements purport to mean and perhaps they can be reconciled, the Port's tariff does not seem to be ambiguous. Item 10110 of the tariff seems to indicate that the per unit billing method will include all services including drayage which the Port now performs. The tariff item states:

At request of vessel or cargo owner, when all of the factors involving charges, i.e., weight, measurement, length or other, are known to the terminal operator, *the services herein contained* will be quoted and billed on a per unit basis as may be requested. (Emphasis added.)

Not only is the tariff provision unambiguous, but if the per unit method of billing is supposed to be a convenient method of informing cargo owners of all of their terminal charges in a single figure, as the Port claims, it would appear that drayage charges would be included in the single figure. However, whatever the situation is, the fact remains that the Port does now publish a charge ($2.00 per ton) in its tariff for a drayage service which it performs when loose cargo is removed from a CFS (container freight station) or terminal to a warehouse (i.e., storage) position. (Item 60000.) (Affidavit, December 9, 1977, paragraph 7.) The Port is therefore performing a drayage from CFS or terminal to warehouses and publishes its charge for the service. There is no evidence that the Port does not charge for this service when it is performed, whether it is included in the per unit method of billing combined with other terminal charges, or is separately stated and billed. Whatever method of billing is employed by the Port, the important fact is that each service it performs be specified and charges therefor be published in its tariff. Having published the drayage charge in its tariff, the Port cannot be found to be engaging in an unreasonable practice in violation of section 17 of the Act for failure to publish and there is no evidence that shippers have been confused or have suffered discrimination either before or after publication of the charge in the Port's tariff. Moreover, if, as it appears, the Port was not performing the drayage service prior to February 1, 1977, but was merely passing on charges of a cartage company, there would appear to be no reason why the Port would have been required to publish that other company's charges. With respect to the per unit or per carton system of billing, furthermore, it appears not only that no shipper suffered adversely but, on the contrary, received a convenient form of billing at his own request. There is, furthermore, no evidence that the Port departed from its published charges regardless of which billing method it employed.

As the Port has suggested in response to my own suggestions, if there is any remaining problem having to do with the Port's publication of its drayage charges, the matter should be dealt with in another proceeding with a fresh Commission mandate, or perhaps even better, on an informal staff level. (See the Port's Supplemental Memorandum Re Issue No. 2, December 9, 1977, p. 4; my Order dated November 10, 1977, p. 10, footnote 3, and the case cited therein.) The idea of informal staff discussions is especially appealing not only because the original Order of the Commission is ancient but the fact that the issue as framed in that Order does not even refer to the Commission's terminal-tariff regulation, General Order 15, 46 CFR 533. No member of the Commission's staff having expertise in the terminal area presented evidence as to his views of the propriety of the Port's tariff practices past or present. As stated, I cannot find on this sparse record that the Port's tariff is ambiguous or that anyone has suffered discrimination or unreasonable treatment. Under these circumstances it seems that formal proceedings and expensive litigation are unnecessary and that informal discussions between the staff and Port would be fruitful, if the Commission believes that the matter needs further attention or that the Port's tariff needs clarification.[31]

## ULTIMATE CONCLUSIONS

The Port of Seattle offers a consolidation service in which its personnel use computerized equipment to locate cargoes, select them for inland consolidation and prepare relevant documents. The cargoes move through terminals operated by the Port or by its lessees. The service facilitates movement from vessel through the terminals to inland carriers and ultimately benefits consignees who enjoy lower inland rates because of consolidation.

The Port is an other person subject to the Act as defined in section 1 of the Shipping Act, 1916, since it furnishes terminal facilities in connection with common carriers by water. The consolidation service is a service performed in conjunction with its status as an other person subject to the Act. It is a service subject to section 17 of the Act since it relates to the delivering of property which has been transported by water carriers across the Pacific Ocean. In peforming the service, the Port is furnishing terminal facilities, i.e., labor and equipment, as well as a terminal service related to the receiving, handling, storing, and delivering of property. Even if the Port's computerized equipment and personnel working the equipment were not terminal facilities within the meaning of section 1 of the Act, the Port furnishes such facilities on its own and through its lessees

[31] It should be a simple matter for the Port to explain to the Commission in its exceptions whether its per unit billing (Item 10110) includes drayage charges (Item 60000). My belief, despite the confusion described, is that the unambiguous tariff rule regarding per unit billing (Item 10110) shows that drayage charges in Item 60000 will be included in the per unit computation. If, for some reason, drayage from CFS or terminal to warehouse is not included in the per unit billing method, then the tariff can easily be modified to explain such fact.

and the consolidation service relates to the delivering of property from the various terminal facilities and locations owned or operated by the Port.

The consolidation service serves the very purpose for which any terminal is established, i.e., to facilitate interchange of cargo from one phase of transportation to another. It is not necessary to constitute a terminal service for the Port to send laborers to the terminals to move cargo around with their hands or with fork lift trucks or other such equipment. Some terminal services are merely incidental or auxiliary to physical movement but serve the purpose of facilitating movement. Some terminal services, such as "usage" or "wharfage," do not even involve the Port's or terminal owner's furnishing any physical service at all.

The Commission's jurisdiction under section 17 extends to practices of terminal owners or operators relating to cargo stored on the premises until cargo is taken into custody by inland carriers. The terminal operator is in reality only performing the obligations of common carriers by water who must arrange a convenient location for consignees to take possession of their property. A terminal operator may convert his operations into those of common carriers, i.e., Part-IV freight forwarders under the Interstate Commerce Act, in which event this Commission's jurisdiction would terminate. The Port has not done this and does not purport to do this when performing its consolidation service.

The Commission should not read remedial statutes like section 17 of the Act narrowly lest the congressional pruposes underlying its enactment be frustrated. The Supreme Court has recognized that section 17 is a broad statute designed to implement remedial purposes and that the legislative history of section 1 indicates an intention to embrace various facets of terminal operations as links in the stream of transportation. More recently, the Commission has followed the exhortations of the Supreme Court in adapting to changes in technology. The instant case demonstrates the need for the Commission to continue its policy of adaptibility to such changes.

Having offered a terminal service without publishing it in its terminal tariff, the Port has been in violation of section 17 of the Act and the Commission's General Order 15. The latter regulation is flexible enough to embrace the Port's innovative service. Even if it were not, section 17 would require publication in the Port's terminal tariff.

There is no evidence that the Port has failed to bill for or collect applicable terminal charges published in its tariff by granting excessive free time or otherwise.

At one time the Port did not publish a drayage charge in connection with movement of cargo from piers or terminals to warehouses. It now does publish such a charge, as it should do since it is providing the service. The Port's tariff is not ambiguous although there is a little uncertainty in the record as to whether the drayage charge is included in the Port's method of billing on a "per unit" or "per carton" basis. There is no evidence that the Port departed from its published tariff charges whether it computed its billing on the "per unit" basis or an item by item basis. No evidence of discrimination or confusion stemming from the use of the "per unit" billing method or previous failure to publish a drayage charge (for a service the Port had not provided) appears on the record. If there is any further need to look into the matter of ambiguity in the Port's tariff in this particular regard, the Commission can direct its staff to consult with the Port in lieu of continuing expensive formal litigation.

Similarly, in the matter of the deferred question of reasonableness of the Port's service, the Commission ought to consider a number of less formal, quicker, and less costly procedures to employ rather than simply remand the question for further evidentiary hearings, if any further proceedings are still warranted, in view of the age of this case and the danger of embarking upon many more years of complex litigation needlessly. Consideration should be given therefore to informal fact-finding procedures, shortened procedures, staff consultations with the Port, or instructions to the Port to furnish relevant information.

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

WASHINGTON, D.C.
*March 9, 1978*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 76–24

UNITED NATIONS

*v.*

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Tariff classification "PAPER ARTICLES N.O.S." found to more reasonably apply to shipment of tabulating cards.

*William Levenstein* for Complainant.
*Renato C. Giallorenzi* for Respondent.

## REPORT

*September 18, 1978*

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

This proceeding comes before the Commission on Exceptions filed by the Complainant United Nations (U.N.) to the Initial Decision of Administrative Law Judge Charles E. Morgan (Presiding Officer). Replies to the Exceptions have been filed by the Respondent Flota Mercante Grancolombiana, S.A. (Flota).

### FACTS

Complainant in this proceeding seeks reparation for a shipment of tabulating cards which moved from Brooklyn, New York, to Barranquilla, Colombia. Complainant alleged that Flota violated section 18(b) (3) of the Shipping Act, 1916, by its assessment of a rate higher than that properly applicable under its tariff.[1] The shipment occurred October 11, 1974 and the freight was pre-paid.

The goods in question were 1,900 boxes of tabulating cards or punched cards which measured 7⅜ inches in length and 3¼ inches in width, to which Flota applied the "Cards N.O.S." rate of $120 per ton W/M.

Complainant asserted that it was entitled to have its goods classified as "PAPER, Automatic Register, Cash Register, Computing Machine, or Ticker

* Commissioner Leslie Kanuk dissenting.

[1] At the time of the shipment, Flota was a member of the East Coast Colombia Conference and a party to that conference's Freight Tariff F.M.C. No. 1.

Tape," which carried a rate of $69 W/M. Rated under that classification, the overcharge claimed was $3,633.73. In the alternative, U.N. relied on the tariff classification for "PAPER ARTICLES: Boards, xxx Cardboard xxx Not Corrugated." This classification bears a rate of $80.75 W/M and would have resulted in an overcharge on the shipment of $3,947.25.

DISCUSSION

The Presiding Officer rejected the specific tariff classifications relied upon, determining instead that the tabulating cards should have been rated as "Paper Articles N.O.S.", which bears a rate of $117.25 per ton W/M. On this basis, the Presiding Officer found that the shipment was overcharged $195.94 and awarded reparation in that amount.

The Presiding Officer held that because of their texture and the use for which they are intended, tabulating cards are not the type of material covered by either of the two tariff classifications relied upon by Complainant. Nor could he find tabulating cards specificially mentioned under any of the categories listed under those two "paper" classifications.

Moreover, the Presiding Officer determined that the tabulating cards were "something different" or more than paper, and cannot take the rate for "PAPER, Automatic Register, Cash Register, Computing Machine or Ticker Tape." Similarly, the Presiding Officer held that the cards are not the same as "PAPER ARTICLES: Boards, Cardboard, Not Corrugated," because the tabulating cards are not the same as cardboard.

In its Exceptions, Complainant reiterated its position that the tabulating cards should have been rated as either: "PAPER, Automatic Register, Cash Register, Computing Machines or Ticker Tapes;" or PAPER ARTICLES, Board, not Containers K.D. or Container Blanks: Cardboard Not Corrugated (except Linerboard)." It is argued that neither of these two tariff items are qualified in any way and that these tariff categories are sufficiently broad so as to include the goods shipped.

Flota, in its Reply to Exceptions, supports the Presiding Officer's Initial Decision, and argues that Complainant's suggested interpretation of the tariff classifications does not properly construe the meaning of the words used in these tariff descriptions. Further, the tariff provisions urged by U.N. could allegedly only cover the commodity if those tariff provisions were interpreted in a strained and unnatural manner.

Upon careful consideration of the record of this proceeding, including the arguments and contentions of the parties, we conclude that the Presiding Officer was correct in holding that the proper tariff classification for the commodity shipped was "Paper Articles N.O.S."

The Commission laid down its rule of reasonability in the interpretation of tariffs in *National Cable and Metal Co. v. American Hawaii S.S. Co.*, 2 U.S.M.C. 471, 473 (1941), where it was stated:

"In interpreting a tariff the terms used must be taken in the sense in which they are generally understood and accepted commercially, and neither carriers nor shippers should be permitted to use for their own purpose a strained and unnatural construction . . . . [N]either the intent of the framers nor the practice of the carriers controls, for the shipper can not be charged with knowledge of such intent nor with the carrier's canons of construction. A proper test is whether the articles may be reasonably identified by the tariff description."

In upholding the tariff classification of "Paper Articles N.O.S.," and the resulting overcharge of $195.94, the Presiding Officer properly determined that tabulating cards are not the type of materials covered by either of the two tariff classifications advanced by Complainant.

While a paper product, the tabulating cards in question are not "paper", as that term is generally understood. They are thicker and stronger than paper as evidenced by the fact that they are able to withstand the demands of a keypunching machine. Clearly, the tabulating cards in question are not of the same type of paper material used in connection with cash registers, adding machines and computers.

Likewise, the tabulating cards are not the type of material that could take a *cardboard* classification.[2] While tabulating cards and cardboard possess somewhat similar characteristics, cardboard is a thicker, stronger substance than the material out of which the tabulating cards were produced. Tabulating cards are a paper product, which although stronger than paper, are not as strong as cardboard, and not the same as cardboard.

While the distinction between paper articles, cardboard, and paper used in adding machines, computers, etc., may be one of degree, that distinction nevertheless becomes significant when considered in connection with tariff classifications. It is these differences which we must take into account in reaching decisions involving the interpretation of tariffs.

In our opinion "Paper Articles N.O.S." is the tariff classification that *most reasonably* covers the goods shipped. Other tariff categories would have to be read in such a manner so as to distort their meaning—as that meaning is generally understood in a reasonable commercial sense.

THEREFORE, IT IS ORDERED, That Flota shall pay reparation to U.N. in the amount of $195.94 with interest at the rate of six per cent per annum if not paid within 30 days of the date of this Report and Order.

FURTHER, IT IS ORDERED, That the complaint in this proceeding is dismissed and the proceeding discontinued.

*Commissioner Leslie Kanuk dissents* and makes the finding that the tariff classification "PAPER, Automatic Register, Cash Register, Computer Machine, or Ticker Tape," reasonably applies to the shipment of tabulating cards.

(S) JOSEPH C. POLKING
*Assistant Secretary*

[2] *Webster's New World Dictionary of American Language* (1970), defines "cardboard" as "a material made of paper pulp but thicker and stiffer than paper; pasteboard."

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-38

PUERTO RICO MARITIME SHIPPING AUTHORITY—
GENERAL INCREASE IN RATES

NOTICE

*September 21, 1978*

Notice is given that the time within which the Commission could determine to review the August 16, 1978, initial decision in this proceeding has expired with no such determination being made. Accordingly, review will not be undertaken.

(S) JOSEPH C. POLKING
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

No. 75–38

PUERTO RICO MARITIME SHIPPING AUTHORITY—
GENERAL INCREASE IN RATES

*Finalized on September 21, 1978*

General rate increase of fifteen (15) percent found just and reasonable and thus lawful.

*Amy Loeserman Klein* of Galland, Kharasch, Calkins & Short for Puerto Rico Maritime Shipping Authority.

*C. Douglass Miller* and *John Robert Ewers*, Director of Commission's Bureau of Hearing Counsel, for Hearing Counsel.

## INITIAL DECISION,[1] IN REOPENED AND REMANDED[2] PROCEEDING, OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

### BACKGROUND

On August 21, 1975, the Puerto Rico Maritime Shipping Authority (PRMSA) filed Supplement No. 7 to its tariff FMC–F No. 1 increasing its ocean freight rates between the Atlantic and Gulf Coasts and Puerto Rico by fifteen (15) percent. Supplement No. 7 became and has been effective since September 1, 1975. On October 2, 1975, the Commission ordered (published in the *Federal Register* October 8, 1975, p. 47216) an investigation into the lawfulness of the increase, pursuant to sections 18(a) and 22 of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933.

By Order served May 11, 1978, the Commission vacated the Initial Decision served herein on March 8, 1977, and reopened and remanded this proceeding to the Presiding Administrative Law Judge for further hearings as he deemed appropriate consistent with the Commission direction in the said May 11, 1978, Order (mimeo p. 14).

A prehearing conference was held June 6, 1978, pursuant to Notice served May 18, 1978, in the reopened and remanded proceeding. The official stenographic transcript thereof consists of pages 1 through 25. It was agreed by all present:

(1) PRMSA would present its written testimony on or before Monday, June 19, 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).

[2] Proceeding reopened and remanded by Commission Order served May 11, 1978, granting PRMSA's Petition to Reopen thereby allowing PRMSA a further opportunity to meet its burden of proof, and justify the 15 percent rate increase (Order, mimeo p. 9).

(2) Hearing Counsel would present its written testimony on or before Monday, July 17, 1978.

(3) Parties would submit a status report on or before Monday, July 24, 1978.

(4) Should a hearing be necessary herein, hearing would commence Tuesday, August 22, 1978.

Subsequently, the parties saw no need for further evidentiary hearing in the matter or briefing, as indicated by a letter dated July 24, 1978, in which Hearing Counsel wrote, among other things:

> Counsel for PRMSA and Hearing Counsel have agreed that the written direct testimony of Robert A. Ellsworth, Hearing Counsel's witness and Mr. Kenneth W. Cabarle, PRMSA's witness should be admitted in evidence without cross-examination. Thus, no further evidentiary hearing is required. We respectfully request the Administrative Law Judge to admit the testimony of Mr. Cabarle and Mr. Ellsworth in evidence.

The additional testimony of Kenneth W. Cabarle (received June 26, 1978) is hereby marked as Exhibit No. 19, for identification. It consists of 6 pages. On the basis of the above request, Exhibit No. 19 for identification is received in evidendce as Exhibit No. 19. Mr. Cabarle also sponsored Exhibits Nos. 20 through 27 for identification which are received in evidence as Exhibits Nos. 20, 21, 22, 23, 24, 25, 26 and 27. It is noted that in a letter dated June 23, 1978, to Hearing Counsel, counsel for PRMSA wrote:

> . . . I am enclosing herewith two copies of Exhibits 19, 24, 25, 26 and 27 which should be substituted for the exhibits of the same numbers previously submitted by PRMSA with its Petition to Reopen the record. As explained at the prehearing conference (June 6, 1978), these new exhibits cover the same subject matter contained in the previous exhibits of the same number, but are based upon actual audited results for the fiscal year 1977.

The above substitutions are made as requested.

The testimony of Dr. Robert A. Ellsworth is marked as Exhibit No. 28 for identification and received in evidence as Exhibit No. 28.

From the official stenographic transcript of hearings, the exhibits received in evidence and all papers and requests filed in this proceeding, the Presiding Administrative Law Judge clearly and precisely finds the following *Facts*:

1. PRMSA, created by the Legislature of Puerto Rico Act No. 62, approved June 10, 1974 (Exh. 2, pp. 3 & 6), is a non-stock public corporation as well as a government instrumentality of the Commonwealth of Puerto Rico. PRMSA is the single successor to four (4) privately-owned common carriers, namely, SeaLand Service, Inc.,[3] Gulf-Puerto Rico Lines, Inc. (a wholly-owned subsidiary of Sea-Land Service, Inc.), Seatrain Lines, Inc.,[4] and Transamerican Trailer Transport, Inc.,[5] which had served Puerto Rico from the East and Gulf Coasts of the United States (Exh. 1, p. 5).

2. PRMSA commenced service in the Puerto Rico trade in October of 1974 (Exh. 7, p. 2). It commenced with three roll-on/roll-off vessels (the *PONCE DE LEON*, *ERIC K. HOLZER* and *LA FORTALEZA*) operated under long-term (20 year) Charter Party Agreements (Exh. 1, p. 7). (Charter Party Agreement for

[3] PRMSA acquired the assets of Sea-Land (a subsidiary of R. J. Reynolds Industries, Exh. 9, p. 2) and Seatrain primarily by the issuance of six-year notes in the amount of $150 million payable in approximately equal monthly insallments (Exh. 7, p. 2)

[4] Now, Seatrain is PRMSA's competitor in the North Atlantic with a fortnight sailing into San Juan. (Tr. 65).

[5] The stock of TTT of Puerto Rico was acquired for cash from a loan granted by the Government Development Bank of Puerto Rico (Exh. 7, p. 3).

each of the above named vessels is found in Exhs. 3, 4, and 5, respectively.) A fourth such vessel (*PUERTO RICO,* Exh. 6 for Charter Party Agreement) was obtained in January, 1975 (Exh. 1, p. 7). The operation of the vessels and services of PRMSA were basically handled by the Puerto Rico Marine Management Incorporated (PRMMI) (Tr. 91). Maritime Transportation Management, Int. (MTM), was a second management company, which had separate management and operation of PRMSA's roll-on/roll-off vessels and equipment during the period October 1974 through September 1975.

3. PRMSA was serving the East and Gulf Coast/Puerto Rico trade lanes with a fleet of eleven (11)[6] vessels (Exh. 8, p. 6), i.e., eight (8) containerships, all built originally in 1944 or 1945 (Exh. 7, p. 3). Approximately 73% of the fleet utilized by PRMSA in the Puerto Rico trade was composed of vessels more than 30 years old *(Ibid.)*, and three (3) trailerships built in late 1960 or early 1970. During peak periods PRMSA deployed a fourth trailership in the trade (Exh. 7, p. 2). These ships were supported by a fleet of rolling equipment (annual leases cost for rolling stock amounted to approximately $7 million) consisting of approximately 13,800 containers and 3,000 trailers *(Ibid.*, p. 4).

4. PRMSA Tariff No. 1—FMC–F No. 1 was filed with the Commission and became effective September 15, 1974 (Exh. 8, p. 4). The said tariff, with few exceptions, was published at the same level of rates as applied prior to September 15, 1974 *(Ibid.)*.

5. PRMSA's first full year of operation ended in September, 1975. On August 21, 1975, PRMSA filed Supplement No. 7 to its Tariff FMC–F No. 1, to be effective September 21, 1975, providing for an increase of fifteen (15) percent in ocean freight rates to and from Puerto Rico (Sections 5, 7, 8, 9, 10, 11, 12, 13 and 14), including matter under suspension in I & S Docket 75–18 (Supplement 5) and Rule 470 (Minimum Charge per Bill of Lading), Rule 315 (Return of Empty Pallets, etc.). Rule 240 (Part 2—Exclusive Use of Trailers), Rule 100 (Application of Rates and Charges on Refrigerated or Controlled Temperature Cargo from Puerto Rico and the Virgin Islands), Rule 80 (Application of Rates "Per Container" or "Per Trailer").

6. From the PRMSA data submitted as per 46 CFR 512.3(d)(1), with the August 21, 1975, Supplement No. 7 to PRMSA's tariff providing for the 15-percent increase herein, the Commission was persuaded that additional revenue is necessary if PRMSA is to continue the service it has been offering in the Puerto Rican trade, and the Commission permitted the 15-percent increase to go into effect September 21, 1975, without suspension (Order of Investigation herein served October 2, 1975, p. 2).

7. In this reopened and remanded proceeding audited actual figures of the operation of PRMSA are presented so that no projections are used. (June 6, 1978, Tr. 14).

8. PRMSA was not required in this reopened and remanded proceeding to present testimony on the issue of the tax exempt status of PRMSA *(Ibid.)*. PRMSA pays no significant taxes of any type as a consequence of its operation as an ocean common carrier (Exh. 1, p. 4.).

[6] In Aggregate terms, the PRMSA fleet is comprised of 12 vessels: Three (3) C4J Lift-on/Lift-off vessels, three (3) "Trans" Class Lift-on/Lift-off vessels, two (2) C4X Lift-on/Lift-off vessels, and four (4) "Ponce" class Roll-on/Roll-off vessels. Exh. 8, attachment V.

9. For the period June 30, 1975, through June 27, 1976, PRMSA in Exh. 20 Exhibit A shows a rate base of $156,754,000, comprised as follows:

| | |
|---|---|
| Investment in Vessels | $ 63,837,000 |
| Reserve for depreciation | 3,571,000 |
| Vessels—Net | 60,266,000 |
| Other Property and Equipment—Net | 91,112,000 |
| Working Capital | 5,376,000 |
| Total | $156,754,000 |

10. For the period June 30, 1975, through June 27, 1976, PRMSA in Exh. 20 Exhibit B shows total Net Income of $13,068,000:

| | |
|---|---|
| Operating Revenue | $193,505,000 |
| Vessel Operating Expense | 99,207,000 |
| Gross Profit | 94,298,000 |
| Deduct: | |
| Administrative and General Expense | 20,118,000 |
| Other Shipping Operations | 46,467,000 |
| Depreciation and Amortization | 14,645,000 |
| Total | 81,230,000 |
| Net Income (Loss) Before Provision for Federal Income Tax | 13,068,000 |
| Net Income (Loss) | 13,068,000 |
| Total Net Income (Loss) | 13,068,000 |

11. PRMSA cannot finance essential assets out of its operating funds (Exh. 7, p. 6).

12. PRMSA as such does not operate anything. PRMSA basically sets up policies, guidance, works on the financing, and supervises the operation of PRMMI. Vessel or terminal operation, booking of cargo is all done by PRMMI (Tr. 91). PRMSA and PRMMI have a five-year contract with two renewal options. The management service contract which PRMSA holds with PRMMI requires the payment of an annual management fee (Tr. 26). As to the amount of payment, there are 3 elements—2 are determined by the number of revenue tons involved, the third component is basically a percentage of the savings attained in the rendering of the service. These are incentive payments. The personnel costs of PRMMI are paid for by PRMSA from PRMSA funds. The compensation paid to PRMMI for the purposes of their services is separate and apart (Tr. 27)—above and beyond what is paid out in salaries ($50 million payroll (Tr. 107)) to employees of PRMMI.

13. PRMSA's competition in the trade is:

Seatrain Gitmo who entered the trade during December, 1975. Also during December, 1975, Rico Lines announced plans to enter the trade. Interisland Intermodal Lines replaced Berwind Lines. Sea-Land Service on October 10, 1974, filed Tariff 231—FMC No. 27. On April 25, 1975, Sea-Land filed Freight Tariff 243—FMC-F No. 30. In addition, there are three other competitors, i.e., Puerto Rico Marine Lines, Trailer Marine Transport and Gatco (Gulf Atlantic Towing Co.) (Exh. 8, p. 12).

14. The Commission's Notice of Intent to Make an Environmental Assessment, as to this proceeding, was served October 28, 1975, and published October 31, 1975, in the *Federal Register*—page 50750, Vol. 40 No. 211. Notice of Environmental Negative Declaration was served September 8, 1976, and published September 13, 1976, in the *Federal Register*—page 28824, Vol. 41, No. 178 to the effect that the environmental issues relevant herein do not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, *et seq.*

15. To date PRMSA has not been able to find an acceptable source of long-term financing (Exh. 7, p. 2).

## Issues

(A) Whether PRMSA has sustained its burden of proof that the subject rate increase meets the standard of reasonableness prescribed by section 3 of the Intercoastal Shipping Act, 1933, and/or section 18(a) of the Shipping Act, 1916.

(B) Whether the rate increase implemented by PRMSA and in effect, without suspension by the Commission since September 21, 1975, is lawful under section 18(a) of the Shipping Act, 1916, and/or section 4 of the Intercoastal Shipping Act, 1933.

## Holdings

(A) PRMSA has sustained its burden of proof that the subject rate increase meets the standard of reasonableness prescribed by section 3 of the Intercoastal Shipping Act, 1933, and section 18(a) of the Shipping Act, 1916.

(B) The rate increase implemented by PRMSA and in effect, without suspension by the Commission, since September 21, 1975, is found just, reasonable and thus lawful under section 18(a) of the Shipping Act, 1916, and/or section 4 of the Intercoastal Shipping Act, 1933.

## Discussion, Findings, Conclusions and Reasons

The testimony of witness Cabarle, Vice President and Comptroller of Puerto Rico Marine Management, Inc. (PRMMI) (Exh. 9, p. 1), and the testimony of witness Ellsworth, Chief of the Office of Economic Analysis, Bureau of Industry Economics of this Commission (Exh. 28, p. 1), according to Hearing Counsel's July 24, 1978, letter to the Presiding Admistrative Law Judge indicates that Hearing Counsel met with PRMSA's counsel on July 14, 1978, and reviewed the testimony of these witnesses. The letter states in part, "There is no conflict between the prepared direct testimony of Mr. Ellsworth and that of Mr. Kenneth W. Cabarle, PRMSA's witness. Each recognizes that there are a number of valid methods of testing PRMSA's need for the subject rate increase. Regardless of the method employed, the result remains the same—the increase does not result in an unreasonable return to PRMSA."

Dr. Ellsworth gave several means of assessing the revenue requirements of such a company:

(1) As to examining the debt-coverage ratio, he says that, essentially, coverage ratios are designed to relate the fixed financial charges of a firm to its ability to service them. The ratios reflect the number of times the flow of earnings available to service these requirements cover fixed obligations (Exh. 28, p. 9). Dr. Ellsworth also says that the coverage ratio is used extensively in the analysis of municipally-owned utilities, entities which are relatively similar to PRMSA.

Forms of coverage ratio are:

(a) The times-interest-earned ratio (TIER) (*Ibid.*, p. 12).
The formula for TIER is as follows:

$$\frac{\text{pre-tax earnings \& interest payments}}{\text{interest payments}}$$

(b) Fixed-charge-coverage ratio is

$$\frac{\text{net income before interest} + \text{depreciation and amortization} + \text{lease payments}}{\text{interest} + \text{principal payments} + \text{lease payments}}$$

Dr. Ellsworth is of the opinion this is an excellent ratio to use, since the data are available (*Ibid.*, p. 16). He concludes that a reasonable coverage ratio for PRMSA is 1.25 and that as PRMSA's short term debt is converted, the zone of reasonableness may reach the 1.5 level (*Ibid.*, p. 18).

Dr. Ellsworth analysed PRMSA—submitted data for the fiscal years 1976–77 as follows:

| (000's) | 1976 | | 1977 | |
|---|---|---|---|---|
| Net Income Before Interest: | $13,068 | | $ 9,661 | |
| Depreciation and Amortization: | 14,645 | | 17,142 | |
| Lease Payments: | 24,989 | | 17,667 | |
| Net Revenues: | 52,702 | | 44,480 | |
| Interest on Bank Loan: | $ 2,231 | | $ 4,115 | |
| Other Debt Repayment: | 17,758 | | 22,533 | |
| Lease Payments: | 24,989 | | 17,677 | |
| Fixed Charges: | $45,018 | | $44,325 | |
| Net Revenues / Fixed Charges | $52,702 / $45,018 | =1.17 | $44,480 / $44,325 | =1.00 |

Dr. Ellsworth states that, "The only negative aspect of utilization of the coverage ratio is that it must be recognized that this is only one tool of analysis." (Exh. 28, p. 21). He concluded that usage of the fixed-charge ratio at this time as a means of assessing PRMSA's revenue requirement is the best available tool (*Ibid.*, p. 37).

(2) The Comparable Earnings Test—one means of determining the fair rate of return that PRMSA should be permitted to earn on equity. Using this method of analysis, comparison is made with historic rates of return of various industries and conclusions made that PRMSA should earn the same average rate of return on equity as other U.S. industries, plus or minus certain adjustments for risk. Once having completed these calculations an allowed rate of return for PRMSA will have been computed that should be sufficient to attract capital and be

commensurate with rates of return being earned by other enterprises of similar risk (*Ibid.*, p. 22).

It was concluded by Dr. Ellsworth that, ". . . the fair rate of return on equity that PRMSA should be permitted to earn is 14 percent on equity . . . based on the fact that the average U.S. industry which competes in the capital markets earned approximately 12.5 percent on equity during the 1968–77 period, plus . . . conclusion that PRMSA require a 1.5 percent risk premium as a result principally of its high leveraged position." (*Ibid.*, p. 31)

(3) Fair Rate of Return on Rate Base. In calculating rate of return on rate base, PRMSA has submitted data under a variety of scenarios. The scenarios covered by the PRMSA data include rate of return both with and without the rate increase, in addition to both with and without capitalization of leases (*Ibid.*, p. 32).

(a) Hypothetical debt/equity ratio. Use of PRMSA's actual capital structure of 100 percent debt/0 percent equity and actual cost of debt would derive the following rate of return:

Fiscal Year 1977

| Capitalization | | | Rate | | Return |
|---|---|---|---|---|---|
| Debt | 1.00 | × | 7.2 | = | 7.20 |
| Equity | 0.00 | × | 14.0 | = | 0.00 |
| | | | | | 7.20 |

This 7.2 percent rate of return would, in actuality, only cover PRMSA's embedded debt costs, much of which is short term and therefore unsound financing.

Dr. Ellsworth asserts that "the hypothetical capital structure is the only means feasible by which we can attempt to assess PRMSA's cost of capital using the conventional rate-of-return methodology." Using a capital structure comprised of 45 percent debt and 55 percent equity, and based upon the 14.0 percent return on equity, 12.5 percent which he deemed, the average rate of return that a company such as PRMSA should be entitled to, plus a 1.5 percent risk premium, Dr. Ellsworth developed (*Ibid.*, p. 34) a:

Composite Cost of Capital

| Capitalization | | | Rate | | Return |
|---|---|---|---|---|---|
| Debt | .45 | × | 7.2 | = | 3.24 |
| Equity | .55 | × | 14.0 | = | 7.70 |
| | | | | Composite Cost | 10.94 |

If capital structure of 60 percent debt/40 percent equity is used

Composite Cost of Capital

| Capitalization | | | Rate | | Return |
|---|---|---|---|---|---|
| Debt | .60 | × | 7.2 | = | 4.32 |
| Equity | .40 | × | 14.0 | = | 5.60 |
| | | | | Composite Cost | 9.92 |

Dr. Ellsworth applied (*Ibid.*, p. 35) the various scenarios presented by PRMSA—those in Exhibits Nos. 25, 27, 26 and 24 which show a rate of return on rate base of 5.01%, Negative, Negative and 5.16% respectively, wherefore he says, "It should be apparent then, that whichever scenario is utilized, including the use of the actual capital structure which produced a cost of capital of 7.2 percent, PRMSA will not have earned a rate of return on rate base in excess of the allowable rates, which were based upon the use of hypothetical and actual capital structures."

Witness Cabarle states that Exhibits 20 through 27 are all in the format of reports which must be filed annually with the Commission pursuant to its General Order 11. The exhibits were intended to provide the data necessary for a standard rate of return analysis; Exhibits 20–23 reflect the actual results of operations of PRMSA for the fiscal year 1976—based on *audited* financial statements; Exhibits 24–27 reflect the audited results of the 1977 fiscal year; Exhibits 21, 23, 25 and 27 were prepared under the assumption that certain leases would be capitalized in accordance with the provisions of Financial Accounting Standards Board Statement No. 13.

Witness Cabarle attached to each exhibit in G.O. 11 format a Rate of Return Analysis. In each case, it was assumed the required return to equity is 10%, and the ratio was computed without deduction for taxes.

PRMSA's witness Roseman, an economist, whose direct testimony is Exhibit No. 12, advanced the proposition that for a test of reasonableness of the rate increase under investigation the Commission break with its traditional test of reasonableness, that is, the rate of return on rate base method and judge the propriety of a rate increase by another indicator, namely the debt-coverage ratio.

Witness Roseman says that regulatory standards have not been very extensively developed in the agencies regulating the rates and charges of publicly-owned enterprise (Exh. 12, p. 10); that it is not possible to apply the standard rate-of-return-on-rate-base to PRMSA because there is no way to determine what would be a fair return on equity capital, since PRMSA does not raise equity capital in the money markets, as well as because there is no balancing of consumer and investor interest (*Ibid.*, p. 6).

A rate of return, of course, is not merely a mechanical computation from separate elements. *Bluefield Waterwork and Improvement Co. v. PSC of West Virginia*, 262 U.S. 679 (1923), and *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). Rate of Return is a percentage developed to be applied to a rate base to provide the amount necessary to cover debt interest, dividends on preferred stocks and earnings on common equity. The amount so determined is equivalent to net earnings from operation, or operating income. The rate of return is developed through a study of the cost of capital together with appraisal of other factors, which require judgment, such as, fixed costs, variable costs, incremental costs, commodity costs, etc.

Fortunately, the parties now have presented a record, inventory and accounting procedures that lend to simple, clear, distinctive identifying, tracing and explaining of the costs associated with this service, revealing the whole story of the project with competent explanation. Patently, accounting procedures are not and should not be accomplices of legerdemain, but exponents of true facts and a means of proving them in an orderly fashion establishing the truth of each and the total.

Under section 3 of the Intercoastal Shipping Act, 1933, the burden was upon PRMSA to prove the rates just and reasonable. The Presiding Administrative Law Judge finds and concludes for the reasons given herein, including those supplied by and adopted from the analysis presented, that PRMSA has met that burden.

The receipt in this reopened and remanded proceeding of PRMSA's additional documentary evidence and testimony based upon *audited* financial figures, and the presentation by Hearing Counsel of testimony analyzing the evidence, facilitated the analysis of the "pros and cons" as to ways and means of measuring PRMSA's revenue needs. The parties in this proceeding, as in *Transconex, Inc.–Proposed General Rate Increase in the Virgin Islands Domestic Offshore Trade–Docket No. 76–26,* 16 SRR 1625 (1976), cooperatively have made a record herein containing supporting and underlying records and accounts by which the accuracy and efficiency of the evidence was and may be tested as to its probativeness, reliableness and substantialness, for findings as to the lawfulness of the instant rate increase under section 18 of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933. Hearing Counsel and its technical staff has reviewed the testimony of PRMSA and presented Hearing Counsel's own testimony which in turn has been reviewed by PRMSA and its technical staff. As a result, the analysis and helpful data now in this record serves well the public interest. Further, interested persons can read it for the support it gives in this case. The parties are agreed there is no conflict between the testimony presented by PRMSA and Hearing Counsel.

All of the testimony is part of this record. All of this has been closely examined and weighed by the Presiding Administrative Law Judge. Need for the increase has been shown, and no computation made with respect to the increase shows it to be improper.

The record reflects satisfactorily the usage of (1) debt-coverage ratio test, (2) comparble earnings test and (3) fair rate of return on rate base test. Again, computation, made by any one of them with respect to the increase does not show the increase to be improper.

Witness Roseman says it is not possible to apply the standard rate of return on rate base to PRMSA because there is no way to determine what would be a fair return on equity capital; however Dr. Ellsworth suggests the comparable earnings test as one means of determining the fair rate of return to earn on equity. There is no indication that the debt coverage ratio or comparable earnings test or the *fair rate of return* on rate base should be used exclusively, although Dr. Ellsworth views as excellent and best available the fixed-charge-coverage ratio under the debt-coverage ratio. All are means of testing and analyzing.

The Presiding Administrative Law Judge is satisfied and does adopt the parties' recognition of the congruence of the testimony in this proceeding. He *finds* and *concludes,* for that reason and the application of judgment, that the rate increase is not unjust or unreasonable. The increased rates withstand the test of debt-coverage ratio, comparable earnings test and fair rate of return on rate base test. Thus, tested by several criteria, and proper analysis would dictate that more than one test might be applied, the increase here is found just and reasonable.

The Commission has held that the fair-return-on-fair-value standard is proper in determining rates in the domestic offshore trade, and that the prudent investment standard would be used to determine the fair value of property. *Pacific Coast/Puerto Rico General Increase in Rates*, Docket No. 903, 7 F.M.C. 525, 533 (1963). The prudent investment standard prevents an undue inflation of the rate base predicated upon monies which a carrier has not spent. *Alcoa S.S. Co., Inc., General Increase in Rates in the Atlantic Gulf Puerto Rico Trade*, Docket No. 1066, 9 F.M.C. 220, 236 (1966).

The Commission also has said, it has been usual ". . . to consider at least as an important factor, in proceedings relating to the rates of carriers with little capital investment in comparison with their total costs of operations, the 'operating ratio' of such carriers, i.e., the margin between revenue and expenses of operation." *Transconex, Inc.–General Increase in Rates in the U.S. South Atlantic/Puerto Rico-Virgin Islands Trades*, Docket No. 69–21, and *Consolidated Express, Inc.–General Increases in Rates in the U.S. North Atlantic/ Puerto Rico Trade*, Docket No. 69–29, 14 F.M.C. 35, 44 (1970).

Thus it is seen that there are many criteria that can be used in the analysis for reasonableness and justness. As pointed out in *Bluefield* and *Hope, supra*, that a rate of return is not merely a mechanical computation from separate elements, the same applies here. For example, in the area of return on equity, witness Cabarle assumed a required return to equity of 10%, witness Ellsworth concluded PRMSA should be permitted to earn 14% on equity and an average rate of return of 12.5% that a company such as PRMSA should be entitled to, and witness Roseman says in part there is no way to determine what would be a fair return on equity capital, since PRMSA does not raise equity capital in the money markets; none of these are adopted herein for specific use henceforth automatically as requiring any percent as a return to equity.

The "novel question" of tax-exempt organization such as PRMSA and the appropriate rate of return as to such tax-exempt organizations is answered in this proceeding by the economic testimony and evidence presented and the testing thereof by criteria referred to above. Dr. Ellsworth in examining the "novel question" pointed out there are a number of organizations which are quite similar to PRMSA in certain respects (i.e., debt-financed, tax-exempt, and publicly owned)—municipally-owned utilities; Federal power agencies such as the Tennessee Valley Authority (TVA); the Bonneville Power Administration; and Rural Electric and Telephone Cooperatives (Exh. 28, p. 4). It appears at this time, the answer to the "novel question" of PRMSA's tax-exempt status, and how this affects rate of return analysis is to use several of the criteria that the Commission has used referred to above or those used herein to test for justness, reasonableness and lawfulness.

The Presiding Administrative Law Judge for the reasons given herein, *finds* and *concludes*, in addition to the findings and conclusions herein-before stated:

(1) PRMSA's rates for the Puerto Rican trade, as filed August 21, 1975, in its Supplement No. 7 to its tariff FMC–F No. 1 are just and reasonable.

*Wherefore, it is ordered,* that:

(A) PRMSA's increase in rates by its Supplement No. 7 to its tariff FMC-F No. 1, in effect since September 21, 1975, are just and reasonable under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933, and therefore are lawful.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

WASHINGTON, D.C.
*August 16, 1978.*

# FEDERAL MARITIME COMMISSION

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

## MATSON NAVIGATION CO.—PROPOSED CHANGES IN RATES IN THE U.S. PACIFIC COAST-HAWAII TRADE; PETITION FOR RECONSIDERATION OF DECISION PARTIALLY ADOPTING INITIAL DECISION

### ORDER ON RECONSIDERATION

*September 29, 1978*

The Military Sealift Command (MSC) on behalf of the Department of Defense has petitioned the Commission to reconsider its Decision and Order Partially Adopting Initial Decision, served June 30, 1978, in this proceeding. Respondent Matson Navigation Company (Matson) filed a Reply opposing the Petition.

These consolidated proceedings were instituted to determine the justness and reasonableness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, of certain rate changes filed by Matson during the years 1973, 1974, and 1975 in the U.S. Pacific Coast/Hawaii Trade. An Initial Decision was issued in which Presiding Administrative Law Judge Seymour Glanzer found, among other things, that the issues of the justness and reasonableness of the rates had become moot. On Exceptions the Commission issued a Decision and Order substantially adopting the findings of the Presiding Officer "with the exception of that portion declaring moot the issues of justness and reasonableness of rates." It is this single phrase in the Decision and Order that we are now asked to reconsider.

MSC believes the Commission avoided deciding the mootness issue and now requests a determination as to that issue so that parties to rate increase proceedings will not be induced to pursue these matters if in the end "findings of unjustness and unreasonableness can be avoided merely by carriers filing further rate increases."

Matson on the other hand takes the position that because the proposed rates were found to be just and reasonable, discussion construing the Commission's statutory powers if the rates were found to be unjust and unreasonable is unnecessary.

It must first be stated that the Commission did decide the issue of mootness to the extent that it disagreed with the Presiding Officer's finding that the issue of the justness and reasonableness of the rates in question was moot *ab initio*. Beyond that, we agree with Matson that to decide the secondary issue of what remedy would be available if the rates were found to be unjust and unreasonable in this case, where the increase has not been found to be unreasonable, would render such a discussion mere dicta.

Petitions for reconsideration are not a proper vehicle to answer theoretical regulatory issues.[1]

IT IS THEREFORE ORDERED, That the relief requested in the "Petition for Reconsideration of Decision and Order Partially Adopting Initial Decision" filed by Military Sealift Command is denied except to the extent already incorporated in the Commission's Decision and Order served in this proceeding.

By the Commission.

(S) JOSEPH C. POLKING
*Assistant Secretary*

[1] Rule 261 (46 C.F.R. 502.261) clearly requires that Petitions for Reconsideration must "state concisely the alleged errors in the Commission decision or order." As posed in the context of this case MSC has not alleged any error in the Commission's decision warranting relief.

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 76–60

## INTERMODAL DUAL RATE AGREEMENTS

## DENIAL OF PETITION FOR RECONSIDERATION

*September 29, 1978*

Seatrain International, S.A. (Seatrain) has submitted a Petition for Reconsideration (Petition) of the Commission's Order of August 2, 1978, denying Seatrain's Petition for Declaratory Order.[1] Seatrain had requested a declaratory order concerning the legality of dual rate contracts as applied to intermodal movements and/or the inland segment thereof. In its August Order, the Commission denied the relief requested because: (1) the question Seatrain sought to have resolved by declaratory order was squarely raised in another proceeding in which Seatrain is a party;[2] (2) there were disputed factual issues; and (3) no compelling reason was offered for issuing a declaratory order in these circumstances.

In its Petition for Reconsideration, Seatrain asserts that a declaratory order concerning the legality of dual rate contracts in intermodal transport would "remove uncertainty" in the industry and would not depend upon any contested issues of fact. While conceding that such a declaratory ruling would leave unresolved "certain legal and factual issues concerning the tariff format and the possibility of impossibility of carriers maintaining a fixed dual rate spread," Seatrain argues that such issues could be resolved *after* the issuance of a declaratory order, presumably on a case by case basis.

Seatrain also expresses concern that, if the Commission denies its Petition for Declaratory Order, it will not have the benefit of the comments filed by other parties in response to Seatrain's request for declaratory relief. Several of these comments were filed by entities that already are parties to Docket No. 76–11, and many of these entities opposed Seatrain's request for a declaratory order.

The arguments advanced by Seatrain in its Petition for Reconsideration have already been fully considered by the Commission in its Order denying Seatrain's Petition for Declaratory Order. Seatrain's Petition for Reconsideration presents no matters of law or fact which would cause the Commission to reverse or alter any determinations made in its August 2, 1978, Order. The relief sought by Seatrain's present Petition will, accordingly, be denied.

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[1] Replies in opposition to the Seatrain Petition were received from the Commission's Bureau of Hearing Counsel, Sea-Land Service, Inc. and the Japan/Korea Atlantic and Gulf Freight Conference filing jointly with the Trans-Pacific Freight Conference of Japan/Korea. Having shown good cause for its delay, North European Conferences was permitted to late file a reply in opposition to the Seatrain Petition.

[2] Docket No. 76–11, *In Re Agreement Nos. 150 DR–7 and 3103 DR–7*. This case is presently pending decision by an Administrative Law Judge and involves some 1570 pages of transcript and 35 exhibits.

However, to alleviate Seatrain's concern and to further facilitate comment on the important issues raised in Docket No. 76-11, the Commission will entertain Petitions to Intervene in Docket No. 76-11, for the limited purpose of filing exceptions, or replies thereto, to the Initial Decision ultimately entered in that proceeding by the Administrative Law Judge. So limiting the scope of interventions should serve to avoid unduly delaying the proceedings.

THEREFORE, IT IS ORDERED, That the relief requested in the Petition for Reconsideration of Seatrain International, S.A., is denied, and that the Commission's Order of August 2, 1978 denying the Petition for Declaratory Order of Seatrain International, S.A., is affirmed.

By the Commission.

(S) JOSEPH C. POLKING
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 77–33

AGREEMENT NO. 10044–3; MODIFICATION OF POOLING, SAILING, AND EQUAL ACCESS AGREEMENT—UNITED STATES GULF PORTS TO PORTS IN PERU

## DISCONTINUANCE OF PROCEEDING

*November 7, 1978*

This proceeding was instituted to determine whether Agreement No. 10044–3, an equal access and pooling agreement between Compania Peruana de Vapores and Lykes Bros. Steamship Co., Inc., should be approved, disapproved or modified pursuant to section 15, Shipping Act, 1916.[1] On September 21, 1977 we approved Agreement No. 10044–3 *pendente lite* or until September 30, 1978, whichever came first.[2] Because the Agreement has now expired by its own terms, the issues raised by our Order of Investigation have been rendered moot.

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

(S) FRANCIS C. HURNEY
*Secretary*

[1] The proceedings have not advanced beyond the prehearing stage

[2] The Agreement expired by its own terms on September 30, 1978.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 77–34

AGREEMENT NO. 10041–4; MODIFICATION OF POOLING, SAILING, AND EQUAL ACCESS AGREEMENT— UNITED STATES ATLANTIC PORTS TO PORTS IN PERU

## DISCONTINUANCE OF PROCEEDING

*November 7, 1978*

This proceeding was instituted to determine whether Agreement No. 10041–4, an equal access and pooling agreement between Compania Peruana de Vapores and Prudential Lines, Inc., should be approved, disapproved or modified pursuant to section 15, Shipping Act, 1916.[1] On September 21, 1977 we approved Agreement No. 10041–4 *pendente lite* or until September 30, 1978, whichever came first.[2] Because the Agreement has now expired by its own terms, the issues raised by our Order of Investigation have been rendered moot.

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

(S) FRANCIS C. HURNEY
*Secretary*

[1] The proceedings have not advanced beyond the prehearing stage.

[2] The Agreement expired by the its own terms on September 30, 1978.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 75–8

PUERTO RICAN FORWARDING CO., INC., ET AL.
POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916,
AND THE INTERCOASTAL SHIPPING ACT, 1933

## ORDER

*November 8, 1978*

By an Order of Investigation and Hearing dated March 31, 1975, this proceeding was instituted to determine whether Puerto Rican Forwarding Co., Inc., certain of its subsidiaries and certain carriers in the Puerto Rican trade were engaging in practices violative of Sections 15, 16 and 18 of the Shipping Act, 1916, and/or Section 2 of the Intercoastal Shipping Act, 1933. Named as respondents in this proceeding were Puerto Rican Forwarding Co., Inc. (PRF), European Container Service, Transmodal Associates, Inc., Seatrain Lines, Inc. and the Puerto Rico Maritime Shipping Authority (PRMSA). Prior to the hearings in this case, Respondent PRMSA entered into a settlement agreement with the Commission and was subsequently dismissed as a respondent in the case. Hearings were held as to the violations alleged to have been committed by the remaining respondents. An Initial Decision was issued by the presiding Administrative Law Judge on September 24, 1976. Pursuant to the special settlement procedures set forth at 46 CFR 505.5(c), Respondent PRF requested and received Commission permission to enter into settlement negotiations with the Commission's Office of General Counsel. On October 26, 1976, the Commission suspended further action in Docket No. 75–8 in order to permit Respondent PRF to explore the possibility of settlement.

Prior to commencement of settlement negotiations, PRF and other respondents participated in hearings before an Administrative Law Judge. The evidence, exhibits and stipulations entered in that hearing provide the factual basis upon which settlement has been concluded. As an express condition of settlement the respondent has consented to the entry of an Order directing it to cease and desist from practices enumerated below and has further consented to the entry of an Order requiring the submission of compliance reports in a manner set forth below.

THEREFORE, IT IS ORDERED:

That Puerto Rican Forwarding Company, Inc. (PRF), and its subsidiaries shall cease and desist from operating as a non-vessel-operating common carrier unless and until such time as it or they shall have filed appropriate tariffs with the Federal Maritime Commission.

That Respondent PRF shall cease and desist from application of the Freight All Kinds (FAK) rate to shipments consolidated by PRF which do not qualify for such a rate under the applicable carrier's tariff.

That Respondent PRF shall cease and desist from failing to submit a manifest to the ocean carrier of the contents of each container shipped by PRF under an FAK rate.

That Respondent PRF shall cease and desist for a period of three years from the date of this order from discarding, mutilating, disposing of or otherwise destroying such underlying documents as warehouse receipts, shippers' instructions or packing lists, delivery receipts, weight bills or other documentation which show or reflect the actual weight or measure of cargo received by Respondent and upon which the ocean freight rate is computed and assessed.

IT IS FURTHER ORDERED:

That Respondent Puerto Rican Forwarding Company, Inc. shall, upon reasonable notice, allow investigators or attorneys of the Federal Maritime Commission unimpeded access to the underlying documents required to be maintained by this Order, and shall allow the removal of such documents specifically requested by Commission investigators or attorneys for the purpose of duplication.

That within sixty (60) days after service upon it of this order, Respondent Puerto Rican Forwarding Company, Inc. shall file with the Commission under the oath and signature of a responsible officer a written report setting forth in detail the measures which have been taken to ensure the elimination of the practices which resulted in misratings and other operations which are the basis of the violations set forth in the Settlement Agreement which has been concluded with Respondent. Such a report shall also be submitted from time to time as the Commission may require.

IT IS FURTHER ORDERED: That this proceeding be, and hereby is, discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 359(I)

DURITE CORPORATION, LTD.

*v.*

SEA-LAND SERVICE, INC.

## ORDER ON RECONSIDERATION

*November 8, 1978*

By Petition for Reconsideration, Respondent Sea-Land Service, Inc. (Sea-Land) asks the Commission to reconsider its decision of May 12, 1978, in this proceeding wherein the Commission found that Sea-Land had collected charges in excess of those provided in the applicable tariff on a shipment of woodworking machinery and awarded reparation to the Complainant, Durite Corporation, Ltd.

Sea-Land points out that as the shipment moved from Elizabeth, New Jersey, to Arecibo, Puerto Rico, it was an error to find Sea-Land in violation of section 18(b)(3) of the Shipping Act, 1916, which section applies only to transportation in the foreign commerce of the United States. The objection is well taken. The reference should have been to section 2 of the Intercoastal Shipping Act, 1933.*

Otherwise, Sea-Land's arguments are but a restatement of contentions already advanced by Sea-Land and fully considered, and rejected, by the Commission, in reaching its May 12, 1978, decision. Sea-Land has presented no new facts or arguments which would cause us to alter that decision.

Consequently, the Commission Report and Order served May 12, 1978, in this proceeding is amended to reflect the fact that Sea-Land violated section 2 of the Intercoastal Shipping Act, 1933, rather than section 18(b)(3) of the Shipping Act, 1916, by collecting freight charges in excess of those provided in the applicable tariff on a shipment of woodworking machinery carried for Complainant Durite Corporation, Ltd. from Elizabeth, New Jersey, to Arecibo, Puerto Rico. The Commission's decision is affirmed in all other respects.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

* Like section 18(b)(3) of the 1916 Act, section 2 of the 1933 Act directs common carriers by water to file with the Commission tariffs showing all their rates and charges for the transportation of property and prohibits them from charging, demanding, collecting, or receiving more than specified in such tariffs (46 U.S.C. 844).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 562

SCHENECTADY MIDLAND, LTD.

*v.*

GULF/UNITED KINGDOM CONFERENCE

ADOPTION OF INTITIAL DECISION

*November 17, 1978*

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

By application timely filed on February 7, 1978, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.92(a), and section 18(b)(3) of the Shipping Act, 1916, the Gulf/United Kingdom Conference requested authority to refund a portion of the freight charges collected for a shipment of paratertiary butyl phenol from Houston, Texas to Liverpool, England. The application was concurred in by the complainant-consignee, Schenectady Midland, Ltd., and by the participating ocean carrier, Sea-Land Service, Inc.

Administrative Law Judge Charles E. Morgan issued an Initial Decision March 15, 1978, granting permission to the ocean carrier, Sea-Land Service, Inc. to refund a portion of the charges collected. The Commission served a notice of its determination to review that decision.

Having now completed its review the Commission finds the ultimate conclusion reached by the Administrative Law Judge to be proper and fully supported by the evidence of record. Specifically convincing of the merits of the application is the notation appearing at the bottom of page 98 of the 8th Revised Gulf/United Kingdom Tariff No. 38 (FMC-17) which provides: "Paratertiary Butyl Phenol deleted—Covered under Phenol page 99." The decision of the Administrative Law Judge is, therefore, adopted by the Commission and is made a part hereof.

It is so ordered.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 562

SCHENECTADY MIDLAND, LTD.

*v.*

GULF/UNITED KINGDOM CONFERENCE

*Adopted November 17, 1978*

Application for permission to refund $1,600.06 of freight charges granted.

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

By application timely filed on February 7, 1978, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), the Gulf United Kingdom Conference seeks authority to refund a portion of the freight charges collected for a shipment of paratertiary butyl phenol from Houston, Texas, to Liverpool, England, bill of lading dated September 22, 1977. The application is concurred in by the complainant-consignee, Schenectady Midland, Ltd., and by the participating ocean carrier, Sea-Land Service, Inc.

The shipment consisted of 800 bags of the paratertiary butyl phenol on 22 pallets in a 40-foot container. Eighteen pallets with bags each measured 42 × 48 × 56 inches, and four pallets with bags each measured 42 × 48 × 33 inches. The weight of the shipment was 45,372 pounds, or about 20.2554 weight tons (ton of 2,240 pounds). The shipment had a cubic footage of 1,330 or 33.25 measurement tons.

On July 28, 1977, the Conference deleted the entry for paratertiary butyl phenol from page 98 of its tariff no. 38, FMC 17, which had provided a rate of $128.25 W, under the mistaken impression that this commodity was covered on page 99 of its tariff. But, the rate on page 99 on paratertiary butyl phenol applied "in drums," but not "in bags," and also the rate on page 99 was WM (ton of 2,240 pounds or ton of 40 cubic feet whichever produces the greater revenue), instead of W only.

Consequently since the shipment was made "in bags," it became necessary to charge the rate on chemicals N.O.S. of $126.25 WM. The shipment was made freight collect, and the complainant-consignee paid charges, at the chemicals rate on 33.25 measurement tons, of $4,197.81.

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).

*Respondent is not aware of any other shipments of the same commodity* moved during the same period via respondent at the rate applicable and charged herein.

The respondent Conference requests permission for the ocean carrier, Sea-Land, to refund a portion of the charges collected. Shortly after the shipment moved, the tariff was corrected on September 28, 1977, to reinstate the rate of $128.25 W on paratertiary butyl phenol on 10th revised page 99 of the Conference's tariff. Under this rate the corrected charges on 20.2554 weight tons are $2,597.75. The difference sought to be refunded is $1,600.06.

It is concluded and found that there was an error of an administrative or clerical nature in the conversion of the tariff item from its application to the butyl "in drums" only from its application including "in bags," and there was error in the designation of WM in place of W; that the authorization of a refund of a portion of the freight charges collected will not result in discrimination among shippers; that prior to applying for authority to refund a portion of the charges collected, the Conference filed a new tariff setting forth the corrected rate basis, on which the refund of a portion of the charges collected would be computed; and that the application was timely filed.

In accordance with section 18(b)(3) of the Act, permission is granted to the ocean carrier, Sea-Land, to refund a portion of the charges collected. The refund authorized is $1,600.06.

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

WASHINGTON, D.C.
*March 15, 1978*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 74–5

AGREEMENT NO. 10066—COOPERATIVE WORKING ARRANGEMENT

Agreement No. 10066, an equal access agreement between Prudential Lines, Inc. and Flota Mercante Grancolombia, S.A., found subject to section 15 of the Shipping Act, 1916, and approved pursuant to that section, subject to certain modifications.

*J. Alton Boyer* and *William H. Fort*, for Prudential Lines.
*Renato C. Giallorenzi*, for Flota Mercante Grancolombiana, S.A.
*Thomas E. Kimball* and *Robert B. Yoshitomi*, for Westfal-Larsen and Co. A/S.
*Donald J. Brunner* and *C. Jonathan Benner*, for the Bureau of Hearing Counsel.

## REPORT AND ORDER

*November 17, 1978*

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

This proceeding was instituted to determine whether Agreement No. 10066 (Agreement), an equal access agreement between Prudential Grace Lines Inc.** (PLI) and Flota Mercante Grancolombia, S.A. (Flota), should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916. Westfal-Larsen Line, A.S. (WL), a Norwegian-flag carrier, protested approval of this Agreement and was named petitioner in this proceeding.

In his Initial Decision, served January 16, 1975, Chief Administrative Law Judge John E. Cograve (Presiding Officer) conditionally approved Agreement No. 10066, except the equal access provision thereof which provision he found was not subject to section 15 of the Act. Exceptions to the Initial Decision were filed by PLI, WL and the Commission's Bureau of Hearing Counsel (Hearing Counsel). Flota filed replies to the exceptions. We heard oral argument on July 30, 1975.

### FACTS

Agreement No. 10066 is an equal access agreement and, as submitted, is for an indefinite term. The primary purpose of this Agreement is to give its parties

* Commissioner Bakke concurs in the majority's finding on the jurisdictional issue. He will file a separate dissenting opinion to the majority's other findings.

** Now Delta Steamship Lines, Inc. See discussion *infra* page 33.

equal access to cargoes which, but for the Agreement, would be reserved by the parties' respective governments for carriage aboard national-flag vessels.

Specifically, Agreement No. 10066 provides that PLI and Flota:

(1) "manifest their wishes in collaborating mutually for a better service between the ports of the East Coast and the Pacific Coast of the United States of North America and Colombia." (Paragraph 1)[1]

(2) will "make all the necessary efforts so that commerce between the United States . . . East Coast and Pacific Coast and Columbia are served regularly, efficiently and continually, and will coordinate their services for this purpose."[2] (Paragraph 2)

(3) agree that Flota in United States East Coast and Pacific Coast ports and Prudential in ports in Colombia "will have free access to the total import and export cargo available" and that Flota and Prudential "will each use its best efforts to secure for the other . . . the benefits of its nation's decrees, legislation, and/or administrative rules and regulations regarding the reservation of cargo to its nation's Merchant Marine." (Paragraph 3).

(4) will commit themselves to obtaining from their respective governments approval of the Agreement. The character of "associate" for PLI in Colombia and for Flota in the United States attaches upon approval of the Agreement by both countries. (Paragraph 4)

(5) will "collaborate mutually in the transportation of cargo so that if one of them is not able to handle a shipment offered to it, will pass this offer to the other company." Flota will not ask its government to release a shipment without first offering it to PLI if Flota can't handle the shipment. (Paragraph 5)

PLI operates the only United States-flag ships in liner service between ports on the East and West Coasts of the United States and ports in Colombia. Since sometime prior to 1972 in the United States East Coast/Colombia trade, and the Fall of 1973, in the West Coast/Colombia trade, PLI has been accorded "associate" status by the Colombian Government.[3] This was accomplished in the United States East Coast/Colombia trade by Agreement No. 9833, which expired in May 1972, and since, then by unilateral extension of such status by the Colombian Government in response to PLI's request, made through Flota. In the United States West Coast/Colombia trade, associate status was obtained by unilateral action similarly requested.[4]

Flota is a Colombian corporation, 80 percent of whose stock is owned by the Colombian Coffee Growers Association and 20 percent by the Republic of Ecuador.[5] Flota owns and operates vessels in liner service between United States East and West Coast ports and Colombia. However, Flota does not maintain a service from the United States West Coast to Colombia's North Coast.

WL is a Norwegian company headquartered in Bergen, Norway. It owns and operates vessels in liner service in the North American West Coast/South American trade. WL's vessels are designed to carry mainly breakbulk type cargoes including lumber, woodpulp, and alkane.

In 1966, the Colombian Government instituted a program designed to develop and promote a national-flag merchant marine. On April 29, 1966, as part of this

[1] WL does not serve the United States East Coast/Colombia trade and, while expressing its desire that the full Agreement be disapproved, proffers no evidence as to this trade.

[2] There was considerable dispute among the parties as to the scope of this "coordination of service."

[3] This status gives PLI access to Colombian Government controlled cargoes equal to that of Colombian-flag vessels.

[4] Although the record reflects that the Colombian Government granted PLI "associate status" as a result of a request submitted through Flota, there is no persuasive evidence to support WL's allegation of an unfiled section 15 agreement between PLI and Flota based thereon.

[5] The Colombian Coffee Growers Association is a major shipper from the Colombian West Coast to the United States West Coast.

program, the Colombian Government issued Decree 994 which reserved a percentage of Colombia's import and export cargo for carriage by Colombian-flag vessels. Decree 1208, implementing Decree 994, followed on July 21, 1969. That decree reserved "no less than" 50 percent of Colombia's general import and export cargo to Colombian-flag vessels on trade routes served by those vessels.

In December of 1971, the Colombian Government issued Decree 2349 which authorizes governmental approval of pooling or other transportation agreements between Colombian-flag lines and foreign-flag lines and confers "associate" status on the foreign line. This in turn makes the foreign-flag line eligible to carry reserved cargo under Decree 1208. Decree 2349 further provides that any agreement approved thereunder must be based on equal or reciprocal treatment for Colombian shipowners. Thus, before a foreign-flag line can achieve "associate" status under Colombian law, it must be in a position to aid Colombian shipowners in obtaining "equal access" to cargo which would otherwise remain captive to that foreign line.

The decrees in question are all implemented in the Colombian import trade by a stamp system. The import license for a reserved commodity has a stamp placed on it indicating that it must move either on a Colombian-flag vessel, certain Ecuadorian-flag vessels or "associates" of a Colombian-flag vessel.[6] The Colombian consular officials in this country will not release a cargo whose import license is so stamped unless the cargo has been booked on a Colombian-flag vessle or an associate line or unless the consular officials have been notified that the "reservation" has been lifted or waived. Waivers can be obtained when a Colombian-flag vessel or "associate" is either unavailable or inadequate to carry the particular reserved cargo.[7]

For many years the United States has also maintained programs designed to develop and promote our merchant marine. Two such programs are pertinent to this proceeding. Public Law 664, the Cargo Preference Act of 1954, 68 Stat. 832, requires that at least 50 percent of the gross tonnage of certain United States Government generated cargoes be transported on privately owned United States-flag commercial vessels. This requirement generally applies to: (1) procurements by the United States for its own account; (2) equipment, material or commodities furnished for the account of a foreign nation by way of (a) grants; (b) loans or credits; and (c) guarantees of convertibility of foreign currencies.

Public Resolution 17 (PR–17), approved in 1934, embodies "the sense of Congress" that public agencies making loans to finance exports shall require that those exports be carried on United States-flag vessels. However, a waiver of the United States-flag requirement is permitted and may be granted by the Maritime Administration (Marad) to vessels of the recipient country. In granting waivers for PR–17 cargoes, Marad considers, among other things, whether United States-flag vessels are accorded parity of treatment in the carrying of cargoes controlled by the government of the recipient country. Thus, while Marad could

[6] Freely translated, the stamp reads: Goods covered by this import license must be transported only in Colombian-flag vessels, or the following Equadorian vessels: *Republica de Ecuador*, *Ciudad de Quito*, *Ciudad de Guayaquil* and *Ciudad de Cuenca*, or in those of lines associated with a Colombian enterprise. The Equadorian vessels named on the stamp are those owned by Flota.

[7] It is not clear from the record under exactly what circumstances a Colombian-flag vessel or "associate" is to be deemed "unavailable or inadequate".

insist that 100 percent of such cargoes move on United States-flag vessels, its policy is to allow the national-flag vessels of the recipient country to carry as much as 50 percent of PR–17 cargoes.

There are three major United States West Coast/Colombia trade routes served by two or more of the carrier parties to this proceeding. The first is the United States West Coast/Colombia North Coast, southbound trade. The main commodities moving in this trade are woodpulp, clay pipe, peas, vehicles, fertilizer and talc. The Colombian cargo reservation laws are not effected in this trade because Flota does not serve it.[8]

The second major trade route is the United States West Coast/Colombia West Coast trade southbound. The major commodities moving in this trade have been flour, woodpulp and alkane. At the time the record in this proceeding was closed, WL had ceased operating in this trade. The Colombian cargo reservation laws did not have a substantial impact on this trade until 1972 when more import licenses were stamped. PLI can identify about 4000 tons of cargo lost to Flota since 1972 but they cannot quantify the total amount.

The third major trade route is the Colombia West Coast/United States West Coast trade northbound. Coffee is the major commodity in this trade, accounting for approximately 90% of the cargo.

The Colombian cargo reservation laws have not been effected in this trade because the Coffee Growers Association, the majority owner of Flota, has a continuing need for service from Colombia's West Coast to coffee processors on the West Coast of the United States.

## Discussion

### *Nature and Effect of the Agreement*

Section 15 of the Shipping Act, 1916, requires the filing for approval of every agreement between two common carriers by water subject to the Shipping Act, 1916:

> . . . [F]ixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive preferential, or cooperative working arrangement.

Section 15 also requires that the Commission shall:

> . . . after notice and hearing, cancel or modify any agreement . . . whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements. . . .

An approved section 15 agreement is exempt from the antitrust laws of the United States. However, where an agreement submitted to the Commission for approval is established as violative of the antitrust laws, this alone will normally

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[8] While the Presiding Officer found that the clear language of the Decrees (1208 and 994) makes the reservation laws applicable only to trades served by Flota, there is evidence, offered by WL, that PLI had to seek a number of waivers before it was permitted to carry reserved cargo.

constitute substantial evidence that the agreement is contrary to the public interest, unless the proponents to the agreement can demonstrate by substantial evidence that the particular agreement "is required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238 at 243 (1968). *Canadian American Working Arrangement*, ____ F.M.C. ____ (1976), 16 SRR 733.

Agreement No. 10066 is clearly an agreement which must be filed for approval under section 15. This Agreement is a preferential, cooperative working arrangement within the meaning of section 15 in that: (1) it accords PLI the special privileges and advantages available under the cargo preference laws of Colombia; (2) each party to the Agreement must offer to the other cargo it cannot carry, with Flota additionally agreeing not to ask its Government to release cargo it cannot handle without that cargo being first offered to PLI; and (3) it permits the parties to "coordinate" their services in some unspecified manner. Futher, to the extent that the Agreement commits the carriage of Colombian cargo to the parties to the Agreement, and thereby restricting the availability of such cargo to other carriers, it effectively controls and regulates competition.

While the Colombian cargo reservation laws, in and of themselves are restrictive of competition in the United States foreign commerce, the amount of competitive restriction they create is limited by, and proportional to, the number of vessels available to take advantage of those laws.[9] Thus, since the implementation of Decree 1208 in 1970, the Colombian-flag fleet *alone* was unable to carry sufficient cargo under the Colombian decrees to cause serious economic harm to WL or PLI. However, when PLI enters into this Agreement with Flota, and PLI is extended the advantages of the Colombian cargo preference laws, the "fleet" sailing under those laws is increased, and the anticompetitive effects of those laws are exacerbated. As a result, the Agreement will have a further chilling effect on the competitive situation in United States/Colombia trade.

Although not all section 15 agreements are violative of the antitrust laws, there can be little doubt that Agreement No. 10066 between PLI and Flota represents at the very least a combination in restraint of trade violative of section 1 of the Sherman Act.

Although the Agreement between PLI and Flota is prompted by foreign legislation, this does not change its status with respect to the Sherman Act. An agreement or combination which is in restraint of, or has a substantial anticompetitive effect on, United States commerce, is nonetheless violative of the Sherman Act even though it may derive its impetus from foreign legislation.[10] In *Sisal, supra,* the defendants solicited the passage of laws which aided them in

[9] As discussed above, the United States also has cargo reservation laws which to a limited extent restrict competition for certain cargoes moving in the United States foreign commerce. However, as also noted above, United States cargo preference laws restrict competition on cargo only when the United States Government is directly involved in the financing of the goods under one of its aid programs. We think there is a significant and critical difference between the United States cargo preference laws and those of Columbia which apply to all general cargo.

[10] *United States v. Sisal Sales Corporation*, 274 U.S. 268 (1927), *Continental Ore Co., et al. v. Union Carbide and Carbon Corp., et al.*, 370 U.S. 690 (1962). Accord, American Bar Association, *Antitrust Developments, 1955–1968, A Supplement to the Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955* (1968) at pages 45–52, and Pugate, *Foreign Commerce and the Antitrust Laws*, 2nd Ed. (1973) at pages 75–82.

carrying out a conspiracy to monopolize the sisal trade with the United States.[11] In reversing a lower court decision which dismissed the complaint the Supreme Court stated:

Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein. The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True the conspirators were aided by discriminating legislation but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws. *Id.*, at 276.

Similarly, in *Continental Ore Co., supra*, Electro Met of Canada, a wholly-owned subsidiary of defendant Union Carbide, was appointed the exclusive purchasing agent of vanadium for the Metals Controller of the Canadian Government. Continental Ore Co., the plaintiff, attempted to introduce evidence consisting of communications between the plaintiff and Electro Met of Canada tending to show that Electro Met, under the control and direction of defendent Union Carbide, was conspiring to monopolize the vanadium market. The lower court rejected this attempt, stating that Electro Met of Canada was an arm of the Canadian Government and efforts of the defendant to influence the Canadian Government through its agent were not within the purview of the Sherman Act. In reversing the lower court, the Supreme Court stated that the defendants were insulated from antitrust liability merely because the acts of an agent of a foreign government were involved because "the conspiracy was laid in the United States, [and] was effectuated both here and abroad." *Continental Ore Co., supra*, at 706. The Court continued stating that:

Respondents are afforded no defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law. *Id.* at 706.

Agreement No. 10066 involved a party domiciled in the United States and made effective, in part, by acts done in the United States and whose purpose is to affect the foreign commerce of the United States. The Agreement is clearly one which unless exempted under section 15 of the Act would be subject to this nation's antitrust laws.[12]

*Applicability of Noerr/Pennington Doctrine*

The Presiding Officer found the equal access provision of Agreement No. 10066 not to be subject to Commission jurisdiction by reason of the *Noerr/Pennington* doctrine. *Eastern R.R. Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In this, we believe he erred.

The holdings in *Noerr* and *Pennington* are basically that a combination or association of two or more persons entered into for the purpose of soliciting, with unmistakable anticompetitive intent, a governmental action with respect to the

[11] Sisal is the fiber of the henequen plant, and is used to fabricate the twine for bailing our grain crops.

[12] It should be noted that the circumstances of this "Agreement" are unlike those involved in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F.Supp. 1291 (D.C. Del. 1970), where the anticompetitive activity was *compelled* by foreign legislation. PLI was not compelled to become a party to this Agreement but entered into it of its own volition. The Colombian legislation here may have been an impetus for the Agreement, but the fact remains that PLI entered into the Agreement deliberately and voluntarily.

passage or enforcement of laws is not violative of the Sherman Act. The stated reasons for this holding are several.

First, the Supreme Court found such "political" activity to be "essentially dissimilar" from the types of activities normally held violative of the Sherman Act, *i.e.*, business activities. Second, the Court determined that while the dissimilarity of activity alone might not be dispositive, the question of the status of this activity with regard to the Sherman Act is conclusively answered when it is considered that a holding to the contrary would impair the ability of the people to collectively and freely petition the government and for their government to take action thereon. To hold otherwise, the Court explained, would give the Sherman Act regulatory effect over political activity and would impute to Congress an intent, in passing the Sherman Act, to invade the right of petition, an imputation not justified in light of the countervailing consideration discussed above. *Noerr Motor Freight, supra.*

The holding of *Noerr* and *Pennington* does not apply to the facts in this proceeding. First, the cargo preference laws of Colombia and the United States already exist, therefore no "solicitation" is necessary to encourage their enactment. In *Continental Co., supra,* the Supreme Court indicated that the Noerr/Pennington doctrine does not encompass the use or manipulation of existing legislation as an instrument to effectuate an anticompetitive contract. The Court there stated:

> Respondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purposes of the Sherman Act, and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr. Continental Co., supra,* at 707.

Secondly, the agreement between PLI and Flota to secure for one another the benefits of their respective nation's decrees, legislation and rules governing the reservation of cargo cannot be characterized as "political" activity, in view of the fact that no form of political persuasion or advocacy is involved. It is apparent from PLI's previous dealings with Flota and the Colombian Government that no lobbying or pursuasion is necessary to have that government extend to PLI the benefits of the Colombian cargo preference laws once the Agreement is executed. The Colombian Government *will,* as a matter of course, extend the privileges of its preference laws to PLI on a contract basis upon approval of this Agreement.

Even assuming that Flota must actually lobby its government to secure for PLI the benefits of Colombia's cargo preference legislation, the lobbying of a foreign government is not an activity necessarily entitled to full constitutional protection. In *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.,* 331 F.Supp. 92 (C.D. Calif. 1971), *aff'd, per curiam,* 461 F.2d 1261 (9th Cir. 1972), *cert. den.,* 409 U.S. 950 (1972), the defendant had allegedly induced several foreign governments to enact legislation which, allegedly, ultimately resulted in the plaintiff losing valuable oil interests in the Persian Gulf. In passing on the defendant's motion to dismiss the complaint on various grounds, including the applicability of the *Noerr/Pennington* doctrine, the court explained:[13]

[13] The court granted the defendant's motion to dismiss the complaint on other grounds.

Examination of the premises underlying *Noerr* indicates that the case's rationales do not readily fit into a foreign context, such as the facts of this case. One of the roots of the *Noerr* decision was a desire to avoid a construction of the antitrust laws that might trespass on the First Amendment right of petition. 365 U.S. at 138, 81 S. Ct. 523. The constitutional freedom "to petition the Government" carries limited if indeed any applicability to the petitioning of foreign governments. *Id.*, at 107.

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A second basis of *Noerr* is a concern with insuring that, "[i]n a representative democracy such as this," law-making organs retain access to the opinions of their constitutents, unhampered by collateral regulation. . . . The persuasion of Middle Eastern states alleged in the present case is a far cry from the political process with which *Noerr* was concerned.

In sum, the interests asserted in this case are dissimilar to those that *Noerr* was concerned with safeguarding; therefore, the wholesale application of that exception to the Sherman Act appears inappropriate. *Id.*, at 108.

The rationale expressed in *Occidental Petroleum, supra,* is equally applicable in this proceeding.

Finally, PLI's efforts to secure for Flota the benefits of this nation's cargo preference laws will consist, so far as the record indicates, of responses to queries routinely made by the Maritime Administration. Before granting a waiver under PR-17, which would allow vessels of the recipient nation to carry reserved cargo, Marad solicits the views of United States-flag carriers serving the trade involved with respect to the feasibility of granting the waiver, particularly to determine whether United States-flag shipping is being accorded parity of treatment in the carriage of the recipient nations' government controlled cargo. Marad's decision to grant or deny waivers is not subject to advocacy or persuasion but rather is rendered solely on the basis of whether or not the recipient nation discriminates against United States-flag carriers.[14] Because there is no advocacy or persuasion involved in responding to Marad's inquiries, the response cannot be characterized as *Noerr/Pennington* type political activity.

Our holding that the equal access provision of the Agreement is subject to section 15 does not interfere with PLI's right to petition Marad or other agencies for more favorable treatment for Flota. Regardless of whether the equal access provision is ultimately approved or disapproved, PLI retains the right of any citizen to petition its Government to secure additional benefits on behalf of Flota.

In conclusion, we find that the Agreement before us is not an agreement to engage in political activity regardless of how the parties choose to phrase their respective promises. This is a commercial agreement, the execution of which, if approved by the Commission, does not depend on "solicitation" but rather is determined by legislation already in existence. The *Noerr/Pennington* doctrine simply does not apply.

### *Justification for Agreement*

Having determined that Agreement No. 10066 is subject to the requirements of section 15 and contrary to the antitrust laws we must now decide whether the Agreement, as submitted, has been justified, in whole or in part, and accordingly whether it should be approved, disapproved or modified. The critical issue then becomes whether legitimate objectives for the Agreement outweigh its anticom-

[14] *See* the *Statement of Policy of Public Resolution 17–73rd Congress*, issued by the Maritime Administration, July 24, 1959, *Pike and Fischer Shipping Regulations*, section 501.

petitive effects. *F.M.C. et al. v. Aktiebolaget Svenska Amerika Linien, et al., supra.*

Recently, in its decision in Docket No. 73–72–*Agreement No. 10056–Pooling, Sailing and Equal Access to Cargo in the Argentina/U.S. Pacific Coast Trade,* 20 F.M.C. 255 (1977), the Commission modified its earlier policy that "international harmony" and "the avoidance of governmental conflict" alone secured important public benefits sufficient to overcome the anticompetitive effects of pooling/equal access agreements. Prior to that decision, the Commission had determined that "international harmony" is in the public interest and that the "avoidance of potential government confrontation" generally warrants Commission approval of a commercial arrangement that remedies discriminatory practices resulting from foreign legislation. *Agreement No. 9939–Pooling, Sailing and Equal Access to Government–Controlled Cargo Agreement,* 16 F.M.C. 293 (1973).

In *Agreement No. 10056, supra,* the Commission determined that proponents of a pooling and equal access agreement would be required to establish "more immediate [public] benefits" than just "international harmony" and the "avoidance of governmental" confrontation. As a result of this decision, if an agreement is to be justified on the basis of "international harmony", proponents must first establish "a clear likelihood that a specific type of official confrontation would be avoided, and particularize the negative effects this confrontation would have upon ocean shipping in the United States trade route in question."

We have given careful consideration to the rationale expressed in Docket No. 73–72 and have determined that the policy established there ignores the realities surrounding cargo preference laws, particularly in our South American trades, and imposes upon proponents of a commercial arrangement, negotiated in response to a given cargo preference law, an insurmountable and unrealistic burden of proof.[15]

The Commission and its predecessors have long recognized the aspirations of many nations to develop and maintain a merchant marine that is capable of carrying a substantial portion of its commerce. *E.g., West Coast Line, Inc. v. Grace Line, Inc.,* 3 F.M.B. 586 (1951), *Agreement No. 9939, supra.* The measures taken by these nations to assure that their respective national-flag vessels carry more of their imports and exports generally require that certain cargo be carried on a national-flag line or encourage shippers to use the national-flag line by imposing surcharges or additional custom duties on cargoes that are not carried by the preferred line. Whatever the means used, the effect is to secure for the preferred line or lines a larger share of the available cargo at the expense of other ocean carriers serving the trade. Because these measures affect the imports and exports of the United States–insofar as our trade with a given country is concerned–they in and of themselves, are a source of "inter-governmental conflict." This "conflict" can only be resolved either through a commer-

[15] Although a United States-flag carrier might *request* retaliatory action from this Commission, Marad or the Department of State, it would find it extremely difficult, if not impossible, to establish "a clear likelihood that a specific type of official confrontation would be avoided" by the approval of a commercial arrangement. This is so because in each instance the actions taken by the respective governments would be discretionary and could take many forms.

*cial arrangement or resort to retaliatory measures such as those permitted under* section 19 of the Merchant Marine Act, 1920.[16]

We believe that a commercial arrangement which avoids potential inter-governmental conflict is clearly preferable to disruptive retaliatory action. The avoidance of such potential "inter-governmental conflict" and the maintenance of international harmony is a legitimate public interest objective to be derived from the approval of a bilateral agreement.

Agreement No. 10066 is clearly such an arrangement. To the extent it serves to obviate "conflict" between the United States and Colombia by attempting to reconcile the policies of the two nations, it clearly yields important public benefits. Without this agreement, PLI might well seek retaliatory action from the Commission, the State Department, Marad, or others to counter the effects of the Colombian cargo preference laws.

The Agreement also serves the public interest by enhancing common carrier service capabilities in the United States/Colombia trade through the operations of PLI.[17]

However, a finding that certain benefits flow from an agreement, is not sufficient by itself to justify approval. We must also examine the detriments, if any, the Agreement has on other areas of the public interest which we are charged to protect, such as shipper service, and determine whether such detriments, warrant disapproval of the Agreement not withstanding the benefits that may flow from it.

Although WL argued that this Agreement was detrimental to shipper service and would force WL's withdrawal from the trade, the record does not support such a conclusion. In fact, the Agreement, as conditionally approved, will cause little direct harm to WL. This conclusion is based in large measure on the fact that the equal access provision does not apply in the United States West Coast/Colombian trades actively served by WL.[18] Flota does not serve the trade from the United States West Coast to the North Coast of Colombia, hence the cargo preference laws and equal access provision will not be applied in that trade. Furthermore, because of the coffee trade, the cargo preference laws and equal access provision will not be applied in the Colombian West Coast/United States West Coast trade. Also, because WL does not maintain a service from the North American West Coast to the Colombian West Coast, or between the United States Atlantic/Coast and Colombia the execution of the equal access provision in those trades will not effect WL. Thus, it can be seen that approval of the equal access provision will have little direct effect on WL's extant services.

Nor do we not find WL's experiences with equal access agreements in other trades to be sufficiently relevant to the situation. Specifically relied upon by WL is its so-called "Peruvian experience" which began early in 1973 when the

[16] In *Agreement No. 10056, supra*, we noted that whenever section 19 of the Merchant Marine Act, 1920, "has been invoked in the past, it has almost always resulted in a commercial arrangement" which has offset the restrictive measures imposed.

[17] The record indicates that subsequent to the enactment and enforcement of Colombia's cargo preference laws PLI suffered substantial loss of cargo, but that upon the unilateral extension of the benefits of the Colombian cargo preference laws to PLI, its declining situation with respect to Colombian cargo carriage first stabilized and then began to improve.

[18] Some evidence of record suggests that in the trade south from the United States West Coast to Colombia's North Coast the Colombian cargo preference laws are being enforced to PLI's advantage despite the absence of Colombian-flag vessel service. It was indicated that waivers were necessary to move twenty-two lots of cargo in this trade. It would appear, however, as PLI and Flota maintain that the imposition of the waiver requirements on these shipments were due to clerical error.

Commission approved Agreement No. 9939 between Prudential Grace Lines (PGL)—now PLI—and Compania Peruana Vapores (CPV), *Agreement No. 9939, supra*, covering the trade south from the United States West Coast to Peru. This agreement provided PGL with "associate" status under the Peruvian cargo preference law, which reserved about 50% of import cargoes to Peruvian-flag vessels and their "associates". Agreement No. 9939 also allowed for the pooling of revenues earned by the parties to the Agreement. WL alleges that as a direct result of approval of Agreement No. 9939 its carriage of cargo from North America to Peru declined precipitously and caused it to abandon one of its South American services.

Whatever the merits of WL's allegations with respect to its "Peruvian experience", we believe them irrelevant to the issue of the approval of Agreement No. 10066. Colombia's cargo preference laws are not effected in the trades actively served by WL. Agreement No. 10066 contains no cargo pooling provisions. There is evidence that Colombia may be more liberal in granting waivers to foreign-flag lines than was Peru. In summation, the two situations are not subject to the type of comparison that would be of probative value to the issue presented here.

The contention has also been advanced in this proceeding that the approval of this Agreement, to any extent, is contrary to the terms of the 1928 Treaty of Friendship, Commerce and Navigation between the United States and Norway, 27 Stat. 2135, Article 7 of which provides in relevant part:

> Between the Territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every land within the territorial limits of the other which are or may be open to foreign commerce and navigation.
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> All articles which are or may be legally imported from foreign countries into ports of the United States or are or may be legally exported therefrom in vessels of the United States may likewise be imported into those ports or exported therefrom in Norwegian vessels, without being liable to any other or higher duties or charges whatsoever than if such articles were imported or exported in vessels of the United States; . . . .

The approval of the Agreement before us does not infringe on this Treaty. Our approval of this Agreement neither restricts the freedom of Norwegian-flag vessels and cargo, to come to all places, ports and waters of every land within the territorial limits of the United States, nor makes the exportation or importation of goods from or to United States ports on Norwegian-flag vessels in any way illegal, nor at all subjects such exportation or importation on Norwegian vessels to a higher duty than if carried on United States-flag vessels. All of the rights and obligations created by the Treaty between Norway and the United States have therefore been preserved and protected.

*Modifications Required*

Our finding that Agreement No. 10066 is in the public interest because it confers significant benefits does not however conclude our inquiry. We must, in considering an antitrust exemption for the Agreement make certain that the conduct legalized does not invade the prohibitions of the antitrust laws anymore than is necessary to secure the purposes of the Shipping Act, 1916,[19] and the legitimate objectives of the Agreement itself. We have carefully reviewed the entire Agreement with this consideration in mind and find that certain provisions, i.e., coordination of sailings and cargo offering, exceed the legitimate objectives of the Agreement. Accordingly, the deletion of these provisions is being made a condition to the approval of the Agreement. We are also requiring as a condition to approval that a provision be added to the Agreement which allows for the admission of other "national-flag carriers." A discussion of each of the required modifications follows:

1. *Coordination of Sailings Provision*

The parties to the Agreement have a competitive advantage over WL by reason of the equal access provision. However, were this the only provision to the Agreement the parties would still, to some extent compete between themselves for Colombian reserved cargo and ostensibly at least, have little or no competitive advantage over WL with regard to trades where the Colombian decrees are not enforced. Approval of the coordination of services provision, however, would encourage the elimination of all competition between the parties to the Agreement by allowing them to arrange their sailings so as to eliminate competition among themselves for controlled and *non-controlled cargo*, optimizing their advantages over WL under the cargo preference laws. As a result, PLI and Flota would substantially improve their competitive positions over WL with respect to the non-controlled cargo. Furthermore, the language of the coordination of services provision is so broad that it could be used alone or in conjunction with the other provisions of the Agreement as a basis for a myriad of other anticompetitive activities.

Little specific evidence was proffered by the parties to the Agreement to justify the approval of the coordination of services provision. There is testimony in the record to the effect that beyond some unspecified plan for coordination of sailings, no action was contemplated under the provision. This prompted the Presiding Officer to reject the coordination of sailings provision, stating:

> After much contention between the parties over the meaning of "coordination of services", Flota and Prudential both insist that what is meant is "the coordination of sailings to insure that the frequency is so spread as to give coverage as needed by the trade." In the same breath it is offered that no coordination of sailings is presently contemplated. Indeed, in the United States West Coast to Colombia trade none is presently feasible given the itineraries of the parties. While this provision is explicitly made subject to section 15 jurisdiction, it is clear that no activity under it is contemplated in the foreseeably near future. The respondents have thus no concrete plans for the coordination of sailings with which to apprise the Commission of the impact of such coordination upon the trade. Such future authority to in some unspecified manner "coordinate sailings" should not be approved under section 15. Indeed respondents offer no justification for its approval.[20]

We agree.

This Commission has consistently held that it will not abdicate its responsibilities under the Shipping Act, 1916, by approving an agreement that is *not* so sufficiently precise so as to permit any interested party to ascertain how the agreement works without resorting to inquiries of the parties. As we explained in

[19] *Isbrandtsen Co. Inc. v. United States*, 211 F.2d 51 (D.C. Cir. 1954).

[20] The parties did not except to the Presiding Officer's finding that this provision should be deleted.

*Agreement 9448–North Atlantic Outbound/European Trade,* 10 F.M.C. 299, 307 (1967):

> . . . great care must be taken when the agreements are approved to see that (1) the Commission knows precisely what it is approving, and (2) the agreements set forth clearly, and in sufficient detail to apprise the public, just what activities will be undertaken. . . . It would be contrary to the public interest to approve an agreement whose coverage is so vague that the public cannot ascertain the coverage by reading the agreement. The approval of such an agreement would deprive the public of the protection, afforded by statute, of the Commission's surveillance over conference activities. The blank check that would be afforded by the approval of this agreement would simply fail to protect the public interest and the flow of commerce in the manner contemplated by Congress in the enactment of section 15.

On the bases of the foregoing, we are requiring as a condition of approval of the Agreement that the parties delete that provision allowing for the coordination of services.

2. *Cargo Offering Provision*

We also find the Agreement's cargo offering provision to be unacceptable. As with the coordination of services provision, the cargo offering provision, when considered together with the equal access provision and the Colombian cargo preference laws tends to unjustifiably increase the anticompetitive effect of the equal access provision and those laws. If Flota cannot carry government controlled or noncontrolled cargo, it must, under the Agreement as submitted, offer the cargo to PLI. As a result, government controlled, as well as noncontrolled cargo, will not be available to WL until the parties have exercised their right of first refusal under the cargo offering provision. This provision further impairs WL's ability to compete in the trade and would allow for unwarranted and unjustified anticompetitive activity.

It would be anomalous to approve such an anticompetitive provision in an agreement, the approval of which has been sought on the basis of increased competition with respect to government controlled cargo. Therefore, in the absence of a showing that this anticompetitive provision is specifically required by a serious transportation need, is necessary to secure important public benefits or is in furtherance of a valid regulatory purpose, we find the cargo offering provision, contrary to the public interest. Approval of Agreement No. 10066 is therefore conditioned upon deletion of that provision.

3. *National-Flag Participation*

As we have indicated, the impetus for Agreement 10066 was a series of decrees issued by the Colombian Government which were designed to foster that country's merchant marine by reserving "not less than 50%" of Colombia's imports and export cargoes to Colombian-flag or "associate" vessels. A non-Colombian-flag carrier can achieve "associate" status only if it is in a position to "aid" Colombian-flag carriers in obtaining "equal access" to cargo that would otherwise not be available to Colombian-flag carriers. In the United States/Colombia trade, United States-flag carriers are in a position to aid Colombian-flag carriers in obtaining cargoes that are subject to the cargo preference laws of the United States and which are otherwise not generally available to Colombian-flag carriers. However, the "aid" which a United States-flag carrier may provide is dependent upon the parity of treatment afforded the United States-flag carriers in the carriage of Colombian controlled cargoes.

Because Agreement No. 10066 does not provide for the admission of other "national-flag carriers," a United States-flag carrier could be precluded from entering the trade.[21] This follows from the fact that such carrier would not have access to Colombia's controlled cargo and thus would not be in a position to "aid" Colombian-flag carriers in obtaining "equal access" to United States cargo that otherwise would not be available to Colombian-flag carriers. Indeed, if a new United States-flag entrant–in the United States/Colombia trade–advised Marad that is unable to carry Colombian controlled cargo, the privileges afforded the parties to Agreement No. 10066 could be affected, for Marad examines the "parity" afforded all United States-flag carriers in the trade, not just the "parity" afforded a signatory to a commercial arrangement.

Because the exclusion of other United States-flag carriers from this Agreement could be contrary to the public interest and could operate to the detriment of the commerce of the United States, we shall require, as a further condition of approval, that the Agreement be modified to provide for participation by other United States-flag lines who may enter the United States/Colombian trades.[22]

*Term of the Agreement*

We turn now to the duration of the approval granted herein. While the Agreement as submitted is for an indefinite term, we are requiring that it be limited to three years. Not only have proponents failed to justify an indefinite term, by limiting the term of the Agreement, the Commission and the parties will be able to reevaluate the need for the Agreement in view of the circumstances then existing in the United States/Colombia trade. Given the nature of the Agreement and the trade involved, we believe that the period prescribed is reasonable. Therefore, this Agreement is approved on the condition that the Agreement be specifically limited to a term of three years from the date of its approval.

*Status of PLI*

We now consider a matter that arose subsequent to the closing of the record in this proceeding. On May 9, 1978, Delta Steamship Line, Inc. (Delta) and PLI advised the Commission that Delta was acquiring PLI and would be taking over its Mexican, Caribbean, Central and South American operations. Delta further advised that it wished to assume all of PLI's rights and liabilities "under the respective section 15 agreements to which PLI is presently a party," including Agreement No. 10066. On May 23, 1978, we gave notice, 43 Fed Reg 27074, of Delta's intent to assume the rights and liabilities of PLI under the respective section 15 agreements in the trades concerned and advised that we would substitute Delta for PLI with respect to these agreements. No comments or protests to such notice were filed. Accordingly, as a further condition of

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[21] The Colombian decrees appear to afford all Colombian-flag vessels access to government controlled cargo. *See* footnote 6 *supra*.

[22] Our holding here is not inconsistent with our responsibilities under section 15 which requires that we give the same measure of protection to third-flag vessels (i.e., a vessel flying the flag other than that of United States or Colombia) that we do an United States-flag carrier. For as we said in *Agreement 9939—Pooling Sailing and Equal Access to Government Controlled Cargo Agreement*, 16 F.M.C. 293 at 305:

> This does not necessarily mean that the third-flag vessel always receives identical treatment [as compared to United States flag vessels] for that third flag vessel may be burdened by handicaps or impediments not burdening an American flag vessel. Thus, WL can not qualify to become an "associated" line of CPV, because it, WL, unlike PGL, cannot assist CPV in obtaining access to United States government controlled cargo, whereas PGL can do so.

approval, we shall require the Agreement to be modified by substituting Delta Steamship Lines, Inc. for PLI.

## CONCLUSION

For all the foregoing reasons we believe that Agreement No. 10066, if modified as provided herein, is in the public interest, is in furtherance of the regulatory purposes of the Shipping Act, and is not a greater invasion of the prohibitions of the antitrust laws than necessary to further these regulatory purposes. Moreover, the extent of the anticompetitive activity being approved is not sufficient to outweigh these benefits and warrant disapproval. Further, we find that the Agreement, as conditionally approved, is not unjustly discriminatory or unfair, detrimental to the commerce of the United States or otherwise in violation of the Shipping Act, 1916.

THEREFORE, IT IS ORDERED, That Agreement No. 10066 is approved pursuant to section 15 of the Shipping Act, 1916, on the condition that:

1. The preamble and paragraphs 3 and 4 be amended by deleting Prudential-Grace Lines and substituting therefore Delta Steamship Lines, Inc.

2. Paragraph 2, the coordination of services provision and paragraph 5, the cargo offering's provision, be deleted.

3. A new paragraph 2 be inserted as follows:

> In the event that an additional United States-flag line(s) or Colombian-flag line(s) enters the trade covered by this Agreement, it is mutually agreed by the signatories hereto that such additional line(s) shall upon application and notice to the Federal Maritime Commission become signatory(ies) and participate fully in this agreement.

4. Paragraph 6, the term provision, be deleted and replaced by a new paragraph, designated paragraph 5, reading as follows:

> "The term of this Agreement shall be three years from ________________, 1978, the effective date of the Federal Maritime Commission's approval of this Agreement, provided, however, that either party may terminate the Agreement on 30 days' notice.

5. The Commission receive on or before *January 12, 1979*, a complete copy of Agreement No. 10066 modified in accordance with subparagraphs 1, 2, 3 and 4 herein signed by the parties.

IT IS FURTHER ORDERED, That the approval contained herein shall be effective on the date the above conditions are met.

IT IS FURTHER ORDERED, That this proceeding be discontinued.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 77–61
MITSUI & CO. (U.S.A.), INC.

*v.*

SEA-LAND SERVICE, INC. AND
NIPPON YUSEN KAISHA (NYK LINE)

Respondents found to have properly classified and rated shipments of beef carcasses. Reparation denied.

## REPORT

*October 3, 1978*

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

The proceeding is before the Commission on exceptions from Sea-Land Service, Inc. (Sea-Land) to the Initial Decision of Chief Administrative Law Judge John E. Cograve (Presiding Officer), in which he held that Respondents Sea-Land and Nippon Yusen Kaisha (NYK Line), both members of the Pacific Westbound Conference (PWC), had collected freight charges in excess of those provided in the applicable tariff in violation of section 18(b)(3) of the Shipping Act, 1916. Reparation in the amounts requested by Mitsui & Co. (U.S.A.), Inc. (Mitsui) was awarded.

The basis of the complaint is essentially as follows. Mitsui delivered to the Respondents, at various times, in containers for transportation from ports in California to ports in Japan, cargo described in the bills of lading as "chilled hanging beef carcasses." The bills of lading requested that the temperature within the containers be maintained within a range of 25°–28° Fahrenheit. Sea-Land and NYK Line charged the rate applicable to fresh beef carcasses which is higher than the rate provided for frozen carcasses.[1]

[1] Pacific Westbound Conference Local Freight Tariff No. 4 (FMC 12), Item 011 1000 32:
Meat of Bovine Animals
Including Beef & Veal
Carcasses, Halves
Quarters, Fresh
Refrigerated
Rule 74
The rate under this Item to Japan Base Ports was $272.50 W/T until March 31, 1976, when it was raised to $293.00 W/T. Item 011 1000 33:

Mitsui admits that the carcasses were chilled and not frozen when delivered to the carrier but argues that when kept at the temperatures requested the carcasses would freeze during transportation and, accordingly, should be assessed the rate for frozen beef. Mitsui further maintains that the accepted practice in the locality, is that beef cargo at less than 32° Fahrenheit "is considered 'frozen' *whether or not the beef is actually frozen. . . .*" (Emphasis added)

The Presiding Officer agreed with Mitsui that Respondents had improperly rated the shipments and awarded reparation. In his opinion beef carcasses maintained at 27° Fahrenheit could not be rated as "fresh."

## Discussion and Conclusion

Both parties agree that (1) the beef carcasses, described as "chilled" in the bills of lading, were fresh when delivered to the carriers; (2) Mitsui had requested that the temperature within the containers be kept at an average of 27° Fahrenheit; and (3) when kept at that temperature, 46 percent of the water contained in the carcasses would be frozen. On these facts the parties draw diametrically different conclusions. Sea-Land's position is that the carcasses cannot be considered "frozen" when at best, only 46 percent of the water content would freeze during transportation, while Mitsui maintains that meat carcasses which are 46 percent frozen can no longer be considered "fresh."

We reject at the outset Mitsui's argument that "practice in the locality" would dictate that beef carried at less than 32° Fahrenheit be considered frozen "whether or not it is actually frozen." The tariff refers to "frozen" beef without any qualification. Tariffs are published for the benefit of the public at large and are not, unless otherwise specified, limited to a particular locality. Their meaning, therefore, cannot he restricted by an implied "practice in the locality."

The rate for fresh beef carcasses provides for refrigeration.[2] The question then is whether in requesting that the temperatures within the containers be maintained at an average of 27° Fahrenheit Mitsui wanted the carcasses to freeze during transportation or simply that they be kept "chilled" (which might have included a certain degree of freezing). It would appear that had Mitsui intended the carcasses to freeze, it would have asked for lower temperatures.[3] At the temperatures indicated in the bills of lading the beef carcasses could only partially freeze, leaving the major portions of the carcasses fresh. In our opinion, therefore, Respondents properly rated the shipments under Item 011 1000 32 of PWC's tariff as beef carcasses "Fresh Refrigerated." Consequently, the decision of the Presiding Officer must be reversed and reparation denied. NYK Line, which refunded $12,495.27 of the charges collected on the 45 shipments it

Meat of Bovine Animals
Including Beef & Veal
Carcasses, Halves
Quarters, Frozen
Rule 74

The rate under Item 33 to Japan Base Ports was $207.50 W/T until March 31, 1976, when it was raised to $223.00 W/T.

[2] To refrigerate means: to make or keep cool or cold, chill . . . to preserve by keeping cold or freezing. Webster's New World Dictionary of the American Language, Second College Edition (1970), at p. 1194.

[3] Mitsui's letter to Sea-Land, of August 13, 1973, referred to in the Initial Decision, discloses Mitsui's disappointment because "the meat arrived at Yokohama in a nearly frozen condition."

carried, is directed to file with the Commission within thirty days from the service of this Report, evidence showing that it has taken the steps necessary to collect from Mitsui the amount refunded.

The complaint is dismissed.

It is so Ordered.

*Commissioner Thomas F. Moakley, dissenting.**

I find no basis in either fact or law to sustain the Majority Report.

The opinion rests on a foundation of three facts with which, according to the opinion, "both parties agree." The first of the three is that

"the beef carcasses, described as 'chilled' in the bills of lading, were fresh when delivered to the carriers." (Report at 3).

This is simply wrong. Mitsui never agreed that the beef carcasses were fresh. The record of this proceeding reveals only one instance which could *conceivably* form the basis for this assertion. In its Reply Memorandum, Mitsui states

"the carcasses tendered to Sea-Land were described as 'chilled' rather than as 'frozen' because when the carcasses are delivered at dockside to the carrier they are not frozen."

This can in no way be construed to mean that Mitsui *agrees* that the carcasses were *"fresh"*.

Such reasoning effectively equates the definitions of the words "fresh" and "chilled" and arises from a blurring of the two separate but related temperature scales involved here.[4] The first scale, that used to describe the cargo when tendering it to the carrier, defines three temperature ranges (i.e., "fresh", "chilled" and "frozen"); the second scale, that which the tariff requires to define the cargo for rating purposes, admits to only two temperature ranges (i.e., "fresh" and "frozen"). Thus, the Majority Report errs by reasoning that where one extreme (frozen) of a three-range scale fails to adequately define the cargo relative to two other temperature ranges, that same word must, therefore, likewise fail to define the cargo relative to a single alternative on a two-range temperature scale. The Majority Report thus fails to effect the reconciliation of the two distinct continua of temperature ranges necessary to determine that range on the "fresh-frozen" scale that corresponds to the "chilled" range on the "fresh-chilled-frozen" scale.

On the basis of this factual inaccuracy, and in conjunction with the two other "agreed" facts, the Majority Report concludes that the cargo here in question was correctly rated under the "fresh" category. The source of the last of these three facts, that when kept at a temperature of 27°F. "46% of the water contained in the carcasses would be frozen" is Sea-Land's Exceptions to the Initial Decision. At page 3 of its Exceptions, Sea-Land states:

. . . perhaps the most definitive original research on the subject which is still valid and utilized today is found in *Brown's Cold Storage Temperature and Humidity Charts,* Second Edition, 1932. This document provides information that beef carcasses contain approximately 7% salt which goes to reducing the freezing temperature of the beef. The examples set out in *Brown's* provide the following: At 29°F. only 40% of the total water in the beef carcass is frozen. *At 27° F. only 46% of the total water contained in the beef carcass is frozen.* At 25°F. 57% of the total water is frozen, and at

* Commissioner Karl E. Bakke concurs in this dissent.

[4] Indeed, in reasoning as it does, the Majority Report appears to have become entrapped in the quagmire of the tariff ambiguities discussed herein.

5°F. 84% of the water content of the beef becomes frozen. Clearly, then, 27°F. is not sufficient to freeze beef. (Emphasis added).

Accepting Sea-Land's position that "27°F. is not sufficient to freeze beef", it seems clear that if "46% of the total water contained in the beef is frozen", it cannot be perfunctorily rated as "fresh" either.

Indeed, a letter attached to Mitsui's Reply to Exceptions from the OK Meat Packaging Co. states that "hanging beef *will freeze* when kept in a closed container at 27°F." (Emphasis added).

Even accepting *arguendo* the proposition that the beef was not, in fact, deep frozen, I find that the holding of the Majority Report requires reliance on a strained and unnatural construction, *Bratti v. Prudential*, 8 F.M.C. 375, 379 (1965), inconsistent with the purposes of the tariff, *National Van Lines, Inc. v. U.S.*, 426, F.2d 329, 336 (Ct. Cl., 1970), to reach the finding that it was properly rated as "fresh."

Premised on inaccurate facts and concluded with tortured logic, the Report totally ignores the most significant legal issue of this proceeding.

In its Reply to Exceptions, Mitsui correctly asserts that "if there is an ambiguity in the tariff, it must be decided against the Lines who drafted it." Certainly this statement, at the very least, requires that the ambiguity issue be addressed. Yet nowhere does the Report consider the possibility that the tariff may itself have been ambiguously constructed.

In its Exceptions, quoted above, Sea-Land, while asserting that 27°F. is insufficient to freeze beef, still fails, in fact, to show at what temperature the beef will be frozen. At 5°F., according to Sea-Land, the water in the beef carcasses is still only 84% frozen. Viewed in this light, Sea-Land's Exceptions serve only to heighten the complexity of the tariff ambiguity.

It would seem that in its effort to determine whether the carcasses were "fresh" or "frozen" the Majority failed to consider that the tariff against which these terms are defined may have been unclear as to their application. In concentrating its efforts on the cargo the question of the tariff was ignored.

The Report's failure to address this issue is all the more confusing since the text of the Report itself explicitly recognizes that "chilled" "might have included a certain degree of freezing." Indeed, the Report goes so far as to state that

"at the temperatures indicated in the bills of lading the beef carcasses *could* only *partially freeze*, leaving the major portion of the carcasses fresh." (Emphasis added).

When a cargo is partially defined by two distinct tariff items (frozen: 46%, fresh: 54%) and the tariff fails to clarify which item applies, consideration of the question of tariff ambiguity seems to be compelled.

Thus, assuming *arguendo* that Mitsui has failed to establish a record containing "sufficient facts to indicate with reasonable certainty" that the beef in question was indeed frozen, *Colgate Palmolive Company v. United Fruit Company*, Informal Docket No. 115 (I), Commission Order served September 30, 1970, quoted with approval in *Ocean Freight Consultants v. Royal Netherlands Steamship Company*, 17 F.M.C. 143, 144 (1973), the Majority Report fails to recognize that Mitsui must still prevail where there is an ambiguity in the tariff under which the cargo moved.

*I find that by its very silence on the question of which temperature range* defines the fresh rating classification as contrasted to the temperature range defining the frozen rating classification, the Conference has itself established a patent ambiguity in its tariff; the very ambiguity which gave rise to this proceeding, and since tariffs are subject to the rules of interpretation generally applicable to written instruments and those rules hold that a document is vulnerable against its maker, *Rubber Development Corp. v. Booth S.S. Co.*, 2 USMC 746, 748 (1945); *Cf. Great Northern Railway Company v. Merchants Elevator Company,* 259 U.S. 285, 291 (1922) (holding court jurisdiction without preliminary resort to the I.C.C.), it follows that proof of a tariff ambiguity entitles the complainant to the lower of the ambiguous rates, i.e., the "frozen" rate. *Bratti v. Prudential,* 8 F.M.C. 375, 379 (1965).

Therefore, Mitsui is not limited to proving that the beef carcasses were actually frozen. Rather, Mitsui has the benefit of established case law in support of the proposition that its burden of proof is sustained if it successfully establishes the existence of a patent ambiguity in the tariff itself.[5] The question, therefore, resolves itself to whether or not the record supports a finding that two or more of the competing provisions of The Pacific Westbound Conference tariff could reasonably be applied to the commodity shipped.

Even if the foregoing is not considered sufficient *per se* to establish the existence of a patent ambiguity in the tariff it is obvious from the record in this proceeding that the tariff descriptions, "fresh" and "frozen" as applied to hanging beef carcasses, are not susceptible to universally accepted definition.[6] In the past, the Commission has held that where respondents apply different rates to the same commodity, the tariff is ambiguous.[7]

In this Docket there are only two potentially applicable rates, neither of which address the temperature at which the cargo is to be transported.[8] Respondent, NYK Line, a party to the Pacific Westbound Conference tariff, chose to correct its billing to reflect the "frozen" beef rate. In so doing, NYK Line expressed its judgment that the "frozen beef rate should apply on cargo maintained at temperature of 32°F. or below."[9] It is, therefore, obvious that on its face the record clearly sustains a finding that different rates could be and, in fact, were applied to essentially the same cargo by the respondents. Consequently, a logical application of Commission precedent to the facts in the record, dictates that the tariff must be found ambiguous, and Mitsui must be awarded the lower "frozen" rate.

Thus, even without addressing the numerous instances of confusion as to the applicability of the terms "fresh" and "frozen" to the description "chilled",

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[5] I am not bothered by the fact that Mitsui failed to allege a tariff ambiguity. Mitsui felt as did the Presiding Officer and, upon reconsideration, did NYK Line, that the tariff was clear in its support of Mitsui's position. The issue was nevertheless noted in Mitsui's Reply to Exceptions. Under such circumstances it would be patently unfair to penalize Mitsui on the procedural grounds of failing to enter an alternative pleading as to tariff ambiguity. Furthermore, in an excercise of its administrative discretion, the Commission should *sua sponte* explore such issues which, in a given proceeding, it finds relevant to the equitable resolution of a matter before it.

[6] This was adequately demonstrated during the course of the Commission's discussion of the record in this proceeding.

[7] See for example, *Rubber Development Corp. v. Booth S.S. Co., Ltd.*, 2 USMC 746, 748, where it was held that the ambiguity of the tariff is demonstrated by the fact that respondents applied three different rates to the articles in question.

[8] Both items refer to Rule 74 of the tariff. As noted by the Presiding Officer (ID. pg. 2 Footnote 3) this rule sets out the general terms and conditions applicable to shipments of refrigerated cargo. The rule does not specify temperatures.

[9] See the Correction to B/L & F/L documents prepared by NYK Line.

the record of this proceeding and the weight of Commission precedent dictate that Mitsui must prevail.

The Commission, in its quest for knowledge relating to a precise temperature at which one specific product becomes frozen (in this instance meat), lost sight of its Congressionally mandated function to order enforced reasonable classifications, tariffs, regulations and practices on behalf of the shipping public.

(S) JOSEPH C. POLKING
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 544

LEVEL EXPORT SALES CORPORATION

*v.*

SEA-LAND SERVICE, INC.

## ORDER ON REVIEW

*October 11, 1978*

The proceeding is before the Commission on exceptions by Sea-Land Service, Inc. (Sea-Land) to the Initial Decision of Administrative Law Judge Seymour Glanzer denying Sea-Land permission to waive collection of a portion of the freight charges asssessed on 73 shipments of cotton denim. The shipments delivered in 55 containers were carried for Level Export Corporation from Portsmouth, Virginia, to Genoa, Leghorn and Naples, Italy at various times between February 2, 1977 and March 4, 1977.

Section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), requires that applications for permission to waive collection of a portion of the freight charges be filed within 180 days from the date of shipment. On exceptions Sea-Land confirms that, as found in the Initial Decision, the shipments took place between February 2, 1977 and March 4, 1977. The application was filed on September 1, 1977, that is in excess of the 180 days provided in the statute. The Commission therefore has no authority to grant the relief requested and the application must be denied as late filed, without regard to its merits.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET No. 77-57

HILO COAST PROCESSING COMPANY

*v.*

MATSON NAVIGATION COMPANY

## NOTICE

*October 12, 1978*

Notice is given that the time within which the Commission could determine to review the August 31, 1978 initial decision in this proceeding in the absence of exceptions has expired with no such determination being made. Accordingly, review will not be undertaken.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

No. 77–57

HILO COAST PROCESSING COMPANY

*v.*

MATSON NAVIGATION COMPANY

*Finalized on October 12, 1978*

Request for reparation denied where tariff used in assessing charges on shipment of machinery was found to be appropriate and proper for the items shipped in RO/RO service, notwithstanding the fact that carrier mis-stated the applicable tariff and underestimated the charges in preliminary negotiation letter to shipper's representative.

*David H.C. Lee, Esq.*, for complainant Hilo Coast Processing Company.
*David F. Anderson, Esq.*, and *Peter P. Wilson, Esq.*, for respondent Matson Navigation Company.

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

This proceeding commenced with the filing of a complaint on November 18, 1977, by the Hilo Coast Processing Company (Hilo or complainant) against the Matson Navigation Company (Matson or respondent), in which the complainant alleged that the respondent carrier assessed charges greater than those permitted under the applicable filed tariff, in violation of section 18 of the Shipping Act, 1916 (46 U.S.C. 817(a)). The subject shipment was comprised of 24 pieces of machinery (agricultural equipment) which was received by the respondent ocean carrier at its Oakland, California, terminal sometime between March 29, and April 6, 1977, was unloaded from Southern Pacific railroad cars, reloaded onto 13 Matson flatbed trailers, and transported from Oakland to Hilo, Hawaii, on one of Matson's "Roll-On/Roll-Off" (RO/RO) service vessels. After the filing of the Answer, counsel for both parties agreed that there were no factual matters at issue that required an oral hearing or cross-examination and that the case could be decided on the basis of filed written direct testimony,[2] exhibits and briefs.

[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] Complainant's direct testimony, served March 22, 1978, consists of the affidavits of Donald J. Martin, president of Hilo Coast; James E. Graybill, senior buyer, C. Breqer & Co., agents for Hilo; and Michael J. McMurtray, president of Transp. Analysis, Inc.,; together with exhibits attached thereto. Additionally, in the introduction to Complainant's Direct Testimony, complainant's counsel requested that the Commission take official notice of certain filed tariffs, rules, and definitions. That request is granted and copies of such documents are already in the record as exhibits attached to Complainant's Direct Testimony. Respondent's direct testimony, served April 14, 1978, consists of the affidavits of John S. Walter, manager of Matson's container operations, and Christopher A. Kane, Matson's manager of pricing, together with exhibits attached thereto.

The controversy centers upon which one of two Matson filed tariffs is the properly applicable tariff for this particular shipment of machinery. The respondent carrier contends that Matson's Freight Tariff No. 14–E, FMC–156, was applicable, and assessed the freight charges on that basis, including $13,236.92 in "overwidth" charges. The complainant claims that Matson's Freight Tariff No. 1–S, FMC–158 was applicable, which tariff had no provision for overwidth charges. The overwidth charges constitute the bulk of the disputed amount.

## DISCUSSION

The dispute apparently had its genesis in a letter Matson sent in reply to an inquiry from the complainant's representative. After being given a thorough and fair description of the machinery to be shipped, the Matson letter[3] specifically stated that: "These units would move in our Ro-Ro service under Matson Tariff 1–S item 5 Cargo N.O.S." Charges were then estimated on each unit, and the total estimate then given was substantially lower than Matson ultimately billed and collected, using *not* the cited Tariff 1–S, but the higher Tariff 14–E. (Of the two tariffs, only 14–E provided for "overwidth" charges). Matson concedes that complainant Hilo "sought a rate quotation from Matson in a very professional manner, and that Matson, in writing, provided Hilo Coast Processing Company with an erroneous quotation."[4] If this were an ordinary civil contract matter, that Matson letter and the admission could be dispositive of the matter, but it is not—this is a question of lawfully filed tariffs and mandatory applicability (assuming no ambiguity). Although it may seem harsh and callous to say so, contract principles, equity and principles of ordinary, arms-length fair business dealings are uninvited strangers in a tariff proceeding; that is to say, they are totally irrelevant. Here, the shipper-consignee[5] did the best it could to fix a reasonable limit on its transportation costs before shipment, but the carrier blundered and misled the shipper to his detriment, so who pays? Why the shipper, of course.[6] Had the shipper been provided with a more accurate estimate instead of a "low ball," it might have shopped elsewhere for its freight transportation.

Except for the allegations in the Complaint and the arguments of counsel in briefs, the complainant has submitted no witness statements which offer the reasoning or rationale which lead to the conclusion that the lower-yielding tariff should have been used instead of the one upon which the carrier based its charges. This is surprising particularly since one of complainant's three witnesses for direct testimony was the president of a firm which is in the business of auditing freight charges made by carriers, and said witness[7] testified (by affidavit) that he had been contacted on behalf of the complainant to conduct an

[3] Douglas to Graybill, December 7, 1976.

[4] Testimony of Christopher A. Kane, at 9.

[5] The consignee (Hilo) negotiated for, arranged and paid for the subject transportation.

[6] "The shipper's knowledge of the lawful rate is conclusively presumed," *Kansas City Southern Ry. Co. v. Carl*, 227 U.S. 639 (1913). The same presumption is applicable to tariff rules and regulations. Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit a deviation from the rates, rules and regulations in the carrier's filed tariff. *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94 (1915); *Boston & Maine RR v. Hooker*, 233 U.S. 97, 112 (1914); *U.S. v. Pan American Mail Line*, 69 Civ. 2381 (USDC, SD, N.Y., Sept. 11, 1972), 1973 AMC 404, *Kraft Foods v. Moore McCormack Lines*, 17 F.M.C. 320, 323 (1974).

[7] Michael J. McMurtray, president of Transportation Analysis, Inc.

*audit of the transportation charges on the subject shipment*—but we have not been offered the results or conclusions of that audit. Nevertheless, all the exhibits and documentation submitted with the pleadings and direct testimony, i.e., bill of lading, negotiation correspondence, applicable tariff pages, rates, rules and definitions, etc., establish an adequate picture of the items shipped and the nature of the dispute as to the appropriate tariff and proper charges.

Although the amount of overcharge alleged in the original Complaint was $14,374.70, by virtue of a voluntary refund to the complainant by Matson ($1,975.48) based on an admitted error by Matson in freight charges for two of the twenty-four pieces shipped, and an implicit recognition by counsel for complainant[8] that even if complainant's preferred tariff were utilized, the total overcharge would not be as great as originally stated in the Complaint, the net amount of alleged overcharge still in dispute has been reduced to $6,784.44.[9]

In order to determine whether Matson Tariff 14–E (as billed) or Matson Tariff 1–S (as claimed by complainant) was the applicable tariff for the assessment of proper freight charges, we find from an analysis of the tariffs, the tariff rules and their filed definitions, that the preliminary determination must be made as to whether the shipped machinery constituted "containerizable" or "non-containerizable" cargo. Both parties now agree that *if* the shipment (the remaining disputed portion) was "containerizable," then Matson Tariff 14–E was appropriately applied and the freight charges ultimately collected (after subsequent refund) by Matson was correct; conversely, both parties agree that if the subject shipment was "non-containerizable," then the complainant was overcharged $6,784.44 because Matson Tariff 1–S should have been applied. (See testimony of Matson witness Kane and Opening Brief of complainant Hilo, at 3, proposed finding 8.) The gist of complainant's argument is that some of the machinery was wider than the trailers on which they were shipped and therefore they did not come within the filed tariff definition of "containerizable cargo" as being "any piece or package which can be loaded *wholly within or on* a . . . container or trailer for which rates are published to Hawaii in M.N.C. Tariff No. 14–D . . . including . . . reissues thereof." (Rule 15, original page 10, Matson Freight Tariff No. 1–S, FMC–158, Matson Exh. "K".) Complainant would likewise argue that such overwidth machinery does not come within Matson's filed tariff definition of "container cargo," i.e., "that cargo which can safely be carried *in or on* a trailer or container not exceeding 45 feet in length or 8 feet in width." (Rule 1(x), 2d revised page 13, Matson Westbound Container Freight Tariff No. 14–E, FMC–156, Matson Exh. "A".) Twelve of the twenty-four pieces shipped had widths exceeding the 8-foot width of Matson's flatbed trailers (testimony of Matson witness J.S. Walter and Exh. "1" thereto, Matson Dock Receipt; see also Exh. "D" to testimony of Hilo witness Graybill). Page 2 of the Matson dock receipt lists the 13 flatbed trailers used by Matson for this shipment and dimensions of each "package" are set forth on the dock receipt.

I find the analysis of Matson witness Kane to be thorough and accurate with regard to whether the subject shipment was properly treated as "containerizable" and, accordingly, whether the remaining 22 disputed pieces of machinery

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[8] Proposed Findings #8 & #11, Complainant's Opening Brief, and page 11 of same.

[9] *Ibid.*

were properly assessed under Matson Tariff 14–E, rather than Tariff 1–S. It was in the course of this same review that Mr. Kane discovered that, indeed, two of the thirteen trailers (and two of the 24 pieces) had been misrated, and he thereupon arranged for a Matson check to be drawn in favor of Hilo for $1,975.48 to rectify the error.

Cargoes moving to Hawaii in Matson's RO/RO service are rated under either one of two Matson tariffs—Matson Freight Tariff 1–S (FMC–158) or Matson Westbound Container Freight Tariff 14–E (a re-issue of 14–D) (FMC–156), depending upon whether or not the cargo is container cargo as defined in Matson's filed tariff rules and definitions. The two pertinent definitions ("container cargo" and "containerized cargo") are given *supra* with the citations to their filed tariff sources. For brevity I will not repeat the step-by-step analysis of Mr. Kane in his filed written direct testimony (pages 3–9).[10] Suffice it to say that I do not find any ambiguity in which tariff properly applied to the subject shipment; Matson Westbound Container Freight Tariff 14–E clearly applied. By operation of the filed tariff definitions, the subject shipment was container cargo and the fact that some of the machinery overlapped the sides of the flatbeds on which they rested I find to be immaterial and irrelevant. Overwidth charges were properly applied, and I see no relief for complainant in those portions of the filed definitions that stated "cargo which can be safely carried . . . *on* a trailer" (container cargo) or "any piece or package which can be loaded *wholly within or on* a . . . container or trailer" (containerizable cargo). The subject machinery was loaded wholly on the flatbeds and the portions extending over the sides were not otherwise supported by any other "outriggers" or other extension supports; hence, they were loaded wholly on, and supported wholly and solely by, the flatbeds on which they were placed. Carriage of overwidth cargoes is regularly and safely performed by Matson in just such a manner on standard 40-foot flatbed trailers only eight feet in width. The overwidth charge is a reasonable charge in recognition of the fact that overwidth loads, working in concert, eventually eliminate what would be another salable trailer position on the ocean-going vessel. The tariff exception for "lowboy" trailers (eliminating them from using Tariff 14–E) was inapplicable to this shipment.

Rule 260(b)(5) of Matson's Tariff 14–E (container cargo) provides for an additional charge for each linear foot or fraction thereof of overhang of the cargo beyond the trailer width. If, as complainant contends, the mere fact that a cargo overhangs the trailer bed was sufficient to disqualify that cargo from being "container cargo," then there would be no reason to have such an "overwidth" provision in the container cargo tariff (14–E).

I find that the proper total charges are as listed on page 11 of Mr. Kane's testimony, i.e., two trailers rated under Matson Tariff 1–S (for which refund was made) and eleven trailers rated under Matson Westbound Container Freight Tariff 14–E; a total of $6,626.55 for the former and $47,441.21 for the latter, including in both cases all wharfage and heavy lift charges, and in the case of the 14–E trailers the overwidth charges and unloading allowance. The grand total comes to $54,067.76.

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[10] Mr. Kane's testimony carefully tracked all the possible exceptions to Matson Tariff 14–E and showed how this particular cargo would not fit them. He also demonstrated that Matson Tariff 1–S could not possibly apply to this cargo and the way it was shipped, with the exception of the two trailerloads (out of 13) for which a refund was made.

Finally, that portion of the Complaint's "Wherefore" clause must be addressed which demands "costs" and "reasonable attorneys' fees." Such items are not recoverable in Commission reparation proceedings absent specific statutory authority. In this area we have the same limitation as other Federal administrative agencies. See, *e.g.*, *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717–720 (1967); *Fitzgerald v. Civil Service Commission*, 407 F. Supp. 380 (USDC, D.C. 1975); *Ace Machinery Co. v. Hapag-Lloyd*, 16 SRR 1258, 1261 (1976); *Ibid*, 16 SRR 1531, 1534 (1976); see also *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975).

## CONCLUSION

Having found that the amount ultimately collected by the carrier (after the partial refund) exactly corresponds to what the carrier was entitled to collect under the applicable filed tariffs, the complainant's request for reparation must be, and is, DENIED.

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

WASHINGTON, D.C.
*August 31, 1978*

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 405(I)

PARAMOUNT EXPORT COMPANY

*v.*

SEA-LAND SERVICE, INC.

## ORDER ON RECONSIDERATION

*October 12, 1978*

By Petition filed June 27, 1978, Respondent Sea-Land Service, Inc. (Sea-Land) asks the Commission to reconsider its Report served May 12, 1978, awarding reparation to Complainant Paramount Export Company.

Sea-Land's position is that no final action should be permitted until (1) either the consignor or the consignee submits a Shipper's Export Declaration Correction Form as provided in 15 U.S.C. 30.16, and (2) Complainant files with the Commission a verified statement in the form prescribed by section 502.304(a) of the Commission's Rules, 46 C.F.R. 502.30(a). Alternatively, Sea-Land proposes that the Commission "through its governmental contacts . . . ascertain whether the customs declaration filed with the exporting and importing nation accurately reflects the same amount of cargo which is the subject of this complaint."

Sea-Land apparently intends the Commission to institute an independent investigation of Complainant's compliance with custom regulations. Apart from the fact that the Bureau of Customs and not the Commission is charged with regulating export declarations, Petitioner states no reason, or offers no new evidence from which to conclude that the correction of the export declaration would serve any purpose. The export declaration and the corresponding ocean bill of lading prepared by the same ocean freight forwarder, presumably at the same time, reflect the same amounts of cargo being shipped. In reaching its May 12, 1978, decision the Commission had both documents before it, and concluded that the evidence of record supported the finding that the number of crates of plums found in the container was less than the number indicated in the shipping documents. Although it might further support the Commission's conclusion, additional evidence in the form of a corrected export declaration is unnecessary in this instance.

Petitioner also asks the Commission to provide guidelines on the burden of proof to be used by ocean carriers in informal dockets. The Commission's Rules provide no special standards of evidence for carriers. The Administrative

Procedure Act places the burden of proof on the proponent of a rule or order, 5 U.S.C. 556(d). This rule governs in informal as well as formal docketed proceedings.

Sea-Land has, however, correctly noted that the complaint lacks the verified statement prescribed by section 502.304(a) of the Rules.* Accordingly, the record will remain open for twenty (20) days from the service of this Order in order to allow Complainant to file the required statement. Should Complainant fail to file such statement, reparation shall be denied.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

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* The verification required by Appendix A to Part 502 of the Rules reads as follows:

VERIFICATION

State of ________, County of ________, ss: ________, being first duly sworn on oath deposes and says that he is ________

(The claimant, or if a firm, association or corporation, state the capacity of the affiant.) and is the person who signed the foregoing claim, that he has read the foregoing and that the facts set forth without qualification are true and that the facts stated therein upon information received from others, affiant believes to be true.

________

Subscribed and sworn before me, a notary public in and for the State of ________, County of ________, this ________ day of ________, 19 ________.

(SEAL) ________
(Notary Public)

# FEDERAL MARITIME COMMISSION

DOCKET NO. 78–23

ROBERTS STEAMSHIP AGENCY, INC.

*v.*

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS AND ATLANTIC AND GULF STEVEDORES, INC.

## ORDER OF DISMISSAL

*October 16, 1978*

Administrative Law Judge Charles E. Morgan served an order of dismissal in this proceeding August 14, 1978. No appeal of the order was filed. We issued a notice of determination to review the order of dismissal.

The complaint in question alleges that respondents have reached an agreement for use of berths and wharves at the Port of New Orleans which agreement has not been submitted to or approved by the Commission in violation of section 15 of the Shipping Act, 1916. The arrangement is also alleged to be in violation of section 16 First and 17 of the Act.

We recognize that in a complaint proceeding we cannot require the parties to litigate against their wishes and for this reason we will not disturb the Administrative Law Judge's order of dismissal. The Commission, however, has an independent responsibility to examine alleged violations of the Shipping Act where circumstances warrant. We think the allegations here deserve further examination and, accordingly, they will be pursued for now at the Commission staff level. Further formal proceedings will ensue if warranted.

It is ordered that the complaint in this proceeding is dismissed.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

No. 78–23

ROBERTS STEAMSHIP AGENCY, INC.

*v.*

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS AND ATLANTIC AND GULF STEVEDORES, INC.

## COMPLAINT DISMISSED

*Finalized on October 16, 1978*

By motion to dismiss dated June 21, 1978, respondent Board of Commissioners of the Port of New Orleans moves that the complaint in this proceeding be dismissed with prejudice. The other respondent joins in the motion, and the complainant does not oppose the motion. Because specific reasons for dismissal were not stated in the motion, it was directed that facts and reasons in support of the motion be submitted.

By letter dated July 26, 1978, the respondent Board of Commissioners of the Port of New Orleans states that at the same time that the complainant filed its complaint in No. 78–23, the complainant also filed a complaint and motions for a temporary restraining order and preliminary injunction in the U.S. District Court for the Eastern District of Louisiana. The complaint in District Court adverted to the same facts as those in No. 78–23, and sought injunctive relief pending the outcome of No. 78–23. The District Court denied the complainant's motion for a temporary restraining order. The complainant then moved that its District Court complaint be dismissed with prejudice, which motion was granted at a hearing in the District Court on June 16, 1978.

As a consequence of the dismissal with prejudice of the Federal court action, the complainant advised the respondents in the present proceeding, No. 78–23, that it would not oppose a motion to dismiss with prejudice in No. 78–23. The complainant chose not to pursue the complaint in No. 78–23, and to waive any right it might have to reassert its claim in the future.

By letter dated July 31, 1978, counsel for Atlantic & Gulf Stevedores, Inc., state substantially the same reasons as above in support of dismissal of the complaint.

Under the circumstances, the complainant will be considered in effect to have withdrawn its complaint. The motion to dismiss is granted and the subject complaint hereby is dismissed with prejudice.

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

*August 14, 1978*

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 534(I)

AQUINO SAILCLOTH, INC.

*v.*

UNITED STATES LINES, INC.

## ORDER AWARDING REPARATION

*October 17, 1978*

The Commission by order served September 7, 1978, determined that claimant had not adequately substantiated its claim for overcharges in this proceeding. Claimant was provided additional opportunity to substantiate its claim.

The dispute concerns the proper measurement of the cargo which consisted of a mix of Dacron and Nylon Sailcloth. The measurements said to have been taken at the pier were 336 cu. ft. This was evidenced by the dock receipt and was entered on the rated bill of lading. The measurement said by claimant to be correct is 120 cu. ft. This was evidenced by the packing list said to cover the shipment. Claimant has now submitted additional evidence which shows the weight to measurement relation of similar shipments by claimant of mixes of the same commodities in question here. This evidence establishes that on other shipments of dacron and nylon sailcloth the average weight in pounds was 30.3 times the cube.

There is no dispute as to the weight of the shipment in question. The shipper's packing list, the bill of lading and the dock receipt all list the weight as 4046 lbs. If the cube suggested by claimant (120 cu. ft.) is accepted as accurate, the weight of the shipment in question would be 33.7 times the cube. If the cube recorded on the dock receipt (336 cu. ft.) is accepted, the weight would be only 12.0 times the cube. It is apparent then that, inasmuch as the weight of the shipment is undisputed, the 336 cube recorded on the dock receipt and used to rate the shipment would be completely out of line with the cube on similar shipments of the same commodities. The 120 cube advocated by claimant, on the other hand, is within reasonable bounds. An exact relation of the instant shipment to the other shipments could not be expected because of the different mixes of the two commodities on the several shipments. However, such exactness is not necessary because of the clear unreliability of the dock receipt figure.

On the basis of the foregoing, it is concluded that claimant has satisfactorily demonstrated that the shipment was misrated, and that it is entitled to reparation in the amount of $596.70. It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 74–45

AGREEMENT NO. 8005–7 BETWEEN MEMBERS OF THE NEW YORK TERMINAL CONFERENCE

## ORDER ON RECONSIDERATION

*November 2, 1978*

Now before the Commission are petitions filed by the New York Terminal Conference (NYTC) and Sea-Land Service, Inc. (Sea-Land) seeking reconsideration of widely different aspects of the Commission's August 14, 1978, Report and Order disapproving Agreement No. 8005–7.[1]

Sea-Land objects to the August Report's affirmation of the basic principle that individual terminal operators have a right, within the limits of Shipping Act sections 15, 16 or 17, to establish their own prices and policies. NYTC requests the Commission to reverse its earlier decision and approve Agreement No. 9005–7 because application of the *Svenska* doctrine to the proposed extension of NYTC's authority to fix free time and demurrage rates is allegedly unreasonable.

Neither petition contains new arguments or information. The August Report addressed, and denied, the contentions presently advanced by NYTC and Sea-Land.

THEREFORE, IT IS ORDERED, That the relief requested by the "Petition for Reconsideration" of the New York Terminal Conference and the "Petition for Limited Reconsideration" of Sea-Land Service, Inc., is denied.

By Order of the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

[1] Replies were filed by the Commission's Bureau of Hearing Counsel, Sea-Land, NYTC, the Maryland Port Administration and 12 North Atlantic freight conferences.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 77–49

UNITED STATES LINES, INC.; GENERAL INCREASE IN RATES IN THE U.S. MAINLAND/GUAM TRADE

DOCKET NO. 77–51

MATSON NAVIGATION COMPANY; GENERAL INCREASE IN RATES IN THE U.S. MAINLAND/GUAM TRADE

NOTICE

*November 3, 1978*

Notice is given that the time within which the Commission could determine to review the September 15, 1978, order of discontinuance in this proceeding has expired with no such determination being made. Accordingly, review will not be undertaken.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

No. 77–49

UNITED STATES LINES, INC.; GENERAL INCREASE IN RATES IN THE U.S. MAINLAND/GUAM TRADE

## MOTIONS TO DISMISS PROCEEDING GRANTED

*Finalized on November 3, 1978*

By Order of Investigation and Suspension[1] served September 28, 1977, the Federal Maritime Commission (the Commission) instituted an investigation to determine whether a proposed 5% general rate increase of United States Lines, Inc. (USL), on its ocean freight rates and charges for its service in the U.S. mainland—Guam trade would be unjust, unreasonable, or otherwise unlawful under section 18(a) of the Shipping Act, 1916, or section 4 of the Intercoastal Shipping Act, 1933. The USL investigation bore Docket No. 77–49.

By Order of Investigation served September 29, 1977, the Commission instituted a similar investigation to determine whether an identical 5% general rate increase proposed by the Matson Navigation Company (Matson) in the same trade (U.S. mainland—Guam) would be just and reasonable under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933. In this Matson Order (77–51), the Commission made the following observations:

> United States Lines, Inc. (USL) Matson's competitor in the trade, filed a similar 5 percent increase simultaneously with Matson. The Commission believes that USL may be earning an excessive rate of return and therefore has ordered the increase of USL suspended and investigated. That investigation may result in a Commission order prescribing the maximum rate level to be charged by USL. Historically, the rate levels maintained by USL and Matson have remained at parity for competitive reasons. Therefore, any order affecting the rate level of USL will probably affect Matson as well. Accordingly, we believe that the revenue requirements of Matson must be considered in determining the level of rates which will, in all probability, be charged by both carriers in the trade. (Matson Order of Investigation, Docket 77–51, at 2)

On motion of Matson, unopposed by the other parties to the proceeding, the two proceedings were ordered consolidated by the Chief Administrative Law Judge on November 28, 1977. The other parties to the proceeding were FMC Hearing Counsel and two intervenors, the Military Sealift Command (MSC) and the Government of Guam (Guam).[2]

[1] Although the Commission initially suspended the USL 5% rate increase, which had been scheduled to go into effect on September 29, 1977, the rate ultimately did go into effect on January 28, 1978. Matson's increase was not suspended.

[2] MSC's petition to intervene was granted on November 2, 1977; Guam's petition to intervene was granted May 12, 1978.

There have been two prehearing conferences[3] in this proceeding, as well as extensive discovery, including depositions, document production and interrogatories. The oral evidentiary hearing had been scheduled (after postponements) for September 18, 1978.

On August 14, 1978, respondent USL filed a Motion to Dismiss Investigation based upon USL's determination "to eliminate immediately the 5% rate increase, such reduction to be effective upon the grant of the motion to dismiss the investigation in Docket 77–49" (the USL investigation). The reasons for USL being willing to cancel the 5% rate increase were set forth in its motion and included, *inter alia,* the fact that dismissal of the proceeding "would also remove the necessity of possibly premature resolution of complex accounting and legal issues." All of the other parties to the proceeding concurred in the position that the dismissal should be granted ("conditioned upon the simultaneous withdrawal of the 5% rate increase"). Hearing Counsel, in their reply, concurred with the proviso that the dismissal "is not to be construed as an admission that the present rate level is proper and is without prejudice to the initiation of a proceeding testing the reasonableness of the rates and practices in the trade in the future" (citing *Dismissal of Atlantic/Gulf–Hawaii Portion of Investigation into Hawaiian Rates,* FMC No. 960, 5 SRR 583, 1965).

On August 29, 1978, respondent Matson filed a similar Motion to Dismiss Investigation contingent upon the roll-back of its 5% general rate increase, and provided that the Commission concurrently grants the similar motion of USL. No party opposed Matson's motion. It should be noted that Hearing Counsel's position, from early in the proceeding, was that Matson's proposed 5% increase was justified by Matson's need for additional revenue,[4] and that Guam, although initially opposing Matson's proposed 5% general rate increase, after extensive discovery of Matson's financial and operating data, concluded that it would not have any "affirmative evidence to present in support of the proposition that the Matson rate increase is unjust and unreasonable."[5] Matson gave as the basis for its decision to cancel the 5% increase and to move for dismissal of the investigation the following:

> It is Matson's understanding, based on the pleadings and proposed testimony and exhibits in this proceeding, that no party contends that Matson is not entitled to the proposed 5% rate increases. It follows, *a fortiori,* that no party could reasonably object to dismissal of the investigation of Matson's increases in Docket No. 77–51 concurrently with a roll back of the proposed increases.
>
> Matson has determined that it would be worse off, in terms of loss of revenue, if it attempted to operate with rates 5% higher than those of its competitor, United States Lines, than it would be if it rolls back the 5% increases. Hence, Matson has no choice but to roll back its rates if the similar motion of United States Lines is granted and United States Lines rolls back its rates. (Matson Motion to Dismiss, at 2)

The 5% general rate increases of both respondents constituted the essential subject matter of the two investigations ordered by the Commission. Upon the voluntary roll-back of those increases by both respondents, there no longer exists

[3] December 13, 1977 and May 31, 1978, both in Washington, D.C.

[4] See Hearing Counsel letter to Judge Reilly, August 28, 1978.

[5] See Memorandum of the Government of Guam filed August 25, 1978. See also August 30, 1978, Memorandum of Military Sealift Command in which MSC expresses the view that "all of the evidence developed in the prehearing phase of these proceedings supports the conclusion that the increased rates are just and reasonable as to Matson."

the subject the Commission intended to investigate. Accordingly, it is appropriate and proper that the investigation be now ordered dismissed and discontinued, contingent upon the effectuation of the roll-backs by both respondents with all deliberate speed. Copies of the tariff pages effecting the cancellation of the said 5% general rate increases shall be served by both respondents upon all parties to this proceeding and the presiding Administrative Law Judge. Immediately upon such action being taken by the respondents, this consolidated proceeding will be deemed DISMISSED and the investigation discontinued. However, the proviso expressed by Hearing Counsel in its August 18, 1978, Reply to Motion to Dismiss is made a condition attached to the dismissal, i.e.:

> The dismissal of this proceeding is not to be construed as an admission that the present rate level is proper and is without prejudice to the initiation of a proceeding testing the reasonableness of the rates and practices in this trade in the future.

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

*September 15, 1978*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 75-20

PUERTO RICO MARITIME SHIPPING AUTHORITY—
RATES ON GOVERNMENT CARGO

## ORDER DENYING RECONSIDERATION

*November 20, 1978*

The Commission has before it three petitions seeking modification of the August 9, 1978, Report and Order (August Order) in the above-captioned matter.[1] The August Order directed the Puerto Rico Maritime Shipping Authority (PRMSA) to cancel certain tariff provisions for "Government Cargo" effective September 15, 1978, and to cease and desist from publishing tariff provisions which: (1) do not forbid government shipments from alternating between currently effective government and commercial rate items; and (2) do not require shipping documents which fully identify all items tendered as "Government Cargo" in terms of prevailing commercial tariff classifications.

Petitioners largely repeat contentions previously presented to the Commission and have provided no information warranting modification of our earlier decision.[2] The August Order will, however, be clarified to the following extent.

Ocean carriers may establish simplified or multiple commodity tariff classifications which provide for the shipment of numerous commodities at a uniform rate.[3] The mixing of commodities—under conditions which preclude shippers from simultaneously qualifying for more than one rate—is a sufficient transportation distinction to uphold the publication of such a classification. *The carrier must, however, make this classification available to all shipments which meet the transportation conditions stated in its tariff.* A failure to treat similarly situated shippers equally in this regard would violate Shipping Act sections 16 or 18(a), or both. Thus, a carrier publishing a "Government Cargo" classification with no

[1] The petitions are the: "Petition for Reconsideration or Clarification" of the Military Sealift Command (MSC), "Petition for Clarification of Decision" of PRMSA; and "Petition for Clarification" of the Commission's Bureau of Hearing Counsel (Hearing Counsel). Replies were submitted by MSC, Matson Navigation Company, United States Lines, Inc., and the Household Goods Forwarders Association of America, Inc. Related motions seeking a stay of the August Order's effective date were granted by a separate Commission order served September 18, 1978.

[2] MSC wishes to continue identifying its "Government Cargo" shipments under the "MILSTAMP" nomenclature code, rather than provide the more thorough descriptions necessary to accurately classify the commodities it ships under PRMSA's commercial tariff. Hearing Counsel, on the other hand, continues to oppose special classifications for "Government Cargo" and believes MSC should be restricted to the use of commercial commodity classifications. PRMSA generally supports MSC's requests, but is primarily concerned that PRMSA not be unfairly singled out among Puerto Rico trade carriers to impose more burdensome requirements upon MSC shipments. This concern should be alleviated by the Commission's continuation of its September 18, 1978, Stay Order until a final decision is entered in FMC Docket Nos 77-18 and 77-38.

[3] The uniform rate chosen must yield total revenues equivalent to those realized from the shipment of the same items at commercial commodity rates except to the extent the carrier can justify a differential based upon cost or other recognized rate making factors

limiting conditions beyond those prescribed by the August Order would be required to make that classification available to noncommercial shippers of mixed cargoes otherwise undistinguishable from eligible government shipments.[4] Conversely, a carrier publishing such an unrestricted "Government Cargo" classification must rate *all government shipments* under that classification.[5]

If a carrier intends for some government shippers to employ its commercial commodity descriptions, and those government shippers wish to do so, a "Government Cargo" tariff classification may be published which is expressly limited to a particular category of government shipments (*e.g.*, "U.S. Military Cargo".[6] Any changes in the shippers (or shipments) eligible to use a special "Government Cargo" type classification must be reflected in an amendment to the carrier's tariff.

A complete description of the items included in each "Government Cargo" shipment must be provided to the carrier *at the time of shipment*. This description must be sufficient to permit classification under the carrier's commercial tariff. If an adequate description is not furnished, the cargo is ineligible for the "Government Cargo" rate and must be rated under commercial tariff classifications (*e.g.*, "Cargo, N.O.S.").[7] Failure to rate an incompletely identified MSC shipment under commercial tariff classifications would subject the carrier to Shipping Act penalties.

It is the description provided at the time of shipment which determines the applicable commercial commodity classification for purposes of judging the *level* of a carrier's "Government Cargo" rates under Shipping Act section 18(a).[8] Carriers are expected to maintain complete and accurate records of the shipping documents tendered by government shippers and should periodically (*e.g.*, semi-annually) evaluate their "Government Cargo" rates to assure that they can be justified in terms of the commercial rates which would otherwise apply to the items being shipped.[9]

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[4] A "U S Government Cargo" classification fairly implies that only noncommercial commodities will be shipped Nonetheless, the publishing carrier would be prudent to specify whether commercial or noncommercial items qualify for the classification and to provide all other relevant information concerning the value of service of the commodities it intends to include If containers of mixed freight are permitted or required, or if a minimum number of containers must be tendered, these facts should also be included in the tariff

[5] It appears that PRMSA's "Government Cargo" classification was in fact limited to MSC shipments despite the broad language employed in PRMSA's tariff Failure to adhere to the exact terms of a tariff violates section 2 of the *Intercoastal Shipping Act*, 1933 46 U S C. 844.

[6] The second full sentence on page 11 of the August Order spoke to the need to preclude government shippers from alternating between *simultaneously effective* government and commercial classifications. It was not intended to require that all types of government shippers be included in the same tariff classification(s) It is necessary however that any shipper which does use a "Government Cargo" classification commit itself to that classification exclusively for all of its qualifying shipments until such time as a tariff amendment is implemented which eliminates that particular shipper's eligibility for the "Government Cargo" rate

[7] If MSC actually identifies a shipment as "Cargo, N O S.," it would qualify for the "Government Cargo" rate, but see note 8, *infra*.

[8] If a "Cargo, N O.S " description is furnished by MSC at the time of shipment, the carrier's commercial "Cargo, N O S." rate shall govern in a subsequent section 18(a) inquiry, regardless of whether a more accurate description is later furnished Deliberate manipulation of the commodity descriptions provided by government shippers for the purpose of obtaining lower commercial rates on certain shipments would not only violate Shipping Act section 16 initial paragraph, but would put steady upward pressure on the level of the "Government Cargo" rate PRMSA states that its commercial "Cargo, N O S " rate is almost double its "Government Cargo" rate. Petition for Clarification, at note 2.

[9] The August Order stated that MSC contracted for domestic offshore ocean transportation services at six month intervals and assumed that "Government Cargo" tariff items would have fixed expiration dates See notes 12 and 21. MSC now indicates that it never negotiated fixed time period contracts in domestic offshore commerce. This fact makes it all the more important that MSC provide carriers with a contemporary and complete description of the items it ships as "U S Military Cargo "

MSC contends it cannot describe its shipments in the manner contemplated by the August Order without "great difficulty and expense," and, if it were to do so, there would be no further need for a simplified "Military Cargo" tariff classification system.[10] MSC fails to recognize, however, the availability of any government cargo classification depends both upon the carrier's willingness to offer it and the carrier's ability to justify the level of rates it generates. Innovation and simplification in ocean carrier tariffs are to be encouraged, but only as long as the innovations conform to the Shipping Act—including P.L. 93–487. The United States Government has enjoyed no special status as a shipper since former section 6 of the Intercoastal Shipping Act was repealed on October 26, 1974. The August Order represents the Commission's attempt to leave MSC and PRMSA with a reasonable choice of tariff arrangements. If the simplified system permitted under P.L. 93–487 is not economical for MSC, then MSC need not use it.

THEREFORE, IT IS ORDERED, That the Commission's August 9, 1978, Report and Order is clarified to the extent indicated above; and

IT IS FURTHER ORDERED, That the relief requested by the petitions for reconsideration or clarification filed by the Puerto Rico Maritime Shipping Authority, Military Sealift Command and Bureau of Hearing Counsel is denied in all other respects; and

IT IS FURTHER ORDERED, That the Commission's Order of September 18, 1978, staying the August 9, 1978, Order in the instant proceeding remain in effect until further notice.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

[10] MSC indicates that in many (but not all) instances, it can accurately identify its shipments using Uniform Freight Classification or National Motor Freight Classification descriptions, and has amended its procedures to do so in the Hawaii/Guam trades. Petition at 4–5. When this method does accurately identify each item shipped (or accurately identifies a mixed freight item such as "Freight All Kinds"), it may be employed in satisfaction of the August Order. When it does not, the carrier must rate the items under commercial tariff classifications.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 78–13

OLD BEN COAL COMPANY

*v.*

SEA-LAND SERVICE, INC.

## NOTICE

*November 29, 1978*

Notice is given that no exceptions have been filed to the October 11, 1978 initial decision in this proceeding and that the time within which the Commission could determine to review that decision has expired. Determination to review has not been made and accordingly, review will not be undertaken.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

No. 78–13

Old Ben Coal Company

*v.*

Sea-Land Service, Inc.

*Finalized on November 29, 1978*

Complainant, a consignee of a shipment of coal mining equipment, alleges that respondent common carrier by water collected certain charges for reworking containers at the carrier's terminal and seeks to collect further demurrage charges. Complainant alleges that assessment of these charges is an unreasonable practice in violation of section 17 of the Shipping Act, 1916, because respondent was at fault in overloading containers, thereby necessitating the additional work. Respondent admits that it was at fault in loading the containers but not that it violated the law. Rather than continue to litigate, however, both parties have submitted a settlement agreement and seek its approval. Upon consideration of the evidence and arguments of the parties urging approval of the settlement agreement, it is held:

(1) The settlement agreement by which respondent would refund to complainant the full amount of the reworking charges and not attempt to collect demurrage charges, and in which each party would discontinue its claims against the other in order to terminate their controversy, is just and reasonable, does not violate law or policy, and comports with the strong policy of law which encourages settlements;

(2) Approval of the settlement agreement would avoid costly multiple litigation involving determination of complicated issues which would have to be decided by the Commission and the courts, at the parties' expense;

(3) Since the claims of both parties raise complicated legal issues which are not easily determined, the decision of the parties to discontinue litigation and of Sea-Land to return the money charged for the reworking services and discontinue pursuit of demurrage charges represents a prudent decision to terminate a controversy rather than to expend money in continued litigation whose outcome is uncertain, especially when Sea-Land admits that it was at fault in overloading containers;

(4) The settlement is approved and the complaint is dismissed.

*Edmond J. Moriarty,* for complainant Old Ben Coal Company.
*B. Carlton Bailey, Jr.,* for respondent Sea-Land Service, Inc.
*John Robert Ewers, Aaron W. Reese,* and *Bruce Love,* for Bureau of Hearing Counsel.

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

This proceeding began with the filing of a complaint served by the Commission on April 25, 1978. Complainant Old Ben Coal Company alleged that

[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)

respondent Sea-Land Service, Inc., carried a total of 1,435.295 kilos (metric tons) of coal mining equipment from Antwerp, Belgium, to New Orleans, Louisiana, in March and April of 1978, ultimate destination being Benton, Illinois. When the containers loaded with this equipment arrived at Sea-Land's terminal in New Orleans, however, 44 of them, according to the complaint, were found to be overloaded and were reworked with the authorization of the consignee, Old Ben, so that they could be transported over the highways. On August 11, 1978, Old Ben paid Sea-Land the amount of $15,246.84, the alleged cost of the reworking service. Old Ben was also billed the amount of $22,575 for demurrage charges which had accrued while the containers were being reworked in New Orleans. Old Ben has not paid this charge.

The facts which gave rise to this controversy, as alleged in the complaint, are that Old Ben discovered, after it had paid the reworking charge, that the containers had been loaded in Europe in accordance with the instructions of Sea-Land's own agents. In other words, Old Ben states that the entire problem which ultimately necessitated additional reworking and demurrage charges at New Orleans was the fault of Sea-Land, not the consignee, Old Ben, nor the German shipper.

In the belief that it should not be held responsible for payment of the two charges, Old Ben asked Sea-Land to refund the $15,246.84 paid and to release it from payment of the demurrage charges. Sea-Land advised Old Ben to file a claim with the Commission. By letter dated April 13, 1977, Old Ben submitted an informal claim with the Commission. However, this claim could not be processed informally. Thereafter Old Ben filed a formal complaint which could not be served by the Commission because it failed to allege a violation of any specific provision of the Shipping Act, 1916 (the Act). Accordingly, the defective complaint had to be rejected. Finally, the present complaint was served.

As a result of the foregoing facts alleged in the complaint, Old Ben stated that Sea-Land Service, Inc., had subjected Old Ben to the payment of charges for services which were unjustly discriminatory and prejudicial in violation of section 17 of the Act, 46 U.S.C. 816, and, furthermore, that Sea-Land had provided false information which caused an increase of charges and resulted in Sea-Land's unjust enrichment.

In its answer, Sea-Land admitted the material facts as alleged but denied that it violated the law. Sea-Land stated that although it provided false information, it did not intentionally mislead Old Ben and believed that it was required to assess the charges in question in accordance with its tariffs, as required by law.

Hearing Counsel petitioned for leave to intervene, which petition was granted. Hearing Counsel stated that the case appeared to focus on questions of law since the parties seemed to be agreeing on the material facts and expressed concern that because the equities in the case seemingly favored Old Ben, care should be taken to ensure that proper consideration was given to principles of law which might govern despite the equities.

At the prehearing conference held on June 6, 1978, it became evident that there would be no dispute of material facts and that the parties would actively cooperate with Hearing Counsel in furnishing all relevant factual information and documentary materials for the purpose of reaching an agreed statement of facts, thereby obviating the need for a trial-type hearing. Furthermore, Old Ben recognized that its complaint did not relate to prejudice or discrimination but in reality, to the allegation that Sea-Land had engaged in an unreasonable practice relating to the receiving, handling, storing, or delivering of property in violation of the second paragraph of section 17 of the Act. Similarly, respondent recognized that it had been relying upon the defense that it had been required to follow its tariffs but had failed to specify that in the area of terminal services and tariffs, the Commission's General Order 15, 46 CFR 533, is pertinent. In the presence of all parties, both complainant and respondent amended their complaints to conform to the nature of the allegations and issues contained in the pleadings and, having been provided actual notice of the amendments, waived formal requirements of service of the amended pleadings.[2]

As amended, therefore, the complaint raises the question whether Sea-Land violated the second paragraph of section 17 of the Act by engaging in an unreasonable practice in receiving, handling, etc., of property. The answer raises the question whether Sea-Land was entitled to rely upon its tariffs when assessing the reworking and demurrage charges.

After the prehearing conference, both parties, with the active assistance of Hearing Counsel, uncovered, presented, and stipulated to all relevant facts, thereby obviating any need for a trial-type hearing. Furthermore, after a more complete factual record was developed, Old Ben and Sea-Land successfully negotiated a settlement of their controversy and, with the support of Hearing Counsel, have submitted it for approval. The only issue for decision, therefore, is whether the proffered settlement should be approved. I believe it should be. However, before addressing this question I make the following findings of fact which consist essentially of the parties' agreed statement of facts but with minor modifications based upon the underlying shipping documents, correspondence, and other relevant materials.

## FINDINGS OF FACT

1. On November 20, 1975, Old Ben Coal Company (Old Ben) contracted to purchase certain equipment from Rheinstahl AG Umformtechnik and Bergbautechnik of Duisburg, West Germany. (Ex. 1.)

2. The purchase price of the equipment was $2,378,300. (Ex. 1, p. 6.)

3. The purchase contract provided that the "Price is to be understood f.o.b. Rotterdam/Antwerp, duty unpaid." (Ex. 1, p. 6.)

4. On January 30, 1976,[3] Sea-Land Service, Inc. (Sea-Land), prepared an analysis of transportation costs for delivery of the mining equipment to Benton, Illinois. Sea-Land prepared cost comparisons for two methods of transport:

   1. NOLA[4]-Rail/Truck.
   2. NOLA-Truck (Ex. 2.)

5. The cost analysis specified that the trucker involved in the NOLA-Truck proposal, Container Carrier Corp., "Will not accept over 43,000 lbs."

[2] See Report of Ruling Made at Prehearing Conference Including Amendments to Complaint and Answer, June 8, 1978.

[3] The agreed statement incorrectly shows this date as January 1, 1930. Exhibit 2 shows the correct date.

[4] "NOLA" means New Orleans, Louisiana. (Transcript of Hearing, p. 12.)

6. The equipment purchased by Old Ben was a new construction and there was some confusion as to weight and measurement and as to how the equipment would be split for shipment. (Ex. 3.)

7. Sea-Land's agent in Germany, Paul Guenther, prepared an interim loading pattern based upon available information. (Ex. 3.)

8. During the following four weeks new loading plans were exchanged between Sea-Land in Bremen and Bremerhaven and Sea-Land's agent, Paul Guenther in Bremen and Dusseldorf. (Ex. 3.)

9. In Mid-February, 1976, Sea-Land's agent saw the new prototype of the equipment and noted final weights and measurements of various parts. The agent, however, did not make a container loading test. (Ex. 3.)

10. Loading of containers commenced on March 24, 1976, at the shipper's plant under the supervision of an expert from Sea-Land Operations, Bremerhaven. (Ex. 3.)

11. Final loading plans were made on the spot, and it became necessary to strengthen container floors because it was apparent that the equipment being loaded was overweight. (Ex. 3.)

12. Five containers of the equipment were shipped on the Sea-Land vessel *VENTURE* from Antwerpen to New Orleans on March 29, 1976. (Ex. 4.)

13. Thirty-seven containers of the equipment were shipped on the Sea-Land vessel *CONSUMER* from Antwerpen to New Orleans on April 8, 1976. (Ex. 5.)

14. Thirty-five containers of the equipment were shipped on the Sea-Land vessel *PRODUCER* from Antwerpen to New Orleans on April 18, 1976. (Ex. 6.)

15. One container was shipped on Sea-Land vessel *ECONOMY* under bill of lading dated May 8, 1976. (Ex. 7.) The total number of containers loaded in Germany was therefore 78.

16. The bill of lading for each shipment (Ex. 4, 5, 6, 7) contained the following notations:

> HOUSE/HOUSE SERVICE
> SHIPPERS LOAD AND COUNT
> FREIGHT PREPAID
> SHIPPED ON BOARD

17. Sea-Land's Import Sales Manager in Chicago, William J. Kenwell, made all arrangements for the shipment of the equipment and coordinated the entire movement from the shipper's door to the consignee's mine site. Based upon information furnished by Sea-Land's German agent, Mr. Kenwell and a representative of Old Ben, Mr. James Rinehart, determined that the containers were being overloaded. Kenwell and Rinehart communicated this information to Sea-Land's representatives in Germany. When the first five containers reached New Orleans they were found to be overweight and Kenwell so notified Rinehart.[5] Kenwell requested authorization from Old Ben to rework the containers at cost. (Ex. 8.)

18. Old Ben responded by telex on May 24, 1976, authorizing Sea-Land to strip containers, correct weights to meet highway load limits, relieved Sea-Land of liability, and agreed to pay incurred costs. (Ex. 9.)

[5] The overweight problem arose because the containers exceeded the maximum permissible weight established by the State of Illinois. (Ex. 3, p. 2.)

19. After the first containers to reach New Orleans were found to be overweight, Kenwell, in an emphatic communication, again tried to impose weight and loading restrictions. Sea-Land's representatives in Germany did nothing to rectify the problem. (Ex. 8.)

20. Eventually 35 of the 78 containers loaded in Germany had to be reworked in New Orleans and 12 additional containers were required (Ex. 10.) Sea-Land then invoiced Old Ben for $15,246.84, the actual costs for labor, crane rental, and blocking and bracing materials. (Ex. 11.)

21. Old Ben paid Sea-Land, by check number 185100 dated August 11, 1976, the sum of $15,246.84. (Ex. 12.)

22. Old Ben invoiced the German shipper for the amount paid to Sea-Land. The shipper responded by advising Old Ben that Sea-Land's invoice should not be paid because the containers had been loaded in accordance with "prescription" of Sea-Land's agent, Paul Guenther. (Ex. 13.)

23. Old Ben, based upon the information received from the German shipper, commenced efforts to obtain a refund from Sea-Land. (Ex. 14.)

24. While Sea-Land was reworking the containers allowable free time was exceeded by 2 to 49 days. (Ex. 15.)

25. Sea-Land invoiced Old Ben in the amount of $22,575.00 for the accrued demurrage charges by invoices dated August 24, 1976. (Ex. 16.)

26. The demurrage charges were assessed pursuant to Rule 25B (Page 11 a) of the Continental/U.S. Gulf Freight Association Tariff (F.M.C. no. 2). (Ex. 17.)

27. The demurrage charges have not been paid. (Complaint, paragraph 1, page 3.)

28. Efforts by Old Ben to obtain a refund of the reworking charges and cancellation of the demurrage charges, first by correspondence with Sea-Land, and finally with FMC staff, failed. (Exs. 18 through 26.)

29. The complaint in this proceeding, which was received by the Office of the Commission's Secretary on April 24, 1978, was filed within the two-year period of limitation required by section 22 of the Act.

*The Settlement and Mutual Release*

The settlement and mutual release for which the parties are seeking approval as a means to end litigation and terminate the controversy is set forth below. As can be seen, it resembles a typical settlement and release. Old Ben and Sea-Land agree not to pursue any new claims against each other on account of anything relating to the shipments of coal mining equipment in question and state that the settlement "is in full accord and satisfaction of doubtful and disputed claims, and is not an admission of liability or violation of law by any party hereto." Sea-Land agrees to pay Old Ben the $15,246.84 which Old Ben had been seeking as reparation and not to seek collection of the disputed demurrage charges. The settlement will become effective only upon being approved by the Federal Maritime Commission.

For the sake of completeness the complete text of the settlement is set forth as follows:

## *SETTLEMENT AND MUTUAL RELEASE*

IT IS HEREBY AGREED, by and between the undersigned, OLD BEN COAL COMPANY (Old Ben), Complainant in Federal Maritime Commission Docket No. 78-13, and SEA-LAND SERVICE, INC. (Sea-Land), Respondent, that Docket No. 78-13 shall be terminated by mutual agreement on the following terms and conditions:

1. Sea-Land shall pay to Old Ben the sum of $15,246.84 (but expressly without admission of liability, therefore).
2. Sea-Land will not receive, and Old Ben will not be required to pay, demurrage charges which it has demanded from Old Ben in connection with the shipment of coal mining equipment pursuant to Sea-Land bills of lading numbered 930 530951, 930 531196 and 930 531596.
3. Old Ben and/or any successor in interest will be barred from initiating any new claim against Sea-Land in connection with the shipment of coal mining equipment pursuant to Sea-Land bills of lading numbered 930 530951, 930 531196 and 930 531596 except for the enforcement of any of the provisions of this Agreement.
4. Sea-Land and/or any successor in interest will be barred from initiating any new claim against Old Ben in connection with the shipments of coal mining equipment pursuant to the above bills of lading except for the enforcement of any of the provisions of this Agreement.
5. It is understood and agreed that this Settlement and Mutual Release is in full accord and satisfaction of doubtful and disputed claims, and is not an admission of liability or violation of law by any party hereto.
6. This Agreement will become effective and binding on the parties only upon being approved by the Federal Maritime Commission.
7. This Settlement and Mutual Release constitutes the entire Agreement between the parties hereto.

IN WITNESS WHEREOF, the undersigned have executed this Settlement and Mutual Release this 19th day of September, 1978.

| OLD BEN COAL COMPANY | SEA-LAND SERVICE, INC. |
|---|---|
| By /s/ Edmund J. Moriarty | By /s/ B. Carlton Bailey Jr. |
| Chief Counsel | General Attorney |

### DISCUSSION AND CONCLUSIONS

As noted above, the issue for decision is whether the proffered settlement should be approved. In determining this question, a brief look at applicable principles and policies of law would be helpful.

In a well-researched memorandum in support of the parties' request that their settlement be approved by the Commission, Hearing Counsel cite the well-settled principles of law that favor settlement and emphasize that the Commission has followed these long-accepted principles. Furthermore, Hearing Counsel cite recent proceedings before the Commission in which settlements have been approved which did not include admissions of violations of law but did permit complainants to receive monetary compensation in return for entering into the agreements to settle. Furthermore, in still other cases, settlements involving monetary considerations were approved even though departure from tariff provisions might have occurred. Hearing Counsel emphasize that this case involves an allegation that Sea-Land engaged in an unreasonable practice in violation of Section 17 of the Act and that inasmuch as Sea-Land has not denied that it was at fault in overloading the containers, several decisions of the Commission lend support to the allegation. Hearing Counsel urge approval of the settlement since, otherwise, Sea-Land might gain financial advantage as a result of its own fault.

On the basis of their analysis of Commission decisions approving settlements between carriers and shippers and their analysis of the facts in this case, Hearing Counsel conclude that the settlement does not constitute rebating or the use of unjust or unfair devices which would allow Old Ben to obtain transportation at rates below those published in tariffs. In other words, Hearing Counsel believe that the settlement itself is proper and does not itself violate any provision of law. I agree.

*Applicable Principles of Law*

It is well settled that the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid. See, e.g., *Merck Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244, 247 (1973), citing *General Discount Corp. v. Schram*, 47 F. Supp. 845 (E.D. Mich. 1942), and *Florida Trailer & Equipment Company v. Deal*, 284 F. 2d 567, 571 (5 Cir. 1960); *Levatino & Sons v. Prudential-Grace Lines*, 18 F.M.C. 82, 85, 112–114 (1974); *Robinson Lumber Company, Inc. v. Delta Steamship Lines, Inc.*, 18 SRR 744, 747 (ALJ) (FMC Notice of Determination Not to Review, August 28, 1978); *Com-Co Paper Stock Corp. v. Pacific Coast-Australasian Tariff Bureau*, 18 SRR 619, 623 (ALJ) (FMC determined not to review, July 27, 1978).

The Commission's rules of practice similarly encourage settlement as does the Administrative Procedure Act. See Rules 91 and 94, 46 CFR 502.91 and 502.94; 5 U.S.C. 544(c)(1).[6]

The general policy favoring settlements is summarized rather effectively in the following passage drawn from a recognized legal authority:

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy. 15A American Jurisprudence, 2d Edition, pp. 777–778 (1976). (Footnote citations omitted.)

While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation. As the quotation cited notes, settlements must not contravene any law or public policy. For example, in some instances, a settlement between carriers or other persons subject to the Act might be meritorious but might require formal approval under section 15 of the Act. See, e.g.,

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[6] The Administrative Procedure Act (APA) states in pertinent part:

> The agency shall give all interested parties opportunity for—(1) the submission and consideration of . . . offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit. 5 U.S.C. 554(c)(1)

The Commission's Rule 91 closely tracks this language. There is considerable discussion as to the merits of settlements which avoid expensive litigation in the legislative history to the APA, although the emphasis seemed to be on settlement with the agency rather than merely settlement among private parties. For a brief discussion of this subject, see my initial decision in *Heavy Lift Practices and Charges*, 17 SRR 505, 536–538 (1977).

*Massachusetts Port Authority v. Container Marine Lines*, 11 SRR 37, 40 (1969); *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82, 89 (1970); *Delaware River Port Authority v. Puerto Rico Maritime Shipping Authority*, 14 SRR 1509, 1510 (1975). In other cases, there is some authority to the effect that the settlement itself must not contravene the tariff policies embodied in section 18(b)(3) of the Act and similar tariff laws. See *Consolidated International Corp. v. Concordia Line*, 18 F.M.C. 180, 183 (1975); *Com-Co Paper Stock Corp. v. Pacific Coast-Australasian Tariff Bureau*, cited above, 18 SRR at p. 622; *Ketchikan Spruce Mills v. Coastwise Line*, 5 F.M.B. 661, 662 (1959); but compare *Plaza Provision Company and Pueblo Supermarkets, Inc. v. Maritime Service Corporation*, 17 F.M.C. 47 (1973). In other instances, a proffered settlement could conceivably constitute a secret, unjust, or discriminatory device to prefer a particular shipper or shippers assuming the entire complaint was not filed in good faith. (Cf. *Levatino & Sons v. Prudential-Grace Lines*, cited above, in which a settlement was attacked on these grounds, albeit without basis in fact.) In still other instances, a settlement might be invalidated if brought about by fraud, duress, undue influence, mistake, etc. See 15A American Jurisprudence, 2d Edition, p. 800.

If a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval. It is also recognized, however, that a judicial officer or reviewing tribunal may evaluate the merits of the settlement under certain criteria established in this field of law. Thus, a judicial officer, in reviewing a proffered settlement, may look to see if the settlement is fair, reasonable, and adequate, and may weigh the likelihood of a complainant's success if litigation were pursued and the adequacy of the terms of the settlement balanced against the estimated cost and complexity of continued litigation. This does not mean, however, that the approving officer must actually make findings of violations or of lack of violations. To do so would interfere with the willingness of the parties to discuss settlements in the first place. Thus, in *State of West Virginia v. Chas. Pfizer Co.*, 440 F. 2d 1079 (2 Cir. 1971), the Court of Appeals affirmed the approval of a settlement in an antitrust case in which defendants proposed to pay $100,000,000 in settlement of numerous claims arising out of alleged violations of the antitrust laws in the sale of antibiotics. The appellate court, in affirming the order of the lower court approving the settlement set forth certain guidelines for judges to follow in evaluating the merits of settlements, emphasizing the limited role of the judge. Thus, the Court of Appeals stated:

> Whether to approve the compromise involves an exercise of discretion. . . . Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically. The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." (Citations omitted.) 440 F. 2d at p. 1085.

The Court proceeds to emphasize the policy of the law to encourage settlements, consider what would happen if the settlement were not approved and litigation were to continue, the need to avoid wasteful litigation, and the danger of discouraging settlements by making definitive judicial determinations on the ultimate issues involved, although tentative evaluations of legal positions might be permissible. 440 F. 2d at p. 1085.[7] In past decisions in which settlements have been approved, including those in which substantial amounts of money have been paid by respondents to complainants as part of settlement agreements the Commission has considered settlements to be meritorious if they served to avoid wasteful litigation and if it seemed to be more economical for respondents to make monetary payments as part of a settlement than to continue with lengthy, costly litigation. For example, in *Levatino & Sons v. Prudential-Grace Lines,* cited above, the Commission found that the settlements in two previous complaint cases[8] involving alleged discrimination against a number of fruit importers by a common carrier were perfectly lawful. The Commission found that the carrier had quite properly determined that it would be more prudent to pay the numerous complainants $81,000 rather than to seek vindication by costly litigation and possible court appeals. 18 F.M.C. at pp. 100–102; 112–114. In *Com-Co Paper Stock Corp. v. Pacific Coast-Australasian Tariff Bureau,* cited above, another settlement involving payment of $20,000 by respondents to settle a complaint alleging, among other things, discriminatory rates, the settlement was found to represent a prudent decision to terminate the case rather than undergo the lengthy and costly litigation that would ensue absent settlement. 18 SRR at p. 623. In *Robinson Lumber Company, Inc. v. Delta Steamship Lines;* Inc., cited above, we have another example of a settlement which was approved by which respondents agreed to make a monetary payment ($2,000) in settlement of numerous claims, some of which would not have been under the Commission's jurisdiction had litigation continued, again to avoid the greater costs of continued litigation. 18 SRR at p. 747.

A particularly significant example of a case in which the Commission approved a settlement involving payment of considerable sums of money despite the possibility that some departure from strict adherence to applicable tariffs would result is *Plaza Provision Company and Pueblo Supermarkets, Inc. v. Maritime Service Corporation,* 17 F.M.C. 47 (1973). In effect, that case concerned a settlement between carriers and shippers, many of whom had not paid demurrage bills on cargo delivered in Puerto Rico. The parties conceded that by their settlement they were seeking "to depart from the carriers' tariff rules and settle for 90 percent of the unpaid demurrage balances. . . ." 17 F.M.C. at 49. However, there were so many claims for unpaid demurrage extending over two years involving voluminous invoices and containers that the problem of

[7] It is not necessary for respondents to admit to violations of law for purposes of offering settlements and none of the Commission cases which I am citing in which settlements were approved involved admissions of violations of law. Indeed, Rule 91 of the Commission's rules, 46 CFR 502.91, specifically provides that if a party submits an offer of settlement, this shall be done "without prejudice to the rights of the parties" and further provides that evidence of such offers of settlement cannot be admitted into evidence over the objection of any party. *In Merck Sharp & Dohme v Atlantic Lines,* cited above, 17 F.M.C. at p. 247, the Commission specifically recognized that offers of settlement do not constitute admissions of violation but merely show a desire to terminate a controversy by paying an amount of money if necessary.

[8] The two cases were Docket No. 66–64, *All Chilean Fruit Corp. v. Grace Line, Inc.* and Docket No. 66–69, *Arthur Schwartz and Justamere Farms, Inc. v. Grace Line, Inc.*

proving what was exactly owed would have been enormous. Recognizing this problem and the policy of encouraging settlements as a means of putting controversies to rest while avoiding expensive litigation, the Commission approved the settlement, permitting the carriers to waive 10 percent of unpaid demurrage bills and to refund 10 percent of those bills that some shippers had paid in full.

Hearing Counsel correctly rely upon *Plaza Provision* to support their position that the settlement in this case should be approved. As in this case, *Plaza Provision* involved terminal charges, some of which were the result of the carriers' own fault. The Commission indicated that assessment of such charges would be improper under a statute (section 18(a) of the Shipping Act) which is comparable to section 17, second paragraph, with regard to the requirement that carriers observe "just and reasonable regulations and practices . . . relating to or connected with the receiving, handling, storing . . . or delivering of property." The settlement was approved, even though, because of the difficulty of proof, it was conceivable that some portions of the demurrage charges that were waived or refunded were reasonable and therefore normally required to be collected under the carriers' tariffs. The strong policy of encouraging settlements was therefore followed and was not allowed to be defeated by a too-rigid adherence to tariff law which, had such law been strictly observed, would have necessitated the continuation of enormously complicated and expensive litigation.

Still another example of a settlement between litigating parties in which a respondent paid $10,000 to a complainant and relinquished its claims seeking to collect charges under the tariff is that which terminated both Docket No. 75-48, *Sea-Land Service, Inc. v. City of Anchorage,* and Docket No. 76-4, *City of Anchorage v. Sea-Land Service, Inc.* These settlements were approved. See *Totem Ocean Trailer Express, Inc.,* Order Denying Request for Declaratory Order, October 2, 1978, note 1. The similarities between these settlements and the one proposed in this case are evident. In this case, as in those, a respondent agrees to pay money and to discontinue seeking to collect certain tariff charges in order to terminate controversy and avoid expensive litigation.

*Approvability of the Present Settlement*

I find the proffered settlement in this case to represent an example of prudent judgment on the part of the litigating parties to forego the costs and complexities of continued litigation in favor of settlement.

Under the terms of the settlement Old Ben would receive $15,246.84, which it had been asking as reparation and would be released from payment of the additional demurrage charges which Sea-Land had been seeking. Both Old Ben and Sea-Land would forego litigating claims against each other except for enforcement of the settlement agreement, if enforcement became necessary, and both parties expressed their views that the settlement and mutual release "is in full accord and satisfaction of doubtful and disputed claims, and is not an admission of liability or violation of law by any party hereto." Under the previous principles enunciated above, this settlement should be approved.[9]

[9] Alternatively, the complaint could be dismissed since it has been satisfied Rule 93 of the Commission's rules of practice, 46 CFR 502 93, provides that "[s]atisfied complaints will be dismissed in the discretion of the Commission." The rule further requires the

The basis of the complaint, as noted earlier, was the allegation that Sea-Land's assessment of reworking and demurrage charges constituted unreasonable practices because the additional charges were the result of Sea-Land's own fault. This claim appears to have merit under applicable law. The Commission has indicated in previous decisions that assessment of terminal charges by carriers might be or would be unreasonable when the charges resulted from carrier fault. See, *e.g.*, *Uniform Rules and Regulations Governing Free Time on Import Containerized Cargo at the Port of New York*, 18 SRR 465, 469 (1978) (assessment of demurrage when carrier failed to provide equipment "could result in a practice violative of section 17"); *Plaza Provision Company and Pueblo Supermarkets, Inc. v. Maritime Service Corporation*, cited above, 17 F.M.C. at p. 51 ("the practice of billing for demurrage resulting from carrier fault . . . is unjust and unreasonable."); *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89, 106–107 (no demurrage should be charged when carrier is unable to tender cargo for delivery); *Free Time and Demurrage Practices, at N.Y. Harbor*, 11 F.M.C. 238, 253 (1967) (same, but if free time had expired, carrier has option to charge non-penalty demurrage during longshoremen's strike); *Truck and Lighter Loading and Unloading*, 9 F.M.C. 505, 515 (1966), affirmed *sub nom. American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 389 F. 2d 962 (D.C. Cir. 1968) (terminal operator cannot absolve self from liability for detaining trucks when detention is caused by the terminal operator); *Joseph & Sibyl James v. South Atlantic & Caribbean Line, Inc.*, 14 F.M.C. 300 (carrier not allowed to assess storage charges when carrier failed to give proper arrival notice).

Had this case proceeded to full litigation, we might have heard defenses from Sea-Land and arguments regarding the question whether the cases cited are apposite or whether this particular transaction constituted a "practice" within the meaning of section 17 of the Act rather than a one-time occurrence. See, *e.g.*, *Investigation of Practices of Stockton Elevators*, 8 F.M.C. 181, 200–201 (1964).[10] Or conceivably we might have heard arguments or taken further evidence regarding the legal effect of Old Ben's having agreed to pay for the reworking charges and receiving goods before it had learned that the containers were loaded in Europe under Sea-Land's supervision. Cf., *e.g.*, *Southern Pacific Company v. Miller Abattoir Company*, 454 F. 2d 357, 359 (3 Cir. 1972).[11]

Numerous other interesting legal issues and arguments could have been raised if money were no object and the parties wished to expend it generously in wasteful litigation. For example, Sea-Land admittedly had no tariff on file to authorize its assessment of the reworking charges although it did have a tariff

parties to submit a statement showing how the complaint has been satisfied including the amount of reparation agreed upon and a statement that a like adjustment will be made with other persons similarly situated. The settlement and mutual release in effect comply with the rule and there is no evidence that there were other shippers or consignees who were similarly assessed terminal charges as a result of Sea-Land's fault.

[10] Hearing Counsel contend that since Sea-Land imposed demurrage on each container separately and believed that it would be required to assess demurrage under its tariff, Sea-Land's actions appear to constitute "practices" rather than one isolated instance. (Hearing Counsel's Memorandum, p 9 ) Hearing Counsel may be correct I need not decide the question for purposes of ruling upon the settlement. However, the contention illustrates the point that a continuation of this litigation would involve resolution of numerous difficult legal issues.

[11] *In Southern Pacific*, the court cited the many cases which hold that one who accepts goods consigned to him is liable for all freight charges. However, in that case there was a tariff which applied. In this case, Sea-Land admittedly had no tariff on file covering assessment of the reworking charges

applicable to the demurrage charges.[12] Therefore, the question arises as to whether Sea-Land could have successfully defended against a claim for reparation as to the reworking charges and whether Old Ben could have successfully defended against a Sea-Land suit for the demurrage charges. These questions have no simple answers, however. Even without a tariff, as Hearing Counsel notes, Sea-Land could have sought to retain the reasonable costs of the reworking charge, if the parties wished to litigate further what such reasonable costs would be. See *e.g., Carton-Print, Inc. v. The Austasia Container Express Steamship Co.*, 17 SRR 571, 579 (FMC determination not to review, July 7, 1977), citing *J. G. Boswell Co. v. American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95, 104–105 (1939). Moreover, had Sea-Land wished to pursue its demurrage claims under its tariff, it would have to file a complaint in a court against the shipper, Old Ben, since under section 22 of the Shipping Act, complaints can only be filed against a "common carrier by water, or other person subject to this Act" and such "other person" is not defined in section 1 of the Act to include shippers such as Old Ben. See 46 U.S.C. 821 and 801. This suit in a court could, in turn, lead to a defense by Old Ben that the demurrage charges constituted unjust and unreasonable practices in violation of section 17 of the Act, which defense in turn could lead to a referral of this question by the court to the Commission under the doctrine of primary jurisdiction. See, *e.g., Marine Terminal v. Rederi. Transatlantic*, 400 U.S. 62, 68–69 (1970); *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 295 n. 2 (1922); *Sacramento-Yolo Port District v. PCEC*, 8 SRR 20, 569 (N.D. Cal. 1970). If such referral took place and if the tariff provision embodying Sea-Land's demurrage practices were found to be unreasonable, the general principle requiring shippers and consignees to pay Sea-Land what the tariff provides could conceivably not be applicable.[13]

What I am attempting to demonstrate by the above discussion is not that Sea-Land has necessarily violated section 17 of the Act or that Sea-Land clearly has a valid claim for demurrage which a court would uphold but that the outcome of Old Ben's claim filed with the Commission and any Sea-Land action filed with a court is uncertain. As mentioned above, it is not necessary nor indeed advisable to make final determinations of the many legal issues when considering offers of settlement since, to do so, might discourage parties from even attempting to propose settlement. My objective is to demonstrate that disapproval of the settlement which the parties desire to implement would very likely perpetuate a series of complicated proceedings both before the Commission and the courts in

[12] See Continental/U.S. Gulf Freight Association Tariff (F.M.C. No. 2) Rule 25B, first revised page 11a

[13] Although the general rule of law is that carriers must collect what is specified in their tariffs, there are exceptions. For example, in *Joseph & Sibyl James v. South Atlantic & Caribbean Lines, Inc.*, cited above, in a domestic offshore trade, the carrier was not allowed to retain storage charges under its bill of lading (which by section 2 of the Intercoastal Shipping Act, 1933 must be included in the tariff) because the carrier had failed to provide adequate arrival notice. In *Plaza Provision Company v. Maritime Service*, cited above, carriers were not allowed to retain certain portions of demurrage charges under their tariffs because of their own fault. In *Southern Pacific Company v. Miller Abattoir Company*, cited above, the failure of the carrier to give proper notice of stoppage in transit under a shipping contract gave the consignee a right to counterclaim for damages against the carrier's assessment of additional charges under its tariff. In other exceptional cases, carriers have been denied rights to recovery under their tariffs when they have misled shippers regarding who has paid charges, have failed to advise shippers of cheaper routing, or have violated some other duty owed to shippers. See cases discussed in 83 American Law Reports 245, 260–261, 263, 267, and in 88 American Law Reports 2d 1375, 1377, 1387, 1395. See also cases cited in *Southern Pacific Company v. Miller Abattoir Company*, cited above, 454 F. 2d at p. 361 n 6. Finally, see *Free Time on Import Containerized Cargo at the Port of New York*, cited above, 18 SRR at p. 469 (assessment of demurrage under carrier's tariff when carrier has failed to provide equipment may result in a practice violative of section 17). Note especially that in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915), in the quotation often cited by Mr. Justice Hughes regarding strict adherence to tariffs, he stated that shippers and carriers must abide by the tariff "unless it is found by the Commission to be unreasonable."

which numerous problematic legal issues would have to be determined at some expense to the parties. At the hearing held on September 19, 1978, all parties agreed that their settlement was offered in lieu of the painful and expensive alternative of carrying out litigation before the Commission and the courts and, furthermore, Sea-Land made clear that it had worked to develop the record and bring this case to a conclusion with the objective of reaching settlement. Therefore Sea-Land had not attempted to present facts or arguments as it would have done had it been necessary to present a full and complete defense, in other words, had litigation continued. (Tr. 34–40.)

It is clear that the parties have decided that their claims against each other should be dropped in the interest of avoiding costly and wasteful litigation. Clearly, too, Sea-Land feels the inequity of seeking to retain money for services which were the result of Sea-Land's fault in not exercising proper supervision over the loading of the containers in Europe. I see no purpose in compelling Sea-Land to pursue claims for demurrage in a court where the outcome is not certain or in forcing Old Ben to seek to prove a violation of law in this case and to raise defenses against Sea-Land's tariff claims in a court case. In other words, I agree with the parties that it is more prudent and reasonable for Sea-Land to refund to Old Ben the full sum of the reworking charges and to forego court action seeking demurrage charges in view of the alternatives of carrying on multiple litigation. From Sea-Land's point of view, furthermore, since it acknowledges its fault, the result is especially equitable, and it need not run the risk of an adverse finding of violations of law which could have additional adverse consequences as well as uncertain effects on its tariff. Finally, since there is no evidence that other shippers of mining equipment were also assessed reworking or demurrage charges because of Sea-Land's fault in loading containers, Sea-Land's refund of Old Ben's payment for the reworking services and waiver of demurrage charges in this particular instance would not mean that any competitor of Old Ben would suffer any disadvantage or unjust discrimination.[14]

Accordingly, I find that the settlement and agreement proffered by the parties are just and reasonable, do not violate any law or policy, and fully accord with the principles of law and Commission policy which strongly encourage settlements. Therefore, subject to whatever modifications the Commission may wish to make in the event that exceptions are filed or that the Commission decides to review this decision under Rule 227, 46 CFR 502.227, as amended (43 Fed. Reg. 33721), the settlement is approved and the complaint is dismissed.

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

WASHINGTON, D.C.
*October 11, 1978*

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[14] The fact that the parties have settled this particular controversy does not mean that the Commission is unable to take steps to improve Sea-Land's tariff regarding demurrage if the Commission believes that the particular tariff provision may be unreasonable. This tariff is not merely that of Sea-Land but also that of the members of the Continental/U.S. Gulf Freight Association and further controversies over demurrage may arise. Being an administrative agency, the Commission is free to choose any appropriate means of exploring this matter. It could, for instance, instruct its staff to begin discussions with the Association, initiate a rulemaking proceeding under section 17 of the Act, or an investigation. The Commission could take similar remedial action, if it chose, with regard to the fact that no tariff was on file governing the assessment of the reworking charges.

## FEDERAL MARITIME COMMISSION

DOCKET NO. 78–7

E. I. DU PONT DE NEMOURS AND COMPANY

*v.*

SEATRAIN INTERNATIONAL, S.A.

## ORDER OF ADOPTION OF INITIAL DECISION

*December 5, 1978*

Pursuant to the Commission's Order on Review of August 22, 1978, Complainant E. I. du Pont de Nemours and Company has submitted into evidence bills of lading and packing lists which support the allegations of the complaint and show that Respondent Seatrain International, S.A. collected freight charges on Complainant's shipments, in excess of those provided in the Shipping Act, 1916.

In view of the foregoing, the Initial Decision of Administrative Law Judge William Beasley Harris, awarding reparation, is hereby adopted.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

No. 78–7

E. I. DU PONT DE NEMOURS AND COMPANY

*v.*

SEATRAIN INTERNATIONAL, S.A.

*Adopted December 5, 1978*

Reparation of $22,970.82 awarded to complainant upon confession by respondent.

*Don A. Boyd, William R. Rubbert* and *Raymond Michael Ripple* for complainant.
*Harvey M. Flitter,* Vice President, Pricing and Regulatory Matters, Seatrain Lines, Inc., Container Division, for respondent.

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

Oral testimony and cross-examination thereon was not resorted to in this complaint proceeding because the respondent in its answer to amended complaint[2] admitted under oath that as to the 23 shipments between April 2, 1976, and December 1, 1976, described as "Synthetic Fabric (not woven)," there is clear evidence that the commodities shipped under each and every bill of lading in question should have been described as "Fabric, Spun Bonded or Laced" under item 655.4524.565 in Seatrain's South Atlantic/Continent Freight Tariff No. E.S.A. 7, FMC No. 65, and that these commodities should have moved at the rate set forth in that item of up to/including $1.75 per pound, minimum 1,600 cft per container, at rate of $40.00–WM (increasing to $43.25–WM effective September 20, 1977). Respondent also admitted that due to that original incorrect description of the commodity, complainant, in violation of 46 U.S.C. §817, has been overcharged on the shipments set forth in Appendix A[3] to the complaint, in a total amount of $22,970.82.

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[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] Paragraph II of complaint amended to show Seatrain International, S.A., as the respondent party. This was evidenced by the following correspondence: Letter dated April 20, 1978, from complainant stating ". . . I have been informed by Seatrain that the name of that carrier as it appears in the complaint . . . should more properly and completely be 'Seatrain International, S.A.' We have no objection to this minor correction." In a letter dated May 1, 1978, respondent stated *inter alia,* ". . . we are in complete agreement with Complainant's letter of April 20, 1978, with respect to amending Respondent's name to read Seatrain International, S.A. in lieu of Seatrain Lines, Inc. to conform therewith, our answer is styled accordingly."

[3] Appendix A refers to bills of lading from 5/28/76 through 11/27/76, thus within two (2) year statute of limitation of section 22 of the Shipping Act, 1916, as amended.

## DISCUSSION

Where the respondent in a complaint proceeding for reparation acknowledges the claim to be correct in the trial of the matters, as here, the complainant is entitled to have a ruling against the respondent for the amount of reparation claimed. This is judgment upon confession. *Union Carbide Inter-America, Incorporated v. Venezuelan Line (Compania Anonima Venezolana de Navegacion),* Docket No. 75-58, 16 SRR 652 (1976).

Besides the confession, the respondent herein asks that ". . . the Complaint in the proceeding be granted. . . ."

The Presiding Administrative Law Judge upon consideration of the entire record in this proceeding, *finds and concludes*, in addition to the finding and conclusions hereinbefore stated:

1. Seatrain International, S.A., collected from E. I du Pont de Nemours and Company $22,970.82 more than properly was due for the services rendered in the transportation of complainant's freight, and in violation of section 18(b)(3) of the Shipping Act, 1916, as amended.

2. Seatrain International, S.A., admits the claim to be correct, entitling the complainant to judgment upon such confession.

Wherefore, it is ordered:

(A) E. I. du Pont de Nemours and Company be and hereby is awarded reparation in the amount of $22,970.82 from Seatrain International, S.A.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

WASHINGTON, D.C.
*May 9, 1978*

# FEDERAL MARITIME COMMISSION

DOCKET No. 77-52

FAR EAST CONFERENCE, PACIFIC WESTBOUND CONFERENCE JAPAN/KOREA-ATLANTIC AND GULF FREIGHT CONFERENCE AND TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA ASSESSMENT OF INCHEON ARBITRARY UNITED STATES IMPORT/EXPORT TRADES

Commission inquiry into assessment of the "Incheon arbitrary" does not reveal any violation of the Shipping Act, 1916. Proceeding discontinued.

*Edward D. Ransom, R. Frederick Fisher* and *Richard C. Jones* for Respondents Pacific Westbound Conference and its member lines.

*Charles F. Warren, George A. Quadrino* and *John E. Ormond, Jr.* for Respondents Japan/Korea-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan/Korea, and their member lines.

*Elkan Turk, Jr.* for Respondents Far East Conference and its member lines.

*John Robert Ewers, Paul J. Kaller* and *Alan J. Jacobson* for the Bureau of Hearing Counsel.

## REPORT AND ORDER

*December 5, 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 arose out of the assessment by certain conferences[1] in the United States Far East trades of a higher rate for cargo moving to or from the Korean Port of Incheon than was assessed on cargo moving to or from the Korean Port of Busan.

Respondents arrived at their Incheon rates by taking their rate to Busan and adding thereto a fixed charge, known as the "Incheon arbitrary", to reflect the additional cost of transporting the cargo to and from Busan across the Korean peninsula from or to Incheon. Many carriers now call at Incheon by water without going through Busan but still assess the conference "arbitrary" charge. This situation led to concern that, in many cases, the "arbitrary" assessed bears no reasonable relationship to the extra cost to the carrier of calling at Incheon over calling at Busan.

[1] Far East Conference (FMC Agreement No. 17), Pacific Westbound Conference (FMC Agreement No. 57), Japan/Korea-Atlantic and Gulf Freight Conference (FMC Agreement No. 3103), and Trans-Pacific Freight Conference of Japan/Korea (FMC Agreement No. 150) and their member lines. These conferences and their member lines will hereinafter be referred to collectively as "Respondents"

An inquiry into the Incheon arbitrary was initiated by the Commission pursuant to section 21 of the Shipping Act, 1916. Detailed requests for information were issued to Respondents and to certain independent lines concerning the movement of cargo from and to Incheon and Busan. After receiving and considering the responses to its section 21 inquiries, the Commission issued an Order, dated October 12, 1977, directing Respondents to show cause why the Commission should not disapprove, as violative of section 15 of the Shipping Act, 1916, that portion of Respondents' respective conference agreements which allows for the setting of rates to and from the Port of Incheon, Korea. Respondents and the Commission's Bureau of Hearing Counsel filed affidavits of fact and memoranda of law in response to the Commission's Show Cause Order.[2]

## DISCUSSION

There are two basic issues before the Commission in this case: (1) whether the evidence establishes that Respondents have violated the Shipping Act in assessing the Incheon arbitrary; and (2) if the evidence does establish a violation, whether the Commission should disapprove Respondents' conference agreements as to Incheon in order to remedy such violation.

The Order to Show Cause in this case referred only to the question whether conference rate-setting authority to and from the Port of Incheon warrants continued approval under section 15 of the Shipping Act in view of the assessment of the Incheon arbitrary. Respondents and Bureau of Hearing Counsel read this as precluding inquiry into possible violations of sections 16, 17 and 18(b)(5) of the Shipping Act, 1916. This interpretation overlooks the fact that section 15 requires disapproval of all agreements found to be "in violation of this Act," thus incorporating the standards applied in sections 16, 17 and 18(b)(5). Although an important distinction exists between a particular *implementation* of an agreement being violative of the Shipping Act, and the *agreement itself* being violative of the Shipping Act, it is well settled that an agreement can be disapproved under section 15, if necessary, in order to prevent an implementation violative of other sections of the Shipping Act.[3] It is therefore proper for the Commission to consider the full range of possible Shipping Act violations in this case.

### *Section 18(b)(5)*

This section of the Shipping Act, 1916 provides that "[t]he Commission shall disapprove any rate or charge filed by a common carrier by water in the foregin commerce of the United States or conference of such carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." The legislative history of section 18(b)(5)

[2] The Pacific Westbound Conference submitted the affidavit of Donovan D. Day, Jr., Chairman of the Pacific Westbound Conference; the Japan/Korea-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan/Korea filed a joint memorandum of law but no affidavits; and the Far East Conference submitted the affidavit of Gerald J. Flynn, Chairman of the Far East Conference, and the affidavit of Richard S. Patterson, holder of a Master's license. Hearing Counsel filed a reply to Respondents' memoranda and submitted the affidavit of Edward F. Hawkins, Chief of the Commission's Office of Tariffs and Intermodalism.

[3] *See, e.g., Iron and Steel Rates, Export-Import*, 9 F.M.C. 180, 193 (1965) (section (18(b)(5) violations)), and *Imposition of Surcharge by the Far East Conference at Searsport, Maine*, 9 F.M.C. 129, 132–133 (1965) (section 17 violations).

makes it clear that Congress did not intend the Federal Maritime Commission to have ratemaking powers over foreign commerce similar to those of the Interstate Commerce Commission over interstate commerce. Because the Commission has not been charged with fixing a reasonable rate of return for carriers in our foreign commerce the "unreasonably high" language "does not refer to the level of profit earned by a carrier."[4] The relationship between a particular carrier's incremental costs in serving Incheon and the arbitrary assessed by the conference of which it is a member is of marginal significance. The determinative issue is the impact of the rate or arbitrary upon the foreign commerce of the United States; this issue is not addressed in the Commission's section 21 inquiry or the responses thereto, nor is it addressed in the Show Cause Order or the responses thereto. Accordingly, there is no evidence of record that the Incheon arbitrary violates section 18(b)(5) of the Shipping Act.

*Sections 17 and 16 First*

Sections 17 and 16 First of the Shipping Act prohibit, respectively, " unjustly discriminatory" rates, and rates resulting in "undue and unreasonable preference or prejudice". The differences between "unjust discrimination" and "undue and unreasonable preference or prejudice" were discussed definitively by the Commission in *North Atlantic Mediterranean Freight Conference—Rates on Household Goods.*[5]:

> "To constitute unjust discrimination, there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions but who are paying different rates. In such a case, it is immaterial that the shippers are not in competition with each other. Where the service is different—e.g., different commodities—or the transportation is between different localities, it is a case of undue or unreasonable preference or prejudice unless the many relevant considerations render the different rates reasonable. Ordinarily, the shippers involved must be competitors."

A *prima facie* showing of a section 17 violation is made if it can be shown that different rates are charged for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions";[6] a competitive relationship between the similarly situated shippers need not be shown. In the case of the Incheon arbitrary, where carriage between two *different* ports and the United States is involved, a section 17 violation involving unjust discrimination between shippers can not exist.[7]

A violation of section 16 First of the Shipping Act arises when "shippers at A and B are competitive in a common market at C, the line hauls [length of routes] 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*. . . ."[8] The justification or defenses available to the carrier include competition from other

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[4] *Iron and Steel Rates, supra* note 3, at 191. Surcharges, *i.e.*, temporary charges to account for specific exigencies, have received closer scrutiny than rates, such as the rate charged to Incheon. *See Imposition of Surcharge by the Far East Conference, supra* note 3.

[5] 11 F.M.C. 202, 213 (1967) *rev'd on other grounds sub. nom. American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 409 F.2d 1258 (2d Cir. 1969).

[6] *North Atlantic Mediterranean Freight Conference, supra* note 5.

[7] Commissioner Bakke believes that the record in this case raises the possibility that the assessment of the Incheon arbitrary constitutes an unjust discrimination between ports, in violation of section 17 of the Shipping Act, 1916, but that the record is incomplete on this point, and does not support a finding that a section 17 violation has occurred.

[8] *Council of North Atlantic Shipping Associations v. American Mail Lines*, 21 F.M.C. 91, 17 SRR 781, 840 (1977).

carriers, public convenience, relative cost of service, needs of shippers, impact on carrier profits, and other such factors.[9] The evidence gathered to date does not squarely address the question of competing shippers or the impact of the arbitrary upon them. It does address some factors that may tend to justify the rate differential between Busan and Incheon.[10] The evidence of record does not support a finding that the assessment of the Incheon arbitrary is violative of sections 17 or 16 First of the Shipping Act, 1916.

*Section 15*

The overall approvability of Respondents' conference agreements under the standards approved in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*[11] was not addressed in the Commission's inquiry under section 21 of the Shipping Act. The facts relied upon to institute this show cause proceeding do not establish that Respondents' conference agreements are unapprovable under section 15 of the Shipping Act, and no facts rendering the agreements unapprovable have been developed during this proceeding.

The record in this case also does not support a finding that the assessment of the Incheon arbitrary is violative of sections 16, 17, or 18 of the Shipping Act. The questions of resorting to disapproval of Respondents' conference agreements pursuant to section 15 as a remedy to such violations therefore is not raised.

## CONCLUSION

The evidence of record does not establish that the assessment of the Incheon arbitrary by Respondents is violative of the Shipping Act, 1916, and it does not appear that further investigation or action is warranted at this time.

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

(S) FRANCIS C. HURNEY
*Secretary*

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[9] *Id.*

[10] The responses received by the Commission to its section 21 Orders indicate at least two factors that tend to justify the assessment of the Incheon Arbitrary: (1) the average costs incurred by carriers actually providing overland service from Busan to Incheon were *greater* than the arbitraries assessed for this service; (2) some carriers indicated that the cost of serving Incheon by water is higher than the cost of serving Busan, due to significantly higher clerking costs, stevedoring differentials, barge operating differentials and other conditions peculiar to Incheon.

[11] 390 U.S. 238 (1968).

# FEDERAL MARITIME COMMISSION

DOCKET NO. 74-30

SEA-LAND SERVICE, INC.-GENERAL INCREASE IN RATES IN THE U.S. WEST COAST/ PUERTO RICO TRADE

Proceeding to investigate the reasonableness of a rate increase in domestic offshore commerce discontinued following the carrier's discontinuance of the all-water service to which the rates applied.

*Warren J. Price, Jr.* for Sea-Land Service, Inc.
*Dennis M. Barnes* for Commonwealth of Puerto Rico.
*John Robert Ewers and Bert Weinstein* for Bureau of Hearing Council

## REPORT AND ORDER

*December 6, 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 instituted by the Commission on August 13, 1974, to determine the lawfulness, under section 18(a) of the Shipping Act, 1916, of a 15% general increase in rates proposed by Sea-Land Service, Inc. (Sea-Land) in the U.S. West Coast/Puerto Rico Trade.[1]

Upon completion of discovery, Sea-Land, Hearing Counsel, and Puerto Rico moved to discontinue the proceeding on the ground that, based on an analysis of available financial data, the rate increase was reasonable. Administrative Law Judge Seymour Glanzer (Presiding Officer) found the data to be an insufficient basis for a decision, and initially declined to rule on the motion. The parties subsequently submitted a Supplemental Motion to Discontinue presenting additional financial data. The Presiding officer issued an Initial Decision on July 6, 1976, wherein he suggested, but did not actually find, that the rate increase was reasonable. He discontinued the proceeding not pursuant to the motions, but on the ground of mootness, because the 1974 rates which were the subject of the investigation were superseded by a subsequent general revenue increase effective January 15, 1976.,

[1] The Commonwealth of Puerto Rico (Puerto Rico) had protested the rate increase because a previous Sea-Land rate increase was then pending Commission investigation. Docket No. 71-53, *Sea-Land Service, Inc.-General Increases in Rates in the U.S. Pacific/ Puerto Rico Trade*. Puerto Rico and the Commission's Bureau of Hearing Counsel (Hearing Counsel) were made parties to the instant proceeding.

Hearing Counsel filed Exceptions to the Initial Decision and argued that the proceeding should have been discontinued on its merits rather than for mootness. Hearing Counsel claimed a rate case is not mooted by subsequent tariffs and requested the Commission to rule that Sea-Land's rates were reasonable. No other exceptions (or replies) were filed.

## DISCUSSION

The fact that the particular subject of a proceeding no longer exists does not necessarily preclude a decision on the case's merits; both this Commission and the Interstate Commerce Commission have ruled upon the reasonableness of rates no longer effective. *E.g., Rates on U.S. Government Cargoes,* 11 F.M.C. 263 (1967); *Bell Potato Chip Co. v. Aberdeen Truck Line,* 43 M.C.C. 337 (1944). Since the institution of this proceeding, however, Sea-Land has also cancelled the all-water service from the Pacific Coast to Puerto Rico for which the instant rates were filed, and has replaced it with a joint rail/water intermodal operation.[2] This fact, as well as certain gaps and inconsistencies in the economic data relied upon by the parties, renders it doubtful that any useful purpose would be served by a decision on the merits.[3]

THEREFORE, IT IS ORDERED, That the Exceptions of Hearing Counsel are denied;

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
*Secretary*

[2] The service was terminated on February 1, 1978, subsequent to the filing of Hearing Counsel's Exceptions.

[3] Two additional Sea-Land rate increases were implemented between 1976 and the discontinuance of the all-water service, which further diminish the reliability of the record. Although the Commission clearly ordered that all Sea-Land tariff amendments and other changes be made a part of the investigation (Order of Investigation and Suspension, at 2), Hearing Counsel and Puerto Rico failed to demonstrate an interest in incorporating into the investigation the tariff amendment which preceded the Initial Decision.

# FEDERAL MARITIME COMMISSION

## DOCKET No. 77–11

## PACIFIC CRUISE CONFERENCE–
## PETITION FOR DECLARATORY ORDER

Petition for Declaratory Order of Pacific Cruise Conference denied because: (1) a significant but not easily resolved fact is in dispute; (2) any dispute between the parties is appropriately resolved through arbitration; (3) the practice in controversy has been terminated and does not appear likely to recur; and (4) the factual pattern presented does not appear to be of sufficiently general application to warrant the issuance of a declaratory order.

*Thomas E. Kimball* and *Robert B. Yoshitomi* for Petitioner Pacific Cruise Conference and its member lines.

*Arthur D. Bernstein, William Karas,* and *Robert L. McGeorge,* together with *Michael Fox,* for Respondents Savers Travel Club, Inc. and Save-On Travel, Inc.

*Paul S. Quinn* for Intervenor American Society of Travel Agents, Inc.

*John Robert Ewers* and *John W. Angus, III* for the Bureau of Hearing Counsel.

## REPORT AND ORDER

*December 7, 1978*

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

Pursuant to Part 502.68 of the Commission's Rules,[1] the Pacific Cruise Conference and its member lines (Petitioners) filed a Petition for Declaratory Order (Petition) seeking a ruling from the Commission as to the legality, under the Shipping Act, 1916 and/or Petitioners' conference agreement,[2] of certain practices of Savers Travel Club, Ltd. (the Club) and/or Save-On Travel, Inc. (the Agency).[3] The practices in question involve giving refunds or rebates (bonuses) by the Club to persons who buy passages on Petitioners' ocean cruises through the Agency.[4] Petitioners express concern that the Club and the Agency may not

[1] 46 C.F.R. 502.68

[2] *Pacific Cruise Conference Agreement,* FMC No 131.

[3] The Agency is authorized to sell Pacific Cruise Conference passages in accordance with an agency appointment agreement between it and the Conference. Paragraph 3 of the appointment agreement operates to prohibit the Agency from giving rebates or similar inducements.

[4] The Club operates as a travel promoter and publishes a magazine, *Easy Living*, that is provided to savings and loan institutions for distribution to the public. The magazine offered a cash "bonus," in the form of free traveler's checks provided by the savings and loan institution, to persons ordering Petitioners' cruise passages through the Club. The Club reimbursed the savings and loan institution for the travelers checks and channeled all the patronage obtained through the "bonus" program to the Agency, which obtained full fares for the cruise passages it sold.

be separate entities, *i.e.*, that the Club is being used as the *alter ego* of the Agency to enable it to give rebates that would be violative of the Agency's appointment agreement with Petitioners and would also cause Petitioners, as the Agency's principals, to be in violation of their conference agreement and the Shipping Act, 1916.

The American Society of Travel Agents (ASTA) filed a Petition to Intervene in this proceeding,[5] asserting that Commission approval of the practices in question would allow the Agency to obtain unfair advantage over competing travel agents, who may then be forced to start their own "separate" clubs to meet the competition of Save-On Travel. The Commission's Bureau of Hearing Counsel also was made party to this proceeding.

A crucial factual issue in this case is the nature and extent of the relationship between the Club and the Agency. Petitioners and ASTA contend that the Club is really the *alter ego* of the Agency. The Club and Agency deny this and maintain that they are completely separate and independent entities. The facts as presently articulated by the parties are inconclusive,[6] and a further evidentiary hearing would be required to resolve the disputed factual issue of the Club's relationship to the Agency.

Petitioners have made some effort to ascertain the nature and extent of their Agency's connection with the Saver's Travel Club, but they have not offered an explanation of why they have been unable to resolve this issue within the framework of their conference self-policing system.[7] Although they have not elicited all the facts from their Agency concerning its relationship with the Club, Petitioners would have the Commission issue a declaratory order in this case without first resolving this question. Declaratory orders generally are not well suited to situations where a major factual issue is in dispute and cannot easily be resolved by the Commission.

The purpose of a declaratory order is "to terminate a controversy or to remove uncertainty."[8] Any controversy or uncertainty surrounding the legality of the "bonus" program conducted by the Club and/or Agency has been substantially

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[5] The Petition to Intervene was filed pursuant to Part 502.72 of the Commission's Rules (46 C.F.R. 502.72). It appears that ASTA has a substantial interest in this proceeding and that its grounds for intervention are pertinent to the issues already presented and do not unduly broaden them. ASTA's Petition to Intervene therefore is granted.

ASTA also seeks to participate in discovery even though its Petition was filed after the date on which its discovery rights are presumed to be waived under Part 502.72(b) of the Commission's Rules (46 C.F.R. 502.72(b)). ASTA argues that there was good cause for this delay because a two week enlargement of time was granted for the filing of replies to the Pacific Cruise Conference's Petition, and that it needed to review these replies before filing its Petition to Intervene. This argument is without merit because a reply to a reply is prohibited by Part 502.74(a) of the Commission's Rules (46 C.F.R. 502.74(a)), and ASTA therefore had no need to consider the replies of other parties before filing its Petition to Intervene. To the extent that ASTA's Petition responds to replies, it has been disregarded. ASTA's request to participate in discovery in this proceeding is denied as untimely. ASTA's request is also moot in light of the fact that the Commission is terminating this proceeding.

[6] In support of the Club's supposed independence from the Agency, it is noted that the Club appears to be operating at a profit and appears not to have received any reimbursement from the Agency for "bonuses" paid by the Club. "Bonus" payments reportedly amounted to only 1.3% of the Club's net sales for the year ending April 30, 1976. There is apparently no written agreement between the Club and the Agency, although they do have an ongoing business relationship. In support of Petitioners' contention, it is noted that the same person serves as Vice-president/Manager of the Agency and is also responsible for travel and tour planning with the Club. The original shareholders and directors of the Agency have the same address as the original shareholders and directors of the Club. The Agency and Club have refused on grounds of "confidentiality" to honor Petitioners' informal requests for information as to the identity of the Club's current stockholders and directors, the Agency's current stockholders and directors, or any other connection between the Club and the Agency.

[7] Clause 8 of the Agency's agreement with Petitioners provides that the agreement may be cancelled by Petitioners if the Agency engages in prohibited or unethical conduct (such as rebating). A system of arbitration prior to such cancellation is prescribed by Rule E-7 of Petitioners' conference agreement. Petitioners make no indication that they have attempted to utilize this mechanism.

[8] 46 C.F.R. 502.68

reduced by the action of a travel agency self-regulatory body.[9] The Agency has agreed to discontinue the "bonus" program and to pay a fine to the self-regulatory body. The Club has in fact discontinued the "bonus" program,[10] and the Commission has not received any complaints of similar cash "bonus" plans by other travel clubs and/or agencies.

The issuance of a declaratory order in this proceeding is neither necessary nor appropriate, for the following reasons: (1) There is a significant but not easily resolved fact still in dispute in this case; (2) Any dispute between Petitioners and the Agency is appropriately resolved by arbitration as provided in their conference and agency agreements; (3) The practice in controversy here has been terminated and does not appear likely to recur; and (4) The Commission has no reason to believe that the factual pattern here is of sufficiently general application to warrant the issuance of a declaratory order.

THEREFORE, IT IS ORDERED, That the Petition to Intervene of the American Society of Travel Agents is granted, except that the request of the American Society of Travel Agents to participate in discovery proceedings is denied as untimely and moot; and

IT IS FURTHER ORDERED, That the Petition for Declaratory Order of the Pacific Cruise Conference is denied.

(S) FRANCIS C. HURNEY
*Secretary*

[9] "Decision of Robert L. Park, Travel Agent Commissioner [In re] Save-On Travel, Inc., *Complaint of Director, Office of Enforcement, Air Transport Association, Docket 77-236C, Agency Code 84332*," dated March 29, 1978.

[10] In the summer, 1978 edition of *Easy Living*, at page 27, the Club published a letter from its executive director, stating that, "Recently, the regulatory authorities of the travel industry deemed that the Club's Cash Bonus Plan was not permissible under its rules. Consequently, the Club is now obligated to discontinue the Cash Bonus Plan."

# FEDERAL MARITIME COMMISSION

DOCKET NO. 73–72

AGREEMENT NO. 10056—POOLING, SAILING AND EQUAL ACCESS TO Government CARGO (ARGENTINA/U.S. PACIFIC COAST TRADE)

## ORDER

*December 7, 1978*

On November 16, 1978, Delta Steamship Lines, Inc. and Empresa Lineas Maritimas Argentinas, S.A., filed a notice of withdrawing Agreement No. 10056 and Delta's November, 1977 Petition for Reconsideration in the above-captioned proceeding.

THEREFORE, IT IS ORDERED, That this proceeding is terminated; and

IT IS FURTHER ORDERED, That the voluntary withdrawal of Agreement No. 10056 is without prejudice to any new agreement the parties may submit for Approval.

By order of the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 76–43

## MATSON NAVIGATION COMPANY–PROPOSED RATE INCREASES IN THE UNITED STATES PACIFIC COAST/HAWAII DOMESTIC OFFSHORE TRADE

Rate increases are unjust and unreasonable within the meaning of section 18(a) of the Shipping Act, 1916.

*David F. Anderson, Peter P. Wilson* and *George D. Rives* for Matson Navigation Company.
*Ronald Y. Amemiya* and *William W. Milks* for the State of Hawaii.
*Dudley J. Clapp, Jr., Milton J. Stickles, Jr.,* and *Terrance A McGinnis* for Military Sealift Command.
*John Robert Ewers, C. Douglas Miller, John C. Cunningham* and *Alan J. Jacobson* for Bureau of Hearing Counsel.

## REPORT AND ORDER

*December 12, 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 instituted August 5, 1976, to determine the lawfulness of a 3.5% general rate increase on all cargos (except eastbound bulk sugar and molasses) filed by Matson Navigation Company (Matson) in the U.S. Pacific Coast/Hawaii trade. The rates under investigation became effective August 2, 1976, but were superseded by two subsequent Matson rate increases which took effect in 1977 and 1978, respectively.[1]

Administrative Law Judge Stanley M. Levy (Presiding Officer) served an Initial Decision July 21, 1978, holding that the 1976 increase was reasonable and lawful. The Presiding Officer found that with the 3.5% increase Matson would collect net revenues of $8,986,000, and that with these net revenues Matson would realize a rate of return of 12.71% on rate base and 13.92% on equity.[2] It

[1] The 2.0% July 31, 1977, increase and 2.5% March 4, 1978, increase were not joined in the instant investigation. A carrier's implementation of subsequent rate changes does not necessarily render a rate investigation moot. *See* Docket No. 75–57–*Matson Nav. Co.–Proposed Rate Increases*–Order on Appeal, served January 14, 1977, 16 S.R.R. 1701. Cf. Docket No. 73–22, 73–22 (Sub. No. 1) 74–36 (Sub. No. 1)–*Matson Nav. Co.–Changes in Rates*, Decision and Order Partially Adopting Initial Decision, served June 30, 1978.

[2] These conclusions were based upon the finding thet Matson had a rate base of $70,637,000, imbedded debt rate of 8.6% and a debt/equity ratio of 22.8% debt and 77.2% equity.

[3] A 15% return on equity was also found to be consistent with that permitted regulated airlines by the Civil Aeronautics Board, based upon the presumption that the airline and shipping industries have equivalent risk characteristics.

was also determined that although the average U.S. industry earns a 12% return on equity, Matson, because it is a highly leveraged firm with varying earnings and because the cost of capital has increased in recent years, was entitled to earn a potential 15% return on equity.[3] Exceptions to the Intitial Decision were filed by the Military Sealift Command (MSC) and the Commission's Bureau of Hearing Counsel (Hearing Counsel).

## Position of the Parties

Hearing Counsel argues that Matson's maximum rate of return on equity should be 13% because the company's operations involve only slightly greater risks than the average U.S. enterprise; that is, Matson is not as highly leveraged as it appears, its earnings vary at a consistently high level, it enjoys a virtual monopoly in the trade, and its operations do not compare to those of commercial airlines.

Military Sealift Command argues that because the Presiding Officer used an erroneous income tax figure in his calculations Matson's actual return on rate base was 12.79% and its actual return on equity was 14.03%. MSC also argues for a lower maximum rate of return for basically the same reasons as Hearing Counsel, but recommends a direct roll-back of the rates presently in effect based upon that portion of the past increase it deems unreasonable.

In reply, Matson basically defends the Initial Decision. However, it does provide an explanation of the figure used for after tax net income which had not been explained in the Initial Decision.[4] Matson also argues that the Commission lacks authority to devise any remedy for unreasonably high rates.

## Discussion

### *Methodology*

The methodology used by the Presiding Officer in determining Matson's rates of return is correct in most respects. However, there are two minor points which require adjustment.

First, although the after-tax net income figure used in the Initial Decision which varied from that submitted by Matson (Exhibit No. 64), was correct, the Presiding Officer neglected to describe how it was computed. During the course of the proceedings the parties agreed that an allocated portion of Matson's deferred income tax account be deducted from the service rate base. The deduction of deferred taxes from Matson's rate base lowered its service debt to total debt ratio, which in turn lowered the apportioned interest deduction allocated to the service, increasing net revenues, and causing the income tax figure for the service to be slightly increased.[5]

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[4] Finding of Fact No. 10 cites Exhibit 64 as a basis for finding $8,980,000 in after tax net income, but the exhibit indicates $9,031,000 for this entry. The use of the figure stated in the exhibit would result in higher rates of return than those found by the Presiding Officer.

[5] The service rate base was reduced $5,044,000 in deferred taxes allocated to the service, yielding a net adjusted rate base for the service of $70,637,000. Matson's total debt and equity is $104,313,000. Applying the debt ratio of 22.8% to these figures we arrive at service and a total debt figures of $16,105,000 and $23,783,000, respectively. Taking the ratio of service debt to total debt (67.7%) and applying this to the total corporate interest expense of $2,092,000, Ex. 60, Sch. VI, we arrive at a service interest expense of $1,174,000. Net taxable income is then increased to $14,884,000 increasing taxes to $7,377,000 and decreasing net after tax income to $8,980,000. *I.D.* at 5. *It should be noted that* total capital for debt/equity ratio purposes does not include deferred tax credits as the service rate base has been reduced by an allocated portion of deferred taxes. This is logically consistent.

The second adjustment involves the findings as to Matson's rates of return on rate base and on equity. The Commission has previously held that an allocated portion of deferred taxes based upon the ratio of service rate base to total capital should be deducted from the rate base.[6] Left open for decision in this case is the question of what should be included in total capital in making this computation. Although not excepted to by any party, the Commission concludes that deferred investment tax credits should not be included in total capital in allocating a deferred tax deduction if no portion of these deferred credits is deducted from the rate base.[7] Deferred investment tax credits of $4,579,000 have therefore been excluded from Matson's total capital for purposes of computing the allocated deferred tax deduction in this case, and has resulted in an ultimate determination that Matson's rates of return on rate base and equity are 12.75% and 13.98%, respectively.[8]

*Reasonable Rate of Return*

The standard for judging a carrier's maximum permissible rate of return begins with the presumption that regulated industries are entitled to a return on equity capital which equals the average return earned by other U.S. industries, with deviations from this standard for risk "premiums" and "discounts", being assessed in light of how each regulated company's risk factors compare to the average firm.[9] There is unanimous agreement in this proceeding that the average return for U.S. industries is 12%. The real issue presented is how Matson compares to that average firm in terms of its risk characteristics.

The weight of the evidence indicates that if Matson's risks are greater than the average U.S. industry, they are only slightly so. Hearing Counsel's recommended 1% risk premium is therefore the position best supported by the record.[10]

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[6] Docket No. 73-22, 73-22 (Sub No. 1), 74-36 (Sub No. 1)-*Matson Nav. Co -Proposed Changes in Rates, supra*, mimeo at 7, 8 n. 6.

[7] This adjustment only changes the portion of deferred taxes deducted, and does not answer the question of whether investment tax credits should likewise be deducted from the rate base They were not deducted in this instance. This matter has not heretofore been litigated or discussed and perhaps is more appropriately the subject of a *rulemaking proceeding*.

[8] The rates of return are computed as follows:

$ 75,681,000 (rate base) / $112,088,000 (total capital) = 67 52%

$7,775,000 (deferred taxes) × 67.52% = $5,250,000 (allocation)

$75,681,000−$5,250,000 = $70,431,000 (adjusted rate base)

| | |
|---|---|
| $16,301,000 | (net income, Ex. 64) |
| −7,379,000 | (Income taxes, for computation procedure see n. 10) |
| + $56,000 | (profits of related companies, Ex. 64) |
| $ 8,978,000 | NET INCOME |

$ 8,978,000 (net income) / $70,431,000 (adjusted Rate Base) = 12.75% Return on Rate Base

(.1275 − .228 × 086) / 772 = 13.98% Return on Equity

The rate of return on equity can be computed with the formula Re = (Rt − (D/C)Rd) / (E/C), where the rate of return on rate base (Rt) is known (12 75% = 1275), the imbedded debt cost rate (Rd) is known (8.6% = .086), the debt ratio (D/C) is known (22.8% = .228) and the equity ratio (E/C) is known (77.2% = .772). No party excepted to the finding as to the debt rate and the debt/equity ratio. I.D. at 17-18.

[9] Such a methodology fulfills the basic requirements of *Bluefield Waterworks and Improvement Company v. Public Service Commission of West Virginia*, 252 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) in that Matson will be allowed to earn a return on rate base equal to that generally being made on investments in other enterprises having corresponding risks and which also generates enough revenue to allow it to maintain its credit and attract capital.

[10] Ex. 55, pp. 13-29.

Under present economic and financial conditions a carrier with Matson's financial structure and risk characteristics, will be allowed a maximum rate of return on equity of 13%.[11]

Numerous factors are involved in assessing the risk characteristics of an enterprise. It was argued that Matson is a highly "leveraged" firm indicating more risk to equity holders. As used in the Initial Decision "leverage" apparently refers to "business leverage", or the relative amount of costs that must be met prior to realizing net revenues, as opposed to "financial leverage" indicating the relative amount of debt financing of the firm. Matson's higher "business leverage", however, must be offset by the fact that its ratio of debt to equity is lower than average.[12]

Similarly, while Matson does show a greater degree of earnings variations than average, indicating more risk, these variations occur at a consistently high level of earnings.[13] The relatively high cost of money today should not affect Matson's relative risk because this factor applies to all U.S. firms more or less equally and because Matson does not seek capital on the money market.[14] Finally, the subjective element of Matson's comparative market position must be given some weight in any risk analysis in recognition of the major role this fact plays in the real world of investment decisions.[15] Matson has been the dominant carrier in the Hawaiian trade for many years and, except for limited competition from United States Lines and three barge carriers presently enjoys a virtual monopoly.[16]

The weight of evidence in this case indicates that the 1976 3.5% rate increase has resulted in Matson realizing an excess of return on equity of .98%, which means that the maximum permissible rate increase would have been 2.8%.[17]

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[11] This was the maximum lawful rate of return determined in Docket No. 75-57—*Matson Navigation Company–Proposed Rate Increases*, Decision and Order Partially Adopting Initial Decision, served simultaneously herewith, which covered an overlapping test period of calendar year 1976.

[12] Ex. 55, pp. 14–16. The Presiding Officer distorts the meaning of the debt/equity ratio test of comparative financial leverage as used by Dr. Ellsworth in Ex. 55. In ex. 57 at 786 Dr. Ellsworth states that he did not include vessel leases in calculating debt as the statistics given by *Forbes* did not. To include the leases in Matson's debt and compare the resulting ratio to other industries where this is not done is an invalid comparison. See Appendix I for a graphic depiction of the effect of the debt/equity ratio on the rate of return on equity.

[13] Ex. 22. It should be noted that the figure for return on equity for 1975 is given as 7.64% when the Commission in Docket 73–22, *supra*, found it to be 9.02% indicating that these figures may unduly favor Matson. Even so in the past 19 years Matson's return on equity has fallen below 8% only six years, 1959–1961 and 1970–1972, when Matson faced serious competition. Recent years have been very good to Matson as since 1973 its rate of return (using in part Commission figures) has been steadily rising; 1973–8,79%, 1974–8.72%, 1975–9.02%, 1976–12.58%, and in this test year–13.98%. Matson's 19-year average is 9.02%. See Appendix II for a computation of Matson's earnings variations for 1973–1977, which indicates less variation than the average firm as presented by Matson in Exhibit 24.

[14] Ex. 55, pp. 27–28.

[15] Ex. 55, pp. 22–27. It could be argued that the subjective criteria of risk are the ultimate decision factors in the investment market and should dominate rate of return considerations. The Commission, however, prefers to employ a more balanced approach between subjective and objective criteria for assessing risk. A one-dimensional approach, whether statistical or intuitive, runs the risk of extreme findings that could contravene other valid evidence of record.

[16] Ex. 55, pp. 23–24. United States Lines' service to Hawaii is strictly a one-way westbound service offered as part of its Far East service (Tr. 65) and carries only 10% of containerized cargo in the Hawaiian trade. Ex. 7, p. 29. Barge competition consists of Hawaiian Marine Lines' regular service from Portland and Seattle (Ex. 8, p. 4), Sause Brothers Ocean Towing Company's service from the South Oregon coast (Ex. 7, p. 15–16), and Dillingham Corporation's private contract operation from the Pacific Northwest (Tr. 57), all of which combined represents only a small portion of the Hawaiian trade tonnage. Matson carries 85% of all container cargo and 90% of all cargo of all types moved by ocean cargo ships in the Pacific Coast/Hawaii trade (Ex. 55, p. 24).

[17] The excess return on equity of .98% when applied to the rate base equity of \$54,372,732 (\$70,431,000 rate base × 77.2% equity ratio) yields \$532,852.77 in net after tax excess profits. Applying Matson's effective tax rate of 45.3% (\$7,379,000 income taxes divided by \$16,301,000 net income) yields gross excess revenues collected of \$974,136.69 (\$532,852 divided by .547). This is 20% of gross revenues derived from the increase of \$4,836,000 (Ex. 60) or a .7% excess increase.

THEREFORE, IT IS ORDERED, That the general rate increase instituted by the Matson Navigation Company between August 2, 1976, and July 31, 1977, was unreasonable to the extent it exceeded 2.8%; and

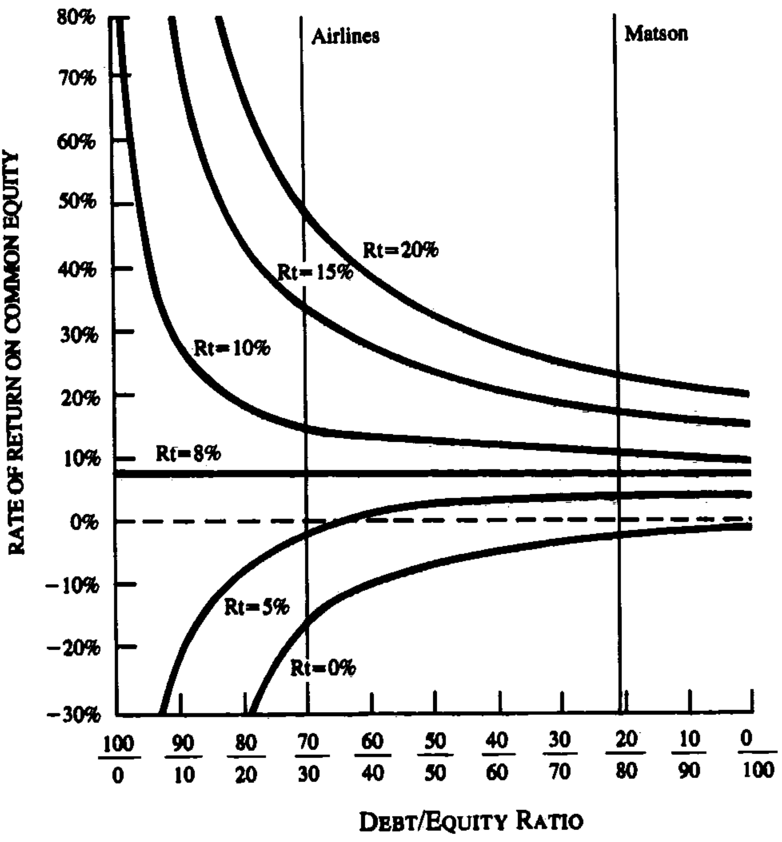
IT IS FURTHER ORDERED, That this proceeding be discontinued.

(S) FRANCIS C. HURNEY
*Secretary*

# APPENDIX I

## EFFECTS OF DIFFERENT DEBT/EQUITY RATIOS ON THE RATE OF RETURN ON EQUITY

Assuming Imbedded Debt Rate of 8% and Returns on Rate Base (Rt) of 0%, 5%, 8%, 10%, 15% and 20%



*Example 1*—Carrier A earning 10% on Rate Base (Rt=10%) with a debt/equity ratio of 20/80 will have a 10.5% return on equity but Carrier B with the same earnings at a debt/equity ratio of 80/20 will have an 18% return.

*Example 2*—Carrier A earning 5% on Rate Base (Rt=5%) with a debt/equity ratio of 20/80 will have a 4.25% return on equity but Carrier B with the same earnings at a debt/equity ratio of 80/20 will have a −7% return.

## APPENDIX II

### COMPUTATION OF VARIABILITY IN RATES OF RETURN ON COMMON EQUITY MATSON NAVIGATION COMPANY—1973 TO 1977

| Year | Return on Common Equity |
|---|---|
| 1973 | 8.79% |
| 1974 | 8.72% |
| 1975 | 9.02% |
| 1976 | 12.94% |
| 1977 | 13.98% |

*Risk Measures:*

Average Rate of Return on Common Equity—10.69%
Coefficient of Variation—.21

Source: For 1973 and 1974 see Ex. 22; for 1975 see Appendix A of Decision and Order in Docket Nos. 73-22, 73-22 (Sub. No. 1) and 74-36 (Sub. No. 1), served June 30, 1978; for 1976 see Decision and Order in Docket No. 75-57, served simultaneously herewith; for 1977 see *supra* at 6. (Test year of 8/1/76–7/31/77)

# FEDERAL MARITIME COMMISSION

DOCKET NO. 75–57

MATSON NAVIGATION COMPANY—PROPOSED RATE INCREASES IN THE UNITED STATES PACIFIC COAST/HAWAII DOMESTIC OFFSHORE TRADE

General rate increase is just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916.

The substituted service offered by Matson between Los Angeles and Oakland does not violate sections 16 First or 18(a) of the Shipping Act, 1916, or section 2, Intercoastal Shipping Act, 1933.

The rate on animal feed does not result in any undue or unreasonable prejudice or disadvantage within the meaning of sections 16 First and 18(a) of the Shipping Act, 1916.

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

*Ronald Y. Amemiya, William W. Milks* and *Richard S. Sasaki* for The State of Hawaii.

*Robert D. Raven, James J. Garrett, Charles R. Farrar, Jr.,* and *James P. Bennett* for Pineapple Growers Association of Hawaii.

*Robert E. Freer, Jr., Kenneth A. Strassner* and *Michael A. Nemeroff* for Kimberly-Clark Corporation.

*Arthur B. Reinwald* for Hawaii Meat Company, Limited.

*Dudley J. Clapp, Jr., Milton J. Stickles, Jr.,* and *Robert H. Swennes, II,* for Military Sealift Command.

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

## REPORT AND ORDER PARTIALLY ADOPTING INITIAL DECISION

*December 12, 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 instituted by the Commission on December 3, 1975, to determine the lawfulness of the Matson Navigation Company's (Matson) "multi-tier" general rate increase in the Pacific Coast/Hawaii trade (1975 increase). The simultaneously filed increases ranged from 2% to 15% and averaged 5.4% on the commodities which were affected.

The investigation was originally limited to Matson's general revenue level and whether the 15% increase on westbound animal feed was prejudicial. There was subsequently included in the investigation, issues concerning the lawfulness of

Matson's substituted service from Los Angeles to Oakland and its rate differentials between Pacific Northwest and California ports.[1] Although the "multi-tier" rates were superseded by subsequent general rate increases, the Commission ruled that the investigation was not moot because the commodity rate issues and important questions of methodology remained to be decided.[2]

Administrative Law Judge Stanley M. Levy (Presiding Officer) rendered an Initital Decision on July 21, 1978, wherein both the general and commodity rate increases were declared lawful.[3] The Presiding Officer found that the increased revenues produced a rate of return on rate base of 10.08% and on equity of 10.51%, and that under present conditions a carrier with Matson's risk factors should be allowed to earn as much as 15%–16% on equity. The substituted service was found lawful because Matson had filed a tariff explaining that the existing practice applied only to trailer cargo and no party had objected. On July 30, 1976, Matson cancelled its reduced rates on *paper products* from the Pacific Northwest which led the Presiding Officer to conclude that California and Northwest rates were generally in parity.

Exceptions to the Initial Decision were filed by the Commission's Bureau of Hearing Counsel (Hearing Counsel) and the Military Sealift Command (MSC).

## POSITION OF THE PARTIES

Hearing Counsel does not contend that Matson's rate of return is unreasonable, but alleges several errors in the methodology used to reach that determination, including the treatment of certain rate base and income account items, the maximum rate of return permitted and the repeated revision of Matson's test year revenues. Hearing Counsel also excepts to the finding that Matson's overall rate structure is reasonable, and claims that none of the east/west differentials were justified, and that Matson continues to publish rates on *lumber and building materials* which favor Pacific Northwest ports.

MSC alleges that Matson's rate of return is actually 17.49% because the revenue data employed (both projected and actual) greatly understated the carrier's test period revenues. Because 17.49% is allegedly an excessive rate, MSC urges the Commission to order a rollback of Matson's *present rates* to compensate for the previous windfall.[4]

In reply, Matson essentially defends the Presiding Officer's findings and claims that the revised test year submissions were the most reliable evidence available of its rate of return on rate base and equity. Matson's only response to Hearing Counsel's allegations that a preferential rate differential continues to exist on lumber and building materials shipped from Pacific Northwest ports is

[1] The Order of Investigation and Suspension discussed rate differentials between northern and southern ports on the Pacific Coast and made Kimberly-Clark Corporation (which had specifically protested the differential on paper products), a complainant in the proceeding. The original Order did not, however, specifically subject the differentials to investigation, an oversight which was subsequently remedied by the Commission in its "Order Denying Motion to Sever Certain Issues and Clarifying Scope of Proceeding," served April 26, 1976.

[2] Order on Appeal, served January 14, 1977; 16 S.R.R. 1701. Matson implemented general rate increases on August 2, 1976, July 31, 1977 and March 4, 1978.

[3] The Initial Decision merely incorporated by reference the Commission's decision denying a subsequent complaint proceeding involving the same Matson animal feed rates; Docket No. 77-45—*Hawaii Meat Co., Ltd. v. Matson Navigation Company*, 18 S.R.R. 479, 734 (1978).

[4] MSC also excepts to the approval of Matson's overall rate structure.

that Commission policy precludes resolution of commodity rate issues in general revenue investigations.

## DISCUSSION

Several revisions in the Initial Decision's treatment of the general revenue issues are necessary.

Matson was permitted to repeatedly submit revised exhibits as to its revenues, expenses, and rate base incorporating actual operating results, determined as the proceeding continued, into the original test year. The effect of the procedure was not to improve the record—which eventually became voluminous and confused —but to extend the proceeding. The test year projections submitted by the carrier with its initial tariff filing must be the starting point of any rate of return analysis, and should be amended only in unusual circumstances. The original figures were the basis for the carrier's decision to increase its rates. To allow revisions in this data contravenes the Commission's policy of expediting general revenue inquiries and hinders effective participation by persons opposed to rate increase. Subsequent figures reflect, in part, discretionary operational changes and are subject to *post hoc* rationalizations and ensuing evidentiary disputes based thereon. The instant decision, therefore, will be based on the initial figures contained in Matson's Exhibit 34.

The rate base and income account adjustments to the Exhibit 34 data proposed by Hearing Counsel are also appropriate.[5] Taking these adjustments into consideration,[6] the rate of return on rate base computes to 11.91% and the rate of return on equity 12.94%.[7] Although higher than that found by the Presiding Officer or calculated by Hearing Counsel, the 12.94% figure is nonetheless within the maximum rate of return on equity Matson could earn for the period without generating unreasonably high profits within the meaning of Shipping Act section 18(a).

Calculation of a reasonable rate of return on equity for a regulated carrier begins with the proposition that such carrier is entitled to a return equal to the average U.S. industry with deviations from this standard for risk "premiums" and "discounts", assessed in light of how the carrier's risk factors compare to the average firm.[8] The evidence in this case indicates that the average rate of

[5] Hearing Counsel proposed two deductions from the original Matson rate base (Exhibit 34); $188,000 for two assets claimed as part of the service, but not projected to be used during the test year and $4,691,694 of Matson's deferred income tax account, the latter agreed to by Matson The income account was increased by $585,000. This amount consisted of $25,000 profits of related companies, $393,000 in expenses for vessels not projected for use in the service, $10,000 depreciation for these vessels, $144,000 overestimate in administrative and general expenses (reduced from the $148,000 proposed adjustments as it was computed on a larger rate base than actually used herein) and $13,000 in excess entertainment and solicitation expenses.

[6] Matson, in its Reply to Exceptions, not only conceded the Allocated Deferred Taxes alleged by Hearing Counsel, but included $1,384,000 in the account for Matson Terminals, Inc. It then recomputed the allocation to $6,448,000. However, with the adjusted rate base used herein the correct allocation is $5,576,000

[7] Rate Base—$66,163,000; Net Income—$7,791,000. Return on Rate Base—$7,791,000/$66,163,000 = 11 91% Return on Equity—(.1191 − .244 × .0872)/.756 = 12.94%.

The rate of return on equity can be computed with the formula Re = (Rt − (D/C)Rd)/ (E/C) where the return on rate base (Rt) is known (11.91% = .1191), the imbedded debt cost rate (Rd) is known (8 72% = 872), the debt ratio (D/C) is known (24.4% = .244) and the equity ratio (E/C) is known (75.6% = 756). No party excepted to the findings as to the debt rate and the debt/equity ratio

[8] Such a methodology clearly fulfills the basic requirements of *Bluefield Waterworks and Impovement Company v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S 591 (1944), in that Matson will be allowed to earn a return on rate base equal to that generally being made on investments in other enterprises having corresponding risks and at the same time generate enough revenue to maintain its credit and attract capital.

return on equity for U.S. firms is 12%.[9] Matson, however, will be allowed a risk premium of 1% because, while the objective standards of earnings variations and comparative leverage indicate a high risk enterprise, these considerations must be tempered by the subjective factors of a history of high-level earnings and Matson's traditionally dominant market position.[10]

The conclusion that the substituted service practice of Matson from Los Angeles to Oakland of trailer cargo is lawful was not excepted to, and, as no error appears on the record in this regard, that portion of the Initial Decision is adopted.

The chronic shortage of eastbound cargoes has previously led the Commission to approve east/west rate differentials in Matson's rates.[11] A prior holddown on canned pineapple eastbound and the present increase in animal feed westbound were specifically upheld in recent decisions.[12] Nothing in the record of this proceeding warrants a different result.

A different situation is presented by rate differentials between Pacific Northwest and California ports on certain westbound commodities. While Matson did in fact cancel its tariff items creating the differential on paper products, the record clearly discloses that Matson retains the Northwest/California differentials on lumber and building materials.[13]

Rate differentials are not *per se* unlawful; only "undue or unreasonable prejudice" is prohibited. In order for a rate differential to violate section 16 First there must generally be a preliminary showing that a particular person, locality, or description of cargo has been subjected to a competitive disadvantage that results in actual injury.[14] Even then, valid transportation factors such as cost of service, carrier competition, traffic volume, distance covered, comparative advantages of location, and frequency of service may exist which justify the practice.[15]

No shippers of lumber or building material products, or competing carriers, were parties to the instant proceeding and there was little development of the record regarding the competitive effects of the ifferentials on these commodities. Under such circumstances, we believe the most prudent course is to discontinue the proceeding without a finding as to the lawfulness of the remaining north/south differentials and invite interested shippers or carriers to remedy any injury they may be experiencing by filing a section 22 complaint.[16]

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[9] I.D. at 7; Exhibit 23, p. 35; Dr. Ellsworth in Exhibit 28, pp. 15–16 found the average to be 11.0–11.5% but it is felt that too much weight was given the First National City Bank index (10.8%) over Standard and Poor's (12.31%), Moody's (12.82%) and Fortune 500 (11.81–12.00%). Furthermore, there was an upward trend in the 1965–74 decade and a test year of 1976 should indicate the higher end of the scale.

[10] Exhibit 28 at 21–37. No evidence of any future potential threat to Matson's dominant position was adduced, and the Commission has no reason to believe that the earnings variations Matson suffered between 1969 and 1971 are likely to reoccur in the foreseeable future.

[11] Docket No. 71–18—*Matson Navigation Company,* 16 F.M.C. 96, 102 (1973); Docket No. 73–22 (Sub. No. 1) and 74–36 (Sub No. 1)—*Matson Navigation Company—Increased Rates,* 18 S.R.R. 649, 657 (1978).

[12] Docket No. 73–22; *etc.*—*Matson Nav. Co., supra,* 18 S.R.R. at 657 (as to canned pineapple) and Docket No. 77–45—*Hawaii Meat Co., Ltd. v. Matson Nav. Co., supra* (as to animal feed).

[13] Tr. at 54; Matson Tariff No. 30, FMC-F No. 149.

[14] *North Atlantic Mediterranean Freight Conference,* 11 F.M.C. 202 (1967).

[15] *Discounting Contract/Noncontract Rates,* 12 F.M.C. 20 (1968).

[16] There are certain situations where a competitive relationship need not be shown if the carrier's obligation to render a particular service is "absolute" and not dependent on commodity characteristics or transportation factors. *Valley Evaporating Co. v. Grace*

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

IT IS FURTHER ORDERED, That this proceeding be discontinued.

(S) FRANCIS C. HURNEY
*Secretary*

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*Lines, Inc.*, 14 F.M.C. 16 (1970). The Commission has also held that an ocean carrier may not selectively reduce its rates solely to mee local competition from a particular port unless the economic viability of its operations is threatened—at economic viability of it operations is threatened—at least in situations where the viability of the local competitor's operations is threatened by the reduction *Rates from Jacksonville, Florida to Puerto Rico*, 10 F.M.C. 376 (1967). The record in this case is insufficient to determine if thes principles are applicable to the situation presented herein.

# FEDERAL MARITIME COMMISSION

No. 75–57

MATSON NAVIGATION COMPANY—PROPOSED RATE INCREASES IN THE UNITED STATES PACIFIC COAST/HAWAII DOMESTIC OFFSHORE TRADE

*Partially Adopted December 12, 1978*

Rate increases are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933.

There is no rate differential between the Pacific Northwest and California to Hawaii and Matson is not in violation of sections 16, First and 18(a) of the Shipping Act, 1916.

The substituted service now offered by Matson between Los Angeles and Oakland as set forth in Rule 263 of Tariff No. 14–E is not in violation of sections 16, First and 18(a) of the Shipping Act, 1916, and section 2, Intercoastal Shipping Act, 1933.

The rate on animal feed does not result in any undue or unreasonable prejudice or disadvantage and is not in violation of sections 16, First and 18 of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933.

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

*Ronald Y. Amemiya, William W. Wilks* and *Richard S. Sasaki* for The State of Hawaii.

*Robert D. Raven, James J. Garrett, Charles R. Farrar, Jr.,* and *James P. Bennett* for Pineapple Growers Association of Hawaii.

*James P. Bennett* for Pineapple Growers Association of Hawaii.

*Robert B. Freer, Jr., Kenneth A. Strassner* and *Michael A. Nemeroff* for Kimberly-Clark Corporation.

*Arthur B. Reinwald* for Hawaii Meat Company, Limited.

*Dudley J. Clapp, Jr., Milton J. Stickles, Jr.,* and *Robert H. Swennes, II,* for Military Sealift Command.

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

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

On October 16, 1975, Matson Navigation Company (Matson) published multi-tier general rate increases in its Pacific Coast/Hawaii tariffs. The increases varied in percent from 2 to 15 and averaged 5.4% for all commodities which took the increases. The only significant holddowns were westbound chilled cargoes, and eastbound canned pineapple, bulk sugar and bulk molasses.[2] The increases

[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] Bulk sugar is carried under a Sugar Freighting Agreement filed as Matson's Tariff No. 12–D which contains clauses escalating rates and charges in accordance with the movement of all principal cost components. Bulk molasses is carried pursuant to a Molasses Freighting Agreement which became effective as a new tariff (Matson Tariff No. 23–A) on January 1, 1976.

Also involved in this proceeding are mid-1976 changes resulting in cancellation of paper products rates in items 5, 35 and 40 of Matson's Tariff No. 30 (which left the higher level of rates in Tariff 14–E applicable to those products when shipped from the Pacific were intended to yield approximately $6,101,761 to Matson on an annualized basis.[3]

As a consequence of Matson's filing, the Commission by Order of Investigation served December 3, 1975, instituted this proceeding. The State of Hawaii (Hawaii or State), Kimberly-Clark Corporation (Kimberly-Clark) and Hunt-Wesson Foods, Inc. (Hunt-Wesson), were named complainants in the Commission's Order of Investigation and Suspension. Subsequently, Military Sealift Command (MSC), Boise Cascade Corporation (Boise), Hawaiian Meat Company, Ltd. (Hawaiian Meat), the Pineapple Growers Association of Hawaii (PGAH), Longview Fibre Company (Longview) and Georgia Pacific Corporation (Georgia Pacific) were granted leave to intervene.

Hearings in the proceedings were held in Washington, D.C., beginning on June 1, 1976. The record in this proceeding consists of 1,604 pages of transcript and 104 exhibits.

On the opening day of the hearing Matson announced that in the near future it intended to file a further general rate increase.[4] It in fact did file a 3½% across-the-board general increase which became effective on August 2, 1976, and was made the subject of a separate investigation in Docket No. 76–43. Thus, the rates under investigation are no longer in effect and the question is presented as to whether this proceeding is moot, except as to matter of principle.

Unlike Part I of the Interstate Commerce Act and certain other federal[5] and state regulatory statutes, the Shipping Acts contain no provision for a refund to shippers in the event that general rate increases are determined to be excessive. This Commission's powers under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933, are limited to adjustments having prospective effect.

It seems probable that in enacting section 4 of the Intercoastal Shipping Act, 1933, Congress assumed that general rate increase investigations would be concluded before it became necessary for carriers to file further increases. Neither the present high rate of inflation nor exhaustive investigations were envisioned by Congress. Whatever the reasons, or the subsequent developments, Congress has not yet seen fit to conform the Intercoastal Shipping Act, 1933, to Part I of the Interstate Commerce Act or the Natural Gas Act.

Nevertheless, the principles involved in this proceeding will be determined whether or not refunds would or would not be available in the circumstances.

Pursuant to section 3 of the Intercoastal Shipping Act, 1933 (46 U.S.C. § 845), Matson has the burden of proving that under prudent and efficient management, the proposed general rate increases will not result in unreasonable or excessive earnings.

1. What is the fair rate of return for Matson?

Northwest) and cancellation of most less-than-containerload rates on specific commodities in favor of Cargo NOS rates. On an annualized basis, the paper products charges are expected to increase Matson's revenues by $700,000 (Tr. 47) and the LCL commodity rate charges by $500,000 (Tr. 48).

[3] Ex. 1, p. 1.

[4] Tr. 56.

[5] Part I of the Commerce Act gives the ICC power to require refunds by railroads (see 49 U.S.C. § 15(7)). Perhaps the nearest analogy would be Section 4 of the Natural Gas Act (15 U.S.C. § 717(c)). Section 4 of the Natural Gas Act, which was enacted subsequent to the Intercoastal Shipping Act, is similarly worded except that it grants the Federal Power Commission authority to order refunds.

*Matson contends that its fair rate of return is 16% on common equity,* and 14.4% on rate base.

2. What rates of return on equity and rate base will the proposed rates yield for the Constructive Year 1976?

Matson estimates that its rate of return on common equity will be 10.51% and its return on rate base (for both The Service and The Trade) will be 10.08%.

3. Should rate base be determined at the beginning of the test year 1976 or on an average of mid-year basis?

Matson believes that rate base should be calculated as at the beginning of the year.

4. Should deferred income taxes be deducted from rate base?

Matson contends that deferred income taxes are not reflected in rate base, but that in any event, there should be no deduction from rate base.

5. Has Matson presented a reasonable cargo forecast for the Constructive Year 1976?

Matson maintains that its forecast is reasonable.

6. Is Matson's multi-tiered schedule of increases, ranging from 2% to 15%, a reasonable and lawful method of deriving the needed additional revenue?

Matson believes the affirmative.

7. Was the holddown on eastbound canned pineapple justified?

Matson believes the affirmative.

8. Do Matson's rates for eastbound cargoes impose an undue burden on westbound shippers?

Matson's position is that eastbound rates are lawful and not a burden.

9. Was Matson justified in cancelling the paper products items in its Tariff No. 30 so as to put the Northwest paper products shippers in rate parity with Kimberly-Clark Corporation and other California shippers of the same products?

Matson believes it was justified.

## FINDINGS OF FACT

1. For the calendar year 1975 Matson actually realized net income after taxes of $5,460,000 in its Pacific Coast/Hawaii service. Its rate base for The Service for that year was $75,539,000. Corresponding rates of return were 7.2% on rate base and 6.71% on common equity. Embedded cost of debt was 8.6%.[6]

2. The proposed increases varied in percent from 2 to 15% and averaged 5.4% for all commodities which took the increases.[7]

3. Commodity rates were not increased on westbound chilled cargoes and eastbound canned pineapple.[8]

4. Matson carries eastbound bulk molasses under a new Tariff 23-A which became effective January 1, 1976.[9] This new tariff increases Matson's revenues to the extent of $690,000 per annum over what they would have been under the old tariff.[10]

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[6] Ex. 32.

[7] Ex. 1, p. 1.

[8] Ex. 2, p. 3.

[9] Tr. 49.

[10] Tr. 924–25.

5. The escalation clauses in Matson's Sugar Freighting Agreement filed as Tariff 12–D have resulted in substantial increases in both per ton rate and on-berth charges since January 1, 1974.[11]

6. Matson's earnings at the pre-tax level are $3,743,000 per annum higher with the carriage of bulk sugar and molasses than they would be if the same level of westbound service were maintained without the carriage of those cargoes.[12]

8. The multi-tier form of Matson's proposed general increases makes Matson's rate structure more cost oriented.[14]

9. Cancellation of Items 5, 35 and 40 in Matson's Tariff No. 30 places Los Angeles shippers on rate parity with the Pacific Northwest shippers.[15]

10. Matson's cargo forecast for the Constructive Year 1976[16] is a reasonable approximation of what Matson's carriage will be.[17]

11. Matson's operations and fleet scheduling are conducted efficiently.[18]

12. For the Constructive Year 1976 after giving effect to the proposed rate increases Matson will have after-tax net income of $7,472,000 for The Service, a rate base of $74,131,000 and rates of return of 10.08% on rate base and 10.51% on common equity. Embedded cost of debt will be 8.72%[19]

13. Matson has constructed its rate base properly as at the beginning of the year as required by General Order 11 (46 CFR § 512 7(b)(1)).[20]

14. Giving effect to elimination from equity of Matson's loan to A&B, Matson's capital structure consists of $24,474,000 or 24.4% debt and $75,877,000 or 75.6% common equity.[21]

15. Matson's embedded debt cost is 8.7%.[22]

16. Matson experienced greater variation in earnings per share than 875 (83%) of 1,054 companies studied and 52 of 61 industries studied. Matson's return on common equity varied more than that of 894 (89%) of 1,008 companies studied, 55 of 60 industries studied, 114, or 67%, of 171 trucking companies studied, and 7 of 12 airlines studied.[23] Matson's return on total capital, or rate base varied more than that of 900 of 994 companies studied, 58 of 60 industries studied, and 8 of 14 airlines studied.[24]

17. The more than 1,000 industrial enterprises studied averaged 12% and the 171 trucking companies averaged 14 to 15% on common equity 1959–1973; the

[11] Tr. 924–25.

[12] Exs. 40 and 41.

[13] Ex. 11.

[14] Ex. 1, p. 2.

[15] Tr. 47.

[16] Ex. 15.

[17] Tr. 278.

[18] Ex. 17, pp. 6–12.

[19] Ex. 42.

[20] Ex. 31, p. 7.

[21] Tr. 1214–17.

[22] Ex. 23, Sch. 30.

[23] Ex. 23, pp. 11, 14–17.

[24] Ex. 23, pp. 12, 16.

CAB has allowed the airlines 16.75% on common equity; and regulatory commissions in 1974 and 1975 allowed electric utilities between 12 and 15% on common equity.[25]

18. Interest rates and the cost of common equity are substantially higher than they were on the average during the past 15 years.[26]

DISCUSSION

In preparing its testimony and exhibits, Matson has followed its practice in past cases of showing both the results of operations for "The Trade" (i.e., results under FMC tariffs only) and for "The Service" (total results from Pacific Coast/Hawaii operations including those under ICC tariffs and mail contracts). All of Matson's exhibits for the Constructive Year 1976 indicate, however, that Matson's revenues for The Trade now comprise more than 95% of its revenue for The Service.

Annual reports of carriers to the Commission pursuant to General Order 11 are not required to be broken down into The Trade and The Service if The Trade revenue constitutes more than 95% of The Service revenue (46 CFR § 512.6(c)). Matson now files its GO 11 reports for "The Service" only. Matson believes that if this procedure is adopted (i.e., so long as the 95% test is met) it will eliminate much needless time and work in making the numerous allocations reflected on Schedule XI of the various income statements.

The expert witness for the State of Hawaii, Nathan Simat, agreed that in determining whether rate of return requirements are being met reliance should be placed on The Service column.[27] Matson's financial witness, Craig Wallace, testified that Matson believes The Service column would be the appropriate basis for the decision in this proceeding.[28] No contrary view was expressed by any witness or even by counsel.

Upon due consideration it is concluded that it is appropriate to use The Service as the basis for decision in this proceeding because, as reflected on Ex. 42, Matson projects the same rate of return on rate base for The Service and The Trade for the Constructive Year 1976.

Matson published, effective June 1, 1976, Rule 263 (Substituted Service—Roll-on/Roll-off Service)[29] in its Westbound Container Freight Tariff No. 14-E in response to the concern expressed by the Commission at p. 2 of the Order of Investigation with respect to Matson's Los Angeles to Oakland transshipping practices. It provides in essence that when cargo is of such a nature that it must be carried on a trailer Matson will accept the loaded trailer at Los Angeles Harbor and transport it at Matson's expense to the Port of Oakland for loading to one of Matson's ro/ro vessels. This did not involve a change in operations but rather merely the publication of a specific tariff rule to cover existing practices.[30] No

[25] Ex. 23, pp. 34-37.

[26] Ex. 23, pp. 31, 32.

[27] Tr. 1438.

[28] Tr. 875.

[29] Ex. 11.

[30] Tr. 198-9.

one voiced any opposition to Rule 263, or Matson's transshipping practices under it, and it would appear that this matter is no longer an issue in the proceeding.

This Commission has recognized that projections of costs and other financial data for the future cannot be reduced to an exact science and that all that is required is that "the results obtained represent reasonably close and reliable approximations," Alcoa Steamship Company—General Increase in Rates in the Atlantic/Gulf-Puerto Rico Trade, 9 F.M.C. 220, 231 (1966); Sea-Land Service, Inc. Increase in Rates in the U.S. Pacific Coast/Puerto Rico Trade, 15 F.M.C. 4, 10 (1971).

Exhibit 42 shows that, after giving effect to the proposed general increases for the full year, and to the specific increases for the appropriate fractional year, Matson will have after-tax net earnings in The Service of $7,472,000 and rates of return of 10.08% on rate base and 10.51% on common equity for the adjusted Constructive Year 1976. Unless otherwise stated, these are the key figures which are relied upon herein in the determination of the reasonableness of the proposed rates.

Exhibits 46–50 deal with Matson's actual results of operations for the first four months of 1976. This data confirms the basic soundness of Exhibit 42 and that it is a reasonable approximation of Matson's results of operations for the Constructive Test Year 1976. The important exhibit in this group is No. 46 which compares Matson's actual results of operations for the first four months in The Service with the first four months of operations as included (but not shown separately in Exhibit 42.

Exhibit 46 shows that Matson actually realized a net income of $818,000 in The Service for the first four months as compared to $482,000 it had projected for the first four months, as a part of the overall constructive 1976 projection. The first four months as projected (shown in the column entitled "Exhibit") exclude the proposed general rate increases inasmuch as they were suspended until April 8 (paper products and automobiles until May 2) and thus not reflected in the actual results for the first four months. The actual results would not reflect any significant amount of cargo that moved subject to the increases because only a few voyages that commenced after April 8 would have terminated on or before April 30 so as to be included in the data. Hence, the "Actual" and "Exhibit" columns on Exhibit 46 are on a comparable basis.

Exhibit 46 shows the difference between the projected and actual results for the first four months to be $336,000 in terms of net income. This difference is accountd for by the one voyage of the *PROGRESS* which was scheduled to terminate in 1975 but which, because of a casualty, slipped over into early 1976. The voyage results for that voyage were $650,000 pre-tax or approximately $325,000 after-tax.[31] This means that in terms of the bottom line results Matson's projections for 1976 were very close to what actually happened after removing the distortion of the slopover voyage of the *PROGRESS*. Thus, Exhibit 46 confirms the basic soundness of at least the first four months of Matson's projection for the year 1976 in Exhibit 42.

[31] Tr. 1585.

Hearing Counsel contends that Matson should have used average or midyear rate base rather than beginning of the year rate base as required by General Order 11 (46 CFR § 512.7(b)(1)).

It is Matson's position that the method of constructing rate base required by General Order 11 for annual reports and general rate increase filings should be used by the Commission in determining the reasonableness of rates under investigation. It contends that it would make little sense for the Commission to require rate base to be constructed in one manner to determine whether general increases should be suspended or investigated and another method for purposes of any investigation.

The Commission in *Matson Navigation Company–Changes in Rates in the U.S. Pacific Coast-Hawaii Trade,* Docket Nos. 73–22, 73–22 (Sub. No. 1) and 74–36 (Sub. No. 1), June 30, 1978, mimeo p. 4, with regard to depreciated rate base stated that although "Matson should be permitted to rely on the Commissions regulations [*i.e.,* depreciated rate base be calculated as of the beginning of the year rather than an average of mid-year] it would commence a rulemaking proceeding to focus on this question of whether mid-year or average rate base may be a more appropriate basis for measuring rate of return."

In accordance with that ruling of the Commission the rate base for purposes of decision herein is determined on the basis of beginning of the year depreciated value.

The ultimate issue for decision is whether the subject general rate increases are just, reasonable and otherwise lawful within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. The respondent is required by law to sustain the burden of proving that its proposed increases are consistent with the standards established in the cited statutes. Section 3, Intercoastal Shipping Act, 1933, 46 U.S.C. 845; *Commonwealth of Puerto Rico v. FMC,* 468 F. 2d 872 (D.C. Cir. 1972); *Transconex, Inc.–Gen. Increase in Rates in the U.S. South Atlantic/Puerto Rico-Virgin Islands Trades,* 17 F.M.C. 95 (1973); *Pacific Islands Transport Line–Gen. Rate Increases bet. Pacific Coast and Hawaii and Pago Pago,* 18 F.M.C. 215, 221 (1975).

Computation of fair return on equity is governed by the standards developed by regulatory commissions and courts, and particularly the decisions in *Bluefield Waterworks and Improvement Company v. Public Service Commission of West Virginia,* 262 U.S. 679, 692–93 (1923), and *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944). *Bluefield* established that a utility should be permitted to earn a return on rate base equal to that generally being made on investments in other enterprises having corresponding risks. *Hope* makes clear that the return should be sufficient to provide such a comparable return to the equity owner *and* assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.[32]

In general rate increase cases, following the guiding principles set forth in *Hope* and *Bluefield,* in determining what is a reasonable rate of return the Commis-

[32] Ex. 23, pp 2 , 3.

sion[33] in *Alcoa Steamship Co., Inc.–Gen. Increase in Rates . . . Puerto Rico Trade,* 9 F.M.C. 220 (1966), at page 238, said:

Consistent with all of our precedents, we adopt as the measure of a reasonable rate of return that amount which is required to meet all allowable expenses of providing service, including the cost of acquiring or retaining the capital needed to provide service. The level of earnings needed to pay interest on respondent's notes and to pay dividends adequate to give stockholders a return comparable with other investments having a comparable risk should be allowed.

In *Matson Navigation Company, supra,* decided June 30, 1978, the Commission pointed out:

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

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

The instant proceeding closely tracks *Matson Navigation Company* and the Commission language with minor variations is equally applicable herein.

The issue of rates in the instant proceeding focuses on the results of Matson's operations for the Constructive Year 1976 after giving effect to the proposed rate increases. This reflects a rate of return of 10.08 percent on rate base and 10.51 percent on common equity.

The evidence as to rate of return consists of the testimony and exhibits of Herman G. Roseman, on behalf of Matson;[34] the testimony and exhibits of Nathan S. Simat, on behalf of the state of Hawaii;[35] and the testimony and exhibits of Robert A. Ellsworth, on behalf of Hearing Counsel.[36]

Both Mr. Roseman and Mr. Simat presented testimony and exhibits in Docket Nos. 73–22 and 73–22 (Sub. No. 1) (consolidated) substantially similar to their respective testimony and exhibits in this case.[37] To save duplication herein of cross-examination on rate of return in those cases, their testimony and exhibits on rate of return in those cases were incorporated by reference herein.[38]

Matson, as a wholly-owned subsidiary of Alexander & Baldwin, does not directly seek equity capital in the market.[39] Therefore, evaluation of Matson's cost of equity requires, in compliance with the *Bluefield* and *Hope* criteria, consideration of elements of comparative risk.

The comparison must evaluate whether the earnings will be sufficient to attract capital, for a firm whose return is the same as that of "other enterprises

[33] *See also Atlantic-Gulf/Puerto Rico General Increases in Rates and Charges,* 7 F.M.C 87 (1962); *Gen. Increases in Rates–Pacific Coast/Hawaii, Atlantic Coast/Hawaii,* 7 F.M.C. 260, 290 (1962)

[34] Exs. 23, 24 and 25.

[35] Exs. 26 and 27.

[36] Exs. 28 and 29.

[37] Considered and decided by the Commission June 30, 1978

[38] Tr. 686–87; 855–56.

[39] Ex 23, p. 3

*having corresponding risks*" does not necessarily thereby earn enough to attract capital. This is particularly significant in this proceeding in view of the substantial increase in the cost of money as of the close of the record.[40] Further, when the comparison is with regulated enterprises, the proper comparison is between the return Matson is given the opportunity to earn and the return the comparison companies were given the opportunity to earn.[41]

The evidence establishes the proposed rates at issue herein would produce revenues sufficient to provide for The Service a return on rate base of 10.08 percent (for The Trade 10.08 percent) and a return on common equity of 10.51 percent on the basis of Constructive Year 1976 conditions.[42] These rates of return are not an unreasonable rate of return, as Mr. Roseman's testimony supports a reasonable return of as much as 14.2 percent on rate base, composed of an 8.7 percent embedded debt cost and a 16 percent return on common equity.[43] The foregoing testimony followed the requirements set forth by the Court in *Hope* and *Bluefield* and was based on an analysis of Matson's risk due to earnings variability, its financial and business risks, a review of the comparative risks and earnings of other companies and general trends in the cost of money. While there may be a disagreement with Mr. Roseman's conclusion that a 16 percent return on equity was not unreasonable, the return of 10.51 percent on equity would be more difficult to attack as unreasonable.

Mr. Roseman concluded that the fair rate of return for Matson could be as high as 14.4 percent,[44] a level well in excess of the rate of return that would be provided by the rates at issue herein. The evidence also shows that not even Mr. Simat's proposed rate of return of 10.5 percent nor Mr. Ellsworth's proposed 11.2 percent would be exceeded by the proposed rates.

The Commission in its recent determination, without setting forth the specific return which would be appropriate, indicated that a 10 percent return was in the zone of reasonableness on equity capital for a carrier similar to Matson. An overall return of 10.08 on rate base and 10.51 on common equity is not at such variance with the principles recently enunciated by the Commission as to be found to be unreasonably high.

In addition to the foregoing there remains for disposition two other matters.

Insofar as there is to be determined in this proceeding pursuant to sections 16, First and 18 of the Shipping Act, 1916, whether Matson's proposed increases on animal feed are likely to result in an undue or unreasonable prejudice or disadvantage against the local Hawaiian egg, poultry and cattle industry or an undue or unreasonable preference or advantage to shippers of eggs, poultry and cattle originating within the continental United States there is incorporated by reference herein and made part of this Initial Decision the Initial Decision, served May 10, 1978, in Docket No. 77–45, *Hawaii Meat Company, Limited v. Matson Navigation Company.*

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[40] Ex. 23, pp. 4, 5.

[41] Ex. 23, p. 5.

[42] Ex. 42.

[43] Ex. C–23, Sch. 30.

[44] Based on debt ratio of 22.7% and equity ratio of 77.3% (Ex. 35, Sch. VII). Giving effect to elimination from equity of Matson's loan to A&B (Tr. 1214–17), the debt-equity ratios become 24.4% and 75.6%, respectively, and the fair rate of return becomes 14.2%.

There is also to be determined in this proceeding whether there is any undue or unreasonable preference between Los Angeles shippers and shippers from the Pacific Northwest in violation of sections 16, First and 18(a) of the Shipping Act, 1916.

Matson cancelled Items 5, 35 and 40 in its Tariff No. 30. This action places Los Angeles shippers on rate parity with the Pacific Northwest shippers.[45] Paper product rates in Matson's Tariff No. 14-E are applicable to both California and Pacific Northwest shippers. There is no evidence that the paper product rates in Tariff No. 14-E are unreasonably high in relationship with other rates in the tariff.

There is now no rate differential between the Pacific Northwest and California to Hawaii and Matson is not in violation of sections 16, First and 18(a) of the Shipping Act, 1916.

## Conclusion

Accordingly, it is found and concluded that:

Respondent's rates under investigation in this proceeding are just, reasonable and lawful under section 18(a) of the Shipping Act, 1916, and under sections 3 and 4 of the Intercoastal Shipping Act, 1933.

There is no rate differential between the Pacific Northwest and California to Hawaii and Matson is not in violation of sections 16, First and 18(a) of the Shipping Act, 1916.

The substituted service now offered by Matson between Los Angeles and Oakland as set forth in Rule 263 of Tariff No. 14–E is not in violation of sections 16, First and 18(a) of the Shipping Act, 1916, and section 2, Intercoastal Shipping Act, 1933.

The rate on animal feed does not result in any undue or unreasonable prejudice or disadvantage and is not in violation of sections 16, First and 18 of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933.

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

WASHINGTON, D.C.
*July 21, 1978*

[45] Tr. 47.

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 77–19

## AGREEMENT NO. 10235—CONSOLIDATED FORWARDERS INTERMODAL CORPORATION

An agreement between independent ocean freight forwarders to form and operate a common carrier service subject to the Shipping Act is a cooperative working arrangement within the meaning of Shipping Act section 15. Commission jurisdiction is not defeated by the use of a corporate form of organization for the new service.

A cooperative working arrangement between persons subject to the Shipping Act to form and operate a freight consolidation service is sufficiently related to the parties' Shipping Act operations to be within the Commission's section 15 jurisdiction, even though freight consolidation is not an activity which is independently subject to the Shipping Act. CONFICO is ordered to cease and desist from conducting any consolidation activities in the absence of an approved agreement.

Further administrative proceedings concerning the approvability of Agrement No. 10235 are stayed to permit an appeal of the jurisdictional issue.

*Gerald H. Ullman*, for Consolidated Forwarders Intermodal Corporation.

*John Robert Ewers*, *C. Douglass Miller*, for Bureau of Hearing Counsel.

*Janice M. Reece*, for Antitrust Division, U.S. Department of Justice.

*Raymond P. deMember*, for International Association of NVOCCS and Boston Consolidation Service, Inc.

*Charles F. Warren*, *George A. Quadrino*, *John E. Ormand, Jr.*, for members of the Trans-Pacific Freight Conference of Japan/Korea and Japan/Korea-Atlantic & Gulf Freight Conference.

*Seymour H. Kligler*, *David R. Kay*, for the members of the Associated Latin American Freight Conference.

*Stanley O. Sher*, *John R. Attanasio*, for the members of the North Atlantic Mediterranean Freight Conference and five related conferences.

*Howard A. Levy* and *Patricia E. Byrne*, for the members of the North Atlantic United Kingdom Freight Conference and nine related conferences.

*Edward D. Ransom*, for members of the Pacific Westbound Conference and the Far East Conference.

*John R. Mahoney*, *Wade S. Hooker, Jr.*, for members of the Atlantic & Gulf-Indonesia Conference and the Atlantic and Gulf-Singapore, Malaya and Thailand Conference.

*Alan F. Wohlstetter* and *Richard V. Merrill* for Express Forwarding and Storage Co., Inc.

## INTERIM REPORT AND ORDER

*December 13, 1978*

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

The Commission has before it seven appeals[1] from the May 25, 1978 "Order of Dismissal" (Dismissal Order) entered by Administrative Law Judge Stanley M. Levy (Presiding Officer) in the above-captioned matter. Replies to these appeals were filed by the United States Department of Justice and the shareholders of Consolidated Forwarders Intermodal Corporation (CONFICO), the Proponents of the Agreement. Oral argument was conducted before the Commission on September 14, 1978.

## BACKGROUND

Agreement No. 10235 is an arrangement between some 50 independent ocean freight forwarders licensed by the Commission and subject to Shipping Act regulation under 46 U.S.C. 801 and 841b.[2] This agreement was executed and submitted for approval after the Commission rejected a nonvessel operating common carrier (NVO) tariff tendered by CONFICO in late 1975.[3]

CONFICO's origins go back to 1967 when 39 ocean forwarders entered into Agreement No. 9646 for the purpose of creating the Forwarders Intermodal Container Conference.[4] This "conference" was authorized to organize a corporation for the purpose of performing the functions of consolidating and "arranging for the movement" of cargo in foreign commerce. Such a corporation (Forwarders Intermodal Corporation of FICO) was chartered by the State of New York on March 28, 1967—prior to the Commission's approval of Agreement No. 9646—for the limited purpose of:

> [E]ngag[ing] in the business of consolidating, unitizing, containerizing, distributing and transporting freight and shipments in export and import commerce; . . . engag[ing] in the business of carrying goods by surface, ocean, and air, warehousing, packing, chartering, a break-bulk operation and freight consolidation; [and] to purchase, lease, operate and otherwise use such facilities and properties, both real and personal as may be necessary or desirable in connection with the aforesaid purposes.

FICO was authorized to issue 300,000 shares of common stock with a par value of 10 cents per share.[5] On May 23, 1967, FICO's shareholders mutually agreed

[1] The parties filing appeals (Protestants) were the Commission's Bureau of Hearing Counsel (Hearing Counsel); a group of 17 steamship conferences serving Europe and U.S. Atlantic and Gulf Coast ports (NAC/MED Group); Boston Consolidation Service, Inc., and the International Association of NVOCCS, filing jointly; the Associated Latin American Freight Conferences, excluding member lines Flota Mercante Grancolombiana, S.A. and Seatrain International, S.A.; the Pacific Coast European Conference; the Trans-Pacific Freight Conference of Japan/Korea and the Japan/Korea-Atlantic & Gulf Freight Conference, filing jointly; and, Express Forwarding & Storage Co., Inc.

[2] It is unclear how many shareholders CONFICO has or whether they are all licensed freight forwarders. The Agreement as filed lists 52 shareholders, only 48 of which were then or are now licensed forwarders. It appears from the Commission's tariff files that three of the Proponents are themselves nonvessel operating common carriers as well as independent ocean freight forwarders.

[3] Agreement No. 10235 was executed on March 24, 1976 and filed April 23, 1976. The instant proceeding was commenced on May 23, 1977 to determine whether the Agreement is a true and complete copy of the understanding between the Proponents, whether Proponents have implemented Agreement No. 10235 (or any other agreement) without prior approval, and whether Agreement No. 10235 should be approved.

[4] As approved by the Commission on September 26, 1967, Agreement No. 9646 listed only 39 members, but Proponents now claim there were 49 original members (Feste Affidavit, at 1). This is one of several relevant factual inconsistencies left unresolved by the Order of Dismissal. Although the Commission fully appreciates the difficulties encountered by the Presiding Officer in developing an accurate record (see Dismissal Order at 4–6), and is concerned with the lack of directness and cooperation demonstrated by the parties, the fact remains that our Order of Investigation contemplated a complete compilation of the history, nature and scope of the proposed agreement before the proceeding was terminated. This does not mean the Commission is mandating protracted evidentiary proceedings in all instances; an Administrative Law Judge should proceed promptly to decision when convinced that all relevant facts have been uncovered. In the present case, however, the record fails to support the Presiding Officer's finding that the CONFICO shareholders are *not* engaged in an ongoing cooperative working arrangement.

[5] CONFICO's April 1976 application for approval of Agreement No. 10235 reported that some 170,000 shares had been issued to the 52 members listed therein.

*to restrict ownership in the corporation to licensed* freight forwarders and forego any sale transfer, assignment, pledge, encumbrance or disposal of shares held by themselves without first offering them to the corporation at the original purchase price.[6] Any licensed freight forwarder could become a FICO shareholder by buying shares at a price set by the Board of Directors. The Board of Directors presently consists of seven members elected by the shareholders, each of whom is also an officer and director of a Proponent.[7]

On or about October 25, 1968, FICO merged with a similar corporation owned by ten other ocean freight forwarders known as Confreight, Inc.[8] The name of the surviving company was changed to Consolidated Forwarders Intermodal Corporation.[9] It appears that CONFICO operates under the same Certificate of Incorporation, By-Laws, and Shareholders Agreement as did FICO.[10]

Effective August 11, 1970, Proponents cancelled Agreement No. 9646 and the CONFICO NVO tariff, but continued to maintain the CONFICO organization. Through CONFICO, Proponents have acted as an agent for steamship lines and as a consolidator of ocean freight at various times up to and including part of 1978. CONFICO prepared and filed a second NVO tariff with the Commission in 1975. This tariff was rejected because Proponents had no approved agreement on file covering the proposed NVO operation.

Since 1975, Proponents have argued that the Commission lacks section 15 jurisdiction over their ownership and management of CONFICO.[11] Shortly after the date specified for the comencement of hearings in this proceeding, Proponents submitted a "Motion to Dismiss" accompanied by allegations of fact. Although some Protestants complained generally about the adequacy of the record, they chose not to challenge Proponents' factual allegations for purposes of resolving the "Motion to Dismiss." The Presiding Officer then proceeded to rule that Agreement No. 10235 did not fall within one of the seven categories enumerated by section 15 and granted Proponents' motion.

The Dismissal Order concludes that the ownership and management of CONFICO by its shareholders does not involve an "ongoing arrangement" between Proponents. Agreement No. 10235 is equated with a one-time or passive acquisition of stock (or similar tangible asset). Emphasis was given to the fact that individual Proponents will receive no special treatment in any of

[6] *See* Shareholders Agreement attached to Proponents' November 29, 1977 "Motion to Dismiss", and Article 3 of Agreement Nos. 9645, 9646 and 10235. The common stock of FICO was to contain a printed notice informing potential purchasers of the first refusal right created by the Shareholders Agreement. FICO's Certificate of Incorporation contains a provision precluding shareholder preemptive rights in any FICO shares or other securities.

[7] *See* Exhibit AA, Items A.2-4; and Exhibit BB, Item 6 attached to Proponents' "Motion to Dismiss." Article III, section 2, of FICO's By-Laws provides that there shall be at least three directors and that directors need not be shareholders.

[8] Confreight, Inc., operated under FMC Agreement No. 9645, the International Container Group Agreement. Agreement No. 9645 closely resembled Agreement No. 9646 and was also approved by the Commission on September 27, 1967. FICO and Confreight both operated as NVO's under FMC tariffs until shortly before their merger. Agreement No. 9645 and the Confreight NVO tariff were cancelled on October 16, 1968, and August 30, 1968, respectively.

[9] Authority to modify Agreement No. 9646 through the addition of new members was neither requested nor granted at the time of the Confreight merger or any time thereafter.

[10] Several provisions of Agreement No. 9646 conflicted with CONFICO's Certificate of Incorporation and By-Laws (*e.g.*, Articles 3, 6, and 10). Most of these provisions do not appear in Agreement No. 10235, but counsel for Proponents has asserted that: "What we are trying to do today [with regard to commercial operations] is exactly the same as what we tried to do in 1967. . . ." Transcript of Oral Argument at 55.

[11] Section 15 of the Shipping Act, 1916, 46 U.S.C. 814.

their dealings with CONFICO,[12] and that CONFICO has conducted an insubstantial volume of business to date. The Commission's decision in *Customs Forwarders, Inc., (Agreement No. FF 71-7),* 17 F.M.C. 302 (1974), asserting jurisdiction over and approving a similar arrangement to form a corporation which would operate as an ICC Part IV Freight Forwarder, was distinguished on the ground that Customs Forwarders was limited to performing services exclusively for its shareholders.[13] Although the existence of some 50 freight forwarders with a financial stake in offering business to CONFICO was recognized as a competitive advantage, the Presiding Officer concluded that such an advantage was not *anticompetitive* and, therefore, could not alone "control, regulate, prevent, or destroy competition" within the meaning of section 15.

## POSITION OF THE PARTIES

Protestants argue that the Dismissal Order should be vacated for the following reasons:

(1) Agreement No. 10235 does not concern a discrete, one-time action, but involves instead a constant interaction between otherwise independent entities which warrants continuous Commission supervision. The organization and operation of a consolidation/NVO business is no less an ongoing activity when conducted under the arms length formalities of corporation law than when conducted under a detailed partnership agreement.

(2) The Commission's *Customs Forwarders, Inc.,* decision, *supra,* is controlling. That case did *not* involve any exclusive dealing arrangement between the incorporating parties and Customs Forwarders, Inc.

(3) An agreement need not be anticompetitive to be subject to section 15. It is sufficient that it affect competition. The instant joint venture affects competition between the various Proponents and also between the Proponents and third parties—even though it also creates a new competitor in the NVO market.

(4) The Proponents can "pool traffic" through their use of CONFICO and thereby receive a competitive advantage over other freight forwarders who lack access to an affiliated consolidation/NVO service. By patronizing CONFICO, Proponents can control the level of freight forwarder brokerage they receive on NVO shipments and can direct cargo to vessel operating carriers of their choice.

(5) Sharing CONFICO's profits (if any) will reduce the cost to Proponents of obtaining consolidation and NVO services and constitutes a "special advantage" over non-participating forwarders within the meaning of section 15.

(6) Through their common ownership of CONFICO, Proponents are "pooling or apportioning earnings and losses" and "fixing or regulating rates" within the meaning of section 15.

(7) An agreement among existing NVO's to form and operate a new NVO service is subject to section 15 even if an identical agreement among independent

[12] There appears to be no undertaking by Proponents to deal exclusively with CONFICO regarding either consolidation or NVO services, and CONFICO seems willing to serve all licensed forwarders without discrimination. No attempt was made, however, to ascertain how the allegedly valuable "neutrality" of the CONFICO consolidation/NVO service was to be accomplished vis-a-vis each of the 50 Proponents as well as those freight forwarder customers of CONFICO which are not CONFICO shareholders.

[13] *Star Shipping A/S, (Agreement No. 9955-1),* 18 F.M.C. 426 (1975) was also distinguished by the Presiding Officer on the grounds that the parties were committed to certain exclusive or restrictive arrangements with the new corporation created by their agreement.

freight forwarders is not. Certain of the Proponents compete with each other and would compete with CONFICO as NVO's.

Proponents assert that the Order of Dismissal is correct in all significant respects. The Department of Justice takes a more limited view and argues only that joint ventures of this type are beyond the Commission's jurisdiction because they resemble corporate mergers or stock acquisitions and involve no "continuing obligations between the parties" within the meaning of *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1975).

## DISCUSSION

Agreement No. 10235 is indistinguishable from the *Customs Forwarders* agreement.[14] It is clearly subject to Shipping Act jurisdiction without regard to whether CONFICO proves to be a profitable or sizable enterprise.

Proponents have come together for private commercial reasons[15] to share the costs of forming and operating a business organization which will serve the ocean shipping industry in the New York City area (and perhaps other North Atlantic ports) by providing cargo consolidation and NVO services to the public at large. Membership in CONFICO itself, however, is limited to independent ocean freight forwarders, the price of membership (share acquisition) is controlled by the Board of Directors, members may act through CONFICO to discuss any topic (including freight forwarder fees and compensation) with any person subject to the Shipping Act, and all shareholders may be bound to ancillary section 15 agreements by the vote of a majority.[16] By exercising their voting rights as shareholders, Proponents may control the price they (and other CONFICO customers) pay for consolidation services and the amount they receive as freight forwarder compensation—to the extent they patronize CONFICO.[17]

The concertedly financed corporation CONFICO would compete with other NVO's and consolidators. Its Proponents would compete with other freight forwarders who do not possess affiliated consolidation or NVO operations. Although nothing presently indicates that CONFICO or the Proponents will (or will not) prove to be superior competitors by virtue of Agreement NO. 10235, it is undisputed that the arrangement provides them with a "competitive advantage." The presence of such a competitive advantage was the stated basis for the Commission's jurisdictional rulings in *Customs Forwarders, Inc.*, 17 F.M.C. at

[14] There were no exclusive dealing arrangements or convenants not to compete in Agreement No. 71-7. The ICC Part IV service to be offered by Customs Forwarders, Inc., was available to all shippers. That the parties to Agreement No. 71-7 wished to obtain and operate an affiliated inland (or "intermodal") transportation service and the present Proponents plan to operate a service offering foreign transportation by water is of no relevance whatsoever.

[15] *See* Proponents' "Reply to Appeals" at 16-17.

[16] Agreement No. 10235 provides for CONFICO shareholders to meet and discuss matters of mutual concern to themselves and other persons subject to the Shipping Act, and allows a majority of the Proponents to authorize the corporation to enter into agreements concerning such matters (subject to Commission approval). A vote of the majority binds *all* shareholders to accept the terms of ancillary section 15 agreements, an arrangement which is inconsistent with ordinary principles of shareholder responsibility.

[17] The proposed CONFICO tariff would pay 6½% of the tariff rate to freight forwarders as brokerage compensation. Although there are other NVO's which offer larger amounts (especially in recent months), a spot check of FMC tariffs reveals that 6½% is above the industry average.

305–307, 313, and *Star Shipping A/S*, 18 F.M.C. at 453–458, but a further exposition of those rulings can be readily provided.[18]

A joint venture is *not* the same thing as a merger or acquisition of stock. This critical fact is evident from the Supreme Court's decision in *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), the decision which also establishes that joint ventures should be analyzed under the same antitrust laws applicable to mergers.[19] The *Seatrain* exclusion[20] of one-time acquisitions from section 15 is based upon the absence of a need for continuing Commission oversight, not upon any conflict with section 7 of the Clayton Act.[21] See *Star Shipping, A/S, supra,* at 427–429, 453. It is precisely because it is a joint venture that Agreement No. 10235 is both a "cooperative working arrangement" and an agreement "controlling, regulating or preventing competition." All 50 Proponents have survived the formation of CONFICO, will continue to compete as separate and independent entities, and will be continually obligated to make decisions concerning their joint management of CONFICO—decisions which will also relate to the management of their own businesses.

Proponents' jurisdictional argument hinges upon the contention that the organization of CONFICO (or subsequent purchase of its shares) involves its shareholders in no continuing activities or obligations. Proponents' decision to conduct their joint venture through the medium of corporate democracy does not, however, mask the ongoing nature of Agreement No. 10235. A closely held corporation cannot be operated without the active participation of its shareholders. Management decisions must be made daily. The establishment of CONFICO's policies under the Agreement presents a constant need and opportunity for cooperation between Proponents which warrants Commission supervision. The possibility that most of the Proponents will do no more than examine materials prepared by management and vote at shareholder meetings merely glosses over the fact that Proponents' elected representatives—CONFICO's Board of Directors—will frequently be engaged in detailed discussions, planning sessions and agreements concerning competitively significant matters. The powers delegated to the Board of Directors must be attributed to CONFICO's shareholders under the circumstances.

In *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968), the Commission was reversed for taking too narrow a view of the "cooperative working arrangement" category of section 15 agreements. The Supreme Court characterized the language of section 15 as "expansive" and noted that it specifically refers to *every* agreement between persons subject to the Shipping Act. *Id.*, at 273–275. The policy, recognized in other situations, of strictly construing exemptions from the antitrust laws, is inapplicable in the case of cooperative working arrangements; legislative history indicates that *all* [con-

[18] In *Star* and *Customs*, the Commission concentrated its discussion on the agreements' respective capabilities for "controlling, regulating or preventing competition" and "giving special privileges or advantages." In the absence of further information concerning the implementation of the "neutrality" feature attributed to Custom Forwarders and CONFICO, it appears that no true "special advantage" would be conferred upon Proponents or their proposed joint venture vis-a-vis other similarly situated persons.

[19] The *Penn-Olin* court expressly recognized the distinction between joint ventures and mergers. 387 U.S. at 170, 173–174.

[20] *Federal Maritime Commission v. Seatrain Lines, Inc., supra. See also American Mail Line, Ltd. v. Federal Maritime Commission*, 503 F.2d 157 (D.C. Cir. 1974), *cert. den.*, 419 U.S. 1070 (1974), *reh. den.* 421 U.S. 1017 (1975).

[21] 15 U.S.C. 18.

going] agreements dealing with water transportation matters are to be submitted for Commission approval.[22] As indicated above, Agreement NO. 10235 is such an agreement.

The joint venture proposed by Agreement No. 10235 was organized to further the existing line of business engaged in by the proponents—ocean freight forwarding and common carriage by water in foreign commerce. Courts and commentators have removed all doubts that joint ventures tend to lessen or "control" competition between the parties.[23] Agreement No. 10235, therefore, is also a matter which falls within the fourth category of agreements listed in section 15.

CONFICO's NVO and consolidation services both require section 15 approval. Although freight consolidation is not itself a function regulated by the Shipping Act, it is sufficiently related to Proponents' Shipping Act activities for section 15 jurisdiction to attach. Agreements among ocean carriers or freight forwarders to concertedly finance, undertake, or control such related services can directly affect the parties' participation in that segment of the ocean shipping industry which is primarily entrusted to Commission regulation and should be filed for approval.[24]

Freight forwarders and nonvessel operating carriers are essentially service rather than manufacturing or equipment operating organizations. Whatever investment they do make in plant and equipment (other than office facilities) is apt to be for the purpose of performing cargo packing, consolidation or storage services for their shipper clients. By combining to provide a consolidation service perceived by themselves as dependable and adequate for their needs, Proponents are sharing what may be the major capital expenditure (or cost item) associated with a sizeable freight forwarding/NVO business. This sharing of costs is intended to improve Proponents' ability to compete with nonparties, may reduce the likelihood of Proponents individually entering the consolidation business in the same area, and might also have the effect of raising entry barriers to potential competitors. A freight consolidation business could also be employed to unduly prefer or prejudice shippers, carriers or other persons that deal with Proponents in a Shipping Act capacity.[25]

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[22] *Id.*, at 273–277. The difference between the filing and approval of section 15 agreements, and the procedure established by section 35 of the Shipping Act (46 U.S.C. 833a) for exempting *de minimus* or routine agreements from section 15 requirements was cited as evidence of this broad Congressional intent. *See also, Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40, 53–55 (1978), wherein the Commission was described as the "public arbiter of competition in the shipping industry."

[23] The Supreme Court stated in *Penn-Olin*,

> . . . [T]he formation of a joint venture and purchase by the organizers of its stock would substantially lessen competition—indeed foreclose it—as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise. Realistically, the parents would not compete with their progeny. 378 U.S. at 168.

*Accord, Northern Natural Gas Company v. Federal Power Commission*, 399 F.2d 953, 972 (D.C. Cir. 1968); Brodley, *Oligopoly Power Under the Sherman and Clayton Acts*, 19 Stan. L. Rev., 285, 333–334 (1967); Pitofsky, *Joint Ventures Under the Antitrust Laws*, 82 Harv. L. Rev. 1007, 1030–1038 (1969), and cases cited therein.

[24] Section 15 encompasses every ongoing arrangement between Shipping Act persons. The burden is upon the parties to demonstrate that the subject matter of their agreement bears no reasonable relationship to ocean shipping in the foreign commerce of the United States. In the instant case, any activity which would be authorized under CONFICO's Certificate of Incorporation is likely to be so closely connected with Proponents' freight forwarding interests as to require prior section 15 approval.

[25] The minutes of CONFICO's special directors meeting of June 4, 1975, describe a discussion to "commence an NVOCC operation *in conjunction with the Seatrain service*." Attachment to Exhibit CC, Feste Affidavit (emphasis supplied). Seatrain International, S.A., is a vessel operating common carrier subject to Shipping Act regulation. CONFICO once performed freight deconsolidation services solely for American Export Lines, Inc., another such carrier.

To the extent Proponents are now performing consolidation services through the vehicle of CONFICO they shall be directed to cease and desist from such unauthorized implementation of Agreement No. 10235[26] The resumption of evidentiary proceedings will be stayed for 60 days to enable interested parties an opportunity to appeal the Commission's final ruling on the jurisdictional issues raised by Proponents' "Motion to Dismiss."

THEREFORE, IT IS ORDERED, That the Order of Dismissal entered in Docket No. 77-19 on May 25, 1978 is vacated and the Order of Investigation remanded to the Presiding Officer for such further proceedings as are necessary to resolve the issues designated therein; and

IT IS FURTHER ORDERED, That Consolidated Forwarders Intermodal Corporation cease and desist from operating as a consolidator or deconsolidator of import or export shipments or otherwise implementing Agreement No. 10235 until such time as the parties to Agreement No. 10235 obtain Commission approval of said Agreement; and

IT IS FURTHER ORDERED, That, the Presiding Officer refrain from reopening Docket NO. 77-19 for sixty (60) days from the service date of this Interim Order, and if an appeal is taken from this Interim Order, shall further stay the reopening of Docket No. 77-19 until such time as the appeal is finally disposed of by the United States Court of Appeals.

(S) FRANCIS C. HURNEY
*Secretary*

[26] Counsel for Proponents advised the Commission at oral argument that CONFICO had ceased the consolidation services it had been performing at the time the Feste Affidavit was submitted.